

FEMALE GENITAL MUTILATION: UNITED STATES ASYLUM LAWS ARE IN NEED OF REFORM

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Gender-based asylum claims are becoming more prevalent in the United States ("US").² Specifically, female genital mutilation ("FGM") is an issue that is currently receiving widespread attention.³ This Comment analyzes and criticizes US asylum laws regarding FGM. It advocates redefining the legal element "persecution," a component of the current US asylum test, to include maintaining and perpetuating the subordination of women. Under this new definition, females who flee their native countries after having undergone FGM may be granted asylum so long as they fear contributing to the preservation of patriarchal structures if forced to return to their homelands.

A law or mandatory societal custom that targets only women and severely punishes them for violation may be classified as a form of gender-based persecution.⁴ Currently, the structure of US immigration law does not fully recognize gender-based asylum claims, particularly FGM.⁵ Section I of this Comment describes FGM in-depth and sections II and III explain current US asylum law while exploring the

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2. See Karen Musalo, *In re Kasinga: A Big Step Forward for Gender-Based Asylum Claims*, 73 Interpreter Releases 853 (1996) (characterizing gender-based asylum claims as an "emerging" area of US asylum law).

3. *Id.* (observing that numerous US governmental agencies such as the Immigration and Naturalization Service (INS), Board of Immigration Appeals (BIA), as well as immigration and federal courts are focusing on gender-based asylum issues).

4. *IJ Grants Asylum on the Basis of Persecution Relating to Female Genital Mutilation*, 72 Interpreter Releases 1188, 1189 (1995) [hereinafter "IJ Grants"] Gender-based persecution also occurs when women are not afforded the same protection that men receive. *Id.* at 1190.

5. *Id.* at 1189 (describing a sub-group of women being persecuted in Sierra Leone).

three legal elements necessary to satisfy the definition of a refugee in order to be granted asylum.

Section IV briefly discusses the three components of the asylum test. Section V analyzes a groundbreaking case, *In re Kasinga*, in which a young woman was granted asylum based on her fear of potentially being forced to undergo FGM.⁶ This Comment attempts to show that while *Kasinga* opened the door for additional gender-based claims to be granted asylum, it did so only to a small degree. The principles set forth in *Kasinga* do not apply to claims involving women who have already undergone FGM, and thus reform is needed.

Section VI explores the definition of past persecution as a basis for granting asylum. It concludes that the current interpretation of the definition of "past persecution" incorrectly excludes women who have undergone FGM by paralleling their mutilation to a country where conditions have changed so that persecution no longer exists. This Comment attempts to show that this comparison is flawed. Although a mutilated woman cannot fear persecution based on the mutilation of her body, she still may have a well-founded fear of persecution if such persecution includes using a woman's mutilated body as an instrument that perpetuates the ideology of women being subordinate to men. United States asylum laws need to be interpreted in a way that protects women who fear maintaining and contributing to patriarchal structures within their own societies. Without such a re-interpretation, the US will continue to perpetuate the notion that women are subordinate to men by forcing these women to return to their homelands.

Although this Comment mainly emphasizes the need for reforms in the asylum process, section VII briefly discusses an additional way that claims of past persecution may be granted asylum under current law. This standard, which grants claims from a humanitarian perspective, is used when country conditions have changed. Thus, this Comment proposes using this humanitarian standard only if a claim fails under the new definition of persecution set forth above.

I. THE US SHOULD CHANGE ITS LAWS SO AS NOT TO PERPETUATE THE SUBORDINATION OF WOMEN, AS OPPOSED TO CHANGING THE LAWS OF OTHER COUNTRIES

This Comment does not seek to change the cultural practices of other countries. Granting women asylum in the US under a gender-

6. *In re Kasinga*, A73 476 695, Int. Dec. 3278 (BIA, June 13, 1996).

based claim does not create a different standard of behavior for other societies.⁷ The United Nations ("UN") General Assembly has stated that granting "asylum by a State is a peaceful and humanitarian act and ... as such, it cannot be regarded as unfriendly by any other state."⁸ The US asylum process judges "the reasonableness of the applicant's belief that persecution was based on a protected ground."⁹ Refugee law protects individual claimants while politics deal with how political bodies relate to each other.¹⁰ These areas are separate and should not be confused.¹¹ Asylum law should not be interpreted narrowly for fear of condemning another country's practices.¹²

Gender-based asylum claims generally involve women who have suffered or will suffer persecution "because of characteristics specific to her gender."¹³ Asylum standards have historically ignored women's special needs when dealing with gender-based claims.¹⁴ Asylum laws need to take women into account and recognize the persecution they often exclusively suffer.¹⁵ This problem of ignoring women's needs is further exacerbated by the fact that women refugees have less access to Western countries than male displaced persons.¹⁶ This is partly because female refugees tend to be less mobile and have fewer resources than male refugees.¹⁷ The few women who do arrive in the US confront an asylum system that does not fully recognize the gender differences of their persecution.¹⁸

7. *IJ Grants*, *supra* note 4 at 1190.

8. *In re S-P*, A72 971 091, Int. Dec. 3287, 10 (BIA, June 18, 1996) (quoting Declaration on Territorial Asylum, G. A. Res. 2312 (XXII), 22 U.N. GAOR, Supp. No. 16, at 81, U.N. Doc. A/6716 (1967)).

9. *Id.*

10. *See id.*

11. *See id.*

12. *Id.*

13. Musalo, *supra* note 2, at 853 (examining FGM as a form of gender-based persecution).

14. See Deborah Anker, Nancy Kelly, and John Willshire-Carrera, *The BIA's New Asylum Jurisprudence and its Relevance for Women's Claims*, 73 Interpreter Releases 1173, 1179 (1996).

15. *Id.* at 1174.

16. *See id.*

17. *Id.*

18. *See id.*

II. UNDERSTANDING FEMALE GENITAL MUTILATION

A. *Defining Female Genital Mutilation*

There are three different types of female genital mutilation: 1) circumcision; 2) excision; and 3) infibulation.¹⁹ Countries and ethnic groups vary as to which type they use. In circumcision, also referred to as sunna²⁰ or clitoridectomy,²¹ the chief operator cuts off the hood of the clitoris while the body remains intact.²² In excision, the operator cuts off the whole clitoris as well as the labia minora (small lips of the vagina). The labia majora (large lips of the vagina), however, remains intact while the two sides of the vulva are not stitched together.²³ Infibulation and pharaonic circumcision are interchangeable terms.²⁴ This occurs when the operator removes all of the foreskin, the entire clitoris, the labia minora, and the labia majora.²⁵

As a result of infibulation, a large hole is created which needs to be stitched up in order to close the vagina.²⁶ Various items such as sugar, eggs, cigarette paper or thorns are used to seal the wound,

19. RODNEY HEDLEY AND EFUA DORKENOO, *CHILD PROTECTION AND FEMALE GENITAL MUTILATION* 5 (1992).

20. *Id.*; see also Karen Hughes, *The Criminalization of Female Genital Mutilation in the United States*, 4 J.L. & POL'Y 321, 328 (1995) (stating there are a number of interpretations as to the definition of sunna, and that some claim that in Arabic the word means tradition); GHANIM I. ABDEL SALAM, *FEMALE GENITAL MUTILATION IN ARAB COUNTRIES* 3 (1994) (observing that others interpret sunna to mean that the Prophet Mohammed's instructions are being followed and that this interpretation has religious connotations, thus linking mutilation to religion); Robbie D. Steele, *Silencing the Deadly Ritual: Efforts to End Female Genital Mutilation*, 9 GEO. IMMIGR. L.J. 105, 116 (1995) (noting there are two types of sunna: mild and modified, with mild sunna consisting of slicing, pricking or eliminating the hood of the clitoris, and modified sunna consisting of removal of part or all of the clitoris' body).

21. See Joleen C. Lenihan, *A Physician's Dilemma: Legal Ramifications of an Unorthodox Surgery*, 35 SANTA CLARA L. REV. 953 (1995); Karen Engle, *Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509, 1510 (1992) (stating that clitoridectomy is a rite of passage into womanhood for many cultures so that if a girl does not go through this "ritual," she may not be granted certain privileges accorded to adult women in her culture).

22. HEDLEY AND DORKENOO, *supra* note 19, at 5; see STEELE, *supra* note 20, at 106 (noting that female genital mutilation is not equivalent to penile circumcision; its equivalent would be cutting off the entire penis along with its surrounding tissue.); Alison T. Slack, *Female Circumcision: A Critical Appraisal*, 10 HUM. RTS. Q. 437, 445 (1988) (commenting that unlike female circumcision, male circumcision does not reduce "sexual pleasure, performance, ability or desire").

23. Mary Ann James, *Federal Prohibition of Female Genital Mutilation: The Female Genital Mutilation Act of 1993, H.R. 3247*, 9 BERKELEY WOMEN'S L.J. 206, 207 (1994).

24. Lenihan, *supra* note 21, at 953.

25. *Id.*

26. HEDLEY AND DORKENOO, *supra* note 19, at 5. See Steele, *supra* note 20, at 117 (stating in Latin, that the word fibula, forms the base of the word "infibulation," which means to clasp or pin. During infibulation, the sides of the vaginal opening are sewn together so that tissue will grow and form a bridge over the wound.)

while a small hole is left for the passage of urine and menstrual blood.²⁷ The operator prevents the vagina from being completely sealed by using matchsticks or small pieces of wood.²⁸ A woman may undergo infibulation more than once.²⁹

1. *The Process: How Female Genital Mutilation Occurs*

To begin, a female's legs are opened, often forcibly by other women,³⁰ while a chief operator does the cutting.³¹ Once the initial cut is made, the operator takes her own sharp fingernail and makes a hole the length of the clitoris.³² By doing this, she is able to manually pull out the entire clitoris.³³ The operator then takes her knife to cut the female's labia minora.³⁴ Once this stage of the process is complete, the operator stitches together what is left of the vaginal lips with large acacia thorns.³⁵ To allow urine and menstrual blood to pass, the operator leaves a very small hole, often no bigger than a kernel of corn, in the woman's genital area.³⁶ Generally, anesthetics are not used,³⁷ and the procedure does not occur under clean conditions.³⁸

The female is then bandaged from the waist down to her knees.³⁹ To allow a scar to form, the female may have her legs bound together for up to forty days.⁴⁰ During this time, the female must lie on a mat

27. Daliah Setareh, *Women Escaping Genital Mutilation—Seeking Asylum in the United States*, 6 UCLA WOMEN'S L.J. 123, 127 (1995) (describing some materials that operators use to seal infibulation wounds).

28. HEDLEY AND DORKENOO, *supra* note 19, at 5.

29. Setareh, *supra* note 27, at 127; see SALAM, *supra* note 20, at 3 (commenting that when a female's opening is narrowed after childbirth, divorce or a husband's death, additional portions of the vagina are cut and then sewn together. In Arabic, this type of re-circumcision is known as "adla" which means correction.)

30. Hughes, *supra* note 20, at 322.

31. Hughes, *supra* note 20, at 322.

32. Hughes, *supra* note 20, at 322.

33. Hughes, *supra* note 20, at 322.

34. Hughes, *supra* note 20, at 322; see Lenihan, *supra* note 21, at 954 (noting that there are variations on how the cutting is done. In Africa, women traditionally perform this procedure using razor blades, knives, broken glass, jagged stones or hot rocks.)

35. Hughes, *supra* note 20, at 322.

36. Hughes, *supra* note 20, at 322.

37. See e.g., Lenihan, *supra* note 21, at 953 (claiming that most African female genital mutilation is done without painkillers).

38. HEDLEY AND DORKENOO, *supra* note 19, at 5; see Lenihan, *supra* note 21, at 954 (pointing out that the same cutting instruments, be it knives, rocks or other crude devices, may be used on several young girls without being appropriately sterilized).

39. See e.g., Slack, *supra* note 22, at 442 (noting that a woman's legs are bound together to immobilize her).

40. HEDLEY AND DORKENOO, *supra* note 19, at 5.

while her excrement accumulates and remains in the bandages.⁴¹ A mutilated female's husband will often come immediately after the healing of her wound, when her legs are no longer bound, so that he can consummate the marriage.⁴²

B. The Physical Effects of Female Genital Mutilation Are Devastating

The physical effects of FGM are devastating⁴³ with the chance of death fairly high.⁴⁴ If the female survives, there is a high probability that she will develop serious medical complications.⁴⁵ Immediate physical complications often include extreme pain and bleeding,⁴⁶ which may lead to hemorrhaging,⁴⁷ blood poisoning,⁴⁸ shock, anemia, damage to organs such as the urethra, and bladder infections.⁴⁹ Long-term complications may include pelvic infections, difficulty in urinating, painful intercourse,⁵⁰ cysts in the vulva that may make reproduction impossible and AIDS because sanitary conditions are often absent and the same instrument may be used from one female to the next.⁵¹ Years later, reproductive tract infections which lead to in-

41. Hughes, *supra* note 20, at 322-323; Slack, *supra* note 22, at 451.

42. Linda Burstyn, *Asylum in America: Does Fear of Female Genital Mutilation Qualify?*, WASH. POST, Mar. 17, 1996, at C6.

43. See e.g., Hughes, *supra* note 20, at 328-29 (describing the pain and long-term medical disorders that female genital mutilation can cause).

44. See e.g., Slack *supra* note 22, at 451 (claiming that the death rate for recently infibulated women approaches one-third of all mutilation victims in parts of the Sudan where antibiotics are unavailable).

45. Hughes, *supra* note 20 at 329; see Marie-Jose Ragab, *Genital Mutilation: The Case for International Duplicity*, NATIONAL NOW TIMES, June 1994, at 12. Death rates for women are far higher in Africa than in North America and Western Europe, and FGM only contributes to these numbers. The maternal death rate in Africa is one in 21 compared to one in 6,500 in North America and one in 9,800 in Western Europe.

46. See e.g., Slack, *supra* note 22, at 451 (observing that the extreme pain experienced by the victims causes them to move during the operation which can result in a more drastic form of female genital mutilation than the operator intended because she cannot precisely control the incisions she makes while the victim is thrashing around).

47. See e.g., Slack, *supra* note 22, at 451.

48. Lenihan, *supra* note 21, at 954.

49. SALAM, *supra* note 20, at 10.

50. Lenihan, *supra* note 21, at 954.

51. SALAM, *supra* note 20, at 10; see Layli Miller Bashir, *Female Genital Mutilation in the United States: An Examination of Criminal and Asylum Law*, 4 AM. U. J. GENDER & L. 415, 423 (1996) (noting that cysts may occur as a result of FGM that sometimes cause the girl to believe that she has cancer); see Beth Corbin, *The Torturous Realities of Female Genital Mutilation*, NATIONAL NOW TIMES, June 1994, at 6 (noting that other long-term complications include the following: scars formed on the vulva can become so big that walking is hampered; menstrual blood cannot flow freely, causing menstruation to become increasingly painful. Additionally, menstrual blood may get trapped within the body, causing severe abdominal cramps. In one incident, a mutilated teenage girl went to a Djibouti hospital to receive treatment for her abdominal cramps. Doctors opened up her vulva to discover over three liters of blackish, foul-smelling blood that had literally been trapped inside her body.)

fertility may occur.⁵² Additionally, if a woman is pregnant, her doctor may not be able to tell what stage of labor she is in due to her mutilation.⁵³ During childbirth, a baby may be born brain damaged or still-born because of a lack of oxygen in the birth canal.⁵⁴

C. A Brief History of Female Genital Mutilation

Female genital mutilation has been practiced for over 2000 years throughout the world.⁵⁵ It occurs in Asia, Europe and Latin America, although it is currently most prevalent in Africa,⁵⁶ where approximately 100 million females have undergone FGM.⁵⁷ This is a major portion of the approximately 110 million females who have suffered FGM worldwide.⁵⁸ Female genital mutilation affects girls from the city and the countryside alike, and makes no note of social status.⁵⁹ Every year, approximately 2 million girls undergo FGM.⁶⁰

There is no single age at which FGM occurs. The practice has been reportedly performed on newborns and young women immediately before marriage, as well as women pregnant with their first child.⁶¹ The average age that FGM occurs, however, appears to be between seven and twelve.⁶² Often, mutilated females are threatened with death by witchcraft if they reveal what has happened.⁶³

52. Lenihan, *supra* note 21, at 954.

53. Lenihan, *supra* note 21, at 955 (stating that excision and infibulation make it difficult to determine what stage of labor a woman is experiencing).

54. Lenihan, *supra* note 21, at 955.

55. Hughes, *supra* note 20, at 323.

56. Lenihan, *supra* note 21, at 953.

57. Hughes, *supra* note 20, at 323; see Eugenie Anne Gifford, "The Courage to Blaspheme": *Confronting Barriers to Resisting Female Genital Mutilation*, 4 UCLA WOMEN'S L.J. 329, 345 (1994) (observing that in the late 1800's, FGM was practiced within the United States as a custom brought over from England. It was thought to cure women of "hysteria, nymphomania, lesbianism, and excessive masturbation.").

58. Setareh, *supra* note 27, at 123; see Hughes, *supra* note 20, at 323 (pointing out that as of 1995, forty countries maintained this practice); SALAM, *supra* note 20, at 4 (stating that in the Arab world, FGM is practiced in Sudan, Egypt, Somalia, Djibouti, Mauritania, as well as the countries which border the Red Sea coast).

59. Marie-Jose Ragab, Walker, *NOW Give New Visibility to Mutilation*, NATIONAL NOW TIMES, Nov. 1993, at 1.

60. Barbara Reynolds, *80 million more—but unreported—sex-organ stories*, U.S.A. TODAY, Jan. 21, 1994, at 9A.

61. HEDLEY AND DORKENOO, *supra* note 19, at 5.

62. HEDLEY AND DORKENOO, *supra* note 19, at 5.

63. Pamela Constable, *INS Debates Female Mutilation as Basis for Asylum*, WASH. POST, Sept. 11, 1995, at D-1.

III. HOW AN ALIEN CURRENTLY MAY WIN ASYLUM IN THE UNITED STATES

A. *The Asylum Standard*

According to the general provisions of the Immigration and Nationality Act ("INA"), the definition of a refugee is:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion...⁶⁴

In more simplistic terms, there are three legal elements that an applicant needs to prove in order to be granted asylum in the United States. They are: (1) persecution, (2) a well-founded fear, and (3) a claim that falls under one of the five enumerated grounds mentioned above. A reasonableness standard is always used to assess whether an asylum applicant has established the various components.⁶⁵ Generally the alien should also present more than testimony to show that she or he has been persecuted or fears persecution based upon one of the five categories.⁶⁶

Although it is necessary for an applicant to satisfy these three prongs to be granted asylum, it is in no way sufficient.⁶⁷ Asylum is a discretionary matter with a final determination made by an asylum officer or Immigration Judge ("IJ").⁶⁸

64. Immigration and Nationality Act § 101(a)(42)(A) [hereinafter INA]; see *Hadjimehdig-holi v. INS*, 49 F.3d 642, 647-49 (10th Cir. 1995) (stating that although the burden falls upon the alien to prove that she or he is a refugee, an alien does not have to show that she or he is an individual target of persecution if she or he demonstrates that she or he is a part of a "similarly situated" group(s) of persons against which there is a 'pattern or practice' of persecution in her or his country on account of any of the five statutory grounds for asylum").

65. *In re Kasinga*, A73 476 695, Int. Dec. 3278, at 30.

66. *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984). The exception to this rule is if the alien's testimony is believable, persuasive, and focuses on specific facts which imply that the alien is justified in fearing that she or he will be persecuted. See also, 8 C.F.R. § 208.13 (stating that if an asylum applicant's testimony is credible, it may be sufficient to sustain the burden of proof without corroboration).

67. ANN PARRENT, *Representing Asylum Applicants 17* (1995) (unpublished manual, available through the Lawyers Committee for Human Rights).

68. *Id.*

B. Withholding of Removal

Another way a fleeing alien may legally reside in the US is if the IJ grants what was referred to as "withholding of deportation or return", and is currently referred to as "withholding of removal."⁶⁹ To be granted withholding of removal, an alien must satisfy a standard that shows a clear probability of persecution.⁷⁰ To pass this clear probability of persecution standard, an alien must show that it is "more likely than not that the alien [will] be subject to persecution."⁷¹ This is a higher standard than the well-founded fear test necessary to obtain asylum.⁷² Although this standard is more difficult to meet, once it is met, the IJ has no discretion to deny withholding.⁷³

IV. SATISFYING THE DEFINITION OF ASYLUM: EXPLORING THE THREE PRONGS

This Section briefly explores the various components of the asylum test in order to gain a fuller understanding of how the laws need to change to incorporate gender-based claims.

A. Persecution

Persecution is the first legal element an asylum-seeker must satisfy. Essentially, persecution is when one inflicts harm or suffering upon another.⁷⁴ There is no precise definition for persecution, as various groups define it differently. The Board of Immigration Appeals ("BIA") defines it as "harm or suffering inflicted upon a person in order to punish that individual for possessing a belief or characteristic the persecutor seeks to overcome."⁷⁵ Federal courts define it as:

[T]he oppression inflicted on groups or individuals because of a difference between the persecutor's views or status and that of the victim, or a difference that the persecutor will not tolerate, as well as 'the infliction of suffering or harm upon those who differ in a manner regarded as offensive.'⁷⁶

69. INA § 241 (b) (3) (A); *See, Hajimehdigholi v. INS*, 49 F.3d 642, 646 (1984) (noting under US law, asylum and withholding are two options available to "otherwise deportable alien[s]" who fear persecution and do not wish to return to their native countries) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987)).

70. *Singh v. Ilchert*, 801 F. Supp. 313, 318 (N.D. Cal. 1992).

71. *Id.* quoting *INS v. Stevic*, 467 U.S. 407, 424 (1984).

72. *Hajimehdigholi*, 49 F.3d at 646-47.

73. *See id.* at 647.

74. *Id.* at 646.

75. Setareh, *supra* note 27, at 136.

76. Setareh, *supra* note 27, at 136-37.

The United Nations High Commissioner for Refugees ("UNHCR") advocates harm as being included in the definition of persecution. It categorizes harm as:

(1) serious physical harm; (2) loss of freedom; (3) other serious violations of basic human rights as defined by international human rights instruments; (4) discriminatory treatment which leads to consequences of substantially prejudicial nature.⁷⁷

In addition to how the court or BIA chooses to define persecution, an alien must also show that the government or someone whom the government cannot or refuses to control causes her persecution.⁷⁸

B. Well-Founded Fear of Persecution

A well-founded fear of persecution is the second component an asylum applicant needs to prove in order to win asylum in the US. The alien must prove that her or his well-founded fear of persecution is both objective and subjective.⁷⁹ First, the alien must provide facts showing that her or his fear of being persecuted is reasonable.⁸⁰ This satisfies the objective portion of the standard.⁸¹ Once this is done, the alien must satisfy the subjective component by showing that her or his fear is genuine.⁸²

C. Social Group

An applicant's claim must fall under one of the five enumerated grounds (race, religion, national origin, membership in a social group or political opinion) to satisfy the third legal component of the asylum test. Gender does not have its own enumerated ground, hence gender-based claims such as FGM, often fall under the "social group" category.⁸³

There is no rigid definition for what constitutes a social group. The BIA requires that all members of a social group share a common immutable characteristic.⁸⁴ This characteristic may be based on sex, race, kinship ties, or a shared past experience. It cannot change and

77. Setareh, *supra* note 27, at 137.

78. Setareh, *supra* note 27, at 139. Persecution may be "attributable to the government" if it is caused by society and the government does nothing to prevent its occurrence. *IJ Grants*, *supra* note 4, at 1189.

79. *Hadjimehdigholi*, 49 F.3d at 646.

80. *Id.*; see *Carvajal-Munoz*, 743 F.2d at 574 (stating that an applicant needs to show evidence that persecution is a reasonable possibility and not a probable result).

81. *Hadjimehdigholi*, 49 F.3d at 646.

82. *Id.*

83. *In re Kasinga*, A73 476 695, Int. Dec. 3278 at 16.

84. Setareh, *supra* note 27, at 144.

must be fundamental to the identities of each group member.⁸⁵ The Ninth Circuit terms a social group as one in which there is voluntary association between group members.⁸⁶ Although a person may be able to satisfy these vague standards, the courts ultimately have discretion as to whether one falls into a social group,⁸⁷ which often makes it "impossible for a woman to qualify as a member of a social group based on her gender alone."⁸⁸

V. HOW CURRENT ASYLUM PRINCIPLES TREAT A CLAIM OF FEMALE GENITAL MUTILATION: *IN RE KASINGA*

The *Kasinga* decision illustrates a trend in the US to offer greater protection to women seeking asylum⁸⁹ based on their gender.⁹⁰ Fauzyia Kasinga was a 17-year old female who fled her native land, Togo, because she feared being subject to FGM.⁹¹ In a precedential decision, the BIA granted her asylum in the United States.⁹²

In *Kasinga*, the BIA applied traditional standards for evaluating persecution in order to recognize a harm that specifically affected women.⁹³ This case was the first time that the BIA, which has national jurisdiction, recognized FGM as a type of persecution.⁹⁴ This type of

85. Setareh, *supra* note 27, at 145.

86. Setareh, *supra* note 27, at 144.

87. Setareh, *supra* note 27, at 144.

88. Setareh, *supra* note 27, at 144.

89. Pamela Goldberg, *U.S. Law and Women Asylum Seekers: Where Are They and Where Are They Going?*, 73 Interpreter Releases 889, 897 (1996).

90. Musalo, *supra* note 2, at 853-54.

91. *In re Kasinga*, A73 476 695, Int. Dec. 3278 at 3. The applicant was scheduled to have an arranged marriage take place at the time she fled. She testified that her aunt, her legal guardian at the time, and the husband selected by her aunt planned to force her to undergo female genital mutilation before the marriage was officially consummated. The applicant was able to flee with her sister's help.

92. *Id.* at 1.

93. Anker, et al., *supra* note 14, at 1174.

94. *BIA Grants Asylum to Woman Fearing Genital Mutilation*, 73 Interpreter Releases 817, 818 (1996); *see More on IJ Decision Granting Asylum Based on Genital Mutilation*, 72 Interpreter Releases 1257, 1265 (1995) (showing at this point in time, there is little consistency with how FGM cases are decided in terms of what constitutes persecution); *see also Still More on Asylum Claims Relating to Female Genital Mutilation*, 72 Interpreter Releases 1365, 1375 (1995) (noting that although precedential for the BIA, FGM has been dealt with in immigration court. Immigration Judge Paul Nejelski held in *In Matter of M-K* that FGM constituted a form of persecution for asylum purposes. Yet, in a similar case known as *Matter of J*, Immigration Judge John F. Gossart, Jr. held that FGM did not constitute persecution); *see* 72 Interpreter Releases 1257 at 1265 (observing that Judge Gossart's reasoning was that although a woman could not change her gender, she could change her views against FGM and support her tribe's practice); *see* 72 Interpreter Releases 1365 at 1375 (stating that FGM did not constitute persecution on the basis of membership in a social group of women who opposed FGM); *see* 72 Interpreter Releases 1257 at 1265 (noting that these rulings show that there is little agreement among IJs as whether to view FGM as a form of persecution).

persecution was based on account of Ms. Kasinga's membership in a social group,⁹⁵ composed of young women from a particular tribe in Togo who had not undergone FGM and opposed the practice.⁹⁶ The BIA deemed the characteristic of having intact genitalia as one so pertinent to the identity of young females that they should not be forced to change it.⁹⁷ This in turn satisfied the social group definition which requires members of the group to share characteristics that they "either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities."⁹⁸ Ms. Kasinga thus satisfied the definition of a refugee, and the BIA further used its discretion and granted her asylum.⁹⁹

Although *Kasinga* opened the door for women with FGM cases to win asylum, it did so very narrowly. As mentioned above, the BIA granted Ms. Kasinga asylum based on persecution of a social group of women who, among other things, had "not been subjected to female genital mutilation."¹⁰⁰ The BIA in *Kasinga* did not want to create a "comprehensive analytical framework" based on this one case to assess all types of FGM cases.¹⁰¹

In doing so, the BIA failed to take into account those women who have already been forced to undergo FGM. "[W]hen a woman's sexual identity is attacked and violated, that is an immutable characteristic."¹⁰² Women who have been forcibly mutilated and oppose the practice should constitute a social group and thus be granted asylum. This Comment advocates reforming the interpretation of the legal element "persecution" so that women in this particular social group satisfy its definition.

95. Goldberg, *supra* note 89, at 895.

96. *In re Kasinga*, A73 476 695, Int. Dec. 3278 at 3.

97. *Id.* at 17.

98. *Id.*

99. *Id.* at 23.

100. *Id.* at 1.

101. *In re Kasinga*, A73 476 695, Int. Dec. 3278 at 27.

102. See Anker, et al., *supra* note 14, at 1181 (quoting *Matter of D-M*, A 40 379 801 (IJ New York, Nov. 22, 1993) at 12) (referring to a case where a woman was held captive for six months and repeatedly raped and where the IJ found that she was not persecuted "merely because of her gender, but because of the personal and inviolate component of her gender, which was her sexual identity").

VI. REFORMING PERSECUTION: TAKING INTO ACCOUNT GENDER-BASED CLAIMS OF PAST PERSECUTION

Suffering past persecution will not automatically guarantee a grant of asylum.¹⁰³ Once an applicant establishes that past persecution occurred on account of one of the five enumerated grounds,¹⁰⁴ a rebuttable presumption of future persecution automatically arises.¹⁰⁵

In determining whether this presumption is rebutted, the likelihood of present or future persecution becomes important.¹⁰⁶ Once an applicant establishes past persecution, the burden then shifts to the Immigration and Naturalization Service ("INS") which must then show that there is "little likelihood of present persecution"¹⁰⁷ and that the applicant no longer has a well-founded fear of persecution.¹⁰⁸ The Immigration Judge or BIA will look at changed country conditions to determine whether future persecution exists if the applicant were to return to her or his homeland.¹⁰⁹ If country conditions change so that a fleeing applicant no longer has a well-founded fear of persecution, that applicant will be denied asylum under this standard.¹¹⁰

103. *Draganova v. INS*, 82 F.3d 716, 721 (7th Cir. 1996). *In re S-P*, A72 971 091, Int. Dec. 3287 at 12 (noting that when dealing with civil wars, the Geneva convention prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" as well as "outrages upon personal dignity, in particular humiliating and degrading treatment"). The BIA has not granted asylum for violating the Geneva convention; however, violations of the Geneva convention may imply and support the notion that an applicant has been persecuted based on one of the five enumerated grounds. *Id.*

104. *Matter of Chen*, A26 219 654, Int. Dec. 3104, 5 (BIA, Apr. 25, 1989); *but see Singh*, 801 F. Supp. 313 at 322 (stating that if a petitioner establishes past persecution, she or he will be granted withholding of deportation if she or he can prove that clear probability of persecution still exists if she or he were forced to return).

105. *Matter of Chen*, A26 219 652, Int. Dec. 3104 at 5; see *In Re H-*, A73 149 072, Int. Dec. 3276, 14-5 (BIA, May 30, 1996) quoting C.F.R. sec. 208.13 (b) (1) (i) (noting that a "finding of past persecution gives rise to a regulatory presumption that the applicant has a well-founded fear of future persecution." The regulations state that an applicant who has established past persecution "shall be presumed also to have a well-founded fear of persecution unless a preponderance of the evidence establishes that since the time the persecution occurred conditions... have changed to such an extent that the applicant no longer has a well-founded fear." *Id.* quoting 8 C.F.R. sec. 208.13(b) (1) (i).

106. *Matter of Chen*, A26 219 654, Int. Dec. 3104 at 5.

107. *Singh v. Ilchert*, 801 F. Supp. at 322 quoting *Matter of Chen*, A26 219 654, Int. Dec. 3104 at 5.

108. *Id.* at 319.

109. *Matter of Chen*, A26 219 654, Int. Dec. 3104 at 5.

110. *Gutierrez-Rogue v. INS*, 954 F.2d 769, 772 (D.C. Cir. 1992). The Nicaraguan government changed while the asylum applicant's appeal was pending. The government that the applicant feared was no longer in power, therefore she no longer had a well-founded fear of persecution by that government if she were forced to return to her homeland. The applicant was then denied asylum. *Id.* at 771; see *Kazlauskas v. INS*, 46 F.3d 902, 906 (9th Cir. 1994) (stating that a well-founded fear of persecution has two components: subjective and objective. When country conditions change, the applicant no longer has a well-founded fear of persecu-

In *Kasinga*, the INS argued that women who have suffered FGM should not be eligible for asylum based on past persecution.¹¹¹ The INS reasoned that a woman who has already been mutilated cannot be mutilated again.¹¹² Therefore, like the changed country conditions standard, the presumption of a well-founded fear of future persecution arising from past persecution is successfully rebutted.¹¹³

This reasoning is flawed because it interprets persecution in a way that defines women by their body parts. When applying this current asylum standard to a female who has suffered FGM, the applicant will ultimately fail this prong for the definition looks upon her mutilation as being the end of her persecution. Rather, her mutilation signifies a starting point of her being persecuted within her society, as she is now officially seen as subordinate to men.

"Fundamental social or political changes in the applicant's homeland" are very important factors when determining whether future persecution exists.¹¹⁴ Although a mutilation has taken place, the social changes in the woman's native country have not changed. What has changed is the woman's body, and her mutilation serves as an enhancement of the patriarchal structures that are already in place. Her mutilation is a way in which men retain power and women remain oppressed. When interpreted in this manner, a genitally mutilated woman has a well-founded fear of future persecution that arises from her past persecution, and should thus be granted asylum.

Furthermore, the BIA in *Matter of Chen*, held that "we do not think that all chance of persecution on account of his religion has been eliminated by the change in regime since the Cultural Revolution."¹¹⁵ The basic form of the government had not changed and religious freedom was still not tolerated.¹¹⁶ The applicant was thus granted asylum.¹¹⁷ Along those lines, when a woman has been mutilated, the idea that she is subordinate in her society has not changed, and thus oppression of women is still tolerated.

tion that is objectively reasonable. Thus, the second prong is not satisfied, and the fleeing applicant will be denied asylum.); also see *Matter of H-M*, A28 746 038, Int. Dec. 3204, 13 (BIA, Aug. 11, 1993). The BIA ruled that the government had changed and the applicant had no well-founded fear in the new government. Thus, he failed the asylum standard set forth and was ultimately denied asylum.

111. *In re Kasinga*, A73 476 695, Int. Dec. 3278 at 25.

112. *Id.*

113. *Id.*

114. *Kazlauskas*, 46 F.3d at 906.

115. *Matter of Chen*, A26 219 652, Int. Dec. 3104 at 9.

116. *Id.*

117. *Id.*

A. Subordination

Before analyzing how FGM perpetuates the notion of women being subordinate to men, it is important to note that there is much controversy surrounding Western feminists' interpretation of FGM.¹¹⁸ Western feminists tend to view FGM as a form of "(male) societal control over female bodies," and therefore advocate that FGM must be stopped.¹¹⁹ Although this may be true for some feminists, not all women suffer the same types of oppression because they are women.¹²⁰ There are many women within Africa who do not wish to eliminate FGM. These African feminists focus on the cultural importance of FGM rather than the subordination elements.¹²¹

Although this viewpoint is very important and not to be trivialized, this paper will focus on the Western feminists' interpretation that FGM oppresses women. The recommendations made below emphasize a reformation of Western asylum law. As stated previously, this paper does not advocate changing the customs of other countries. Rather, it proposes changing US law so as not to further the idea of women being subservient to men.

Subordination of women can occur in different ways. For instance, FGM is a practice through which women are coerced "to accept the authority of men and suppress dissent against the idea of male supremacy."¹²² Females are oppressed¹²³ for a vital body part central to the young girl's sexuality is taken away.¹²⁴ The female has no choice in this continuous process because other people control her own reproductive system and sexuality.¹²⁵ FGM emphasizes the role of women as subordinates in a patriarchal society while maintaining the

118. Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 23 (1995).

119. Engle, *supra* note 21, at 1510; see Gifford, *supra* note 57, at 334 (noting that Western feminist Mary Daly asserts that women do not question male dominance because it is seated deeply in our consciousness and political order. Given this reasoning, men are able to maintain their position in the status quo without trying.)

120. Gifford, *supra* note 57, at 330.

121. Lewis, *supra* note 118, at 31-32; see Lenihan, *supra* note 21, at 957 (stating that one reason for FGM is that it is a tradition preserved within the culture of a particular group. Many times extensive ceremonies occur which emphasize the girl's initiation into that group); *But see* Engle, *supra* note 21, at 1510 (noting some African women who oppose FGM believe that governments listen to Western feminists more often, and thus are better able to influence the prohibition of FGM).

122. Isabelle Gunning, *Arrogant Perception, World Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 235 (1991-1992).

123. Setareh, *supra* note 27, at 124.

124. Lenihan, *supra* note 21, at 961.

125. Setareh, *supra* note 27, at 127.

status quo.¹²⁶ Although women themselves may promote FGM, in effect they are upholding male attitudes of oppressing and dominating women.¹²⁷ Furthermore, men cannot suffer certain types of abuses such as FGM.¹²⁸

1. Marriage as a Means of Economic Survival for Women in Africa

In some cultures, whether a woman can marry depends on whether she has been infibulated.¹²⁹ Throughout Africa, for instance, women need to marry in order to survive economically because employment outside the home is generally unavailable.¹³⁰ If a woman chooses to remain single, she will not have the financial and social resources necessary for her to live.¹³¹

Furthermore, marriage is often a way for females to improve the economic and social status of their families.¹³² Brides are considered valuable property, and often a woman's "bride-price" will depend on the size of her vaginal opening, with a smaller opening being more valuable.¹³³ If a woman is a virgin, she is considered to be a more desirable wife.¹³⁴ As a result, FGM is performed on young girls to preserve their virginity, so their value to their families will be greater when they are married.¹³⁵ This way, the family views its daughter's purity as "a marketable commodity, and the mutilation procedure an obvious way to protect the family's investment."¹³⁶

126. Setareh, *supra* note 27, at 129.

127. Setareh, *supra* note 27, at 131.

128. Setareh, *supra* note 27, at 124.

129. Corbin, *supra* note 51, at 1; see Gunning, *supra* note 122, at 215 (noting an example of this is in Sudan where it is necessary for a female to undergo FGM as a career move and that her chances of getting married are very low if she does not).

130. Corbin, *supra* note 51, at 1; see Gunning, *supra* note 122, at 246 (commenting that if women continue to believe that they will not get married if they are not mutilated, and that having a husband is the only way to have economic security, then women will continue to practice FGM).

131. Setareh, *supra* note 27, at 130; See Gunning, *supra* note 122, at 216 (observing that in addition to being forbidden to inherit money or property, a woman's children may also be killed if she is not mutilated).

132. HEDLEY AND DORKENOO, *supra* note 19, at 7 (acknowledging that female genital mutilation can secure economic status as well as enhance a family's social standing).

133. Corbin, *supra* note 51, at 1; see Hughes, *supra* note 20, at 322. An example of this is in Somalia where the smaller the hole left after FGM, the more money the girl is worth as a bride.

134. Lenihan, *supra* note 21, at 953.

135. Gifford, *supra* note 57, at 339; see Hughes, *supra* note 20, at 331-32. In various cultures FGM originated as a way to change females from common to private property along with controlling what was perceived to be females' sexual wishes.

136. Gifford, *supra* note 57, at 339.

At times, the family of the future husband inspects the young girl to ensure that FGM has occurred.¹³⁷ Some women in these cultures have premarital sex and then are re-infibulated prior to their wedding so as to appear virginal.¹³⁸

2. *Oppression of Women's Sexuality Through Female Genital Mutilation*

In addition to subordination through economic means, males oppress females through FGM sexually.¹³⁹ Controlling a woman's sexuality appears to be fundamental within many societies.¹⁴⁰ Disfiguring a woman's body via FGM, as well as the subsequent decrease in her sex drive are ways in which a woman's bodily and psychological integrity are destroyed.¹⁴¹ Prohibiting women from enjoying sex is arguably a form of male domination over women.¹⁴² FGM controls a female's sexuality and the gender characteristics that she identifies with.¹⁴³ Alice Walker, for instance, once observed that the clitoris challenges male authority and this is why it is so often destroyed.¹⁴⁴

Female genital mutilation is used to keep women faithful to their spouses by making sexual intercourse very painful, thus deterring women from engaging in sexual intercourse when they are not required to do so by their husbands.¹⁴⁵ Given this reasoning, the woman is reduced to her wound which becomes "a chastity belt of flesh."¹⁴⁶ It is important not to reduce women to components, but to see them as whole people.¹⁴⁷

137. HEDLEY AND DORKENOO, *supra* note 19, at 21.

138. Gifford, *supra* note 57, at 339.

139. Steele, *supra* note 20, at 114.

140. Lenihan, *supra* note 21, at 957.

141. Gunning, *supra* note 122, at 234. Sexual and bodily integrity are two issues that many Westerners, particularly feminists believe are important. This fact gives additional credibility to the idea of changing US laws so as not to re-enforce themes which degrade women.

142. Hughes, *supra* note 20, at 331-32.

143. Note, *What's Culture Got To Do With It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1955 (1993).

144. Steele, *supra* note 20, at 115; see ALICE WALKER AND PRATIBHA PARMAR, WARRIOR MARKS, FEMALE GENITAL MUTILATION AND THE SEXUAL BLINDING OF WOMEN 18 (1993). "Their [women] genitalia are unclean, it is said. Monstrous. The activity of the unmutated female vulva frightens men and destroys crops." See also Gifford, *supra* note 57, at 337 (commenting that many men in countries where FGM is practiced believe that the ideal woman is "silent, powerless and submissive").

145. See Lenihan, *supra* note 21, at 957 (concluding that if the clitoris is removed, there is the belief that a woman's sexuality will be controlled and she will remain faithful to her husband). But see also Note, *supra* note 143, at 1952 (observing in countries where FGM is practiced, the belief exists that the clitoris will cause a woman to uncontrollably command her husband to have sex with her. As the perception goes, when he cannot meet all of her demands, she will have an extra-marital affair, thus justifying the removal of her clitoris).

146. Gifford, *supra* note 57, at 340; see HEDLEY AND DORKENOO, *supra* note 19, at 7. The rationale is that if FGM occurs before marriage, a woman is in effect closed off until her wedding

Furthermore, the perception exists that if a woman's sexuality is controlled, she will not become promiscuous.¹⁴⁸ For this reason, FGM is practiced not only on unwed young girls, but also on widows, divorcees and married women whose husbands have been absent for long periods of time.¹⁴⁹ Additionally, if a woman is not circumcised correctly, either initially or when she is re-circumcised after childbirth, she risks losing her husband to other women (such as additional wives or prostitutes) or to divorce.¹⁵⁰ The ramifications of such a loss can be traumatic on an economic level as well as an emotional one.¹⁵¹

Another theory explains that in regions where men can have more than one wife, FGM is necessary to preserve the man's integrity.¹⁵² The rationale is that it would be impossible for the husband to satisfy all of the wives' sexual desires, therefore, the solution resides in lessening the woman's sexual appetite.¹⁵³ Other reasons for practicing FGM include enhancing male sexual desire and pleasure, and testing the husband's endurance and strength to see whether he can consummate the marriage in one night.¹⁵⁴ Thus FGM contributes to the notion that women are dominated by men.¹⁵⁵

3. *Myths about the Origins of Female Genital Mutilation*

There are several mythical stories in Africa that explain why FGM occurs.¹⁵⁶ These tribal stories perpetuate the idea that women must

night.

147. Gifford, *supra* note 57, at 340.

148. HEDLEY AND DORKENOO, *supra* note 19, at 21; see *Lifetime Consequences*, NATIONAL NOW TIMES, June 1994, at 12 (explaining the perception that if FGM does not occur, women's sexuality will be uncontrollable, thereby threatening men); see SALAM, *supra* note 20, at 7-8 (stating that FGM is practiced to control a young girl's behavior while also perceived to uphold female's morals).

149. HEDLEY AND DORKENOO, *supra* note 19, at 21.

150. Gunning, *supra* note 122, at 216. Control over female sexuality still persists in Western societies. *Id.* at 215.

151. Gunning, *supra* note 122, at 216.

152. *Lifetime Consequences*, *supra* note 148, at 12. In Sudan, a husband has complete control over his wives if they are infibulated.

153. *Lifetime Consequences*, *supra* note 148, at 12.

154. SALAM, *supra* note 20, at 7-8.

155. Setareh, *supra* note 27, at 127; see Burstyn, *supra* note 42, at C6. In addition to being mutilated, women are expected to be subservient to their husbands in other ways. In Togo, for instance, on the morning of a girl's wedding day, the groom's wives sit with the bride to be, explaining all that the husband will expect of her. Many young brides are told that they must be "deferential," and a ceremony to legally wed the young bride may take place without her consent. *Id.*

156. Steele, *supra* note 20, at 115-16.

be kept powerless to guarantee men's safety.¹⁵⁷ Some myths portray the clitoris as a dangerous animal-like object that will kill a man by either poisoning or eating his penis during sexual intercourse.¹⁵⁸ Other myths suggest that feminine and masculine souls are a part of every person, as represented in her or his sexual organs;¹⁵⁹ the clitoris apparently represents the masculine soul in the female.¹⁶⁰ Young people cannot enter the adult world without removing the "physical characteristics of the opposite sex."¹⁶¹ Thus, removing part or all of a female's genitals, justifies the practice of FGM.¹⁶² Additional cultures view women's sex parts as being "masculine," justifying removal of them in order to maintain men's attraction.¹⁶³ Themes of motherhood also serve as justifications for removing the clitoris. Some societies view the clitoris as an object of danger, which can injure a newborn.¹⁶⁴ Other cultures believe that women are naturally sterile, and FGM will make them fertile.¹⁶⁵

VII. SEVERITY OF PERSECUTION: AN ADDITIONAL WAY FOR FGM CLAIMS TO WIN ASYLUM

Although this Comment advocates reforming the current persecution standard as a way to encompass gender-based claims that have already occurred, there is one additional prong of the current asylum test that these claims may fall under. If past persecution has occurred and there is little likelihood of future persecution, an applicant may still be granted asylum for humanitarian reasons.¹⁶⁶ In *Matter of Chen*, the BIA stated that:

157. Steele, *supra* note 20, at 115-16. When women desire sex, the appropriate form of expression is often passive. Many women in Africa are not allowed to ask their husbands for sexual intercourse. Rather, they send their husbands smoke signals with fragrant oils or drop pans on the kitchen floor to signify their sexual wishes. *Id.* at 122.

158. Steele, *supra* note 20, at 115-16.

159. Slack, *supra* note 22, at 447.

160. Slack, *supra* note 22, at 447.

161. Slack, *supra* note 22, at 447.

162. Slack, *supra* note 22, at 447-48.

163. Slack, *supra* note 22, at 447.

164. Slack, *supra* note 22, at 448.

165. Slack, *supra* note 22, at 459.

166. *Matter of Chen*, A26 219 652, Int. Dec. 3104 at 5; see *In Re H-*, A73 149 072, Int. Dec. 3276 at 5 (stating that according to the INA, an applicant may be granted asylum based on a claim of past persecution); see also *id.* at 15 quoting 8 C.F.R. § 208.13 (b) (1) (ii) which states:

An application for asylum shall be denied if the applicant ... is determined not also to have a well-founded fear of future persecution ... unless it is determined that the applicant has demonstrated compelling reasons for being unwilling to return ... arising out of the severity of the past persecution.

It is frequently recognized that a person who — or whose family — has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee.¹⁶⁷

Thus, in order to assess whether an applicant suffered such a severe form of past persecution, the applicant must show that past persecution occurred based on one of the five grounds, and the INS must have successfully rebutted the past persecution claim by showing that country conditions have changed so that a well-founded fear of persecution no longer exists.¹⁶⁸

Courts are reluctant to define the level of atrocity needed to grant asylum based on past persecution.¹⁶⁹ Under case law, being harassed and ostracized, jailed for interrogation, arrested, beaten, and or fired from work are not sufficient levels of atrocity.¹⁷⁰

Although there is no exact formula, often the "extreme shame and psychological trauma" that accompany gender-based crimes constitute a level of past persecution severe enough to warrant a granting of asylum under this standard.¹⁷¹ Studies indicate that psychological harm results from FGM.¹⁷² Part of the reason why this type of trauma occurs is because the young girls were forced to undergo the process by their families, for whom there is a great amount of trust and love.¹⁷³ Psychological ramifications of FGM include low self-confidence, depression, sexual frustration, feeling victimized, and irritability that occurs over and over again.¹⁷⁴ According to Fran Hoken of Women's International Network, suicides in Upper Volta are

167. *Matter of Chen*, A26 219 652, Int. Dec. 3104 at 5; see *In Re H*, A73 149 072, Int. Dec. 3276 at 5 (showing recently, there have been several examples in which the BIA and federal courts have favorably applied this statute toward asylum applicants. Examples of recognizing past persecution include the following: see *Matter of D-V*, Int. Dec. 3252 (BIA 1995) (recognizing as persecution grievous harm suffered in Haiti in direct retaliation for activities on behalf of Aristide); *Matter of B*, Int. Dec. 3251 (BIA 1995) (recognizing that the 1988 arrest of a Mujahidin supporter in Afghanistan, and his subsequent interrogation and severe physical abuse constituted persecution).

168. Anker, et al., *supra* note 14, at 1177.

169. *Kazlauskas*, 46 F.3d at 906-7 (stating there is no minimal level of atrocity that must be proven to warrant a grant of asylum).

170. *Id.*

171. Anker, et al., *supra* note 14, at 1178. An applicant's psychological evaluation may serve as important evidence in determining the severity of past persecution.

172. Setareh, *supra* note 27, at 129.

173. Hughes, *supra* note 20, at 329-30.

174. Setareh, *supra* note 27, at 129; see HEDLEY AND DORKENOO, *supra* note 19, at 23 (noting that having undergone FGM may affect a child's developmental behavior with possible symptoms taking the form of restless, exaggerated singing, as well as feeling as if one must talk).

a result of the psychological trauma that stems from FGM.¹⁷⁵ These young women who kill themselves apparently cannot cope with sexual intercourse and childbirth after genital mutilation.¹⁷⁶

The INS has issued guidelines to its asylum officers on how to adjudicate women's asylum claims.¹⁷⁷ These guidelines recognize the possibility that women who have undergone FGM have suffered past persecution.¹⁷⁸ Specifically, they state that genital mutilation is a form of "mistreatment primarily directed at girls and women and [it] may serve as evidence of past persecution on account of one or more of the five grounds."¹⁷⁹ Additionally, the INS General Counsel has admitted that FGM is a way to manipulate female sexuality in order to preserve men's power.¹⁸⁰ The INS General Counsel also termed FGM as a severe violation of the body that should be regarded as satisfying asylum standards, even when the subjective intent is benign.¹⁸¹

For instance, *In Matter of M-K*, a woman who was forced to undergo FGM won asylum in the US on the notion that FGM, among other claims, constituted a severe form of past persecution.¹⁸² The IJ reasoned that:

[the] mutilation caused her serious physical and psychological harm, was contrary to her basic human rights as reflected in human rights conventions ratified, by Sierra Leone, and constituted discriminatory behavior that ... resulted in permanent sensory loss and difficulties in marital relations and delivery of children.¹⁸³

Although the woman in this case won asylum partly because of her claim of past genital mutilation, it must be noted that this was not the only claim her case was decided on. She also brought forth claims of severe domestic violence as well as being an active member of a political party.¹⁸⁴

When a woman has undergone FGM and fled her country, such an act does not automatically guarantee that she will be granted asylum under this current severity of persecution claim.¹⁸⁵ Although in the-

175. *Lifetime Consequences*, *supra* note 148 at 12.

176. *Lifetime Consequences*, *supra* note 148, at 12.

177. *In re Kasinga*, A73 476 695, Int. Dec. 3278 at 9.

178. Musalo, *supra* note 2, at 856.

179. *In re Kasinga*, A73 476 695, Int. Dec. 3278 at 9.

180. *Id.* at 17.

181. *Id.*

182. Anker, et al., *supra* note 14, at 1180.

183. Anker, et al., *supra* note 14, at 1180.

184. Anker, et al., *supra* note 14, at 1180.

185. Anker, et al., *supra* note 14, at 1177.

ory this standard has the potential to take into account gender-based claims of past persecution, in reality it seldom does. Thus, the current asylum test still needs to be reformed, and this humanitarian standard should only be relied on if a gender-based claim fails under the reformed version of the asylum test set forth in this Comment.

VIII. CONCLUSION

Female genital mutilation raises complex and controversial issues. Although FGM has been practiced for centuries, only recently has the US taken notice of the issues it raises. One reason that this issue has only recently grabbed the legal community's interest may be because women are gaining equality in the US and consequently, gender-based claims are now considered a higher priority than in years past.

Although the US is passing an increasing number of laws that reflect women's claims, there is still room for reform. There is a serious error in the way international human rights theory currently stands.¹⁸⁶ It is the notion that human rights are essentially defined by a male perception.¹⁸⁷ To rectify this flaw, international human rights theory needs to be redefined and re-conceptualized to take women's rights into account.¹⁸⁸ One way to do this would be to have women define their own rights.¹⁸⁹ For this to occur, there needs to be a recognition of the differences between women and men.¹⁹⁰

This could be accomplished by restructuring US asylum laws to consider gender-based issues. If the US refuses to grant asylum to women who have already been mutilated, then in effect it perpetuates the oppressive gender structures of other countries that it so often criticizes. The US is essentially punishing those women who are taking a stand against FGM and do not wish to return to the subordinate role in which the US perceives their society has placed them. If the US takes a position that women should not be oppressed, then it is necessary for its laws to reflect such a position.

Unfortunately, within the US, the notion that women are subordinate and need to be controlled is still prevalent.¹⁹¹ Many people still favor women not having control over their own bodies.¹⁹² The US

186. Engle, *supra* note 21, at 1520.

187. Engle, *supra* note 21, at 1520.

188. Engle, *supra* note 21, at 1520.

189. Engle, *supra* note 21, at 1520.

190. Engle, *supra* note 21, at 1520.

191. Gunning, *supra* note 122, at 210. This is indicated for instance by the abortion debate. *Id.*

192. Gunning, *supra* note 122, at 210. Sexual assault, pornography and prostitution are

government should stop perpetuating the notion that women are property via its asylum policies and start leading the way toward reform. Until this occurs, there will not be true equality between the sexes.

On one last note, many courts reason that by denying aliens asylum, they are upholding Congress' desire to limit the number of immigrants into the United States.¹⁹³ Although there tends to be an "anti-immigrant hysteria" in recent times,¹⁹⁴ in reality, those persons who are able to flee their homelands do not make up the majority. Often, those women who flee persecution are able to do so because they or their families have access to sufficient money.¹⁹⁵ Money and power are therefore major factors that separate those women who can leave an oppressive political or social environment from those who cannot.¹⁹⁶

United States asylum laws need to change in order to incorporate asylum claims that specifically affect women. The US needs to stop maintaining structures that view women in subordinate roles. Reforming asylum laws to take a woman's experience into account is a powerful change that is long overdue. The US should therefore grant asylum to women who have fled their countries because they have been genitally mutilated.

other forms of gender oppression which reduce women to their body parts, only to be violated. GIFFORD, *supra* note 57, at 331.

193. *Carvajal-Munoz*, 743 F.2d at 580.

194. *Musalo*, *supra* note 2, at 861.

195. *Goldberg*, *supra* note 89, at 896.

196. *Goldberg*, *supra* note 89, at 896.

