

NOTE

INVISIBLE AND INVOLUNTARY: FEMALE GENITAL MUTILATION AS A BASIS FOR ASYLUM

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INTRODUCTION

Female genital mutilation (FGM), the practice of cutting or otherwise damaging the genitalia of young women and girls, is a cultural tradition in some third-world countries.¹ Although the practice is widespread in parts of the world, many women and girls participate unwillingly. After all, FGM has severe short- and long-term health consequences both for the women who undergo it and for their future children. Despite the severity of the harm caused by FGM, however, many women who arrive in the United States seeking asylum on the basis of FGM have difficulty establishing that they are, in fact, refugees.

The claims of these asylum applicants usually founder on the propriety of including the applicants within the “particular social group” category of section 101(a)(42) of the Immigration and Nationality Act (INA).² That section of the Act defines the term “refugee” and requires that a refugee have a well-founded fear of persecution based on one of five enumerated grounds.³ Asylum claims based on female genital mutilation fit most appropriately into the fourth category, “membership in a particular social group.”⁴ Yet the Board of Immigration Appeals (BIA) and some courts have wavered in allowing FGM asylum claims pursuant to this category.⁵ To be sure, female genital mutilation does not fit into the category perfectly, especially given the recent addition of a “social visibility” requirement to the definition of a “particular social group.” But FGM is precisely the type of persecution against which the “particular social group” category ought to protect. Indeed, the INA explicitly provides asylum to anyone who has been forced to “abort a pregnancy or to undergo involuntary sterilization,”⁶ two procedures with obvious similarities to FGM. Female genital mutilation should be a basis for asylum under the social-group category of section 101(a)(42) of the INA, despite that category’s visibility requirement; indeed, courts and the BIA should abolish the social-visibility requirement for all asylum cases. Moreover, as with

¹ See *infra* text accompanying notes 8–10.

² 8 U.S.C. § 1101(a)(42) (2006).

³ See *infra* Part II.

⁴ INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

⁵ See *infra* Part III.

⁶ INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

forced sterilization, the statute should explicitly mention FGM as a basis for asylum.

Part I of this Note provides an in-depth explanation of the different types of FGM and the populations that most commonly practice FGM. Part II summarizes what the INA generally requires of noncitizens to qualify for asylum in the United States. Additionally, Part II provides the background of the social-group category, under which FGM claims often fall. Part III supplies the history of female genital mutilation as a basis for asylum in the United States. In Part IV, I argue that FGM should constitute a basis for asylum in the United States and that, within section 101(a)(42) of the INA,⁷ FGM falls most logically under the social-group category. Part V argues that the visibility requirement of the social-group category should not apply to claims for asylum on the basis of FGM. Moreover, Part V contends that adjudicators should abolish the social-visibility requirement altogether. Parts VI and VII identify two other possible avenues of asylum for victims of FGM. Part VI explores the possible analogy of female genital mutilation to forced sterilization, which is explicitly mentioned in the asylum statute. Part VII discusses the possibility of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as another path to asylum for victims of FGM.

I

GENERAL BACKGROUND OF FEMALE GENITAL MUTILATION

Female genital mutilation, also called “female genital cutting” or “female circumcision,”⁸ refers to the practice of partially or completely removing external female genitalia or otherwise injuring female genitalia.⁹ The procedure has no medical purpose; rather, for communities in some parts of the world, FGM is a time-honored ritual.¹⁰ In fact, women who have themselves experienced FGM often

⁷ *Id.*

⁸ The range of terms for FGM reflects the corresponding range of opinions about the practice. Proponents of FGM, for example, often call the practice “female circumcision,” which is a more clinical, less loaded term. *Cf.* WORLD HEALTH ORG., ELIMINATING FEMALE GENITAL MUTILATION: AN INTERAGENCY STATEMENT 22 (2008), available at http://whqlibdoc.who.int/publications/2008/9789241596442_eng.pdf. Conversely, the term “mutilation” “emphasizes the gravity of the act.” *Id.* at 3. As I believe that the practice violates the human rights of women who are involuntarily subjected to it, I use the term “female genital mutilation” or “FGM.” For the terminology used by various international organizations, see *id.* at 22.

⁹ See *id.* at 1, 4.

¹⁰ See FEMALE GENITAL MUTILATION: A GUIDE TO LAWS AND POLICIES WORLDWIDE 5 (Anika Rahman & Nahid Toubia eds., 2000) [hereinafter FEMALE GENITAL MUTILATION] (describing the role of FGM as a rite of passage in some communities); WORLD HEALTH ORG., *supra* note 8, at 5–6 (explaining that some societies use FGM in coming-of-age rituals, to “raise a girl properly and to prepare her for adulthood and marriage,” and that FGM

perpetrate the practice.¹¹ The victims are usually young women or girls, although some older women also undergo female genital mutilation.¹² The World Health Organization (WHO) estimates that three million girls are at risk of undergoing FGM procedures each year and that between 100 and 140 million women have already experienced FGM.¹³ Despite its prevalence, female genital mutilation “has no known health benefits.”¹⁴ Rather, the procedure, which is typically “performed without anesthetic by a layperson,”¹⁵ is painful and causes long-term negative health consequences.¹⁶

The WHO divides female genital mutilation into four different types.¹⁷ Type I, a “clitoridectomy,” involves the “[p]artial or total removal of the clitoris and/or the prepuce.”¹⁸ Type II, “excision,” is the “[p]artial or total removal of the clitoris and the labia minora, with or without excision of the labia majora.”¹⁹ Type III, “infibulation,” is the “[n]arrowing of the vaginal orifice with [the] creation of a covering seal by cutting and appositioning the labia minora and/or the labia majora, with or without excision of the clitoris.”²⁰ Finally, Type IV includes “[a]ll other harmful procedures to the female genitalia for non-medical purposes, for example: pricking, piercing, incising, scraping[,] . . . cauterization,”²¹ and “stretching or burning of the clitoris and/or surrounding tissues.”²² In addition, FGM often includes “sewing shut [the victim’s] vaginal opening so that only a small hole remains through which urine and menstrual fluid may pass.”²³

is so firmly a part of the social structure that some girls “may desire to undergo the procedure as a result of social pressure from peers”); see also Howard W. French, *The Ritual: Disfiguring, Hurtful, Wildly Festive*, N.Y. TIMES, Jan. 31, 1997, at A4.

¹¹ See FEMALE GENITAL MUTILATION, *supra* note 10, at 3; Pamela Constable, *Area Immigrants with Wounds that Won’t Heal: Mutilated Women Seek Asylum in U.S.*, WASH. POST, Nov. 3, 2008, at B1.

¹² See WORLD HEALTH ORG., *supra* note 8, at 4 (“Female genital mutilation is mostly carried out on girls between the ages of 0 and 15 years. However, occasionally, adult and married women are also subjected to the procedure.”).

¹³ *Id.* at 1.

¹⁴ *Id.*

¹⁵ Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals’ Dilemma*, 96 COLUM. L. REV. 1093, 1111 (1996).

¹⁶ WORLD HEALTH ORG., *supra* note 8, at 1, 4, 11 (noting, for example, that “babies born to women who have undergone female genital mutilation suffer a higher rate of neonatal death compared with babies born to women who have not undergone the procedure”); see FEMALE GENITAL MUTILATION, *supra* note 10, at 8–9.

¹⁷ WORLD HEALTH ORG., *supra* note 8, at 4.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² FEMALE GENITAL MUTILATION, *supra* note 10, at 8. Some definitional difficulty still exists in this catch-all category. See WORLD HEALTH ORG., *supra* note 8, at 28.

²³ Coleman, *supra* note 15.

Even considering the clearly invasive nature of these procedures, the number of negative health consequences that female genital mutilation causes is staggering. Negative health consequences can result from any of the four types of FGM, although the first three types are more likely to produce serious consequences.²⁴ In the short term, all four types cause excessive bleeding, severe pain, and emotional trauma (family or tribe members usually hold a girl down for the procedure and then bind her legs together for several weeks as she heals).²⁵ In addition, all types of FGM can cause shock, difficulty in urinating, infections (including human immunodeficiency virus (HIV)), unintended labia fusion, and death.²⁶ Long-term health consequences often include “chronic pain, infections [to the genitalia], decreased sexual enjoyment, and psychological consequences, such as post-traumatic stress disorder.”²⁷ Long-term health consequences can also include keloids (excessive scar tissue), reproductive tract infections, sexually transmitted infections, HIV, a reduced quality of sexual life and painful sexual intercourse, a need for later surgery, urinary and menstrual problems, and infertility.²⁸ Moreover, women who have suffered FGM Types I, II, and III are more likely to suffer complications during childbirth, including postpartum hemorrhage and death of the baby.²⁹ These complications increase for women who do not give birth in hospitals, an occurrence that is not uncommon in many of the areas where FGM is practiced.³⁰

Communities that practice FGM exist mainly in Africa, Asia, and the Middle East, though some ethnic groups in Central and South America also practice FGM.³¹ Thus, noncitizens who arrive in the United States seeking asylum on the basis of FGM are most likely to come from these parts of the world.

²⁴ See WORLD HEALTH ORG., *supra* note 8, at 11 (noting that the health risks and complications “tend to be significantly more severe and prevalent the more extensive the procedure”).

²⁵ See *id.*; Constable, *supra* note 11.

²⁶ See WORLD HEALTH ORG., *supra* note 8, at 33.

²⁷ *Id.* at 11; see also FEMALE GENITAL MUTILATION, *supra* note 10, at 7–9.

²⁸ See WORLD HEALTH ORG., *supra* note 8, at 34–35. Some women who have immigrated to the United States, France, and other countries have found surgeons who have been able to reverse some (but not all) of the physical consequences of FGM. See Eve Conant, *The Kindest Cut*, NEWSWEEK, Oct. 20, 2009, available at <http://www.newsweek.com/id/218692/page/1>.

²⁹ See WORLD HEALTH ORG., *supra* note 8, at 11 (discussing the dangers that FGM poses for childbirth).

³⁰ See *id.*

³¹ See *id.* at 4. The WHO also provides a chart of the countries whose populations practice female genital mutilation and indicates the prevalence of FGM within each country. See *id.* at 29–30.

II

GENERAL BACKGROUND OF ASYLUM LAW AND THE
SOCIAL-GROUP CATEGORY

A. The Definition of “Refugee” and “Persecution”

The Immigration and Nationality Act (INA) provides the basis for asylum law in the United States. The INA defines a “refugee” as any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .³²

As this definition makes clear, to qualify for asylum in the United States, a noncitizen must demonstrate persecution on the basis of at least one of five enumerated grounds: race, religion, nationality, membership in a particular social group, or political opinion.³³ The INA, however, does not define “persecution.” As a result, courts have developed a fact-dependent meaning of the term.³⁴ It is clear that the harm to the asylum applicant must be severe to constitute persecution. As the Seventh Circuit has explained, “the conduct at issue must rise above the level of mere harassment,”³⁵ and “unpleasant and even dangerous conditions do not necessarily rise to the level of persecution.”³⁶ Not all bad acts, therefore, constitute persecution.³⁷

An applicant may also demonstrate a well-founded fear of future persecution to qualify for asylum.³⁸ This standard has both subjective and objective components.³⁹ To satisfy the subjective component, the applicant’s fear must be genuine.⁴⁰ The objective component re-

³² INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006).

³³ See *id.*

³⁴ See 3 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 33.04[2] (2008).

³⁵ *Prela v. Ashcroft*, 394 F.3d 515, 518 (7th Cir. 2005) (citing *Asani v. INS*, 154 F.3d 719, 723 (7th Cir. 1998)).

³⁶ *Mitev v. INS*, 67 F.3d 1325, 1331 (7th Cir. 1995).

³⁷ See *Fatin v. INS*, 12 F.3d 1233, 1243 (3d Cir. 1993) (“‘[P]ersecution’ is an extreme concept that does not include every sort of treatment our society regards as offensive.”).

³⁸ See INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

³⁹ See *Dobrican v. INS*, 77 F.3d 164, 167 (7th Cir. 1996) (“To show a ‘well founded fear’ a petitioner must demonstrate both that the fear is (subjectively) genuine and that it is reasonable in light of the (objective) credible evidence.” (citations omitted)); *Castillo v. INS*, 951 F.2d 1117, 1121 (9th Cir. 1991) (“The determination that an alien has a well-founded fear of persecution has both an objective and subjective component.” (citations omitted)).

⁴⁰ See *Castillo*, 951 F.2d at 1121 (“The subjective component requires a showing that the alien’s fear is genuine.”).

quires the applicant's fear to be reasonable.⁴¹ An applicant must demonstrate that the fear is reasonable with "credible, direct, and specific evidence in the record."⁴² To meet this standard, an applicant must show that his or her persecutor has both the capability and inclination to punish the applicant for a characteristic or belief that the persecutor knows the applicant to have.⁴³ The applicant may provide either specific evidence of the applicant's personal experience with persecutors, or, in some cases, more general evidence that persecutors target people who are similarly situated to the applicant.⁴⁴

An applicant who can demonstrate past persecution will presumptively have a well-founded fear of future persecution.⁴⁵ The government can rebut that presumption either by providing evidence that the applicant could safely relocate within the applicant's own country⁴⁶ or by showing that "conditions in the applicant's country of nationality or last habitual residence have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted."⁴⁷

If the applicant fails to show either past persecution or a well-founded fear of future persecution, humanitarian asylum represents the applicant's last opportunity to enter the United States as a refugee. Under humanitarian asylum, an adjudicator may discretionarily grant asylum if

[t]he applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or . . . [t]he applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.⁴⁸

As noted, an asylum applicant must show that his or her persecutors targeted or will target the applicant "on account of" at least one

⁴¹ See *id.*

⁴² *Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (9th Cir. 1986).

⁴³ See *GORDON ET AL.*, *supra* note 34, § 33.04[2][a][ii].

⁴⁴ See 8 C.F.R. §§ 208.13(b)(2)(iii), 1208.12(b)(2)(iii) (2009); *Ndom v. Ashcroft*, 384 F.3d 743, 754 (9th Cir. 2004) ("[W]e are . . . more likely to find that particular instances of past persecution experienced by an applicant were inflicted on account of a protected ground where similar acts are regularly experienced by others who share the applicant's protected affiliation." (citations omitted)).

⁴⁵ See *GORDON ET AL.*, *supra* note 34, § 33.04[2][b][i].

⁴⁶ See 8 C.F.R. §§ 208.13(b)(1)(i)(B), 1208.13(b)(1)(i)(B) (allowing an immigration judge to deny an asylum application if the government can show by a preponderance of the evidence that "[t]he applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so").

⁴⁷ *In re H-*, 21 I. & N. Dec. 337, 346 (B.I.A. 1996).

⁴⁸ 8 C.F.R. §§ 208.13(b)(1)(iii), 1208.13(b)(1)(iii).

of five enumerated grounds.⁴⁹ Those grounds are race, religion, nationality, membership in a particular social group, and political opinion.⁵⁰ For persecution to be “on account of” one of these grounds, the ground must be “at least one central reason for persecuting the applicant.”⁵¹ The persecutor need not have acted with malice, however. As in many FGM cases, the persecutor may have acted in conformity with social tradition or in the belief that the persecutor was helping the asylum applicant.⁵² On the other hand, the asylum applicant must show that “the persecutor is aware or could easily become aware of the [applicant’s] protected status or beliefs.”⁵³

B. The “Particular Social Group” Category

Membership in a particular social group is the most appropriate and most common category for applicants seeking asylum based on female genital mutilation. Like the term “persecution,” the INA does not define “particular social group.” Thus, courts have been largely responsible for defining the term. The exact definition differs from circuit to circuit.⁵⁴

Essentially, a particular social group is “a group of persons all of whom share a common, immutable characteristic.”⁵⁵ A characteristic is immutable if “members of the group either cannot change [the characteristic], or should not be required to change [it] because it is fundamental to their individual identities or consciences.”⁵⁶ An immutable characteristic can be “innate or experiential.”⁵⁷ Innate characteristics are those traits with which the applicant was born, like “gender, . . . kinship units such as clans, . . . or individual family membership.”⁵⁸ An experiential immutable characteristic is one that “reflect[s] a shared experience, such as past membership in a military or paramilitary force.”⁵⁹

In addition, the BIA and most circuit courts recognize a “social visibility” requirement as part of the meaning of “particular social

⁴⁹ See *supra* note 33 and accompanying text.

⁵⁰ INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006).

⁵¹ REAL ID Act of 2005, Pub. L. No. 109-13, § 101(a)(3)(B)(i), 119 Stat. 302, 302–03.

⁵² See *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996) (noting that the persecutor’s “subjective ‘punitive’ or ‘malignant’ intent is not required for harm to constitute persecution”).

⁵³ GORDON ET AL., *supra* note 34, § 33.04[3] (citing *Eduard v. Ashcroft*, 379 F.3d 182, 192–93 (5th Cir. 2004)).

⁵⁴ See *id.* § 33.04[4][c][i].

⁵⁵ *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

⁵⁶ *Id.*

⁵⁷ GORDON ET AL., *supra* note 34, § 33.04[4][c][i].

⁵⁸ *Da Silva v. Ashcroft*, 394 F.3d 1, 5 (1st Cir. 2005) (citations omitted).

⁵⁹ *Id.* (citations omitted).

group.”⁶⁰ As the courts apply the term, “social visibility” measures the “extent to which members of the purported group would be recognizable to others” in the community.⁶¹

Finally, some courts have balked at defining any particular social group too broadly.⁶² Even if a court is willing to define a social group broadly, an individual applicant may face a higher burden of proof in showing that he or she has a well-founded fear of persecution.⁶³ For example, applicants have sometimes had trouble defining a social group based on gender only.⁶⁴ Finally, persecution alone does not constitute a social group.⁶⁵

III

HISTORY OF FEMALE GENITAL MUTILATION AS A BASIS FOR ASYLUM

A. *In re Kasinga*

The BIA first confronted the issue of FGM as a basis for asylum in 1996 in *In re Kasinga*.⁶⁶ The asylum applicant in *Kasinga* was a nineteen-year-old citizen of Togo and a member of the Tchamba-Kunsuntu tribe.⁶⁷ Although members of the Tchamba-Kunsuntu tribe usually subject fifteen-year-old women to FGM, the applicant was not a victim of FGM because her influential father opposed the practice.⁶⁸ After her father died, the applicant fled Togo because her remaining family intended to subject her to FGM.⁶⁹ The BIA held that the applicant had a “well-founded fear of persecution in the form of FGM if

⁶⁰ See *In re C-A*, 23 I. & N. Dec. 951, 959 (B.I.A. 2006), *aff'd sub nom.* Castillo-Arias v. U.S. Att’y Gen., 446 F.3d 1190 (11th Cir. 2006); see also *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74–75 (B.I.A. 2007) (holding that “affluent Guatemalans” are not members of a particular social group because they lack visibility as a group).

⁶¹ *In re C-A*, 23 I. & N. Dec. at 959.

⁶² See, e.g., *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1577 (9th Cir. 1986) (“Major segments of the population of an embattled nation, even though undoubtedly at some risk from general political violence, will rarely, if ever, constitute a distinct ‘social group’ for the purposes of establishing refugee status. To hold otherwise would be tantamount to extending refugee status to every alien displaced by general conditions of unrest or violence in his or her home country.”).

⁶³ See *Hong Ying Gao v. Gonzales*, 440 F.3d 62, 70 (2d Cir. 2006).

⁶⁴ See, e.g., *Fisher v. INS*, 79 F.3d 955, 963 (9th Cir. 1996) (holding that because the applicant had “demonstrated only discrimination on account of her sex,” she was not eligible for relief). *But see Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993) (holding that “Iranian women who refuse to conform to the government’s gender-specific laws and social norms” may constitute a particular social group (emphasis omitted)).

⁶⁵ See *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003) (“[A] ‘particular social group’ must exist independently of the persecution suffered by the applicant for asylum.”).

⁶⁶ 21 I. & N. Dec. 357 (B.I.A. 1996).

⁶⁷ *Id.* at 358.

⁶⁸ *Id.*

⁶⁹ *Id.*

returned to Togo” and granted her asylum.⁷⁰ In reaching its holding, the BIA defined the applicant’s social group as the group “consisting of young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”⁷¹ The BIA concluded that both being a young woman and being a member of the Tchamba-Kunsuntu tribe were immutable characteristics.⁷² Further, “[t]he characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.”⁷³ Although the BIA came down squarely in favor of granting asylum on the basis of FGM, the Board took pains to note that it would not “speculate on, or establish rules for, [FGM] cases that [were] not before [it].”⁷⁴

B. Developments in the Law

Since *Kasinga*, courts analyzing asylum claims under the social-group category have looked favorably upon applicants’ claims for asylum based on FGM. In *Niang v. Gonzales*,⁷⁵ for example, the Tenth Circuit reasoned that “female members of a tribe would be a social group” because “[b]oth gender and tribal membership are immutable characteristics.”⁷⁶ In contrast to *Kasinga*, however, the Tenth Circuit reasoned that there was no need for a social-group definition to include more than gender and tribal membership (that is, there was no need to include opposition to FGM).⁷⁷

The Ninth Circuit further paved the way for future asylum claims based on FGM in *Mohammed v. Gonzales*.⁷⁸ In that case, the court held that women who have undergone FGM in the past are eligible for asylum even without a further showing of a well-founded fear of future persecution.⁷⁹ The Ninth Circuit reasoned that FGM, “like forced sterilization, is a ‘permanent and continuing’ act of persecution, which cannot constitute a change in circumstances sufficient to rebut the presumption of a well-founded fear” of persecution.⁸⁰ Other cir-

⁷⁰ *Id.* at 368.

⁷¹ *Id.*

⁷² *Id.* at 366 (“[T]he particular social group is defined by common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities.”).

⁷³ *Id.*

⁷⁴ *Id.* at 358.

⁷⁵ 422 F.3d 1187 (10th Cir. 2005).

⁷⁶ *Id.* at 1199.

⁷⁷ *See id.* at 1200 (finding it noteworthy that “*Kasinga*’s explanation provides no reason why more than gender or tribal membership would be required to identify a social group,” although including opposition to FGM as part of the definition would not harm the applicant’s claim).

⁷⁸ 400 F.3d 785 (9th Cir. 2005).

⁷⁹ *See id.* at 800.

⁸⁰ *Id.*

cuits, however, still allow the government to rebut the presumption of a well-founded fear of persecution.⁸¹

C. Recent Cases

In September 2007, the BIA decided another FGM asylum case, *In re A-T*.⁸² The Board's holding conflicted with the Ninth Circuit's decision in *Mohammed v. Gonzales*. In *In re A-T*, the respondent, a twenty-eight-year-old woman from Mali, had undergone FGM as a child but had no memory of the experience.⁸³ The Board distinguished the respondent from the applicant in *Kasinga* because in *Kasinga* the applicant had not yet undergone FGM.⁸⁴ Therefore, the BIA held that because "FGM is generally performed only once," the respondent could not have a well-founded fear of future persecution.⁸⁵ The respondent had also attempted to analogize FGM to forced sterilization,⁸⁶ which the INA specifically lists as a basis for asylum.⁸⁷ Although the BIA recognized the similarities between forced sterilization and FGM,⁸⁸ the Board nevertheless reasoned that FGM was not a basis for asylum because Congress specifically included forced sterilization, but not FGM, in the statutory definition of the term "refugee."⁸⁹

⁸¹ See, e.g., *Niang v. Gonzales*, 422 F.3d 1187, 1202 (10th Cir. 2005) ("Once one discredits . . . the threats of future harm . . . one could rationally decide that she had failed to show that if she returned . . . she would be killed or otherwise subjected to torture."); *Oforji v. Ashcroft*, 354 F.3d 609, 613 (7th Cir. 2003) (noting that an asylum applicant can show that she has "suffered past persecution on account of one of the enumerated categories, creating a rebuttable presumption of future persecution"); *Seifu v. Ashcroft*, 80 F. App'x. 323, 323–24 (5th Cir. 2003) (noting that the act of FGM is "the very fundamental change required to rebut the presumption of persecution created by the showing of past persecution").

⁸² 24 I. & N. Dec. 296 (B.I.A. 2007), *vacated*, 24 I. & N. Dec. 617 (Op. Att'y Gen. 2008).

⁸³ *Id.* at 296.

⁸⁴ See *id.* at 299.

⁸⁵ *Id.*

⁸⁶ See *id.* at 299–300. The BIA had previously held that forced sterilization was a form of continuing persecution. See *In re Y-T-L*, 23 I. & N. Dec. 601 (B.I.A. 2003).

⁸⁷ See INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006) ("For purposes of determinations under this chapter, a person who has been forced . . . to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure . . . , shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.").

⁸⁸ See *In re A-T*, 24 I. & N. Dec. at 300 ("FGM is similar to forced sterilization in the sense that it is a harm that is normally performed only once but has ongoing physical and emotional effects . . .").

⁸⁹ See *id.* ("Congress has not seen fit to recognize FGM . . . in similar fashion with special statutory provisions.").

In June 2008, the Second Circuit reached a very different conclusion in an FGM case. In *Bah v. Mukasey*,⁹⁰ the Second Circuit held that the BIA had erred in *In re A-T* when it assumed “categorically” that a woman could undergo FGM only once.⁹¹ Rather, the court said, the government has the burden of proving in each case that the specific applicant is not in danger of suffering FGM again.⁹² Further, the BIA erred by requiring that the applicant fear repetition of the identical harm (FGM) that the applicant originally experienced.⁹³ Indeed, the court found that members of the applicant’s particular social group commonly suffered many types of harm.⁹⁴

Several months after the Second Circuit decided *Bah*, the Attorney General vacated the BIA’s decision in *In re A-T*.⁹⁵ The Attorney General agreed with the Second Circuit that the BIA had erred in deciding that a woman could suffer FGM only once and by ignoring the possibility that a woman who suffered FGM in the past could suffer a different form of persecution in the future.⁹⁶ The Attorney General remanded the case to the BIA to determine whether the regulations entitle the applicant to a presumption of a well-founded fear of persecution;⁹⁷ “if so, whether the Government has satisfied or can satisfy its burden . . . of establishing one of the factors that would rebut the presumption”;⁹⁸ and whether the applicant’s past experience of female genital mutilation is related to her current fear of a forced marriage.⁹⁹

IV

FEMALE GENITAL MUTILATION SHOULD BE A BASIS FOR ASYLUM

The current trend toward allowing women to obtain asylum in the United States on the basis of female genital mutilation is a positive change in the law. Indeed, the INA’s definition of the term “refugee” should include both women who face FGM and those who have already suffered it. Unwanted FGM is clearly persecution, and a showing of FGM in the past should create a rebuttable presumption of a well-founded fear of future persecution.

⁹⁰ 529 F.3d 99 (2d Cir. 2008).

⁹¹ *Id.* at 114.

⁹² *See id.* (putting “the burden on the government to show that these particular petitioners are not at risk of further mutilation”).

⁹³ *Id.* at 115–16 (“Nothing in the regulation suggests that the future threats to life or freedom must come in the same *form* or be the same *act* as the past persecution.”).

⁹⁴ *See id.* at 116.

⁹⁵ 24 I. & N. Dec. 617 (Op. Att’y Gen. 2008).

⁹⁶ *See id.* at 621–23.

⁹⁷ *See id.* at 624; *see also* 8 C.F.R. § 1208.16(b)(1)(i) (2009).

⁹⁸ *In re A-T*, 24 I. & N. Dec. at 624; *see also* 8 C.F.R. § 1208.16(b)(1)(i)(A)–(B), (ii).

⁹⁹ *See In re A-T*, 24 I. & N. Dec. at 624; *see also* 8 C.F.R. § 1208.16(b)(1)(iii).

First, unwanted female genital mutilation constitutes persecution. Both the short- and long-term physical and psychological effects of FGM¹⁰⁰ are severe enough to rise to the level of persecution. Moreover, although some scholars and criminal defense lawyers defend the practice of FGM on cultural grounds,¹⁰¹ any woman who feared FGM and did not desire to undergo the practice or who underwent the practice against her desires—that is, any woman who rejected a cultural acceptance of FGM—should have a valid claim of persecution. In addition, both the Second Circuit’s decision in *Bah v. Mukasey*¹⁰² and the Attorney General’s decision in *In re A-T*¹⁰³ were correct in asserting that a showing of past FGM creates a rebuttable presumption of a well-founded fear of future persecution.¹⁰⁴ In fact, some women undergo female genital mutilation multiple times.¹⁰⁵ Furthermore, many communities justify FGM as a means of controlling women’s sexuality, either to insure that women remain virgins until marriage or to reduce women’s sexual desires.¹⁰⁶ Such a justification is a violation of women’s human rights.¹⁰⁷ Although not every human rights violation constitutes persecution for asylum purposes, the severe physical and psychological harm that FGM causes makes it persecution. Indeed, courts have recognized the existence of persecution in cases involving much less severe physical harm¹⁰⁸ or even in the absence of physical harm.¹⁰⁹

¹⁰⁰ See *supra* Part I.

¹⁰¹ See, e.g., Katherine Brennan, *The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, 7 LAW & INEQUALITY 367, 396 (1989) (“If all cultures are equally valid, on what authority can the human rights system evaluate these practices?”).

¹⁰² 529 F.3d 99 (2d Cir. 2008).

¹⁰³ 24 I. & N. Dec. 617 (Op. Att’y Gen. 2008).

¹⁰⁴ See *supra* text accompanying notes 90–99.

¹⁰⁵ See *In re A-T*, 24 I. & N. Dec. at 621 (referring to a case in which the BIA granted humanitarian asylum to “two women who had suffered female genital mutilation multiple times” (citing *In re S-A-K & H-A-H*, 24 I. & N. Dec. 464, 465 (B.I.A. 2008))); U.S. DEP’T OF STATE, PREVALENCE OF THE PRACTICE OF FEMALE GENITAL MUTILATION (FGM); LAWS PROHIBITING FGM AND THEIR ENFORCEMENT; RECOMMENDATIONS ON HOW TO BEST WORK TO ELIMINATE FGM 6 (2001), available at <http://www.state.gov/documents/organization/9424.pdf> (explaining that in the communities that practice the infibulation type of FGM, “[r]einfibulation must be performed each time a child is born” and on a woman’s wedding night).

¹⁰⁶ See FEMALE GENITAL MUTILATION, *supra* note 10, at 5.

¹⁰⁷ See *id.* at 20–39.

¹⁰⁸ See, e.g., *Beskovic v. Gonzales*, 467 F.3d 223 (2d Cir. 2006) (“[A] ‘minor beating’ or . . . any physical degradation designed to cause pain, humiliation, or other suffering, may rise to the level of persecution if it occurred in the context of an arrest or detention on the basis of a protected ground.” (citation omitted)).

¹⁰⁹ See, e.g., *Makhoul v. Ashcroft*, 387 F.3d 75, 80 (1st Cir. 2004) (“As a theoretical matter, we acknowledge that, under the right set of circumstances, a finding of past persecution might rest on a showing of psychological harm.” (citations omitted)); *Kovac v. INS*, 407 F.2d 102, 104, 106–07 (9th Cir. 1969) (reasoning that the asylum applicant’s inability

Because FGM is plainly persecution, women who have a well-founded fear of FGM should be eligible for asylum in the United States under the INA on the basis of membership in a particular social group.¹¹⁰ As most recent case law on FGM demonstrates, asylum applications based on a well-founded fear of FGM fit most logically into the social-group category. An applicant has never asserted that she suffered FGM on the basis of her race, her nationality, or her religion. Further, although an applicant may be able to show that her persecutors subjected her to FGM on the basis of her political opinion, in most cases, applicants will be most successful applying the particular-social-group category to FGM asylum claims.

Women who fear female genital mutilation generally meet the criteria for membership in a particular social group. In communities where FGM is prevalent, persecutors target women who have not undergone FGM. In addition, the characteristic of fearing FGM (or, analogously, the desire not to undergo FGM) is likely to be immutable among most women. Even if it is possible to change a woman's attitude toward FGM, no woman should be forced to change this characteristic or belief—that is, women “should not be required to change [this characteristic] because it is fundamental to their individual identities or consciences.”¹¹¹

Moreover, women who have already suffered FGM will also fit most of the criteria for membership in a particular social group. In some cultures, persecutors target these women for repeated FGM.¹¹² Even if a particular community did not subject women to multiple experiences of FGM, a showing of past persecution and enduring physical and emotional harm should be sufficient for such women to obtain asylum. For those women who have already suffered FGM, the immutable characteristic is experiential,¹¹³ rooted in their experience of having undergone FGM. Within the social-group category, however, asylum claims would probably be less successful if the group were defined as women in general, as decision makers have been reluctant to acknowledge a particular social group if it is too broad.¹¹⁴

In the cases of both women who have already undergone female genital mutilation and those who have not, the visibility requirement¹¹⁵ of the social-group category presents a problem. Another person will not immediately know whether a woman has undergone

to “earn a decent living to support [his] family” because of discrimination may constitute persecution sufficient for asylum (internal quotation marks omitted)).

¹¹⁰ See INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006).

¹¹¹ See *supra* text accompanying note 56.

¹¹² See *supra* note 105 and accompanying text.

¹¹³ See *supra* text accompanying notes 56–59.

¹¹⁴ See *supra* text accompanying notes 62–65.

¹¹⁵ See *supra* text accompanying notes 60–61.

FGM or whether she fears FGM. How should courts handle this element of the definition of a particular social group? The next Part discusses this issue.

V

THE VISIBILITY REQUIREMENT SHOULD NOT APPLY TO FEMALE GENITAL MUTILATION

A. History of Including the Visibility Requirement in the Definition of a Particular Social Group

The Second Circuit originated the visibility requirement of the “particular social group” category. In 1991, in *Gomez v. INS*,¹¹⁶ the court held that the applicant’s asserted social group, “women who have been previously battered and raped by Salvadoran guerillas,”¹¹⁷ did not constitute a particular social group under the INA because “would-be persecutors could [not] identify [the women] as members of the purported group”—that is, it was not possible for the persecutors to target members of the alleged group for persecution.¹¹⁸ The Second Circuit retained the visibility requirement in *Gao v. Gonzales*,¹¹⁹ requiring a particular social group to “share [] a . . . characteristic that is identifiable to would-be persecutors and is immutable or fundamental.”¹²⁰

The BIA approved the Second Circuit’s new “social visibility” requirement in *In re C-A*.¹²¹ In that case, the BIA explained that the “recognizability” of a social group depended on its visibility to others in a society.¹²² In laying out the social-visibility requirement, the BIA relied on guidelines issued by the United Nations High Commissioner for Refugees (UNHCR) for understanding the social-group category under international law.¹²³ The UNHCR Guidelines define a particular social group as:

[A] group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, un-

¹¹⁶ 947 F.2d 660 (2d Cir. 1991).

¹¹⁷ *Id.* at 663–64.

¹¹⁸ *Id.* at 664.

¹¹⁹ 440 F.3d 62 (2d Cir. 2006), *vacated*, *Keisler v. Hong Yin Gao*, 128 S. Ct. 345 (2007).

¹²⁰ *Id.* at 64.

¹²¹ 23 I. & N. Dec. 951 (B.I.A. 2006).

¹²² *See id.* at 959–60.

¹²³ *See id.* at 956. *See generally* UNHCR, *Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, ¶¶ 10–23, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter UNHCR Guidelines], available at <http://www.unhcr.org/3d58de2da.html> (discussing its standard in defining the factors that constitute “membership of a particular social group”).

changeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.¹²⁴

As the BIA noted, this definition also incorporates the social-visibility requirement into the definition of social-group membership.¹²⁵ The Guidelines also state, and the BIA emphasizes, that the social-group category is not a “catch all” category for every individual who faces persecution.¹²⁶

Although the UNHCR Guidelines use the phrase “perceived as a group by society” rather than the “socially visible” language,¹²⁷ in *In re C-A*, the BIA interpreted the two formulations in the same way.¹²⁸ The use of the word “social” before “visibility” allows courts and the BIA to avoid requiring a strict “visibility” standard. As long as society perceives individuals as part of the group, group members need not physically differ from others in society.

B. The Cases in Which the Visibility Requirement Defeats the Asylum Claim Differ Substantively from Female Genital Mutilation Claims

Noncitizens' asylum applications based on the social-group category often fail, both before the BIA and courts, because their alleged social groups lack social visibility. For example, in *In re A-M-E- & J-G-U*,¹²⁹ the BIA denied asylum to a group of noncitizens who claimed they were a part of the social group of “affluent Guatemalans.”¹³⁰ Wealthy Guatemalans are not visible, according to the BIA, because “violence and crime in Guatemala [are] . . . pervasive at all socio-economic levels” and persecutors also victimized less wealthy Guatemalans.¹³¹ In *Santos-Lemus v. Mukasey*,¹³² the Ninth Circuit also rejected an asylum claim based on the social-group category of “young men in El Salvador resisting gang violence,” reasoning that the alleged group did not qualify because of its lack of social visibility.¹³³ Most

¹²⁴ UNHCR Guidelines, *supra* note 123, ¶ 11 (emphasis omitted).

¹²⁵ See *In re C-A*, 23 I. & N. Dec. at 956.

¹²⁶ See *id.* at 960; UNCHR Guidelines, *supra* note 123, ¶ 2 (“[A] social group cannot be defined exclusively by the fact that it is targeted for persecution (although . . . persecution may be a relevant element in determining the visibility of a particular social group).” (emphasis omitted)).

¹²⁷ UNHCR Guidelines, *supra* note 123, ¶ 11.

¹²⁸ See *In re C-A*, 23 I. & N. Dec. at 956, 959–60 (claiming that the UNHCR Guidelines adopted “the Second Circuit’s ‘social perception’ approach” and later referring to this requirement as “social visibility”).

¹²⁹ 24 I. & N. Dec. 69 (B.I.A. 2007), *aff'd sub nom.* Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007).

¹³⁰ See *id.* at 69.

¹³¹ *Id.* at 75.

¹³² 542 F.3d 738 (9th Cir. 2008).

¹³³ *Id.* at 745; see also *Xiang Ming Jiang v. Mukasey*, 296 F. App'x 166, 168 (2d Cir. 2008) (holding that “people who are targeted for gang violence because they are caught

recently, in *Davila-Mejia v. Mukasey*,¹³⁴ the Eighth Circuit rejected a petition for asylum based on the social-group category of “competing family business owners.”¹³⁵ The court held that such a status did not make the applicants sufficiently socially visible such that persecutors would target the applicants in particular.¹³⁶

The visibility requirement for a particular social group is not appropriate in FGM cases for several reasons. First, in the cases that apply the visibility element to the asylum claim, the opinion usually justifies the visibility requirement because of the need for persecutors to perceive, and thus target, members of the alleged group.¹³⁷ Yet in cases in which applicants fear FGM, persecutors have no difficulty perceiving the applicants. In these cases, the applicants are usually young or about to marry, and they are always female. Moreover, in most FGM cases, the applicant is part of a tribe or other small community, and potential persecutors are neighbors and relatives.¹³⁸ Thus, many potential applicants are known to their persecutors, and identifying characteristics are unnecessary.¹³⁹

In the cases in which the BIA or courts have denied applicants asylum based on the visibility requirement of the social-group category, the persecution the applicants allege often differs substantively from female genital mutilation. For example, many of the cases in which the social group is found to lack social visibility involve claims of economic persecution, as in *In re A-M-E- & J-G-U*¹⁴⁰ and *Davila-Mejia*.¹⁴¹ Although it is possible for an applicant to obtain asylum on the basis of economic persecution, decision makers tend to require a much higher level of harm in such cases.¹⁴² Even in *Santos-Lemus v.*

between rival criminal gangs but are not protected by police in China” do not constitute a particular social group for asylum purposes); *In re E-A-G-*, 24 I. & N. Dec. 591, 594 (B.I.A. 2008) (holding that the group “persons resistant to gang membership” does not constitute a particular social group).

¹³⁴ 531 F.3d 624 (8th Cir. 2008).

¹³⁵ *Id.* at 629.

¹³⁶ *See id.* For other decisions rejecting the applicant’s proposed social group, see *Umoeka v. Att’y Gen.*, 294 F. App’x 736, 739 (3d Cir. 2008) (holding that “perceived police informants” did not constitute a particular social group); *Kholyavskiy v. Mukasey*, 540 F.3d 555, 572 (7th Cir. 2008) (holding that “the mentally ill” and “Jewish refugees who resettled in the United States” are not particular social groups); *In re A-T-*, 24 I. & N. Dec. 296, 303 (B.I.A. 2007) (expressing doubt that “young Bambara women who oppose arranged marriage have the kind of social visibility that would make them readily identifiable to those who would be inclined to persecute them” (citation omitted)).

¹³⁷ *See supra* Part V.A.

¹³⁸ *See* FEMALE GENITAL MUTILATION, *supra* note 10, at 3.

¹³⁹ *See, e.g., In re Kasinga*, 21 I. & N. Dec. 357, 358 (B.I.A. 1996) (explaining that, after her father died, the applicant’s relatives wanted to subject her to FGM).

¹⁴⁰ *See supra* notes 129–31 and accompanying text.

¹⁴¹ *See supra* notes 134–36 and accompanying text.

¹⁴² *See* GORDON ET AL., *supra* note 34, § 33.04[2] (explaining that “economic disadvantage alone will not suffice” to constitute persecution).

Mukasey,¹⁴³ the harm of which the applicant complained was “harassment”—the persecutors demanded money from the applicant and once beat him.¹⁴⁴

Indeed, in most social-group-category cases in which the court holds that the alleged group lacks the visibility element, the court’s unspoken rationale seems to be that another element besides the visibility requirement is missing from the applicant’s claim. Most often, the missing element actually seems to be that the characteristic or belief that forms the social group is not immutable or fundamental enough. It may seem odd to discuss a characteristic or belief as not being immutable or fundamental “enough”—indeed, by definition, the two words are take-it-or-leave-it qualities. For this reason, however, courts seem to shy away from discussing such applicants’ characteristics as not being immutable or fundamental and instead rely on the visibility requirement to deny claims. For instance, in *Santos-Lemus*, it would have been odd—and perhaps even insulting—for the court to say that resisting gang violence was not an immutable quality for young men in El Salvador. Yet the language that describes the status, “resisting,” implies that some people stop resisting. Moreover, it would be unreasonable for the court to suggest that individuals in such a group *should* change such a characteristic or belief, even if that characteristic or belief is not fundamental to the individuals’ identities.

Indeed, in *In re A-M-E- & J-G-U-*, the BIA admitted that wealth as a characteristic of a social group was not immutable.¹⁴⁵ But, the BIA continued, “the shared characteristic is so fundamental to identity or conscience that it should not be expected to be changed.”¹⁴⁶ The BIA recognized that it could not expect the applicants to change their shared characteristic (that is, to divest themselves of their wealth)¹⁴⁷ and thus denied asylum based on lack of visibility.¹⁴⁸ The BIA was explicit that it could not decide *In re A-M-E- & J-G-U-* on the basis that the applicants could simply change their characteristic.¹⁴⁹ That it would be unreasonable for an adjudicator to ask an asylum applicant to change a characteristic or belief, however, does not make that characteristic or belief fundamental to the applicant’s identity. In practice, it is rarely easy to choose asylum applicants to turn away from the United States. But one way to make such line drawing easier would be

¹⁴³ See *supra* notes 132–33 and accompanying text.

¹⁴⁴ See 542 F.3d 738, 746 (9th Cir. 2008).

¹⁴⁵ See 24 I. & N. Dec. 69, 73 (B.I.A. 2007).

¹⁴⁶ *Id.*

¹⁴⁷ See *id.* at 73–74.

¹⁴⁸ See *id.* at 74–75.

¹⁴⁹ *Id.* at 73–74 (“In this regard, we would not expect divestiture when considering wealth as a characteristic on which a social group might be based.”).

to recognize that there are many characteristics that individuals should not *have* to change that are not necessarily fundamental to those individuals' identities.

The pattern of these social-group-category cases, combined with FGM cases, suggests that courts and the BIA should abolish the social-visibility requirement. In asylum cases in which adjudicators rely on the visibility requirement as the key issue, courts and the BIA could instead simply weigh the strength of the applicant's characteristic or belief that is the basis for the social-group-category claim. Admittedly, this balancing would not be an easy bright-line rule for adjudicators to apply, but such balancing would not be less clear than the current social-visibility requirement. And the change would allow courts and the BIA to judge asylum cases with an eye to fundamental fairness. In prioritizing different applicants' characteristics or beliefs, adjudicators might use as a guideline whether the characteristic or belief is innate or immutable, or merely learned or adopted. Under this scheme, wealth is not immutable—even absent the intervention of a persecutor (or a court, for that matter), no one is ever guaranteed eternal wealth. Conversely, the experience and symptoms of having been genitally mutilated are immutable.

Eliminating the social-visibility requirement would not change the outcome of cases like *In re A-M-E- & J-G-U*¹⁵⁰ or *Davila-Mejia*,¹⁵¹ indeed, those cases could even form the basis of a justification for abolishing the requirement. In such cases, the court or the BIA would reach the same outcomes by explaining the relative importance to an individual of characteristics like affluence or ownership of a family business as compared to characteristics like gender or a shared, past traumatic experience. In addition, other claims of persecution on the basis of legitimate social groups, like those of applicants who fear or who have undergone FGM, would not falter on the social-visibility requirement. Importantly, courts and the BIA would be explicit about the bases for their determinations of asylum, thereby making a complicated and at times bewildering process more transparent to noncitizens, lawyers, and government officials.

VI

OTHER AVENUES FOR ESTABLISHING ASYLUM BASED ON FEMALE GENITAL MUTILATION: ANALOGY TO INVOLUNTARY STERILIZATION

Even if courts and the BIA do not abolish the social-visibility requirement of the social-group category of the INA entirely or just for

¹⁵⁰ See *supra* notes 129–31, 146–49 and accompanying text.

¹⁵¹ See *supra* notes 134–36 and accompanying text.

FGM, asylum applicants may still be able to reliably establish asylum on the basis of FGM in another way. The INA explicitly includes forced sterilization as a basis for asylum:

For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.¹⁵²

The INA thus categorizes forced sterilization as persecution on account of political opinion, not membership in a particular social group. Therefore, asylum applicants who hope to gain admission to the United States on the basis of a fear of FGM may be able to analogize it to involuntary sterilization and thereby avoid the social-visibility-requirement problem.

A. History of Involuntary Sterilization as a Basis for Asylum

One of the earliest cases in which the BIA explicitly recognized involuntary sterilization as persecution was *In re Y-T-L*.¹⁵³ In that case, the Chinese applicant and his wife had three children, despite the Chinese law prohibiting couples from having more than one child.¹⁵⁴ After the illegal birth of the second child, the Chinese government fined the applicant and his wife.¹⁵⁵ After the illegal birth of the couple's third child, the Chinese government forcibly sterilized the applicant's wife.¹⁵⁶ In its decision, the BIA reasoned that forced sterilization constitutes persecution because the practice deprives an individual of the ability to have children.¹⁵⁷ Importantly, the BIA also declined to hold that an asylum applicant's past sterilization could establish a "fundamental change in circumstances" sufficient to discretionarily deny asylum merely because the applicant faced no further threat of forced sterilization.¹⁵⁸ Moreover, the passage of time since a

¹⁵² INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006).

¹⁵³ 23 I. & N. Dec. 601 (B.I.A. 2003). In its decision, the BIA relied on an earlier case, *In re C-Y-Z*, 21 I. & N. Dec. 915 (B.I.A. 1997).

¹⁵⁴ See *In re Y-T-L*, 23 I. & N. Dec. at 602.

¹⁵⁵ See *id.*

¹⁵⁶ See *id.*

¹⁵⁷ See *id.* at 607.

¹⁵⁸ See *id.* at 605–07.

forced sterilization will not change the fact that an individual who has been forcibly sterilized has a well-founded fear of persecution.¹⁵⁹

The Ninth Circuit agreed with the BIA's holding in *In re Y-T-L* and extended the applicability of the Board's reasoning. In *Qili Qu v. Gonzales*,¹⁶⁰ Chinese authorities denied the asylum applicant and his wife a birth permit because of their political beliefs.¹⁶¹ When the applicant's wife became pregnant, the couple hid their child with his grandparents.¹⁶² The couple finally received a birth permit four years after they had applied for one, and they attempted to apply the permit to the child who had already been born by pretending that the child was younger than he was.¹⁶³ When authorities discovered the ruse, a neighborhood committee forcibly sterilized the applicant's wife.¹⁶⁴ The Ninth Circuit held that when the Chinese government involuntarily sterilized the applicant's wife, the harm constituted "permanent and continuing persecution."¹⁶⁵ The court further held that, unlike in ordinary asylum cases, the U.S. government could never rebut the presumption of persecution in such cases.¹⁶⁶ The Ninth Circuit reasoned that, because the persecution was ongoing, it was not possible for conditions to change or for the applicant to relocate such that he could eliminate his well-founded fear of persecution.¹⁶⁷

B. History of Analogizing Female Genital Mutilation to Involuntary Sterilization

Following *In re Y-T-L*, *Qili Qu*, and similar cases, some asylum applicants who had suffered female genital mutilation attempted to analogize FGM to forced sterilization. The correlation between the two practices was obvious: FGM and involuntary sterilization have similar types of physical and emotional harm and similar long-term effects. The first case in which the applicant drew a comparison between female genital mutilation and involuntary sterilization was *Mohammed v. Gonzales*.¹⁶⁸ There, the analogy succeeded. The Ninth Circuit held that female "genital mutilation, like forced sterilization, is a 'permanent and continuing' act of persecution, which cannot constitute a change in circumstances sufficient to rebut the presumption of a well-founded fear."¹⁶⁹

¹⁵⁹ See *id.* at 605–08.

¹⁶⁰ 399 F.3d 1195 (9th Cir. 2005).

¹⁶¹ See *id.* at 1197.

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ See *id.*

¹⁶⁵ *Id.* at 1203.

¹⁶⁶ See *id.* at 1202–03.

¹⁶⁷ See *id.* at 1203.

¹⁶⁸ 400 F.3d 785 (9th Cir. 2005). See generally *supra* text accompanying notes 78–80.

¹⁶⁹ 400 F.3d at 800.

Other circuits, however, were unwilling to accept the analogy to involuntary sterilization with such ease, and many applicants who applied for asylum on the basis of FGM did not enjoy the same success. All subsequent cases in which an applicant analogized FGM to forced sterilization either distinguished *Mohammed* or explicitly disagreed with the Ninth Circuit. For example, in the original decision of the BIA in *In re A-T*,¹⁷⁰ the BIA disagreed with the continuing-harm analysis of the Ninth Circuit in *Mohammed*.¹⁷¹ The BIA noted that the INA does not explicitly include FGM as a basis for asylum.¹⁷² Moreover, the Board explained that FGM was like any other past injury that rises to the level of persecution, “including those that involve some lasting disability, such as the loss of a limb.”¹⁷³

The Sixth Circuit came to a similar conclusion in *Diallo v. Mukasey*.¹⁷⁴ In *Diallo*, the asylum applicant claimed to have a well-founded fear of persecution on account of her political activities; she had also undergone FGM as a child.¹⁷⁵ In rejecting her claim for asylum, the Sixth Circuit distinguished *Mohammed*: “The soundness of the decision in *Mohammed*, however, is debatable because Congress specifically defined the term ‘refugee’ to include victims of forced sterilization. No equivalent ‘shortcut’ to refugee status applies to those subjected to FGM.”¹⁷⁶ The court also distinguished *Mohammed* on the facts: in *Mohammed*, the petitioner might have been at risk for further female genital mutilation, but the applicant in *Diallo* had identified no such risk.¹⁷⁷ In making this distinction, the court pointed out that in *Mohammed*, the Ninth Circuit had concluded in the alternative that “even if FGM were not analogous to forced sterilization, the petitioner might well have been at risk of further genital mutilation if returned to Somalia.”¹⁷⁸ Finally, the Sixth Circuit pointed out that the INA explicitly includes forced sterilization as a basis for asylum in response to the coercive family-planning policies of countries like China.¹⁷⁹ The Sixth Circuit did not explain, though, why this intended purpose of includ-

¹⁷⁰ 24 I. & N. Dec. 296 (B.I.A. 2007). See generally *supra* text accompanying notes 82–89. Although the Attorney General recently vacated this case, see 24 I. & N. Dec. 617 (Op. Att’y Gen. 2008), *In re A-T* represents the BIA’s response to an analogy between FGM and forced sterilization.

¹⁷¹ See *In re A-T*, 24 I. & N. Dec. at 300.

¹⁷² See *id.*

¹⁷³ *Id.*

¹⁷⁴ 268 F. App’x 373 (6th Cir. 2008).

¹⁷⁵ See *id.* at 374–75.

¹⁷⁶ *Id.* at 380 (citing INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007); *In re A-T*, 24 I. & N. Dec. 296).

¹⁷⁷ See *id.*

¹⁷⁸ *Id.* (emphasis added).

¹⁷⁹ See *id.* (citing *In re A-T*, 24 I. & N. Dec. 296).

ing forced sterilization made the analogy to female genital mutilation inappropriate.

C. Courts Should Accept the Analogy Between Female Genital Mutilation and Involuntary Sterilization

Despite the inconsistent responses by the BIA and courts to analogies between forced sterilization and female genital mutilation, asylum applicants should be able to liken the two and thereby receive the benefits of asylum. Female genital mutilation, like forced sterilization, has ongoing physical and psychological effects on the individuals who are involuntarily subjected to it.¹⁸⁰ Indeed, one potential effect of FGM is infertility.¹⁸¹ Considering this potential health consequence, FGM is arguably even more physically and emotionally scarring than involuntary sterilization. Moreover, women who are genitally mutilated against their will and individuals who are forcibly sterilized both suffer a grievous breach of bodily autonomy.¹⁸²

Admittedly, some problems exist with this approach as an avenue to asylum for victims of FGM. Historically, with the exception of *Mohammed v. Gonzales*,¹⁸³ cases in which asylum applicants analogized FGM to forced sterilization have not prevailed.¹⁸⁴ Nevertheless, judicial history can be, and frequently is, overcome either by legislation or acts of the judiciary itself. A second, perhaps more serious, problem with the analogy between FGM and involuntary sterilization lies in the definition of each type of persecution. The INA states that forced sterilization constitutes persecution on account of political opinion, not membership in a particular social group,¹⁸⁵ while FGM fits most appropriately into the category of membership in a particular social group.¹⁸⁶ Again, however, this difference is not fatal to the analogy between FGM and involuntary sterilization.

The best solution to this difference in statutory treatment is to explicitly mention female genital mutilation as a basis for asylum in the INA, just like involuntary sterilization. Such an addition could be accomplished easily. The current language of section 101(a)(42) of the INA could remain, but an additional sentence, analogous to the current sentence about forced sterilization, should be added at the end of the section. That sentence might read:

¹⁸⁰ See *supra* notes 24–30 and accompanying text.

¹⁸¹ See *supra* text accompanying note 28.

¹⁸² Cf. *supra* text accompanying note 107.

¹⁸³ See *supra* text accompanying notes 168–69.

¹⁸⁴ See *supra* text accompanying notes 170–79.

¹⁸⁵ See INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006).

¹⁸⁶ See *supra* Part II.B.

For purposes of determination under this chapter, a person who has been forced to undergo involuntary genital mutilation, or who has been persecuted for failure or refusal to undergo such a procedure, shall be deemed to have been persecuted on account of membership in a particular social group, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of membership in a particular social group.

The addition of such a sentence would prevent courts or the BIA from distinguishing FGM and involuntary sterilization on the basis of congressional intent. Indeed, with the inclusion of such a sentence, an adjudicator would have to make only a factual determination as to a potential asylee's application—whether or not the applicant had a well-founded fear of female genital mutilation. Such a statutory change would thus have the added benefit of alleviating currently overloaded court dockets.

Until Congress changes the statute, however, courts and the BIA should still allow asylum applicants to analogize FGM to forced sterilization, and women should be able to secure asylum on the basis of FGM. In *Diallo v. Mukasey*,¹⁸⁷ the Sixth Circuit relied on the legislative intent to include forced sterilization in the INA.¹⁸⁸ The Sixth Circuit claimed that Congress included involuntary sterilization in the definition of refugee in the INA directly in response to China's coercive family-planning policies.¹⁸⁹ Even if this explanation of the legislative history of the INA is accurate, a policy or practice of irreparably physically and psychologically injuring women in a community is just as despicable as a coercive family-planning policy, and Congress and the courts should recognize it as such. But until Congress recognizes FGM as equally harmful as or more harmful than involuntary sterilization, courts and the BIA should allow applicants to compare the practices in their bids for asylum.

Moreover, the current difference in the "on account of" categories for involuntary sterilization and FGM does not affect the underlying analysis. The INA requires only that persecution be on account of one of the five enumerated grounds.¹⁹⁰ After a ground is identified in any asylum analysis, that ground does not affect the rest of the asylum process. Indeed, the same type of harm can be a basis for asylum under different enumerated grounds. As long as FGM fits into one of the enumerated categories, it should not be important to courts or

¹⁸⁷ 268 F. App'x 373 (6th Cir. 2008).

¹⁸⁸ See *id.* at 380 (citing *In re A-T-*, 24 I. & N. Dec. 296 (B.I.A. 2007)); see also *In re Y-T-L-*, 23 I. & N. Dec. 601 (B.I.A. 2003).

¹⁸⁹ See *Diallo*, 268 F. App'x at 380.

¹⁹⁰ See *supra* Part II.A.

the BIA whether FGM falls into the same category as involuntary sterilization or not.

VII

ANOTHER AVENUE: UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

In addition to domestic asylum law, the applicants seeking asylum on the basis of female genital mutilation may have recourse to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).¹⁹¹ Although CAT is not self-executing in the United States,¹⁹² Congress passed the Foreign Affairs Reform and Restructuring Act in 1998, which implemented Article 3 of CAT.¹⁹³ Article 3 of CAT provides that state parties to the Convention may not “expel, return (*“refouler”*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹⁹⁴ Therefore, an asylum applicant must meet a heavier burden of proving persecution under CAT, under which the applicant must fear *future* harm,¹⁹⁵ than under section 101(a)(42) of the INA,¹⁹⁶ under which past harm is sufficient.¹⁹⁷

The Convention Against Torture defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹⁹⁸

Thus, the four elements of torture under CAT are severe physical or mental pain or suffering; intentional infliction; infliction for the purpose of obtaining information, punishing, intimidating, coercing, “or

¹⁹¹ G.A. Res. 39/46, 39 U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter CAT].

¹⁹² See GORDON ET AL., *supra* note 34, § 33.10[2].

¹⁹³ See Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2822.

¹⁹⁴ CAT, *supra* note 191, art. 3.

¹⁹⁵ See *id.* (requiring that an individual must believe “that he *would be* in danger of being subjected to torture” (emphasis added)).

¹⁹⁶ 8 U.S.C. § 1101(a)(42) (2006).

¹⁹⁷ See *supra* text accompanying note 45.

¹⁹⁸ CAT, *supra* note 191, art. 1; see also 8 C.F.R. §§ 208.18(a)(1), 1208.18(a)(1) (2009) (incorporating CAT’s definition of torture).

for any reason based on discrimination of any kind”;¹⁹⁹ and “inflict[ion] by or at the instigation of or with the consent or acquiescence of a public official” or someone “acting in an official capacity.”²⁰⁰

A. Application to Female Genital Mutilation

Given the extreme physical and psychological harms associated with female genital mutilation,²⁰¹ an asylum applicant could make a strong argument that FGM meets the level of severe physical or mental pain or suffering that the Convention Against Torture requires. Indeed, this element would probably be the least controversial in any FGM claim under CAT, given that previous FGM cases have recognized the severity of the suffering that FGM causes to the women who undergo it. Moreover, this element does not seem to differ substantially from the (high) level of harm that section 101(a)(42) of the INA requires.²⁰²

Asylum applicants who have suffered FGM likewise would have no trouble showing intentional infliction of FGM. Indeed, intentionality is an integral part of the definition of female genital mutilation. In any hypothetical situation involving some harm that might be described as unintentional female genital mutilation, the woman who had suffered the harm would not be able to obtain asylum under section 101(a)(42) of the INA, either. In such a situation, the woman would not be able to show that she had suffered persecution “on account of” one of the five enumerated grounds²⁰³ because she would not have suffered FGM on account of anything at all.

The third element of the CAT definition of torture, infliction for one of the listed purposes, would also pose few problems to asylum applicants who have suffered FGM. In many cases of FGM, applicants can show that their persecutors inflicted FGM as a means of controlling women’s sexuality,²⁰⁴ a purpose that should qualify as intimidation or coercion under CAT. Even in those cases in which asylum applicants cannot show that their persecutors subjected them to FGM as a means to control women’s sexuality, applicants should have no difficulty showing that their cases fall into the final category of listed purposes, “for any reason based on discrimination of any kind.”²⁰⁵ After all, the name of the practice itself—*female* genital mutilation—

¹⁹⁹ CAT, *supra* note 191, art. 1.

²⁰⁰ *Id.*

²⁰¹ See *supra* notes 24–30 and accompanying text.

²⁰² See *supra* notes 34–37 and accompanying text.

²⁰³ See *supra* Part II.A.

²⁰⁴ See *supra* text accompanying note 106.

²⁰⁵ CAT, *supra* note 191, art. 1.

makes clear that persecutors subject only women to this type of torture and that FGM is thus a form of gender discrimination.

The most difficult element of the CAT definition of torture for a woman who has suffered or fears suffering FGM would most likely be the fourth element. That element requires that the harm be inflicted by a public official or someone acting in an official capacity, or at least that such an official acquiesce to the act. In most FGM cases, the requirement that the “official” acquiesce is not at issue; in the communities that practice FGM, no one attempts to stop the practice, nor even to condemn it.²⁰⁶ Rather, the difficulty for a woman who has suffered FGM would be in showing the “officialness” of the actor or actors. Because the usual practitioners of female genital mutilation are members of the female’s community or tribe,²⁰⁷ they are not always formal public officials. Nevertheless, an applicant seeking protection under CAT could plausibly argue that respected tribal leaders function as officials of the tribe. Additionally, given that most females who undergo FGM are children and young women,²⁰⁸ such women could argue that the practitioners of FGM often have an additional age-related authority over their victims.

CONCLUSION

Asylum law based on the particular-social-group category of section 101(a)(42) of the INA is murky, and the category is difficult for noncitizens to apply in practice. For this reason, the BIA and the courts should make clear that an applicant who has suffered or who fears suffering FGM has a well-founded fear of persecution. Further, that applicant’s asylum claim should not falter with application of the particular-social-group category. Despite the unwise recent addition of the visibility requirement to the definition of a social group, women who have undergone or who fear undergoing FGM are a clear example of a social group that deserves protection under U.S. asylum law. The rationales for the visibility requirement are still fulfilled in cases of FGM. Persecutors have no difficulty targeting these women; moreover, the characteristic is either immutable or fundamental, depending on how it is articulated.

Female genital mutilation cases highlight the ultimate problems with the social-visibility requirement. Although courts should recognize that women in FGM cases have the requisite social visibility, the requirement should be abolished for all asylum cases. As long as communities around the world continue to practice FGM, women who

²⁰⁶ Cf. *supra* text accompanying note 10.

²⁰⁷ Cf. *supra* text accompanying note 25.

²⁰⁸ See *supra* note 12.

fear or unwillingly undergo the practice should qualify for asylum in the United States.

The difficulty of applying the social-group category may be eclipsed altogether by simply adding female genital mutilation to the INA as an explicit ground for relief. Such an addition would properly mirror the inclusion of involuntary sterilization as a ground for asylum. Furthermore, it should not matter to the asylum analysis whether FGM fits under the same enumerated ground as forced sterilization because the type of harm is similar.

Until U.S. immigration law functions properly to allow victims of FGM to obtain asylum, victims may also consider an asylum claim under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Although the CAT standard, by requiring fear of future harm, is narrower than the standard for persecution under the INA, women who fear FGM will often have strong cases under CAT.

Hopefully, one day the path to asylum for victims of female genital mutilation will not require resort to international law at all. As long as communities around the world continue to practice FGM, women who unwillingly undergo the practice should be able to take refuge in the United States.