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We Can't Apply from the Grave: Why the Asylum Standard of Proof Fails Those Who Need It Most

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WE CAN'T APPLY FROM THE GRAVE: WHY THE ASYLUM STANDARD OF PROOF FAILS THOSE WHO NEED IT MOST

BY: HILANA SAID*

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I. INTRODUCTION

A woman in Florida sits in front of her TV, unsure if the sound of static is coming from shock or the screen. Her eyes reflect the fires that blaze from within her church in Alexandria, Egypt. Numbly, the pads of her fingers attempt to call family members, praying that, for once, they skipped service. She lets go of a breath she did not know she was holding. The time between now and another attack exists on a clock that she cannot see. But she knows it is ticking.

Eman Boghdadi is an Egyptian immigrant who moved to the United States along with her husband and two daughters through the diversity lottery in 2004, something she and her family contend was the ultimate form of divine intervention. For Eman and her family, betting against the odds in the diversity lottery seemed a clearer route than navigating the maze of asylum law.

* 2023 Albany Law School graduate and former Editorial Board Member of the Albany Law Review—I would like to thank my beautiful Coptic Orthodox Christian Community, without watching you persevere against all odds in youth, I would not have found the courage to continue to fight the good fight as I grew up. I hope as the torch has passed on; I do my part in keeping it alight.

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Asylum and refugee law emerged in reaction to global humanitarian crises. The United States first officially opened its borders to refugees in 1910 as thousands of refugees attempted to enter the United States because of the unrest caused by the Mexican Revolution.[1] Admitting those at risk of harm from their governments continued during World War II when the global refugee crisis resulting from the Nazi campaign against the Jews of Europe led to an unprecedented number of refugees seeking safety.[2]

The status of asylum and refugee law consists of an amalgamation of judicial opinions that the Board of Immigration Appeals ("BIA") chooses to publish. BIA opinions serve as precedent and guidance in interpreting the Immigration and Nationality Act of 1952 ("INA").[3] This system results in interpretations and applications of the Immigration and Nationality Act of 1952 that shift and change from circuit to circuit as circuit courts override BIA decisions.[4]

Individuals applying for asylum are at the mercy of the circuit that receives their applications and, consequently, risk being denied relief when another court may have granted relief for the same case by applying a different test and standard. The result is an irregular and unpredictable approach to asylum that casts many applicants back to their dangerous home countries and subjects them to further harm.[5] Incongruent approaches among the

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1. *See Refugee Timeline*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/about-us/our-history/stories-from-the-archives/refugee-timeline (last updated Feb. 7, 2023) ("The violence and political unrest caused by the Mexican Revolution drove thousands of Mexican refugees north across the U.S.-Mexico border.").

2. *See id.*

3. *See generally* Grace Kim, *Abandoning the Objective and Subjective Components of a Well-Founded Fear of Persecution*, 16 NW. J.L. & SOC. POL'Y 192, 196-98 (2021) (explaining that administrative and judicial authorities have set complex precedents in asylum law).

4. *See id.* at 193-95 ("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."); Caroline Cohn, *The U.S. Asylum Adjudication System: Failure to Protect*, 1 PENN UNDERGRADUATE L.J. 73, 78 (2013) (suggesting several factors to explain or partially account for the well-documented decision disparities, including (1) the "virtual impunity" that immigration judges have had for their seeming failures and documented misconduct, (2) the lack of an adequate complaint process against immigration judges, (3) the "lack of independence arising from the placement of immigration judges within the Justice Department," (4) the "politicization of the immigration bench . . . during the Bush Administration," and (5) the "crushing workload of immigration judges").

5. *See generally* Kim, *supra* note 3, at 209-11; Humberto H. Ocariz & Jorge L. Lopez, *Practical Implications of* INS v. Cardoza-Fonseca*: Evidencing Eligibility for*

federal circuits make asylum the most litigated area of immigration law.[6] For this reason, there must be an active reform of the immigration system with a focus on making the application of the law more uniform and equitable.

"The very essence of the rule of law, embodied in the Due Process Clause of the Fifth Amendment, is that individual cases should be disposed of by reference to standardized norms rather than by arbitrary factors, particularly the personal biases, attitudes, policies, or ideologies of government adjudicators."[7] So what do we do? This Article argues that the immigration adjudication system needs to employ tools to ensure a more equitable application of the law.[8]

First, this Article outlines the history and status of asylum law. For an asylee to gain permanent residency in the United States or successfully avoid deportation, they must prove they are a member of a particular social group that has been subject to persecution, resulting in a "well-founded fear of persecution."[9] The tests and thresholds to prove a well-founded fear before asylum vary greatly among the circuits. This section compares opinions from different circuits to highlight how courts weigh different factors and how an asylee's chances of being able to settle permanently do not always depend on the merits of the case, but on geography.[10]

Second, this Article will focus on how the lack of homogeny in asylum law has negatively affected certain groups of asylees, with a focus on Coptic Orthodox Christians ("Copts"), a minority group in Egypt with a history of persecution.

Last, this Article argues that national recognition by the United States government of persecution against a particular group should waive the standard of proof for asylum or lead to a presumption of a well-founded fear of persecution. This proposal is grounded in precedent. Courts have often recognized that evidence of the country's status and the government's reaction to discrimination is convincing enough to prove that the asylee has

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Asylum under the "Well-Founded Fear of Persecution" Standard, 19 U. MIAMI INTER-AM. L. REV. 617, 661 (1988) ("The courts, however, by their inconsistent application of the well-founded fear standard have constructed a revolving door, leaving aliens uncertain about which way it swings.").

6. *See generally* DAVID MARTIN, ASYLUM CASE LAW SOURCEBOOK: MASTER INDEX AND CASE ABSTRACTS FOR U.S. COURT DECISIONS (2d ed. 1948).

7. *See* Andrew I. Schoenholtz et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 299-300 (2007).

8. *See id.* at 302.

9. Immigration and Nationality Act of 1952, 8 U.S.C. § 1101(a)(42).

10. *See id.*

a well-founded fear of persecution.[11]

The United States' recognition of systemically persecuted minorities has been viewed as a reliable form of evidence for courts to find that the asylee has a well-founded fear, mainly because in cases with asylees, it is often hard to gather corroborating evidence when one's priority is fleeing their country.[12] As a result, immigration system reforms, such as this one, serve the system in a few ways. Besides allowing for more administrative efficiency and alleviating the infamous backlog of asylum cases the United States has, reforms would also allow for a more uniform and homogenous approach to asylum cases, as initially intended by Congress with the enacting of the Refugee Act.[13]

The United States has long held itself out to be a champion of those who are abused by their governments.[14] As an underdog that dug itself out of a regime over 300 years ago, fighting governmental corruption has been a hallmark of the United States' international identity since its inception.[15] It is a great failure, then, with 300 years to grow and shape, its immigration system is incredibly new in comparison to other systems, such as the tax system, and that it is failing to meet its intended goals. A case study of such an ongoing humanitarian crisis and how the legislative intent of asylum law has long been left behind by current case law shows how far we have fallen from the picture of refuge we have painted.

II. WHAT IS ASYLUM: DEFINITION, HISTORY, AND BURDEN OF PROOF

The two most popular humanitarian forms of immigration in the United States are refugee and asylee programs. Determining whether someone is an

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11. *See* CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 34.02 (2021).

12. *See id.*

13. *See* Deborah E. Anker, *Determining Asylum Claims in the United States Summary Report of an Empirical Study of the Adjudication of Asylum Claims before the Immigration Court*, 2 INT'L J. REFUGEE L. 253, 255 (1990) ("The current process not only falls short of Congress' mandate for fair and evenhanded treatment of asylum claims, but bureaucratic inefficiencies, often inaccurately attributed to asylum applicants and their attorneys, cause significant delays in reaching final determinations of cases.").

14. *Cf. Failure to Protect: Biden Administration Continues Illegal Trump Policy to Block and Expel Asylum Seekers to Danger*, HUM. RTS. FIRST (Apr. 20, 2021), https://www.humanrightsfirst.org/resource/failure-protect-biden-administration-continues-illegal-trump-policy-block-and-expel-asylum (highlighting that the United States still has policies that force asylum seekers to cross into the United States in between ports of entry).

15. *See generally* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

asylee or refugee depends on the statutory definition in the INA.[16] The BIA is tasked with applying and interpreting the INA.[17] The BIA chooses which of the cases decided in immigration courts are published to serve as precedent.[18] These precedents stand unless a Supreme Court or circuit court decision states otherwise; however, circuit courts give great deference to BIA precedent and the lower immigration court rulings.[19] As a result, although the order of authority is statutory in the INA—Supreme Court, circuit court, then immigration court decisions published by BIA—the BIA decisions still do much to color INA interpretation.[20]

Although the immigration adjudication system seems like it has multiple levels of oversight, this is untrue. The system is plagued with many independent variables, and most scholars are concerned about their effect on case outcomes:

> Whether an asylum applicant is able to live safely in the United States or is deported to a country in which he claims to fear persecution is very seriously influenced by a spin of the wheel of chance; that is, by a clerk's random assignment of an applicant's case to one asylum officer rather than another, or one immigration judge rather than another.[21]

The issues begin at the root: the statutory language. To apply for asylee status, an applicant must prove that they fit under the INA's definition of "refugee:"

> The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, 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, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality,

16. *See Immigration Law and Policy*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/laws-and-policy (last visited Jan. 31, 2024).

17. *See Criminal Defense of Immigrants*, L. OFFS. OF NORTON TOOBY, https://nortontooby.com/node/16590 (last visited Jan. 31, 2024).

18. *See id.*

19. *See id.*

20. *See id.*; Schoenholtz, *supra* note 7, at 388.

21. Schoenholtz, *supra* note 7, at 378.

> membership in a particular social group, or political opinion.[22]

Then, once an alien has met the definition of "refugee," they may apply for asylum where they are:

> [P]hysically present in the United States or at a land border or port of entry…the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A) of this title.[23]

The core difference between the two forms of relief is that refugees apply outside of the United States. In contrast, asylees apply from within the country, presumably having either entered the country through a visa and overstayed or entered without inspection.[24]

The difference between asylees and refugees results in a few procedural deviations. While both refugees and asylees must pass a credible fear interview, asylees have a limited one-year span upon entry into the United States to apply for relief.[25] Asylum relief can come in two forms: affirmative or defensive.[26] Affirmative relief comes when an asylee, without prompting, applies for asylum, whereas defensive relief speaks to an application for asylum to avoid deportation.[27] Returning to the credible interview, both asylees and refugees must:

> [B]e found to have a credible fear of persecution if he or she establishes that there is a 'significant possibility' that he or she could establish in a full hearing before an Immigration Judge that he or she has been persecuted or has a well-founded fear of persecution or harm on account of his or her race, religion, nationality, membership in a particular social group, or political opinion if returned to his or her country.[28]

The interview is the first instance when most applicants encounter the "well-founded fear" standard, which exists to aid judges in deciding whether an applicant meets the definition of refugee such that they are eligible for

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22. Immigration and Nationality Act of 1952, 8 U.S.C. § 1101(a)(42).

23. Immigration and Nationality Act of 1952, 8 U.S.C. § 1158(a).

24. *See* GORDON ET AL., *supra* note 11, at § 33.05; *Refugees and Asylees Annual Flow Report*, DEPT. HOMELAND SEC., https://www.dhs.gov/ohss/topics/immigration/refugees-asylees-AFR (last updated Nov. 14, 2023).

25. *See* Lindsay M. Harris, *The One-Year Bar to Asylum in The Age Of The Immigration Court Backlog*, 2016 WIS. L. REV. 1185, 1185 (2016).

26. *See id.* at 1190.

27. *See id.*

28. *See Credible Fear Cases Completed and Referrals for Credible Fear Interview*, DEPT. HOMELAND SEC., https://www.dhs.gov/immigration-statistics/readingroom/RFA/credible-fear-cases-interview (last updated Nov. 17, 2023).

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humanitarian aid.[29]

The United States provided humanitarian aid when it took in refugee immigrants to help individuals flee from communist countries and the Middle East by passing the Refugee Relief Act of 1953.[30] The trend of responding to humanitarian crises continued with the Hungarian Escapee Program and the Cuban Airlift Program.[31] Finally, Congress passed the Refugee Act of 1980 to create a comprehensive policy for refugee admission, to create a statutory basis for asylum, and to remove geographic limitations of refugee status that resulted from past amendments to the INA.[32] Staggeringly, although the state of the world and human rights have continued to change, the Act's definition of "refugee" has not changed from the original drafting, which was based on the 1951 United Nations Convention.[33]

While the statutory definition of a refugee did not change, courts' interpretation of the INA has evolved. Over time, courts' definitions of "refugee" and the methods they use to decide whether an individual has met the definition have changed.[34] Currently, to decide whether an applicant has a "well-founded fear" of past or future persecution for purposes of proving they are a "refugee" and are eligible for asylum, courts analyze the applicant's claim under a two-pronged approach.[35]

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29. *See id.*

30. *See* Refugee Relief Act of 1953, Pub. L. No. 83-203, § 2, 67 Stat. 400 (1953); PHILIP G. SCHRAG, A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA 24 (2000).

31. *See Refugee Timeline, supra* note 1.

32. *See id.* Notably, the Refugee Act created a new section 208 authorizing the attorney general to establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A) of this title. Carvajal-Munoz v. Immigr. & Naturalization Serv., 743 F.2d 562, 564, 569 (7th Cir. 1984); Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 103, § 201(b).

33. Refugee Act of 1980, Pub. L. 96-212, § 101, 94 Stat. 102 (1980); *see An Overview of U.S. Refugee Law and Policy*, AMER. IMMIGR. COUNCIL, https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy (last updated Oct. 22, 2022).

34. *See* Todd Howland, *A Comparative Analysis of the Changing Definition of a Refugee*, 5 J. HUM. RTS. 33, 36 (1987) (comparing different definitions of "refugee").

35. *See* Yousif v. Immigr. & Naturalization Serv., 794 F.2d 236, 244 (6th Cir. 1986) ("Although the petitioner may prevail upon establishing a subjective fear of persecution, the petitioner's assertions of fear must nonetheless be supported by objective evidence."); Pilica v. Ashcroft, 388 F.3d 941, 950 (6th Cir. 2004) ("A well-founded fear

The subjective prong requires a refugee to prove they have a genuine fear of persecution.[36] Courts examine whether an applicant can show a genuine fear of persecution or an "anticipation or awareness of danger."[37] This prong is often met with less extrinsic evidence, as the subjective fear is often sufficiently proven by the act of applying as a refugee or asylee. Courts regularly find individuals would not willingly leave their homes absent good reason.[38] However, because the subjective prong is based on the applicant's personal fear, a lack of credibility may be the downfall of a claim.[39] While "[t]here is no presumption of credibility . . . if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal."[40] Credibility is generally decided by "[c]considering the totality of the circumstances and all relevant factors."[41] Thus, courts are more likely to order the removal of an applicant for failure to meet the objective prong of the test rather than the subjective prong.[42]

Meeting the objective prong, however, has proven to be more difficult for asylum applicants. The objective prong focuses on the reasonableness of the applicant's fear of persecution.[43] There is currently no consensus on what evidence is sufficient to meet the objective prong, whether a court will find that a sufficient case has been made or an objective fear of persecution has been met. Results differ based on the circuit where the claim is being adjudicated.[44] Throughout the nation, different circuits have developed

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of persecution thus has both a subjective and an objective component").

36. *See* Diaz Escobar v. Immigr. & Naturalization Serv., 782 F.2d 1488, 1492 (9th Cir. 1986) ("The subjective component requires a showing that the alien's fear is genuine").

37. Matter of Acosta, 19 I. & N. Dec. 211, (B.I.A. 1985) *overruled on other grounds by* Matter of Mogharrabi, 19 I. & N. Dec. 439, 443 (B.I.A. June 12, 1987).

38. *See* UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 11-12 (Feb. 2019), https://www.unhcr.org/us/media/handbook-procedures-and-criteria-determining-refugee-status-under-1951-convention-and-1967 [hereinafter HANDBOOK].

39. *See id.* at 19 ("An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions.").

40. Refugee Relief Act of 1953, 8 U.S.C. § 1158(b)(1)(B)(iii).

41. *Id.*

42. *See* GORDON ET. AL., *supra* note 11, at § 34.92.

43. *See Criminal Defense of Immigrants*, *supra* note 17.

44. *See* Kathryn A. Ditrrick Heebner, *Protecting the Truly Persecuted: Restructuring the Flawed Asylum System*, 39 U.S.F. L. REV. 549, 550 (2005) ("a judge's

different tests for whether an applicant has successfully proven an objective fear component.[45]

For example, the Seventh Circuit has found that the objective prong may be met by requiring that the applicant "be specific in his claims, to show that there is a 'reasonable possibility' of persecution, and to show that he has 'good reason' for his fear of persecution."[46]

In the case of *Carvajal-Munoz v. INS*, Carvajal-Munoz claimed asylum relief after he was allegedly beaten, held for several days, and arrested multiple times by Argentinian police because of his views against the government.[47] Although he had never made any speeches, he was met at his house by Argentinian police armed with machine guns who took him to the police station to tell him to leave the country upon the belief that he was a Chilean spy.[48] Carvajal-Munoz then fled to the United States without going through inspection and applied for asylum.[49]

The court noted that to meet the evidentiary burden, "[t]he applicant must present specific facts through objective evidence if possible, or through his or her own persuasive, credible testimony, showing actual persecution or detailing some other good reason to fear persecution on one of the specified grounds."[50] The court held country reports concerning Argentina's current conditions were insufficient.[51] Although the court admitted that Carvajal-Munoz's testimony was held to be credible when applying the aforementioned test, the court held that "[s]uch general information is insufficient by itself to establish a claim of persecution; there must be specific circumstances giving rise to a reasonable possibility that *this*

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discretionary role is not limited to determining the validity and extent of an alien's fear of persecution. Indeed, the judge's discretion extends to allow consideration of factors beyond the scope of persecution, which effectively screen out certain undesirable or unworthy refugees from the benefits of asylum.").

45. *See generally* Matter of Mogharrabi, 19 I. & N. Dec. 439, 443 (B.I.A. June 12, 1987); M.A. A26851062 v. United States Immigr. & Naturalization Serv., 858 F.2d 210, 213 (4th Cir. 1988) ("in developing a definition of 'a well-founded fear' we look both to the precedents of other circuits, although scarce, and to the United Nations protocol on refugees.").

46. *See generally* Matter of Mogharrabi, 19 I. & N. Dec. at 443.

47. *See* Carvajal-Munoz v. Immigr. & Naturalization Serv., 743 F.2d 562, 571 (7th Cir. 1984).

48. *See id.*

49. *See id.*

50. *Id.* at 565.

51. *See id.* at 571.

petitioner will be persecuted to qualify under the statute."[52] The court further pointed out that if Carvajal-Munoz's Argentinian friends had been left untouched, the petitioner should have brought up this important fact.[53] Not only did the petitioner fail to testify to these specifics, but he also failed to supply either affidavits from his friends who participated in the demonstrations with him regarding the events that transpired, or at least their names and addresses."[54]

The court's conclusion contradicts the fact that most courts generally recognize that, given the danger and nature of asylum, paperwork such as affidavits may realistically be too perilous to obtain. There is also a consensus that the applicant's fear, presented through their testimony, may be sufficient on its own.[55] Carvajal-Munoz noted this precisely, citing a Sixth Circuit case wherein the petitioner was afforded relief on much less evidence.[56] The court noted the differences between the two applicants, particularly that "the applicant in [*Reyes v. Immigration & Naturalization Service*] did obtain statements from persons describing conditions in the Philippines who were familiar with the applicant's attitudes and political beliefs first-hand."[57]

The court's conclusion seems to fall short because it rejected general country-status reports, and it is unclear whether additional specificity in those reports would have bridged the gap created by this court between what meets the burden and what does not.[58]

Carvajal-Munoz's plight is a perfect example of courts and circuits coming to different conclusions. The Fourth Circuit took a different approach than the Seventh Circuit, citing the Fifth Circuit case, *Guevara-Flores v. Immigration & Naturalization Service*. Guevara-*Flores* held that "[a]n alien possesses a well-founded fear of persecution if a reasonable person in her circumstances would fear persecution if she were to be returned to her native country."[59] The Second Circuit subsequently adopted this

52. *Id.* at 577.

53. *See id.* at 578.

54. *Id.* (stating that the petitioner's failure to supply more specific details of his arrests or corroborate his contentions through affidavits solicited from his friends or possibly even his family (petitioner's mother and brother reside in Argentina), or at least supply the names and addresses of potential witnesses, make this case much less persuasive).

55. *See id.* at 579.

56. *See id.*

57. *Id.*

58. *See id.* at 577.

59. *See generally* Matter of Mogharrabi, 19 I. & N. Dec. 439, 445 (B.I.A. June 12,

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standard.[60] Unlike in the Seventh Circuit, this standard requires less of a dependency on surrounding detailed and specific facts, so long as the applicant's beliefs and fears of being persecuted were reasonable. It begs the question that if Mr. Carvajal-Munoz were to apply for asylum in the Fourth, Fifth, or Second Circuit with nothing but his harrowing yet credible claims of mistreatment by the Argentinian government, would he have been granted relief?

The Fourth Circuit applied this rule in *M.A. A26851062 v. United States INS,* in which petitioner M.A. noted that he fled El Salvador to avoid serving in a military that was committing atrocities.[61] Petitioner noted that

> He thought it likely that he would be "rounded up and made to serve." He stated that it was a common practice for the military to pick up "young people from buses, from the street, from wherever they can find them. . ." At one time, M.A. was recruited by a friend to be a spy for the army and the government. He was encouraged to "denounce" others suspected of anti-government activity. His friend informed him that those who had been denounced would likely be tortured and killed.[62]

In assessing the facts, the Fourth Circuit noted that "corroborative (or 'objective') evidence of specific facts that an individual seeking political asylum will be singled out for persecution is unavailable, and, we think, unnecessary."[63] The court further explained that M.A. had met his burden with the evidence provided "[w]e interpret the petitioner's burden to produce specific, objective evidence of a 'good reason' to fear persecution, not to require evidence that demonstrates that the petitioner has individually been threatened by the authorities."[64]

To further emphasize the differences in the assessments of the well-founded fear standard, we can also look to tests that some circuits have created. The Sixth Circuit defined its view on the objective prong by requiring that the "alien must actually fear that he will be persecuted upon return to his country, and he must present evidence establishing an 'objective situation' under which his fear can be deemed reasonable."[65] What the differing tests have in common is they all seek to ensure that the fear of

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1987); M.A. A26851062 v. United States Immigr. & Naturalization Serv., 858 F.2d 210, 213 (4th Cir. 1988).

60. *Matter of Mogharrabi*, 19 I. & N. Dec. at 445.

61. *See M.A. A26851062*, 858 F.2d at 216.

62. *Id.*

63. *Id*. at 214 (citing *Carvajal-Munoz*, 743 F.2d at 574 and Cardoza-Fonseca v. Immigr. & Naturalization Serv., F.2d 1448 (9th Cir. 1985)).

64. *Id.*

65. Pilicia v. Ashcroft, 388 F.3d 941, 950 (6th Cir. 2004).

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persecution is objectively reasonable. What they differ on is what exactly "objectively reasonable" looks like. Besides the conflicting rulings between cases, the BIA has required applicants to prove the following elements to show the reasonableness of their fear:

> (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.[66]

"[T]hese four factors may be demonstrated with less than a fifty percent likelihood of occurrence."[67]

Jurisdictions that still follow the BIA's most recent precedent follow a different rule than those whose circuit courts have created their own tests. Comparing the two cases and acknowledging that some circuits have tests for guidance where others do not, the question persists and continues. What if Mr. Carvajal-Munoz had applied in the Fourth, Fifth, or Second circuit? Would he have received relief through the M.A. approach? What would the result be if the Sixth Circuit factor test was applied?

Comparing cases illuminates the stark differences between circuit decisions, behaviors, and inequitable application of law. Petitioners are faced with drastic differences in approaches and expectations between what meets the burden and what does not, as well as what is reasonable to request of the petitioner and what is not. It is clear that despite a collective agreement on the legislative intent behind asylum and refugee law, the circuits are not collectively acting toward those goals.

III. HOW ASYLUM LAW IS FAILING THOSE WHO NEED IT MOST: A CASE STUDY

For decades, the United States has held itself out to be a champion of human rights through its philanthropic reactions to global crises.[68] This narrative is evidenced by the United States' reputation as a melting pot, the idea of the American Dream, and messages such as the inscription on the

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66. Matter of Mogharrabi, 19 I. & N. Dec. 439, 445 (B.I.A. June 12, 1987) (quoting Matter of Acosta, Interim Decision 2986, 212 (B.I.A. Mar. 9, 1985); RAIO, RAIO COMBINED TRAINING PROGRAM READING AND USING CASE LAW TRAINING MODULE 13 (2019) ("Published BIA decisions apply nationwide, except in federal circuits with conflicting law.").

67. Ocariz & Lopez, *supra* note 5, at 649.

68. *See id.* at 661.

Statue of Liberty.[69]

The United States has long prided itself on its willingness to take in those individuals plighted by systemic corruption, particularly as it relates to religion. During the Holocaust, for example, President Roosevelt called for an international meeting concerning the refugee crisis.[70] However, the United States' philanthropy proved to be shallow and performative.[71] For example, the United States continued to make immigration particularly difficult and provided no fast pass to safety for refugees affected by the Holocaust and Nazi regime.[72] The practice of formally acknowledging crises while not backing up the subsequent statements with actions has continued to this day, leading the United States to have a negative reputation in the immigration-policy world.[73]

One example is the United States' recognition and subsequent futile

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69. *See* Emma Lazarus, *The New Colossus (1883)*, N.Y. TIMES (June 19, 1975), https://www.nytimes.com/1975/06/19/archives/new-jersey-pages-the-new-colossus.html ("Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore, Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!").

70. *See generally* International Religious Freedom Act of 1998, Pub. L. 105-292, §101, 112 Stat. 2787, 2792 (1998); *Americans and the Holocaust*, U.S. HOLOCAUST MEM'L MUSEUM, https://exhibitions.ushmm.org/americans-and-the-holocaust/main/the-refugee -crisis-1938 (last visited Feb. 1, 2024).

71. The United States is often attributed to be the reason that the United Nations Relief and Rehabilitation Administration was not renewed during the Cold War, after allowing the mandate to expire in 1947 as a result of the United States pulling its support because of the financial burden. *See* Jérôme Elie, *The Historical Roots of Cooperation Between the UN High Commissioner for Refugees and the International Organization for Migration*, 16 GLOB. GOVERNANCE 345, 347 (2010).

72. *See Americans and the Holocaust*, *supra* note 70 ("The US government made no exceptions for refugees escaping persecution and did not adjust the immigration laws in the 1930s or 1940s. The waiting lists for US immigrant visas grew as hundreds of thousands of Jews attempted to flee Europe.").

73. *See* Steven Feldstein, *How U.S. Policies Are Worsening the Global Refugee Crisis*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Oct. 16, 2017), https://carnegieendowment.org/2017/10/16/how-u.s.-policies-are-worsening-global-refugee-crisis-pub-73480 ("[G]iven the U.S.'s role in contributing to the global refugee crisis, raising the refugee cap above the Obama-era level of 110,000 seems appropriate. In contrast, Trump has proposed decreasing the cap to 45,000, which would be the lowest number any president has sought since the government first established refugee ceilings in 1980. Increasing refugee admissions above 110,000 would set an important precedent. It would be a symbolic admission that the U.S. bears a critical measure of responsibility for the global humanitarian crisis. It would also demonstrate to domestic audiences that fighting wars abroad has real consequences and force U.S. communities to wrestle directly with the implications of armed interventions.").

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attempts at aiding Coptic Orthodox Christians ("Copts"). Copts are native to Egypt and genetic descendants of the ancient Egyptians. They were the majority religious group until the Arab Conquest of 640 C.E., which forced most Copts and Jews to face the ultimatum of conversion, paying taxes, which most could not afford, or death.[74] This persecution led to mass cultural erasure as Arabic replaced Coptic as the main language in the country.[75]

Subsequently, Copts did not have fundamental rights, such as the ability to own land or hold seats in the government, until 1841.[76] Since then, Copts have been at the mercy of various leaders and their policies towards the minority group. The 1841 regime provided more rights to the Coptic Community than the 1952 regime under Gamal Abdel Naser, which led to moderate discrimination, such as subjection to mandatory Islamic studies in school or exclusion from universities. Life for Copts worsened under Anwar El Sadat's rule in the 1970s, when the state empowered extremist groups like the Muslim Brotherhood, which openly preached hatred against Christians and strengthened the role of Islam in government.[77]

The systemic oppression became clearer as the government took bolder action against Coptic Christians, most notably with the exile of His Holiness Pope Shenouda III in 1985.[78] In 1981, President Sadat was assassinated and

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74. *See* Christian Solidarity Worldwide, *Long Read: The History of Religious Persecution in Egypt*, FREEDOM OF RELIGION OR BELIEF IN FULL (Nov. 3, 2019), https://forbinfull.org/2019/03/11/long-read-the-history-of-religious-persecution-in-egypt/.

75. *See* Meriam Kelada, The Arab Republic of Egypt and The Coptic Orthodox Population (May 2020) (M.A. dissertation, Rutgers University Camden Graduate School) (on file with the Rutgers University Comm. Repository).

76. *See* Christian Solidarity Worldwide, *supra* note 74.

77. *See id.*; Imad Boles, *Egypt–Persecution: Disappearing Christians of the Middle East*, MIDDLE E. Q., Winter 2001, at 26-27 ("By the time of Abdel Nasser's death in 1970, the Copts found themselves in a much worse situation than just a decade earlier . . . . [T]he 1971 constitution . . . proclaimed 'Islam is the religion of the state, Arabic its official language, and the principles of the Islamic Shari'a a principal source of legislation.' . . . The 1980 constitution went a step further and made the Shari'a *the* principal source of legislation.").

78. *See* Christian Solidarity Worldwide, *supra* note 74; Scott Kent Brown II, *The Coptic Church in Egypt: A Comment on Protecting Religious Minorities from Nonstate Discrimination*, 2000 BYU L. REV. 1049, 1082 (2000) ("Sadat withdrew state recognition of Pope Shenouda III and banished him to a monastery in Upper Egypt. Under Article 2(3) of the CCPR. . . Egyptian laws should have provided the Pope and his followers with an 'effective remedy' for this violation of their 'rights and freedoms.' Unfortunately, none was provided, and the Coptic Pope consequently remained in exile for over four years.").

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replaced by President Hosni Mubarak.[79] "Under Mubarak, the state continued to discriminate against Copts in university admissions, public spending, and military promotions."[80] The result of this regime has had lasting effects. Currently, non-Christians hold ninety percent of the seats in the Egyptian government.[81] There continues to be a pattern of attacks on Copts and Coptic churches; for example, under the Minya governate, there were seventy-seven recorded incidents of violence against Copts between 2011 and 2016.[82]

Persecution of Copts comes in other forms, as well. For example, in 2017, a string of churches was bombed on Palm Sunday. There have been other incidents such as "Coptic churches and homes . . . [being] set on fire, members of the Coptic minority . . . [being] physically attacked, and their property . . . [being] looted."[83] Coptic women have also been put at risk. There is a recorded trend of "abduction, forced conversion to Islam and forced marriage to Muslims."[84]

The pattern of persecution has not gone unnoticed. Since 1999, the United States has openly recognized the struggle that the Copts face.[85] In a hearing

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79. *See* Christian Solidarity Worldwide, *supra* note 74.

80. *Id.*

81. *See* Matt Rehbein, *Who are Egypt's Coptic Christians?*, CNN (May 26, 2017), https://www.cnn.com/2017/04/09/middleeast/egypt-coptic-christians/index.html.; Scott Kent Brown II, *supra* note 78, at 1049 ("Egypt's Constitution forbids sectarian groups from forming political parties. Additionally, even if the Copts could form themselves into a nonreligious political party, they would have to garner eight per- cent of the total vote before a member of their party could have a seat in Parliament. Hence, it is not surprising that in 1995 '[f]ifty- six Copts ran in the election, but all lost.' In addition to low or no representation in elected positions, there are complaints that Copts are rarely appointed heads of public or government institutions.").

82. *See, e.g.*, Boles, *supra* note 77, at 23 ("Since 1981 more than thirty massacres of Copts have taken place, 21 leading to the deaths of more than two hundred persons, as documented by human rights organizations"); Press Release, Egyptian Initiative for Pers. Rts., EIPR Warns of Increasing Sectarian Attacks in Minya Governorate and Urges State Institutions to Enforce the Law and Initiate Social Dialogue on the Church Construction Law (July 18, 2016), https://eipr.org/en/press/2016/07/77-incidents-sectarian-violence-and-tension-minya-governorate-january-25-2011; *Egypt*, OPENDOORS, https://perma.cc/4YML-LNMB (last visited Apr. 14, 2022).

83. *See* Rehbein, *supra* note 81.

84. *See Minority at Risk: Coptic Christians in Egypt*: *Hearing Before the Comm. on Security and Cooperation in Europe*, 112th Cong. 1, 54 (2011) [hereinafter *Minority at Risk*].

85. *See* Boles, *supra* note 77, at 23 (stating "[t]he subject of Coptic religious freedom has been raised at all levels, including by the U.S. secretary of state, assistant secretary for Near Eastern affairs, the U.S. ambassador, and other embassy officials. President

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before the Commission on Security and Cooperation in Europe, the 112th Congress discussed the status of Copts, stating,

> The plight of Copts has been well-documented, including by the State Department's International Religious Freedom reports and its Country Reports on Human Rights Practices and by the reports of the U.S. Commission on International Religious Freedom. The most recent International Religious Freedom report said that the Egyptian Government's respect for this fundamental human right is quote, "poor."[86]

Aside from the Egyptian government's direct actions in persecuting Copts, their stance on religious liberty is further highlighted by their inability or unwillingness to control persecution by extremist groups.[87] Where there have been claims and complaints filed about bombings and abductions, Egypt has routinely failed to conduct investigations or hold the parties at fault responsible.[88]

It has been widely accepted that "there is clear evidence of an increasing pattern and practice by Commission, of government-sanctioned persecution of Copts."[89] The overwhelming bipartisan response by the United States government has been to attempt to pressure Egypt into finding solutions to the rampant mistreatment of Copts, either withholding aid or attaching conditions to motivate the government to act.[90] Facially, it may seem as though Coptic Christians would be the poster people for eligibility in asylum cases.

Clinton raised the issue with President Mubarak during Mubarak's visit to the United States in mid-1999. In February 1999, the secretary of state's special representative for international religious freedom visited Egypt and met with official interlocutors and community activists").

86. *See Minority at Risk, supra* note 84, at 2 (Statement of Hon. Christopher H. Smith).

87. *See generally* DEP'T OF STATE OFF. OF INT'L RELIGIOUS FREEDOM, 2020 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: EGYPT 25 (2021), https://www.state.gov/reports/2020-report-on-international-religious-freedom/egypt ("[T]he government failed to hold the perpetrators of sectarian violence accountable and failed to protect victims of sectarian attacks; prosecuted individuals for religious defamation; and enabled religious discrimination by means of official religious designations including on national identity cards").

88. *See Minority at Risk, supra* note 84, at 2-3.

89. *See id.*

90. *See, e.g.*, *id.*; Brown *supra* note 78, at 1077 ("Because Egypt receives approximately two billion dollars a year from the United States in foreign aid, the IRFA has real implications for Egypt. In an effort to utilize the full strength of the IRFA, the American Coptic Association successfully lobbied the Senate appropriations subcommittee to propose that the entire two billion dollars in foreign aid "be conditioned on improvements in 'respect' for Copts.").

Coptic Christians have a highly documented history of persecution. With the recent increase in attacks, they appear to be the perfect candidates to benefit from the United States' outstretched hands. Not only do Copts have a subjective fear of the forms of persecution allowed by the government, but their fear can meet the objective prong with the documentation of recent events corroborated by the historical treatment of the minority.[91]

In this instance, the failure of the United States' asylum system becomes clearest. Where Congress intended for the standard of proof to filter frivolous claims from those with genuine need, the courts' arbitrary and irrational application has inadvertently denied those who most merit relief.[92]

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91. While a more extensive fleshing out of how the two-prong approached has affected Coptic individuals would have served to illustrate the above point more clearly, absent published BIA cases and considering the danger that individuals I have spoken to would face if they publicized their experiences, the information is not available.

92. *See, e.g.*, Anker, *supra* note 13, at 258; Kate Morrissey & Lauryn Schroeder, *Who Gets Asylum? Even Before Trump, System was Riddled with Bias and Disparities*, SAN DIEGO TRIB. (Aug. 3, 2020), https://www.sandiegouniontribune.com/news/immigration/story/2020-08-23/who-gets-asylum-even-before-trump-system-was-riddled-with-bias-and-disparities ("Where asylum seekers wait for their day in court can mean the difference between protection and deportation. That 'where' depends on two decisions mostly out of asylum seekers' control—whether they are held in detention and in which part of the country their hearings are scheduled. It can ultimately influence several other important factors: their chances of finding legal representation, the judge assigned and what legal precedents the judge must follow. Outcomes also vary by nationality, discrepancies that cannot be fully explained by the human rights violations that vary from country to country. Mixed into all of this are the tendencies of each judge. Even among judges at the same court, grant and deportation rates vary widely. 'Stories of different outcomes for similar cases, even for family members fleeing the same danger, are common.'"); Cohn, *supra* note 4, at 76 ("at one end of the spectrum, judges granted asylum in more than half the cases they had heard from 1995 through most of 1999. . . [and] at the other end, some judges granted asylum in less than 5 percent of the cases they heard, some less than 2 percent. . . . [S]tatistically significant disparities were the norm rather than the exception between immigration judges sitting in the same immigration courts, leading him to conclude that immigration courts were 'one of the most arbitrary arenas in immigration policy. . .where an asylum seeker's hopes can depend as much on which judge hears the case as anything else.'"); Heebner, *supra* note 44, at 563 ("Without an opinion from the Supreme Court, judges are not prohibited from making discretionary rulings on the basis of foreign policy interests or political opinion. This may lead to dangerous results, especially in the wake of the events of September 11, 2001, when Americans are particularly leery of allowing foreign nationals into the United States."); *Asylum Outcome Increasingly Depends on Judge Assigned*, TRAC IMMIGR. (Dec. 2, 2016), https://trac.syr.edu/immigration/reports/447/ ("The median level of asylum decision disparity that asylum seekers face is now over 56 percentage points. That is, the assignment of the judge for the typical asylum seeker could alter the odds of receiving asylum by this magnitude.").

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Courts routinely find asylees ineligible for asylum relief because they incorrectly apply the tests and laws they created. These denials lead to those in need becoming victims of two governments.[93] These denials result from conflicting tests, exaggerated standards of proof, informal and restrictive evidentiary rules, the appearance of adjudicator partiality, major problems in foreign language interpretation, and rejection of objective human rights assessments.[94] Collectively, these variables make the applicability of the law unpredictable and unfair, leading even groups with as extensive a case as Copts to continue to suffer from the harm asylum seeks to avoid.

IV. NEXT STEPS

It is evident that the immigration legal landscape is failing, particularly as it relates to asylum. The question then becomes how we fix it and how we ensure that the United States' aid is effective for asylees seeking help and effective in being philanthropic. The United States has long held itself out to be a protector of those who cannot protect themselves, but the country's efforts are fruitless.[95] This Article proposes a policy change to the asylum analysis that seeks to rectify its shortcomings.

The asylum system has the potential to be much more successful in meeting its philanthropic goals if a new approach were taken to the asylum analysis, particularly as it concerns the "well-founded fear of persecution" aspect of immigration proceedings. Because of the fragmented approach taken by circuits, it would be simpler to instill a categorical approach. The categorical rule would establish that when the United States recognizes a persecuted minority, it should lead to a presumption of a "well-founded fear of persecution" or a waiver of the burden of proof entirely.

This policy change would improve a few things. First, the change will largely aid the backlog of cases the immigration system constantly struggles with.[96] The change would provide multiple benefits, such as preventing high-risk cases from slipping through the cracks and avoiding further harm

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93. *See, e.g.*, Mansour v. Ashcroft, 390 F.3d 667, 671 (9th Cir. 2004).

94. *See* Anker, *supra* note 13, at 256-57.

95. *See* Ruth Ellen Wasem, *More than a Wall: The Rise and Fall of US Asylum and Refugee Policy*, 8 J. MIGRATION & HUM. SEC. 1, 1 (2020) (noting that "the tensions between the aspiration to welcome asylees and refugees and the nativist fears of foreigners of different religions, nationalities, and races have characterized the United States since its founding.").

96. *See Asylum Outcome Increasingly Depends on Judge Assigned*, *supra* note 92 (noting "court[s] have become increasingly challenged by a rising backlog of cases, along with administrative pressure to expedite proceedings").

to asylees as a result of the slow-moving legal system.[97] Second, creating a categorical approach, as opposed to the current ad-hoc method used by immigration courts, will result in a homogenization of the immigration system.[98]

Concerning the backlog of immigration cases, currently, "Immigration Courts are entering a worrying new era of even more crushing caseloads . . . [which is] concerning since no attempt at a solution has yet been able to reverse the avalanche of cases that Immigration Judges now face."[99] Not only does a court backlog delay aid to those in need, but it also puts pressure on Immigration Judges to adjudicate quickly, ultimately leading to more judicial error.[100] However, the group at the most risk from these delays is the asylees.[101]

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97. *See A Mounting Asylum Backlog and Growing Wait Times*, TRAC IMMIGR. (Dec. 22, 2021), https://trac.syr.edu/immigration/reports/672; *"I am in Limbo:" Our New Report on the Asylum Backlog and How the Biden Administration Should Resolve It*, HUMAN RTS. FIRST (Apr. 12, 2021), https://www.humanrightsfirst.org/blog/i-am-limbo-our-new-report-asylum-backlog-and-how-biden-administration-should-resolve-it ("More than 386,000 asylum seekers are caught in the asylum backlog. Most endure prolonged family separation, economic deprivation, and the grinding fear that they will be deported back to their homelands where they would face persecution, torture, or death.").

98. *See* Amit Jain & Phillip Dane Warren, *An Ode to the Categorical Approach*, 67 UCLA L. REV. DISC. 133, 139 (2019) (discussing early immigration courts and categorical approaches, Jain and Warren state that "benefits included uniformity and efficiency; by guaranteeing that individuals with like convictions were treated identically, the categorical approach ensured that the inclinations of individual immigration judges did not cloud their review of noncitizens' prior offenses, and the approach eliminated the need for resource-intensive factual inquiries into past conduct.").

99. Priscilla Alvarez, *Immigration Court Backlog Nearly Equals Size of Philadelphia's Population, Study Finds*, CNN (Jan. 18, 2022, 5:38 PM), https://www.cnn.com/2022/01/18/politics/immigration-court-backlog/index.html; *A Mounting Asylum Backlog and Growing Wait Times*, *supra* note 97 (noting that "of the 1.6 million Court cases in which asylum applications were filed, two-thirds of a million asylum seekers (667,229) are still waiting for hearings to resolve their cases").

100. *See* Kara A. Naseef, *How to Decrease the Immigration Backlog: Expand Representation and End Unnecessary Detention*, 52 U. MICH. J.L. REFORM 771, 784 (2019).

101. *See* Lindsay M. Harris, *The One-Year Bar to Asylum in the Age of the Immigration Court Backlog*, 2016 WIS. L. REV. 1185, 1206 (2016) ("These backlogs have an especially deleterious effect on asylum seekers, however, due to the dysfunctional mechanics of the one-year deadline. By regulation, an asylum application is "filed" for the purposes of meeting the one-year filing deadline if it is "received by" an immigration court or the Board of Immigration Appeals.").

Implementing a categorical approach regarding the "well-founded fear of persecution" aspect of an asylum claim would help chip away at the mountain of cases, simplifying and streamlining the process. Immigration courts currently use government findings and statistics of country conditions and weigh them heavily in asylum proceedings.[102] Thus, not only would it be in line with the current procedure, but it would cumulatively shave off significant amounts of time, often spent gathering evidence or trying to wrestle with foreign and hostile governments for affidavits and documents.

Asylees come from places that are hostile to them, whether colloquially in their towns or in government generally.[103] Often, this reality means "[t]he ability of an asylum seeker to corroborate a claim can be very difficult, especially if agents of that government were involved in the persecution or torture."[104] In addition, securing affidavits in the mail from witnesses in war-torn countries can be extremely slow, if not impossible. Allowing courts to rely solely on findings from the United States would greatly simplify the system and ensure that courts are not bogged down by slow-moving litigation and discovery. The faster cases move, the less backlog they have.

Another benefit would be to begin to homogenize the immigration system for just applicability for all. As discussed above, every circuit applies different tests when analyzing whether there is a well-founded fear of persecution and whether there is a dysfunction and lack of communication when it comes to meeting the goals of the Refugee Act.[105] The result is a broken legal system and a maze of laws that not even the drafters and judges could wade through.[106] Many administrations have attempted to consolidate the immigration system to make it more efficient and ensure fair application of the law; however, the change would need to begin from within the system itself, not from the outside.[107] Thus, adopting a categorical approach would

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102. *See generally* Pilica v. Ashcroft, 388 F.3d 941, 950 (6th Cir. 2004); Matter of Mogharrabi, 19 I. & N. Dec. 439, 445 (B.I.A. June 12, 1987); Carvajal-Munoz v. Immigr. and Naturalization Serv., 743 F.2d 562, 567-569 (7th Cir. 1984). Most cases look to reports of the petitioner's native country's status, whether generally referring to human rights or the right infringed upon.

103. *See generally* Anna Cabot, *Problems Faced by Mexican Asylum Seekers in the United States*, 2 J. ON MIGRATION & HUM. SEC. 361, 361-62 (2014).

104. *Id.*

105. *See infra* Part II.

106. *See Asylum Outcome Increasingly Depends on Judge Assigned*, *supra* note 92.

107. *See* Jessica Bolter, Emma Israel & Sarah Pierce, *Four Years of Profound Change: Immigration Policy during the Trump Presidency*, MIGRATION POL'Y INST. 1, 59, 65-68 (Feb. 2022), https://www.migrationpolicy.org/research/four-years-change-immigration-trump; *FACT SHEET: The Biden Administration Blueprint for a Fair, Orderly and Humane Immigration System,* THE WHITE HOUSE (July 27, 2021),

allow for a more even application of the law and predictable outcomes that are more dependent on the merits of an individual's case rather than what docket their case ends up on.

Another question must then be raised: What would happen if we took a categorical approach to the well-founded fear analysis? The immigration court system already largely depends on the United States' human rights findings when weighing the possibility of danger and an applicant's well-founded fear.[108] Thus, the foundation has already been set for referring to international reports and findings guidance in deciding the objective prong of the analysis. However, the courts have been hesitant to recognize anything as decidedly dispositive, often requiring more than just international reports and nonspecific data from the petitioner to make their determination.[109] This hesitation seems to be counterproductive to the goals set by the Refugee Act and the concept of asylum as a whole. Section 101 of the Refugee Act states:

> (a) The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas, efforts to promote opportunities for resettlement or voluntary repatriation, aid for necessary transportation and processing, admission to this country of refugees of special humanitarian concern to the United States, and transitional assistance to refugees in the United States . . .
> (b) The objectives of this Act are to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted.[110]

There are two important words to focus on here: the statute's use of "systematic" and "urgent." As discussed above, our current system fails in both those aspects.[111] First, between the shifting circuit court tests and

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https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/27/fact-sheet-the-biden-administration-blueprint-for-a-fair-orderly-and-humane-immigration-system/.

108. *See generally* Pilica v. Ashcroft, 388 F.3d 941, 950 (6th Cir. 2004); Matter of Mogharrabi, 19 I. & N. Dec. 439, 445 (B.I.A. June 12, 1987); Carvajal-Munoz v. INS, 743 F.2d 562, 567-69 (7th Cir. 1984).

109. *See generally Carvajal-Munoz*, 743 F.2d at 567-569.

110. Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 101 (1980).

111. *See FY 2022 (First Quarter) Asylum Grant Rates by Court*, EXEC. OFF. FOR IMMIGR. REV. WORKLOAD AND ADJUDICATION STAT. (Jan. 19, 2022); *see, e.g.*, *Asylum Outcome Increasingly Depends on Judge Assigned*, *supra* note 92.

numerous incohesive[112] guidelines that may even be contradictory, it is hardly systematic.[113] Second, the immigration system in the United States is famously slow-moving and does not provide immediate relief, which is needed in high-stakes and dangerous situations, as often seen in cases of asylees and refugees.[114]

A uniform approach, such as national recognition of persecution as a waiver for the burden of proof or a presumption that the "well-founded fear" standard has been met, meets both these goals. Hesitation to make the system more uniform or efficient would directly go against the legislative intent of the Refugee Act.[115]

V. CONCLUSION

The current system blatantly ignores immigration law's very foundation: a desire to help those in need and prove that the United States is the "land of opportunity." The United States is infamous for a slow-moving system that treats immigrants as a burden, evidenced by shifting and confusing case law.[116] This is particularly problematic for asylees and refugees, who find themselves in perilous situations with dire time constraints.

The immigration system needs efficient reform to welcome individuals who want to move to the United States. Applicants seeking aid should not feel as though a roll of the dice determines their cases. One approach to reform is to consider formal recognition by the United States that a group faces persecution as either a waiver or a presumption that the "well-founded fear of persecution" criterion has been satisfied. This will bring uniformity and efficiency for urgent claims back into focus, two goals that were originally contemplated in the legislation. Most importantly, immigration reform will ensure that asylees are not applying from their graves.

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112. *See FY 2023 Asylum Grant Rates by Court*, EXEC. OFF. FOR IMMIGR. REV. WORKLOAD AND ADJUDICATION STAT. (Oct. 12, 2023) (showing the vast disparity in Asylum Grant rates among different courts).

113. *See* Schoenholtz, *supra* note 7, at 302 ("[I]n the very large volume of adjudications involving foreign nationals' applications for protection from persecution and torture in their home countries, we see a great deal of statistical variation in the outcomes pronounced by decision makers.").

114. *See FY 2023 Asylum Grant Rates*, *supra* note 112 (showing a difference in number of Asylum applications granted per court).

115. *See* Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 101 (1980).

116. *See generally* Muzaffar Chishti & Julia Gelatt, *Mounting Backlogs Undermine U.S. Immigration System and Impede Biden Policy Changes*, MIGRATION POL'Y INST. (Feb. 23, 2022), https://www.migrationpolicy.org/article/us-immigration-backlogs-mounting-undermine-biden.