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COMMENTS

IN RE FAUZIYA KASINGA: THE UNITED STATES HAS OPENED ITS DOORS TO VICTIMS OF FEMALE GENITAL MUTILATION

When I was about 5 years old, my father decided it was time for me to be circumcised The woman who did it called herself a “professional cutter,” but she was just an old gypsy who traveled around with her bag The old woman held a dirty razor blade, and I could see the dried blood on it from the person she had cut before me. I opened my legs, closed my eyes, and blocked my mind The woman didn’t just cut the clitoris—she cut everything, including the labia. She then sewed me up tightly with a needle They tied my legs together to stop me from walking, so that I wouldn’t rip open I bled for the next two, three months. I nearly died. I wanted to die at the time—I had given up on life.¹

INTRODUCTION

Female genital mutilation (“FGM”), or “female circumcision,”² is an age-old cultural practice that involves incision, and

¹ Laura Ziv, *The Tragedy of Female Circumcision: One Woman’s Story*, MARIE CLAIRE, Mar. 1996, at 65.

² Although FGM has been commonly referred to as “female circumcision,” it “is not comparable to male circumcision, unless one considers circumcision amputation.” 141 CONG. REC. H1695 (daily ed. Feb. 14, 1995) (statement of Sen. Schroeder). See Mary Ann James, *Federal Prohibition of Female Genital Mutilation: The Female Genital Mutilation Act of 1993, H.R. 3247*, 9 BERKELEY WOMEN’S L.J. 206, 208 (1994) (noting that “the male equivalent to FGM would be the cutting and/or amputation of the penis and its surrounding tissues”). For a discussion of the varying terminology for the procedure, see Blake M. Guy, *Female Genital Excision and the*

usually removal, of part or all of the female external genitalia,³ which commonly results in serious health complications and sometimes death.⁴ Despite the evident dangers involved, the "tradition" endures in approximately forty African and Asian countries and immigrant communities in several other countries,⁵ whose people support the practice with various unpersuasive justifications.⁶ FGM is typically viewed as a rite of passage for young girls, but is also performed on infants, toddlers, and adult women.⁷ The number of victims estimated to have suffered from FGM thus far ranges from 80 to 130 million,⁸ and it contin-

Implications of Federal Prohibition, 2 WM. & MARY J. WOMEN & L. 125, 128 n.18 (1995); Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 4-8 (1995). For convenience, "female genital mutilation" and "female circumcision" will be used interchangeably throughout this Comment.

³ See Note, *What's Culture Got to Do With It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1946 (1993) [hereinafter *What's Culture Got to Do With It?*]. The female genitalia is comprised of the clitoris and the clitoral prepuce, or hood, the labia majora (large lips of the vagina), and the labia minora (small lips of the vagina). *Id.*

⁴ See *infra* Part I B discussing the physical and psychological effects of FGM.

⁵ See FRAN P. HOSKEN, *STOP FEMALE GENITAL MUTILATION: WOMEN SPEAK: FACTS AND ACTION* 14 (1995); OLAYINKA KOSO-THOMAS, *THE CIRCUMCISION OF WOMEN: A STRATEGY FOR ERADICATION* 17 (1987) (outlining practice of female circumcision in various countries); RAINBO, *HEALTH AND HUMAN RIGHTS FOR WOMEN 3* (acknowledging existence of FGM in Africa and Asia and its recent spread to immigrant communities in Europe, Australia, Canada, and United States); Barbara Crossette, *Female Genital Mutilation by Immigrants Is Becoming Cause for Concern in the U.S.*, N.Y. TIMES, Dec. 10, 1995, at A18. "[R]ecently it has been found that African and Middle Eastern immigrants to Europe, North America and Australia, mostly refugees, continue to practice these mutilations on their children, no matter where they go to live". For maps illustrating the geographic distribution of FGM, see EFUA DORKENOO, *CUTTING THE ROSE: FEMALE GENITAL MUTILATION: THE PRACTICE AND ITS PREVENTION* viii - xi (1994); see also Celia W. Dugger, *Genital Ritual Is Unyielding in Africa*, N.Y. TIMES, Oct. 5, 1996, at A1 (illustrating, statistically, the prevalence of FGM in Africa).

⁶ See *infra* Part I C (discussing some of the more commonly cited reasons for continuing the practice); see also RAINBO, *supra* note 5, at 3 (listing some justifications for existence of this practice).

⁷ The procedure is performed most frequently on girls between the ages of three and eight, but other cultures mutilate infants, brides, and new mothers. Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 526 (1993); see RAQIYA HAJI DUALEH ABDALLA, *SISTERS IN AFFLICTION: CIRCUMCISION AND INFIBULATION OF WOMEN IN AFRICA* 11 (1982) (giving age at which procedure is performed in various countries).

⁸ The World Health Organization estimates that over 80 million females have been subjected to FGM. Jennifer Bingham Hull, *Battered, Raped and Veiled: The New Sanctuary Seekers*, L.A. TIMES, Nov. 20, 1994, (Magazine), at 26. Some estimates assert that as many as 110 million females have been genitally mutilated. Stuart Wasserman & Maria Puente, *Female Genital Mutilation Under Scrutiny at*

ues to rise at a rate of 2 million girls each year.⁹

Although human rights have long been recognized by the United States and the international community,¹⁰ women who suffer gender-based forms of persecution, such as FGM, have continually failed to be protected.¹¹ The United States, a purported leader in the human rights campaign, has historically refused to expand existing immigration law to provide a safe haven for women fleeing the torturous act of FGM.¹² Recently, how-

Hearing, USA TODAY, Feb. 11, 1994, at A3. Others purport that the number of victims may be as high as 130 million. NAHID TOUBIA, *FEMALE GENITAL MUTILATION: A CALL FOR GLOBAL ACTION* 21 (1995).

⁹ See Guy, *supra* note 2, at 135 (noting that World Health Organization has reported at least two million victims of FGM each year); see also Ellen Goodman, *Another Step Toward Redefining Abuse of Women*, BOSTON GLOBE, Mar. 27, 1994, at 75; *Two Million Women a Year Subjected to Sexual Mutilation*, AGENCE FRANCE PRESSE, Oct. 2, 1994, available in LEXIS, News Library, ARCNWS File ("The latest statistics show that there are now more mutilated girls and women in Africa than ever before due to population growth."); FRAN B. HOSKEN, *THE HOSKEN REPORT: GENITAL AND SEXUAL MUTILATION OF FEMALES* 10 (1993); see also Guy, *supra* note 2, at 134 (indicating that decreasing frequency of this practice is substantially offset by increase in population).

¹⁰ See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 1229-34 (1996) [hereinafter *INTERNATIONAL HUMAN RIGHTS*] (listing human rights documents). For example, international documents include the Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) [hereinafter *UDHR*]; the International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, entered into force Mar. 23, 1976, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, reprinted in 6 ILM 368 (1967) [hereinafter *ICCPR*]; the International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, entered into force Jan. 3, 1976, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, reprinted in 6 ILM 360 (1967) [hereinafter *Economic Covenant*]; the Convention on the Rights of the Child, adopted Nov. 20, 1989, entered into force Sept. 2, 1990, G.A. Res. 44/25, 44 U.N. GAOR, Supp. (No. 49), UN Doc. A/44/49, (1989), reprinted in 28 ILM 1448 (1989). Regional instruments include the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, signed Nov. 26, 1987, entered into force Feb. 1, 1989, Doc. No. H(87)4 1987, ETS 126, reprinted in 27 ILM 1152 (1988); the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, signed June 9, 1994, entered into force Mar. 3, 1995, reprinted in 33 ILM 1534 (1994); the African Charter on Human and Peoples' Rights, adopted June 27, 1981, entered into force Oct. 21, 1986, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, reprinted in 21 ILM 58 (1982).

¹¹ See Deborah Sontag, *Asking for Asylum in U.S., Women Tread New Territory*, N.Y. TIMES, Sept. 27, 1993, at A1 ("Immigration law has tended to ignore the plight of refugee women."); see also Sunny Kim, *Gender-Related Persecution: A Legal Analysis of Gender Bias in Asylum Law*, 2 AM. U. J. GENDER & L. 107, 108 (1994) (recognizing that female victims of human rights persecution are not extended equal protection).

¹² See Layli Miller Bashir, *Female Genital Mutilation in the United States: An Examination of Criminal and Asylum Law*, 4 AM. U. J. GENDER & L. 415, 417-18

ever, in *In re Fauziya Kasinga*, the Board of Immigration Appeals ("BIA") has taken a long-awaited first step and granted asylum to a young African woman who escaped her homeland and came to the United States in order to avoid genital mutilation.¹³

Part I of this Comment provides background information on FGM, the types of procedures involved, its physical and psychological effects, and the reasons offered for its continuation. Next, Part II discusses human rights in the international context, and addresses some of the reasons why women's rights, although protected in theory by international human rights doctrine, are not typically secured in practice. Part III examines pertinent United States immigration law and the requirements to obtain refugee status. Finally, Part IV explains the BIA's rationale in the *Kasinga* decision as well as its potential effects on future gender-related asylum claims.

I. FEMALE GENITAL MUTILATION

A. *The Procedure*

Female genital mutilation includes three types of procedures. Clitoridectomy, the first and least severe form of FGM, consists of cutting and removing the prepuce and part or all of the clitoris.¹⁴ The second and most common form of FGM, called excision, involves the entire removal of the clitoris and labia minora.¹⁵ The third and most severe form of FGM is infibulation.¹⁶

(1996) (noting United States' failure to respond to practice of FGM); Peter C. Godfrey, *Defining the Social Group In Asylum Proceedings: The Expansion of the Social Group to Include a Broader Class of Refugees*, 3 J.L. & POL'Y 257, 273 (1994) (indicating that United States courts have narrowly construed "particular social group" so as to exclude aliens persecuted on basis of gender).

¹³ *In re Fauziya Kasinga*, Int. Dec. 3278 (BIA June 13, 1996); see *infra* Part IV discussing the facts of the case and the rationale of the court.

¹⁴ See ABDALLA, *supra* note 7, at 8; ASMA EL DAREER, *WOMAN, WHY DO YOU WEEP?* 2 (1982); DORKENOO, *supra* note 5, at 5; KOSO-THOMAS, *supra* note 5, at 16. In Muslim countries, clitoridectomy is also referred to as "sunna," which means tradition. EFUA DORKENOO & SCILLA ELWORTHY, *FEMALE GENITAL MUTILATION: PROPOSALS FOR CHANGE* 7 (3d ed. 1992).

¹⁵ DORKENOO, *supra* note 5, at 5 (noting that "[a]pproximately 80 per cent of those affected undergo excision"); DORKENOO & ELWORTHY, *supra* note 14, at 7.

¹⁶ See ABDALLA, *supra* note 7, at 10; DORKENOO & ELWORTHY, *supra* note 14, at 7; Guy, *supra* note 2, at 131. Infibulation is sometimes referred to as "Pharonic circumcision" because it typically has been practiced in Egypt. HOSKEN, *supra* note 9, at 33.

During infibulation, the clitoris and labia minora are removed, the labia majora are sewn together, typically with thorns, and a sliver of wood is inserted to preserve an opening for the passage of urine and menstrual blood.¹⁷ The woman's legs are then bound together for several weeks until the wounds have healed.¹⁸

The age of the FGM victim varies from culture to culture.¹⁹ Regardless of the victim's age, however, the conditions under which the operations are performed are unsanitary and anesthetics are rarely used.²⁰ The "traditional surgeon" is typically an elderly female member of the community whose instruments may include unsterile razor blades, kitchen knives, and broken glass.²¹ Sometimes the wounds are treated with native soap, palm oil, vaseline, kerosene, or engine oil.²²

B. *The Effects*

The physical effects of FGM vary with the degree of hygiene used during the operation and the deportment of the woman throughout the procedure.²³ Common immediate effects include

¹⁷ See DORKENOO, *supra* note 5, at 5; DORKENOO & ELWORTHY, *supra* note 14, at 7; see also Guy, *supra* note 2, at 131; *What's Culture Got to Do with It?*, *supra* note 3, at 1947.

¹⁸ See DAREER, *supra* note 14, at 2; DORKENOO, *supra* note 5, at 5; DORKENOO & ELWORTHY, *supra* note 14, at 7; see also *What's Culture Got to Do with It?*, *supra* note 3, at 1947.

¹⁹ See *supra* note 7 and accompanying text (discussing age range of FGM victims); see also DORKENOO, *supra* note 5, at 10-12. In Togo, girls are cut at earlier ages, before they are old enough to escape. Celia W. Dugger, *A Refugee's Body Is Intact but Her Family Is Torn*, N.Y. TIMES, Sept. 11, 1996, at A1. In some cultures, circumcision is performed on pregnant women to prevent spiritual or physical injury to the baby during childbirth, which is believed to occur if the baby's head touches the clitoris. See *What's Culture Got to Do With It?*, *supra* note 3, at 1950. For a breakdown of the types of circumcision and the ages of the victims, see DAREER, *supra* note 14, at 13.

²⁰ *What's Culture Got to Do With It?*, *supra* note 3, at 1947 (stressing that same blade is often used for several circumcisions). Sometimes earth, ashes or even cow manure is applied to the genitals to stop the bleeding. Bashir, *supra* note 12, at 421 (citing Roger Kaplan, *Prisoners of Ritual*, 25 FREEDOM REV. 25, 26 (1992)).

²¹ Bashir, *supra* note 12, at 421; *What's Culture Got to Do With It?*, *supra* note 3, at 1947. In some parts of Nigeria, the village barber performs the ritual. *What's Culture Got to Do With It?*, *supra* note 3, at 1947. Over 90% of circumcisions are performed by midwives, more than half of whom are untrained. See DAREER, *supra* note 14, at 14. For an illustration of how the procedure is performed, see TOUBIA, *supra* note 8, at 11.

²² *What's Culture Got to Do With It?*, *supra* note 3, at 1947.

²³ DORKENOO, *supra* note 5, at 13; KOSO-THOMAS, *supra* note 5, at 25. Because no anesthesia is used, the experience is obviously quite painful. See Guy, *supra* note 2, at 133 (noting unavailability of anesthesia). The victim, therefore, must be held

excruciating pain, hemorrhage, shock, infection, and possibly death.²⁴ The equally shocking long-term physical consequences can include urinary infection, vaginal abscesses, infertility, scars, and cysts which can grow large enough to require surgical removal.²⁵ The infibulated woman frequently experiences painful sexual intercourse and childbirth because she must undergo repeated disinfection and reinfibulation.²⁶

FGM also causes psychological damage. In addition to the anxiety suffered as the imminent operation approaches, the FGM victim often feels betrayed by the family members who forcibly held her down and allowed the operation to occur.²⁷ Fur-

down forcibly by several women. See *id.* (indicating that girl's female relatives forcibly restrain her during procedure).

²⁴ DORKENOO, *supra* note 5, at 13-15; see DAREER, *supra* note 14, at 30-35 (detailing immediate post-circumcision problems). It has been estimated that 15% of all circumcised females die from complications. Judy Mann, *Torturing Girls Is Not a Cultural Right*, WASH. POST, Feb. 23, 1994, at E13.

²⁵ See DORKENOO, *supra* note 5, at 15-17 (discussing long term complications); Bashir, *supra* note 12, at 422-23; Kris Ann Balser Moussette, *Female Genital Mutilation and Refugee Status in the United States - a Step in the Right Direction*, 19 B.C. INT'L & COMP. L. REV. 353, 365-67 (1996). See generally DAREER, *supra* note 14, at 35-49 (detailing complications resulting from FGM, particularly those that are sexual in nature). The women frequently experience difficulty passing menstrual blood, which can lead to infection. *Id.* In an extreme case, a young girl, whose circumcision had been performed so tightly that she could barely pass any menstrual blood, was killed to protect family honor because the accumulation of blood increased her abdomen to the point that her family thought she was pregnant. *Id.* at 37. "Because some effects are not immediately apparent, the woman or child, her parents and family, the community, and the practitioner may not acknowledge the causal connection between the operation and the complications that materialize years later." Moussette, *supra*, at 363.

²⁶ For a discussion of disinfection and reinfibulation, and the reasons for and effects of the procedures, see DAREER, *supra* note 14, at 50-65. The infibulated woman may be disinfectioned on her wedding night by her husband, who uses a dagger to allow for penetration. DORKENOO, *supra* note 5, at 13. If a pregnant woman is not disinfectioned, at childbirth "the baby can explode out of that tiny opening and tear the mother every which way, into her anus and bladder." Moussette, *supra* note 25, at 366 (quoting Judy Steed, *Mission to Stop Female Genital Mutilation: Health Workers Fear Girls Could Die Because of Practices Done in Secret*, TORONTO STAR, Nov. 13, 1994, at E4).

²⁷ See DORKENOO, *supra* note 5, at 24-27 (explaining psychological effects of FGM); Lori Ann Larson, Note, *Female Genital Mutilation in the United States: Child Abuse or Constitutional Freedom?*, 17 WOMEN'S RTS. L. REP. 237, 239 (1996) (noting young girl's feeling of betrayal by family members who forced her to undergo procedure); see also Moussette, *supra* note 25, at 366-67 (stressing that resulting psychological harm is life long). "[T]he terrible suffering and severe psychological trauma that FGM imposes on female children and women at an early age and throughout their lives can never be measured. They are a social burden of sexual violence imposed by the traditional patriarchal system on those least able to protect

thermore, the woman's obligation to engage in painful and undesirable sexual intercourse with her husband can result in permanent psychological damage.²⁸

C. *The Unjustified Justifications*

Supporters of female circumcision assert several justifications for the practice. Among the most common reasons offered for the performance of FGM are religious beliefs, tradition, health, aesthetics, and morality.²⁹

The rationale that FGM is based on religious beliefs is misguided. In the countries that practice FGM, the predominant religions observed are Christianity and Islam; yet neither the Bible nor the Koran require female circumcision.³⁰ Proponents of the practice, however, argue that virginity and modesty, both of which are valued in the Bible and the Koran, necessitate the removal of the clitoris, which is believed to make women promiscuous.³¹

The most frequently cited justification for the continuance of FGM is the reluctance to break a custom that has endured for centuries.³² The communities that engage in the ritual view it as

themselves." HOSKEN, *supra* note 5, at 14.

²⁸ See DORKENOO, *supra* note 5, at 17-24 (discussing sexual health problems related to FGM including painful sexual intercourse and deprivation of sexual instinct); see also DAREER, *supra* note 14, at 40-49 (discussing effects of circumcision on sexual relations).

²⁹ See DAREER, *supra* note 14, at 67-76 (analyzing justifications for existence of FGM); DORKENOO, *supra* note 5, at 34-41 (same). *But see* DAREER, *supra* note 14, at 78-82 (discussing reasons for rejecting continuance of circumcision).

³⁰ See DORKENOO, *supra* note 5, at 36-39 ("[T]here is no basis in the various religious texts for FGM but rather it is how these religious books have been interpreted to the people that matters."); Anna Funder, *De Minimis Non Curat Lex: The Clitoris, Culture and the Law*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 417, 436 (1993). *But see* DAREER, *supra* note 14, at 72 (noting that while Koran does not mandate circumcision, it is implicitly discussed by Prophet Mohammed).

³¹ KOSO-THOMAS, *supra* note 5, at 8, 9; see DAREER, *supra* note 14, at 75 (quoting belief that "[i]f [the woman was] left ... uncircumcised, she [would] wander about looking for men, she [would] be a prostitute"); see also Larson, *supra* note 27, at 240 (explaining belief that clitoris causes women to be oversexed, to make uncontrollable sexual demands on their husbands, and to eventually commit adultery).

³² Some scholars estimate that FGM began more than 2,000 years ago, before the arrival of Christianity or Islam. Dugger, *supra* note 5, at A1; see Karen Hughes, Note, *The Criminalization of Female Genital Mutilation in the United States*, 4 J.L. & POL'Y 321, 330 (1995) (indicating that FGM predates Christianity and Islam). For a contrary position on the role of custom and tradition, see Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry

a sacred tradition that "symbolizes the shared heritage of a particular ethnic group."³³ Uncircumcised women are frequently ostracized for deviating from the social mores of the community.³⁴

Ironically, those who practice FGM also justify the procedure on hygienic or aesthetic grounds.³⁵ The uncircumcised female is considered dirty and impure, and the female genitalia is thought to be ugly, thereby necessitating its removal.³⁶ The argument that FGM promotes cleanliness, however, is wholly unfounded. The retention of urine and menstrual blood, which typically results from FGM, can lead to many health complications ranging from discomfort to infection.³⁷ In addition, although "beautiful" is a relative term, the hardened scar and stump that is left in place of the clitoris can hardly be thought of as aesthetically pleasing.³⁸ Nevertheless, even beauty cannot serve as a valid justification for the infliction of pain or the removal of a body part. The idea, therefore, that a healthy organ must be mutilated against the victim's wishes in order to attain "beauty" is questionable at best.

"In addition to the religious arguments in favor of chastity, advocates point to the prevention of promiscuity as a separate

IV.")

³³ Moussette, *supra* note 25, at 360 (citing KOSO-THOMAS, *supra* note 5, at 8); *What's Culture Got to Do With It?*, *supra* note 3, at 1949.

³⁴ Bashir, *supra* note 12, at 426; *see also* DAREER, *supra* note 14 at 69 (noting social stigma attached to deviation from custom); *See How Africa Understands Female Circumcision*, N.Y. TIMES, Nov. 24, 1993, at A24. ("The importance of the ceremony among traditional Kikuyu cannot be understated").

³⁵ DAREER, *supra* note 14, at 73; KOSO-THOMAS, *supra* note 5, at 7; DORKENOO, *supra* note 5, at 40. In parts of Africa, the female genitalia are considered dirty. *Id.* For example, in Egypt, the uncircumcised female is referred to as "nigsa," meaning unclean. *Id.*

³⁶ DAREER, *supra* note 14, at 73. Some mothers, when asked why they circumcise their daughters, responded, "[w]e cannot leave them dirty and impure and smelly." *Id.* It is also believed that the female must be made beautiful through circumcision. *Id.*

³⁷ DORKENOO, *supra* note 5, at 40 (noting that discomfort, odor, and infection result from inability of urine and menstrual blood to escape naturally). Quite often, the effects of FGM are far more severe. *See supra* Part I B. There are no known medical justifications for practicing FGM on healthy women. Minority Health Improvement Act of 1994, H.R. REP. NO. 103-501, at 66 (1994).

³⁸ "Many Somali women, when they go to the hospital before giving birth, have been made to feel like freaks ... [d]octors and nurses come running, to stare at them." Moussette, *supra* note 25, at 363 (quoting Judy Steed, *Mission to Stop Female Genital Mutilation: Health Workers Fear Girls Could Die Because of Practices Done in Secret*, TORONTO STAR, Nov. 13, 1994, at E4); *see* Larson, *supra* note 27, at 240 (stressing unattractiveness of stump and scar left in place of excised clitoris).

and distinct reason to continue the practice of female circumcision.³⁹ Proponents maintain that it must be removed to suppress the desire to seek extramarital affairs because they believe the clitoris makes women lascivious.⁴⁰ Thus, circumcised women are more "marriageable,"⁴¹ and men are assured that future pregnancies are not the result of infidelity.⁴²

The reasons cited for the practice of mutilation fail to justify what, in actuality, amounts to physical and psychological torture. Despite the justifications, FGM merely emerges as a vehicle to ensure that women remain subordinate in a male-dominated society.⁴³ In a community where women are economically dependent on their husbands, marriage is imperative and women, therefore, compelled to submit to circumcision in order to survive.⁴⁴ Thus, the vicious cycle of mutilation endures, as successive generations of women impose the practice onto themselves and their daughters.⁴⁵

³⁹ *What's Culture Got to Do With It?*, *supra* note 3, at 1952 (citing KOSO-THOMAS, *supra* note 5, at 8); see also HANNY LIGHTFOOT-KLEIN, PRISONERS OF RITUAL 39 (1989) ("The belief that uncircumcised women cannot help but exhibit an unbridled and voracious appetite for promiscuous sex is prevalent in all societies that practice female circumcision.").

⁴⁰ DAREER, *supra* note 14, at 75; DORKENOO, *supra* note 5, at 35; KOSO-THOMAS, *supra* note 5, at 8. *But see* DAREER, *supra* note 14, at 75 ("Infibulation can ... encourage misbehaviours [sic] because only recircumcision is necessary to restore an appearance of virginity").

⁴¹ Uncircumcised women are considered "unclean, oversexed and unmarriageable." Shannon Brownlee et al., *In the Name of Ritual*, U.S. NEWS & WORLD REP., Feb. 7, 1994, at 56, 58. In Sudan, marriage is considered a privilege for women; thus, no woman would risk rejection by not being circumcised. DAREER, *supra* note 14, at 73. Men prefer circumcised women because the vaginal passage is tighter, providing more sexual satisfaction for the man. *Id.* at 74. While this causes intercourse to be painful for women, they do not protest because they believe it is their duty to make intercourse as satisfying as possible for their husbands. *Id.* at 74-75.

⁴² LIGHTFOOT-KLEIN, *supra* note 39, at 29 (noting that circumcision preserves monogamy).

⁴³ Daliah Setareh, *Women Escaping Genital Mutilation - Seeking Asylum in the United States*, 6 UCLA WOMEN'S L.J. 123, 129-130 (1995). "African boys who grow up in families where girls are routinely mutilated, where women are beaten and violated and treated like slaves accept such behavior as normal." HOSKEN, *supra* note 5, at 5.

⁴⁴ Guy, *supra* note 2, at 146 (noting importance of marriage given women's economic instability); Setareh, *supra* note 43, at 129-31.

⁴⁵ *Id.* at 130 ("[I]t is the women themselves who enforce the practice...."). Mothers continue to subject their daughters to FGM in order to ensure marriage. Brownlee et al., *supra* note 41, at 56, 58.

II. FGM IN THE INTERNATIONAL HUMAN RIGHTS CONTEXT

The international community has taken great strides with regard to the protection of human rights. For example, the Universal Declaration of Human Rights ("UDHR") protects the "right to life, liberty and security of person," and prohibits "cruel, inhuman or degrading treatment or punishment."⁴⁶ Likewise, the International Covenant on Civil and Political Rights ("ICCPR") provides for similar protections.⁴⁷ The United Nations Convention Relating to the Status of Refugees⁴⁸ and the United Nations Protocol Relating to the Status of Refugees⁴⁹ reemphasized the international community's concern for human rights by precluding deportation if a person's life or freedom is jeopardized on account of race, religion, nationality, membership in a particular social group, or political opinion.⁵⁰ Notwithstanding the fact that both the UDHR and the ICCPR afford their stated rights equally to both men and women,⁵¹ the human rights of women have routinely been, and continue to be, violated.⁵²

⁴⁶ UDHR, *supra* note 10, arts. 3 & 5, reprinted in INTERNATIONAL HUMAN RIGHTS, at 1157.

⁴⁷ ICCPR, *supra* note 10, pmbl., reprinted in INTERNATIONAL HUMAN RIGHTS, *supra* note 10, at 1161.

⁴⁸ Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (1951) [hereinafter Refugee Convention].

⁴⁹ Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267 (1967) [hereinafter Refugee Protocol].

⁵⁰ Refugee Convention, *supra* note 48, 189 U.N.T.S. at 176, art. 33; Refugee Protocol, *supra* note 49, 606 U.N.T.S. at 268, art. 1.

⁵¹ UDHR, *supra* note 10, pmbl., reprinted in INTERNATIONAL HUMAN RIGHTS, at 1156; ICCPR, *supra* note 10, art. 3, reprinted in INTERNATIONAL HUMAN RIGHTS, at 1162. The foundation of women's rights being recognized as human rights began in 1945, when the United Nations Charter ("U.N. Charter"), sought to "solv[e] international problems of an economic, social, cultural, or humanitarian character" and "promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all without distinction as to ... sex", U.N. CHARTER, art. 1 para. 3. The U.N. Charter also stated as one of its underlying tenets "the equal rights of men and women." *Id.* at pmbl.

⁵² Notwithstanding the existing 'paper rights,' the universal fact is that women are routinely subjected to torture, starvation, terrorism, humiliation, mutilation, rape, multiple birth and other maternity-related health risks, economic duress, and sexual exploitation, simply because of their sex. Recurrently, these inflictions on women because of their sex are justified or explained by culture and tradition: genital mutilation, female infanticide, bride burning, foot-binding, slavery, face-hiding, wife-beating, honor-killing, forced pregnancy, forced abortion, and multiple, early and closely spaced, child-bearing and birthing, to name but a few.

Berta Esperanza Hernández-Truyol, *Women's Rights As Human Rights - Rules, Realities and the Role of Culture: A Formula For Reform*, 21 BROOK. J. INT'L L. 605,

One explanation for the continuance of these violations is the public/private dichotomy in the human rights context. Actions that are unregulated by the government are traditionally thought of as "private," as illustrated in the aphorism "a man's home is his castle."⁵³ As a result, persecution is presumed to be only that which a person suffers due to governmental oppression, which is typically experienced by men.⁵⁴ Thus, because women usually suffer persecution in the private sphere,⁵⁵ their persecution is recognized only when it fits within the male norm. Feminist scholars have argued that this distinction has been manufactured by the patriarchal concept that human rights in the public sphere, typically dominated by men, are more deserving of protection than human rights of women, which are generally violated in the private sphere of their home and community.⁵⁶ It is asserted that the recognition of gender-based asylum claims would serve to promote the acknowledgment of women's rights as human rights and initiate the eradication of the unjustified public/private differentiation.

Those who support the continuance of female circumcision, as well as other forms of gender-based persecution, hide behind

634-38 (1996).

⁵³ See Felicite Stairs & Lori Pope, *No Place Like Home: Assaulted Migrant Women's Claims for Refugee Status and Landings on Humanitarian and Compassionate Grounds*, 6 J.L. & SOC. POL'Y 148, 182-187 (1990).

⁵⁴ *Id.*; see, e.g., *Klawitter v. INS*, 970 F.2d 149, 152 (6th Cir. 1992) (stating that applicant's claim that government official sexually harassed her was personal in nature and therefore not deserving of asylum relief).

⁵⁵ Stairs & Pope, *supra* note 53, at 182-87.

The key criteria for being a refugee are drawn primarily from the realm of public sphere activities dominated by men. With regard to private sphere activities where women's presence is more strongly felt, there is primarily silence - silence compounded by an unconscious calculus that assigns the critical quality 'political' to many public activities but few private ones. Thus, state oppression of a religious minority is political, while gender oppression at home is not.

Nancy Kelly, *Gender Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 628 (1993) (quoting Doreen Indra, *A Key Dimension of the Refugee Experience*, 6 REFUGEE 3 (1987)).

⁵⁶ For feminist critiques of the public/private dichotomy in international law, see Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, in HUMAN RIGHTS OF WOMEN 85 (Rebecca J. Cook ed., 1994); Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 625-34, 638-41 (1991); Rebecca J. Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 125, 150-53 (1994). But see Fernando R. Tyson, *Feminism and International Law: A Reply*, 33 VA. J. INT'L L. 647, 670-72 (1993) (arguing that there is no conspiracy and explaining some reasons for keeping private spheres).

the shield of "cultural relativism" by arguing that others should not pass judgment and condemn the traditions and practices of cultures different from their own.⁵⁷ The cultural relativism argument creates a conflict between the "right of men to live in terms of their own traditions" and "respect for the individual as an individual."⁵⁸ While cultural relativists argue that cultural behavior should be judged through the norms and customs of the specific culture, universalists maintain that basic human rights standards must apply equally to all nations and cultures.⁵⁹

The torturous act of female genital mutilation clearly violates all of the above mentioned human rights documents. Furthermore, the infliction of severe pain and suffering that is forced upon a woman, with governmental acquiescence, for the mere preservation of unnecessary ancient custom, serves no other purpose than to insure male dominance and female subordination.⁶⁰

Recognizing that, despite the numerous human rights doc-

⁵⁷ See generally Katherine Brennan, *The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, 7 L. & INEQ. J. 367 (1989) (questioning whether United Nations criticism of long standing cultural practices is appropriate).

Cultural relativism asserts that the practices within any specific culture are unique to the values, systems, and practices within that culture. For the cultural relativist there are no universal standards and the morality and values of one national culture cannot be compared to that of any other. Cultural relativism dominates social, political and academic thought today and it serves as a justification of many inhuman social practices ... There is nothing unique across cultures in the practices of the enslavement of women except perhaps the diversity in the strategies men employ to carry them out

KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* 139-140 (1979).

⁵⁸ American Anthropologist Association, *Statement on Human Rights by the Executive Board*, 49 AM. ANTHROPOLOGIST 543 (1947); see also Brennan, *supra* note 57, at 368 (comparing cultural relativist's viewpoint of established traditions against human rights proponents' beliefs in certain understandable and universal individual rights).

⁵⁹ See Lewis, *supra* note 2, at 17-18. Cultural relativists argue "that cultural behavior should be judged only through culturally specific, rather than universal, norms and values." *Id.* at 17. Universalists subscribe to the belief that "the international community has an obligation to protest human rights violations wherever they are perpetrated." *Id.* at 19.

⁶⁰ Lewis, *supra* note 2, at 23-25; Setareh, *supra* note 43, at 129-31. "FGM has been characterized as 'sexual oppression' that is 'based on the manipulation of women's sexuality in order to assure male dominance and exploitation.'" NAHID TOUBIA, *FEMALE GENITAL MUTILATION: A CALL FOR GLOBAL ACTION* 12, 24-25 (1993) (quoting Raqiya Haji Dualeh Abdalla, Somali Women's Democratic Organization).

trines already in existence, "extensive discrimination against women continues to exist,"⁶¹ the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW")⁶² was established in 1979 to "condemn discrimination against women in all its forms."⁶³ In particular, the document specifically seeks to eradicate conventions that serve to discriminate based on gender.⁶⁴ A major setback for the CEDAW, however, is the high number of reservations that were taken by some countries when ratifying the document.⁶⁵ For instance, Iraq has taken reservation to several sections, including article 2, paragraph (f), which requires action to "modify or abolish existing laws, ... customs and practices" that discriminate against women.⁶⁶ Despite the explicit prohibition against reservations that are "incompatible with the object and purpose" of the document,⁶⁷ reservations such as those taken by Iraq jeopardize the force of the CEDAW and intimate that international obligations imposed by the CEDAW are disparate and less binding than those of other human rights treaties.⁶⁸

⁶¹ Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 13, 15 [hereinafter CEDAW]. The Human Rights Watch established the Women's Rights Project in 1990 to "monitor violence against women and discrimination on the basis of sex that is either committed or tolerated by governments." HUMAN RIGHTS WATCH WORLD REPORT 345 (1996). The project was developed from the "recognition of the rampant levels of gender-based violence and discrimination around the world and of the past failure of human rights organizations, and the international community, to hold governments accountable for abuses of women's basic human rights." *Id.*

⁶² See CEDAW, *supra* note 61.

⁶³ CEDAW, *supra* note 61, art. 2, at 16.

⁶⁴ CEDAW, *supra* note 61, art. 2(f), at 16. The campaign against female circumcision finds further support in the European Commission on Human Rights, which interpreted "inhuman" treatment, within the UDHR, to constitute "at least such treatment as deliberately caus[ing] severe suffering, mental or physical."

⁶⁵ INTERNATIONAL HUMAN RIGHTS, *supra* note 10, at 918; see also Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643, 644 (1990) ("The volume of reservations brings this Convention among the most heavily reserved of international human rights conventions....").

⁶⁶ INTERNATIONAL HUMAN RIGHTS, *supra* note 10, at 921. See generally Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281 (1991); Cook, *supra* note 65, at 714-16 (1990) (listing nation's reservations and objections to CEDAW).

⁶⁷ CEDAW, *supra* note 61, art. 28 (2), at 23.

⁶⁸ Clark, *supra* note 66, at 285-86.

III. UNITED STATES ASYLUM LAW

Despite the global community's outcry against female genital mutilation,⁶⁹ the United States has been reluctant to recognize FGM as grounds for granting asylum.⁷⁰ The 1967 Protocol Relating to the Status of Refugees,⁷¹ which the United States signed onto in 1968, adopted articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees.⁷² Subsequently, Congress passed the Refugee Act of 1980, codified within the Immigration and Nationality Act,⁷³ which incorporated many of the United States' Protocol obligations. The Refugee Act was created to develop a "humanitarian refugee policy with a broad scope that conformed to United States international law obligations."⁷⁴

The Refugee Act provides that, at the Attorney General's discretion, asylum may be granted to any person who meets the statutory definition of "refugee."⁷⁵ The term "refugee," within the meaning of the Immigration and Naturalization Act, applies to:

⁶⁹ "FGM has been condemned by such groups as the United Nations, the World Health Organization, and the American Medical Association." TOUBIA, *supra* note 60, at 45-46 (quoting Raqiya Haji Dualeh Abdalla, Somali Women's Democratic Organization); see also United Nations High Commissioner for Refugees, Memorandum: UNHCR Position On Female Genital Mutilation (May 10, 1994) (stating that FGM is "an act which causes severe pain as well as permanent physical harm, [and] amounts to a violation of human rights."). FGM violates many rights that are protected by international human rights documents. See UDHR, *supra* note 10, art. 3, reprinted in INTERNATIONAL HUMAN RIGHTS, at 1157 (right to life, liberty and security of person); ICCPR, *supra* note 10, art. 6, reprinted in INTERNATIONAL HUMAN RIGHTS, at 1163 (same); Economic Covenant, *supra* note 10, art. 12, reprinted in INTERNATIONAL HUMAN RIGHTS, at 1178 (right to highest standard attainable of physical and mental health).

⁷⁰ Bashir, *supra* note 12, at 437; see Pamela Constable, *INS Debates Female Mutilation as Basis for Asylum*, WASH. POST, Sept. 11, 1995, at D1.

⁷¹ Refugee Protocol, *supra* note 49. American refugee law is based primarily on the Refugee Protocol, which the U.S. signed onto to satisfy its obligations to preserve human rights. See Kathryn M. Bockley, Comment, *A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise*, 21 N.C. J. INT'L L. & COM. REG. 253, 278-79 (1995).

⁷² Refugee Convention, *supra* note 48; see Mousette, *supra* note 25, at 380.

⁷³ 8 U.S.C. § 1101 (1994). The purpose of the Refugee Act was to offer "liberty and safety to persons from other lands who are persecuted." Doris Meissner, *Reflections on the Refugee Act of 1980*, in THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980S, THE NINTH SOKOL COLLOQUIUM ON INTERNATIONAL LAW 57, 59 (David A. Martin ed., 1988). For a discussion of the history, adoption, and implementation of the Refugee Act, see Bockley, *supra* note 71, at 278-86.

⁷⁴ Linda Dale Bevis, "Political Opinions" of Refugees: *Interpreting International Sources*, 63 WASH. L. REV. 395, 397 (1988); see Bockley, *supra* note 71, at 281.

⁷⁵ 8 U.S.C. § 1158(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 opinion⁷⁶

Accordingly, a woman seeking asylum in the United States must demonstrate four factors: that she has a fear of persecution; that her fear is well-founded; that the persecution will be inflicted by the government or by an individual the government cannot or will not control; and that the persecution is on account of one of the five specified grounds.

If an asylum applicant has established refugee status but nevertheless is denied a discretionary grant of asylum, the court must then determine whether to withhold deportation.⁷⁷ A court must withhold deportation to a country if the "alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."⁷⁸ The applicant seeking a withholding of deportation must meet a higher standard of proof than is required to establish refugee status, namely a clear probability of persecution.⁷⁹ The failure to establish refugee status thus precludes the alien from obtaining an order withholding deportation.⁸⁰ Gender-based claims do not fit easily into the statutory definition of refugee because gender is not one of the enumerated grounds to define refugee status. Consequently, there is very little case law in the United States dealing with FGM victims

⁷⁶ 8 U.S.C. § 1101(a)(42)(A).

⁷⁷ 8 C.F.R. § 208.16(a) (1994); *see* *INS v. Stevic*, 467 U.S. 407, 428 (1984) (noting that every alien who qualifies as refugee is not entitled to withholding of deportation). An asylum application is also examined as an application for withholding of deportation. 8 C.F.R. § 208.3(b).

⁷⁸ 8 U.S.C. § 1253(h)(1); *see* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987) (noting that withholding deportation is not discretionary).

⁷⁹ *Stevic*, 467 U.S. at 430. A clear probability means the persecution is more likely to occur than not. *Id.* at 429-30; *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1578 (9th Cir. 1986).

⁸⁰ *See, e.g., Safaie v. INS*, 25 F.3d 636, 641 (8th Cir. 1994) (holding that failure to meet standard for eligibility for asylum is also failure to meet standard for withholding of deportation); *Gomez v. INS*, 947 F.2d 660, 665 (2d Cir. 1991) ("[A]n alien cannot obtain withholding of deportation unless he or she is eligible for ... asylum.")

and other gender-related persecution.⁸¹

In an attempt to guide states on procedures and criteria for determining refugee status, the United Nations High Commissioner for Refugees ("UNHCR") issued the Handbook on Procedures and Criteria for Determining Refugee Status ("Handbook").⁸² Then, in May 1995, the Office of Internal Affairs of the Immigration and Naturalization Service ("INS") took a significant step forward in recognizing gender-related persecu-

⁸¹ Kelly, *supra* note 55, at 636. "For the most part, asylum law has developed through the adjudication of the cases of male applicants and has therefore involved an examination of traditionally male-dominated activities." *Id.*; see *Malsonado-Cruz v. INS*, 883 F.2d 788 (9th Cir. 1989); *Dwomoh v. Sava*, 696 F. Supp 970, 972 (S.D.N.Y. 1988) (Ghanaian male seeking asylum in United States to avoid persecution for his participation in coup attempt); *In re Izatula*, 20 I. & N. Dec. 467 (1990) (Afghan male who supported mujahedin seeking asylum to avoid persecution by Afghan government); *In re Pula*, 19 I. & N. Dec. 467, 468 (1987) (Albanian male seeking asylum to avoid political persecution); *In re Salim*, 18 I. & N. Dec. 311 (1982) (member of Afghan mujahidin seeking asylum in United States to avoid arrest by Soviet backed government upon return). Aliens facing deportation may qualify for a discretionary grant of suspended deportation upon a showing of (1) seven continuous years of presence in the United States, (2) good moral character, and (3) extreme hardship for themselves or family members who are United States citizens. 8 U.S.C. § 1254 (a)(1) (1987). This statute was first tested on the basis of genital mutilation in March 1994, when Lydia Omowunmi Oluloro was granted a suspension of deportation, based on her fear that her daughters, both United States citizens, would be subjected to FGM if they returned to her home country of Nigeria. See *Mousette*, *supra* note 25, n.328 (citing *In re Lydia Omowunmi Oluloro*, In Deportation Proceedings, Portland Oregon, No. A72-147-491 (Mar. 23, 1994) (oral decision)). Oluloro was a native of Nigeria who entered the United States as a non-immigrant visitor, married a Nigerian-born, United States permanent resident, and gave birth to two United States born daughters. See *Mousette*, *supra* note 25, at 389; Patricia Dysart Rudloff, *In re Oluloro: Risk of Female Genital Mutilation as "Extreme Hardship" In Immigration Proceedings*, 26 ST. MARY'S L.J. 877, 878-79 (1995); see also *Brownlee et al.*, *supra* note 41, at 56 (describing Oluloro story); Timothy Egan, *An Ancient Ritual and a Mother's Asylum Plea*, N.Y. TIMES, Mar. 4, 1994, at A25 (same). Subsequent to a divorce, Oluloro gained custody of her children, and because she had been genitally mutilated when she was a child, feared they would be forced to undergo FGM if she were deported. See *Mousette*, *supra* note 25, at 389-90; Rudloff, *supra*, at 878-79. Easily satisfying the continuous presence and moral character elements, Immigration Judge Kendall Warren determined that although Oluloro would not suffer extreme hardship if returned to Nigeria, her daughters would. See *Mousette*, *supra* note 25, at 390; Rudloff, *supra*, at 898. Accordingly, the judge granted Oluloro's application for suspension of deportation. See *Mousette*, *supra* note 25, at 390. This decision marked a positive step toward acknowledging gender-based claims. It offers little assistance in refugee applications, however, because the court did not determine if the fear of FGM constituted persecution. *Id.* at 395.

⁸² OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979) [hereinafter HANDBOOK].

tion claims by issuing a memorandum entitled Considerations For Asylum Officers Adjudicating Asylum Claims From Women ("INS Guidelines"). This memorandum provided "guidelines that formally recognize gender-based persecution as a potential ground for asylum."⁸³ Women fleeing FGM may still be denied asylum, however, because the guidelines are merely designed to provide asylum officers with procedures and methods to evaluate gender-based discrimination and are not binding on immigration courts.⁸⁴

A. Persecution

The first factor an asylum applicant must demonstrate is that female genital mutilation rises to the level of "persecution."⁸⁵ The UNHCR Handbook notes that "serious violations of human rights ... [may] ... constitute persecution."⁸⁶ The immigration statutes, however, do not define the term and thus the courts are faced with the challenge of determining whether FGM should be considered such a violation of human rights and thus "persecution." In *In re Acosta*,⁸⁷ the Board of Immigration Appeals determined that "persecution" as used in the Refugee Act "clearly contemplates that harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome."⁸⁸ A woman fleeing FGM faces the problem of proving the act to be persecution although it is technically not a form of punishment. The United States Court of Appeals for the Seventh Circuit, however, has defined persecution as "punishment for political, religious, or other reasons that our country does not recognize as legitimate."⁸⁹ In order to comply with its obligations under international human rights doctrine, the United States

⁸³ 72 INTERPRETER RELEASES 771 (June 5, 1995). The memorandum was issued subsequent to the United Nations High Commissioner for Refugees ("UNHCR") Guidelines on the Protection of Refugee Women, which acknowledged gender-related asylum claims, and was modeled after guidelines established by Harvard's Women Refugees Project. Setareh, *supra* note 43, at 125.

⁸⁴ See 72 INTERPRETER RELEASES 771; Setareh, *supra* note 43, at 125.

⁸⁵ 8 U.S.C. § 1101(a)(42)(A); see *In re Acosta*, 19 I & N Dec. at 219.

⁸⁶ HANDBOOK, *supra* note 82, para. 51, at 14.

⁸⁷ 19 I. & N. Dec. 211 (1985).

⁸⁸ *Id.* at 223.

⁸⁹ *Osaghae v. INS*, 942 F.2d 1160, 1163 (7th Cir. 1991); see also *Zalega v. INS*, 916 F.2d 1257, 1260 (7th Cir. 1990) (determining persecution to be "the infliction of suffering or harm ... in a way regarded as offensive").

must recognize female genital mutilation, which is plainly not "legitimate punishment," as "persecution" within the meaning of the Refugee Act. Furthermore, according to the UNHCR Handbook, "an applicant may have been subjected to various measures not in themselves amounting to persecution ... [but] combined with other adverse factors ... if taken together, [they] produce an effect ... that can reasonably justify a claim to well-founded fear of persecution on 'cumulative grounds.'"⁹⁰ Under this application, while the act of FGM may not be considered persecution in and of itself, when combined with other factors such as the lack of alternatives available to a woman, the health risks involved, and the gross violation of her fundamental human rights, a court may synthesize these components and grant asylum on "cumulative grounds," thus strengthening an asylum claim based on FGM.

B. *Well-founded*

The second factor an asylum applicant must establish is that her fear of persecution is well-founded.⁹¹ The Supreme Court's decision in *INS v. Cardoza-Fonseca*⁹² seems to have made this the easiest obstacle to overcome. In *Cardoza-Fonseca*, the Court ruled that the well-founded fear requirement is met if the applicant faces a "reasonable possibility" of persecution.⁹³ Furthermore, the applicant's fear must meet both an objective and subjective standard:⁹⁴ a subjective fear is one that is genuine,⁹⁵ and

⁹⁰ HANDBOOK, *supra* note 82, para. 53, at 14-15.

⁹¹ 8 U.S.C. § 1101(a) (42) (A) (1994). Under Title 8, a person seeking to obtain asylum must meet the definition of a refugee. *Id.*

⁹² 480 U.S. 421 (1987). In *Cardoza-Fonseca*, the INS had begun deportation proceedings against a 38 year old Nicaraguan citizen after she had remained in the United States beyond the time permitted as a visitor. *Id.* at 421. While conceding that she was in the country illegally, Ms. Cardoza-Fonseca requested asylum as a refugee and the withholding of her deportation. *Id.*

⁹³ *Id.* at 440 (quoting *INS v. Stevic*, 467 U.S. 407, 424-25 (1984)). The Court, noting that a less than fifty percent chance of facing persecution can be reasonable, *id.* at 431, stated that even a ten percent chance may be sufficient to establish a well-founded fear. *Cardoza-Fonseca*, 480 U.S. at 440; ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 180 (1966).

⁹⁴ *Cardoza-Fonseca*, 480 U.S. at 430-32. The objective component requires the person to "establish by objective evidence that it is more likely than not that he or she will be subject to persecution upon deportation." *Id.* at 430 (citing *Stevic*, 467 U.S. at 422). In contrast, when determining the subjective component, eligibility "turn[s] to some extent on the subjective mental state of the alien." *Id.* at 430-31.

⁹⁵ *Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (9th Cir. 1986); see *In re Moghar-*

an objective fear is more than a "mere irrational apprehension."⁹⁶

Women seeking asylum based on FGM may, nevertheless, face difficulty in establishing their fear to be well-founded. In cultures that practice FGM, women, who generally play a submissive role, are conditioned to believe that they lack power to speak out against the wishes of their dominant male counterparts.⁹⁷ Moreover, the manifestation of a desire to avoid FGM is viewed as a rejection of social mores of their community and a dishonor to their families.⁹⁸ As a result, the reluctance of these women to discuss their situations may result in their stories being viewed as incredible.⁹⁹

C. Government Participation

The woman seeking refugee status must further show that her well-founded fear of persecution will be inflicted by the government or an individual the government is unable or unwilling to control.¹⁰⁰ It is clear that FGM is not directly enforced by the governments of those countries which practice it. Nevertheless, by remaining silent and allowing FGM to be inflicted continu-

rabi, 19 I. & N. Dec. 439, 446 (1987) (noting that fear can be well-founded if persecution happened to similarly situated individuals).

⁹⁶ *Guevara-Flores v. INS*, 786 F.2d 1242, 1249 (5th Cir. 1986). The Ninth Circuit has stated that "group membership itself subjects the alien to a reasonable possibility of persecution, so that he or she will be able to satisfy the objective component of the well-founded fear standard simply by proving membership in the targeted group." *Kotas v. INS*, 31 F.3d 847, 852 (9th Cir. 1994).

⁹⁷ For example, despite one woman's opposition of subjecting her daughters to the procedure, she deferred to the wishes of her husband, stating "[i]t is up to my husband ... [t]he man makes the decisions about the children." Dugger, *supra* note 5, at 7.

⁹⁸ Bashir, *supra* note 12, at 440. FGM is a prerequisite for marriage in countries in which it is practiced. In these countries where a single woman has no independent means of support, these women are "socialized to believe that marriage and motherhood are a duty, [so that] refusal to undergo this practice can have dire consequences." INS Resource Information Center, Alert Series Women: Female Genital Mutilation, July 3, 1994 (AL/NGA/94.001).

⁹⁹ *Id.* The implementation of the new "grant-refer" system creates an additional obstacle that the applicant must overcome to establish that the fear is indeed well-founded. Under the new procedure, asylum officers can either grant asylum or refer the applicant to an immigration judge for deportation proceedings. *Id.*; *INS Finalizes Reform Regulations*, 71 INTERPRETER RELEASES 1577, 1579 (1994). It has been suggested that the new procedures may jeopardize both applicants' rights and the accuracy of asylum officers' decisions. *Id.*; Stephanie Kaye Pell, *Adjudication of Gender Persecution Cases Under the Canada Guidelines: The United States Has No Reason to Fear an Onslaught of Asylum Claims*, 20 N.C. J. INT'L L. & COM. REG. 655, 661 (1995).

¹⁰⁰ 8 U.S.C. § 1101(a)(42)(A) (1994).

ously, the persecution can be attributed to the government.¹⁰¹ Interestingly, only five countries that traditionally practice FGM have implemented legislation prohibiting it.¹⁰² Notwithstanding such legislation, the practice continues with little, if any, recourse.¹⁰³ Such governmental acquiescence obviously demonstrates an unwillingness to terminate the torturous practice, thereby providing women with no avenue for refuge.

D. *On Account of ...*

The fourth and final element requires that the applicant must demonstrate that the persecution she fears is on account of one of five grounds: race, religion, nationality, membership in a particular social group, or political opinion.¹⁰⁴ Women bringing gender-based claims must attempt to "fit" their claim into one of the five enumerated grounds since gender-related persecution is not explicitly listed as a basis for seeking asylum. In most asylum cases, women bring gender-related claims under the "particular social group" category.¹⁰⁵ While this remedy has gained international support,¹⁰⁶ the United States has been reluctant to include gender-based persecution within the scope of a

¹⁰¹ See Bashir, *supra* note 12, at 445. "[W]here serious violations of human rights are committed and the state faces or refuses to act, such failure to act on the part of the state is in itself an act of persecution." Pamela Goldberg, *Any Place But Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 CORNELL INT'L L.J. 565, 570 (1993).

¹⁰² "Five countries - Sudan, Kenya, Egypt, Ivory Coast and Burkina Faso - have taken legal or policy measures against genital mutilation." Seble Dawit & Salem Mekuria, *The West Just Doesn't Get It*, N.Y. TIMES, Dec. 7, 1993, at A2.

¹⁰³ INS Resource Information Center, Alert Series Women: Female Genital Mutilation, July 3, 1994. For example, in Sudan and Egypt, legislation allows partial removal of the clitoris, *id.*, while legislation in other countries condemns the practice without providing legal remedy. Roger Kaplan, *Prisoners of Ritual*, 25 FREEDOM REV. 25, 29 (1992); see also Setareh, *supra* note 43, at 140 (stating that countries with laws banning FGM rarely enforce such laws).

¹⁰⁴ 8 U.S.C. § 1101(a)(42)(A) (1994); see also *supra* note 91 and accompanying text.

¹⁰⁵ Setareh, *supra* note 43, at 141. "Political opinion" is also commonly used in gender-based asylum claims. *Id.* In order to recognize the reality of FGM, courts must adopt a broader notion of "political opinion." *Id.* at 142. For a discussion of interpreting social group under United States law, see Godfrey, *supra* note 12, at 259-70 ("[T]he breadth of a social group is not a proper consideration for determining whether a particular social group is cognizable under asylum law.").

¹⁰⁶ Canada and other nations that have adopted the United Nations Convention Relating to the Status of Refugees have expanded the definition of refugee to include gender-based claims. See Moussette, *supra* note 25, at 367-69.

“particular social group.”¹⁰⁷ Notwithstanding this reluctance, two tests have emerged from United States courts which, if met, may result in a grant of asylum to women fleeing gender-based persecution.¹⁰⁸

One test, as set forth in *In re Acosta*,¹⁰⁹ requires that members of a particular social group share a “common, immutable characteristic ... that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”¹¹⁰ Such characteristics can be “innate ... such as sex, ... [or] might be a shared past experience.”¹¹¹ The United States Court of Appeals for the First Circuit, in *Ananeh-Firempong v. INS*,¹¹² expanded the “immutable characteristics” test to further require that the members have “similar background[s], habits or social status.”¹¹³ Women fleeing FGM, therefore, clearly meet the “particular social group” standard set forth in *Acosta* due to their innate characteristic of gender. Arguably, these women can also satisfy the First Circuit’s definition because it is probable that women

¹⁰⁷ See Godfrey, *supra* note 12, at 270-74 (noting that United States courts’ failure to include gender as “particular group”). United States case law indicates a lack of consensus in defining the social group category. See, e.g., *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994) (stating that women are too expansive to be “particular” group but that Iranian women who challenge government may be “particular”); *Fatin v. INS*, 12 F.3d 1233, 1239-40 (3rd Cir. 1993) (accepting “sex” as innate characteristic linking members of particular social group); *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) (indicating that gender is too broadly-based to be considered “particular group”); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576-77 (9th Cir. 1986) (holding class of young working males of military age is too broad to be considered “particular group”); *In re Acosta*, 19 I. & N. Dec. 211, 233 (1985) (including sex among possible “particular groups”).

¹⁰⁸ *Bashir*, *supra* note 12, at 447. The two tests for defining membership in a “particular social group” were established in *In re Acosta*, 19 I. & N. Dec. 211, and *Sanchez Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986).

¹⁰⁹ 19 I. & N. Dec. 211.

¹¹⁰ *Id.* at 233. The court further stated that by construing persecution on account of membership in a social group in this manner, the concept of a refugee would be restricted to individuals “who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.” *Id.*

¹¹¹ *Id.*

¹¹² 766 F.2d 621 (1st Cir. 1985).

¹¹³ *Id.* at 626. This expansion of the “immutable characteristics” test was originally delineated in the HANDBOOK, *supra* note 82, para. 77, at 19, which has generally been considered to be authoritative and a “useful tool” for interpreting the phrase “social group.” *Ananeh-Firempong*, 766 F.2d at 626. *But see Sanchez-Trujillo*, 801 F.2d at 1576 (noting that “the Handbook provides little assistance in arriving at a workable definition of ‘particular social group’”) (alteration in original).

within a particular culture that practices female circumcision share comparable backgrounds, habits, and social status.

In *Sanchez-Trujillo v. INS*,¹¹⁴ the United States Court of Appeals for the Ninth Circuit established a more restrictive test. The Ninth Circuit defined a particular social group as "a collection of people closely affiliated with each other, who are actuated by some common impulse or interest"¹¹⁵ ... [requiring a] voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group."¹¹⁶ The court supported this narrow interpretation by concluding that "[t]he statutory words 'particular' and 'social' ... modify [the word] 'group'... [and thus] the term does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance."¹¹⁷ The strict requirements set forth by the *Sanchez-Trujillo* court ultimately excludes broadly based groups, such as those delineated by gender, from the particular social group category and, consequently, some courts have determined that gender, in and of itself, does not satisfy the definition.¹¹⁸ Nevertheless, under a more liberal application of the Ninth Circuit's requirements, a woman fleeing FGM who voluntarily associated herself with other women in her community rejecting FGM and believing the practice should be discontinued may satisfy the court's definition of particular social group, despite a possible contradiction in the court's opinion.¹¹⁹

¹¹⁴ 801 F.2d 1571 (9th Cir. 1986).

¹¹⁵ *Id.* at 1576.

¹¹⁶ *Id.* at 1576. *But cf.* Daniel Compton, *Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar* - *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986), 62 WASH. L. REV. 913, 922-23 (criticizing Ninth Circuit's interpretation and noting that court did not develop "useful standard for recognizing a 'particular social group'").

¹¹⁷ *Sanchez-Trujillo*, 801 F.2d at 1576; *see* Godfrey, *supra* note 12 at 265. The court further noted that "of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some characteristic that is fundamental to their identity as a member of that discrete social group." *Sanchez-Trujillo*, 801 F.2d at 1576.

¹¹⁸ Godfrey, *supra* note 12, at 266; *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) (holding gender is too broadly based to be considered "particular social group"); *Sanchez-Trujillo*, 801 F.2d at 1574-77 (excluding gender from "particular social groups").

¹¹⁹ *See* Bashir, *supra* note 12, at 448 (noting that *Sanchez-Trujillo* opinion contradicts itself by suggesting family as prototypical social group despite family's lack

In more recent cases, the circuit courts have continued this inconsistent application of the social group category in gender-based asylum claims. In *Fatin v. INS*,¹²⁰ the Third Circuit held that Fatin satisfied the particular social group category “simply because she [was] a woman.”¹²¹ The Eighth Circuit, however, in *Safaie v. INS*,¹²² applied a more narrow view, stating that “a group of women, who refuse to conform and whose opposition is so profound that they would choose to suffer the severe consequences of noncompliance, may well satisfy the definition [of social group],”¹²³ but ultimately found that the applicant’s fear of persecution merely because she was an Iranian woman was overbroad.¹²⁴ Finally, in *Gomez v. INS*,¹²⁵ the Second Circuit rejected a woman’s claim for asylum, stating that “[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.”¹²⁶

of voluntary associational relationship); Godfrey, *supra* note 105, at 267-68 (noting criticism of Ninth Circuit’s flawed logic); T. David Parish, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 942 (1992) (criticizing Sanchez-Trujillo interpretation of social group as “drawn from faulty logic”). Furthermore, the Ninth Circuit later rejected its own example of social group, holding that a family unit falls outside of the category. *Estrada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir. 1991).

¹²⁰ 12 F.3d 1233 (3d Cir. 1993).

¹²¹ *Id.* at 1240. The court established three elements that must be shown in order to qualify for asylum based on membership in a particular social group: “[t]he alien must (1) identify a group that constitutes a ‘particular social group’ within the interpretation [of the *Acosta* court], (2) establish that he or she is a member of that group, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that membership.” *Id.* Although Fatin had satisfied the first and second element, she was denied asylum because “ha[d] not shown that ... she ha[d] a well-founded fear of ... ‘persecution’ based solely on her gender.” *Id.*

¹²² 25 F.3d 636 (8th Cir. 1994).

¹²³ *Id.* at 640. The court relied on reasoning presented in *Acosta*, 19 I. & N. Dec. 211, 234 (1985).

¹²⁴ *Id.* The court reasoned that no fact-finder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely upon their gender. *Id.*

¹²⁵ 947 F.2d 660 (2d Cir. 1991).

¹²⁶ *Id.* at 664. Gomez, a Salvadoran woman who had been raped and beaten by guerrilla forces, feared recurrence if she returned to her home country. *Id.* at 662. The court dismissed her petition for review of the BIA’s denial of asylum, which had concluded that she “failed to demonstrate that the guerrillas are inclined or will seek to harm her based on her association with a particular social group or on account of any other ground enumerated in the Act.” *Id.* at 663.

D. Application

Prior to the issuance of the INS guidelines explicitly stating that FGM is a form of persecution,¹²⁷ the United States had not recognized FGM as a basis for gender-related persecution.¹²⁸ The problem persists, however, because the guidelines have not been uniformly applied. For example, two recent cases involved African women who had been victims of FGM. In one case, a Virginia immigration judge granted a woman asylum, declaring that she had suffered "an atrocious form of persecution."¹²⁹ In the other case, however, the woman was denied asylum by a Maryland judge who explained that she had a choice of supporting the practice, which he thought important for maintaining tribal unity.¹³⁰ Thus, despite the guidelines, the lack of a clear-cut definition has led to disparate judgments.¹³¹ Moreover, although there have been three cases where the INS granted asylum to applicants fleeing FGM,¹³² decisions by immigration judges produce no legal precedent for other courts and agencies and, consequently, have provided little hope for women who seek to escape this life threatening practice.

The predominant reason for failure to expand United States

¹²⁷ Bashir, *supra* note 12, at 445.

¹²⁸ See *IJ Grants Asylum on the Basis of Persecution Relating to Female Genital Mutilation*, 72 INTERPRETER RELEASES 1188 (1995) [hereinafter *IJ Grants Asylum*] (noting that *In re M.K.* decision was first case determining asylum claim based on FGM.).

¹²⁹ *In re M.K.*, No. A72-374-558 (IJ Arlington, Va. Aug. 9, 1995). The immigration judge found that membership in a social group may consist of women who are forced to undergo genital mutilation, and that although future persecution may be unlikely, humanitarian asylum may be warranted if past persecution was "so atrocious the asylee should not be expected to repatriate." *Id.*; see Joshua B. Frank, *IL Grants Asylum to Citizen of Sierra Leone Who Suffered Forced Female Genital Mutilation*, 9 GEO. IMMIGR. L. J. 613 (1995) (summarizing case); *IJ Grants Asylum, supra* note 128, at 1188-90 (same).

¹³⁰ *In re J.*, No. A72-370-565 (IJ, Baltimore, Apr. 28, 1995) (stating that while applicant "cannot change the fact that she is female, she can change her ... position towards the FGM practice" and "acquiesce to the tribal position of FGM."); see *Still More on Asylum Claims Relating to Female Genital Mutilation*, 72 INTERPRETER RELEASES 1375 (1995) (summarizing *In re J.*).

¹³¹ See 72 INTERPRETER RELEASES 1265 (Sept. 18, 1995) (stating varying rulings of two cases show lack of consistency developed on issue); Pamela Constable, *INS Debates Female Mutilation as Basis for Asylum*, WASH. POST, Sept. 11, 1995, at D1 (noting disparate results of *In re M.K.* and *In re J.*).

¹³² Richard C. Reuben, *New Ground for Asylum*, 82 A.B.A. J. 36 (Aug. 1996); *In re M.K.*, No. A72-374-558 (IJ Arlington, Va. Aug. 9, 1995); *In re Oluloro*, No. A72-147-491 (Wash. EOIR Immigr. Ct. Mar. 23, 1994).

asylum law was tersely expressed by the Ninth Circuit in *Sanchez-Trujillo v. INS*: to do so would ultimately extend "refugee status to every alien displaced by general conditions of unrest or violence in his or her home country."¹³³ This fear of "opening the floodgates" underlies the United States restrictive asylum policies.¹³⁴ This fear is unwarranted for several reasons. First, asylum cases represent only a small part of the total number of people immigrating to the United States.¹³⁵ Second, both Canada and France have recognized female circumcision as grounds for granting asylum, while neither country has experienced an increase in the number of applicants.¹³⁶ Third, granting asylum to a member of a group does not require granting asylum to every member of that group.¹³⁷ The applicant must still prove a well-founded fear of persecution on account of that membership, and the grant of asylum remains discretionary.¹³⁸ The fear of "opening the floodgates," therefore, merely serves as justification for the United States' failure to recognize female genital mutilation as a legitimate basis for asylum. Recently, in *In re Kasinga*,¹³⁹ the BIA granted asylum to a woman who fled to the United States in order to escape FGM and set binding precedent for the 179 immigration judges who thus far have been divided on the issue.¹⁴⁰

¹³³ *Sanchez-Trujillo*, 801 F.2d at 1577; see *Lopez v. INS*, 775 F.2d 1015, 1017 (9th Cir. 1985) (holding that fear of general conditions in El Salvador did not amount to possibility of individual persecution).

¹³⁴ Godfrey, *supra* note 105, at 280. *But see* 72 INTERPRETER RELEASES 772 (1995) (noting that INS does not expect increase in asylum claims resulting from INS guidelines).

¹³⁵ For example, in 1993, 900,000 people immigrated to the United States, but only 145,000 entered under asylum claims. Hull, *supra* note 8, at 26. The INS does not expect the *Kasinga* ruling to increase the number of asylum claims based on FGM. Reuben, *supra* note 132, at 36.

¹³⁶ See Bashir, *supra* note 12, at 453-54.

¹³⁷ Godfrey, *supra* note 12, at 283-84 (stating that subgroups of broadly defined groups are usually the only ones eligible for asylum). Thus, asylum can be limited to specifically defined groups, or subgroups.

¹³⁸ 8 U.S.C. § 1101 (a)(42)(A) (1994); see Bashir, *supra* note 12, at 452-54.

¹³⁹ Int. Dec. 3278, 1996 WL 379826 (BIA June 13, 1996).

¹⁴⁰ See Celia Dugger, *Woman's Plea for Asylum Puts Tribal Ritual on Trial*, N.Y. TIMES, Apr. 15, 1996, at B4 [hereinafter *Woman's Plea*]; see also Reuben, *supra* note 132, at 36; Cindy Shiner, *African Women Who Fled Circumcision is Granted Asylum, U.S. Board of Immigration Appeals' Decision Binds Courts, Challenges Tradition*, DALLAS MORNING NEWS, July 7, 1996, at 19A (stating that "the ruling is binding on all U.S. immigration judges who hear asylum cases").

IV. FACTUAL BACKGROUND OF KASINGA AND THE BOARD OF IMMIGRATION APPEALS DECISION

A. Fauziya's Story

Fauziya Kasinga¹⁴¹ was one of five daughters born to Hajia and Muhammad Kasinga, who were members of the Tchamba-Kunsuntu tribe of the west African nation of Togo.¹⁴² Mr. Kasinga's affluence provided his family with a lifestyle atypical from that of the community,¹⁴³ including the capability of his four older daughters to choose their own husbands and avoid being genitally mutilated.¹⁴⁴ Unfortunately, Mr. Kasinga died in 1993, when Fauziya was seventeen years old and unmarried.¹⁴⁵ As tribal custom dictates, Mr. Kasinga's sister, Hadja Mamoude, became Fauziya's guardian¹⁴⁶ and arranged for Fauziya to marry a man who demanded that his future bride be circumcised.¹⁴⁷

Both Fauziya and her mother implored the family not to proceed with the planned circumcision but their pleas went unheeded.¹⁴⁸ With no other alternative, Mrs. Kasinga gave her daughter most of the money she had inherited from her husband

¹⁴¹ The correct spelling of the applicant's name is Kassindja, but it was misspelled by immigration officials. Dugger, *supra* note 19, at B6. For simplicity, this Comment will spell her name as it is documented.

¹⁴² *Id.* For additional articles about Kasinga's case, see Keith Donoghue, *A Rite of Passage: A Berkeley Lawyer's Client Could Establish Precedent for Asylum Claims Based on Female Genital Mutilation*, RECORDER, Jan. 18, 1996, at 1; Keith Donoghue, *Cultural Rite Tests Asylum Law*, LEGAL TIMES, Feb. 5, 1996, at 1; Judy Mann, *When Judges Fail*, WASH. POST, Jan. 19, 1996, at E3.

¹⁴³ Dugger, *supra* note 19, at B6. The family lived in an eight-bedroom house with electricity and running water which were luxuries by tribal standards. *Id.* Furthermore, the Kasinga children attended school, although the community considered educating women a "wast[e] [of] money." *Id.*

¹⁴⁴ *Id.* Mr. and Mrs. Kasinga recalled the agony endured by siblings and, thus, vowed to protect their daughters from the ritual. *See id.*

¹⁴⁵ Dugger, *supra* note 19, at B6; *see Kasinga*, Int. Dec. 3278, 1996 WL 379826 (BIA June 13, 1996); Bashir, *supra* note 12, at 436.

¹⁴⁶ *Kasinga*, Int. Dec. 3278, 1996 WL 379826 (BIA June 13, 1996); Bashir, *supra* note 12, at 436; Dugger, *supra* note 19, at B6. Fauziya's aunt immediately discontinued Fauziya's education, noting that girls "should [not] be too civilized." *Id.* Upon her husband's death, Mrs. Kasinga was required, by tribal custom, to leave her home and family. *Id.*

¹⁴⁷ Dugger, *supra* note 19, at B6. The husband to be, Issakah Ibrahim, already had three circumcised wives. *Id.* He offered the family "four bolts of ... cloth, six veils, two pairs of shoes, four head scarves, a large washbasin and about \$20" as a gift to seal the marriage. *Id.*

¹⁴⁸ *Id.*

so Fauziya could escape.¹⁴⁹ Fauziya fled to Germany, purchased a counterfeit passport and flew to the United States, where she immediately requested asylum upon arrival.¹⁵⁰ She remained in detention by the INS until April 1996.¹⁵¹

B. *The Kasinga Decision and Rationale*

In a decision dated August 25, 1995, the immigration judge summarily denied Kasinga's application for asylum and ordered her excluded and deported from the United States, finding her story irrational and inconsistent.¹⁵² On June 13, 1996, the United States Department of Justice, Board of Immigration Appeals sustained the applicant's appeal, granted discretionary asylum, and ordered her admitted to the United States as an asylee.¹⁵³

By an eleven to one vote,¹⁵⁴ the BIA held that the practice of female genital mutilation can be the basis for a grant of asylum under federal immigration law.¹⁵⁵ Writing for the majority, Immigration Board chair Paul W. Schmidt stated that the Board made seven major findings: (1) Fauziya Kasinga was a "credible witness"; (2) "FGM, as practiced by the Tchamba-Kunsuntu Tribe of Togo ... constitute[d] persecution"; (3) Fauziya Kasinga was "a member of a social group consisting of young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice"; (4) Fauziya Kasinga "ha[d] a well-founded fear of persecution"; (5) "the persecution the applicant fear[ed] [was] 'on account of' her social group"; (6) "the applicant's fear of persecution [was] country-wide"; and (7) Fauziya Kasinga was "eligible for and should be granted asylum in the exercise of discretion."¹⁵⁶ Thus, Fauziya Kasinga had a "well-founded fear of persecution in the form of

¹⁴⁹ *Id.* As tribal custom dictates, Mrs. Kasinga had no rights to her husband's wealth, most of which went to the family. She did, however, receive \$3500. *Id.*

¹⁵⁰ Dugger, *supra* note 19, at B6.

¹⁵¹ *Id.* During her time in prison, Fauziya was beaten and tear-gassed, and subsequently fell into a deep depression. *Id.*; see also *Woman's Plea*, *supra* note 140, at B4 (describing Kasinga's experience while in detention).

¹⁵² *In re Kasinga*, Int. Dec. 3278, 1996 WL 379826 (BIA June 13, 1996) (noting that immigration judge had denied Kasinga's application for asylum).

¹⁵³ *Id.*

¹⁵⁴ Interestingly, Board Member Fred W. Vacca dissented without opinion. *Id.*

¹⁵⁵ *Id.* The parties were in disagreement about the "parameters of FGM as a ground for asylum in future cases" in addition to the present case. *Id.*

¹⁵⁶ *In re Kasinga*, Int. Dec. 3278, 1996 WL 379826 (BIA June 13, 1996).

FGM if returned to Togo"¹⁵⁷ and the persecution she feared was on account of her social group, thereby satisfying the refugee requirements.¹⁵⁸ The opinion stated clearly, however, that this decision did not establish rules for cases that were not before the Board.¹⁵⁹ Nevertheless, the opinion specifically found that the degree of FGM suffered by Kasinga constituted "persecution" within the meaning of the Refugee Act. As support for its decision, the Board stated that "persecution can consist of the infliction of harm or suffering by ... persons a government is unwilling or unable to control"¹⁶⁰ The Board further noted that "subjective 'punitive' or 'malignant' intent is not required for harm to constitute persecution."¹⁶¹

C. Analysis

The Kasinga ruling represents a long overdue effort by the INS to expand antiquated laws to afford women protection from gender-related persecution such as FGM. The decision is very limited, however, and therefore is only a small step toward gender equality under asylum law. The board defined "particular social group" to be "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice."¹⁶² The board declined, however, to "speculate on, or establish rules for, cases" not before it.¹⁶³ Thus, while a binding precedent has been set, it is limited such that disparate rulings may still continue.

The INS guidelines similarly represent a positive attempt to recognize that gender-related discrimination can satisfy the requirements for refugee status.¹⁶⁴ The INS guidelines, which in

¹⁵⁷ *Id.*

¹⁵⁸ 8 U.S.C. § 1101(a)(42)(A) (1994); *Kasinga*, Int. Dec. 3278, 1996 WL 379826 (BIA June 13, 1996).

¹⁵⁹ *Kasinga*, Int. Dec. 3278, 1996 WL 379826.

¹⁶⁰ *Id.* (citing *In re Acosta*, 19 I. & N. Dec. 211, 222-23 (BIA 1985)).

¹⁶¹ *Id.* (citing *In re Kulle*, 19 I. & N. Dec. 318 (BIA 1985)).

¹⁶² *Id.*

¹⁶³ *Id.* The Board rejected the Immigration and Naturalization Service's request to "endorse a significant new framework for assessing asylum claims in the context of a single novel case," noting that such a task should be left to Congress. *Id.* (Filppu, Board Member, concurring). *But see Kasinga*, Int. Dec. 3278, 1996 WL 379826 (Rosenberg, concurring) (noting that majority decision implicitly established "road map" for future gender-based claims).

¹⁶⁴ Judith Gaines, *INS Eases Asylum Guidelines for Women*, BOSTON GLOBE, May 27, 1995, at 13.

large part adopted "Guidelines for Women's Asylum Claims" drafted by the Women's Refugee Project of Cambridge, Massachusetts,¹⁶⁵ acknowledge that gender-based harm, such as female circumcision, may rise to the level of persecution,¹⁶⁶ and suggest a three part analysis.

The first step is to determine whether the harm sought to be avoided constitutes persecution.¹⁶⁷ Harm that satisfies the first step includes "serious physical harm, loss of freedom, other serious violation of basic human rights as defined by international human rights instruments, discriminatory treatment, or a combination of numerous harms which when considered cumulatively creates a well-founded fear of persecution."¹⁶⁸ The second step requires a recognition that women who bring gender-related asylum claims "face special difficulty of proof," and thus, suggests that the applicant's own testimony is sufficient.¹⁶⁹ The final step addresses procedural issues, and recognizes that women who experience gender-based persecution may be reluctant to discuss their situation.¹⁷⁰ These guidelines are useful insofar as will assist the adjudicator evaluate the applicant's testimony, so as not to equate reluctance with incredibility.¹⁷¹ While representing a pragmatic foundation to the recognition of gender-based asylum cases, these guidelines, however, are merely advisory.¹⁷² Courts thus retain discretion to continue restrictive application of the Refugee Act.

¹⁶⁵ See Mousette, *supra* note 25, at 393.

¹⁶⁶ *Id.* at 390-91. These "guidelines are advisory and apply only to the INS asylum officers, who rule on claims by aliens already inside this country." Marcia Coyle, *Exhibit A 'They Shouldn't Be Done' Case Could Widen the Grounds for Asylum, A Young Woman's Fear of Being Mutilated Could Pave Way for Gender-Based Petitions*, NAT'L L.J. May 6, 1996, at A10.

¹⁶⁷ Mousette, *supra* note 25, at 391

¹⁶⁸ *Id.* at 392. Neither a showing of widespread practice of FGM, nor the lack of proof that it exists nationwide, will defeat an applicant's claim. *Id.*

¹⁶⁹ *Id.* at 392-93. The applicant's testimony is often the only evidence available. *Id.*

¹⁷⁰ Mousette, *supra* note 25, at 393. These guidelines also provided that the interview of women asylum applicants should be conducted by women if possible. *Id.* The use of interpreters and presence of family members during an applicant's testimony can also inhibit her testimony because of the sensitive issues involved with sexual abuse. Deborah E. Anker, *Women Refugees: Forgotten No Longer?*, 32 SAN DIEGO L. REV. 771, 799-800 (1995).

¹⁷¹ *Id.*

¹⁷² See 72 INTERPRETER RELEASES 771 (June 5, 1996); Seterah, *supra* note 43, at 151 (discussing the shortcomings of INS guidelines); see also Coyle, *supra* note 168, at A10 (stating that guidelines are only advisory).

Most recently, the United States has sent a strong message to its inhabitants and the international community by passing legislation which outlaws FGM.¹⁷³ The federal law imposes a prison term of up to five years on anyone who "circumcises, excises or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18."¹⁷⁴ Members of Congress believe that this sends a strong message to immigrants that they must abandon FGM, which threatens more than 150,000 females of African origin in the United States.¹⁷⁵ A separate measure, which takes effect next year, will make the United States' "support for loans from international financial institutions dependent on foreign governments carrying out educational campaigns against genital cutting."¹⁷⁶

Although, in the past, the United States has failed to take a clear stance against the practice of female genital mutilation, the *Kasinga* decision in conjunction with the INS guidelines and the federal prohibition of FGM clearly indicate that the United States' position is beginning to change. These steps demonstrate that the United States is finally condemning FGM both domestically and internationally, and supporting the global struggle against it. Unfortunately, however, this is not enough. The Refugee Act must be amended to include gender persecution as one of the enumerated grounds for seeking asylum. Only then can we be sure that women fleeing FGM will not "slip through the cracks" of our inconsistent and incomplete asylum laws as they are today. Until then, *Kasinga* offers a small glimmer of hope to those seeking asylum from gender-based persecution.

CONCLUSION

Despite the numerous human rights documents it violates, women throughout the world are being forced to undergo the torturous, inhumane act of female genital mutilation. Female genital mutilation is indisputably persecution and must be treated as

¹⁷³ See Federal Prohibition of Female Genital Mutilation Act of 1995, Pub. L. No. 104-208, 110 Stat. 3009 (1996); see also Celia W. Dugger, *New Law Bans Genital Cutting In United States*, N.Y. TIMES, Oct. 12, 1996 at A5.

¹⁷⁴ Federal Prohibition of Female Genital Mutilation Act of 1995, Pub. L. No. 104-208 § 654, 110 Stat. 3009 (1996). Dugger, *supra* note 173, at 28.

¹⁷⁵ Dugger, *supra* note 173, at 28.

¹⁷⁶ *Id.*; Federal Prohibition of Female Genital Mutilation Act of 1995, Pub. L. No. 104-208, § 579, 110 Stat. 3009 (1996).

such. While communities around the world are free to enjoy their own cultures, such an egregious violation of basic, fundamental human rights can not be justified by culture or any other proffered reason. The United States must provide these women with a safe haven from the physical and psychological brutality that they seek to escape.

As United States asylum law now stands, a woman fleeing FGM may be denied asylum simply because her claim does not fit easily into a law that was written to reflect the experiences of men. The only means to guarantee gender equality in asylum law is to legislatively include gender persecution as a ground for establishing refugee status. Until that is done, it is imperative that the courts establish a framework whereby gender is incorporated into the "particular social group" category. Only then will bias, inconsistency, and disparity disappear from gender-based asylum claims.

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* J.D. Candidate, St. John's University School of Law, 1998. I would like to thank my family for their constant love and support, without which this Comment would not be possible. I would also like to express my gratitude to Professor Berta Esperanza Hernández-Truyol for encouraging me to write about this very serious issue, and a special thanks to Assistant Law Librarian, Linda Ryan, for all her assistance.

