FEMALE GENITAL MUTILATION: A FORM OF PERSECUTION

I. INTRODUCTION

The practice of female genital mutilation (FGM) raises significant questions not only regarding the human rights of women and girls, but also regarding our responsibilities to each other as individuals, groups, and sovereign states within a global community. Although some have advocated complete western non-involvement in the efforts to eradicate FGM, cultural sensitivity and respect do not demand cultural relativism\(^1\) or abdication of responsibility toward others as human beings. Instead of the abandonment that accompanies cultural relativism, this Comment proposes that the eradication of FGM requires responses on at least three levels: the individual, the domestic, and the international. Although this Comment briefly discusses individual and international approaches to confronting culturally challenging practices, it focuses on one aspect of the domestic level, specifically, the treatment of FGM as persecution for purposes of asylum.\(^2\) This Comment concludes

---

1. "Cultural relativism can be described, in its simplest form, as the theory that there is infinite cultural diversity and that all cultural practices are equally valid." Katherine Brennan, The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study, 7 LAW & INEQ. J. 367, 370 (1989). One result of such a philosophy is that no cultural practice can be rejected or criticized by anyone outside of the society in question. The existence, however, of a body of peremptory, non-derogable human rights norms is evidence that the world community rejects the notion that cultural practices are beyond examination and comment by "outsiders." For a more in-depth discussion of cultural relativism in the context of female genital mutilation (FGM), see infra Part III.B.

2. Because this Comment is primarily concerned with FGM in the context of asylum law, it will not address other aspects of the domestic treatment of FGM, except to recognize the legislative outgrowths of recent public attention to FGM in the media. As a result of the public's attention to this contested and troubling practice, five states (California, Minnesota, North Dakota, Rhode Island, and Tennessee) have made FGM illegal. See Carol M. Ostrom, Hospital Debates Issue of Circumcising Muslim Girls, NEW ORLEANS TIMES-PICAYUNE, Sept. 29, 1996, at A14, available in WESTLAW, NOTPCN database, 1996 WL 11189728; Max Vanzi, Ethiopian Led Campaign to Ban Female Mutilations, L.A. TIMES, Sept. 24, 1996, at A20, available in WESTLAW, LATIMES database, 1996 WL 11647000. Similarly, Congress recently enacted federal legislation outlawing the practice. See 18 U.S.C.A. § 116 (Cum. Ann. Pocket Part 1997). Under the new legislation, federal authorities must tell new immigrants from countries where FGM is practiced that having a female child circumcised in the United States can result in up to five years in prison. See 8 U.S.C.A. § 1374(a)(2)(B) (Cum. Ann. Pocket Part 1997). Moreover, the same penalty can be imposed on anyone who circumscribes, excises, or infibulates the whole or any part of the labia majora, labia minora, or clitoris of anyone under 18 years of age. See 18 U.S.C.A. § 116(a) (Cum. Ann. Pocket Part 1997). Some questions remain regarding this language. For instance, it is unclear from the statutory language whether "circumcises" is meant to cover sunna circumcision (that is, the cutting or removal of the prepuce (hood) of the clitoris), and whether the proscribed procedures are permissible if requested by adult women for themselves.

The questions surrounding the new federal legislation are significant, especially in light of the debate occurring at the Harborview Medical Center in Seattle. See Ostrom, supra at A14, 1996 WL 11189728. Approximately thirty mothers, all from Somalia, have requested doctors at Harborview to circumcise their daughters. See Seattle Doctors Consider Modified Female Circumcision (All Things Considered, National Public Radio broadcast, Oct. 17, 1996), available in WESTLAW, ALLCONS database, 1996 WL 12726879. Although Harborview has not granted any of these requests, its doctors are concerned that these mothers will take their young daughters to someone without medical training to have the procedure done. Harborview doctors are considering a "compromise" that would allow sunna circumcision for girls twelve and older who have given consent (to the extent that a twelve year old child can give consent). See id. Because of the ambiguity of the federal legislation's language, it is unclear whether or not this compromise would violate the new federal prohibition. Even if legal, however, opponents of FGM argue that such a compromise is not justified by the concern that something more grave than the circumcision might happen to the child if these doctors do not act. See id. In fact, says Nahid Toubia, it is uncertain whether such a procedure would even satisfy the Somalis' cultural obligations, because the compromise procedure does not remove sexually responsive
that granting asylum based on FGM is appropriate for two reasons. First, granting asylum in cases based on FGM will protect persecuted women and girls. Second, by granting asylum, the United States will contribute to the development of a customary international norm against FGM without interfering in the internal affairs of other States.

II. THE PRACTICE OF FEMALE GENITAL MUTILATION

Because other writers have extensively documented FGM, I will not do so in great detail here. However, some basic information about FGM is necessary as a foundation for the issues discussed in this Comment. FGM is an ancient, but ongoing, cultural practice in which girls and women have their sexual organs cut, scraped, and removed. Three versions of FGM exist: (1) clitoridectomy (partial or complete removal of the clitoris); (2) excision (removal of both the clitoris and inner labia); and (3) infibulation (removal of the clitoris and some or all of the labia minora, plus incision and scraping of the labia majora). In infibulation, after the incision and scraping, thorns, silk, or catgut are used to hold the skin together. The girl’s legs are then wrapped tightly so that a hood of skin will form and cover the urethra and most of the vagina. This often takes as long as one month.


2. I have chosen to call this practice FGM because it is the name most consistent with the outcome of the procedure. Unlike male circumcision, FGM involves the cutting and/or removal of the female sex organs.

3. See TOUBIA, supra note 3, at 21 (FGM was practiced by the Phoenicians, Hittites, and the ancient Egyptians); see also Kay Boulware-Miller, Female Circumcision: Challenges to the Practice as a Human Rights Violation, 8 HARV. WOMEN’S L.J. 155, 156 n.3 (1985).

4. See TOUBIA, supra note 3, at 9-11.


6. See id.

7. See TOUNIB, supra note 3, at 10.

8. See id. at 9-11.
approximately 85 percent of all FGM,\textsuperscript{11} in regions where infibulation is practiced, it is practiced nearly universally.\textsuperscript{12}

All three procedures can have significant short and long term complications. These complications include excessive bleeding and hemorrhaging, anemia, infection, septicemia, tetanus, retention of urine and menstrual blood, psychological stress, shock, permanent damage to urethra or anus, repeated bladder and urinary tract infections, development of excessive scar tissue, permanent disfigurement, cyst formation, infertility, extreme menstrual pain, pain during sexual intercourse, difficulty achieving sexual satisfaction, recutting for intercourse and child-birth (if infibulated), and death (from excessive bleeding and infection).\textsuperscript{13}

Despite its serious health consequences, FGM is very common. Approximately 130 million women and girls are already genitally mutilated.\textsuperscript{14} "[G]lobally, at least 2 million girls a year are at risk of genital mutilation—approximately 6,000 per day."\textsuperscript{15} Depending on the region where practiced, the ritual may take place at any age from infancy to young adulthood.\textsuperscript{16}

FGM is practiced in approximately forty countries around the world, including at least twenty-six African countries, where it is most common.\textsuperscript{17} It is also practiced on the Arabian Peninsula, in Oman and Yemen, and by small ethnic minorities in India, Malaysia, and Indonesia.\textsuperscript{18} FGM also occurs in immigrant communities throughout the world, including in the United States, Europe, and Australia.\textsuperscript{19}

Because some African Muslim communities cite religion as the reason for performing FGM, the practice is often mistakenly identified with Islam. FGM, however, is not a religious practice. Orthodox (Coptic) Christians, Ethiopian Falashas (Jews who live in Israel), and Muslims\textsuperscript{20} practice FGM, even though the Bible,\textsuperscript{21} the Torah,\textsuperscript{22} and the Quran\textsuperscript{23} do not require the practice.

Rather than being a religious practice, FGM is a cultural ritual employed to prepare girls for their role as women, and to initiate girls into womanhood.\textsuperscript{24}

\textsuperscript{11.} See id. at 10.
\textsuperscript{12.} See id. at 11, 25 (Infibulation occurs most frequently and predominates in coastal Ethiopia, Djibouti, northern Sudan, Somalia, and southern Egypt. Infibulation also occurs, though less frequently, in Eritrea, Gambia, and Mali.).
\textsuperscript{13.} See id. at 13-19.
\textsuperscript{14.} See id. at 5.
\textsuperscript{15.} Id.
\textsuperscript{16.} See id. at 9. In some cultures, the ritual takes place in young adulthood when the girl is of marriageable age, often between the ages of fourteen and sixteen. See id. However, it is more common for girls to undergo FGM between the ages of four and twelve. See id.
\textsuperscript{17.} See id. at 21.
\textsuperscript{18.} See id. at 26.
\textsuperscript{19.} Id. It is also important to note that FGM has occurred in the United States and England in non-immigrant communities. "[A]s recently as the 1940s and 1950s, [FGM was used] to 'treat' hysteria, lesbianism, masturbation, and other so-called female deviances." Id. at 21.
\textsuperscript{20.} See id. at 31-32.
\textsuperscript{21.} See id. at 32.
\textsuperscript{22.} See id.
\textsuperscript{23.} See id. at 31; see also Islam in Perspective: Female Circumcision, ARAB NEWS, Mar. 4, 1994, available in LEXIS, News Library, MOCLIPS File.
\textsuperscript{24.} See TOUBIA, supra note 3, at 9; see also ALICE WALKER & PRATIBHA PARMAR, WARRIOR MARKS: FEMALE GENITAL MUTILATION AND THE SEXUAL BLINDING OF WOMEN 244, 246 (1993) (in an interview with Alice Walker, Efua Dorkenoo described FGM as a "social practice" and tradition).
Although FGM is described as an initiation ritual, in most cases the ritual takes place long before puberty and the onset of menses, and occasionally the ritual does occur in infancy. However, the ritual most often takes place at an age when girls “can be made aware of the social role expected of them as women.” Indeed, festivities and other rituals that celebrate womanhood and the passage into womanhood often accompany the cutting ritual. More specifically, in western Africa, the ritual cutting occurs within “secret societies,” which simultaneously provide formal training and education about the role of women in society.

In addition to educating girls about their role as women, many other reasons are given for the practice of FGM, including: “ensuring the virginity of a woman before marriage and inducing chastity for divorced women or married women whose husbands are away; birth control; initiation into and celebration of womanhood; hygienic reasons; and religious requirements.” Nahid Toubia characterizes the reasons given for the practice of FGM as motivated by: (1) notions of beauty and cleanliness; (2) desire for male protection/approval; (3) health concerns; (4) religion; and (5) morality. Because the reasons for FGM are both important and traditional to members of the practicing society, failure to undergo FGM can have serious social and economic consequences for young women. Young girls who do not undergo FGM are ostracized and are often unable to marry. Inability to marry can have devastating economic consequences because “marriage is a primary path to social and economic survival and advancement.”

III. ERADICATING FGM: ALTERNATIVES TO CULTURAL IMPERIALISM AND CULTURAL RELATIVISM

Although FGM is a common practice affecting vast numbers of women and girls, it is not universally condoned. Commentators from the West and, more significantly, from within the cultures that practice FGM, have criticized the practice. According
to Nahid Toubia, Sudan's first female surgeon, FGM "is an extreme example of efforts common to societies around the world to manipulate women's sexuality, ensure their subjugation, and control their reproductive functions." But this is not the perspective of Toubia alone. Indeed, both men and women in cultures that practice FGM understand that FGM has "patriarchal underpinnings" and that FGM is one way "in which women come to accept their secondary status." Armed with this knowledge, as well as knowledge of the physical and psychological damage that FGM can cause, women inside and outside Africa, particularly in Europe and the United States, began efforts to eliminate FGM.

When worldwide attention first focused on FGM in the 1970s and 1980s, criticism originating in the West was experienced quite differently than criticism from within countries that practice FGM. African communities perceived the criticism leveled by western feminists and western media as particularly intrusive, sensationalized, and reckless. The legacy of colonialism, combined with arrogant and condescending criticism from abroad, made Africans hesitant to work with western women with similar goals. Indeed, many African organizations specifically suggested that any efforts to confront the practice of FGM must be made only by Africans.

African women excluded western women from the process of eradicating FGM partially out of a sense of pride in their people and culture. African women also excluded western women because westerners judged this cultural practice as "barbaric" without considering the value FGM served in African communities. In "essentializing" womanhood, western women did not address the politics and
conditions of the struggle of African women. As a result, the concerns of western feminists did not ring true to African women.41

Even African women who oppose the practice [of FGM] often resent what they perceive as condescension from [w]estern feminists who seek to end all African women’s problems by crusading against this one practice. Western feminists often fail to realize that although sexual and reproductive freedoms are central to their feminist struggles, health, food, education, and childcare may figure more centrally in the struggles of other women.42

The failure of western feminists to see the broader context in which FGM occurs, particularly the broader socio-economic context, alienated western feminists from African women with the same goal. This failure to understand and to communicate across cultures raises challenging questions for those who believe that women and girls should not be subjected to mutilation of their sexual organs. Must westerners adopt a culturally relativistic perspective? Is silent criticism the only appropriate response? Or can westerners, and western nations, respond to this practice in a way that is respectful of women and girls’ physical and psychological health, as well as respectful of the cultures in which FGM is practiced? “The crucial issue is how to strike a balance between respect for cultural diversity (and the containment of cultural imperialism) and the attainment of human dignity for women.”43

Westerners must strike this balance on a variety of planes: on a personal, individual level; on the level of international cooperation; and as sovereign nations. As individuals, those concerned with eradicating FGM should adopt the “world-essentialism as follows:

This approach obscures the identities and submerges the perspectives of women who differ from the norm. Not only does legal theory built on essentialist foundations marginalize and render certain groups invisible, it falls prey to the trap of over-abstraction . . . . It also promotes hierarchy and silencing, evils that women should, and do, seek to subvert.


Just as an essentialist framework for analysis and action in United States jurisprudence results in negative consequences, gender essentialism in the context of FGM has had, and will continue to have, alienating consequences. Mari Matsuda poses “multiple consciousness” as an alternative to essentialism. See Mari J. Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, 11 WOMEN’S RTS. L. REP. 7, 9 (1989). Multiple consciousness is

a deliberate choice to see the world from the standpoint of the oppressed. That world is accessible to all of us. We should know it in its concrete particulars. We should know of our sister carrying buckets of water up five flights of stairs in a welfare hotel, our sister trembling at 3 a.m. in a shelter for battered women, our sisters holding bloodied children in their arms in Cape Town, on the West Bank, and in Nicaragua.

Id.

And we should know of our sisters in Sierra Leone singing to quell their young daughters’ screams during their ritualized entry into womanhood. See Note, What’s Culture Got to Do With It: Excising the Harmful Tradition of Female Circumcision, 106 HARVARD L. REV. 1944, 1948 n.37 (1993) (quoting OLAYINKA KOSO-THOMAS, THE CIRCUMCISION OF WOMEN: A STRATEGY FOR ERADICATION 22 (1987)). “Holding on to a multiple consciousness will allow us to operate both within the abstractions of standard jurisprudential discourse, and within . . . details of our own special knowledge,” thereby avoiding the inappropriate and damaging imposition of one world view onto others. Matsuda, supra, at 9.


42. Id.

43. Kim, supra note 39, at 85-86.
travelling” approach advocated by Isabelle R. Gunning. Achieving this balance in the context of international organizations requires leadership from the regions where FGM occurs, as well as patient cooperation from other regions. Finally, as a sovereign nation, the United States must adopt a refugee-friendly policy protective of individual women and girls at risk of non-consensual, forced FGM.

A. The Individual Level: “World-Travelling”

World-travelling describes an approach to be used by individuals concerned with practices like FGM, but who also are concerned with maintaining respect for other cultures and perspectives. “The [world-travelling] methodology is a process to use in perceiving and understanding [culturally challenging] practices within their cultural context and relies upon a multicultural dialogue as a way to encourage the evolution of more shared values.” The world-travelling method involves adopting three different perspectives: (1) seeing oneself in historical context; (2) seeing oneself as the “other” sees you; and (3) seeing the “other” in her own context. The point of adopting the three perspectives is to evaluate ourselves before evaluating others, and to enhance recognition of both our independence from others, as well as our interconnectedness.

Seeing oneself in historical context means that western feminists must recognize that FGM has been performed in our home countries as well as in non-western countries. Moreover, western feminists also must recognize that the hierarchical ordering of sexuality and gender achieved by FGM is achieved in the United States as successfully as in FGM-countries, if by different means (such as elective cosmetic surgery). Similarly, seeing oneself as the “other” sees you, involves recognition that African feminists may find “[w]estern articulations of concern . . . as only thinly disguised expressions of racial and cultural superiority and imperialism.” This, of course, results from the West’s history of imperialism and racism. Finally, seeing the “other” in her own context requires “understanding that any single event or norm is a part of a larger, complex, organic social environment.” Grasping the complexity of the social environment surrounding FGM involves identifying practices in our own culture that would be challenging or negative to others, and absorbing all of the detail surrounding the practices we find challenging elsewhere. Adopting this world-travelling approach as individuals will enhance our understanding of other cultures, and prevent us from imposing our own views on others in a condescending and self-righteous manner.

44. See Gunning, supra note 27.
45. See id. at 191 n.8 (“[T]he term ‘culturally challenging’ . . . describe[s] any practice that someone outside the culture would view as ‘negative’ . . . .”).
46. Id. at 193.
47. Facelifts, liposuction, breast implants, and other forms of cosmetic surgery are “intended to fix culturally perceived ‘problems.’” Lewis, supra note 7, at n.27; see Gunning, supra note 27, at 213-15; Alison T. Slack, Female Circumcision: A Critical Appraisal, 10 Hum. RTS. Q. 437, 463-64 (1988). The pervasiveness of eating disorders among women and girls in the United States is another manifestation of gender ordering.
48. Gunning, supra note 27, at 212.
49. Id. at 213.
B. The International Level: Balancing Cultural Respect with Women’s Rights

Adoption of an international approach\textsuperscript{50} to eradicating FGM, spearheaded by leaders from the regions where FGM is practiced, implicitly rejects cultural relativism. Cultural relativism is no longer a defensible response to complicated, ethical, and cultural issues because it fails “to recognize the difference between cultural sensitivity and cultural stagnation attributable to power imbalances within societies . . . . The relativist approach to culture, which is an absolutist one, does not consider minority viewpoints and beliefs that coexist with and are subsumed within the dominant ‘culture’ or social group.”\textsuperscript{51} Proponents of cultural relativism fail to recognize that culture is not a static, unchanging, identifiable body of information, against which human rights may be measured for compatibility and applicability. Rather, culture is a series of constantly contested and negotiated social practices whose meanings are influenced by the power and status of their interpreters and participants . . . . We must acknowledge change, complexity, and interpretive privilege in cultural formation to avoid reductionism, essentialism, and rhetorical rigidity.\textsuperscript{52}

Thus, while those interested in protecting the human rights of women must interpret challenging practices with sensitivity, they also must be cautious of simple cultural rationalizations for those practices. This is particularly important because “no social group has suffered greater violation of its human rights in the name of culture than women. Regardless of the particular forms it takes in different societies, the concept

\textsuperscript{50} International efforts to eliminate FGM have focused on public education on the negative health consequences of FGM. See Toubia, supra note 3, at 6. For example, since 1979, the World Health Organization has held conferences and seminars on traditional practices, including FGM, that are harmful to the health of girls and women. See Hosken, supra note 3, at 42 n.1. “[C]ertain groups have focused on ‘the right to health’ and health education as the most appropriate human rights approach to FG[M] because it is believed to cause the least offense to practicing cultures.” Lewis, supra note 7, at 19; see Boulware-Miller, supra note 5, at 164-65; Slack, supra note 47, at 479-81.

However, according to Lewis, there are limits to this health-focused approach:

First, many cultures condone practices that are physically painful or create health risks to children where the procedures are believed to be medically or socially necessary. Second, defenders of FG[M] may suspect that the ‘health’ approach masks [w]estern imperialism in a more palatable guise. Finally, critics point out that a health-based approach may result in reforms whereby FG[M] would continue to be performed, but under hygienic conditions and with anesthesia. To avoid this, many [w]estern feminists argue that FG[M] must be defined as a human rights violation, regardless of the conditions under which it is performed.

Lewis, supra note 7, at 19. For instance, international organizations and western feminists have argued that FGM violates such internationally recognized human rights as the rights of the child, the right to sexual and corporeal integrity, the right to health, and the prohibition against torture and slavery. See Gunning, supra note 27, at 231-37 (describing the types of human rights arguments that have been made by others). However, human rights arguments are not without their problems. First, they are technically difficult to make successfully, and second, “the punitive aspects of the [human rights] system as a legal system” may not “preserve multicultural respect.” Id. at 238. Indeed, it was arguments alleging that FGM violates human rights norms that initially outraged activists from countries where FGM is practiced. This dilemma brings us full circle to the core question: how do we condemn human rights violations without condemning an entire culture? Naming a particular practice as a human rights violation while simultaneously recognizing its cultural value and underpinnings is perhaps the first step in this delicate endeavor. Over time, innate human creativity will find culturally-fulfilling replacements for damaging cultural practices.

\textsuperscript{51} Kim, supra note 39, at 103.

of culture in the modern state circumscribes women's lives in deeply symbolic as well as immediately real ways." Just as "[t]he resort to cultural explanations of women's status is usually defensive, combative, and specifically designed to placate an international audience," so too are cultural explanations of challenging practices directed at women.

In order to avoid the shortcomings of a purely relativist approach, in which FGM is justified by its value solely as a cultural practice, international organizations might adopt a balancing test similar to the test used by the United Nations Working Group on Traditional Practices Affecting the Health of Women and Children (Working Group). The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (Sub-Commission) created the Working Group specifically to study FGM. The Working Group weighed the contemporary "cultural significance [of female circumcision] against the harmful consequences [of FGM]." Thus, the Working Group balanced the physical and psychological consequences to women and girls against the two identified cultural functions of FGM: as a ritual passage into womanhood and as a test of a girl's capacity to endure acute suffering and cope with the future pain of childbirth. Based on this balancing, and its assessment that these cultural functions were obsolete, the Working Group determined that the cultural value of FGM was outweighed by the need to protect the physical and psychological health of women and girls. This balancing approach is valuable because of its honesty within the cultural contours of the societies in question: the contemporary cultural value of FGM is considered, but is not

53. Id. at 169.
54. Id.
55. See Brennan, supra note 1, at 387, 378 n.56. The United Nations Working Group on Traditional Practices Affecting the Health of Women and Children (Working Group) was made up of two [United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (Sub-Commission)] members and representatives from three United Nation agencies, UNICEF, UNESCO, and WHO. The Sub-Commission appointed an African woman, Halima Embarek Sarzazi of Morocco; who served as chairperson of the group, and Muslimshar Bhindare of India . . . . Several representatives of non-governmental organizations also participated.

56. See id. at 381 n.68. Thus, the Working Group represented a truly international body under the direction of a woman from a region where FGM is practiced.
57. See id. at 387.
59. See id.
60. Changes in the practice have rendered these functions obsolete . . . . The operations generally are no longer done at puberty; they are done in infancy or early childhood. This change deprives the operation of its initiatory function because the girls are too young to appreciate the significance of the ritual . . . . The use of modern medical techniques also deprives the practice of its other function within traditional societies testing the girls' capacity to cope with pain.

60. Significantly, once the Working Group determined that FGM was a violation of human rights, it "decided to support the internal African eradication efforts through education and persuasion. [It] did not attempt to embarrass or coerce the governments of countries in which female circumcision is practiced into taking positive steps to prohibit female circumcision." See id. at 382. Thus, the Working Group likely avoided the resistance that early western feminists experienced when they condemned the practice of FGM.
presumptively more valuable than women's health, as it effectively would be under the cultural relativist model.61

C. The Domestic Level: Granting Asylum

Completely distinct from any questions regarding the propriety of western involvement or intervention in African culture is the question of whether or not the practice of FGM can satisfy the persecution requirement for asylum or withholding of deportation within United States immigration law. What distinguishes treatment of FGM in the context of asylum from attempts to eradicate its practice abroad is that granting asylum is a manifestation of United States culture and jurisprudence, within United States territory.62 United States Immigration Judges have recognized that granting asylum under domestic law does not interfere with the domestic, cultural affairs of another State.63 Granting asylum is not meant to be an unfriendly act:

It is important to understand that, in recognizing gender-based asylum claims, . . . the United States [c]ourts are not creating any standard of behavior for other societies. Rather, we are creating the standard by which this country will serve as a refuge for women who are being persecuted because of their gender.64

Given the parallel and pressing imperatives of respecting the cultures of other States; non-interference with other States;65 and the desire to eradicate practices that are physically, psychologically, and socially damaging to women (whether or not we define such challenging cultural practices as human rights violations), the granting of asylum in FGM-based persecution cases is appropriate. By granting asylum in cases of persecution taking the form of FGM, the United States will neither interfere with the internal affairs of other States, nor impose its cultural values on any group

61. Moreover, a balancing test avoids cultural relativism's overly-simplistic trap of labeling States as either protectors or violators of human rights. When a government exempts itself from the perceived cultural hegemony of human rights doctrine, its supporters as well as its detractors participate in perpetuating a false oppositional dichotomy in which . . . cultures are collapsed into two falsely unified packages, one bearing the stamp of human rights and the other lacking it. Rao, supra note 52, at 168.

62. This is consistent with the territorial principle of jurisdiction under international law, which allows a State to assert and exercise jurisdiction over all individuals within its territory, whether or not they are the State's nationals. See Louis Henkin et al., International Law Cases and Materials 1051 (3d ed. 1993).


64. Id. While United States statutory law does not explicitly address this point, Article II(2) of the Organization of African Unity Convention on the Specific Aspects of Refugee Problems in Africa confirms that "the Grant of Asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act." U.N.T.S. 14691, effective June 20, 1974, reprinted in Guy S. Goodwin-Gill, The Refugee in International Law 431 (2d ed. 1996). Similarly, the 1984 Cartagena Declaration on Refugees confirmed "the peaceful, non-political and exclusively humanitarian nature of [a] grant of asylum or [a] recognition of the status of refugee" and underlined "the importance of the internationally accepted principle that nothing in either shall be interpreted as an unfriendly act towards the country of origin of refugees." OAS/Ser.L/VII.66, doc. 10, rev. 1, reprinted in Goodwin-Gill, supra, at 446.

of people that remains within its own culture. Yet, by granting asylum, the United States will help persecuted individuals who seek assistance and protection, while also contributing to the development of an international customary norm against FGM.

While an international customary norm prohibiting FGM does not currently exist, granting asylum in cases involving FGM contributes to the ongoing international dialogue regarding this practice. Although the United Nations has declared that FGM is a violation of human rights, a number of States have outlawed its practice, and both the United States and Canada have granted asylum and suspension of deportation premised on FGM-based persecution. France recently denied asylum to Aminata Diop, a Malian woman who refused to undergo FGM. As a result, the practice of States is currently not sufficiently consistent and wide-spread to constitute a norm of customary international law. If over time, however, States consistently grant asylum in cases involving FGM, then States that allow FGM will be under pressure to eradicate the practice. Although waiting for an international customary norm to develop requires patience, it is a culturally appropriate way to proceed. For if an international customary norm develops, it will represent the view of the world community that FGM violates human rights, and will not represent further western cultural imperialism.

66. According to one source:

The asylum determination process is one of the few [United States] domestic fora in which human rights principles are recognized and elaborated . . . . [T]he gender Guidelines (issued by the United Nations High Commissioner for Refugees in 1991) and their legacies, including [In re Kasinga, Int. Dec. 3278 (BIA June 12, 1996), in which the Board of Immigration Appeals (BIA) granted asylum based on FGM,] and other decisions, are having a direct effect on the underlying human rights abuses that form the basis of women’s claims. Thus, . . . it is those who advocate asylum rights and the equal and fair treatment of all by our legal system who are beginning to direct attention to the causes of refugee flows, and who in the end will most effectively help to “prevent” them.

The BIA’s New Asylum Jurisprudence And Its Relevance For Women’s Claims, 73 INTERPRETER RELEASES 1173, 1174 (Sept. 9, 1996) [hereinafter New Asylum Jurisprudence].


69. See, e.g., In re Kasinga, Int. Dec. 3278 (BIA June 12, 1996); In re M.K., No. A72-374-558 (U Arlington, Va., Aug. 9, 1995); In re Oluloro, No. A72-147-491 (U Portland, Or., March 23, 1994); In re Salim, discussed in Randy Furst, A Child Is Spared; Family Escapes Deportation, Their Daughter’s Ritual Mutilation, STAR TRIB., Mar. 25, 1994, at B1, available in WESTLAW, STTRMSP database, 1994 WL 8441270. According to Lewis, Canada granted refugee status to Khadra Hassan Fara, a Somali woman who feared that her daughter would be forced to undergo FGM if they were sent back to Somalia. See Lewis, supra note 7, at 53.

70. Aminata Diop’s case was discussed in Lewis, supra note 7, at 53, and in WALKER & PARMAR, supra note 24, at 255-57.
IV. FEMALE GENITAL MUTILATION AS PERSECUTION FOR PURPOSES OF ASYLUM CLAIMS

A. Overview of Recent Cases Addressing FGM as Persecution

Six United States Immigration Courts and the Board of Immigration Appeals (BIA) have addressed the question of whether asylum, suspension of deportation, or withholding of deportation should be granted on the basis of FGM. Although I will discuss the requirements of asylum in great detail in the remainder of this Comment, suffice it to say here that to qualify for a discretionary grant of asylum, a petitioner must prove that she is a refugee. A refugee is a person outside her country of origin (or last place of habitual residence) who is unable or unwilling to return to, and is unable or unwilling to avail herself of the protection of, her country of origin,

71. A person can seek asylum in two ways: (1) affirmatively upon arrival in the United States, or (2) as a defense to removal from the United States. In an affirmative petition, an asylum seeker's claim will first be considered by an Asylum Officer. See Aliens and Nationality, 8 C.F.R., § 208.9(a) (1997). The Asylum Officer may grant asylum, see id. § 208.9(e), but has no power to deny asylum, see id. § 208.14(b). If the Asylum Officer does not grant asylum, the petitioner's case will be considered by an Immigration Judge. The Immigration Judge's decision can be appealed to the BIA, the Circuit Court of Appeals, and ultimately, to the United States Supreme Court.

An individual also can claim asylum as a defense in removal proceedings. See id. § 208.4. Although, the requirements are the same as above, this claimant will not go before an Asylum Officer, but will begin her proceedings before an Immigration Judge. The process of appealing an denial of asylum is identical in both types of claims.

For a discussion of the precedential value of immigration decisions, see infra notes 89, 105, and 182.

72. I will only discuss five of these six immigration cases in any detail. Although the Nigerian woman's claim for asylum in the sixth case, In re H.O., No. A71-962-191 (U. Arlington, Va., Sept. 18, 1995), was based on her own past experience of FGM and on the possible future infliction of FGM on her daughter, the facts were so murky that the case does not reveal any real developments in the adjudication of women's asylum claims. See New Asylum Jurisprudence, supra note 66, at 1181.


74. See Immigration and Nationality Act, 8 U.S.C. § 1254 (1994). Like asylum, suspension of deportation is a discretionary form of relief from deportation. See id. § 1254(a). Suspension may be granted in three sets of circumstances, each with slightly varying requirements. See id. In the case of petitioners who are deportable because of violations of federal law, the United States Attorney General may, but is not obligated to, grant suspension if: (1) the petitioner has been continuously physically present in the United States for not less than seven years; and, (2) the petitioner is a person of good moral character and was of good moral character during the entire time he or she was present in the United States; and, (3) the deportation would cause extreme hardship to the petitioner, or the petitioner's United States citizen (or legal permanent resident) spouse or parent, or child. See id. § 1254(a)(1). For otherwise deportable aliens who are victims of battery or extreme cruelty at the hands of their United States citizen (or legal permanent resident) spouse or parent, the physical presence requirement is shortened to three years. See id. § 1254(a)(3). The other requirements remain the same. See id. However, in the case of petitioners who are deportable because they committed certain enumerated criminal offenses, they failed to register, they falsified documents, or they are threats to national security, the requirements for suspension are increased. See id. § 1254(a)(2). In addition to the same requirement of good moral character during their physical presence in the United States, these petitioners must have been continuously present for not less than ten years, and the deportation must result in exceptional and extremely unusual hardship, rather than "extreme hardship." See id.

75. See Immigration and Nationality Act, 8 U.S.C. § 1253(h) (1994) Unlike asylum and suspension of deportation, withholding of deportation is not discretionary. See id. § 1253(h)(1). Rather, "[t]he Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such 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." Id. (emphasis added).

76. See id. § 1158(a).
because she has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 77

In In re Oluloro, Lydia Omowunmi Oluloro, a Nigerian woman, was granted suspension of deportation because of the extreme hardship her two United States citizen children would face if she was deported to Nigeria. In that case, the Immigration Judge (IJ) held that the risk of FGM being performed on Oluloro's two daughters constituted extreme hardship. 78 In order to avoid such hardship, the IJ granted suspension of deportation. 79

Similarly, in In re Salim, an IJ in Bloomington, Indiana granted suspension of deportation to a Palestinian couple because their United States citizen daughter would face extreme hardship if they were deported to Saudi Arabia. 80 The IJ agreed that Layla Salim, the couple's seven year old daughter, would be "subjected to extreme hardship in the form of female circumcision" if she were deported to Saudi Arabia, despite her parents' opposition to the practice. 81

In In re M. K., the IJ granted asylum under section 208(a) of the federal Immigration and Nationality Act 82 to a woman who resisted mutilation for nearly ten years, and who ran away from her home and family to avoid FGM, but who was later abducted and forced to undergo FGM. 83 The IJ considered both asylum and suspension as potential relief from deportation. In this case, the FGM had already been performed on the petitioner, and there was no child or woman to protect from future infliction of FGM. Thus, suspension of deportation would have been inappropriate because there was no extreme hardship arising out of the deportation. While there was no future threat of extreme hardship to a child, as there was in Salim, the IJ in M. K. found there was sufficient evidence of the likelihood of future persecution to warrant a granting of asylum. 84 Moreover, in M. K., the IJ found that the circumstances of M. K.'s mutilation were so serious as to warrant a granting of asylum based on humanitarian concerns. 85

77. See id. § 1101(a)(42)(A).
79. See id. at 19.
80. See In re Salim, discussed in Furst, supra note 69.
81. See id.
82. 8 U.S.C. § 1158(a) (1994).
84. See id. at 23.
85. See id. In cases where future persecution is unlikely because conditions in the country of origin have changed, a showing of "severe past persecution" is required for asylum eligibility. See, e.g., In re H., Int. Dec. 3276 (BIA 1996); In re Chen, Int. Dec. 3104 (BIA 1989). In the case of M. K., the Immigration Judge (IJ) did not specifically find that past infliction of FGM amounted to the "severe past persecution" required for a discretionary grant of asylum in cases where there is little likelihood of future persecution because conditions in the country of origin have changed. See In re M. K., No. A72-374-558 (IJ Arlington, Va., Aug. 9, 1995). However, such a finding of severe past persecution was unnecessary because the IJ also concluded that country conditions had not changed. See id. Thus, the seriousness of M. K.'s persecution, and the lack of changed conditions in her country, were so compelling as to warrant a grant of humanitarian relief. See id.
In the remaining two cases, *In re J.*\(^8\) and *In re Kasinga,*\(^9\) the IJs denied relief based on FGM. In *In re J.*, the IJ considered an asylum petition based on fear of FGM being performed on the petitioner’s children if they returned to Sierra Leone.\(^8\) Despite remarkably similar circumstances to those in *In re M.K.*, the IJ in this case rejected the petition.\(^9\) As in *In re M.K.*, the petitioner was from Sierra Leone, was abducted and forced to undergo FGM, and was forced, on pain of death, to swear silence regarding her treatment.\(^9\) Although the IJ in M.K.’s case found this amounted to persecution, the IJ in *In re J.* did not agree and J.’s asylum petition was denied.

Finally, in *In re Kasinga*, the teen-age petitioner fled her homeland of Togo in order to avoid imminent, forced genital mutilation and an arranged, polygamous marriage.\(^9\) Even though FGM is essentially compulsory among Kasinga’s tribe in Togo, she was able to avoid FGM until the age of seventeen because her father was a wealthy and powerful man who did not believe in the practice.\(^9\) When her father died, the petitioner’s aunt arranged her marriage to a man who already had three other wives.\(^9\) Kasinga objected to the marriage, and refused to sign the marriage certificate.\(^9\) Shortly after the official marriage ceremony, and just prior to her scheduled “circumcision,” Kasinga’s sister helped her escape to Ghana, where Kasinga took the first flight out of the country.\(^9\) After a few months in Germany, Kasinga came to the United States, where she had relatives, in order to seek asylum.\(^9\)

Despite these compelling circumstances, the IJ denied Kasinga’s request for asylum.\(^9\) He did not find her testimony credible; rather, he found her testimony to be irrational, inconsistent, and inherently unpersuasive.\(^9\) While this finding may be

---

\(8\) No. A72-370-565 (U Baltimore, Md., Apr. 28, 1995), reported in *More on IJ Decision Granting Asylum Based on Genital Mutilation*, 72 INTERPRETER RELEASES 1265 (Sept. 18, 1995) [hereinafter *More on IJ Decision*], and in *Still More on Asylum Claims Relating to Female Genital Mutilation*, 72 INTERPRETER RELEASES 1375 (Oct. 6, 1995) [hereinafter *Still More on Asylum Claims*].


\(9\) IJ decisions do not serve as binding precedent on either Asylum Officers or other IJs, unless they are designated and published. See 8 C.F.R. § 103.3(c) (1996). If no designated, published opinion controls an issue, IJs may decide similar cases in completely dissimilar fashions. See id. However, BIA decisions are binding on Asylum Officers and IJs. See 8 C.F.R. § 3.1(g) (1996). Thus, the BIA’s decision in *In re Kasinga*, Int. Dec. 3278 (BIA June 12, 1996), is particularly important because it compels all Asylum Officers and IJs throughout the country to find that FGM, as practiced by Kasinga’s tribe, is persecution. See *In re Kasinga*, Int. Dec. 3278 (BIA June 12, 1996) at 15.


\(8\) See id. at 2.

\(9\) See id.

\(8\) See id. at 4.

\(9\) See id. at 2.

\(8\) See id. at 3.


\(8\) See id. at 10. Yet, “[i]n finding Ms. Kasinga not credible, the judge relied upon non-existent inconsistencies, and made incorrect assumptions about cultural norms in Togo.” Applicant’s Brief on Appeal From Decision of the Immigration Judge at 2, *In re Kasinga* (No. A73-476-695). The IJ’s finding that Kasinga lacked credibility raises significant questions and highlights the difficulty of analyzing gender-based asylum claims. Although a detailed discussion of the problems that arise in assessing credibility is beyond the scope of this Comment, it is important to note that the IJ in the *Kasinga* case did not follow the recommendations contained in the Immigration and Naturalization Service (INS) guidelines regarding the evaluation of testimony of women asylum seekers. See
attributed partially to Kasinga's devastatingly inadequate legal representation,\textsuperscript{99} it is primarily attributable to the IJ who failed to take sufficient account of Kasinga's own testimony.\textsuperscript{100} In addition to finding Kasinga's testimony incredible, the IJ also found that: (1) Kasinga's fear of forced genital mutilation and forced polygamous marriage upon return to Togo did not demonstrate past or future persecution; (2) even if there were evidence of persecution, the persecution was not on account of one of the five statutory grounds (specifically, Kasinga was not persecuted because of membership in a particular social group); and (3) Kasinga failed to show government action or acquiescence because she never approached the government for protection.\textsuperscript{101} The BIA recently considered the \textit{Kasinga} case on appeal, and granted Kasinga asylum based on her membership in the particular social group of young women of her tribe who have not had FGM and who oppose the practice.\textsuperscript{102}

Prior to the BIA's decision in \textit{Kasinga}, the outcomes in the FGM cases were inconsistent because no precedent existed on the question of whether FGM is a form of persecution.\textsuperscript{103} The BIA in \textit{Kasinga} held that the most severe form of FGM is persecution.\textsuperscript{104} This holding is significant because \textit{Kasinga} is binding on all Asylum Officers and IJs throughout the country.\textsuperscript{105} Now that the BIA has answered the threshold question in these asylum cases by holding that FGM can amount to persecution, future cases should be more consistent in their outcomes.\textsuperscript{106}

\begin{flushright}
PHYLIS COVEN, U.S. DEP'T. OF JUSTICE, CONSIDERATIONS FOR ASYLUM OFFICERS ADJUDICATING ASYLUM CLAIMS FROM WOMEN 6-7 (1995) [hereinafter CONSIDERATIONS]. In particular, the IJ in \textit{Kasinga} failed to follow the recommendations contained in the \textit{CONSIDERATIONS} section entitled \textit{Demeanor/Credibility Issues}. \textit{See id.} Although this is disappointing, and perhaps inappropriate, the IJ's failure to apply the \textit{CONSIDERATIONS} is not surprising. [Because] the [\textit{CONSIDERATIONS}] are directed only towards INS [A]syllum [O]fficers, [they have] nothing more than persuasive value in the courts . . . . The [IJs] who preside over the exclusion or deportation merit hearings have broad discretion in adjudicating asylum cases and are not subject to the same standards as INS [A]syllum [O]fficers. Consequently, women seeking to contest their deportability by asserting an asylum claim based wholly or in part on their gender will be heard by an [IJ] who may not have even read the suggestions in the [\textit{CONSIDERATIONS}].

Setareh, supra note 34, at 153. Despite the fact that the \textit{CONSIDERATIONS} were addressed only to Asylum Officers, both the INS and the Immigration Courts are within the Department of Justice, the department that issued the \textit{CONSIDERATIONS}. If asylum policy is to be consistent, then both IJs and Asylum Officers alike should apply the \textit{CONSIDERATIONS}. (The fact that Asylum Officers consider "affirmative" asylum applications and IJs consider asylum requests in removal proceedings should have no bearing on the application of the \textit{CONSIDERATIONS}.)


100. The BIA later undertook an independent review of Kasinga's testimony and found that Kasinga's "testimony in support of her asylum application is plausible, detailed, and internally consistent. It is consistent with her asylum application and with the substantial background information in the record." \textit{In re Kasinga}, Int. Dec. 3278, at 7 (BIA June 12, 1996) (citation omitted).


103. The inconsistent outcomes are also the result of confusion regarding what constitutes membership in a particular social group. \textit{See discussion infra} Part IV.B.3.b.


105. Although the published decisions of the BIA are binding on Asylum Officers and IJs nationwide, asylum cases may still be decided differently because of variations in the asylum case law of different circuits. \textit{See discussion infra} note 182.

106. On the other hand, the BIA's holding that FGM can amount to persecution does not end all inquiry. Although the government's brief to the BIA requested that the BIA establish a general framework for evaluating all asylum claims premised on FGM, the BIA declined the government's invitation and limited its holding to the facts in the instant case. \textit{See Government's Brief in Response to Applicant's Appeal From Decision of Immigration Judge} at 15, \textit{In re Kasinga} (No. A73-476-695); \textit{see also In re Kasinga}, Int. Dec. 3278, at 11 (BIA June 12, 1996) (Filppu,
The BIA’s holding that FGM may serve as the basis of asylum claims of women and their female children was not completely surprising for a number of reasons. First, the Government’s Brief in Kasinga’s appeal, rather than objecting to all asylum claims based on FGM, was particularly moderate and argued only that “certain potential victims of FGM may indeed establish eligibility for asylum and withholding of deportation . . . .” See Government’s Brief in Response to Applicant’s Appeal From Decision of Immigration Judge at 15, In re Kasinga (No. A73-476-695). Second, in 1995, the United States Department of Justice issued its Considerations for Asylum Officers Adjudicating Asylum Claims From Women, which provide an international and comparative law back-drop for analysis of gender based claims. The Considerations encourage Asylum Officers to consider the Canadian Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution, Canadian immigration rulings, the United States High Commissioner on Refugees Handbook (UNHCR Handbook) and other international instruments when rendering decisions in gender-related claims. Moreover, the Considerations recognize that breaching social mores, by marrying outside of an arranged marriage, or by otherwise failing to comply with cultural or religious norms, which would include refusing to undergo FGM, can result in persecution. Given the federal government’s increasing willingness to recognize gender-based asylum claims, it would have been difficult for the BIA to completely bar all asylum claims based on FGM.

B. Satisfying the Elements of an Asylum Claim Based on FGM as Persecution

Under United States immigration law, asylum may be granted to a petitioner who, by a preponderance of the evidence, satisfies the refugee definition set out in section 101(a)(42) of the Immigration and Nationality Act (INA). Under the INA refugee definition, a person is a refugee if she is outside her country, and if she is unable or unwilling to avail herself of the protection of her country because of a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. This definition has been construed

L.S., and Heilman, M.J., concurring). Thus, the BIA’s holding that FGM is persecution is limited to FGM as it is performed in Kasinga’s tribe. See In re Kasinga, Int. Dec. 3278, at 8, 11. The BIA did not decide whether less severe forms of FGM will constitute persecution. As a result, new petitions for asylum based on FGM will need to be evaluated to determine whether the particular form of FGM practiced is persecution. See discussion infra Part IV.B.2.

Similarly, the BIA refrained from deciding whether petitioners who have already had FGM would qualify for asylum. The BIA’s restraint is appropriate. BIA Members Filppu and Heilman explained that even though “this case may well have implications beyond its facts” there is no “immediate need for a more comprehensive analytical framework in which to address FGM claims. To the extent [such a framework] is needed . . . that comprehensive guidance could more appropriately be issued through the legislative or regulatory process, not the [BIA]’s case adjudication process.” In re Kasinga, Int. Dec. 3278 (Filppu, L.S., Heilman, M.J., concurring).

107. See Government’s Brief in Response to Applicant’s Appeal From Decision of Immigration Judge at 15, In re Kasinga (No. A73-476-695).

108. CONSIDERATIONS, supra note 98.

109. See id. at 1-4.

110. See id. at 2-3.

111. See id. at 4.


114. See id. The refugee definition adopted by the United States mirrors the definition used under international law. See Convention Relating to the Status of Refugees, Geneva, July 28, 1951, art. 1(A)(2), 189 U.N.T.S. 137, 152 (effective Apr. 22, 1954). Although the United States is not a party to the 1951 Convention, it is a party to the 1967 Protocol Relating to the Status of Refugees, which incorporates the 1951 Convention definition of refugee. See
by the courts as having four elements: (1) well-founded fear; (2) of persecution; (3) on account of one of the five protected categories (the "nexus" requirement); and (4) government action or acquiescence (such that the petitioner is unwilling or unable to avail herself of the state's protection).

1. Well-Founded Fear

To be a refugee, one must have a well-founded fear of persecution. Well-founded fear "means that a person has either been actually a victim of persecution or can show good reason why he fears persecution." According to federal regulations, an applicant "may qualify as a refugee either because he has suffered actual past persecution or because he has a well-founded fear of future persecution." Thus, if the petitioner has already experienced persecution, she presumptively has a well-founded fear of persecution. A petitioner who has not yet been the victim of persecution must prove that there is a reasonable possibility of future persecution.

The well-founded fear standard has been interpreted to have both a subjective component and an objective component. Accordingly, the petitioner must actually feel fearful, and, the fear must be objectively reasonable. A reasonable possibility of persecution does not mean that the petitioner is more likely than not going to be the victim of persecution. Rather, if the petitioner has a one-in-ten chance of experiencing future persecution, then she faces a reasonable possibility of future persecution.

In two of the FGM asylum cases decided prior to In re Kasinga, the petitioners objected to FGM, were victims of forced FGM, and were threatened with death if they revealed anything about those who performed the FGM. In In re M.K., the IJ held that "[r]espondent was previously persecuted by having female genital...
According to the Code of Federal Regulations, this alone would satisfy the federal refugee definition. Nevertheless, the IJ went on to hold that the petitioner also had a well-founded fear of "future persecution because of the threat made by the Bundo Society to kill those who reveal their 'secret.'" 126

In In re J., however, the IJ held that the petitioner did not have a well-founded fear of persecution despite essentially identical circumstances. 127 According to the IJ, the petitioner’s previous experience of forced FGM did not amount to persecution. 128 As a result, J.’s fear was not presumptively well-founded, and she needed to prove that there was a reasonable possibility of her future persecution. 129 Neither J.’s fear of retribution for having exposed the secrets of the Bundo Society during her asylum hearings, 130 nor her fear of the likely mutilation of her daughters, satisfied the IJ that a reasonable possibility of persecution existed. 131

The basis for the IJ’s conclusion in In re J. is unclear. However, it is possible that the IJ used a narrow reading of well-founded fear that required the fear to be personal, to be a fear of being persecuted oneself. If the IJ applied such a narrow reading, then J.’s fear of her daughter’s mutilation would not satisfy the well-founded fear requirement. Although analysis by a prominent immigration reporting service, Interpreter Releases, did not reveal such a narrow reading on the part of the IJ in In re J., another IJ required personal fear in a similar circumstance in another case. 132

In In re Oluloro, the IJ denied asylum to a Nigerian woman who had undergone FGM herself, but who requested asylum based on her fear that her daughters would be forcibly mutilated if they returned to Nigeria. 133 The IJ construed the well-founded fear requirement to mean fear for oneself, not for others. 134 This interpretation of the

---

125. See Aliens and Nationality, 8 C.F.R. § 208.13(b)(1)(i) (1996) (“The applicant may qualify as a refugee either because he has suffered actual past persecution or because he has a well-founded fear of future persecution.”).
126. In re M. K., No. A72-374-558, at 12. The Bundo Society is a secret women’s society in Sierra Leone that performs the FGM ceremony and provides gender-role education to girls. See id. at 6.
128. See id.; see also Still More on Asylum Claims, supra note 86, at 1375.
130. A petitioner’s views and testimony are “made public in the course of [asylum] proceedings [and] are not concealed” from the relevant authorities. Fisher v. INS, 79 F.3d 955, 970 (9th Cir. 1996) (Noonan, J. dissenting). Furthermore, if the testimony in an asylum proceeding “is not shielded from the government of the country to which a person may be returned, it is only fair to take that testimony into account in determining whether a petitioner has a basis for believing that the government will persecute her if she is returned.” Id.
134. Although the IJ in the Oluloro case denied asylum, he did grant suspension of deportation to the petitioner because of the extreme hardship her daughters would face if they were forced to submit to FGM. See id. at 19. The IJ in In re J., however, did not grant any form of relief to J. See In re J., No. A72-370-565, reported in Still More on Asylum Claims, supra note 86, at 1376. This may be due to the U’s conclusions that FGM is not persecution, and that women who are victims of forced FGM are not members of a particular social group because they are capable of
FEMALE GENITAL MUTILATION

well-founded fear requirement is overly narrow and is incompatible with the interpretation of the United Nations High Commissioner on Refugees (UNHCR) that "a woman can be considered as a refugee if she or her daughters/dependents fear being compelled to undergo FGM against their will; or, if she fears persecution for refusing to undergo or [refusing] to allow her daughters to undergo the practice."\(^{135}\)

The decisions in M.K. and J. would not necessarily have been altered by the BIA's decision in In re Kasinga, if Kasinga had been decided prior to M.K. and J. Although the BIA held that FGM is persecution as it was performed by Kasinga's tribe, and that Kasinga did have a well-founded fear of future persecution because she had not yet experienced FGM,\(^{136}\) the BIA did not address the question of the future persecution of a petitioner's child. Thus, it remains unanswered whether protection of one's children, rather than of one's self, from FGM will satisfy the well-founded fear prong of the refugee definition.

Similarly, the BIA in Kasinga's case did not consider whether a woman who has already been subjected to FGM has a well-founded fear of persecution. Thus, the BIA's decision in Kasinga does not reconcile the divergent holdings in M.K. and J. While, the outcome in M.K.'s case was consistent with extant asylum law, the outcome of J.'s case was not. When the asylum petitioner has experienced past persecution, as did M.K., she presumptively has a well-founded fear of persecution. The IJ in J.'s case, however, erred by holding that J. did not have a well-founded fear of persecution, even though she also had experienced FGM. There are two possible explanations for this inconsistency. First, the IJ in J. may have mistakenly assumed that because J. had already been "circumcised" she could not be circumcised again (thereby making any fear of future persecution unreasonable). Yet, women can be circumcised repeatedly. Indeed, re-circumcision is necessary in certain types of FGM in order to have sex and to give birth.\(^{137}\) And second, the IJ in J. may have incorrectly believed that the United States would be deluged with women seeking asylum if it were to grant asylum to women who already have been circumcised.\(^{138}\)

2. Persecution

Although persecution is not conclusively defined anywhere, "it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion, or membership of a particular social group is always persecution. Other

\(^{135}\) ALERT SERIES, supra note 31, at 12-13 (emphases added).


\(^{137}\) See TOUBIA, supra note 3, at 10-11.

\(^{138}\) It is possible to infer from Canada's experience that the United States will not be subject to an onslaught of gender-based asylum claims had the IJ in In re J. ruled differently. Canada promulgated gender guidelines similar to those of the INS in March 1993. In the two-year period ending December 31, 1995, there were 40,000 refugee claims filed in Canada. Out of that number, about two percent (1,130) were gender-related claims. Of the 1,130 gender-related claims filed, 483 were granted.

Pamela Goldberg, U.S. Law and Women Asylum Seekers: Where Are They and Where Are They Going?, 73 INTERPRETER RELEASES 889, 896 (July 8, 1996).
serious violations of human rights—for the same reasons—would also constitute persecution.\footnote{139} Within United States jurisprudence, persecution has been defined to include torture,\footnote{140} confinement,\footnote{141} and rape,\footnote{142} as well as “threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.”\footnote{143}

Prior to In re Kasinga, the question about whether FGM was persecution had not been answered in a uniform manner by BIA. The BIA finally addressed this question and held that FGM “can constitute ‘persecution’ within the meaning of section 101(a)(42)(A)”\footnote{144} and that “[t]he type of persecution feared by [Kasinga] is very severe.”\footnote{145} This holding of the BIA is, however, somewhat limited. The BIA did not make a blanket ruling that all forms of FGM are persecution. Rather, the BIA specifically limited its holding to FGM as it was practiced by Kasinga’s tribe.\footnote{146} The type of FGM performed by Kasinga’s tribe was infibulation,\footnote{147} the most severe form of FGM. Thus, it remains to be seen whether lesser forms of FGM will be deemed persecution.

The BIA’s analysis in Kasinga may provide a model for analyzing whether less severe forms of FGM will be deemed persecution. In earlier FGM-based cases, the persecution analysis became mired in questions of the persecutor’s intent, even though intent is more accurately part of the “on account of” (or nexus) prong of the refugee test. For example, the IJ in In re J. held that “[t]o constitute -persecution, motive and purpose must be considered as well as consequence.”\footnote{148} Similarly, the IJ in M.K. defined persecution as “harm or suffering inflicted upon persons to punish them for possessing a belief or characteristic the persecutor seeks to overcome.”\footnote{149}

These definitions imply that at least some attention should be paid to the persecutor’s intent to harm or motivation for punishing the victim. Yet, the IJ in M.K. did not actually inquire into the persecutor’s motives, but was concerned instead with the extremity of the mistreatment.\footnote{150} Rather than discussing the persecutor’s intent, the IJ in M.K. focused on four categories of persecution: (1) extreme physical, psychological, and verbal abuse; (2) serious violations of human rights; (3) discriminatory treatment that leads to consequences of a substantially prejudicial nature;\footnote{151} and (4) a combination of harms that cumulatively amount to persecution.\footnote{152}

\begin{itemize}
  \item \textbf{139.} UNHCR HANDBOOK, supra note 117, at para. 51 (emphasis added).
  \item \textbf{140.} See Guevara Flores v. INS, 786 F.2d 1242, 1249 (5th Cir. 1986).
  \item \textbf{141.} See id.
  \item \textbf{142.} See Lazo-Majano v. INS, 813 F.2d 1432, 1434 (9th Cir. 1987).
  \item \textbf{143.} In re Acosta, 19 Immigration & Naturalization Dec. 211, 222 (BIA March 1, 1985), available in Westlaw, Alfeds database, 1985 WL 56042; see also Hernandez-Ortiz v. INS, 777 F.2d 509, 516 (9th Cir. 1985) (persecution is oppression inflicted on others because of a difference in views or status that the persecutor will not tolerate); Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969).
  \item \textbf{144.} In re Kasinga, Int. Dec. 3278, at 8 (BIA June 12, 1996).
  \item \textbf{145.} Id. at 10.
  \item \textbf{146.} See id. at 8.
  \item \textbf{147.} See id. at 4, 8; see also supra notes 6-10 and accompanying text.
  \item \textbf{148.} In re J., No. A72-370-565, reported in Still More on Asylum Claims, supra note 86, at 1376.
  \item \textbf{151.} Not all discrimination amounts to persecution. “Discrimination . . . can rise to the level of persecution
According to the IJ, forced FGM, which resulted in physical and psychological harm, was a violation of M.K.'s human rights and was discrimination. Thus, the IJ found that M.K. experienced a combination of harms that together constituted past persecution. In so doing, the IJ entirely avoided the question of intent.

With hindsight it is possible to see that the IJ in M.K. was correct in abandoning the intent inquiry within the persecution prong. The BIA’s persecution analysis in Kasinga confirmed that “subjective ‘punitive’ or ‘malignant’ intent is not required for harm to constitute persecution.”

The Government’s brief in Kasinga argued that a standard requiring malignant or punitive intent is appropriate in most circumstances, but not in the case of FGM because it is performed, not out of malice, but out of a desire to bind the individual to the society and to create a sense of belonging in the community. The Government argued that if malice were “always required before persecution is found, then FGM would rarely be considered persecution.” The Government then articulated an exception to the general rule for practices which, by their very nature, are so extreme as to be shocking. According to the Government, FGM, in its most severe form, “shocks the conscience because it amounts to an extreme bodily invasion . . . . Female genital mutilation therefore can amount to persecution even if the subjective intention of the one who would perform the circumcision is ostensibly benign.”

The BIA agreed that a malicious or punitive intent was not required. Nevertheless, it did not adopt the Government’s “shocks the conscience” formulation because it found such a formulation unnecessary. The BIA held that its “characterization of FGM as persecution is consistent with our past definitions of that term.”

The Government’s argument in Kasinga for the creation of a new analytical framework for FGM-based claims of persecution was a thinly veiled attempt to cast gender-based claims outside of traditional asylum jurisprudence. As noted by concurring BIA Members Filppu and Heilman, “the level of suffering associated with FGM, as practiced by the applicant’s tribe, would be more than enough to constitute persecution if inflicted exclusively on a religious or political minority.” Thus, there is no reason that infliction of the same level of suffering should not be considered

---

152. See In re M.K., No. A72-374-558, at 12.
153. See id.
155. See Government’s Brief in Response to Applicant’s Appeal From Decision of Immigration Judge at 16, In re Kasinga (No. A73-476-695).
156. Id.
157. See id. at 17.
158. Id. An ostensibly benign practice can be persecutory because of the applicant’s subjective attitude toward the harm. See In re Kasinga, Int. Dec. 3278, at 16, 18 (Rosenberg, L.D., concurring) (determining whether harm is persecution “includes consideration of the applicant’s attitude towards such treatment”).
159. See id. at 10.
160. See id.
persecution when it is inflicted exclusively on women and girls. Although one might question whether persecution in the form of FGM is inflicted on account of political opinion or “membership in a particular social group,” the persecution prong of the refugee test is distinct from the “on account of” element. Determinations of whether FGM is persecution should not deviate from traditional persecution analysis simply because the harm is gender-related.

3. The Nexus Requirement

In order to be eligible for asylum, the claimant also must prove that her persecution is “on account of” race, religion, nationality, membership in a particular social group, or political opinion. The difficulty for women seeking asylum based on persecution because of gender is obvious: there is no statutory ground for gender-based persecution. Nonetheless, women have attempted to meet the nexus requirement by using gender in conjunction with another statutory ground, such as political opinion, membership in a particular social group, and religion. Indeed, political opinion and membership in a particular social group have been used successfully by petitioners seeking asylum based on FGM in the United States. These two grounds will be explored in greater depth below.

a. Political Opinion

In addition to meeting all of the other statutory requirements for asylum, an applicant seeking asylum based on political opinion, “must (1) specify the political opinion on which he or she relies, [and] (2) show that he or she holds that opinion.” The courts have construed “political opinion” somewhat broadly, so that political opinion includes not only attitudes about one’s government, but also includes opinions relating to the treatment and status of women generally within her country or culture, or within her social, religious, or ethnic group. In addition, it includes a woman’s opposition to a particular law or mandated traditional custom that restricts women’s (but not men’s) individual autonomy or movement; restricts

---

163. While the persecutor’s intent is not relevant to whether the harm amounts to persecution, see In re Kasinga, Int. Dec. 3278, at 8, the persecutor’s intent is relevant to the “on account of” aspect of the refugee definition. The “on account of” prong does not require the persecutor’s intent to be malicious, although it must aim at overcoming a characteristic of the petitioner. See id. Although FGM can be seen as persecution on account of gender because the persecutor is attempting to overcome the characteristic of having intact genitalia, this does not immediately satisfy the asylum statute because gender is not one of the five protected categories. See 8 U.S.C. § 1101(a)(42)(A) (1994).

164. See id.


166. See Fatin, 12 F.3d 1233 (3rd Cir. 1993); In re A and Z, No. A72-190-893, at 17-19; In re M.K., No. A72-374-558, at 17-19.

167. See Fisher v. INS, 61 F.3d 1366 (9th Cir. 1994), rev’d en banc, 79 F.3d 955 (9th Cir. 1996). Because FGM is not a religious practice, this Comment does not discuss religion as an avenue for asylum based on FGM.

168. See In re M.K., No. A72-374-558, at 14 (political opinion; membership in a particular social group); In re Kasinga, Int. Dec. 3278, at 9 (membership in a particular social group).

169. Fatin, 12 F.3d at 1242.
women's (but not men's) legal rights or access to education, employment, health care, etc.; or imposes affirmative requirements not imposed on men.\footnote{170}

Consistent with these requirements, the IJ in \textit{In re M.K.} found that forced FGM can amount to persecution on account of political opinion when a petitioner resists and complains about FGM, as did M.K.\footnote{171} Central to the IJ's holding, however, was that the FGM be forced, and that the petitioner have actively resisted the practice.\footnote{172} Nonetheless, the IJ noted that persecution based on political opinion exists when the persecutor perceives the petitioner to hold antagonistic opinions because she refuses to conform to cultural norms and roles, even though she does not protest those practices, norms, and roles.\footnote{173} With this statement, the IJ appeared to say that those who inflict FGM may impute antagonistic views to women who merely evade the cultural practice.

The IJ's finding in \textit{M.K.}, however, seems to contradict the United States Supreme Court's requirement in \textit{INS v. Elias-Zacarias}\footnote{174} that the persecution in question be on account of the petitioner's actual beliefs, not what the persecutor perceives the petitioner's beliefs to be.\footnote{175} According to the Supreme Court, "[t]he ordinary meaning of the phrase 'persecution on account of ... political opinion' ... is persecution on account of the victim's political opinion, not the persecutor's."\footnote{176} The Court then required that the petitioner provide evidence that the persecution was because of his political opinion.\footnote{177}

The \textit{Elias-Zacarias} holding makes an asylum claim based on political opinion very difficult for women fleeing FGM. Even if the persecutor is motivated by a perceived clash in political opinions (because the victim's evasion of FGM flouts cultural norms), a court, applying the \textit{Elias-Zacarias} standard, is unlikely to find the nexus requirement satisfied. Under \textit{Elias-Zacarias}, the required nexus only exists when the victim's actual political opinion is accurately understood by the persecutor.\footnote{178} Thus, in cases in which the woman avoiding FGM has not articulated her opposition to the practice in political terms (for example, by saying that it is an exercise in controlling women's sexuality), courts could presume that reasons other than political opinion motivate the woman's avoidance of FGM. Of course, cases in which the woman seeking to avoid FGM actually articulates her political opposition to FGM in a public way will be rare. Most women in such circumstances will not want to call attention to their actual political beliefs, out of fear of forced FGM and of the social consequences of avoiding FGM, such as ostracization, economic hardship, etc.\footnote{179} Because a court could presume alternative reasons for the victim's opposition, such as health reasons, \textit{Elias-Zacarias} may effectively limit women (and

\footnotesize

171. \textit{See id.} at 14, 17.
172. \textit{See id.} at 14, 20.
173. \textit{See id.} at 20.
177. \textit{See id.}
178. \textit{See id.}
179. \textit{See discussion supra Part II; supra notes 29-32 and accompanying text.}
girls) fleeing FGM to claiming asylum based on membership in a particular social group.

b. Membership in a Particular Social Group

Membership in a particular social group provides another avenue for gender-based asylum claims, and has been used both successfully and unsuccessfully in relation to FGM-based petitions. This inconsistency in outcomes parallels the various definitions of particular social group used in different federal circuits, and reflects the ambiguity surrounding the intended purpose of this prong.

In this Subsection, I will address the history and development of the “membership in a particular social group” category, the competing definitions of the category utilized by various federal circuit courts, and the ways in which the membership in a particular social group category has been used by asylum petitioners to bring gender-related claims. After these three background discussions, I will address how the membership in a particular social group category has been used in the context of FGM.

i. Historical Background

The competing definitions arise in part from a basic confusion regarding the reason why “membership of a particular social group” was included in the 1951 Convention Relating to the Status of Refugees (1951 Convention). As the 1951 Convention was originally drafted, membership in a particular social group was not an included category. This category was added later, by amendment without debate and nearly without discussion, during the drafting conference. Indeed, the entire

182. For examples from different federal circuits, see discussion infra Part IV. The inconsistency among circuit courts is troubling because it means that the outcome of a given asylum claim may depend on where the claim was filed, rather than on the merits of the claim itself. Appropriate deference to the BIA would obviate such inconsistency because:

The BIA is the front-line body whose function is to determine the facts and interpret immigration law. If the [BIA] is doing its job, lower-level agency actors and practicing lawyers must look first to it as the law-enunciating body, not to the federal courts. The principle of deference to the BIA was the message... of the Supreme Court in Elias-Zacarias

New Asylum Jurisprudence, supra note 66, at 1179. The Supreme Court held that “[t]he BIA’s determination . . . must be upheld if supported by reasonable, substantial, and probative evidence on the record considered as a whole.” INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992) (quoting 8 U.S.C. § 1105(a)(4) (1994)). The Court added that “[t]o reverse the BIA finding we must find that the evidence not only supports that conclusion, but compels it.” Id. at 481 n.1. Under this model of deference to the BIA, [t]he function of the federal courts . . . is to correct the [BIA] when it either avoids its job, or when its interpretation is unreasonable or incorrect in light of the statute and congressional intent. If the [BIA] plays its role in an authentic manner, however, the relevance of court decisions—and particularly those inconsistent with those of the Board—is greatly diminished.

New Asylum Jurisprudence, supra note 66, at 1179.

discussion of the amendment amounted to its introduction by the Swedish delegate to the Conference of Plenipotentiaries, which finalized the content of the Convention: “[E]xperience has shown that certain refugees were persecuted because they belonged to particular social groups. The draft [1951] Convention does not provide any special provision for ‘[sic] such cases, and it would be advisable to adopt such a provision.” Due to the paucity of discussion on this issue, little is to be learned from the “legislative history” of the 1951 Convention regarding the purpose or meaning of the membership in a particular social group category.

In 1980, the United States Congress passed the Refugee Act, which incorporates the 1951 Convention definition of refugee into domestic law. Because Congress was merely attempting “to bring the United States into compliance with obligations it had undertaken in ratifying the 1967 Protocol Relating to the Status of Refugees [(1967 Protocol)],” Congress engaged in little or no discussion of the particular terms or provisions of the 1980 Refugee Act when it was passed. Rather than considering the Refugee Act’s specific refugee definition, Congress emphasized that the Refugee Act’s definition of refugee “[was] based directly upon the language of the [1967] Protocol and it is intended that the provision be construed consistent with the [1967] Protocol.” As a result, there is little domestic legislative history defining “membership in a particular social group.” Nonetheless, Congress’s emphasis on consistency with the internationally accepted definition should help inform our domestic interpretation of the concept. According to one scholar,

In virtually all court cases since its inclusion in the definition of refugee, the phrase “particular social group” has been flexibly interpreted. Its definition should be developed progressively in order to provide protection that “correspond[s] to the overflowing imagination of the oppressive powers.” Accordingly, the membership

---

185. Id. at 72 (quoting Traveaux Preparatoires, UN docs. A/CONF.2/ SR. 3 p. 14).
189. Id. According to the Supreme Court, “[i]f one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire [Refugee] Act, it is that one of Congress’s primary purposes was to bring United States refugee law into conformance with the [1967 Protocol] . . . .” Cardoza-Fonseca, 480 U.S. at 436; see also S. Rep. No. 96-256, at 4, 14-15 (1979), reprinted in 1980 U.S.C.C.A.N. 141, 144, 154-55.
191. For a discussion of cases interpreting the “particular social group” requirement, see id.
192. Prat, supra note 184, at 79; cf. Goodwin-Gill, supra note 64, at 47 (arguing that in principle there is no reason that the membership in a particular social group ground should not be progressively developed); ATTLE
in a particular social group category is broad enough to accommodate women fleeing persecution based on FGM, even though this particular social group was not identified at the time of passage of either the 1951 Convention, the 1967 Protocol, or the federal 1980 Refugee Act.

Flexibility and liberality are not the only concerns of those interpreting and applying the Refugee Act. Rather, the multiple definitions of particular social group reflect an attempt to balance two competing concerns:

(1) that the particular social group category be given a liberal reading which is broad enough to offer protection to groups whose social origins put them at risk and flexible enough to evolve in response to changing circumstances; and (2) that the definition not be so broad as to encompass all persons who may be facing harm as a result of war or generalized violence, or persons who can escape persecution by reasonably acceptable alterations of their behavior.  

ii. Competing Definitions of Membership in a Particular Social Group

Each of the five definitions of particular social group discussed below strikes the balance differently between flexibility and the need to limit the size of the social group. The first three definitions used to determine whether a particular social group exists are open-ended, tend to be less concerned with the size of the particular social group, and focus on the fundamental nature of the characteristic that links group members. In contrast, the Ninth Circuit's definition attempts to limit the size of any given particular social group by requiring a certain uniformity of experience and consciousness among group members. Finally, the Second Circuit has developed a hybrid test that incorporates both the immutable characteristic and identifiability requirements used in the other tests, but without requiring a shared consciousness element or group identity.

The first definition is that of the UNHCR Handbook. The UNHCR Handbook defines “particular social group” as a group with a “similar background, [similar]
habits, or [similar] social status." This definition is the most broad. It supports the argument that particular social group classifications were meant to be flexible and inclusive.

The second definition was developed by the BIA. The BIA, in *In re Acosta*, created a slightly more restrictive definition than the above first definition, when it held that a particular social group is

a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex . . . or in some circumstances it might be a shared past experience . . . . Whatever the common characteristic that defines the group, it must be one 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.

The BIA's definition in *Acosta* focuses on immutable characteristics, thereby opening the door to claims based on FGM because of its explicit recognition of sex as a group characteristic. In addition, the BIA's definition recognizes that alteration of some characteristics or beliefs would be abhorrent to the individual required to undergo such a change. Under this definition, women who consider the "alteration" of intact genitalia and sexual organs by FGM abhorrent would comprise a particular social group for whom FGM would be persecution. In fact, the BIA, relying on the *Acosta* definition, later held in *Kasinga* that "[t]he characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it."

In the third definition, the First Circuit effectively combined the *UNHCR Handbook* and *Acosta* definitions. In *Ananeh-Firempong v. INS*, the First Circuit found that the petitioner, a Ghanian woman "associated with the former government," a member of the Ashanti tribe, and among a class of professional, educated, business-people, was a member of a particular social group for asylum purposes. According to the First Circuit, these characteristics were "essentially beyond the petitioner's power to change." Under any of the above three definitions, women seeking asylum, like M.K., Kasinga, and J., should be entitled to asylum as a member of a particular social group, either because FGM is so contrary to their beliefs that it would be abhorrent to them to undergo the ritual, or because having intact genitalia is fundamental to a woman's identity.

If the courts interpret membership in a particular social group broadly under any of the above three approaches, FGM-based claims are likely to be successful. In contrast, these claims will be more difficult in courts that follow a fourth approach similar to that imposed by the Ninth Circuit. In *Sanchez-Trujillo v. INS*, the Ninth Circuit created a four-part test to determine whether a particular social group

197. *See* *Kelly*, supra note 193, at 648 (discussing *Traveaux Preparatoires*, *supra* note 185).
200. *See* *Ananeh-Firempong v. INS*, 766 F.2d 621, 623, 626 (1st Cir. 1985).
201. *Id.* at 626.
202. *See* *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986).
exists.\textsuperscript{203} The test requires: (1) a close affiliation among the group members; (2) a common interest upon which the affiliation is based; (3) voluntary association; and (4) a common trait that distinguishes the group members from the general population.\textsuperscript{204} The four prongs of this test attempt to distinguish cohesive, homogenous groups\textsuperscript{205} deserving of legal protection, from other groupings that might be recognizable, but which do not deserve such protection because they are merely statistical groupings,\textsuperscript{206} or because they are "defined principally in relation to the harm feared by the asylum applicant."\textsuperscript{207}

In \textit{Sanchez-Trujillo}, the Ninth Circuit was concerned with the possibility of granting asylum to "'sweeping demographic divisions' that encompass a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings" all within one social group.\textsuperscript{208} But, this overly-acute concern with not opening the floodgates to unknown numbers of refugees denies protection to deserving individuals. "[T]here is no rational basis for denying protection to individuals who, even if divided in lifestyle, culture, interests, and politics, may yet be linked across another dimension of affinity."\textsuperscript{209}

Women and girls fleeing FGM present just such a social group. They may come from any socio-economic status, political party, or lifestyle, and they are unlikely to have any kind of close affiliation, or any voluntary association. In most circumstances, these women and girls are ostracized.\textsuperscript{210} For this reason alone, women and girls who refuse FGM are unlikely to publicly identify each other or maintain a voluntary association, even if they have a common interest in avoiding FGM for themselves (or in eradicating FGM for all females). As a result, such women and girls would likely be denied asylum in the Ninth Circuit, even though they are linked by their refusal to undergo FGM, and even though this particular characteristic is the reason for their persecution.

On the other hand, in societies that practice FGM, it is common knowledge who has undergone the ritual and who has not, despite a lack of voluntary association and close affiliation. Thus, an underlying goal of the Ninth Circuit's test—identifiability of group members—is satisfied even without a close affiliation or a voluntary association by the women or girls in question. Thus, the Ninth Circuit could effectively shrink its test to two prongs (requiring proof of a common interest and a common trait) without risking an enlargement of the particular social group. Other

\footnotesize

\textsuperscript{203} See id. at 1576.
\textsuperscript{204} See id.
\textsuperscript{205} See id. at 1577.
\textsuperscript{206} See id. at 1576 ("[A] statistical group of males taller than six feet would not constitute a 'particular social group' under any reasonable construction of the statutory term, even if individuals with such characteristics could be shown to be at greater risk of persecution than the general population.").
\textsuperscript{207} In re Kasinga, Int. Dec. 3278, at 15 (Filppu, L.S., Heilman, M.J., concurring) (citations omitted).
\textsuperscript{208} GOODWIN-GILL, supra note 64, at 359 (discussing \textit{Sanchez-Trujillo}).
\textsuperscript{209} Id. at 365.
\textsuperscript{210} "A woman who has not undergone genital mutilation may be considered a social outcast or as someone who has 'destroyed the family honor' and deserves to be killed." ALERT SERIES, supra note 31, at 3. "African women who oppose female genital mutilation, or try to protect their female children, are frequently denounced by family, friends, and society as '[w]estern' feminists and may face threats to their freedom, threats or acts of physical violence and social ostracization." Id. at 14.
elements of the refugee definition will prevent overuse and abuse of asylum. Guy Goodwin-Gill rightly argues that:

If a sociological approach is adopted to the notion of groups in society, then apparently unconnected and unallied individuals may indeed satisfy the criteria: mothers; mothers and families with two children; women at risk of domestic violence; capitalists; former capitalists; homosexuals; and so forth. **Whether they then qualify as refugees** having a well-founded fear of persecution by reason of their membership in a particular social group **will depend on answers to related questions**, including the perceptions of the group shared by other groups or State authorities, policies and practices vis-à-vis the group, and the risk, if any, of treatment amounting to persecution.\(^2\)

Finally, in the fifth definition of particular social group, the Second Circuit in *Gomez v. INS* employed a “compromise” definition that seems to embody the sociological notion of a group that Goodwin-Gill describes.\(^2\) The Second Circuit test requires members of a particular social group to “possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general.”\(^2\) Women seeking asylum in order to escape persecution based on FGM could satisfy the Second Circuit’s definition—women and girls in this group share the immutable characteristic of sex and are identifiable by the persecutor because of their failure to comply with cultural norms and rituals. This definition utilizes a hybrid internal/external approach that combines the immutable or fundamental characteristic requirement of the BIA’s *Acosta* test with the group-identification requirements of the Ninth Circuit. If the Second Circuit’s approach in *Gomez* were applied to FGM cases, then women who refuse to undergo FGM could be deemed internally linked by having engaged in a particular activity (refusal to undergo FGM), and could be externally defined by the perceptions of those in their community (as failing to satisfy the culturally-defined requirements of womanhood).\(^2\)

### iii. Membership in a Particular Social Group and Gender-Based Claims

The perceived tension between applying the social group category flexibly enough to protect deserving individuals while not extending the category so far as to render the refugee definition meaningless is particularly prevalent in gender-based claims because of the potential size of such a social group.\(^2\) One way that courts have limited the number of potential refugees in a social group category is to require that

---

\(^2\) *GOODWIn-GiLL, supra note 64, at 366 (emphases added) (footnote omitted).

\(^2\) *See Gomez v. INS, 947 F.2d 660 (2d Cir. 1991).*

\(^2\) *Id.* at 664.

\(^2\) Guy Goodwin-Gill uses this analysis to demonstrate why the former capitalists from eastern Europe constitute members of a particular social group even though they never were “formally associated one with another. . . . What counted . . . was the fact that they were not only *internally* linked by having engaged in a particular type of (past) economic activity, but also *externally* defined, partly if not exclusively, by the perceptions of the new ruling class.” *GOODWIn-GiLL, supra note 64, at 361.*

\(^2\) It is important to note, however, that female petitioners bringing a membership in a particular social group claim must still satisfy all of the other statutory requirements before being granted asylum. The other requirements will prevent over-extension of the refugee category to those who should not qualify, even though they belong to a broad, particular social group.
the social group exist in society for reasons other than the persecution itself. That is to say, women must exist as a social group for reasons other than their relation to FGM. Yet, this requirement fails to recognize that the status and treatment of women in patriarchal society create women as a social group independent of FGM. Patriarchal society, by its very nature, regulates male and female behavior and roles such that women comprise a meaningful social group ipso facto. Women not only share immutable characteristics, but they also share similar experiences with others in their group, stemming from the treatment the group receives from society at large. Society's treatment of women informs the consciousness of the persecutor, dictating that the persecutor treat women as a group differently than men, in various ways not limited to the infliction of FGM. Thus, it is misleading to suggest that women do not form a social group except in relation to a particular form of persecution. Women exist as a group apart from any one type of persecution purely by virtue of their socially-constructed gender identity.

At least two federal circuits recognize that gender can define a particular social group. The Third Circuit accepted gender as the basis for a particular social group in Fatin v. INS. "[T]o the extent that the petitioner . . . suggests that she would be persecuted or has a well-founded fear that she would be persecuted in Iran simply because she is a woman, she has satisfied the first" element required by the federal asylum statute, identification of a particular social group. The Eighth Circuit adopted the Fatin approach in 1994: "We agree . . . 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 [refugee] definition." Even though gender can help define a particular social group, courts that recognize gender delimit the particular social group by incorporating additional characteristics into the description. In Fatin, for example, the particular social group was delimited to include only "those Iranian women who find [Iran's gender-specific] laws so abhorrent that they 'refuse to conform', even though . . . 'the routine penalty' for noncompliance is '74 lashes, a year's imprisonment, and in many cases brutal rapes and death.'"

The refusal to conform element often takes the form of requiring that the particular social group members oppose the persecutory practice. For example, the Eighth Circuit Court in Safaie held that Safaie was not a member of the particular social group of women who refuse to conform to social norms because "she did not assert

216. See, e.g., In re Kasinga, Int. Dec. 3278, at 14 (BIA June 12, 1996) (Filippu, L.S., Heilman, M.J., concurring) ("[W]e simply do not know . . . whether the similar social groups proposed by the parties are recognized as groupings for any other purposes within Togolese society aside from the serious personal harm at issue here."). These concurring BIA Members would have remanded the case for further examination because "it is questionable whether the statute was meant to encompass groups that are defined principally in relation to the harm feared by the asylum applicant." Id. at 15 n.3.
218. See Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994); Fatin v. INS, 12 F.3d 1233, 1240 (3rd Cir. 1993).
219. See Fatin, 12 F.3d at 1240.
220. Id.
221. Safaie, 25 F.3d at 640.
222. Fatin, 12 F.3d at 1241 (citation omitted) (emphasis added) (quoting Petitioner's Brief at 14).
'some missionary fever' to defy the law . . . [and because] her opposition was not of the depth and intensity required.”

But, the dual requirements of Fatin and Safaie (willingness to suffer the severe consequences of non-conformity, and missionary fever in one’s opposition or non-conformance) are particularly harsh and are inconsistent with other asylum law.

The fallacy in the Fatin and Safaie decisions is that an individual must show that she would “choose to suffer the severe consequences of noncompliance” in order to establish the depth of her conviction. Nowhere else in asylum law has an applicant been required to meet such a high standard . . . . In . . . the political opinion category, . . . courts have not held that an individual must show that he or she would continue to express his or her beliefs regardless of the consequences. It is enough that the individual establish the holding of such beliefs, and persecution or a well-founded fear of persecution on account of those beliefs.

The FGM cases based upon membership in a particular social group may suffer the same maladies afflicting Fatin and Safaie, namely, confusion regarding the requirements of refusal to conform and opposition to the practice.

iv. The FGM Cases: A Sub-Category of Gender-Based Social Group Claims

In re M.K. and In re Kasinga address social group in the context of FGM. In both cases, opposition to FGM was a defining characteristic of the particular social group. According to the IJ in M.K., M.K. was a member of “the sub-group of Sierra Leone women who are forced to undergo female genital mutilation” because of their opposition to the practice. Similarly, the BIA held that Kasinga belonged to a social group comprised of “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.” In this way, the M.K. and Kasinga decisions do not deviate from the gender-based, social group holdings in Fatin and Safaie.

Thus a significant question remaining for future cases is whether opposition to FGM means simple avoidance of the ritual, some more elaborate refutation of the practice (such as more traditional political protest), or willingness “to suffer the severe consequences of noncompliance . . . .” By holding that its construction of a relevant social group was consistent with both the BIA’s Acosta and the Third Circuit’s Fatin standards, the BIA in Kasinga failed to explain what “opposition to the practice” really entails.

---

222. Safaie, 25 F.3d at 640.
224. Goldberg, supra note 138, at 894.
227. See id. at 18 (Rosenberg, L.D., concurring); In re M.K., No. A72-374-558, at 18.
230. Fatin v. INS, 12 F.3d 1233, 1241 (3d Cir. 1993); see Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994) (“[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 membership in a particular social group.).
231. See In re Kasinga, Int. Dec. 3278, at 8.
On the one hand, the BIA's Acosta standard implicitly requires opposition to a practice, for if a characteristic is so fundamental to a petitioner that it should not be changed, then the petitioner is, by definition, opposed to that change. To the extent that the Acosta standard inherently requires opposition to the practice, then the Third Circuit's Fatin requirement of an explicit opposition (by refusing to conform) is not only redundant, but unnecessarily raises the burden on the petitioner. Perhaps even more significantly, the Fatin requirement of explicit opposition to a practice blurs the boundary between political opinion and membership in a particular social group claims. Even though

[the boundary between the notions of social group and of political opinions is not rigid, and there is overlap between the two criteria . . . .] The notion of social group [should be] called upon when the expression of political opinions by the person in question is accidental, not usual, and does not indicate the existence of an active political stance . . . .

Thus, the conflation is problematic because it imports into the membership in a particular social group category the burdensome and troubling requirements of the Supreme Court's Elias-Zacarias v. INS test discussed above in Part IV.B.3.a, when the particular social group membership and political opinion categories are really alternative grounds for a grant of asylum. As separate grounds, the petitioner's opposition, or lack of explicit opposition, to the practice of FGM should not be dispositive of her social group claim.

The concurring opinions in the Kasinga case reveal a nascent understanding that requiring opposition to the practice as an element of the social group definition unnecessarily and inappropriately conflates political opinion and social group claims. Concurring BIA Member Rosenberg's opinion in Kasinga explained that it is unnecessary to include the petitioner's opposition to the practice of female genital mutilation in the definition of the particular social group because social group claims are status-based:

Unlike requests for asylum premised upon political opinion, social group claims . . . are status based and do not necessarily require a showing of the presence of an individual's opinions or activities which spurs the persecutor's wrath or otherwise motivates the harm or persecution. Rather, such requests involve a

---


233. In re Kasinga, Int. Dec. 3278, at 9. It is unclear whether the BIA would have invoked Fatin had the Kasinga case also not arisen in the Third Circuit. (This is because the BIA applies the law of the circuit in which the asylum case was filed.) For a discussion of the problems arising from the BIA's application of decisions from different circuits, see supra note 182.

234. Prat, supra note 184, at 77.


236. In re Kasinga, Int. Dec. 3278, at 12, 17, 18 (Filppu, L.S., Heilman, M.J., and Rosenberg, L.D., concurring). Significantly, two other concurring BIA Members stated that "it is not essential to choose" whether or not "the 'social group' definition includes an element of personal opposition by the victim . . . ." The applicant would qualify for relief under either proffered social group." Id. at 12 (Filppu, L.S., Heilman, M.J., concurring). Perhaps this indicates that the BIA is moving away from including an "opposition to" element of the social group definition. See id.
determination of whether the shared characteristics are those which motivate the agent of persecution to overcome or otherwise harm the individual. 237

Despite recognition by three 238 BIA members that personal opposition to the practice of FGM is unnecessary to find membership in a particular social group, the majority opinion in Kasinga did include an element of personal opposition in its description of the social group of which Kasinga was a member. 239 By embracing both the Acosta and Fatin standards, the BIA in Kasinga left intact the conflation of political opinion and membership in a particular social group appropriately criticized by BIA Member Rosenberg.

The confusion over whether opposition to the persecutory practice should be included in the definition of a particular social group is just one demonstration of the fact that, while the social group category may be the most promising for women seeking refuge from FGM, it unfortunately remains a murky and shifting concept. The precise contours of the social group category differ among the BIA and each federal circuit. As a result, various levels of affiliation, association, common-consciousness, opposition to the persecution, and identifiability of group members by the persecutor may be required. Because there is no definitive, controlling test for membership in a particular social group, these claims may be difficult to make successfully. However, future FGM-based claims will provide opportunities for Asylum Officers, IJs, and the BIA to clarify the existing ambiguity.

4. Government Action or Acquiescence

The UNHCR Handbook recognizes that persecution does not always occur at the hands of the government. 240 Indeed, the persecution may often come from sections of the population that do not respect the standards established by the laws of the country concerned . . . . Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities or if the authorities refuse, or prove unable, to offer effective protection. 241

The BIA has construed the federal asylum statute consistently with the UNHCR’s recommended interpretation, such that persecution by non-governmental actors will satisfy the statute if the government in question acquiesced in the persecution by failing to protect the victims (either because it chose not to act or because it was unable to control the persecutors). 242

237. See id. at 17-18 (Rosenberg, L.D., concurring) (citations omitted).
238. In addition to Member Rosenberg, two other BIA Members stated that “it is not essential to choose” whether or not “the ‘social group’ definition includes an element of personal opposition by the victim . . . [T]he applicant would qualify for relief under either proffered social group.” Id. at 12 (Filppu, L.S., Heilman, M.J., concurring).
239. See id. at 18.
240. See UNHCR HANDBOOK, supra note 117, para. 65.
241. Id.
242. See In re McMullen, 19 Immigration and Naturalization Dec. 90 (BIA 1975); In re Pierre, 15 Immigration and Naturalization Dec. 461 (BIA 1975). According to the UNHCR Division of International Protection, FGM “can be regarded as persecution. The toleration of these acts by the authorities, or the unwillingness of the authorities to provide protection against them, amounts to official acquiescence.” ALERT SERIES, supra note 31, at 12.
Some countries in which FGM is practiced have taken steps to eradicate the practice, including outlawing all forms of FGM. However, in most cases the practice continues, unregulated and undeterred. In re M.K., for example, the IJ recognized that the police would not protect the petitioner from forced FGM; a woman who has experienced forced FGM has no legal recourse because Sierra Leone has not outlawed FGM and because “it is part of traditional custom. Complaints to the police would be useless and potentially harmful, because the police would merely advise the Bundo Society that she had divulged the ‘secret.’ [A woman’s d]ivulging the secret would result in her being harassed, threatened, physically harmed, and possibly killed.” In M.K.’s particular case, M.K. had avoided being mutilated for nearly ten years, but was abducted and had FGM forcibly inflicted upon her. The IJ found that, although the government did not commit the persecutory act itself (that is, the government did not perform the FGM), the government was more than merely unwilling or unable to protect the petitioner. Rather, the IJ found that the Sierra Leone government actually may have “facilitate[d FGM] by advising the Bundo Society of women who complain.” Because the Sierra Leone government acquiesced in the persecution, the M.K. court found that the petitioner was unable to avail herself of State assistance.

In the strikingly similar case of In re J., the IJ found that the government action prong of the asylum test was not satisfied. Although the IJ recognized that the persecutor need not be the government, but could be a group that the government could not control, the IJ failed to recognize that the petitioner’s tribe could be a persecutor outside the control of the government. What seemed to underlie the IJ’s opinion in J. was an assumption, not that the government could not control the petitioner’s tribe, but that it should not control the tribe because FGM is a cultural practice not viewed as abhorrent or barbaric by those who practice it—even though, in this case, the FGM was imposed forcibly, after the petitioner had been abducted, gagged, and bound. Thus, despite the petitioner’s personal objection to FGM, the fact that the FGM was forced upon her, and the fact that FGM is

The BIA’s holdings in McMullen and Pierre are consistent with international law. The Inter-American Court of Human Rights held in the Velasquez Rodriguez case that “[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person . . . ) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required.” Velasquez Rodriguez, Inter-American Court of Human Rights, July 29, 1988, at 154.

243. Although Cameroon, Djibouti, Egypt, Ghana, and the Sudan have outlawed FGM, see James, supra note 68, at 206, the illegalization of the practice has not eradicated it. FGM is still prevalent in Egypt and the Sudan. Moreover, these laws may prohibit the most extreme form of FGM (infibulation), but may still allow excision and or clitoridectomy. See Karen Hughes, Note, The Criminalization of Female Genital Mutilation in the United States, 4 J. L. & Pol’y 321 (1995).


245. See id.

246. See id. at 13.

247. Id.

248. See id.


250. See id.

251. See In re J., No. A72-370-565, reported in More on IJ Decision, supra note 86, at 1265.
irreversible, the IJ in J. found that FGM was a tribal matter, essentially out of the purview of the government.\textsuperscript{252} The IJ’s determination in In re J. is especially problematic in light of the Considerations for Asylum Officers Adjudicating Asylum Claims for Women issued by the United States Department of Justice on May 26, 1995. Although these Considerations were issued a month after the decision in In re J., and although they are not binding authority, the BIA should take them into account if this case is appealed. Under the Considerations, “[t]he relevant issue is whether the woman applying for asylum was subjected to or reasonably feared being subjected to the violence with no recourse to state protection. This lack of recourse to state protection may be because the state is unable or unwilling to provide such protection.”\textsuperscript{253} The IJ’s decision in J. is troubling because it affirms the federal government’s unwillingness to protect petitioners based on an IJ’s perception that the foreign government’s rationale for doing so is reasonable. The J. decision hopefully will be overruled or qualified in future applications of the federal asylum statute.

IV. CONCLUSION

Each element of the federal asylum statute has potential pitfalls for a petitioner seeking asylum from FGM. First, federal case law has yet to decide whether the general presumption that a victim of past persecution has a well-founded fear of future persecution will apply to women who have already been circumcised. Second, the BIA’s holding in Kasinga that infibulation is persecution leaves unanswered whether less invasive forms of FGM also are persecution. Third, as in all asylum claims, the nexus (or “on account of”) element is especially difficult to prove. Because IJs, BIA Members, and circuit court judges have blurred the line between the political opinion and membership in a particular social group categories when gender is an issue, it is unclear when the intent and motivation of the persecutor come into play. However, at the very least, the BIA’s decision in Kasinga tells us that a malicious intent on the part of the persecutor is not required. This is significant for women bringing FGM-based claims because the motivation of the person imposing FGM is usually benign, and, in fact, may be based on love. Unfortunately, standards for proving that the persecution is on account of membership in a particular social group are inconsistent among the federal circuits, and are especially stringent with regard to gender-based claims. While a petitioner’s status as a woman with intact genitalia should be enough to qualify the petitioner as a member of a particular social group, some circuits require more. In some cases, a petitioner must not only fail to conform to the contested practice, but must also actively oppose the practice. Active opposition to the practice may further require women to suffer the consequences of failing to comply before they are offered protection. Taken to its logical extreme, the social group category would require martyrdom of women fleeing FGM, because the consequence of refusing FGM is often forced submission.

\textsuperscript{252} In re J., No. A72-370-565 (U Baltimore, Md., Apr. 28, 1995), reported in Still More on Asylum Claims, supra note 86, at 1376.
\textsuperscript{253} Nancy Kelly et al., Guidelines for Women’s Asylum Claims, 71 INTERPRETER RELEASES 813, 817 (June 27, 1994).
In addition, before recognizing membership in a particular social group, courts have required that the group exist for some reason other than the harm feared. If this becomes the universal standard for asylum, the question that will need to be answered is whether our courts will recognize that women in patriarchal societies do exist as an identifiable group, completely separate from the fear of FGM?

Finally, the requirement of government action or acquiescence can be problematic for women fleeing FGM. Although acquiescence in persecution by private individuals or other groups should suffice, the IJ’s holding in In re J demonstrates that when a practice has cultural underpinnings, IJs are reluctant to require government intervention. This notion of non-intervention by governments into cultural matters brings us full-circle to questions of when and how it is appropriate to critique, or even criticize, cultural practices.

The complicated and technical details of an asylum claim tend to make us forget the more fundamental questions about why we grant asylum, and why we should grant asylum in cases based on FGM. We grant asylum to individuals who are fleeing persecution because we recognize that we have an obligation as a State and as individuals to protect others from harm when their State is incapable of so doing. Although it is appropriate that there be specific, stringent standards in order to qualify for asylum, we should not create standards that fail to respond to real-world conditions. Moreover, we should not abdicate our responsibility toward each other as human beings out of fear of being named cultural imperialists. Instead, that “fear,” or concern, should inform our choices and actions. The granting of asylum is an appropriate way to address difficult cultural practices because it does not involve exporting our ideas of fairness, human rights, or gender equality. Nor does it involve forcibly imposing those ideas on other States and cultures. On the other hand, granting asylum does protect deserving individuals, and does contribute to an ongoing international dialogue regarding the treatment of women and girls. In addition, granting asylum may contribute to the development of an international customary norm prohibiting FGM. Granting asylum in appropriate cases is one way to employ our concern and our humanity respectfully and to create new norms for behavior. It is only in so doing that we, as a global community, will ever have a chance at eliminating physically and psychologically damaging practices, such as female genital mutilation.

BETH ANN GILLIA