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RECENT DEVELOPMENTS

WOMEN ESCAPING GENITAL MUTILATION — SEEKING ASYLUM IN THE UNITED STATES

Daliah Setareh*

Here at our sea-washed sunset gates shall stand
A mighty woman with a torch, whose flame
Is the imprisoned lighting, and her name
Mother of Exiles. From her beacon-hand
Glows world-wide welcome; her mild eyes command . . .

Inscription at the Base of the Statue of Liberty
“The New Colossus” by Emma Lazarus (1903)

Today, girls and women in many parts of Africa, the Arabian Peninsula, the Middle East, India, and East Asia are genitally mutilated. The State Department estimated that up to 110 million girls and women worldwide have already suffered from genital mutilation.¹ Yet, their governments have remained apathetic, either unwilling or unable to stop this practice. Despite the Statue of Liberty’s inscription that proclaims this country to be the “Mother of Exiles,” the United States does not serve as a refuge for women who are persecuted because of their gender. In fact, the United States immigration courts have done little to protest the horrors of female genital mutilation. Recently, how-

* J.D. candidate 1996, Southwestern University School of Law, Los Angeles. I would like to thank Professor Isabelle Gunning for encouraging me to pursue this important topic. I also want to extend my deepest gratitude to David L. Neal, who provided me with invaluable guidance, input, and most of all encouragement throughout the writing of this Article. I am also grateful to the editors and staff of the UCLA Women’s Law Journal for their outstanding effort and dedication. Further, I want to thank Professor Michael Frost, Stefanie Krautstrunk, Brad Shenfeld, and Paul D. Johnson for their support.

1. Stuart Wasserman & Maria Puente, *Female Genital Mutilation Under Scrutiny Hearing*, USA TODAY, Feb. 11, 1994, at 3A.

ever, at the United Nations Fourth World Conference on Women in Beijing, the United States, together with 189 other countries, adopted a Platform for Action calling for the protection and promotion of women's human rights.² Skeptics at the Conference, however, argued that "fine-sounding" agreements negotiated by delegates from around the world would make little difference to the plight of the two million girls whose genitals are mutilated each year.³ The United States, as a purported leader in human rights protection, must dispel such skepticism and take concrete action to heed its commitments to ameliorate the plight of these women. Specifically, United States immigration policy must recognize the unique violations inflicted upon women and provide an adequate remedy: *asylum*.

Since its inception after World War II, asylum law has generally been shaped by the experiences of men, which tend to be political in nature and involve public activities against the government.⁴ Women, however, may have quite different experiences of persecution, stemming from cultural and social laws which dictate gender-specific behavior and treatment.⁵ Women often suffer abuses unique to women which men do not and cannot experience, such as female genital mutilation. The reality of such gender-specific abuse has yet to be genuinely recognized, much less remedied, by United States asylum law.

Recently, immigration policy took a long-awaited first step towards recognizing women's asylum claims based wholly or in part on gender. On May 25, 1995, the Office of Internal Affairs of the Immigration and Naturalization Service (INS) issued a memorandum entitled *Considerations For Asylum Officers Adjudicating Asylum Claims From Women*.⁶ This "Considerations" Memorandum is a response to the international and national initiatives which have increased awareness of the plight of women refugees.⁷ The Memorandum was distributed after the United

2. Teresa Poole, *Watered Down, but Still a Cause for Hope and Pride: 'The Platform' is Not Binding, but Will Create a Climate of Expectation*, THE INDEPENDENT, Sept. 16, 1995, at 12.

3. *Id.*

4. See generally T. Alexander Aleinikoff, *The Meaning of 'Persecution' in United States Asylum Law*, 3 INT'L J. REFUGEE L. 5, 21-22 (1991).

5. Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 626 (1993).

6. Reprinted in 72 INTERPRETER RELEASES 771 (June 5, 1995) [hereinafter *INS Memorandum*].

7. See, e.g., the 1979 *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) which is the most comprehensive international

Nations High Commissioner for Refugees (UNHCR) in 1991 issued *Guidelines on the Protection of Refugee Women*⁸ recognizing that discrimination against women based on gender can be a basis for a refugee status claim.⁹ Additionally, the Memorandum emulates the 1993 Canadian gender guidelines in asylum cases,¹⁰ as well as the proposed set of guidelines submitted by Harvard's Women Refugees Project.¹¹ Although the dissemination of the INS Memorandum is a significant step forward in the consideration of gender-based persecution claims, nevertheless, it is only a step and not a remedy to the inadequacies of current asylum law regarding gender-based persecution claims. The guidelines are not binding on immigration courts, and thus, women who seek asylum based on escaping genital mutilation may be denied protection.¹²

The purpose of this Article is to demonstrate how an asylum claim, founded on gender-based persecution, particularly persecution exacted through genital mutilation, is tenable under current asylum law. Further, this Article argues that a legislative addition to the refugee definition is essential to achieving true gender equality before the law. Specifically, this Article advocates that women who fear and seek to escape female genital mutilation should be protected as refugees.

human rights instrument for women. CEDAW prohibits actions by States which are discriminatory and requires States to take affirmative steps to eradicate discriminatory treatment of women. The United States, however, has yet to sign this document.

8. *Guidelines on the Protection of Refugee Women*, Office of the United Nations High Commissioner on Refugees, U.N. Doc. ES/SCP/67, (1991) [hereinafter *UNHCR Guidelines*].

9. *Id.* ¶ 71.

10. GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT: WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION, Immigration and Refugee Board, Ottawa, Canada (Mar. 9, 1993) [hereinafter *Canadian Guidelines*]. The United States has often received assistance from Canada in remodeling its asylum policy. See 68 INTERPRETER RELEASES 402 (Apr. 8, 1991).

11. NANCY KELLY, HARVARD IMMIGRATION AND REFUGEE PROGRAM, GUIDELINES FOR WOMEN'S ASYLUM CLAIMS (1994). The guidelines were backed by thirty-six different refugee and human rights groups.

12. Recently, an Immigration Judge in Baltimore denied asylum to a woman from Sierra Leone, who had been abducted, gagged, bound, and had her sexual organs partly cut away with a knife. The judge denied her request for asylum, explaining that she had a choice of supporting the practice, which he thought important for maintaining tribal unity. See Pamela Constable, *INS Debates Female Mutilation as Basis for Asylum*, WASH. POST, Sept. 11, 1995, at D1. See also 72 INTERPRETER RELEASES 1265 (Sept. 18, 1995).

Part I of this Article documents the widespread practice of female genital mutilation and demonstrates that it is a socio-political means of oppressing women. Next, in Part II, this Article lays out the substantive requirements of an asylum claim in the United States. Part III advocates a sensible application of current law which can provide a temporary remedy for a woman escaping female genital mutilation by interpreting the statute to include women as members of a "particular social group." Part IV examines the recent "Considerations" Memorandum and postulates its effect on a woman's asylum claim based on female genital mutilation. This section contends that this Memorandum should serve only as a "first step" towards a more just asylum policy for women. Finally, Part V urges the United States to fulfill its commitments made at the United Nations Fourth World Conference on Women in Beijing, specifically by adding a "gender" category to the current United States definition of refugee.

I. GENDER-BASED PERSECUTION: FEMALE GENITAL MUTILATION¹³

Female genital mutilation is one particularly stark example of patriarchal control over women, where women suffer both ongoing physical torture as well as lasting psychological harm. Currently, female genital mutilation is practiced in "at least 26 countries in Africa, in parts of Yemen, Indonesia, Malaysia, and among some groups in India, and in some Middle East countries."¹⁴ The practice of female genital mutilation is so ancient that it has become firmly ingrained into the cultural traditions of practicing countries and has become almost impossible to eradicate. Moreover, as addressed in subpart B of this section, the practice has served as an enduring method of social control

13. Female genital mutilation is often called female circumcision, inaccurately implying a similarity to male circumcision. In fact, female genital mutilation is analogous in a male to "removal of the head and a portion of the length of the penis, and inducing scarring that would make erection painful if not impossible." 72 INTERPRETER RELEASES 1189 (Sept. 1, 1995). Thus, "female genital mutilation is not comparable to male circumcision, unless one considers circumcision amputation." Senator Schroeder, 141 CONG. REC. H1695 (daily ed. Feb. 14, 1995) (statement of then-Rep. Schroeder).

14. Farah, Immigration and Refugee Board (Refugee Division), Canada, May 10, 1994 (publication pending), quoting Fran P. Hosken, *The Hosken Report: Genital and Sexual Mutilation of Females*, WOMEN'S INT'L NETWORK NEWS, Autumn 1982, at 32. See also Evelyn Shaw, *Female Circumcision: Perceptions of Clients and Caregivers*, 33 J. AM. COLLEGES OF HEALTH 193, 194 (1985) (table listing countries in which surgeries are performed).

where the “net result is total control over a woman’s sexuality and reproductive system.”¹⁵ Thus, female genital mutilation is not merely a cultural practice or religious tradition, but a form of *sexual politics* — the control over women.¹⁶

A. Control Through Mutilation — The Process

Women may be subjected to three types¹⁷ of genital mutilation, typically performed without anesthesia: pharaonic circumcision, excision, and sunna circumcision. The mutilation may be carried out when the child is only a few days old, a late teenager, or a mature woman.¹⁸ The most prevalent and most drastic of the operations is called “infibulation” or “pharaonic circumcision.”¹⁹ This is the most painful and debilitating procedure, especially because it is often done repeatedly to a woman.²⁰ This form involves the removal of the entire clitoris along with the labia minora and labia majora.²¹ The two remaining sides of the labia majora are then fastened together leaving only a small opening for urine and menstrual blood to pass through.²² Adhesive substances such as sugar, eggs, cigarette paper, or thorns are then used to bind the wound together to ensure that a very tiny opening remains. During the healing period, which usually takes over a month, the girl’s legs remain bound together. The trau-

15. Senator Schroeder, *supra* note 13.

16. ELIZABETH WILLIAMS MOEN, GENITAL MUTILATION: EVERYWOMAN’S PROBLEM 1 (U. of Colo. - Boulder Working Paper No. 22, 1983).

17. See description of the “less severe” forms of female genital mutilation *infra* note 19.

18. See Hosken, *supra* note 14, at 32. See also Matter of M- K-, A72-374-558 (IJ Arlington, Va. Aug. 9, 1995) in 72 INTERPRETER RELEASES 1188, 1189 (Sept. 1, 1995), where respondent’s genitalia were forcibly mutilated at the age of twenty-three.

19. The second and “less severe” form of genital mutilation is “excision.” This type was invented by midwives in response to colonial prohibitions against the full pharaonic type and involves the removal of the clitoris, parts or all of the labia minora, and slices of the labia majora. “Sunna circumcision” is the third and mildest form of female genital mutilation; yet it is also the rarest form. Here, all or part of the clitoris is removed by either cutting it away, or by “circumbustion”, i.e. burning away the tip of the prepuce of the clitoris. See Asma El Dareer, *Woman, Why Do You Weep: Circumcision and Its Consequences* 1-5 (1982), in Isabelle R. Gunning, *Arrogant Perception, World-Traveling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 195 (1991-92).

20. *Id.*

21. *Id.*

22. In some cultures, “a match stick is inserted in the center of the wound to allow the development of a fistula for urination . . . the match stick is removed daily for urination and reinserted until the wound heals.” MOEN, *supra* note 16.

matic effect of this experience and its pain almost "annihilates the survivor's very capacity for meaningfully relaying the horror."²³

However, the mutilation process may not end after this initial procedure but is continued throughout the woman's life. After marriage, for example, the opening must be enlarged enough to allow intercourse.²⁴ Widows, divorcees, or a married woman whose husband is away or has several wives may have to undergo total reinfibulation, i.e., making the opening match-stick size again.²⁵ This reoccurring and relentless assault on women exercises control by demoralizing and subjugating them; the woman is subjected to physical and mental pain, her body and reproduc-

23. Eugenie Anne Gifford, "The Courage to Blaspheme": *Confronting Barriers to Resisting Female Genital Mutilation*, 4 UCLA WOMEN'S L.J. 329, 339 (1994). It is paramount for a women applying for asylum to relay her experience in as detailed and graphic a way as possible in order to be found credible. The following is a personal account of an adult female asylum claimant's testimony:

I was subjected to this operation when I was eight years old. One afternoon, a group of women, including my mother and aunts, gathered at our house so that they could circumcise me and my cousin who was of the same age. I was told that it is a common thing and that it would enhance my chances of getting married to a good man. They took me into an empty room and tying my arms behind my back. Two pairs of women grabbed my legs and spread them wide open. They held my legs very tight so that I would not be able to move them. Then, another lady started to get a new blade and took the cover off of it. She was holding the blade in her hand when she disappeared between my legs. She inserted her fingers into my inside to search for my clitoris. She got a good grip of my clitoris and started to pull it out, and I felt the pain and started to scream. She cut off my clitoris with the blade and I screamed more and more. This did not deter her nor did it make her to stop cutting my body any further. She continued slicing away my labia minor at which point, I lost consciousness. Subsequently, she scraped raw the wall of my vulva and bound them together with thorns. She place a stick between the raw walls of my vulva so that I would have barely sufficient means to expel my bodily wastes. . . . We were not allowed to urinate for two days and we were not given any liquids to drink. My legs were left tied together for ten days after which time I started to walk again with great difficulty and pain. Even though this event took place over twenty years ago, I can still easily visualize the scene and feel the pain and trauma all over again when I start to talk about it. (Typed as per original with errors and/or omissions).

Farah, *supra* note 14, at 9-10.

24. This is done with a knife by the husband or his relatives, or by women who perform such ceremonies in the village. See LIGHTFOOT-KLEIN, *infra* note 29, at 58.

25. MOEN, *supra* note 16, at 2.

tive system is physically controlled by society, and she has no choice but to endure.²⁶

The consequences of this practice include both physical injury and psychological harm. Women and girls suffer complications such as hemorrhage, infections, septicemia, retention of urine, shock, or even death. Further, women often retain menstrual blood or urine, resulting in infections.²⁷ In addition to corporal suffering, the psychological stress associated with the traumatic amputation rite and its aftermath are life long.²⁸ Psychological consequences include loss of self-esteem, feelings of victimization, severe anxiety prior to the operation, depression associated with physical complications, chronic irritability, and sexual frustration.²⁹

B. *Control Through Mutilation — Sexual Politics*

The practice of mutilating female genitalia exemplifies the subordination of women as a class. It is a form of "sexual politics"— the control over the female population.³⁰ In highly patriarchal societies, this kind of sexual politics plays an integral role in the maintenance of social control and the status quo.

Mutilating a woman's genitalia is used as a tool to ensure her virginity and later her marital fidelity. "The woman's wound becomes, in effect, a chastity belt of flesh, [because] when intercourse is a torture, women can hardly be expected to seek out sex with men to whom they are not contractually bound."³¹ Female genital mutilation also furthers the patriarchal interest of maintaining the purity of a man's blood line by ensuring that his wife's children are indisputably his.³² To achieve these ends, men

26. *Id.*

27. Often, "menstrual blood can get blocked behind the tiny opening left and cause agonizing pain and emit an embarrassing odor." Moreover, urination can become a torture, "requiring from ten minutes to almost two hours to empty the bladder." Gunning, *supra* note 19, at 196.

28. *Id.* at 219.

29. HANNY LIGHTFOOT-KLEIN, *PRISONERS OF RITUAL: AN ODYSSEY INTO FEMALE GENITAL CIRCUMCISION IN AFRICA* 76 (1989). Additionally, women who have suffered female genital amputation are robbed of all sexual sensation and pleasure. Many studies report frigidity in "circumcised" women. One study reports that fifteen percent of the women interviewed disclosed that vaginal intercourse was impossible. Where intercourse was possible, women reported pain which lasted an average of two to three months. *Id.* at 57-58.

30. The practice is "part of a complex system of male domination of women, and is, therefore, not easily abandoned." Gunning, *supra* note 19, at 215.

31. Gifford, *supra* note 23, at 347.

32. See MOEN, *supra* note 16, at 7.

find it necessary to dominate women and control the sexual and reproductive behavior of *each* woman.³³

This form of sexual politics also ensures that women are subordinated and helpless in a society dominated by men. In practicing societies, women are completely dependent on their husbands for economic security and survival, as well as for social status.³⁴ Marriage becomes essential to a woman's survival, and a condition precedent to getting married is that the woman be properly "circumcised."³⁵ Thus, it is the woman's struggle for survival which coerces women to submit to genital mutilation and to impose the practice onto their daughters.³⁶ A woman who successfully avoids being genitally mutilated faces severe consequences.³⁷ In Sudan, for example, a woman is not able to get married if she did not undergo genital mutilation.³⁸ Remaining single may be fatal because women's rights are so severely restricted that these women are virtually helpless without the protection of a husband. In other societies, a woman who is not genitally mutilated is not able to inherit money or property.³⁹ In other countries, the offspring of an "un-amputated" woman will be killed.⁴⁰ Moreover, if a woman is not "properly" amputated and re-sutured after childbirth, she risks divorce by her husband and certain financial and social ruin.⁴¹ Thus, a woman is coerced into genital mutilation for her survival.

The pervasiveness and enormous cultural force of the practice is demonstrated by the fact that it is the women themselves who enforce the practice of female genital mutilation.

33. Unlike many other cultures, where female sexuality is restrained by "moral codes," societies practicing female genital mutilation contort female sexuality by physically amputating female genitalia. See MOEN, *supra* note 16, at 11; Gunning, *supra* note 19; Senator Schroeder, *supra* note 13.

34. ELLEN GRUENBAUM, REPRODUCTIVE RITUAL AND SOCIAL REPRODUCTION: FEMALE CIRCUMCISION AND THE SUBORDINATION OF WOMEN IN SUDAN IN ECONOMY AND CLASS IN SUDAN 311 (1988), *quoted in* Gunning, *supra* note 19, at 215.

35. Being genitally "fixed" becomes a "requirement" for a woman in order to maintain her reputation and marriageability, as well as the reputation of her family members. See MOEN, *supra* note 16, at 12; Gunning, *supra* note 19, at 216.

36. Gunning, *supra* note 19, at 216.

37. Women who escaped mutilation are regarded in their society as "bad" or "unclean" and are often equated with being prostitutes. LIGHTFOOT-KLEIN, *supra* note 29, at 66.

38. Gunning, *supra* note 19, at 215.

39. *Id.* at 216.

40. *Id.*

41. *Id.*

Because traditional patrilineal communities assign women a subordinate role, women feel unable to oppose community dictates even when these affect them adversely. Many women even go to great lengths to support those dictates by organizing groups which mete out punishment to non-conforming women, and conduct hostile campaigns against passive observers. . . . [Women] do not realize that some of the practices they promote were designed to subjugate them, and more importantly, to control their sexuality and to maintain male chauvinistic attitudes.⁴²

Only a few women actually escape this predicament by fleeing from their homelands. United States asylum law must serve as a refuge for those who escape.

II. FEMALE GENITAL MUTILATION AND SUBSTANTIVE ASYLUM LAW

A. *Female Genital Mutilation — Disparate Judgments Under Current Law*

Despite the obvious horror and persecutory nature of female genital mutilation, immigration courts have been reluctant to take a clear and strong stand against the practice. In fact, the courts' confusion regarding whether escaping female genital mutilation is a sufficient basis for granting asylum has resulted in perplexingly disparate judgments.

An Arlington immigration judge, for example, in a case of first impression, recently granted asylum to a woman from Sierra Leone who supported her application partly by asserting that she was escaping from "ritual female genital mutilation" in her country.⁴³ The asylum applicant entered the United States in 1991 and remained beyond the period authorized by her visa. The woman conceded deportability and requested relief from deportation on the basis of gender-based persecution.⁴⁴ She testified that in January 1988, after she had married and had a child, she was abducted while asleep.⁴⁵ She was blindfolded and her hands and legs were tied.⁴⁶ She was then taken against her will to a place where female genital mutilation is performed as an initia-

42. OLAYINKA KOSO-THOMAS, *THE CIRCUMCISION OF WOMEN: A STRATEGY FOR ERADICATION 1* (1987), cited in LIGHTFOOT-KLEIN, *supra* note 29, at 75.

43. Matter of M- K-, A72-374-558 (IJ Arlington, Va. Aug. 9, 1995) in 72 INTERPRETER RELEASES 1188 (Sept. 1, 1995).

44. *Id.*

45. *Id.* at 1189.

46. *Id.*

tion ritual, stripped naked, and genitally mutilated by a woman elder with an unsterilized razor without anesthesia or medication.⁴⁷ The applicant also revealed that the other women broke into song in order to disguise her screams and that she temporarily lost consciousness due to her profuse bleeding.⁴⁸

Furthermore, the woman explained that she had always opposed the practice but that a woman in Sierra Leone cannot effectively complain about female genital mutilation because it is part of traditional custom.⁴⁹ Complaints to the police would be both useless and potentially harmful because divulging information would result in harassment, threats, physical harm, and possibly death.⁵⁰ Although in this particular case one woman was saved from deportation, this case may be a lone bright light in virtual darkness, since decisions by immigration judges set no legal precedent for other courts or agencies.

This very phenomenon was demonstrated when another immigration judge in Baltimore recently reached an entirely contrary decision, denying asylum to a woman who had endured the identical tribulation.⁵¹ The applicant, a thirty-seven year old woman also from Sierra Leone, described how she had been kidnapped at the age of thirteen and held down by her female relatives who cut off her clitoris.⁵² She was threatened with death if she ever spoke about her experience.⁵³ The immigration judge, nevertheless, denied her asylum claim. He ruled that the woman's concern about retribution against her or about forcible circumcision of her daughters did not amount to "fear of political persecution." Furthermore, the judge found that although the woman could not change the fact that she was a female, she "could change her mind about her position [towards mutilation] and choose to support the practice."⁵⁴ The judge attempted to rationalize his decision by calling the practice important for maintaining tribal unity.⁵⁵

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. Matter of J-, No. A72 370 565 (IJ, Baltimore, Apr. 28, 1995) in 72 INTERPRETER RELEASES 1375 (Oct. 6, 1995); Constable, *supra* note 12, at D1; 72 INTERPRETER RELEASES 1265 (Sept. 18, 1995).

52. 72 INTERPRETER RELEASES 1265 (Sept. 18, 1995).

53. *Id.*

54. *Id.*

55. *Id.*

The fact that any woman fleeing female genital mutilation could be denied refugee status in the United States demonstrates the inadequacies inherent in the current United States policy regarding women as refugees. It is paramount for the United States, which aims at being on the forefront of human rights issues, to amend its refugee definition to include "gender."

B. *Qualifying for Asylum Under Current Immigration Law*

To qualify for asylum, a woman who has escaped to the United States bears the burden of proving that she is a "refugee."⁵⁶ The United States Refugee Act of 1980 defines⁵⁷ 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.⁵⁸

In order to prevail on an asylum claim, an applicant must first establish that she has been persecuted or that she has a well-founded fear that she will be persecuted in the future. Next, she must prove that such persecution is at the hands of the government or an individual or entity the government either cannot or will not control. Finally, she must establish that the persecution stems from her race, religion, nationality, membership in a particular social group, or political opinion. Since granting asylum is an exercise of discretion, even if an alien establishes a well-founded fear of persecution and is statutorily eligible, asylum

56. 8 U.S.C.A. § 1158(a) (West, Supp. 1995), provides that:

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

57. The United States definition of "refugee" is derived from the 1951 United Nations Convention Relating to the Status of Refugees (19 U.S.T. 6260, T.I.A.S. No. 6577, 189 U.N.T.S. 137) and the 1967 United Nations Protocol Relating to the Status of Refugees (19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267). The passage of the 1980 Refugee Act was an attempt to conform United States refugee law with United Nations conventions and remove the foreign policy bias from the asylum process. See AMERICAN IMMIGRATION LAWYERS ASSOCIATION, 1994-95 ANNUAL HANDBOOK (1994).

58. 8 U.S.C.A. § 1101(a)(42)(A) (West Supp. 1995).

may be denied in the exercise of discretion.⁵⁹ This is significant in the context of a female applicant basing her claim on female genital mutilation, because ultimately the immigration judge's perspective on the practice and his or her use of discretion will determine the woman's fate.

The primary problem women face when applying for asylum on grounds of specific gender-based persecution is that the refugee definition does not include "gender" as an independent enumerated ground on which to base the well-founded fear of persecution. Despite the statutory failure to provide for a specific gender-based persecution claim, United States courts must recognize that gender-related persecution, such as female genital mutilation, is a form of persecution which can and should be assessed. Courts must link gender and the feared persecution to one or more of the statutory grounds in order to make the woman's claim tenable under current asylum law.⁶⁰

1. Applying the Refugee Definition to Women

The definition of "refugee" is gender neutral, making no distinction between male and female applicants. However, since the experience of persecution is not always gender blind, the effect of this "neutrality" is that women may be less likely than men to qualify for refugee status.⁶¹ This discrepancy stems mostly from the fact that under the definition of "refugee," gender is not enumerated as one of the bases upon which protection can be granted. The result is an overwhelming burden for women bringing gender-specific claims, such as those based on female genital mutilation.

The failure to incorporate "gender" into the refugee definition relates to a larger criticism of human rights law and discourse — that it privileges male-dominated public activities over the activities of women which take place largely in the private sphere.⁶²

59. 8 U.S.C.A. § 1158(a) (West Supp. 1995); 8 C.F.R. § 208.14(a). The BIA has held that "in the absence of adverse factors, however, asylum should be granted in exercise of discretion." *Matter of Pula*, 19 I. & N. Dec. 467, 474 (BIA 1987). Discretionary denials in the asylum context may only be justified "on the basis of genuine compelling factors - factors important enough to warrant returning a bona fide refugee to a country where he may face a threat of imminent danger to his life or liberty." *Hernandez-Ortiz v. INS*, 777 F.2d 509, 519 (9th Cir. 1985).

60. See *Canadian Guidelines*, supra note 10. See also Kelly, supra note 5.

61. Kelly, supra note 5, at 627.

62. *Id.* at 627-28.

The key criteria for being a refugee are drawn primarily from the realm of public sphere activities dominated by men. With regard to private sphere activities, where women's presence is more strongly felt, there is primarily silence - silence compounded by an unconscious calculus that assigns the critical quality "political" to many public activities but to few private ones. Thus, state oppression of a religious minority is political, while gender oppression at home is not.⁶³

While men's experiences are often categorized as political, women's experiences are disclaimed as cultural or domestic predicaments. For example, expression of political opinion through traditional means, such as involvement in political parties and organizations or participation in military actions, tend to be considered a basis for political asylum. To the contrary, less traditional means of political expression such as refusal to abide by discriminatory laws or to follow prescribed rules of conduct are often categorized as personal preference and are, therefore, not similarly remedied.⁶⁴ Consequently, many women's rights advocates have called for amendments to the refugee definition to specifically include gender.⁶⁵ Alternatively, advocates "are trying to show that what happens to women is different but that it qualifies" under the current asylum statute and accords with its intent.⁶⁶

III. APPLYING THE CURRENT LAW SENSIBLY: A REMEDY FOR WOMEN ESCAPING FEMALE GENITAL MUTILATION

The best possible solution to adequately serve women's needs is a legislative amendment of the refugee statute⁶⁷ to include gender-specific persecution as a basis for asylum. A specif-

63. Doreen Indra, *A Key Dimension of the Refugee Experience*, 6 REFUGEE 3 (1987), quoted in Kelly, *supra* note 5, at 628.

64. See, e.g., Noreen Burrows, *International Law and Human Rights: The Case of Women's Rights*, in HUMAN RIGHTS: FROM RHETORIC TO REALITY 80, 86-96 (Tom Campbell et al. eds., 1986) in Kelly, *supra* note 5, at 628.

65. See, e.g., INTERNATIONAL WOMEN'S TRIBUNE CENTRE ET AL., INTEGRATING WOMEN'S HUMAN RIGHTS INTO DELIBERATIONS OF THE 1993 UNITED NATIONS WORLD CONFERENCE ON HUMAN RIGHTS AND INTO THE ON-GOING WORK OF THE UNITED NATIONS 8 (1993), cited in Kelly, *supra* note 5, at 627 (recommending that the 1993 World Conference on Human Rights give consideration to the gender-specific needs of women refugees, including "modification of the definition of refugee under the 1951 Convention on the Status Relating to Refugees [sic] and the 1967 Protocol").

66. Jennifer Bingham Hull, *Battered, Raped and Veiled*, LOS ANGELES TIMES MAGAZINE, Nov. 20, 1994, at 30 (for more on Nancy Kelly, see *supra* notes 5 and 11. Nancy Kelly is the director of the Harvard Women Refugee Project).

67. 8 U.S.C.A. § 1101(a)(42)(A) (West Supp. 1995).

ically enumerated basis for claiming persecution on grounds of gender would eliminate the need to fictitiously fit a woman's claim within one of the existing categories and would reflect the reality that the true basis of her persecution is due to her gender rather than her political opinion, race, religion, nationality, or membership in a particular social group. However, considering that such an amendment cannot be immediately implemented, a more immediate and pragmatic solution is to interpret the current refugee definition to provide protection to women who demonstrate a well-founded fear of gender-related persecution.⁶⁸ Although the United States must not impose its cultural or moral values on other countries, it must follow its own cultural conscience and provide adequate relief for women escaping practices such as female genital mutilation.

A. *Female Genital Mutilation: Proving Persecution*

The first step in determining refugee status is identifying the nature of the persecution feared by the claimant. The difficulty faced by courts today is in deciding whether certain forms of prejudicial treatment imposed on women are within the scope of "persecution." Neither the Board of Immigration Appeals (BIA) nor the United States legislature has addressed the question of whether gender-related discrimination such as female genital mutilation constitutes "persecution."

Since the immigration statutes do not define persecution, the BIA and the federal courts have attempted to undertake the task. However, most cases in which the meaning of persecution has been considered have been cases involving the persecution of men. Thus, persecution has not been widely interpreted to include female-specific experiences, which is detrimental to a woman's claim because women are often victimized in ways men are not. The BIA has defined persecution as harm or suffering inflicted upon a person in order to *punish* that individual for possessing a belief or characteristic the persecutor seeks to overcome.⁶⁹ Federal courts have defined persecution as the op-

68. The United Nations High Commissioner for Refugees (UNHCR), the European Parliament, the Immigration and Refugee Board of Canada, and other bodies have already interpreted the refugee definition to incorporate gender-related claims. See, *UNHCR Guidelines*, *supra* note 8; *Canadian Guidelines*, *supra* note 10.

69. *Guevara-Flores v. INS*, 786 F.2d 1242, 1249 (5th Cir. 1986); *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985) (emphasis added). See also UNHCR HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 51-61 (1979) (determining what constitutes a well-founded fear of being perse-

pression inflicted on groups or individuals because of a difference between the persecutor's *views* or status and that of the victim, or a *difference that the persecutor will not tolerate*,⁷⁰ as well as "the infliction of suffering or harm upon those who *differ in a manner regarded as offensive*."⁷¹

None of these definitions of persecution give courts reliable guidance in fairly adjudicating a woman's gender-specific claim. A woman's experience of genital mutilation does not easily fit into any of these judge-made definitions because the woman is neither directly "punished," nor does she have beliefs the persecutor cannot tolerate.⁷²

Moreover, certain discriminatory and abusive cultural practices such as female genital mutilation have not been widely interpreted to be included in the narrow interpretation of persecution.⁷³ "Traditionally, asylum law has disregarded harm that [i]s inflicted on women because they [a]re women."⁷⁴ In order to eliminate such inequality and to achieve a more just asylum policy, the immigration courts should be required to follow the UNHCR recommendations on women refugees⁷⁵ and adopt and enforce the recent Guidelines on women's asylum claims. The UNHCR, for example, has recognized that severe discrimination against women based on gender can form the basis of a

cuted: discrimination, excessive punishment, severe penalties for unlawful departure or unauthorized stay outside country of origin); *Blanco-Lopez v. INS*, 858 F.2d 531 (9th Cir. 1988).

70. *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985) (emphasis added).

71. *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969) (emphasis added).

72. Women in societies practicing female genital mutilation are not being mutilated because of a dissident belief. However, a woman who has successfully escaped the country can be said to have a belief that society cannot tolerate. See *infra* Part III(C)(1) discussing persecution due to political opinion.

73. Kelly, *supra* note 5, at 5. See also *Matter of J-*, No. A72 370 565 (IJ Baltimore, Apr. 28, 1995) in 72 INTERPRETER RELEASES 1375 (Oct. 6, 1995).

74. Jill Lawrence, *Gender Persecution New Reason for Asylum*, L.A. TIMES, Mar. 27, 1994, at A14. The definition of persecution has not been widely applied to female experiences, such as genital mutilation, infanticide, bride-burning, forced marriage, forced abortion, or compulsory sterilization. See *Canadian Guidelines*, *supra* note 10.

In Nepal, female babies die from neglect because parents value sons over daughters; in Sudan, girls' genitals are mutilated to ensure virginity until marriage; and in India, young brides are murdered by their husbands when parents fail to provide enough dowry. In all these instances, women are targets of violence because of their sex. This is not random violence; the risk factor is being female.

L. Heise, *Crimes of Gender*, 2 WORLDWATCH, at 12-13 (1989).

75. See *UNHCR Guidelines*, *supra* note 8.

claim for refugee status.⁷⁶ The UNHCR's descriptions of harm which should be included in the definition of persecution are the following: (1) *serious physical harm*; (2) *loss of freedom*; (3) *other serious violations of basic human rights as defined by international human rights instruments*; (4) *discriminatory treatment which leads to consequences of substantially prejudicial nature, for example, serious restrictions of the applicant's right to earn her living, her right to practice her religion, or her access to normally available educational facilities*.⁷⁷

To adequately determine whether a woman is persecuted, the adjudicator should evaluate all of the circumstances, including the type of right or freedom denied, the manner in which the right is denied, the seriousness of the harm to the applicant, and any non persecutory justification for the treatment.⁷⁸ Moreover, certain fundamental human rights, such as the right to be free from arbitrary deprivation of life or the right to be free from torture,⁷⁹ can never be abrogated.⁸⁰ Any policy or practice which

76. Refugee Women and International Protection, at 5, U.N.Doc. EC/SCP/59 (1990). See also *UNHCR Guidelines*, *supra* note 8, at ¶ 71 (recommending promotion of acceptance in the asylum adjudication process of the principle that "women fearing persecution or severe discrimination on the basis of their gender should be considered a member of a social group for the purposes of determining refugee status").

77. See KELLY, *supra* note 11, at 4.

78. See James Hathaway, *Framework of Analysis*, Special Issue I, 12-13 (Sept. 1992), *cited in* Kelly, *supra* note 5, at 664.

79. *Id.* Torture is defined 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 [her] or a third person information or a confession, punishing [her] for an act [she] or a third person has committed . . . or intimidating or coercing [her] 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

The United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment, Article 1, *reprinted in Canadian Guidelines*, *supra* note 10, at 15. The prohibition against torture is enunciated in the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment. U.N. Doc. A/39/708 (1984), *quoted in part in* Gunning, *supra* note 19, at 235.

80. The UNHCR has proclaimed that basic inalienable rights such as the right to be protected against arbitrary deprivation of life and from torture and cruel and inhuman or degrading treatment cannot be abrogated. UNHCR Handbook on Procedures and Criteria for Determining Refugee Status ¶ 55 U.N.Doc. HCR/IP/4/Eng.Rev. (1988). These rights are derived from the Universal Declaration of Human Rights. This language "is designed to encompass the broad rationale of political oppression, i.e., to exact conformity and suppress dissent." Gunning, *supra* note 19, at 235.

allows for the violation of such a right *must* be considered persecution. According to the *Universal Declaration of Human Rights*, everyone has the right to life, liberty, and the security of person.⁸¹ These rights are grossly infringed when women are forced to undergo genital mutilation. Thus, the practice of mutilating genitalia is severe enough to be considered persecution, since it flagrantly violates the right to be protected from torture and cruel and inhuman or degrading treatment.⁸²

B. *Proving Persecution: Governmental Inability or Unwillingness to Protect Women From Female Genital Mutilation*

In addition to showing that she is escaping from persecution, an asylum seeker must establish that the persecutory measures are either caused by the government or by a nongovernmental entity or person whom the government is unable or unwilling to control.⁸³

When the treatment is through discriminatory statutes enforced by the government, government involvement is clear. When the discriminatory practice is not applied by the government, but through cultural norms which discriminate against women, the applicant must demonstrate both the existence of the norm and the failure or inability of the government to protect her from its imposition.⁸⁴

In countries practicing female genital mutilation, the agent perpetuating and enforcing the mutilation is not directly governmental. However, the government is indirectly enforcing the practice by allowing the mutilation to continue since it has an interest in upholding the status quo in which men are the dominant group of the society. The government achieves this end by remaining silent or indifferent to gender-based torture such as

81. See *Universal Declaration of Human Rights*, G.A. Res. 217(III), U.N. GAOR 3d Sess., pt. 1, 183d plen. mtg. at art. 2, U.N. Doc. A/811 (1948).

82. The enforcement of this right was made binding on states parties through their incorporation into the International Convention on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess. (1966), 999 U.N.T.S. 171 (entered into force March 23, 1976) in Kelly, *supra* note 5, at 664.

83. An example of a nongovernmental entity persecuting women was recognized in *Fisher v. INS*. "Women have been harassed, detained, or physically attacked if they appear in public in clothing which . . . self-appointed guardians of public morality deemed insufficiently modest." State Department, Country Reports on Human Rights Practices for 1987, at 1168 (1988), *quoted in* *Fisher v. INS*, No. 91-70676, Slip. Op. 14022, 14025-26 (9th Cir. Oct. 5, 1994) Daily Appellate Report, Oct. 6, 1994, at 14025-6.

84. Kelly, *supra* note 5, at 665.

female genital mutilation — playing sexual politics under the guise of “culture.”⁸⁵ Current asylum law, nevertheless, does not recognize the deeper political roots of such cultural practices and has merely classified and dismissed such practices as cultural or personal. Since female genital mutilation is such a pervasive practice, ingrained in the respective society, it is rare for the government to officially enact or enforce any laws curtailing the practice. Only a few legislative attempts to control the practice of female genital mutilation have been made and they have been proven unsuccessful.⁸⁶

In Kenya, for example, legislative action has not been attempted since 1926.⁸⁷ Former Kenyan President Jomo Kenyatta's government expressed pride and approval of the practice of female genital mutilation.⁸⁸ Although in 1982 Kenyatta's successor, Daniel Arap-Moi, issued a public statement calling for the cessation of the practice, which he described as “useless,” no legislation was ever passed — and thus, the practice continues in Kenya today without official opposition and implicit approbation.⁸⁹

Even in countries where laws have been passed to outlaw mutilation, the laws have been mostly ignored and rarely enforced. In Sudan, for example, in response to pressure from British authorities, a law was passed in 1946 outlawing the most radical of the forms of female genital mutilation, but still allowing for the removal of “the free and projecting part of the clitoris.”⁹⁰ However, the law was rarely enforced and even the most radical form is still widespread in Sudan.⁹¹

When persecution is propagated through cultural practice, rather than through official governmental policy, it is possible that a United States court will dismiss the claim as a domestic or cultural phenomenon, lacking the necessary governmental element of the refugee definition. To avoid such injustice, the immigration judges must be made sensitive to gender issues in assessing refugee status. For example, in assessing whether the government was or is unable or unwilling to protect the appli-

85. See *infra* Part I.B.

86. Gunning, *supra* note 19, at 226.

87. *Id.* at 227 n.175.

88. *Id.* at 227.

89. *Id.* at 227-28.

90. *Id.* at 228.

91. *Id.*

cant, the following factors should be considered: whether the applicant sought and was denied protection by the government;⁹² whether governing institutions and or governmental agents were aware of the harm to the woman and did nothing to protect her; whether the applicant has other reasons to believe that it would be futile to seek the protection of the government.⁹³ When judges take these factors into account, persecution can be recognized as the unwillingness or inability of a government to protect women.

C. *Proving The Persecution is Based on Enumerated Grounds*

After the claimant has shown both a well-founded fear of persecution and that her government is unwilling or unable to protect her, she must show that the persecution is based on one of the five enumerated grounds of the statutory refugee definition. Since the Immigration and Nationality Act (INA) does not recognize gender-based persecution as grounds for asylum, female asylum-seekers who have suffered persecution because of their gender have been forced to try to convince immigration officials that they have been persecuted on account of one of the five categories enumerated in the INA. Most commonly, women attempt to bring claims based on gender-based persecution under either the "political opinion" or "particular social group" category.

92. Women in countries practicing genital mutilation lack any form of legal recourse to prevent their mutilation. It is a fundamental principle in international asylum law that when an individual suffers human rights violations and has no legal recourse in his or her own country that that person has the right to seek and to enjoy asylum elsewhere. *See Universal Declaration of Human Rights*, G.A. Res. 217 (III), U.N. Doc. A/Res/217 (1948).

Some argue that "the Charter, the Universal Declaration, other international resolutions and declarations, and other practices of states, have combined to create a customary international law of human rights requiring every state to respect the rights set forth in the Declaration." U.N. CHARTER, 59 Stat. 1031, T.A. 993, 3 Bevans 1153 (1945), in David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 224-25 n. 108 (1988).

93. Reasons may include, for example, if the government has denied protection to similarly situated women, or if the government has systematically failed to apply existing laws. *Id.* *See also* Matter of M- K-, A72-374-558 (IJ Arlington, Va. Aug. 9, 1995), in 72 INTERPRETER RELEASES 1188, 1189 (Sept. 1, 1995), where the respondent explained that complaints to the police are useless and potentially harmful, since divulging the information would result in her being harassed, threatened, physically harmed, and possibly killed.

1. Female Genital Mutilation: Persecution Due to Political Opinion?

To date, courts have failed to recognize that certain cultural practices, such as female genital mutilation are "inherently political and a reflection of a social institution's pattern of control and dominance."⁹⁴ In order to recognize the deeper political realities of female genital mutilation courts must adopt a broader notion of "political opinion." Most often, the claimant is from a society where women are assigned a subordinate status and the authority exercised by men results in a general oppression of women. Courts must be sensitive to the fact that women from these societies may not manifest their protest or activism in the same way as men. Thus, a woman who escapes her country to avoid female genital mutilation is expressing a political opinion that symbolizes her antagonism against the government for failing to stop the practice.

Currently, a woman may attempt to base her well-founded fear of persecution on "imputed political opinion." The General Counsel of the INS recognized that "imputed political opinion" is applicable where persecution is inflicted because the persecutor *erroneously imputes* political opinions to the asylum applicant.⁹⁵

Where tenets of the governing religion in a given country require certain kinds of behaviour exclusively from women, contrary behaviour may be perceived by the authorities as evidence of an unacceptable political opinion that threatens the basic structure from which their political power flows.⁹⁶

The government may interpret a woman's refusal to be mutilated as an objection to its policies and mark her as a political dissident. Although the political opinion basis is applicable in instances where a woman has actively resisted the practice of female genital mutilation, it does not concern the larger group of

94. Hina Jilani, *Whose Laws?: Human Rights and Violence Against Women in Pakistan*, in FREEDOM FROM VIOLENCE: WOMEN'S STRATEGIES FROM AROUND THE WORLD 63 (Margaret Schuler ed., 1992), quoted in Kristine Fox, *Canadian Guidelines Offer a Model for Refugee Determination in the United States*, 11 ARIZ. J. INT'L & COMP. LAW 117, 131 n.97 (1994).

95. INS General Counsel opinion, dated Jan. 19, 1993, and Addendum dated March 4, 1993, reprinted in 70 INTERPRETER RELEASES 485 (Apr. 12, 1993). The Ninth Circuit, for example, found that a woman who had been repeatedly raped and subjected to physical abuse by a military officer in El Salvador could reasonably anticipate persecution for political opinions if she returned. *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987).

96. *Canadian Guidelines*, *supra* note 10, at 4.

women who do not actively resist or who have already succumbed to mutilation. For these women, a more effective claim can be based on the "membership in a particular social group" category.

2. Female Genital Mutilation: Women as a Social Group

Another nonlegislative reform solution to incorporate gender-based persecution claims under current asylum law is to designate women as members of a distinct social group within the meaning of the Refugee Act.⁹⁷ A woman fearing female genital mutilation is discriminated against and suffers persecution specifically on grounds of her gender. This strategy for remedying gender discrimination in asylum law has gained increasing international support.⁹⁸ The European Parliament, for example, passed a resolution stating that the concept of a particular social group can apply to groups of women who transgress moral and ethical principles in their society and, as a result, are victims of cruel and degrading treatment.⁹⁹ However, in the United States, this proposal has not been commonly accepted by immigration courts and is ridden with problems.¹⁰⁰

Since the legal definition of "refugee" was expanded to include those fleeing "persecution on account of membership in a particular social group,"¹⁰¹ the United States has adjudicated few

97. See *UNHCR Guidelines*, *supra* note 8.

98. See Conclusion No. 39 (XXXVI) Refugee Women and International Protection, 1985, where the Executive Committee of the UNHCR recognized that States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group" within the meaning of Article 1 A(2) of the 1951 UN Refugee Convention. *Canadian Guidelines*, *supra* note 10, at 5.

99. *ASYLUM LAW & PRACTICE IN EUROPE AND NORTH AMERICA: A COMPARATIVE ANALYSIS BY LEADING EXPERTS* 92-93, 78 (Jaqueline Bhabha & Geoffrey Coll eds., 1992).

100. The most prominent problem being the parameters of the social group, and which women are to be included in this group. In *Matter of M- K-*, A72-374-558 (IJ Arlington, Va. Aug. 9, 1995), in 72 *INTERPRETER RELEASES* 1188, the immigration judge noted that "it is not all women together that constitute the 'particular social group.' Often it is a sub-group of women who are being persecuted because of membership in that sub-group." The judge explained, in that case, it was not all women in Sierra Leone who were being persecuted; rather, it was the subgroup of women who were forced to undergo female genital mutilation. *Id.*

101. 8 U.S.C.A. § 1101(a)(42)(A) (West Supp. 1995) (amending Immigration and Nationality Act § 101 (a)(42)). See Daniel Compton, *Note, Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar - Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986), 62 *WASH. L. REV.* 913, 915 (1987).

gender-related cases based on this category.¹⁰² The cause may be the "systemic gender bias," as well as confusion about the meaning and parameters of the term "social group."¹⁰³ "[N]either the legislative history of the relevant United States statutes nor the negotiating history of the pertinent international agreements sheds much light on the meaning of the phrase . . ."¹⁰⁴ Thus, the interpretation of the phrase has been left to the courts. Consequently, current judicial and agency standards for determining social group status are vague and even contradictory, often making it impossible for a woman to qualify as a member of a social group based on her gender alone.

Various scholars have taken the position that the social group category is intended to include *all* those persecuted for reasons other than race, religion, nationality, or political opinion. While U.S. courts have been unified in their rejection of this extreme position, they have divided over how to limit the social group category. The *Board of Immigration Appeals* has required that social groups be defined by an *immutable* characteristic common to each member. *The Ninth Circuit* has promulgated its own standard for determining cognizability of a purported social group based upon a *voluntary association* between group members. Many judges, apparently despairing of articulating principled grounds for resolving a claimed social group's cognizability, have resorted to unelaborated proclamations or have simply avoided the issue.¹⁰⁵

102. Walter C. Long, *Escape from Wonderland: Implementing Canada's Rational Procedures to Evaluate Women's Gender-Related Asylum Claims*, 4 UCLA WOMEN'S L.J. 179, 210 (1994).

103. *Id.*

104. *Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir. 1993). "[T]he legislative history does make clear that Congress intended to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, to which the United States acceded in 1968." (citation omitted).

When the Conference of Plenipotentiaries was considering the Convention in 1951, the phrase 'membership of a particular social group' was added to [the refugee] definition as an 'afterthought'. The Swedish representative proposed this language, explaining only that it was needed because 'experience had shown that certain refugees had been persecuted because they belonged to particular social groups,' and the proposal was adopted. United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Rec. of the 3d Mtg., U.N. Doc. A/CONF.2/SR.3 at 14 (Nov. 19, 1951).

Fatin, 12 F.3d at 1239.

105. T. David Parish, *Membership in a Particular Social Group Under The Refugee Act of 1980: Social Identity and The Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 932 (1992) (emphasis added).

The need for expanding the interpretation of the refugee statute to include gender is evident from the lack of uniformity among the different courts and circuits.¹⁰⁶ The consequence of this inadequacy lends the system to gender bias and discrimination.

Although the BIA is the most likely source for interpreting the term "social group," it has offered relatively little guidance as to what properties identify a social group. In *Matter of Acosta*, the BIA gave the "social group" category an outer framework.¹⁰⁷ Employing the doctrine of *ejusdem generis*, the Board:

interpret[ed] the phrase "persecution on account of membership in a 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 shared characteristic might be an innate one such as *sex*, color, or kinship ties, or . . . a shared past experience¹⁰⁸

The common characteristic defining 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.¹⁰⁹ A woman refusing to be mutilated should fall within these parameters since gender is an immutable characteristic. However, there is no guarantee that the court will recognize this claim since "[t]he particular kind of group characteristics that will qualify . . . remains to be determined on a case-by-case basis."¹¹⁰

Unlike the broad definition of social group from *Acosta*, a woman bringing the same claim of escaping female genital mutilation may face a court that uses a more limited definition of social group. In *Sanchez-Trujillo v. INS*,¹¹¹ the Ninth Circuit adopted a much narrower view of the social group category. The court established a four part test to determine social group status within the refugee definition: (1) a close affiliation between members of the group, (2) a common impulse or interest upon which the affiliation is based, (3) a voluntary association, and (4) the existence of a common trait by which group members are

106. This may be caused by the adjudicator's insensitivity to specific women's concerns and experiences.

107. *Matter of Acosta*, 19 I. & N. Dec. 211 (1985).

108. *Id.* at 233 (emphasis added).

109. *Id.*

110. *Id.* See also *Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir. 1993).

111. *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986).

distinguishable from the general population.¹¹² This rigid standard practically eliminates a social group defined solely by gender since such a group lacks the "voluntariness requirement."¹¹³

a. The Well-Founded Fear of Persecution Standard

Although a social group encompassing all women subjected to female genital mutilation is substantial, the actual size of the group is drastically limited by a number of factors. Most prominently, the size of the group of women is limited by the number of women who actually succeed in escaping their country. After showing membership in the particular social group, the individual applicant will further be required to establish her own eligibility under the refugee definition by showing she has a "well-founded fear of persecution."¹¹⁴ The asylum applicant must show past or future persecution, well-founded fear of future persecution, and persecution promulgated or implicitly sanctioned by the government. These requirements dampen any concerns that interpreting the social group to include all women facing genital mutilation constitutes an unreasonably large group.

Furthermore, the size of a persecuted group should not be an issue of concern because "once a person is subjected to a measure of such gravity that we consider it 'persecution,' that person is 'persecuted' in the sense of the Convention, irrespective of how many others are subjected to the same or similar meas-

112. In addition to finding that a cognizable group has been established, the alien must establish that he or she qualifies as a member of the group and that the group in question has been the target of persecution on account of the characteristics of the group members. Finally, the court will consider whether any "special circumstances" exist which warrant regarding mere membership in that "social group" as constituting per se eligibility for asylum or prohibition of deportation. *Id.* at 1574. The court derived the "special circumstances" requirement from subparagraph 79 of the Handbook on Procedures and Criteria for determining Refugee Status, promulgated by the U.N. High Commissioner for Refugees, U.N. Doc. HCR/PRO/4 (1979). The subparagraph provides: "Mere membership in a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution."

In the case of women escaping female genital mutilation, the "special circumstances" category should apply. Although the exact meaning of special circumstances is not stated in the Handbook, factors conceivably qualifying as "special circumstances" could exist when the case simply shocks the conscience of the decision maker. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 45 (1983), quoted in Compton, *supra* note 101, at n. 57.

113. Kelly, *supra* note 5, at 650.

114. *Id.* at 656.

ures."¹¹⁵ Moreover, the fact that a large number of people in an applicant's situation fear harm at the hands of the government or another persecutor actually lends credibility to the asylum claim.¹¹⁶

What is relevant is only that the group, regardless of size, comports with the requirements of being a social group. The group must have a social identity within the specific cultural context based on an immutable and identifiable characteristic, and group members must be targeted for persecution based on their membership.¹¹⁷ Thus, when women are subjected to persecutory treatment or denied protection from such treatment solely on the basis of their gender, the group of "women" constitutes a particular social group within the refugee definition.¹¹⁸ The fact that every woman in a particular culture is imperiled by that practice should not be a barrier to granting asylum to a woman who, personally (or on behalf of her daughters), seeks to escape the horrors of female genital mutilation. The size of the pool of people potentially eligible for protection should not limit the extension of that protection.¹¹⁹

D. *Recent Decisions on Women's Gender-Based Claims in the United States*

The holdings of cases involving gender-based claims vary considerably and currently provide little guidance to women seeking to present these claims.¹²⁰ In some cases, the "women as a social group" argument works; in others it does not. This judicial inconsistency underscores the need for an extension of the statutory definition of refugee to include a "gender" category, in

115. A. GRAHL-MADSEN, *THE REFUGEE IN INTERNATIONAL LAW* 213 (1966), quoted in Kelly, *supra* note 5, at 654. Moreover, other enumerated grounds under the refugee statute, namely race, religion, nationality and political opinion may also encompass large social groups.

116. See 8 C.F.R. § 208.13 (b)(2)(i) (1995) (providing that an applicant can meet her burden of proof in establishing eligibility for political asylum by demonstrating persecution of similarly situated persons).

117. Kelly, *supra* note 5, at 655.

118. *Id.*

119. *Id.* at 654. David Neal suggests that the number of refugees to be admitted under asylum laws is a legislative concern and should not be the concern of an adjudicator in making determinations on persons' refugee status. Neal, *supra* note 92. See also *Canadian Guidelines*, *supra* note 10.

120. Kelly, *supra* note 5, at 637. See also Constable, *supra* note 12, at D1 (reporting on two recent asylum cases based on female genital mutilation in which each immigration judge used his discretion differently, in one case granting and in the other denying asylum).

order to reach more just assessments of women's gender-based claims.¹²¹

In August of 1995 an immigration judge ruled that a Sierra Leone woman, who based her asylum claim partially on her fear of female genital mutilation in her home country, was part of a sub-group of women who are forced to undergo female genital mutilation.¹²² The judge ruled that, in general, "it is not all women together that constitute the 'particular social group,' but that it was often a sub-group of women who are being persecuted because of membership in that sub-group."¹²³

This favorable determination, nevertheless, is only a discretionary interpretation of the refugee statute by an administrative immigration judge and does not set a precedent for other immigration courts or the Board of Immigration Review or the federal circuit courts. Another court can easily interpret the "social group" category to exclude women escaping female genital mutilation.

In 1993, the Third Circuit in *Fatin v. INS* lamented the lack of consensus among the courts and the lack of any clear legislative intent as to the definition of the term "particular social group."¹²⁴ In response, the court formulated its own three-part test for "membership in a particular social group," which is favorable to gender-related claims. To satisfy the *Fatin* test, the woman must first identify the group which meets the definition of a particular social group pursuant to *Matter of Acosta*.¹²⁵ Second, she must establish her membership in that social group.¹²⁶ Finally, she must prove that based on her membership she would be persecuted or that she has a well-founded fear of persecution.¹²⁷ In *Fatin*, the court denied asylum to the applicant who

121. An advocate of this proposition comments: "[a]lthough the 'social group' argument can be advanced to include many women as refugees . . . it does not address the core issue . . . with the problems of violence specifically directed against women as women." Anders B. Johnsson, *The International Protection of Women Refugees: A Summary of Principal Problems and Issues*, 1 INT'L J. REFUGEE L. 221 (1989). Including "gender" into the refugee definition would more accurately address this issue.

122. See *supra* part II.A.

123. *Matter of M- K-*, A72-374-558 (IJ Arlington, Va. Aug. 9, 1995), in 72 INTERPRETER RELEASES 1188, 1189 (Sept. 1, 1995).

124. *Fatin v. INS*, 12 F.3d 1233, 1238 (3d Cir. 1993).

125. *Matter of Acosta*, 19 I. & N. Dec. 211 (1985), see note 107 and accompanying text.

126. *Fatin*, 12 F.3d at 1240.

127. *Id.*

fled Iran due to discriminatory gender-specific laws such as the mandatory wearing of a veil.¹²⁸ The court reasoned she did not prove her well-founded fear of “persecution” was based solely on her gender.¹²⁹ The dismissive justification was that although Americans might find the overall treatment of women in Iran repugnant, such treatment could be accurately described as “generally harsh conditions shared by many other persons.”¹³⁰ The court also asserted that persecution did not include all treatment that United States society regards as unfair, unjust, unlawful, or unconstitutional.¹³¹

Nevertheless, this case could be interpreted as accepting and recognizing women as a social group. According to the three part test set out in this case, a woman’s claim based on female genital mutilation would most likely qualify for asylum. The first prong requires a woman to identify the particular social group according to the immutable characteristic requirement set out in *Matter of Acosta*.¹³² Since gender is an immutable characteristic, she will satisfy this part. A woman will also be able to show that she is a member of that group. Finally, a woman fleeing female genital mutilation will be able to prove that she has a well-founded fear of persecution. Therefore, under the *Fatin* test, a woman who escapes female genital mutilation in her homeland should qualify as a refugee and be granted asylum as a matter of discretion.

In 1991, the Second Circuit rejected the argument that a woman was part of a particular social group. In *Gomez*, the court denied asylum to a Salvadoran woman who had been raped by Salvadoran guerrilla forces, ruling that she had failed to offer evidence of belonging to a particular social group.¹³³ The court held that women who have been abused by guerrillas did not “possess common characteristics — other than gender and youth — such that would-be persecutors could identify them as members of the purported group.”¹³⁴ The court also stated that a social group is comprised of individuals who share some fundamental character-

128. *Id.* at 1242.

129. *Id.* at 1240. The court held that wearing a “chador” does not constitute persecution since there are other women in Iran who find it either inconvenient or irritating but for whom it falls short of persecution. *Id.* at 1241.

130. *Id.* at 1240.

131. *Id.* at 1240-41.

132. See *supra* note 108 and accompanying text for social group test in *Acosta*.

133. *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991).

134. *Id.* at 664.

istic which distinguishes them in the eyes of a persecutor — or in the eyes of the outside world in general.¹³⁵ In this case, it was precisely the woman's gender which formed the basis for her persecution, since the guerrillas were raping only women. The court, nevertheless, failed to recognize that the woman was part of a social group category. This case, therefore, illuminates the fundamental problem confronting gender-based claims: the lack of a separate gender category in the refugee statute as well as the lack of a clear or uniform judicial standard, which allows for excessive discretion of the immigration judges. Consequently, immigration courts are able to deny asylum to a woman fleeing persecution such as female genital mutilation.

In *Matter of J-*, for example, the immigration judge asserted that,

respondent's fears of her tribe's customs with regard to genital mutilation did not grant her any advantage with respect to her persecution claim, since there was no evidence that a *social group* exists of persons in Sierra Leone who do not practice female genital mutilation, or that the government is aware of such a group's opinions. Moreover, he said, a social group for asylum purposes must share some common characteristic that is beyond the respondent's power to change, or is so fundamental to the individual's identity or conscience that he or she ought not be required to change.

He further explained that,

[i]n this situation, respondent can not change the fact that she is a female, but she can change her mind with regards to her position towards the FGM practices. It is not beyond the respondent's control to acquiesce to the tribal position on FGM. Therefore, the respondent does not fit into the category of a particular social group as delineated by case law.¹³⁶

IV. THE "CONSIDERATIONS FOR ASYLUM OFFICERS ADJUDICATING ASYLUM CLAIMS FROM WOMEN" MEMORANDUM

In May 1995 the International Affairs Office of the INS sent a memorandum addressed to all INS asylum officers entitled "Considerations For Asylum Officers Adjudicating Asylum Claims From Women." This Memorandum was distributed after scholars and advocates strongly urged the United States to follow

135. *Id.*

136. *Matter of J-*, in 72 INTERPRETER RELEASES 1375-76 (Oct. 6, 1995) (emphasis added).

the refugee determination guidelines of Canada.¹³⁷ Adopted in 1993 the Canadian guidelines were the first of their kind to expand the basis of refugee claims to include gender persecution.¹³⁸ Although this recent issuance of INS guidelines in the United States must be praised as a positive step towards increased awareness and concern for women, it is important to recognize that it is merely a step. The Memorandum will serve as a guide and a useful tool for asylum officers, but it does not ensure uniformity or consistency in asylum procedures or judicial decisions for two reasons. First, the Memorandum leaves the INS asylum officers much discretion. Second, the Memorandum is not binding on courts because its interpretation applies only within INS jurisdiction.¹³⁹ Despite these guidelines, a woman escaping female genital mutilation may still be denied asylum.

137. *Canadian Guidelines*, *supra* note 10.

138. Alan Thompson, *Canada First in Recognizing Abused Women as Refugees*, TORONTO STAR, Mar. 10, 1993, at A2. See also Fox, *supra* note 94.

The guidelines generally propose that "although gender is not specifically enumerated as one of the grounds for establishing Convention refugee status, the definition of . . . refugee may properly be interpreted as providing protection to women who demonstrate a well-founded fear of gender-related persecution by reason of any . . . of the enumerated grounds." *Canadian Guidelines*, *supra* note 10, at 2.

The various enumerated grounds are interpreted to include specific women's experiences. For example, the political opinion category calls attention to the political nature of oppression of women in the context of religious laws and ritualization. Additionally, the guidelines accept women as a social group.

Further, persecution is defined to include unique forms of women's experiences, such as genital mutilation, infanticide, bride-burning, forced marriage, forced abortion, compulsory sterilization, etc.

The Canadian Guidelines also mark the special evidentiary problems concerning women's asylum claims. The guidelines outline how to cope with situations in which women have trouble relaying their experiences because they are often difficult and humiliating to speak about. The adjudicators are required to abide by the guidelines in assessing a woman's refugee status. Failure to do so subjects the decision maker to disciplinary action.

Referring to the Guidelines, a Canadian immigration court recently granted asylum to a mother and a daughter escaping female genital mutilation in Somalia. The court specifically mentioned its reliance on the Guidelines in reaching its decision that female genital mutilation is persecution and that the "persecution is on account of her membership in a particular social group, namely, women." Farah, *supra* note 14.

139. Note that the INS is a federal agency under the Department of Justice. The United States administrative structure divides the immigration process into five major departments within the executive branch of the federal government. The Attorney General delegates most duties to the INS, which has general jurisdiction over aliens in the United States. The INS handles visa petitions, adjustments from non-immigrant status, citizenship adjudications, and deportations for aliens present in the United States. Specially trained INS asylum officers have jurisdiction over all affirmative asylum applications. These officers have broad discretion in deciding

In order for the guidelines to achieve uniform asylum determinations and justice for female applicants, the guidelines must first be implemented, both by the INS, as well as by the Office of the Immigration Judge. Furthermore, case law demonstrating the application of gender sensitivity and women's rights must be developed. In addition, a monitoring and enforcement mechanism should be established to ensure the implementation of the guidelines.¹⁴⁰

A. *Practical Shortcomings of the Memorandum*

The first obstacle to effective implementation is that the Memorandum does not prescribe mandatory or regulatory procedures. The Memorandum is not found in any INS operations instructions or in any statute. Thus, although the INS guidelines have noble intentions of raising awareness of gender-based asylum claims,¹⁴¹ they were drafted in the weakest format for achieving actual and certain change.

The Memorandum lacks the force and authority to actually achieve significant change in adjudicating women's asylum claims, because this Memorandum is directed *solely* at INS officers. Due to the separation and the independence of the INS and the immigration courts,¹⁴² a woman's asylum case is only in the jurisdiction of the INS if it is an affirmative asylum application and not an exclusion or deportation proceeding.¹⁴³ If the asylum officer denies the woman asylum, the INS will issue her

whether an application is complete, credible, accurate, and in compliance with statutory and regulatory requirements. If the INS officer denies the application for asylum, an applicant has the opportunity to have the immigration judge review the application *de novo* in an exclusion or deportation proceeding.

The Office of the Immigration Judge is *not* part of the INS, but is under the supervision of the Executive Office for Immigration Review (EOIR), a separate and independent administrative body under the Department of Justice. Immigration judges preside primarily over exclusion and deportation hearings, where asylum can be raised as a defense to deportation.

Finally, the decision of the immigration court may be appealed to the BIA.

140. Canada, which has led the world in being the first to adopt refugee determination guidelines that directly address women's gender-based asylum claims, subjects an adjudicator who is determined not to have followed the guidelines to disciplinary action. Fox, *supra* note 94, at 136.

141. See *INS Memorandum*, *supra* note 6, at 1.

142. The BIA, the immigration judges, and the administrative law judges are under the EOIR and completely distinct and independent from the INS.

143. It is the INS adjudication division which is responsible for reviewing an affirmative asylum application. Immigration officers have broad discretion in deciding whether an application is complete, credible, accurate, and in compliance with statutory and regulatory requirements.

an Order to Show Cause and will turn her file over to the trial attorney, bringing the case exclusively within the jurisdiction of the immigration court. In the immigration courts, asylum is a defense to being excluded or deported from the United States. Since the Memorandum is directed only towards INS asylum officers, it has nothing more than persuasive value in the courts.¹⁴⁴ The BIA and the immigration judges are under the auspices of the EOIR, which is completely distinct and independent from the INS.¹⁴⁵ The immigration judges¹⁴⁶ who preside over the exclusion or deportation merit hearings have broad discretion in adjudicating asylum cases and are not subject to the same standards as INS asylum officers. Consequently, women seeking to contest their deportability by asserting an asylum claim based wholly or in part on their gender will be heard by an immigration judge who may not have even read the suggestions in the Memorandum. Thus, the Memorandum still allows inconsistencies and does not ensure just adjudication of a woman's asylum claim. Therefore, the Memorandum is not a remedy for the inadequacies of current substantive asylum law. True emancipation and fairness for women seeking asylum based on gender specific claims will not transpire until Congress adds "gender" as a sixth category in the definition of a refugee. Unless this further step is taken, the current Memorandum is merely rhetoric and will effect no substantial change in asylum law.

In addition, a closer examination of the language within the Memorandum reveals many weaknesses and demonstrates a lack of serious commitment to true gender equality in asylum law. Discussing the "Procedural Considerations for U.S. Asylum Officers," Part II of the Memorandum states: "Asylum Officers *should bear in mind* the context of these human rights and cross-cultural considerations when dealing with women claimants. . . ."¹⁴⁷ Merely advising asylum officers to bear human

144. Interview with Meril Smith, former Directing Attorney for Church World Services, Refugee Division, Miami, Fla., currently an attorney for United Nations Mission in Haiti (U.N.M.I.H.), in Port-au-Prince, Haiti (Aug. 1995).

145. See *supra* note 139.

146. Immigration judges are identified in 8 U.S.C.A. § 1101(b)(4) (West Supp. 1995) as "special inquiry officers" and preside primarily over exclusion and deportation hearings. Until 1983, immigration judges were part of the INS, yet concerns about the neutrality of judges with enforcement responsibilities prompted Due Process challenges to these hearings. In 1983, the Department of Justice resolved this conflict by placing the immigration judges under the direct supervision of the Associate Attorney General in the EOIR.

147. *INS Memorandum*, *supra* note 6, at 4 (emphasis added).

rights in mind demonstrates a lack of urgency or commitment towards achieving the protection of human rights. Furthermore, the Memorandum states: "Rape (including mass rape in, for example, Bosnia), sexual abuse and domestic violence, infanticide and genital mutilation are forms of mistreatment primarily directed at girls and women and they *may serve* as evidence of past persecution on account of one or more of the five grounds."¹⁴⁸ The words "may serve" again demonstrate a lack of vigor and commitment.

Realistically, the Memorandum's advice does not mandate new policy. It does not prescribe that genital mutilation, for example, *must* be considered evidence of past persecution. According to the Memorandum, women escaping genital mutilation are not definitively considered to be escaping "persecution." In sum, the linguistic structure of the Memorandum reflects a lack of commitment needed to achieve the goals of uniformity and consistency in an unbiased asylum policy.

The lack of commitment is also reflected in the Memorandum's interview policy.¹⁴⁹ The policy asserts that both men and women will be expected to conduct interviews of women with gender-based claims. Further, "[a]n interview should *not* generally be canceled because of the unavailability of a woman Asylum Officer."¹⁵⁰ This principle conflicts directly with the Memorandum's proposed ends of incorporating cross-cultural awareness and sensitivity to women's issues in the asylum process. Women who are seeking asylum in the United States have undoubtedly survived traumatic experiences, are often separated from family, and are suffering almost unimaginable culture shock.¹⁵¹ In addition, most women seeking asylum based on gender-specific claims are escaping cultures in which they have been subordinated to and dominated by men. Thus, a woman may not be able to freely relay this private, degrading, and dehumanizing experience to a male interviewer.¹⁵² The woman may not trust

148. *Id.*

149. *Id.* at 5.

150. *Id.*

151. See Steven Forester, *Haitian Asylum Advocacy: Questions To Ask Applicants And Notes On Interviewing And Representation*, 10 N.Y.L. SCH. J. HUM. RTS. 351, 371 (1993).

152. The difficulty of relaying such an experience of pain is expressed by Eugenie Anne Gifford: "The tortured prisoner is robbed of '[w]orld, self, and voice,' leaving the victim powerless to resist the demands of his captors, and the survivor incapable of expressing the horror of his violation to those who would prevent its reoccur-

the attorney or translator due to the cultural differences and due to their status as authority figures. Her inhibition may generate an incomplete description of her persecution as well as create credibility problems, which may be grounds for denial of asylum.

This predicament is exacerbated in the section of the Memorandum which states that: "interviews should *not* generally be canceled and rescheduled because women with gender-based asylum claims have brought male interpreters."¹⁵³ From a pragmatic perspective, in an asylum interview where the claimant does not speak English, the interpreter becomes the voice of the asylum seeking woman. It is unrealistic to assume that a man will be able to accurately convey the emotions associated with the woman's narration of her persecution. In addition, the woman will most likely be inhibited in her ability to speak freely about her experience to a male interpreter, who in her culture has been the authority figure and who could not be trusted to understand her, much less take her side and speak for her.

Furthermore, the Memorandum does not achieve any substantive change in the elements of the asylum process. The infirmities and inconsistencies of the case law involving women's claims remain unchanged.¹⁵⁴ Part III of the Memorandum, entitled "Legal Analysis Of Claims," simply lists these cases and states that "asylum adjudicators should assess whether an instance of harm amounts to persecution on the basis of the general principles set out above."¹⁵⁵ The same problems of defining persecution, determining who is a member of a particular social group, and what is a public versus a private act of persecution still confound asylum law.

V. POST BEIJING: ACTING ON COMMITMENTS TO ACHIEVE EQUALITY BEFORE THE LAW

Although the current United States definition of refugee can be construed to include women as a particular social group, this strategy should only serve as a temporary remedy. For the United States to sincerely take action upon its commitments at the United Nations Fourth World Conference on Women, it must go beyond recognizing that women suffer violations on the basis

rence." Gifford, *supra* note 23, at 339 (quoting ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 35 (1985)).

153. *Id.*

154. See *supra* part III.

155. *INS Memorandum*, *supra* note 6, at 9.

of their gender. The United States must also act to ensure that women who have succeeded in escaping to the United States due to a well-founded fear of gender-based persecution are protected by grants of asylum. Asylum would be granted to more female applicants by a congressional amendment to the current refugee statute enumerating "gender" as a sixth category.

The Platform for Action adopted at the Beijing Conference on Women on September 15, 1995, urges governments to condemn violence against women and to provide women who are subjected to violence with access to the mechanisms of justice.¹⁵⁶ The Platform encourages governments to take all necessary steps to ensure the right to safety of refugees and displaced women and to eliminate all kinds of discrimination against girls and women.¹⁵⁷ United Nations Secretary-General Boutros Boutros-Ghali urged the international community to implement this agenda, which he described as a vehicle for the empowerment of women.¹⁵⁸ Boutros-Ghali further called on all governments to swiftly and effectively implement the tenets of the Conference. He also urged all governments to ratify United Nations human rights instruments such as the Convention on the Elimination of Discrimination Against Women.¹⁵⁹ Remarkably, the United States still has not signed the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹⁶⁰ He concluded by exclaiming, "[T]he empowerment of women is the empowerment of all humanity!"¹⁶¹

In her keynote address at the Woman's World Conference in Beijing, Hillary Rodham Clinton proclaimed that a clear message emanating from the conference was that women's rights are human rights and that human rights are women's rights.¹⁶² The First Lady strongly stated that "it is a violation of human rights when young girls are brutalized by the painful and degrading

156. See *Platform for Action; U.N. Fourth World Conference on Women*, BBC SUMMARY OF WORLD BROADCASTS, Sept. 18, 1995, at EE/D2411/S2.

157. *Id.*

158. Friday Highlights, FEDERAL NEWS SERVICE, Sept. 18, 1995, United Nations Package.

159. *Id.*

160. Paul Watson, *Beijing: An Exercise in Futility?*, TORONTO STAR, Sept. 17, 1995, at B5.

161. *Id.*

162. Hillary Rodham Clinton, *On Women's Rights, It's Time to Break the Silence*, S.F. EXAMINER, Sept. 11, 1995, at A-15.

practice of genital mutilation, which happens to millions of women in Africa."¹⁶³

Will the Platform of Action prove to be mere empty rhetoric?¹⁶⁴ Since the document is not binding on the United States, for example, the United States has no duty to implement any of its tenets. However, in order to stand firm to the resolutions made in Beijing, it is of paramount importance that the United States acts on its commitments. The United States can prevent the efforts and high hopes created in Beijing from being merely a mirage of progress. One area in which the United States can implement its commitment to eliminating gender discrimination and promoting equality before the law is by legislatively amending its asylum law. In order to achieve uniform application of the law for women fleeing female genital mutilation, Congress must take legislative action. Congress must amend the INA to include "gender." An amendment of the statute would result in "the even and consistent application of the law with respect to all types of persecution, including gender persecution."¹⁶⁵

CONCLUSION

Today, women and girls worldwide are persecuted by female genital mutilation. Under current United States asylum law, a woman who bases her asylum claim on having a well-founded fear of female genital mutilation may be denied asylum because her claim does not easily fit within the traditional interpretation of the refugee statute. The refugee definition includes persons having a well-founded fear of persecution on account of race, nationality, religion, and political opinion, but does not include gender. Yet, female genital mutilation is an egregious violation of human rights, and the United States has an obligation to respond to claims based on gender-specific persecution and provide an adequate remedy: asylum.

This Recent Development urges the United States to legislatively add "gender" to the refugee definition. A legislative amendment is the only way to ensure an asylum claim based on gender-related persecution will be adequately remedied. Thus far, attempts to redress the current inadequacies and inequities

163. *Id.*

164. Poole, *supra* note 2, at 12.

165. Todd Stewart Schenk, *A Proposal to Improve the Treatment of Women in Asylum Law: Adding a "Gender" Category to the International Definition of "Refugee,"* 2 *IND. J. GLOBAL LEGAL STUD.* 301, 338 (1994).

have been ineffective. Courts acting alone have proven unable to reform the immigration law to include gender-based persecution as grounds for asylum. A considerable lack of uniformity and consensus in interpreting terms such as "particular social group" or even "persecution" have resulted in disparate judgments and gender bias.

The recent Memorandum addressed to all INS asylum officers is a welcome first step to achieving the long-awaited policy change towards women in American immigration jurisprudence. The International Affairs department of the INS issued this Memorandum as a guideline to assist asylum officers in achieving uniform and consistent decisions in adjudicating cases of women having asylum claims based wholly or in part on their gender. Nevertheless, the guidelines are not a cure for the inadequacies of asylum law. The guidelines have very little force since they are not binding and are merely suggestions for adjudicating women's claims. Further, they are only addressed to INS officers. Due to the separation of the INS and the Office of the Immigration Judge or the Board of Immigration Review, the suggestions have no influence on the courts. Thus, a woman seeking asylum on grounds of having a well-founded fear of female genital mutilation may be denied asylum by an immigration court, as was done recently in the case of a Sierra Leone woman in Baltimore. The judge ruled that the woman who based her claim on female genital mutilation was not part of a social group. He did not regard "gender" as a common characteristic beyond her power to change. Rather, he argued she could change her mind with regard to the practice of female genital mutilation. Such decisions are a mockery of a woman's pain and persecution, and must be prevented.

Particularly now, following the United States' commitments to the Platform for Action at the United Nations Fourth World Conference on Women, the United States must act. If the resolutions within the Platform for Action concerning female genital mutilation are to be more than rhetoric, the United States must commence by providing relief to victims of gender-based persecution. The Platform for Action adopted at Beijing urges governments to condemn violence against women and provide them with mechanisms of justice. It also calls for the elimination of all kinds of discrimination against girls and women. This is the opportune time for the United States, as a leader in human rights protection, to remedy the inadequacy of current asylum law by

adding a sixth category of "persecution due to gender" to the definition of refugee. Judicial attempts to deal with gender claims have created case law marred by inconsistency, disparity, and gender bias. Therefore, a legislative amendment to the refugee definition is the only way to ensure that women's gender-specific claims, such as those based on female genital mutilation, are fairly adjudicated. By taking such concrete action, the United States will not only show its commitment to women's rights, but will truly become "a mighty woman with a torch, whose flame is the imprisoned lighting, and her name Mother of Exiles . . . ," and will serve as an example to the world.

