

FEMALE GENITAL MUTILATION* IN THE UNITED STATES: AN EXAMINATION OF CRIMINAL AND ASYLUM LAW

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* Female genital mutilation is frequently and inaccurately referred to as "female circumcision." In 1990, the regional conference of the Inter-African Committee voted that "female circumcision" did not accurately reflect the ritual practice and decided that it should be called "female genital mutilation." Marilyn Milos, NOCIRC NEWSLETTER, Fall 1993, at 2; see also Letter from Dr. Elizabeth Bowen, Professor, Morehouse Medical School, to Layli Miller Bashir (Aug. 1995) (on file with the *American University Journal of Gender & the Law*) (describing the anatomical effects of the ritual practice as a form of mutilation, not circumcision). For an in-depth discussion of the debate surrounding the proper terminology for the ritual see Hope Lewis, *Between Irva and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 4-9 (1995).

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She is only 15. Pregnancy was supposed to have been physically impossible; when she was just a little girl in Somalia, elders with sharp instruments and makeshift sutures and herbal potions had supposedly assured that.

She went into labor about 9 in the morning. Her water broke about 11. So when she got to the hospital about 4 p.m., she was quite far along. Doctors looked between her legs and gasped They'd never seen such a thing, they said. What was it? How did it open? Throughout the delivery, the attending physician kept a pair of scissors in her hand, snipping here and there around the thick, unyielding keloid scarring characteristic of people of African ancestry. Her sister said she was no expert, but that at home they cut upward and sideways. No, that can't be so, the doctors told her. When the baby's head finally ripped through, the new mother was a pitiable, jagged wound. It took an hour and a half to sew her back up. That is when she lost it. Though she had shown courage and stoicism that belied both her age and her terror, repeated injections of painkillers could not stop her screaming.

The ordeal in the hospital delivery room occurred last summer. In her sister's suburban Washington [D.C.] apartment, the Somali student slowly recovered, and she has since returned to her country, her genitals sewn shut again by American doctors, at her request More and more refugees from [Africa] are coming to the Washington [D.C.] area seeking asylum. They bring with them their children and their customs.¹

I. INTRODUCTION

Female genital mutilation (FGM) is a cultural practice performed in many African and some Asian countries on girls and young women

1. Mary Ann French, *The Open Wound*, WASH. POST, Nov. 22, 1992, at F1 (describing the birthing experience of a circumcised fifteen-year old Somalian girl).

as a rite of passage that results in the permanent excision of the clitoris and often produces serious medical complications and sometimes death.² Although FGM has traditionally been confined to the thirty countries where it originated,³ the World Health Organization recently declared that the practice of FGM by immigrants has made it a public health issue in Europe, Canada, Australia, and the United States.⁴ Although no studies accurately reflect the frequency of FGM in the United States,⁵ there are common reports of its occurrence.⁶ Despite the presence of this practice, the United States

2. MINORITY HEALTH IMPROVEMENT ACT OF 1994, 103d Congress, House of Representatives, Report 103-501, May 11, 1994, at 66 (noting that FGM is a dangerous practice because women and girls often experience immediate physical complications following the operation). Circumcised women typically experience immediate shock, as well as a lifetime of infections, bleeding, infertility, and severe pain during sexual intercourse and child birth. *Id.* at 68; *see also* discussion *infra* part IIA.

3. The African countries that practice FGM form a belt across the center of the continent from the Atlantic Ocean to the Red Sea, the Indian Ocean to the eastern Mediterranean. EFUA DORKENOO & SCILLA ELWORTHY, *FEMALE GENITAL MUTILATION: PROPOSALS FOR CHANGE* 11 (3d ed. 1992) (hereinafter DORKENOO & ELWORTHY). "This belt, with the exception of the Egyptian buckle, corresponds strikingly with the pattern of countries which have the highest child mortality rates." *Id.* Countries in Asia, including the Muslim populations of Indonesia, Malaysia, Bohra, India, Pakistan, Oman, South Yemen, and the United Arab Emirates, also practice FGM. World Health Organization, *Female Genital Mutilation: World Health Assembly Calls for the Elimination of Harmful Traditional Practices* (Geneva: WHO Office of Information, Press Release WHA/10, 12 May 1993), at 1.

4. U.N. *Calls for End to Female Genital Mutilation*, CHI. TRIB., May 5, 1994, at C2; A.M. Rosenthal, *Female Genital Torture*, N.Y. TIMES, Nov. 12, 1993, at A33 (noting that due to the expansion of immigration from about 30 countries, mostly in Africa, there is an increase in the likelihood of mutilation incidences in Europe and in the United States); *see also* Barbara Crossette, *Female Genital Mutilation by Immigrants Is Becoming Cause for Concern in U.S.*, N.Y. TIMES, Dec. 10, 1995, at A11 (reporting that "it is becoming apparent to health workers and lawmakers in the United States that the practice goes on here among immigrants from several of the 40 or more countries in Africa and the Middle East where mutilation is prevalent.").

5. *See* Karen Hughes, *The Criminalization of Female Genital Mutilation in the United States*, 4 J.L. & POL'Y 321, 323-24 (1995); *see also* Ellen Goodman, *A Grotesque Tradition*, BOSTON GLOBE, Oct. 19, 1995, at 19. Catherine Hogan, founder of the Washington Metropolitan Alliance Against Ritualistic FGM, likens the data on the prevalence of FGM to the early reports of incest. She suggests that the anecdotal and empirical data regarding the practice of FGM in the United States only represents the "tip of the iceberg." Linda Burstyn, *Female Circumcision Comes to America*, ATLANTIC MONTHLY, Oct. 1995, at 28, 30. Efforts to study the prevalence of FGM in the United States are thwarted by the limited contact that many African women have with United States physicians as a result of their fear of negative reactions to their mutilated condition. Massie Garb, *U.S. Doctors Seeing "Circumcised" Female Immigrants*, AM. MED. NEWS, Apr. 27, 1990, at 3.

6. 140 CONG. REC. S14242, S14244 (1994) (statement of Senator Reid) (noting that health care workers are seeing an increasing number of immigrants who have been subjected to FGM procedures). Meserak Ramsey, an immigrant nurse, was stunned to meet an 18 month old Ethiopian-American girl recovering from a circumcision performed in Washington, D.C. Crossette, *supra* note 4, at 11. Carol Horowitz, a Seattle, Washington internist, has treated more than 20 Somali refugees, most of whom were victims of the more severe form of mutilation—total infibulation. Sophronia Scott Gregory, *At Risk of Mutilation*, TIME, Mar. 21, 1994, at 46. At Grady Memorial Hospital in Georgia, a mother asked the head of obstetrics to perform FGM on her little girl. NOCIRC NEWSLETTER, Fall 1993, at 3. In Dallas, Texas, doctors are seeing the effects of FGM among the refugees from Somalia and Sudan who come to settle there. Colleen O'Connor & John Yearwood, *Ancient Ritual Modern Dilemma*, DALLAS MORNING

legal system has failed to sufficiently respond to it. As a result, the legal obligations of physicians faced with requests by parents to mutilate their daughters, or by women who have just given birth and wish to be reinfibulated, are unclear. Moreover, immigration and naturalization courts are reluctant to establish that FGM constitutes persecution necessary for refugee status. Several Western nations facing the growing prevalence of FGM in their countries, as a result of increased immigration from parts of Africa, have responded by outlawing the ritual⁷ and recognizing it as a form of persecution worthy of refugee status.⁸ The presence of FGM in the United States necessitates a legal reaction that enunciates a clear disapproval of the practice.

When contemplating an adequate United States legal response to FGM, it is important to understand the medical and cultural ramifications. Part II of this paper, therefore, explains the frequency of FGM, its medical definition, the physical complications associated with it, and the reasons commonly espoused for its maintenance.

Part III examines United States legislative efforts to eradicate FGM. This section discusses several state laws⁹ and a bill that is pending in the United States Congress that would classify FGM as a felony, and

NEWS, May 22, 1994, at 1F. The American Medical Association (AMA) officially recognizes that FGM is a problem facing many doctors in the United States. W. Douglas Kelton, *Female Genital Mutilation*, REPORT OF THE COUNCIL ON SCIENTIFIC AFFAIRS, CSA report 5 - I-94, at line 11-12.

7. FGM is punishable as child abuse under existing laws in Canada, France, the Netherlands, Belgium, and Switzerland. See *infra* notes 108-19 (noting that although these foreign laws do not explicitly outlaw FGM, the practice is punishable as child abuse); see *infra* notes 108-19 (noting that unlike other European countries, Great Britain and Sweden specifically make all forms of female circumcision illegal).

8. Canada granted refugee status to a Somali woman who fled her country with her 10 year-old daughter because she feared that the daughter would be subjected to genital mutilation. Clyde H. Farnsworth, *Canada Gives Somali Mother Refugee Status*, N.Y. TIMES, July 21, 1994, at A14. The French Commission for Appeals of Refugees recognized that female circumcision may be considered a form of persecution under the [1951] United Nations Convention Relating to the Status of Refugees. Valerie Oosterveld, *Refugee Status for Female Circumcision Fugitives: Building a Canadian Precedent*, 51 U. TORONTO FAC. L. REV. 277, 277 (1993) (stating that it is likely that the Canadian Immigration and Refugee Board will follow the decision of the French Commission for Appeals of Refugees and recognize that female circumcision is a form of persecution under the United Nations Convention Relating to the Status of Refugees).

9. Minnesota and North Dakota have passed laws making FGM a felony. MINN. STAT. ANN. § 609.2245 (West 1994) (providing that "whoever knowingly circumcises, excises, or infibulates, in whole or in part, the labia majora, labia minora, or clitoris of another is guilty of a felony" and that "consent to the procedure by a minor on whom it is performed or by the minor's parents is not a defense to a violation of this [law]"); N.D. CENT. CODE § 12.1-36-01 (1995) (specifying that "any person who knowingly separates or surgically alters normal, healthy, functioning genital tissue of a female minor is guilty of a class C felony). New York and Colorado have proposed similar bills. N.Y. S.B. 510, 219th Gen. Ass., 2d Sess. (1996) (pending in the New York legislature, this bill would make performing FGM on a minor a crime); John Sano, *Senate Targets Genital Removal Bill Which Would Ban Act Practiced by Some African Societies*, ROCKY MOUNTAIN NEWS, Jan. 30, 1996, at 8A.

require the development of outreach programs to educate immigrant populations who practice FGM of its health risks and its illegality.¹⁰ While such legislation is encouraging because it reflects a disapproval of FGM, its ability to actually curb the practice may be limited. The limitations of illegalizing FGM are reflected in the experience of Great Britain, which has had a statute categorizing FGM as a felony in their penal code since the mid-1980s.¹¹

Part IV examines United States refugee and asylum law and its response to FGM. United States immigration courts have not yet established whether a woman fleeing FGM may satisfy the definition of a "refugee" and subsequently receive a discretionary grant of asylum.¹² This section argues that a woman fleeing FGM may satisfy the statutory requirements for refugee status by demonstrating that FGM is a form of persecution and that the imposition of FGM is on account of her membership in a particular social group.¹³

II. A GENERAL DESCRIPTION OF FEMALE GENITAL MUTILATION

Female genital mutilation is practiced in more than thirty African and Asian countries.¹⁴ The World Health Organization (WHO) estimates that as many as 114 million girls and women are currently mutilated at the rate of two million per year or 6,000 per day.¹⁵ The ritual has been performed for over 2,500 years¹⁶ and appears to be spreading to populations who traditionally never engaged in

10. H.R. 941, 104th Cong., 1st Sess. (1995) (noting that the bill requires the government of the United States to carry out its obligations under the International Covenant on Civil and Political Rights by prohibiting FGM practices).

11. Prohibition of Female Circumcision Act of 1985, ch. 38, §§ 1(1)(a) and (b) (Eng.).

12. Jennifer Bingham Hull, *Battered, Raped and Veiled; The New Sanctuary Seekers*, L.A. TIMES, Nov. 20, 1994, at 26.

13. In order to prove a claim for refugee status the claimant must show that she has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Refugee Act of 1980, Pub. L. No. 96-212, §101(a)(42), 94 Stat. 102,102-3 (codified at 8 U.S.C. § 1101(a)(42) (1988)).

14. Stephanie Nebehay, *U.N. Calls for End to Female Genital Mutilation*, REUTERS, May 5, 1994; see *supra* note 3 and accompanying text (pointing out the African and Asian countries which practice FGM). For a list of countries where surgeries are performed, see Evelyn Shaw, *Female Circumcision: Perceptions of Client and Caregivers*, 33 J. AM. COLLEGES OF HEALTH 193, 194 (1985).

15. Julia Lieblich & Delia M. Rios, *Conference Targets Mutilation Rite*, PLAIN DEALER, Sept. 5, 1995, at 4E; see United Press International, *WHO Discusses Female Circumcision*, May 5, 1994 (noting that figures estimating the frequency of FGM are unreliable because a high number of girls and women die during or after the procedure); see also Anna Funder, *Deminitus Non Curat Lex: The Clitoris, Culture and the Law*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 417, 435 (1993) (noting that about 80 million women in Africa alone are genitally mutilated).

16. Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 525-26 (1993). Some researchers believe that FGM began in Egypt during pharonic times. Roger Kaplan, *Prisoners of Ritual*, 25 FREEDOM REV. 25, 26 (1992).

FGM.¹⁷ As a result, the number of FGM victims rise by about 5,500 a day or 2 million cases a year.¹⁸ While most girls are mutilated between the ages of four and ten, the age can range from a newborn to a woman on her wedding night to a mother who has given birth to her first child.¹⁹

A. *Defining Female Genital Mutilation And Its Effects*

There are several forms of FGM, which may vary in severity, but always result in irreversible damage to the clitoris and the consequent loss of tactile sensation and ability to achieve orgasm.²⁰ Some incorrectly compare the more mild forms of FGM to male circumcision;²¹ however, FGM would only be similar to male circumcision if the penis were amputated.²² Dr. Nahid Toubia, a Sudanese physician at the School of Public Health at Columbia University, advanced a system of classification that groups the most common forms of FGM into two broad categories: clitoridectomies and infibulations.²³ Type I clitoridectomy ("Sunna circumcision") is the least severe form of FGM and involves the partial or complete removal of the clitoris.²⁴ Type II clitoridectomy ("excision") involves the excision of the clitoris and part of the labia minora.²⁵ In a type III infibulation ("modified

17. Kaplan, *supra* note 16, at 26. It is not clear why FGM is spreading among groups of people who traditionally never performed FGM.

18. Deborah Charles, *Medical Group Calls For Ban On Female Circumcision*, REUTERS, Sept. 30, 1994.

19. Nahid Toubia, *Female Circumcision as a Public Health Issue*, 331 NEW ENG. J. MED. 712, 713 (1994).

20. *Id.* at 712; see also Sami A. Aldeeb Abu-Sahlieh, *To Mutilate in the Name of Jehovah or Allah: Legitimization of Male and Female Circumcision*, 13 MED. LAW 575, 594 (1994) (noting that the erotic function of an excised woman is destroyed forever because there is no surgical technique that will ever repair the mutilation). For further description of these operations, see also Isabelle R. Gunning, *Arrogant Perception, World-Traveling, and Multiple Cultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 194-95 (1991-92).

21. *Unkindest Cut*, THE SCOTSMAN, Sept. 13, 1993, at 14 (suggesting that, like FGM, circumcision should receive international condemnation); Barry Ellsworth, *Circumcising Babies*, N.Y. TIMES, Dec. 19, 1995, at A24. (reporting that "[i]t would be difficult for the United States to influence the debate on genital mutilation so long as the routine circumcision of baby boys is practiced in our hospitals").

22. "There is no similarity between male circumcision, a prophylactic measure recommended for boys in almost every society and female circumcision, the goal of which is to diminish, if not suppress sexual desire in women." Abu-Shalieh, *supra* note 20, at 577 (quoting Wedad Zenie-Ziegler, an Egyptian woman); see also MINORITY HEALTH IMPROVEMENT ACT OF 1994, H.R. Rep. No. 501, 103d Cong., 1st Sess., at 66 (noting that FGM is not analogous to male circumcision because the latter involves the removal of the foreskin of the penis only, and not other genital tissue) [hereinafter MINORITY HEALTH IMPROVEMENT ACT OF 1994]; Surita Sandosham, *Defining Circumcision*, N.Y. TIMES, Dec. 21, 1995, at A20 (rebutting the claim of equivalency between male and female circumcision).

23. Toubia, *supra* note 19, at 712.

24. Funder, *supra* note 15, at 435; Toubia, *supra* note 19, at 712.

25. Funder, *supra* note 15, at 435; Toubia, *supra* note 19, at 712.

infibulation") the clitoris, labia minora, and parts of the labia majora are removed and then the anterior two thirds of the labia majora are sutured together leaving a posterior opening.²⁶ The most severe form of FGM is a type IV infibulation ("total infibulation"). This involves the same amount of cutting as a type III, but the labia majora are sutured together to cover the urethra and the vagina, leaving a very small opening for the passage of urine and menstrual blood.²⁷

The conditions under which the operation is performed are often unsanitary and brutal.²⁸ The mutilation itself is frequently done by elderly women with poor eye sight who use dull razor blades, kitchen knives, or broken glass on young girls writhing in pain.²⁹ Usually no anesthetic is used.³⁰ Consequently, a little girl's body must be forcibly held down and her thighs pried open by up to five women.³¹ This practice results in a dangerous, unsanitary, and imprecise surgery.³² In the case of infibulation, the two sides of the vulva are sutured together by thorns or catgut, and the small opening left so that urine and blood may escape is preserved by the insertion of a tiny piece of wood or a reed.³³ After the operation, a mixture of herbs, earth, cow-dung, and ashes are rubbed on the genital area in order to stop the bleeding.³⁴ The incision may be treated daily with a native soap, palm oil, vaseline, kerosene, or even engine oil.³⁵ In order to prevent the re-opening of the wound, the legs of the girl are bound together from hip to ankle for up to forty days,³⁶ making it very difficult to walk or pass urine.³⁷

26. Funder, *supra* note 15, at 435; Toubia, *supra* note 19, at 712.

27. Funder, *supra* note 15, at 435; Toubia, *supra* note 19, at 712.

28. Funder, *supra* note 15, at 435; Abu-Sahlieh, *supra* note 20, at 578.

29. Kaplan, *supra* note 16, at 28 (describing the tools and methods used in the performance of genital surgeries); Abu-Sahlieh, *supra* note 20, at 577 (noting a Sudanese study that discovered that 64% of female circumcisions are done by traditional matrons, 35% by midwives, and only 0.7% by physicians).

30. Note, *What's Culture Got to Do With It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1947 (1993) (observing that the tools used in these operations are rarely sterilized and that the operations are usually done without anesthesia) [hereinafter *What's Culture Got to do With It?*].

31. Abu-Sahlieh, *supra* note 20, at 578; DORKENOO & ELWORTHY, *supra* note 3, at 7; Cipriani, *supra* note 16, at 526.

32. Kaplan, *supra* note 16, at 28.

33. DORKENOO & ELWORTHY, *supra* note 3, at 7; see also *What's Culture Got to Do With It?*, *supra* note 30, at 1947.

34. Kaplan, *supra* note 16, at 28.

35. *What's Culture Got To Do With It?*, *supra* note 30, at 1947.

36. W. Douglas Kelton, *Female Genital Mutilation*, REPORT OF THE COUNCIL ON SCIENTIFIC AFFAIRS, CSA Report 5 - I-94, at line 11-12.

37. French, *supra* note 1, at F01 (reporting how a young girl felt after being mutilated in her own words):

And then we went back to the house and they bind your two feet together, your legs like this, up here to your butt, so you don't break the stitch at night. Another thing

FGM frequently results in serious and prolonged physical complications.³⁸ A Kenyan study revealed that more than eighty percent of women reported at least one medical complication after undergoing FGM.³⁹ Other reports estimate that between fifteen and thirty percent of all girls and women who endure FGM die from bleeding or infections.⁴⁰ Common early side effects are severe pain⁴¹ and hemorrhaging which sometimes lead to shock and death.⁴² Other complications include wound infections, abscesses, ulcers, septicemia,⁴³ tetanus, and gangrene.⁴⁴

One serious long-term side-effect is hematocolpos, which is the acute retention of urine and menstrual blood resulting from infibulation.⁴⁵ This condition is very dangerous and may lead to

I remember vividly was trying to pass urine. That was so difficult. I held it and held it and held it for three or four days, and I got a bladder infection, and my mother and everybody came, and they were trying to make me go to the bathroom and stuff, and finally one night I must have fallen out of my bed and crawled like this until I was under the dining room table, and they found me there in the morning with urine running all over the place, so I must have done it in the middle of the night . . .

38. In addition to the physical complications are the inevitable psychological wounds that undergoing such a traumatic ordeal as FGM inflicts on young girls who are at an age where such experiences are comprehensible and memorable. *What's Culture Got to Do With It?*, *supra* note 30, at 1948.

I was seven years old when I was excised. I recall the stories from women of my village who spoke of this operation as if their whole life had stopped there and then. The atrocity of their descriptions and at the same time a feeling of inescapable doom had triggered such a panic in me that when the terror-laden day came, I began to vomit. What happened then is still excruciatingly burning my flesh, so much so that I often wake up in the middle of the night screaming and calling for my mother.

Abu-Sahlieh, *supra* note 20, at 578 (quoting the testimony of Samia, a Muslim girl born in a small Egyptian village close to the Sudanese border).

39. Susan Okie, *Female Circumcision Persists Tribal Rite Worries Kenyan Health Officials*, WASH. POST, Apr. 13, 1993, at A9.

40. See, e.g., H. Lightfoot-Klein, *Pharaonic Circumcision of Females in the Sudan*, 2 MED. & LAW 353, 356 (1983) (estimating that one-third of all Sudanese FGM victims die); Judy Mann, *Torturing Girls Is Not a Cultural Right*, WASH. POST, Feb. 23, 1994, at E13 (quoting Rosemary Mburu, a Kenyan gynecologist, who estimates that 15% of all circumcised females die of bleeding or infections).

41. One victim of FGM, who comes from an affluent family in northern Somalia, describes that her genital surgery was performed under sterile conditions, with anesthesia, antibiotics, and painkillers, and "even so, the pain was unbearable." Judy Steed, *Mission To Stop Female Genital Mutilation: Health Workers Fear Girls Could Die Because Of Practices Done In Secret*, TORONTO STAR, Nov. 13, 1994, at E4.

42. Toubia, *supra* note 19, at 713.

43. A "systemic disease associated with the presence and persistence of pathogenic microorganisms or their toxins in the blood." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1189 (26th ed. 1981).

44. Toubia, *supra* note 19, at 713.

45. Loretta M. Kopelman, *Female Circumcision/Genital Mutilation and Ethical Relativism*, 20 SECOND OPINION 55, 63 (1994). One study found that 21.65% of girls are unable to pass urine; 32.2% had long-term problems, with 24.54% suffering urinary tract infections and 23.8% suffering chronic pelvic infection. *Id.* at 58.

chronic pelvic infections, back pain, dysmenorrhea,⁴⁶ infertility, and urinary tract infections, which can result in urinary stones and kidney damage.⁴⁷ These side-effects may cause offensive odors and incontinence resulting in the ostracism of these women from their communities.⁴⁸

The most common long-term complication is the formation of dermoid cysts,⁴⁹ which form in the scar tissue and can grow to be "as small as a pea or as large as a grapefruit."⁵⁰ "The formation of keloids⁵¹ is another disfiguring complication that, like dermoid cysts, causes anxiety, shame, and fear in women who think that their genitals are regrowing in monstrous shapes or who fear they have cancer."⁵² Keloids cause ongoing, painful sexual intercourse and difficult child labor.⁵³ If the vaginal opening is too small, a woman must be cut open on her wedding night in order to allow for penetration.⁵⁴ In childbirth, she is often further opened to allow for the passage of the baby.⁵⁵ Both "procedures" result in extreme pain and additional scar tissue which enhance the development of keloids.⁵⁶

Childbirth creates additional risks, particularly among immigrants in the United States, since American physicians are not trained to deal with infibulated women.⁵⁷ American physicians may unnecessarily perform cesarean sections or further damage vaginal scar tissue by improperly cutting open an infibulation in order to allow for the birth of a child.⁵⁸ If an infibulated woman is not properly cared for during childbirth, complications including perineal tears,⁵⁹

46. "Painful menstruation . . . accompanied by great congestion of the uterus." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 412 (26th ed. 1981).

47. Toubia, *supra* note 19, at 713.

48. Toubia, *supra* note 19, at 713.

49. A dermoid cyst is a fluid filled cavity in the dermis layer of the skin resulting from an injury. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 363 (26th ed. 1981).

50. Toubia, *supra* note 19, at 713.

51. A keloid is "a sharply elevate, irregularly-shaped, progressively enlarging scar due to the formation of excessive amounts of collagen in the corium during connective tissue repair." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 695 (26th ed. 1981).

52. Toubia, *supra* note 19, at 713.

53. Toubia, *supra* note 19, at 713; *What's Culture Got to Do With It?*, *supra* note 30, at 1948 (describing how initial intercourse is a painful ordeal for an infibulated woman).

54. *What's Culture Got To Do With It?*, *supra* note 30, at 1948.

55. *What's Culture Got To Do With It?*, *supra* note 30, at 1948.

56. *What's Culture Got To Do With It?*, *supra* note 30, at 1948.

57. Toubia, *supra* note 19, at 714.

58. Toubia, *supra* note 19, at 714; *see, e.g.* French, *supra* note 1, at F1 (reporting the experience of a circumcised 15 year old girl from Somalia).

59. A perineal tear is a laceration of "the pelvic floor and the associated structures occupying the pelvic outlet." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 991 (26th ed. 1981).

vesicovaginal fistula,⁶⁰ and even fetal death may result.⁶¹ In an effort to prevent painful childbirth, some mutilated women eat less during pregnancy under the mistaken belief that if they ingest less food their baby will be smaller and be able to fit through their mutilated vagina with less pain.⁶² As a consequence of nutritional deficiencies, these women may become anemic and at risk of developing hemorrhages, infections, pre-term deliveries, and having low birth weight infants.⁶³

B. *Justifications for Female Genital Mutilation*

The rationale behind FGM is comprised of a matrix of superstitions, perceptions of gender roles, beliefs regarding health, and religious customs.⁶⁴ According to four independent studies, the primary reasons for performing FGM include: meeting a religious requirement; preserving group identity; protecting virginity and family honor by preventing immorality; helping to maintain cleanliness and health; and furthering marriage goals, including greater sexual pleasure for men.⁶⁵ While those values of cultural identity, morality, and family integrity are honorable, the use of FGM as a means to achieve them is unjustifiable.⁶⁶

The religious reasons cited for perpetuating FGM are unpersuasive because the practice is not explicitly mandated by either Islam or

60. A vesicovaginal fistula is "an abnormal passage or communication . . . from the bladder to the vagina." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 506 (26th ed. 1981).

61. Toubia, *supra* note 19, at 713; *What's Culture Got to Do With It?*, *supra* note 30, at 1948 (noting that infibulated women often have stillborn children, or children who have suffered brain damage from a lack of oxygen during a difficult delivery).

62. *Female Circumcision: State of World Health Organization Position and Activities*, Submitted to the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, June 1982, at 2.

63. *Id.* Anemia is further aggravated by the African custom of drinking large amounts of tea with meals, which inhibits the absorption of iron. *Id.* Another aggravation of anemia is the practice of women being fed last in the family, which frequently results in the women receiving the least desirable and smallest portions of food. *Id.*

64. 139 CONG. REC. H7546 (Oct. 7, 1993) (statement of Rep. Patricia Schroeder).

65. Kopelman, *supra* note 45, at 62. Four researchers conducted the studies: Asma El Dareer studied the Sudan in 1982; Raquiya Haji Dualeh Abdallah wrote about Somalia in 1982; Dr. Olayinka Koso-Thomas published research about Sierra Leone in 1987; and Daphne Williams Ntiri researched FGM in Somalia in 1993. *Id.* According to Kopelman, all four researchers agree that FGM is still practiced in these countries due to the lack of education about human sexuality. *Id.* "The overall consequence of these practices is total control over a woman's sexuality and reproductive system." *Id.*

66. Article 4 of the United Nations Declaration on the Elimination of Violence Against Women asserts that "states should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligation with respect to its elimination." Layli Miller Bashir, *New Trend in Addressing Violence Against Women*, 2 HUM. RTS. L. BRIEF 2 (1994). Specific abuses against women enumerated in the U.N. Declaration include FGM. *Id.*

Christianity, the two predominant religions of the countries where FGM is practiced.⁶⁷ While modesty and chastity are values embodied in both the Koran and Bible, neither religious text suggests that genital mutilation is a means that should be employed to reach that end.⁶⁸ Islam is the religion most associated with the regions where FGM is performed and its leadership has, on multiple occasions, refuted the notion that FGM is mandated by Muslim precepts.⁶⁹ In fact, in Saudi Arabia, the center of Islam, the practice is virtually unknown.⁷⁰ Furthermore, FGM predates Islam and can be traced to

67. *What's Culture Got To Do With It?*, *supra* note 30, at 1951; see also A.M. Rosenthal, *Female Genital Torture*, N.Y. TIMES., Nov. 12, 1993, at A33 (noting that although FGM is "decreed by no religion," it persists through generations, and 80 million women who are alive today have undergone the surgery.); Abu-Sahlieh, *supra* note 20, at 577 (noting that the United Nations Seminar in Ouagadougou, Burkina Faso, declared that "neither the Bible, nor the Koran recommend that women be excised").

68. Abu-Sahlieh, *supra* note 20, at 580.

"Religion, if authentic in the principles it stands for, aims at truth, equality, justice, love and a healthy wholesome life for all people, whether men or women. There can be no true religion that aims at disease, mutilation of the bodies of female children, and amputation of an essential part of their reproductive organs."

Abu-Sahlieh, *supra* note 20, at 583 (quoting Dr. Nawal El-Saadawi, an Egyptian woman who has been excised). Those who cite Islam as authorizing FGM rely on a Sunnah (a tradition established by the Prophet Mohammed that is considered an authority second only to the Koran) in which Mohammed advises a woman who performs FGM that the practice is allowed, although while cutting she must not "overdo it." Abu-Sahlieh, *supra* note 20, at 581.

Not only does Islam not prescribe FGM, but anything that would lessen a woman's sexual pleasure directly contradicts the teachings of Muhammad. Geraldine Brooks, *Against the Verses*, GUARDIAN, Mar. 11, 1995, at T12. Muhammad abhorred the kind of sexual repression required by Christianity's Monastic traditions. *Id.* When discussing that sex within marriage is to be enjoyed by both husband and wife, Muhammad especially encouraged foreplay, saying that when a man has sex with a woman without foreplay it is an impermissible form of cruelty toward women. *Id.*

69. Imam Ahmad Kutty, of the Islamic Foundation of Toronto says, "female circumcision is not a religious requirement for Muslims. Islam teaches one to be compassionate and caring." Judy Steed, *Mission To Stop Female Genital Mutilation Health Workers Fear Girls Could Die Because Of Practices Done In Secret*, TORONTO STAR, Nov. 13, 1994, at E4. "Even Prophet Mohammed did not circumcise his four daughters." *Attack on Female Circumcision*, SACRAMENTO BEE, at A14 (quoting Dr. Aida Abdel-Mohsen). But see John Lancaster, *Top Islamic University Gains Influence in Cairo; Al Azhar Reflects Revival of Fundamentalism*, WASH. POST, Apr. 11, 1995, A14 (reporting that Al Azhar Grand Sheik Gad al-Haq Ali, a religious authority at the oldest and most prestigious university in the Islamic world, issued a fatwa, or religious decree, supporting the continuance of female genital mutilation. He is currently being sued by the Egyptian Organization for Human Rights because of his advocacy of FGM.).

Advocates must remember that the Muslim world is geographically immense and that this area extends from west and north Africa, through the Middle East and the southern Soviet Union to Indonesia. Professor Abdullahi An-Na'im estimates that there are approximately 837 million Muslims currently living in this region. Abdullahi An-Na'im, *The Rights of Women and International Law in the Muslim Context*, 9 WHITTIER L. REV. 491, 493 (1987). As a result of the expansion and diversification of the Muslim cultural composition, he states that "Islam has tended to incorporate and assimilate the social customs and institutions of the various regions and communities which converted to Islam." An-Na'im, *supra* note 69, at 493. Consequently, the correlation between those nations that practice FGM and the predominance of Islam in those countries may be a coincidence of culture, rather than a dictate of religion.

70. Kaplan, *supra* note 16, at 26. The fact that FGM is virtually unknown in Saudi Arabia is perhaps more striking in light of the fact that similar practices have been performed in

the region surrounding the Nile River, which suggests Pharaonic rather than Islamic roots.⁷¹

The most frequently cited reason for the continuation of FGM is that it is a sacred and immutable tradition contributing to the maintenance of group identity.⁷² "The ability to identify with one's heritage and to enjoy recognition as a full member of one's ethnic group, with just claim to its social privileges and benefits, is very important to most African families."⁷³ An elderly Somali woman says that "there's a Somali proverb: if you stop a tradition, it's similar to making God mad."⁷⁴ Among those who practice FGM, obedience to traditions is very important in order to maintain standing within the community.⁷⁵ Consequently, giving up the practice is viewed as an intolerable deviation from the social mores of the community.

FGM is perceived by those who practice it to preserve virginity, prevent promiscuity, and, consequently, preserve family honor.⁷⁶ Parents who mutilate their female children frequently state that if they did not have to perform the procedure their daughters would be perceived as immoral, would be unable to find a husband, and would be ostracized from the community.⁷⁷ In affirmation of the impor-

Europe and the United States. Gunning, *supra* note 20, at 195.

71. Kopelman, *supra* note 45, at 62 (citing a 1982 study by Abdalla and a 1992 study by El Dareer); see also Kaplan, *supra* note 16, at 26 (noting that FGM is virtually unknown in both Saudi Arabia and Iran).

Widespread mutilation seems to have originated in Stone Age central Africa and travelled north, down the Nile, into ancient Egypt. It wasn't until Arab-Muslim armies conquered Egypt in the eighth century that the practices spread out of Africa in a systematic way, parallel to the dissemination of Islam, reaching as far as Pakistan and Indonesia. They drifted back to a few places on the Arabian Peninsula . . .

Brooks, *supra* note 68, at T12.

72. *What's Culture Got To Do With It?*, *supra* note 30, at 1949. In Nigeria, the tradition of FGM is a symbol of group identity. *Id.* Putting FGM in the context of a tradition, "is the most frequent reason that diverse ethnic groups cling fiercely to a practice that inflicts significant pain and suffering on women and girls." *Id.*

73. *What's Culture Got To Do With It?*, *supra* note 30, at 1949 (noting that a female who is not circumcised will be ostracized, even shamed, by her ethnic group).

74. French, *supra* note 1, at F1.

75. In Kenya, mothers said that because FGM is the only ritual for which women have full responsibility, giving it up would result in women losing an important role in the community. Okie, *supra* note 39, at A9 (noting that some Kenyan women are afraid that outlawing FGM will only drive the practice underground, so that women will fear bringing "girls to hospitals for treatment if they suffer complications"). A woman's economic status and survival may depend on her subjection to FGM in some cultures. For example, Professor Gunning reports that if a girl or woman remains uncircumcised in Sudan she has fewer prospects of getting married. Gunning, *supra* note 20, at 215.

76. *What's Culture Got To Do With It?*, *supra* note 30, at 1952. FGM merely "reinforces the mistaken notion that women should see their sexual impulses in terms of what suits men." *Id.* In fact, this control and subjugation of female sexuality implies that men have no similar responsibility to avoid promiscuity and uphold "family honor."

77. When a young girl gets married in Somalia, her parents call about 20 or 30 women to determine whether she has been "appropriately circumcised." French, *supra* note 1, at F1.

tance of maintaining family honor through the virginity of their daughters, a mutilated Somali woman living in the United States says that "the honor of a Somali family lies between the legs of a woman."⁷⁸ The reliance on FGM as a means of promoting chastity, however, implies that men lack the ability to control their own sexual behavior.⁷⁹ Further, the argument that FGM is a guarantor of virginity ignores the fact that women may be sewn back up before their wedding night.⁸⁰

The notion that FGM maintains cleanliness and health is medically inaccurate. To the contrary, FGM is documented for causing serious medical complications and sometimes death.⁸¹ No health benefits have been recognized by the medical community.⁸²

Some proponents of FGM believe that the narrower opening to the vagina left after mutilation is more pleasing to husbands.⁸³ Not only does this view ignore the excruciating pain a mutilated woman endures during sex in order to facilitate this heightened pleasure for her husband, but it also fails to recognize the possibility that sexual relations with a woman whose vagina is lined with scar tissue may be less, rather than more pleasurable.⁸⁴ Men may be further frustrated by sex with a mutilated woman because it can take up to two to three

Before her wedding, the girl's mother and the man's mother will open her "like a gift." *Id.*

78. French, *supra* note 1, at F1. In the rural areas of Egypt, the woman performing FGM delivers a certificate to her parents which verifies that their daughter has been circumcised so they can show it to the family of her prospective husband. Abu-Sahlieh, *supra* note 20, at 588.

79. *What's Culture Got To Do With It?*, *supra* note 30, at 1952. Not surprisingly, male fidelity is not similarly enforced. *Id.*

80. See Alison T. Slack, *Female Circumcision: A Critical Appraisal*, 10 HUM. RTS Q. 437, 457 (1988) (noting that the size of the opening left after infibulation is so small that intercourse cannot occur without the use of a knife or repeated attempts at penetration). Many women are reinfibulated after giving birth to make previous sexual encounters and births undetectable. *Id.* Likewise, even though it would be difficult for a nonvirgin to hide the reinfibulation process from the rest of her intimate community, "it is possible for an unmarried girl to have sexual intercourse and then be reinfibulated." *Id.*

81. See Toubia, *supra* note 19 (detailing the specific medical complications associated with FGM); and *supra* part IIA (describing the severe anatomical and health consequences of FGM).

82. MINORITY HEALTH IMPROVEMENT ACT OF 1994, *supra* note 2, at 66 (stating that there are no medical justifications for practicing FGM on healthy females); Abu-Sahlieh, *supra* note 20, at 595 (recognizing that there is no medical value in female circumcision, as opposed to male circumcision, because women do not have foreskin that may retain harmful germs and bacteria).

83. Supporting this notion is the Sunnah, records of what the prophet Mohammed said about the interpretation and application of Islam, which are often cited by the proponents of FGM. Mohammed is reputed to have said that FGM "brings more radiance to the face and it is more pleasant for the husband." Abu-Sahlieh, *supra* note 20, at 581.

84. According to Abu-Sahlieh, studies document that many men who cannot satisfy their wives sexually as a result of FGM resort to narcotics to maintain an erection long enough for her to reach orgasm. Abu-Sahlieh, *supra* note 20, at 595. Also, women may take hashish in order to elevate their own sexual drive. *Id.* An Egyptian magazine goes so far as to state that "if you want to fight against narcotics, ban excision." *Id.*

months in order to successfully penetrate a tightly infibulated woman.⁸⁵

Evidence supporting the espoused reasons for the maintenance of FGM is seriously lacking. None of the reasons given for the continuation of FGM are persuasive and all fail to justify the harmful mutilation and consequent medical complications that result from the practice of FGM. This is true, particularly in light of the United Nations Declaration on the Elimination of Violence Against Women, which prohibits the invocation of custom or tradition as a defense for violent acts against women.⁸⁶

III. UNITED STATES CRIMINAL TREATMENT OF FEMALE GENITAL MUTILATION

An increasing number of immigrants who practice FGM reside in the United States.⁸⁷ Currently, FGM is not outlawed, leaving many young girls and women unprotected from the serious medical and psychological harm that is caused by genital mutilation. The following section argues that FGM must be criminally prohibited.⁸⁸ It is recognized, however, that FGM may not be "legislated away" and that a comprehensive and culturally sensitive program of education must be instituted if FGM is to be effectively proscribed.

A. *The Right to Outlaw Female Genital Mutilation*

There is no constitutional obstacle to the United States prohibiting female genital mutilation.⁸⁹ While the Due Process Clauses of the

85. See Slack, *supra* note 80, at 453 (reporting that in some cultures the husband's penis is measured and a wooden replica is injected into her infibulated area, after which intercourse must occur frequently to prevent the closure of this wound).

86. Miller Bashir, *supra* note 66, at 2 (citing Article 4 of the December 1993 United Nations Declaration on the Elimination of Violence Against Women (CEDAW) which prohibits countries from articulating a cultural defense for violence against women. CEDAW specifically mentions FGM as an abuse against women.); see also Julie DiMauro, Comment, *Toward a More Effective Guarantee of Women's Human Rights: A Multicultural Dialogue in International Law*, 17 WOM. RTS. L. RPTR. (forthcoming, Apr. 1996) (examining the pros and cons of using CEDAW in a human rights campaign to eliminate the worldwide practice of FGM). Forty-one of the more than 100 countries which have ratified or acceded to CEDAW have entered substantive reservations to its provisions. DiMauro, *supra* note 86. Because many states are unwilling to submit to international law, DiMauro suggests pursuing international human rights standards from within each state using advocacy and education campaigns at the grassroots level. DiMauro, *supra* note 86.

87. See *supra* note 6 and accompanying text.

88. In May 1993, the World Health Organization, by unanimous vote, officially condemned all forms of FGM and resolved to end its practice. NOCIRC NEWSLETTER, *supra* note 6 at 1. Although Sweden, Switzerland, Britain, and Ontario, Canada outlaw FGM, and France and the Netherlands punish its perpetrators as child abusers, the United States has failed to take similar actions to protect women and girls from FGM. NOCIRC NEWSLETTER, *supra* note 6, at 1.

89. See Hughes, *supra* note 5, at 336-54 (demonstrating that a law prohibiting FGM would neither violate the constitutional right to privacy, nor the First, Fifth, and Fourteenth

Fifth and Fourteenth Amendments of the United States Constitution guarantee parents the fundamental right to raise and educate their children as they wish,⁹⁰ courts have been clear that parents may not endanger the lives or physical well-being of their children simply to raise them within the confines of their own culture.⁹¹ FGM is a practice that places the physical, as well as psychological, well-being of the child in danger; therefore, it may be constitutionally outlawed.

In *Wisconsin v. Yoder*,⁹² the Court supported Amish parents' rights to remove their children from school after eighth grade in spite of their child's desire to remain in school. While giving the parents plenary authority over the upbringing of their children, the Court clarified that there were circumstances under which the government may intervene to protect a child by stating that "this case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred."⁹³ The Court explained that the Amish child may, later in life, choose to deviate from her parents' beliefs and obtain a higher level of education.⁹⁴ Thus, the 'reversible' nature of the parents' imposed beliefs on the child is an important factor in finding that the parents may exercise their will over the desires of the child. If there is an indication that the parents' beliefs and cultural practices inflict permanent physical or

Amendments).

90. See *Parham v. J.R.*, 442 U.S. 584, 604 (1979) (holding that parents maintain "plenary authority" over their children "absent the finding of neglect or abuse"); *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972) (holding that Amish parents may remove their children from school in order to raise them according to their beliefs).

91. *Parham*, 442 U.S. at 603 (holding that the state may intervene in parental authority where the physical or mental health of the child is jeopardized); *Prince v. Massachusetts*, 321 U.S. 158, 169-70 (1944) (stating that "[p]arents may be free to become martyrs themselves. But it does not follow that they are free . . . to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."); *Yoder*, 406 U.S. at 230 (noting that the holding in this case, allowing for Amish parents to remove their children from school, would be different if any harm to the physical or mental health of the child could be demonstrated or properly inferred).

92. 406 U.S. 205 (1972).

93. *Id.* at 230.

94. *Id.* at 236.

mental harm to the child, such practices may be proscribed by the state.⁹⁵

FGM results in the permanent disfigurement of a girl's genitalia; thus, it is an irreversible injury to the child's physical and mental well-being that warrants state intervention. Unlike the Court's decision in *Yoder v. Wisconsin*, which involved a parental decision to limit the education of a child, FGM may never be reversed later in life if the child independently chooses to deviate from the moral choices of her parents.⁹⁶ Consequently, unlike other parental choices that are constitutionally protected, FGM results in the permanent physical harm of a child and may therefore be proscribed without interfering with the parents' fundamental right to educate and raise their children.⁹⁷

B. Attempts to Outlaw Female Genital Mutilation

As Americans become more aware of the presence of FGM in the United States, voices of protest echo in many legislative halls throughout the country.⁹⁸ While legislation is an important element in promoting the elimination of the practice among immigrants to the United States, the experience of other countries which have already outlawed FGM demonstrates that legislation alone will not succeed in ending the practice.⁹⁹ Rather, a comprehensive program of education must be provided to immigrant communities which practice FGM in a manner that is sensitive and respectful of their culture.

1. State Laws

There are several initiatives at the state level to outlaw female genital mutilation. In March of 1994, Representative Barbara Clark introduced a bill to the New York state legislature that would ban FGM and appropriate funds for education regarding its physical

95. *Id.*

96. Abu-Sahlieh, *supra* note 20, at 594 (noting that "[t]here is no surgical technique which will ever repair this mutilation, will ever bring back the erogenous sensitivity of the amputated receptors. The erotic function in an excised woman is destroyed forever.").

97. See generally Patricia Schroeder, *Female Genital Mutilation - A Form of Child Abuse*, 331 NEW ENG. J. MED. 739 (1994) (explaining how cases like *Prince* and *Yoder* "provide a good guide to the extent to which the courts can intervene when parents endanger their children for reasons not protected by special rights").

98. See *supra* notes 9-10.

99. See discussion *infra* part III.C. (examining the United Kingdom's experience with outlawing FGM).

effects.¹⁰⁰ In January 1996, Senator Dorothy Rupert led the unanimous passage of a bill in the Colorado state Senate which would outlaw FGM.¹⁰¹ A current law in Illinois classifies ritual mutilation as a felony and may be construed to prohibit FGM.¹⁰²

Minnesota and North Dakota, however, have passed laws that explicitly prohibit FGM. Minnesota's statute states that unless the surgery has been performed for medical purposes,

whoever knowingly circumcises, excises, or infibulates, in whole or in part, the labia majora, labia minora, or clitoris of another is guilty of a felony. Consent to the procedure by a minor on whom it is performed or by the minor's parent is not a defense to a violation of this subdivision.¹⁰³

The law requires that the commissioner of health carry out "education, prevention, and outreach activities in communities that traditionally practice female circumcision, excision, or infibulation" in order to inform them of the health risks associated with FGM and the criminal penalties that accompany the practice.¹⁰⁴ The North Dakota law illegalizes any surgical alteration of the genitals of a female minor, but does not provide for educational or outreach efforts.¹⁰⁵ While these bills are important initiatives to criminalize FGM, their actual effects may be minimal due to the lack of appropriated funds.¹⁰⁶ As the first laws of their kind in the United States, their effectiveness is being closely monitored.

100. N.Y. S.B. 510, 219th Gen. Ass., 2d Sess. (1996); Sophronia Scott Gregory, *At Risk of Mutilation*, TIME, Mar. 21, 1994, at 45 (comparing the bill's provisions to Colorado Representative Pat Schroeder's national efforts to outlaw FGM). About 10,000 women per year emigrate to New York City from countries where FGM is common. Jessica Ancker, *Bill Would Make New York First to Ban Female Circumcision*, ASSOCIATED PRESS, Mar. 1, 1994.

101. John Sanko, *Proposal Prohibits Genital Mutilation Measure Brands Procedure on Girls Blatant Child Abuse*, ROCKY MOUNTAIN NEWS, Jan. 25, 1996, at 8A.

102. ILL. ANN. STAT. ch. 720, para. 12-32, (Smith-Hurd 1994). Under paragraph 12-32(a) "[a] person is guilty of ritualized abuse of a child when he or she commits [prohibited] acts with, upon, or in the presence of a child as part of a ceremony, rite or any similar observance." *Id.* Subsection (1) prohibits actual or simulated torture or mutilation of human beings. *Id.* Even though the bill specifically excludes circumcision from inclusion as a ritual mutilation, it may be construed to prohibit FGM, because medical as well as official government classifications of FGM indicate that it is not a form of "circumcision," but rather a form of mutilation. See Toubia, *supra* note 19, at 713 (refuting that FGM is a form of circumcision). At the regional conference of the Inter-African Committee in 1990, a vote by all official members determined that female "circumcision" was an inadequate description and female genital mutilation was more accurate. Milos, NOCIRC NEWSLETTER, *supra* note 6, at 2.

103. MINN. STAT. ANN. § 609.2245 (West Supp. 1995).

104. *Id.* at § 144.3872.

105. N.D. CENT. CODE § 12.1-36-01 (1995).

106. *Id.* (stating that the health commissioner should "work with culturally appropriate groups to obtain private funds to help finance these prevention and outreach activities").

2. Federal Law

Representative Patricia Schroeder introduced the "Federal Prohibition of Female Genital Mutilation Act of 1995" on February 14, 1995 to the United States Congress. The Act would protect girls under eighteen from FGM in order to carry out certain obligations under the International Covenant on Civil and Political Rights.¹⁰⁷ Modeled after a law in the United Kingdom that proscribes FGM,¹⁰⁸ the bill would impose a fine and jail sentence of up to five years for anyone convicted of performing the procedure.¹⁰⁹ In an attempt to remedy the defect in information regarding FGM in the United States, the bill requires that the Secretary of Health and Human Services "compile data on the number of females living in the United States who have been subjected to female genital mutilation."¹¹⁰

107. H.R. 941, 104th Cong., 1st Sess. (1995). See generally Ben Johnson, *No Excuse for Female Circumcision*, CHI. SUN-TIMES, Mar. 30, 1994, at 45 (describing the Women's Health Equity Act).

108. Mann, *supra* note 40, at E13 (noting that Great Britain outlawed FGM in 1985 based on a BBC documentary revealing how British physicians were mutilating immigrant girls). It should be noted, however, that even though FGM is a criminal offense in Great Britain, and is punishable by five years in prison, "there has been no prosecution in the nine years since the law was passed and social workers say the practice has merely been driven underground." Julie Flint, *The First Cut*, THE GUARDIAN, Apr. 25, 1994, at 58.

109. H.R. 941, 104th Cong., 1st Sess. § 116 (1995). Various health organizations have declared that FGM is considered medically unethical, regardless of the presence of a law prohibiting it. The World Health Organization has declared that it is unethical for a physician to perform FGM. *Female Circumcision: State of World Health Organization Position and Activities, Submitted to the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities* (Press Release WHA/10, June 1982) ("WHO has consistently and unequivocally advised that female circumcision should not be practiced by any health professionals in any setting - including hospitals or other health establishments"). In May 1993, at its annual assembly of 185 nations, the WHO unanimously condemned FGM in all its forms and announced its resolve to put an end to the practice. NOCIRC Newsletter, *supra* note 6, at 1. Also, The International Federation of Gynecology and Obstetrics also passed a resolution in 1994 that called on all doctors to refuse to perform FGM. Carolyn Adolph, *Doctors Must Become Advocates For Women, Conference Is Told*, THE GAZETTE (MONTREAL), Oct. 1, 1994, at A3. The resolution states that "FGM is a violation of human rights, as a harmful procedure performed on a child who cannot give informed consent." Deborah Charles, *Medical Group Calls For Ban On Female Circumcision*, REUTERS, Sept. 30, 1994. Policy 525.987 (A-91) of the American Medical Association (AMA) states that the AMA "opposes all forms of medically unnecessary surgical modification of female genitalia." *Report of the Council on Scientific Affairs*, CSA Report 5 - I-94. AMA policy also recommends that:

(1) The AMA supports legislation to eliminate the performance of female genital mutilation in the United States and to protect young girls and women at risk of undergoing the procedure.

(2) Physicians who are requested to perform female genital mutilation on a patient provide culturally sensitive counseling to educate the patient and her family members about the negative health consequences of the procedure, trying to discourage them from proceeding. If possible, physicians should refer the patient to social support groups that can help them cope with changing societal mores.

Id.
110. H.R. 941, 104th Cong., 1st Sess. § 116 (1995); see generally Joleen C. Lenihan, A Physician's Dilemma: Legal Ramifications of an Unorthodox Surgery, 35 SANTA CLARA L. REV. 953 (discussing the legal and ethical ramifications of physician-assisted FGM); .

According to the bill, the Secretary of Health and Human Services would also identify ethnic communities in the United States which practice FGM, carry out outreach activities "designed and implemented in collaboration with representatives of the ethnic groups practicing such mutilation" to educate communities on the physical and psychological effects of FGM, and "develop recommendations for the education" of medical students regarding FGM.¹¹¹

Tacit support for the bill exists, as evidenced by its introduction and reintroduction to the United States Congress for the past three years, although politicians have not yet determined that FGM is an issue significant enough to warrant immediate action.¹¹² Even if the Congressional bill passes, there is strong evidence, provided by the experience of other countries who have outlawed FGM, that mere illegalization of FGM will not eradicate the practice.

C. *The Potential Effectiveness of a Law Prohibiting Female Genital Mutilation: An Examination of the British Experience*

Many Western nations have laws in their penal code that either implicitly or explicitly outlaw FGM. In Canada,¹¹³ France,¹¹⁴ The Netherlands,¹¹⁵ Belgium,¹¹⁶ and Switzerland,¹¹⁷ FGM is punishable as child abuse under existing laws. In Britain¹¹⁸ and Sweden,¹¹⁹ FGM is explicitly outlawed. The law pending in the United States Congress is modeled after the British law; thus, Britain's

111. *Id.*

112. See 141 CONG. REC. H1751 (1995) (introducing legislation prohibiting FGM); 140 CONG. REC. H302 (1994) (introducing legislation prohibiting "female circumcision" under the International Covenant on Civil and Political Rights); 139 CONG. REC. H7670 (daily ed. Oct. 7, 1993) (introducing legislation prohibiting FGM).

113. Justice Minister Allan Rock said that Canada does not need a specific law to prohibit FGM because it is an offense under existing provisions in the Criminal Code. *Genital Mutilation Already Illegal*, THE GAZETTE (Montreal), Apr. 12, 1994, at B1. Deputy Prime Minister Sheila Copps insists that FGM is already against the law in Canada under child abuse provisions of the Criminal Code. Allan Thompson, *Mutilating Girl's Genitals Is Illegal, Copps Says*, THE TORONTO STAR, Oct. 4, 1994, at A10.

114. France is the only country in the world to prosecute those who carry out FGM. Kathryn Hone, *Tackling Africa's Ritual of Female Circumcision*, IRISH TIMES, Oct. 12, 1994, at 10. In September, 1994, a Paris court gave a suspended sentence to a Malian woman who carried out at least 30 mutilations pursuant to a child abuse law. *Id.*

115. NOCIRC Newsletter, *supra* note 6, at 1 (noting that, in the Netherlands, FGM is punishable as child abuse under existing laws).

116. Toubia, *supra* note 19, at 715 (noting that in Belgium FGM is illegal under existing laws).

117. Abu-Sahlieh, *supra* note 20, at 600 (citing Article 122 of the Swiss Penal Code as effectively illegalizing FGM).

118. Prohibition of Female Circumcision Act, 1985, ch. 38, §§ 1(1)(a) and (b) (Eng.).

119. Sweden passed a law in 1982 that makes all forms of female circumcision illegal. Toubia, *supra* note 19, at 715; see also T.B.E. Ogamien, *A Legal Framework to Eradicate Female Circumcision*, 28 MED. SCI. LAW 115, 117 (1988).

successes and failures provide important information regarding the potential effectiveness of a United States law prohibiting FGM.

In 1985, Britain passed the "Prohibition of Female Circumcision Act," which makes it "an offense for any person to excise, infibulate or otherwise mutilate the whole or any part of the labia majora or labia minora or clitoris of another person" or to "aid, abet, counsel or procure the performance by another person of any of those acts on that other person's own body."¹²⁰ While prohibiting FGM, the Act does allow for those legitimate operations necessary for the physical health or, when necessary, for the mental health of a woman.¹²¹ Even though the Act has been in the British Code for over ten years, it has not facilitated even one conviction.¹²² Moreover, social workers claim that since the law was passed the practice has merely gone underground.¹²³ The lack of prosecutions, despite the continued mutilation of girls in England, calls into question the law's effectiveness.¹²⁴

The lack of prosecutions under the British law banning FGM are attributable to several factors including: the failure to effectively address the cultural underpinnings of FGM, the difficulty of acquiring sufficient evidence against the parents, and the fact that the majority of those performing FGM are not licensed medical practitioners and thus, are not easily regulated. An understanding of the reasons for the Act's failure to end FGM in England is important in order to avoid similar loopholes under a United States law.

Education aimed at the cultural perceptions surrounding the benefits of FGM is regarded as the single most important factor in combating the practice.¹²⁵ As many ethnic communities within a larger dominant Western culture feel the need to preserve their

120. Judith S. Seddon, *Possible or Impossible?: A Tale of Two Worlds in One Country*, 5 YALE J.L. & FEMINISM 265, 269 (1993) (quoting the Prohibition of Female Circumcision Act, 1985, ch. 38, §§ 1(1)(a) and (b) (Eng.)).

121. *Id.* at 271 (commenting that the exception for mental health "has caused considerable controversy"). The bill proposed by Rep. Patricia Schroeder outlawing FGM also provides for those operations necessary for the health of the person, but excludes the portion of the British law that allows for operations in order to maintain the mental health of a woman. H.R. 941, 104th Cong., 1st Sess. § 116, para. (b)(1) (1995).

122. See Flint, *supra* note 108, at 10. Scotland Yard is investigating the case of a physician, Dr. Farouk Hayder Siddique, who charges 400 pounds to perform FGM. Other reports of mutilations of children have also been investigated, but the government has yet to prosecute anyone. Seddon, *supra* note 120, at 273.

123. Seddon, *supra* note 120, at 273. "Health workers fear that FGM is becoming a 'business' in Britain, offered as a cheaper alternative to 'holidays' in the Middle East or Africa." *Id.* at 273.

124. Efua Dorkenoo, the head of the Foundation for Women's Health, Research and Development (FORWARD International) in London, believes as many as 10,000 girls in England are at risk of being mutilated. Kaplan, *supra* note 16, at 26.

125. Seddon, *supra* note 120, at 279; Ogiemien, *supra* note 119, at 117.

cultural traditions, such education must be carried out in a delicate and sensitive manner.¹²⁶ Discussions about FGM that categorize it as a form of child abuse are likely to place the immigrant communities practicing FGM on the defensive,¹²⁷ because it "suggests that women who permit the operation are incompetent and abusive mothers who, in some ways, do not love their children."¹²⁸ An educational program will be successful if it is carried out in a manner similar to that promised by Rep. Patricia Schroeder, when she stated that, in applying the law, "we must make it clear - they and their rich and proud cultures are welcome in the United States, but the practice of FGM is not."¹²⁹

A formidable obstacle to prosecution under the British law banning FGM is the difficulty of gathering adequate evidence, which would often require a victim to testify against her own family.¹³⁰ Among those cultures practicing FGM, family honor, unity, and loyalty are ardently safeguarded. Requiring that a family member betray her family by publicly denouncing an ingrained cultural value in court is a difficult request. One way to mitigate this predicament is to require that both the victim and her family remain anonymous. Even with the guarantee of public anonymity, however, presenting evidence against one's family will require a tremendous amount of courage.

Another impediment to effective use of the British law banning FGM is the fact that the majority of FGM surgeons are not licensed medical practitioners, and thus, are not easily monitored.¹³¹ For some, the nature of the operation requires ritual that is not easily facilitated in a hospital setting, therefore, formal medical establishments are not frequently utilized in performing FGM.¹³² A promising way to combat this dilemma is to effectively educate the ethnic communities practicing FGM on the negative health conse-

126. See generally DiMauro, *supra* note 86 (pointing out how some Nonwestern activists resent the impassioned rhetoric of Western advocates who seek to eradicate a cultural tradition about which they do not fully understand).

127. Flint, *supra* note 108, at 10 (quoting Sadia Ahmed, a Somali sociologist at Oxford House, a community resource center in Tower Hamlets, East London).

128. Kay Boulware-Miller, *Female Circumcision: Challenges to the Practice as a Human Rights Violation*, 8 Harv. Women's L.J. 155, 166 (1985).

129. 139 CONG. REC. H7546 (1993) (statement of Rep. Patricia Schroeder).

130. Seddon, *supra* note 120, at 273.

131. Ogiemien, *supra* note 119, at 115 (stating that efforts to control the situation are further hindered by the fact that "the entire organization is shrouded in secrecy, mysticism and tribalism"). Abu-Sahlieh, *supra* note 20, at 589 (noting a Sudanese study that discovered that less than one percent of female circumcisions are actually performed by physicians).

132. The traditional nature of the operation requires secrecy and mystery and precludes legislation from having much effect; therefore, other preventative methods, such as greater social intervention and awareness of the practice, must also be implemented. Seddon, *supra* note 120, at 279.

quences of the operation, so that they refuse to perform the operation themselves.¹³³

A United States law banning FGM could be successful if the lessons learned from the insufficiency of the British law are heeded. Attempts to merely legislate away FGM will fail. If, however, a comprehensive program of education, judicial propriety, and cultural sensitivity is effectively administered, the practice of FGM will invariably decrease among the immigrant populations in the United States. Ultimately, the eradication of FGM will not come as a consequence of its criminalization. Only through a cultural transformation, initiated and developed by people within those cultures that practice FGM, can the procedure be eliminated. Legal action is, however, imperative as an affirmative statement by the United States that those who attempt to transform their culture and resist FGM will be supported in court and that those young girls, who have no authority to decide the fate of their own reproductive health and, in some cases their survival, will be protected.

IV. UNITED STATES ASYLUM LAW RESPONSE TO FEMALE GENITAL MUTILATION

Fauziya's Story

Fauziya was seventeen years old and a member of a tribe in Togo that practices female genital mutilation. Her father was opposed to the practice and protected Fauziya's older five sisters from FGM, educated them, and saw to it that they entered into monogamous marriages with men outside of their tribe. Fauziya was the youngest daughter and was still finishing her education when her father died and, according to tribal tradition and locally enforced law, left her under the guardianship of his sister. The father's family had always been angry that Fauziya and her sisters did not conform to tribal norms and they took the opportunity after the father's death to impose conformity on Fauziya.

Fauziya's mother was banished from the family and forbidden to see her. Fauziya was forcibly removed from school and informed that she was sold into a marriage with a 45 year old former politician as his fourth wife. As a condition of the marriage, Fauziya was to be mutilated prior to its consumation. Fauziya opposed the marriage and the mutilation, but she was not given a choice in either matter. The wedding ceremony was performed

133. Seddon, *supra* note 120, at 287 (stating that "[o]nly when the women themselves begin to perceive female circumcision as harmful will the practice end").

and, although she refused to sign the certificate, she became lawfully married. She was being kept in a former storage room to await the arrival of the circumciser when her sister arrived with \$3,000 from her mother to help her escape. They drove across the border into Ghana where Fauziya was able to board the only plane leaving that night for Germany. Upon recognition of her disappearance her husband enlisted the assistance of the police, who questioned her sisters and mother about her whereabouts. She had family in the United States and, once in Germany, was able to purchase someone else's passport in order to board a plane bound for America. After arriving at the Newark International Airport, she affirmatively requested asylum.¹³⁴

An increasing number of women who reject FGM and defy the social mores of their respective countries are seeking asylum in the United States.¹³⁵ Despite the international community's unequivocal condemnation of FGM as a human rights violation,¹³⁶ and other Western nations' grants of refugee status to women fleeing FGM,¹³⁷ the United States continues to resist expanding the definition of a refugee to include victims of FGM.¹³⁸ This section seeks to show

134. This is the story of Fauziya Kasinga who was denied asylum on August 25, 1995 by Immigration Judge Donald V. Ferlise. Her case is presently pending at the Board of Immigration Appeals. For articles about her case see Crossette, *supra* note 4; Keith Donoghue, *A Rite of Passage: A Berkeley Lawyer's Client Could Establish Precedent for Asylum Claims Based on Female Genital Mutilation*, RECORDER, Jan. 18, 1996, at 1; Keith Donoghue, *Cultural Rite Tests Asylum Law*, LEGAL TIMES, Feb. 5, 1996, at 1; Judy Mann, *When Judges Fail*, WASH. POST, Jan. 19, 1996, at E3.

I argued Fauziya's case before an immigration judge in Philadelphia, PA, and continue to work on her case at the American University's International Human Rights Law Clinic. I would like to thank Sidney Lebowitz, Nileema Pargaonker, David Shaffer, Denise Thomasson, Professor Karen Musalo and Equality Now for their hard work and commitment to her case. Most importantly, I would like to thank Fauziya for her infinite courage, purity, patience, and steadfastness. She has changed my life, and I know she will continue to touch the lives of many others.

135. The World Health Organization recently declared that the spread of FGM by immigrants has made it a public health issue in Europe, Canada, Australia, and the United States. *U.N. Calls for End to Female Genital Mutilation*, CHI. TRIB., May 5, 1994, at C2.

136. See discussion *infra* part B (noting numerous international organizations and international covenants condemning FGM as violence against women and a deprivation of human rights).

137. Farnsworth, *supra* note 8, at A14 (reporting that Canada "granted refugee status to a Somali woman who fled her country with her 10 year old daughter because she feared that the daughter would face ritual genital mutilation"); Oosterveld, *supra* note 8, at 277 (noting that The French Commission for Appeals of Refugees recognized that female circumcision may be considered a form of persecution under the [1951] United Nations Convention Relating to the Status of Refugees).

138. Decisions among immigration judges have been divided over the issue of FGM as the basis for asylum. For example, in Arlington, VA, an immigration judge granted asylum to a woman from Sierra Leone based on "(1) persecution relating to her resistance to, and her subsequent forcibly-imposed, female genital mutilation; (2) persecution relating to her attempts to assert her individual autonomy and the resulting physical spousal abuse; and (3) persecution relating to her political party activism." Matter of M.K., Arlington Office of the Immigration Judge, #1804A (Aug. 9, 1995); Pamela Constable, *INS Debates Female Mutilation as Basis for*

that a woman fleeing FGM may satisfy the requirements for refugee status under United States asylum law and, subsequently, receive asylum in the United States. The reasons for the United States immigration courts' ambivalence to recognize FGM as grounds for asylum are then examined and rebutted.

To establish eligibility for a discretionary grant of asylum in the United States, a woman fleeing FGM must show that she is a "refugee" as defined in the Refugee Act of 1980 (Act). Under the Act, a refugee is a person "who is unable or unwilling to return to, and is unable or unwilling to avail . . . herself of the protection of that country because of persecution or well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."¹³⁹ To satisfy the statutory requirement for refugee status, the acts of persecution must be committed by the government or by groups or individuals that the government either cannot or will not control.¹⁴⁰

Although the Board of Immigration Appeals (BIA)¹⁴¹ has never

Asylum, WASH. POST, Sept. 11, 1995, at D1. In Baltimore, Philadelphia, and Oklahoma City, however, immigration judges have rejected FGM as a basis for asylum. *Id.* Baltimore Judge John F. Gossart, Jr. said that FGM was "an important ritual" and suggested that the woman seeking asylum could choose to support the practice if that is what she wanted. *Id.* Judge Donald V. Ferlise in Philadelphia dismissed an 18 year old girl seeking asylum to avoid a forced polygamous marriage and the FGM she would have to undergo as a condition of the marriage as not credible. Judy Mann, *When Judges Fail*, WASH. POST, Jan. 19, 1996, at E3. He concluded that "it just doesn't make sense." *Id.* The case out of Philadelphia is currently pending at the Board of Immigration Appeals and will be heard en banc in oral argument. This case is expected to set precedent with respect to this issue. Keith Donoghue, *A Rite of Passage: A Berkeley Lawyer's Client Could Establish Precedent for Asylum Claims Based on Female Genital Mutilation*, RECORDER, Jan. 18, 1996, at 1.

In March 1994, an immigration judge in Portland, Oregon granted Lydia Olulora and her two children, ages five and six, a suspension of deportation based on the claim that if forced to return to Nigeria the girls would be subject to FGM. *The Right Call In A Deportation Case*, Apr. 4, 1994, CHI. TRIB., at 14. None of the statutory requirements for receiving refugee status were addressed, although the court concluded that FGM is an "extreme hardship" (an element required in order to receive suspension of deportation). Hull, *supra* note 14, at 26. See generally Patricia Dysart Rudloff, *In Re Oluloro: Risk of Female Genital Mutilation as "Extreme Hardship" in Immigration Proceedings*, 26 ST. MARY'S L.J. 877 (1995); Robbie D. Steele, Note, *Silencing the Deadly Ritual: Efforts to End Female Genital Mutilation*, 9 GEO. IMMIGR. L.J. 105 (1995).

139. Refugee Act of 1980, Pub. L. No. 96-212, §101(a)(42), 94 Stat. 102,102-3 (codified at 8 U.S.C. § 1101(a)(42) (1988)).

140. Pamela Goldberg, *Anyplace But Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 CORNELL INT'L L.J. 565, 577 (1993) (citing ASYLUM BRANCH, OFFICE OF GENERAL COUNSEL, IMMIGRATION & NATURALIZATION SERV., BASIC LAW MANUAL: ASYLUM, SUMMARY AND OVERVIEW CONCERNING ASYLUM LAW 25 (1991)). Although the United States Refugee Act of 1980 does not define "persecution," the INS describes it as "a serious threat to life or freedom on account of race, religion, nationality, membership in a particular social group or political opinion." Goldberg, *supra* note 140, at 577 (citations omitted). The INS Manual further holds that "serious violations of basic human rights can constitute acts of persecution." Goldberg, *supra* note 140, at 577 (citations omitted).

141. The BIA hears appeals from immigrants denied asylum by an immigration judge. Appeals from an immigration judge's decision may be heard by the BIA, a federal court of

granted asylum to a woman fearing FGM,¹⁴² the following analysis shows that, if confronted with facts that satisfy the statutory requirements for refugee status, the courts could grant asylum based on a woman's well-founded fear of female genital mutilation on account of the "social group" category.¹⁴³

A. A Well-founded fear

An applicant for asylum from FGM must first show that she has a "well-founded fear of persecution."¹⁴⁴ In *INS v. Cardoza-Fonseca*,¹⁴⁵ the United States Supreme Court established that if an applicant for refugee status faces a "reasonable possibility" of persecution, he or she may satisfy the statutory requirement that the fear of persecution is "well-founded."¹⁴⁶ Further, the Court stated that if an applicant faces a ten percent chance of persecution, he or she has a "well-founded fear."¹⁴⁷ The BIA further explained that a fear is well-founded if a reasonable person in her circumstances would fear persecution.¹⁴⁸ The evidentiary requirement for demonstrating a "well-founded fear" allows for the subjective perspective of the applicant; however, an individual's subjective fear must be grounded in objective facts.¹⁴⁹

A "well-founded" fear of persecution may be difficult for many women to convey because of the sensitive nature of FGM. A woman who is conditioned to be quiet and submissive and to believe that her

appeals, or the Supreme Court. Denial of asylum in any of these tribunals can result in deportation if further review is denied.

142. Hull, *supra* note 12, at 26; Keith Donoghue, *A Rite of Passage: A Berkeley Lawyer's Client Could Establish Precedent for Asylum Claims Based on Female Genital Mutilation*, RECORDER, Jan. 18, 1996, at 1.

143. The legal argument posited by this article is presently being tested at the BIA in *Matter of Fauziya Kasinga*.

144. Refugee Act of 1980, Pub. L. No. 96-212, § 101 (a)(42), 94 Stat. 102, 102-3 (codified at 8 U.S.C. § 1101 (a)(42) (1988)).

145. 408 U.S. 421 (1987).

146. *Id.* at 440 (quoting *INS v. Stevic*, 467 U.S. 407, 424-25 (1984)).

147. *Id.*

148. *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 446 (BIA 1987) (stating that a well-founded fear can be based on what has happened to others who are similarly situated). Each situation, however, should be judged on its individual merits. 8 C.F.R. § 208.13(b); Godfrey, *Defining the Social Group in Asylum Proceedings: the Expansion of the Social Group to Include a Broader Class of Refugees*, 3 J.L. & POL'Y 257, 183 (1994) (noting that regardless of whether persecution is viewed as an individual or a group phenomenon, a showing of "real fear" is still required under current standards).

149. *Saleh v. United States Dep't of Justice*, 962 F.2d 234, 239 (2d Cir. 1992) (citing *Gomez v. INS*, 947 F.2d 660, 663 (2d Cir. 1991) (denying Saleh's request for asylum even though he claimed "he had been found guilty of murder and sentenced to death in absentia" by a Muslim court in his native country); Godfrey, *supra* note 148, at 283 (1994) (noting that regardless of whether persecution is viewed as an individual or group phenomenon, a showing of "real fear" is still required under current standards)).

opinions have no weight may be reluctant to articulate her story of genital mutilation to an official. In addition, by fleeing FGM, she has demonstrated a rejection of the social mores of her community that may dishonor her family and frustrate her chances for marriage.¹⁵⁰ In fear of further ostracism from her community because of her rejection of FGM, she may be reluctant to discuss her situation; accordingly, her story may be viewed as incredible.¹⁵¹

In order to establish the objective basis for an applicant's fear of FGM, she may provide expert witnesses,¹⁵² reports from the State Department, non-governmental organizations (NGOs), and other testimony to demonstrate a "reasonable possibility" that she would be forced to undergo FGM.¹⁵³ If an applicant for asylum is a woman from Djibouti or Somalia, where the most extreme form of FGM¹⁵⁴ is performed on 100% of all women,¹⁵⁵ she may easily prove a well-founded fear of persecution as demonstrated by objective facts. Women in the other thirty countries practicing FGM,¹⁵⁶ however, will have more difficulty demonstrating that there is a reasonable possibility that they will be forced to undergo the practice. Communities which do and do not practice FGM often distinguish themselves on the basis of ethnic group.¹⁵⁷ Consequently, showing that the applicant's tribe and/or immediate family performs FGM on

150. INS Resource Information Center, *Alert Series Women: Female Genital Mutilation*, July 3, 1994 (AL/NGA/94.001). In most societies where FGM is practiced, the mutilation is a prerequisite for marriage. *Id.* Being denied the possibility of marriage is particularly devastating in those societies where FGM is practiced because marriage typically determines a woman's status in these communities, and provides the woman her only access to economic stability. DiMauro, *supra* note 86; see also French, *supra* note 1, at F1.

151. An advocate must remember that while demeanor may affect the impression of credibility on the judge, courts have determined that consistency is the hallmark of credibility. *Murphy v. INS*, 54 F.3d 605 (9th Cir. 1995); *Matter of Vilanova-Gonzalez*, 13 I. & N. Dec. 399, 403 (BIA 1969).

152. Courts have consistently given weight to the opinions of academic experts in asylum and withholding cases. See, e.g., *Ramirez-Rivas v. INS*, 899 F.2d 864, 869 (9th Cir. 1990); *Ananeh-Firempong v. INS*, 766 F.2d 621, 628 (1st Cir. 1985).

153. Goldberg, *supra* note 140, at 576.

154. The most extreme form of FGM is called "infibulation" and involves no anesthesia during removal of the clitoris, the labia minora, and parts of the labia majora. The vulva is then sutured together by thorns or catgut to cover the urethra and the vagina, leaving a very small opening for the passage of urine and menstrual blood by inserting a tiny piece of wood or reed. Toubia, *supra* note 19, at 712.

155. DORKENOO & ELWORTHY, *supra* note 3, at 22.

156. Stephanie Nebehay, *U.N. Calls for End to Female Genital Mutilation*, REUTERS, May 5, 1994 (accounting for an estimated 85-114 million females in more than 30 countries in Asia and Africa).

157. Robyn Cerny Smith, Note, *Female Circumcision: Bringing Women's Perspectives Into the International Debate*, 65 S. CAL. L. REV. 2452, 2449-73 (1992) (explaining how anthropological analyses should be employed to recognize the functional value of female circumcision in preserving "tribal group identity").

their daughters as a rite of passage may provide one objective basis for demonstrating a well-founded fear of FGM.

A woman who has already been mutilated may argue that she has a well-founded fear of persecution based on past persecution.¹⁵⁸ When an applicant has previously been persecuted, there is a rebuttable presumption that she has a well-founded fear of future persecution.¹⁵⁹ In order to rebut the presumption of future persecution, the INS must present evidence that there is little likelihood of present persecution or the immigration judge may take administrative notice of changed country conditions.¹⁶⁰ The immigration judge maintains discretionary authority to determine whether the applicant will face future persecution, as established by past persecution.¹⁶¹ In the case of a woman who was mutilated, an immigration judge may exercise discretion favorable to the applicant for humanitarian reasons.¹⁶² Humanitarian asylum is justified where the past persecution was so atrocious that the claimant can not be expected to return to her country of origin.¹⁶³ Having one's genitals forcibly excised is so egregious that it creates a humanitarian justification for a grant of asylum.¹⁶⁴

B. *Of Persecution*

The second element that an applicant for asylum from FGM must demonstrate is that FGM rises to the level of "persecution."¹⁶⁵ The United States Refugee Act of 1980 does not define "persecution";¹⁶⁶ however, the INS Manual, which is not legally binding but provides guidance to the INS in interpreting asylum claims, does.¹⁶⁷ It states that persecution is "a serious threat to life or freedom on account of race, religion, nationality, membership in a particular social group, or

158. 8 C.F.R. § 208.13(b). See, e.g., *Matter of M.K.*, *supra* note 138 (holding that the asylum applicant established past persecution because she was forced to undergo FGM).

159. See, e.g., *INS v. Stevic*, 467 U.S. 407, 424-25 (1984) (holding that "so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that the persecution is a reasonable possibility"). Cf. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (noting that the "clear probability of persecution" standard for suspending deportation is not the same as the "well-founded fear of persecution" standard used in other cases).

160. *Matter of Chen*, Int. Dec. #3104 (BIA 1989).

161. *Id.*

162. *Matter of Pula*, 19 I. & N. Dec. 467, 474 (BIA 1987).

163. *Id.* In Re B-, Int. Dec. #3251 (BIA 1995); 8 C.F.R. § 208.13(b); *Matter of Pula*, 19 I. & N. Dec. 467; .

164. See, e.g., *Matter of M.K.* (stating that "[i]n the present case, the forcible female genital mutilation creates a humanitarian justification for asylum").

165. Goldberg *supra* note 140.

166. See generally 8 U.S.C. § 1101(a)(42).

167. Goldberg, *supra* note 140, at 604, n.46.

political opinion.”¹⁶⁸ The INS Manual also states that “[s]erious violations of basic human rights can constitute acts of persecution.”¹⁶⁹ In *Matter of Acosta*, the BIA further defined persecution as “the infliction of suffering or harm in order to punish an individual for possessing a particular belief or characteristic the persecutor seeks to overcome.”¹⁷⁰ FGM is a serious threat to “life or freedom,” it is considered a serious human rights violation, and is a practice that seeks to overcome a characteristic of its victim; therefore, FGM constitutes “persecution.”¹⁷¹

First, FGM is a serious threat to the “life or freedom” of the girl who undergoes the procedure.¹⁷² Common early side effects of FGM include severe pain and massive hemorrhaging, sometimes leading to shock and death.¹⁷³ Other complications include wound infections, abscesses, ulcers, septicemia, tetanus, and gangrene.¹⁷⁴ Long-term side-effects include hematocolpos,¹⁷⁵ chronic pelvic infections, back pain, dysmenorrhea, possible infertility, formation of dermoid cysts, painful intercourse, and urinary tract infections that can result in urinary stones and kidney damage.¹⁷⁶ A Kenyan study revealed that more than eighty percent of women reported at least one medical complication after undergoing FGM.¹⁷⁷ Other reports estimate that between fifteen and thirty percent of all girls and women who endure FGM die from bleeding or infections.¹⁷⁸ The medical complications that frequently result from FGM are so debilitating and serious that it constitutes a clear threat to the “life or freedom” of the girl undergoing the procedure. Consequently, FGM rises to the level of “persecution.”

168. Goldberg, *supra* note 140, at 577 (citing ASYLUM BRANCH, OFFICE OF GENERAL COUNSEL, IMMIGRATION & NATURALIZATION SERV., BASIC LAW MANUAL: ASYLUM, SUMMARY AND OVERVIEW CONCERNING ASYLUM LAW 25 (1991)).

169. Goldberg, *supra* note 140, at 577. The UNHCR Handbook uses the same definition, except for the word “serious,” which was included by the INS.

170. *Matter of Acosta*, I. & N. Dec. 2986, at 229 (BIA 1985).

171. In *Fatin v. INS* the Third Circuit court made it clear that forcing someone to engage in conduct which is “physically painful or harmful” is persecution. 12 F.3d 1233, 1241 (3d Cir. 1993).

172. For a description of FGM and its medical consequences see discussion *supra* part II.A.

173. Toubia, *supra* note 19, at 713.

174. Toubia, *supra* note 19, at 713.

175. Kopelman, *supra* note 45, at 63.

176. Toubia, *supra* note 19, at 713.

177. Okie, *supra* note 39, at Z09.

178. See, e.g., Oosterveld, *supra* note 8, at 297 (citing H. Lightfoot-Klein, *Pharaonic Circumcision of Females in the Sudan*, 2 MED. & LAW 353, 356 (1983)) (estimating that one-third of all Sudanese FGM victims die); Mann, *supra* note 40, at E13 (quoting Rosemary Mburu, a Kenyan gynecologist, who estimates that 15% of all circumcised females die of bleeding or infections).

Second, FGM is considered a "serious human rights violation" by the international community. The UNHCR Division of International Protection concluded "that FGM, an act which causes severe pain as well as permanent physical harm, amounts to a violation of human rights, including the rights of the child, and can be regarded as persecution."¹⁷⁹ Also, numerous United Nations bodies have declared the practice a violation of human rights. Following the recommendations of the 1993 United Nations World Conference on Human Rights, the United Nations General Assembly adopted the *Declaration on the Elimination of Violence Against Women*,¹⁸⁰ which explicitly states that "female genital mutilation and other traditional practices harmful to women"¹⁸¹ are forms of violence against women that "both violate and impair or nullify the enjoyment by women of human rights and fundamental freedoms."¹⁸² The United Nations Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) adopted *General Recommendation No. 14* and *General Recommendation No. 19*, both of which condemn FGM as a human rights violation.¹⁸³ The Committee states that "[t]he effect of [female genital mutilation] on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms."¹⁸⁴ In addition, FGM may infringe on human rights protected under several other international legal instruments, namely, the *Universal Declaration of Human Rights* (Article 5), *International Covenant on Civil and Political Rights* (Article 7), and *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which prohibit acts of torture and other cruel, inhuman or degrading treatment or punishment.¹⁸⁵ FGM is proscribed by these conventions because, as

179. United Nations High Commissioner for Refugees, *Memorandum: Female Genital Mutilation* (Geneva: UNHCR Division of International Protection, SUS/HCR/011 Washington [UNHCR], 10 May 1994), para. 7.

180. Resolution 48/104 (1993).

181. United Nations General Assembly, *Declaration on the Elimination of Violence Against Women* (Geneva: U.N. General Assembly, A/RES/48/104, 23 Feb. 1994), at 2.

182. *Id.* at 3.

183. United Nations Committee on the Elimination of Discrimination Against Women, "Female Circumcision," *General Recommendation No. 14*, 9th Sess., 1990, at 80; United Nations Committee on the Elimination of Discrimination Against Women, "Violence Against Women," *General Recommendation No. 19*, 11th Sess., 1993, at 6.

184. United Nations Committee on the Elimination of Discrimination Against Women, "Violence Against Women," *General Recommendation No. 19*, 11th Sess., 1993, at 6.

185. INS Resource Information Center, *supra* note 150 (citing United Nations General Assembly, *Declaration on the Elimination of Violence Against Women* (Geneva: U.N. General Assembly, A/RES/48/104, 23 Feb. 1994), art. 3, at 3). It should be noted, however, that although international instruments serve the purpose of preventing human rights violations, they are not binding upon countries unless they are signed and ratified. See Vienna Convention on the Law

one commentator asserts, "[i]t can be argued quite persuasively that female circumcision is an act that is analogous to the definition of torture; it causes both severe pain and mental and physical suffering, it is intentionally inflicted, and it is a manifestation of gender discrimination."¹⁸⁶ The international community's recognition of FGM as a serious human rights violation strongly supports the argument that it is "persecution" under United States asylum law.

Finally, FGM is a practice that seeks to overcome a characteristic of its victim; therefore, it constitutes "persecution" according to the BIA's decision in *Matter of Acosta*.¹⁸⁷ The primary purpose of FGM is to control the sexual drive of women and ensure that they remain "pure" for their husbands.¹⁸⁸ Without the clitoris, a woman's ability to desire and enjoy sexual intercourse is essentially expunged.¹⁸⁹ The clitoris, and a woman's consequent sexual drive, is that characteristic which her community seeks to overcome. The means employed to overcome this characteristic is FGM, which, in all forms, entails removal of the clitoris.¹⁹⁰ The international condemnation of FGM as a serious human rights violation, the fact that FGM seeks to overcome a particular characteristic of those undergoing the practice, and that the practice constitutes a clear threat to the "life or freedom"

of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 336 reprinted in 8 I.L.M. 679, 686 (1969). Nevertheless, countries may be held accountable for transgressing the provisions contained in those human rights instruments they have ratified. Some other rights, protected in international covenants, that may be invoked to show that FGM is a human rights violation include:

- The right to life (*Universal Declaration of Human Rights*, Art. 3 and *International Covenant on Civil and Political Rights*, Art. 6)
- The right to equality (*International Covenant on Civil and Political Rights*, Art. 26)
- The right to liberty and security of person (*Universal Declaration of Human Rights*, Art. 3 and *International Covenant on Civil and Political Rights*, Art. 9)
- The right to equal protection under the law (*International Covenant on Civil and Political Rights*, Art. 26)
- The right to be free from all forms of discrimination (*International Covenant on Civil and Political Rights*, Art. 26)
- The right to the highest attainable standard of physical and mental health (*International Covenant on Economic, Social and Cultural Rights*, Art. 12).

186. Oosterveld, *supra* note 8, at 296.

187. *Matter of Acosta*, I. & N. Dec. #2986, at 229 (BIA 1985) (holding that a man from El Salvador who fled his country out of fear that he would be killed by a guerilla group could not receive asylum in the United States because he failed to demonstrate that the alleged threat of persecution resulted from his membership in a particular social group comprised of persons who share a common, immutable characteristic).

188. DORKENOO & ELWORTHY, *supra* note 3, at 14 (noting that FGM serves the purpose of enabling potential in-laws and husbands to determine whether or not the girl is a virgin).

189. Abu-Sahlieh, *supra* note 20, at 594.

190. Toubia, *supra* note 19, at 712 (stating that all forms of FGM, even the most mild, result in permanent damage to the clitoris).

of its victims, all prove that FGM is a form of "persecution" under U.S. asylum law.¹⁹¹

In addition to establishing that FGM is persecution under the present definitions provided by the BIA and the INS Manual, FGM may be classified as a form of persecution under the recently issued *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (*Considerations for Asylum Officers*).¹⁹² While not binding on immigration judges, and only advisory to asylum officers, the *Considerations for Asylum Officers* explicitly mention FGM as a form of persecution that could provide grounds for a successful asylum claim.¹⁹³ The *Considerations for Asylum Officers* are significant because they indicate an increased awareness by the INS of the severe nature of FGM and its possible willingness to grant asylum based on the practice.

C. *By the State or a Force that State is Unwilling or Unable to Control*

It is not sufficient to show that an asylum applicant has a well-founded fear of persecution; the persecution must be at the hands of the state or a force that the state either cannot or will not control.¹⁹⁴ According to international law, states must act with "due diligence or reasonable care to prevent, investigate, and punish individuals, even non-state actors, who have committed acts that constitute human rights violations."¹⁹⁵ Consequently, when persecution is inflicted by a culture, rather than the government, and where the government is either unable or unwilling to stop the persecution, the persecution is attributable to the government.¹⁹⁶

191. In a landmark case in 1991, France recognized FGM as a form of persecution and established that the threat of it is sufficient grounds to grant a woman refugee status. *Re Aminata Diop*, French Commission for Appeals of Refugees, recours No. 164.078 (Sept. 1991).

192. Issued on May 26, 1995, a memorandum entitled *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* provides asylum officers "with guidance and background on adjudicating cases of women having asylum claims based wholly or in part on their gender." Memorandum from Phyllis Coven issued to all INS Asylum Officers, at 1 (on file with author) [hereinafter *Considerations for Asylum Officers*].

193. *Id.* at 9.

194. *McMullen v. INS*, 658 F.2d 1312, 1315 n.2 (9th Cir. 1981); ASYLUM BRANCH, OFFICE OF GENERAL COUNSEL, IMMIGRATION & NATURALIZATION SERV., BASIC LAW MANUAL: ASYLUM, SUMMARY AND OVERVIEW CONCERNING ASYLUM LAW 25 (1991).

195. Goldberg, *supra* note 140, at 584-85 (citing Velasquez-Rodriguez Case, Annual Report of the Inter-American Court of Human Rights, OAS/ser.L./V./III.19, doc. 13 (1988)); *see also Convention on the Elimination of All Forms of Discrimination Against Women*, Part 1, Art. 5, adopted Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 194, U.N. Doc. A/RES/34/46 (stating that "State Parties shall take all appropriate measures: to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary superiority of either of the sexes or on stereotyped roles for men and women").

196. *See Matter of McMullen*, 19 I. & N. Dec. 90 (BIA 1984); *Matter of Pierre*, 15 I. & N. Dec. 461 (BIA 1975); *Considerations for Asylum Officers*, *supra* note 187, at 1; UNHCR Handbook at 14-

Among the countries that practice FGM, only five have legislated against it.¹⁹⁷ The practical effect of this legislation, however, is negligible. For example, in Sudan there have been no prosecutions for FGM, despite the fact that a law making it illegal has been on the books since 1956.¹⁹⁸ In Egypt, the legislation merely bans certain forms of FGM, which continue to be widely practiced, and allows those forms that remove "only part" of the clitoris.¹⁹⁹ In other countries, the legislation merely condemns FGM without offering a legal remedy.²⁰⁰ As a result of the failure of most African countries to take action against FGM, "women have little legal recourse and may face threats to their freedom, threats or acts of physical violence, or social ostracization for refusing to undergo this harmful traditional practice or for attempting to protect their female children."²⁰¹ Thus, women seeking to avoid FGM do not enjoy state protection and satisfy the requirements necessary to show a "well-founded fear of persecution."

D. On Account of Race, Religion, Nationality, Membership in a Particular Social Group, or Political Opinion

To be considered for asylum, an applicant must show that his or her well-founded fear of persecution by a state or by a force that the state is unwilling to control is on account of either race, religion, nationality, membership in a particular social group, or political opinion.²⁰² Many feminist scholars criticize the definition of a refugee for its failure to recognize gender as a category upon which a well-founded fear of persecution may be based.²⁰³ Partially in response to such criticism, UNHCR has issued guidelines that

15, § 65 (stating that acts of violence "can be considered persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection").

197. Sudan, Kenya, Egypt, Ivory Coast, and Burkina Faso have taken legal measures against it. *Facts About Female Circumcision*, DALLAS MORNING NEWS, May 22, 1994, at F1.

198. Kaplan, *supra* note 16, at 29.

199. DORKENOO & ELWORTHY, *supra* note 3, at 11.

200. Kaplan, *supra* note 16, at 29.

201. INS Resource Information Center, *supra* note 150, at 7.

202. Refugee Act of 1980, 8 U.S.C. § 1101(a)(42)(A) (1988) (West Supp. 1995).

203. See generally Cipriani, *supra* note 16, at 539-40; Sunny Kim, Comment, *Gender-Related Persecution: A Legal Analysis of Gender Bias in Asylum Law*, 2 AM. U. J. GENDER & L. 107, 117 (1994) (arguing that the current definition of "refugee" fails to recognize that in some countries women face persecution simply because they are women); Mattie L. Stevens, *Recognizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category*, 3 CORNELL J.L. & PUB. POL'Y 179, 186-88 (1993) (stating that the current definition of "refugee" fails to acknowledge the violence and discrimination aimed specifically at women); Priscilla F. Warren, *Women are Human: Gender-Based Persecution is a Human Rights Violation Against Women*, 5 HASTINGS WOMEN'S L.J. 281 (1994) (examining the treatment of women in asylum law).

"encourage the use of the particular social group category to encompass the circumstances of certain women . . . where they are able to otherwise satisfy the definition of a refugee."²⁰⁴ Canada followed UNHCR's recommendations and issued precedent setting guidelines that encourage Canadian immigration officials to recognize gender-based persecution under the social group category.²⁰⁵ The INS has recently issued *Considerations for Asylum Officers* for gender-based asylum claims, which, while not as generous as the Canadian guidelines, acknowledge that gender-based persecution may fall under the social group category.²⁰⁶ Nevertheless, a woman fleeing FGM may show that she has a well-founded fear of persecution on account of membership in a particular social group by satisfying the tests established by United States courts.²⁰⁷

United States courts have failed to clearly define the criteria for falling within the "social group" category;²⁰⁸ however, several courts' decisions have resulted in the development of two different tests. In *Matter of Acosta*,²⁰⁹ the BIA developed the "immutable characteristic" test, which requires that "the common characteristic that defines the group . . . 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."²¹⁰ In *Sanchez Trujillo v. INS*,²¹¹ the Ninth Circuit court established a test that defines the social group category as encompassing "a collection of people closely affiliated with each other, who are actuated by some common impulse or interest."²¹² As demonstrated in several recent court decisions, a woman claiming asylum based on FGM may satisfy

204. United Nations High Commissioner for Refugees, *Memorandum: Female Genital Mutilation* (Geneva: UNHCR Division of International Protection, SUS/HCR/011 Washington [UNHCR], 10 May 1994), para. 5.

205. Immigration and Refugee Board, *Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimant Fearing Gender-Related Persecution*, (Ottawa, Canada: Immigration and Refugee Board, 9 Mar. 1993).

206. *Considerations for Asylum Officers*, *supra* note 187, at 13-18. Getting the INS to issue the *Considerations for Asylum Officers* took a good deal of encouragement from women's rights activists. In the spring of 1994, the INS agreed to review how its policies affect women after it received a proposal from Harvard's Women Refugees Project, which was backed by 36 refugee and human rights groups. Hull, *supra* note 12, at 26.

207. Leading commentator James Hathaway asserts that although gender is not one of the five grounds for protection it "is properly within the ambit of the social group category." Goldberg, *supra* note 140, at 591 (quoting JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 162 (1991)).

208. Stevens, *supra* note 203, at 211.

209. 19 I. & N. Dec. 211 (BIA 1985).

210. *Id.* at 233

211. 801 F.2d 1571 (9th Cir. 1986).

212. *Id.* at 1576.

these tests and, subsequently, show that her persecution is on account of a particular "social group."²¹³

1. *Board of Immigration Appeals Test*

The Board of Immigration Appeals interpreted the phrase "persecution on account of membership in particular social group" to mean "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common immutable characteristic. . . . [The characteristic] must be one that the members of the group either cannot change or should not be required to change."²¹⁴ A woman fleeing FGM is a part of a particular social group that may be defined as women or girls from a certain ethnic community, which practices FGM, who reject the ritual, and have no protection against it.²¹⁵ Using a hypothetical case, a woman fleeing FGM may belong to a social group that is defined as "an Ibo woman from Nigeria who rejects FGM as a ritual practice and has no protection against it." The immutable characteristic they share is their feminine anatomy, and consequent sexual drive, which FGM seeks to eradicate. They also share the ethnic affiliation that requires FGM as a rite of passage and cannot be shielded from it. Since women should not be required to change their sexual drive through the excision of their clitoris and they cannot change their ethnic affiliation, they are a part of a "social group" as defined by the "immutable characteristics" test of the BIA.

The First Circuit combined the "immutable characteristics" test along with the additional requirement outlined in the *UNHCR Handbook on Procedures and Criteria for Determining the Status of Refugees* that the members of a proposed social group "have similar background[s], habits or social status."²¹⁶ According to this articulation of a social group (e.g., "an Ibo woman from Nigeria who rejects FGM as a ritual practice and who has no protection from it"), an applicant

213. See *infra* note 225 and accompanying text. If the social group is comprised of women facing FGM from a particular ethnic group, however, the fact that all female members of the tribe are mutilated will not render the claim any less viable. *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984) (holding that "[i]t should be obvious that the significance of a specific threat to an individual's life or freedom is not lessened by the fact that the individual resides in a country where the lives and freedom of a large number of persons are threatened.").

214. *Matter Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

215. All women who undergo FGM cannot be lumped into one large social group category because the importance, prevalence, and severity of FGM varies in different communities. If the social group is comprised of women facing FGM from a particular ethnic group, however, the fact that all female members of the tribe are mutilated will not render the claim any less viable. *Bolanos-Hernandez*, 767 F.2d at 1285.

216. *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985).

for asylum based on FGM would share the ethnicity (or "background"), rituals (or "habits"), and similar "social status" of a woman living in that community with others in her "social group." Thus, a woman fleeing FGM may satisfy the expanded "immutable characteristics" test as required by the First Circuit.

2. Ninth Circuit Test

The Ninth Circuit became the only circuit to develop a test for what constitutes a "social group"²¹⁷ when it decided *Sanchez-Trujillo v. INS*.²¹⁸ The court held that "the phrase 'particular social group' implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest."²¹⁹ Also, there must be "a voluntary associational relationship among the purported members, which impart some common characteristic that is fundamental to their identity as a member of that discrete social group."²²⁰ Many commentators have argued that the Ninth Circuit's requirement of a voluntary associational relationship directly contradicts the BIA's "immutable characteristic" test, which implies that the characteristic of the social group that the persecutor seeks to overcome is involuntary.²²¹ In fact, the Ninth Circuit appears to contradict itself when, in the paragraph following the description of their test, they offer a family as a "prototypical example of a 'particular social group.'"²²² A family is hardly a group that consists of voluntary associational relationships among its purported members.²²³

Despite the controversial nature of the Ninth Circuit requirements for membership in a "particular social group," a woman fleeing FGM may satisfy the test. A woman rejecting the social mores of her ethnic community and choosing to flee from FGM is voluntarily associating herself with others who may be considered heretics, immoral, or betrayers of the community.²²⁴ Other women from her ethnic group who reject FGM are actuated by their common belief that FGM is a harmful practice that should no longer continue. Thus, women

217. Cipriani, *supra* note 16, at 537.

218. 801 F.2d 1571 (9th Cir. 1986).

219. *Id.* at 1576.

220. *Id.*

221. See, e.g., Godfrey, *supra* note 148, at 267-68.

222. *Sanchez-Trujillo*, 801 F.2d at 1576.

223. Most family members love their family, but rarely are they given the opportunity to choose their parents, brothers, sisters, or grandparents.

224. "A woman who has not undergone genital mutilation may be considered a social outcast or a someone who has 'destroyed the family honor' and deserves to be killed." INS Resource Information Center, *supra* note 150, at 5.

who fear persecution as a consequence of failing to submit to FGM are members of a "particular social group" according to the definition of "social group" given by the Ninth Circuit.

3. Other Courts' Considerations of Social Group Defined by Gender

Several recent court decisions have affirmed that a social group may be gender-based, opening the door for the possibility for a woman to receive asylum based on her fear of FGM.²²⁵ In *Fatin v. INS*,²²⁶ the Third Circuit accepted a broad articulation of gender as a social group when it held that an asylum applicant who feared persecution merely because she was an Iranian woman could be a member of a particular social group.²²⁷ Other courts, however, have insisted on the narrowing of a gender-based social group. For example, in *Gomez v. INS*,²²⁸ the Second Circuit held that gender, along with other characteristics, may constitute a social group, but that the "[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group."²²⁹ Similarly, in *Safaie v. INS*,²³⁰ the Eighth Circuit held that the applicant's assertion that she feared persecution because she was an Iranian woman was an overbroad characterization of the social group category, "because no fact finder could reasonably conclude that all Iranian women had a well-founded fear based solely on their gender."²³¹

Thus, while some courts have concluded that gender can define a particular social group, no court has actually granted a woman refugee status because she has demonstrated a well-founded fear that she would face persecution on account of her gender if she is forced

225. See, e.g., *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994) (asserting that "Iranian women, by virtue of their innate characteristic (their sex) and the harsh restrictions placed upon them, are a particular social group"); *Fatin v. INS* 12 F.3d 1233, 1241 (3d Cir. 1994) (holding that an Iranian woman could constitute a member of a particular social group); *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991)).

226. 12 F.3d 1233 (3d Cir. 1994).

227. *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1994). The court did not grant her asylum, however, because *Fatin* had not demonstrated that compliance to the Iranian government's imposition on women was so abhorrent to her that it would constitute persecution. *Id.* at 1240. The case of a woman fleeing FGM may be distinguished from *Fatin* because compliance clearly constitutes persecution. See discussion part IV.B. The Third Circuit in *Fatin* made it clear that forcing someone to engage in conduct that is "physically painful or harmful" is persecution. *Id.* at 1244. This case is helpful for other gender-based claims because it provides guidance by holding that in order to prevail on a social group membership claim, the individual must: (1) identify the group as a particular social group, (2) establish that she is a member of that group, and (3) show that she would be persecuted based on that membership. *Id.* at 1240.

228. 947 F.2d 660 (2d Cir. 1991).

229. *Id.* at 664.

230. 25 F.3d 636 (8th Cir. 1994).

231. *Id.* at 640.

to repatriate.²³² Based on the court decisions noted above, however, a woman who can demonstrate that she has been mutilated, or will be, on account of her gender and nationality (in the Third Circuit) or her gender and other characteristics, such as tribal group, religion, or other common belief, (in the Second and Eighth Circuits) may qualify for a discretionary grant of asylum under United States asylum law. The recognition of FGM as grounds for asylum based on a social group defined by gender would be an important development in United States asylum law, reflecting the United States' maturing understanding of the global oppression and subjugation of women, the severity of which rises to the level of persecution.

E. United States' Ambivalence to Recognize FGM as Grounds for Refugee Status

United States courts are reluctant to grant refugee status to women fleeing FGM.²³³ One explanation for the United States' hesitation to include FGM as grounds for refugee status is the fear that such a move may open the "floodgates" to immigrants seeking refugee status.²³⁴ Such a concern is unwarranted because women seeking refugee status must still conquer numerous procedural hurdles and legal requirements before asylum will be granted.²³⁵ Also, Canada and France have both recognized that fear of FGM may be invoked as grounds for refugee status and they have not experienced a massive influx of women seeking refugee status.²³⁶

In *Sanchez-Trujillo v. INS*,²³⁷ the Ninth Circuit echoed a fear that the "floodgates" of refugee claims would be opened if gender-based claims were recognized as grounds for asylum.²³⁸ This fear was also reflected in the comments of George High, Executive Director of the Center for Immigration Studies in Washington, D.C., who stated that "[r]ecognizing that mistreatment of women is a worldwide

232. *Considerations for Asylum Officers*, *supra* note 192, at 14.

233. See discussion *supra* part IV.

234. Danial Stein, Executive Director of the Anti-immigration Federation for American Immigration Reform in Washington, D.C., opposes asylum for women fleeing FGM because he fears that it would trigger a flood of refugees. Keith Donoghue, *A Rite of Passage: A Berkeley Lawyer's Client Could Establish Precedent for Asylum Claims Based on Female Genital Mutilation*, *RECORD*, Jan. 18, 1996, at 1.

235. Carolyn "Patty" Blum, a professor at Boalt Hall School of Law, says that if someone can meet the rigorous standards of asylum law, asylum should be granted. Donoghue, *supra* note 234, at 1.

236. See generally Stephanie Kaye Pell, *Adjudication of Gender Persecution Cases Under the Canada Guidelines: The United States Has No Reason to Fear an Onslaught of Asylum Cases*, 20 N.C. J. INT'L L. & COM. REG. 655 (1995).

237. 801 F.2d 1571 (9th Cir. 1986).

238. Godfrey, *supra* note 148, at 281.

phenomenon -- something by no means limited to the Third World -- one can only question whether the advocates of gender-based asylum claims realize the massive claims they are inviting upon the United States."²³⁹ In the United States, there are 400,000 pending refugee/asylum cases.²⁴⁰ Appeals can take years, and those denied asylum often stay illegally. Consequently, the "floodgates" argument is predictable, but invalid.

In combating the erroneous concern that a floodgate of asylum seekers would besiege the immigration system if gender-based claims such as FGM were recognized as grounds for asylum, the numbers that "floodgate" theorists fear must be placed into perspective. First, today's immigration rate is the same today as it was at the beginning of the century.²⁴¹ Secondly, asylum is a small piece of the immigration pie. While about 900,000 people immigrated legally into the United States in 1995, only 145,000 people filed asylum claims.²⁴² Of those who filed claims for asylum, only thirty percent were women.²⁴³ An even smaller fraction of those women who are able to file for asylum satisfy the procedural and legal requirements and are granted refugee status.

The "floodgate" argument ignores the fact that, in order to win a claim for refugee status, the claimant must show that she has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.²⁴⁴ Even if FGM is recognized as a legitimate basis for refugee status under the "social group" category, the other requirements will be difficult to satisfy. In order to demonstrate a well-founded fear of persecution the refugee "must show [s]he has a subjective fear of persecution, and that the fear is grounded in objective facts."²⁴⁵ A well-founded fear of persecution may be difficult to convey because of the sensitive nature of FGM. A woman who is conditioned to believe that her word has no weight and that her demeanor should be submissive may be reluctant to articulate her story of genital mutilation to an official. In addition, her recollections may fail the male test for credibility: direct eye contact, and a straightforward

239. Hull, *supra* note 12, at 26.

240. Hull, *supra* note 12, at 26.

241. *The Need to Arrive at a Consensus on Pros and Cons of Immigration*, TAMPA TRIB., Jan. 17, 1996, at 10.

242. Hull, *supra* note 12, at 26.

243. Hull, *supra* note 12, at 26.

244. Refugee Act of 1980, Pub. L. No. 96-212, sec. 201 §101(a)(42), 94 Stat. 102,102-3 (codified at 8 U.S.C. § 1101(a)(42) (1988)).

245. *Saleh v. United States Dep't of Justice*, 962 F.2d 234, 239 (2d Cir. 1992).

manner. Thus, not every girl or woman fleeing FGM will be able to satisfy the requirements for asylum.²⁴⁶

Both France and Canada have recognized that FGM may provide a basis for granting refugee status.²⁴⁷ Strikingly, a flood of refugees have not overwhelmed those countries; thus, critics should not assume that the United States would experience an influx of refugee claims based on FGM.²⁴⁸

The French case granting recognition of FGM as grounds for asylum involved a twenty year-old woman from Mali named Aminata Diop who fled her family's violent attempts to circumcise her before her wedding night.²⁴⁹ In light of her general objection to FGM and the fact that her friend died three days after her circumcision, Diop feared the procedure and fled to France.²⁵⁰ In an unprecedented decision, the French Commission for Appeals of Refugees recognized that the threat or practice of FGM is a form of persecution and that Diop consequently fell within the definition of "refugee" set out in the Geneva Convention.²⁵¹

In May 1994, Canada granted asylum to a Somali woman who fled her country with her ten year-old daughter because she feared that the daughter would face genital mutilation.²⁵² Asylum was granted pursuant to recent guidelines issued by the Canadian Immigration and Refugee Board that place gender-based claims in the category of "membership in a particular social group."²⁵³ This was the first case to grant asylum to a woman fleeing FGM in the West.²⁵⁴

Neither France nor Canada have experienced an increase in the number of women applying for refugee status as a result of their recognition of FGM as grounds for asylum. In Canada, refugee claims actually fell in 1993 from 30,000 to 22,000.²⁵⁵ In the first year after guidelines recognizing gender-based claims were issued, Canada faced

246. Godfrey, *supra* note 148, at 283.

247. See discussion *supra* Part IV (describing the condemnation other Western nations, not including the United States, have enunciated with regard to the practice of FGM within its borders).

248. See generally Pell, *supra* note 230.

249. Oosterveld, *supra* note 8, at 278.

250. Oosterveld, *supra* note 8, at 279.

251. Oosterveld, *supra* note 8, at 278.

252. Farnsworth, *supra* note 8, at A14. In this landmark immigration ruling, the court held that the ancient custom of FGM would infringe upon the girl's "personal security" if she were forced to return.

253. Oosterveld, *supra* note 8, at 279.

254. Hull, *supra* note 12, at 26.

255. Farnsworth, *supra* note 8, at A14.

3,509 gender claims.²⁵⁶ Only 150 cases were actually heard and, of those, 105 were granted asylum.²⁵⁷

As demonstrated by the experiences of France and Canada, and by the fact that women seeking asylum must show that they have a well-founded fear of persecution, the concern that recognition of FGM as grounds for asylum will result in a flood of refugee claims is unwarranted. The United States courts should, therefore, expand the "social group" category to include women fleeing genital mutilation and grant the possibility for refugee status.

V. CONCLUSION

Female genital mutilation occurs in the United States and must be legally condemned. As the international community has recognized through its overwhelming condemnation of the practice, FGM is a form of persecution from which women must be protected. United States law must protect young girls presently living in America and those seeking asylum in America from being forced to undergo the excision of their genitalia and suffer the consequent medical and psychological harm inflicted by this practice. While laws banning FGM and the courts' recognition of FGM as a form of persecution will not alone end the practice, such moves would reflect the United States' disapproval for female genital mutilation and support the global struggle against it.

256. Hull, *supra* note 12, at 26.

257. Hull, *supra* note 12, at 26.