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Opening the Doors to Women? An Examination of Recent Developments in Asylum and Refugee Law

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OPENING THE DOORS TO WOMEN? AN EXAMINATION OF RECENT DEVELOPMENTS IN ASYLUM AND REFUGEE LAW

I. INTRODUCTION

In recent years, immigration law has undergone an expansion of the grounds for granting asylum and withholding deportation. In particular, in regard to human rights violations inflicted on women, courts have recognized new categories of "social groups," one of the grounds on which asylum may be granted or deportation withheld. The consequence of these decisions has been that more women may be granted refugee status in the United States. Yet, while positive steps have been taken in the area of asylum law in regard to women's human rights, courts still are evolving—and must continue to evolve—in their understanding of women's human rights issues and the need to grant persecuted women asylum.

One issue that has received much attention of late is the possibility that a woman may establish "social group" status based on a likelihood of being forced to undergo female genital mutilation (FGM). That is, women who have a well-founded fear of being forced to undergo FGM upon return to their country of origin are now recognized as belonging to a particular social group and can thus be granted refugee status.[1] FGM, also known as female circumcision, is, at this point, a relatively well-known reproductive health issue confronting many women, particularly in African countries.[2] FGM is a broad

1. *See In re* Fauziya Kasinga, 21 I. & N. Dec. 357 (1996). Female genital mutilation has three main forms, which have been classified by the Department of State. Abay v. Ashcroft, 368 F.3d 634, 638 n.1 (6th Cir. 2004) (citing OFFICE OF THE SENIOR COORDINATOR FOR INT'L WOMEN'S ISSUES, U.S. DEP'T OF STATE, PREVALENCE OF THE PRACTICE OF FEMALE GENITAL MUTILATION (FGM); LAWS PROHIBITING FGM AND THEIR ENFORCEMENT; RECOMMENDATIONS ON HOW TO BEST WORK TO ELIMINATE FGM 5 (2001) (June 27, 2001), *available at* http://www.state.gov/documents/organization/9424.pdf). Type I, commonly referred to as a "clitoridectomy," involves the removal of the clitoral hood, and may involve removal of the clitoris. *Id*. Type II, "excision," involves removing the clitoris and either part or all of the labia minora. *Id*. Type III, "infibulation," entails removing all or part of the external genitalia (clitoris, labia minora, and labia majora), and stitching the vaginal opening shut. *Id.* A small opening is left through which urine and menstrual blood can flow. *Id*.

2. Adrien Katherine Wing & Tyler Murray Smith, *The New African Union and Women's Rights*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 33, 43 (2003).

term for different types of "surgeries"[3] involving removal of smaller or larger parts of the woman's genitalia for the purpose of punishment for engaging in premarital sex, as a tribal custom, to kill sexual urges, or to ensure virginity at time of marriage.[4] The surgeries usually are performed with unsanitary and non-medical instruments, and the rate of infection is high, often exposing the girl or woman to "serious, potentially life-threatening complications" such as "bleeding, infection, urine retention, stress, shock, psychological trauma, and damages to the urethra and anus."[5]

The inclusion of FGM victims as a relatively new social group category represents a greater awareness of the brutality of the practice of FGM, and, moreover, could portend greater openness to expanding the social group category to include a wider range of women in particularly terrible situations. Thus, other human rights violations commonly perpetrated on women in a certain area of the world could potentially be addressed under the same line of reasoning to expand asylum prospects. For example, in Africa, "[c]ustomary and religious perceptions of women as marital property . . . [mean that] domestic abuse at the will of the male [is tolerated]."[6] Therefore, perhaps African women whose partners abuse them could assert they are part of a particular "social group." Similarly, the low status of women in that region means that they have little bargaining power to demand that their partners use protection during sex.[7] African women are therefore much more at risk for contracting AIDS and other diseases than their male counterparts.[8] The awareness of FGM can and has sparked greater awareness of other women's human rights violations, particularly those occurring within the same region of the globe. It also has helped women exploit the social group category to a greater degree. Still, the social group designation is only a "second-best solution" to what would be much more advantageous to women's human rights: including persecution based on gender as an independent basis for asylum.

The FGM decisions also have raised new questions in asylum and refugee law, such as whether to grant derivative asylum to parents and other relatives

3. The term "surgery" to describe the procedure is probably a misnomer, since the procedure is not performed out of medical necessity.

4. *See id.*

5. *In re* Fauziya Kasinga, 21 I. & N. Dec. at 361. For more on the devastating effects of female genital mutilation, see Wing & Smith, *supra* note 2.

6. Wing & Smith, *supra* note 2, at 42.

7. *Id.* at 45.

8. *See id.* at 45–46. Approximately 55% of African people living with AIDS are women. *Id.* at 45. Moreover, women with AIDS often die within six months of diagnosis, because of the stigmatization of the disease and a resultant lack of medical care. *Id.* The authors observe that women who have undergone FGM are at an even higher risk of HIV infection, due to micro-lesions that often occur during intercourse, allowing the virus to enter the body easily. *Id.*

whose loved ones are likely to undergo FGM. It also is unclear what the limits to expansion of the term "social group" will be, as the federal circuits have adopted different criteria for determining what constitutes a social group.[9] Most germane to this Comment is the issue of which groups of affected women afflicted by what sorts of women's human rights violations will be protected under this category.

Using FGM as a valuable and noteworthy starting point, this Comment will demonstrate that, although immigration law in relation to endangered groups of women has expanded significantly, some areas of the current law still fail to adequately protect the human rights of women refugees and asylum-seekers, for various reasons. Centrally, it will argue that the law should cover these groups of excluded women. To this end, Section II of this Comment discusses the legal framework that governs asylum law in the United States. It is within this framework that advocates for extending asylum to victims of human rights violations must currently operate. Section III offers some foundational feminist legal theory for the purpose of arguing that it is important to recognize women's human rights claims as valid, and therefore deserving of asylum protection. Section IV deals first with recent FGM decisions and the broadening of the definition of "social group" in immigration law. In this section, claims by victims of private-party abuse and rape also are addressed. Section V of the Comment analyzes treatment of derivative asylum claims among several of the circuits, and recommends a flexible approach to this determination. Finally, the Conclusion makes suggestions as to how women's rights can be better protected through a further expanded and more clear-cut set of asylum and withholding of deportation standards.

II. FEMINIST LEGAL THEORY AND ASYLUM CLAIMS

This Comment takes as a basic premise that violence and persecution perpetrated on women is wrong and that these actions constitute violations of human rights. The United Nations Declaration on the Elimination of Violence against Women defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[10] Violence against women is a worldwide phenomenon. The violence takes on diverse forms, however, depending on the various cultural assumptions and traditions of a region or country. Severe restrictions on

9. See *infra* Part IV.A for a discussion of the circuits' differing views on what constitutes a social group.

10. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, art. 1, U.N. Doc. A/48/49 (Dec. 20, 1993), *available at* http://www.un.org/documents/ga/res/48/a48r104.htm.

reproductive rights, another form of persecution, frequently are experienced by women in China, as the cases discussed below demonstrate.[11] Marital rape and domestic abuse appear to be experienced by women worldwide.[12] In fact, "the World Health Organization has reported that up to 70 per cent of female murder victims are killed by their male partners."[13] In large part, the reason behind the widespread violence against women is society's failure to recognize these abuses as wrong; rather, they often are viewed as an acceptable part of society.[14]

Thus, some feminist scholars have stated that a central focus of the women's human rights movement should be first to legitimize women's claims, the end goal being to transform society as a whole so that violence against women is no longer deemed acceptable.[15] One of the reasons proffered for why women's human rights are not recognized to the same degree as other "generic" human rights is that the field of human rights historically has been dominated by men, who bring typical male viewpoints to their study and promulgation of human rights.[16] Rights such as a right to be free from domestic violence have been seen as falling into a "private" sphere of unregulated conduct—where most women find themselves.[17] These rights are deemed inferior to rights that operate in the "public" sphere, such as legal and political rights (the arena in which men are far more active).[18] Having a place where one may act to a large extent unregulated by the government is not in itself a harmful ideal, but problems occur when certain persons are subjected to abuse in that private forum and find themselves without recourse. Half of the world's citizens are thereby potentially denied the freedom that the "private sphere" de-regulation was meant to effect. The end result is that women's concerns have not been visible to the world.[19]

11. *See infra* Part IV.C.

12. The Human Rights Watch's Web site comments that "[c]ountries as diverse as Uganda, Nepal, Pakistan, South Africa, Jordan, Russia, Uzbekistan, and Peru have one thing in common: horrendous records on addressing domestic violence." Human Rights Watch, Domestic Violence, http://www.hrw.org/women/domesticviolence.html (last visited Jan. 30, 2005).

13. *See* Amnesty International, Worldwide Scandal, http://www.web.amnesty.org/web/web.nsf/print/scandal-index-eng (last visited Jan. 30, 2005).

14. This is especially true in FGM cases and "honor killing" cases. *See id.*

15. *See* Hilary Charlesworth, *What are "Women's International Human Rights"?*, *in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 58, 67 (Rebecca J. Cook ed., 1994) (citing CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 104 (1987)).

16. *Id.* at 68–71.

17. *See id.* at 69.

18. *Id.*

19. *See id.* at 63. Charlesworth states that "[o]nly recently have non-governmental organizations in the human rights area begun to acknowledge the particular disadvantages faced by women." *Id.*

Authors also have lamented that one of the most difficult obstacles to overcome in promoting women's rights is the misconception that discrimination based on race is a much more serious and devastating problem than discrimination or abuse based on sex.[20] This idea is mirrored in the United States' immigration law, which identifies race as a basis upon which one can establish persecution, but does not grant the same protection to those who are persecuted on account of sex. Instead, those who are persecuted because they are women generally have to show some further "social group classification."[21] Similarly, as discussed below, the United States requires aliens to show some government involvement in their persecutions. This requirement reinforces the idea that refugees only should be protected if they are abused in the "public sphere." On the other hand, those who find themselves in danger in private situations are left without a foundation upon which to base their asylum claims.

Many of the asylum claims that women bring involve egregious violations of human rights. If the same acts—rape, physical abuse, etc.—were undertaken because of one's political beliefs or race, these persons could be granted asylum. However, since the violence is inflicted on women "only" because of their sex and subsequent position in society, the same women are left defenseless. If women's human rights concerns are to be properly addressed, the distinction between public and private spheres, with abuses being tolerated in the private sphere, must be erased. The grounds upon which asylum or withholding of deportation and humanitarian asylum are based therefore should broaden to include the real problems that endanger women.

One striking illustration of the public/private dichotomy, discussed briefly above, involves women who are at risk for rape by their family members or other "private" actors. In certain regions, particularly in Africa, these partners often are infected with AIDS.[22] In this case, the harm that many socio-economically disadvantaged African women face is infection and, ultimately, death.[23] Women in such a situation should not be denied asylum based on lack of official government action in their persecution. Yet courts often are unwilling to allow asylum based on the public/private dichotomy, and they show an unwillingness to grant asylum on the basis of abuses that occur with frequency in the United States, as well (such as marital rape and abuse).[24] The

20. Charlesworth, *supra* note 15, at 65.

21. For a more detailed discussion of the added requirements for women to establish a "social group," see *infra* Part III.

22. *See* Wing & Smith, *supra* note 2, at 45–46.

23. *Id.* at 45.

24. Some authors have noted that international law and Immigration and Naturalization Service (INS) guidelines officially have recognized domestic violence as a legitimate basis for asylum. *E.g.*, Deborah Anker et al., *Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify as Refugees Under United*

result is far from logical. It is important for the advancement of all human rights to recognize that oft-overlooked violations of women's rights deserve to be a basis for asylum in the United States. Though advances have been made, courts must increase their understanding and recognition of women's human rights issues, and the legislature must continue to act to expand protection granted to women in the form of asylum.

III. LEGAL FRAMEWORK

Refugee law in the United States is largely based on the United Nations Convention relating to the Status of Refugees and the 1967 Protocol to that Convention.[25] Under United States law, a person who qualifies as a refugee may obtain asylum in the United States and avoid being deported to his or her country of origin if he or she fulfills certain requirements.[26] To an alien present in the United States, various options are available to avoid being deported to one's home country. By federal statute, an alien may seek either a grant of asylum or a withholding of deportation.[27] A withholding of deportation can be effected either by section 241(b)(3) of the Immigration and Naturalization Act (INA)[28] or under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (the Convention), as that treaty is codified in federal statute.[29]

States Asylum Law, 11 GEO. IMMIGR. L.J. 709, 713 (1997). However, as discussed below, courts continue to use the public–private distinction to deny many asylum claims based on domestic violence. Similarly, in 1994, one author noted that "it remains an open question whether privately inflicted gender violence will be treated unequivocally as a human rights violation." Rhonda Copeland, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 294 (1994).

25. Anker et al., *supra* note 24, at 711 (citing United Nations Convention Relating to the Status of Refugess, 189 U.N.T.S. 137 (Apr. 22, 1954), and the Protocol Relating to the Status of Refugess, 606 U.N.T.S. 267 (Jan. 21, 1967)). "If one thing is clear from the legislative history of . . . the entire 1980 [Refugee] Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol [R]elating to the Status of Refugees." *Id*. at 712 n.7 (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987)).

26. *See* Anker et al., *supra* note 24, at 712. A refugee is defined 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.

Id. (quoting the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A)(2000)).

27. *See* Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 208.1(a) (2004).

28. 8 C.F.R. § 208.1(a).

29. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, U.N. Doc. A/39/51 (Dec. 10, 1984), *available at*

A. Withholding of Deportation Under the U.S. Interpretation of the Convention

Under the Convention as enacted by the United States, an applicant for withholding of deportation is required to prove that it is "more likely than not" that he or she would be tortured if removed.[30] That is, as a party to the Convention, the United States is obligated to ensure that aliens are not returned to countries where they are likely to be tortured.[31] To fulfill its treaty obligations, the United States has enacted statutes and regulations that prohibit *refoulement*, or the return of the alien to a dangerous country.[32] Under the Convention's definition of torture, however, the persecution must be committed by state actors, or at the very least, with the "acquiescence" of state or governmental officials.[33]

The meanings of the Convention terms as embodied in U.S. law are subject to the "reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention."[34] The United States' definition of torture therefore governs all decisions made in conjunction with the Convention. Thus, it is erroneous to say that the Convention itself governs the circumstances under which withholding of deportation can be effected. It is important to distinguish between the Convention as drafted by the United Nations and the Convention as adopted by the United States. In almost all cases, the United States' formulation of the Convention is more restrictive than the Convention's original or "non-interpreted" provisions, making it more difficult to invoke the "interpreted" Convention as grounds for asylum.[35]

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http://www.un.org/documents/ga/res/39/a39r046.htm [hereinafter Convention Against Torture]. For a list of U.S. understandings and reservations to the Convention Against Torture, see 136 CONG. REC. 26, 36192–93 (1990).

30. 8 C.F.R. § 208(16)(c)(2).

31. Convention Against Torture, *supra* note 29, at art. 3(1). This is called the principle of *non-refoulement*. *See id.*

32. The United States has implemented its Convention Against Torture obligations by enacting legislation such as the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681, 2681-761.

33. *See* Convention Against Torture, *supra* note 29, at art. 1. The Ninth Circuit has held that the key to torture is acquiescence by state actors, not being held in custody by officials while torture was performed. Azanor v. Ashcroft, 364 F.3d 1013, 1018–19 (9th Cir. 2004). However, the Board of Immigration Appeals has taken the position that, in order to demonstrate acquiescence, the alien must do more than show that the government official was aware of the torture but unable to stop it. Rather, he or she must show that government officials are "willfully accepting" the torture. *In re* S-V-, 22 I. & N. Dec. 1306, 1312 (2000).

34. Foreign Affairs Reform and Restructuring Act of 1998 § 2242(f)(2).

35. For example, the United States has, until recently, defined torture in an extremely narrow manner. *See* Working Group Report on Detainee Interrogations in the Global War on Terrorism:

One obvious example of the difference between the Convention as drafted and the Convention as implemented by the United States is that the Convention states that an alien shall not be deported to his or her home country if *substantial grounds exist* for believing he or she will be tortured.[36] On the other hand, the Convention as implemented in United States immigration legislation states that *refoulement* is prohibited when it is "*more likely than not*" that the alien will be tortured upon his or her return.[37] This interpretation clearly places a heavier burden of proof on the alien to show likelihood of being tortured. She must prove that country or regional circumstances indicate it is more likely than not that she will be tortured in her home country. In effect, the interpretation ups the "probability" by which each alien must show evidence of torture to fifty-one percent or more.

Moreover, the Convention defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . ."[38] The United States' official implementation policy of the Convention defines torture as "an *extreme* form of cruel and unusual punishment committed under the color of law."[39] The State Department has emphasized that this definition is to be interpreted in a limited fashion, and has stated that "rough treatment, such as police brutality, 'while deplorable, does not amount to "torture" for purposes of the Convention.'"[40]

Assessment of Legal, Historical, Policy, and Operational Considerations 4–5 (Mar. 6, 2003), http://www.cdi.org/news/lw/pentagon-torture-memo.pdf.

36. Convention Against Torture, *supra* note 29, at art. 3(1).

37. Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 208(16)(c)(2) (2004) (emphasis added); *see also Azanor*, 364 F.3d at 1020.

38. Convention Against Torture, *supra* note 29, at art. 1(1). The article reads:

> [Torture is] any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain and 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. It does not include pain or suffering arising from, inherent in or incidental to lawful sanctions.

Id.

39. MICHAEL JOHN GARCIA, THE U.N. CONVENTION AGAINST TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING THE REMOVAL OF ALIENS, CRS REPORT FOR CONGRESS (Mar. 11, 2004) (introductory summary), *available at* http://www.au.af.mil/au/awc/awcgate/crs/rl32276.pdf.

40. *Id.* at 2 (citing President's Message to Congress Transmitting the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, May 23, 1988, S. Treaty Doc. No. 100-20, *reprinted in* 13857 U.S. Cong. Serial Set, at 3 (1990)).

Torture also must be engaged in with a specific intent on the part of the torturer. If the harm caused is unintentional or unanticipated, then the acts are not considered torture.[41] Additionally, because of the way the United States has implemented the Convention—and the way the Board of Immigration Appeals (BIA) has interpreted that implementation—an alien must show a specific intent on the part of the torturer to engage in torturing the victim, which could be quite difficult to prove.[42] This interpretation of the treaty language may well be in contravention of the intent of the treaty drafters, who most likely added the word "intentional" in order to exclude negligent or accidental pain from the definition of torture.[43] Again, the burden placed on the alien to show evidence that he or she will be tortured is heavier under United States law than it is under the Convention as drafted; in the United States, applicants essentially must prove the perpetrator's "specific intent to torture" at the time the torture took place.

B. Withholding of Deportation

Withholding of deportation is the second means by which an alien may remain in the United States. The Immigration and Nationality Act (INA) requires an applicant to prove that his or her life or freedom would be threatened (i.e., that he or she would be persecuted) by being returned to the home country on account of race, religion, nationality, membership in a particular social group, or political opinion.[44] If an applicant meets his or her burden of proof on this issue of persecution, there is no discretion on the part of the Attorney General; he or she *must* withhold the alien's deportation.[45] To have deportation withheld, the alien must establish by a "clear probability" that his or her life or freedom would be at risk if deported.[46] That is, the alien must show it is more likely than not that he or she would be subject to persecution.[47] Unlike under the Convention, he or she does not have to prove that life or freedom would be endangered by a government official or with the

41. *See* GARCIA, *supra* note 40.

42. One of the Senate's understandings taken at the time of the ratification of the Convention Against Torture requires that "in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering . . . ." 136 CONG. REC. 25, 36193 (1990).

43. See Lori A. Nessel, *"Willful Blindness" to Gender-Based Violence Abroad: United States' Implementation of Article Three of the United Nations Convention Against Torture*, 89 MINN. L. REV. 71, 126 (2004), for an argument that the United States' interpretation of the definition of torture is contrary to the drafters' intent.

44. Procedures for Asylum and Witholding of Removal, 8 C.F.R. § 208.16(a), (b)(1) (2004).

45. *Id.* § 208.16(d)(1).

46. Zubeda v. Ashcroft, 333 F.3d 463, 469 (3d Cir. 2003) (citing Janusiak v. INS, 947 F.2d 46, 47 (3d Cir. 1991)).

47. *Id.* at 469 (citing INS v. Stevic, 467 U.S. 407, 429–30 (1984)).

acquiescence of the government, however.[48] The alien may meet his or her burden of proof by his or her own testimony.[49] If "credible," no corroboration of the alien's testimony is needed; rather, the testimony alone can suffice to show that he or she is at risk.[50]

C. Asylum

The third option available to an alien seeking refuge is to obtain a grant of asylum. The standard of proof for a grant of asylum is less stringent than needed to withhold deportation—it requires only a well-founded fear of being persecuted on return to one's home country, as opposed to a "clear probability . . . [of] persecution" required under *Zubeda*.[51] The Supreme Court has explicitly held that the two standards are not the same, and that grant of asylum is to be decided on the "well-founded fear" standard, which practically translates to a lower requirement for documentation or other "hard" evidence of persecution or abuses.[52] The Court has stated that a well-founded fear of persecution could be established if

> [we] presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp . . . . In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have "well-founded fear of being persecuted" upon his eventual return.[53]

Lower courts have held that the well-founded fear standard includes both a subjective and objective component.[54] Thus, in contrast to the standard for withholding of deportation, the applicant's state of mind and presence of a genuine fear is a real, relevant factor in the analysis. However, an applicant still must demonstrate the exact bases upon which he or she fears persecution, be it political views, social group, or any of the other categories, and must

48. Thus, in *Moshud v. Blackman*, the Third Circuit affirmed the BIA's denial of a withholding of deportation under the Convention Against Torture. 68 F. App'x 328, 335 (3d Cir. 2003) (unpublished decision). The court stated that although FGM was widespread in the alien's home country, the practice had been made illegal, and public officials had condemned the practice. *Id.* However, the court overturned the BIA's decision to deny withholding of removal under the non-Convention statutory provision. *Id.* It held that the BIA's determination of the alien's failure to prove reasonable fear was "unsupported by evidence." *Id.*

49. 8 C.F.R. § 208.16(b).

50. *Id.*

51. *Zubeda*, 333 F.3d at 469.

52. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 430 (1987).

53. Lukwago v. Ashcroft, 329 F.3d 157, 177 (3d Cir. 2003) (quoting *Cardoza-Fonseca*, 480 U.S. at 431).

54. Aguilera-Cota v. INS, 914 F.2d 1375, 1378 (9th Cir. 1990); Figeroa v. INS, 886 F.2d 76, 79 (4th Cir. 1989).

establish every fact by a preponderance of the evidence.[55] Asylum is also granted at the discretion of the Attorney General.[56] Courts are reluctant to overturn such a decision and will not do so unless a reasonable fact finder would be obliged to reach the opposite result.[57]

D. Past Persecution and Humanitarian Asylum

When an alien establishes past persecution based on one of the enumerated grounds, "it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal."[58] However, this presumption is rebutted upon a finding that there has been a fundamental change in the applicant's home country such that the applicant's life would not be threatened were he or she to return presently.[59] Changes in country conditions, however, must be shown to negate the *particular* refugee's fears so as to make them unreasonable.[60] The presumption can also be rebutted by a showing that the applicant could relocate to another part of his or her country, and thus avoid persecution.[61] However, courts have recognized that in countries undergoing serious civil strife or ongoing dangerous conditions, this may not be a plausible option.[62]

If the government does successfully rebut the alien's assumption of past persecution, there is another alternative available to him or her. The Attorney General has discretion to grant asylum for humanitarian reasons.[63] Humanitarian asylum is granted where "the alien has suffered an 'atrocious form[ ] of persecution.'"[64] Humanitarian asylum requires only proof of severe

55. Daniel J. Smith, *Political Asylum—Well-Founded Fear of Persecution*, 13 AM. JUR. 3D *Proof of Facts* 665 § 2 (2005).

56. *Cardoza-Fonseca*, 480 U.S. at 428.

57. This deferential standard of review stems partly from the watershed *Chevron* case. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984). Even the significantly deferential approach taken under the *Chevron* doctrine does not capture the full extent to which courts defer to the BIA, however. Under a so-called "plenary power" doctrine in immigration law, courts exhibit deference even greater than that required under the *Chevron* doctrine. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547–50, 559–60 (1990).

58. Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 208.16(b)(1) (2004).

59. *Id.*

60. Awale v. Ashcroft, 384 F.3d 527, 531 (8th Cir. 2004).

61. 8 C.F.R. § 208.16(b)(1)(B). This option of "relocation" is only required where "reasonable." *Id.* Courts are to look at a non-exclusive list of factors, including whether the applicant would face harm in the place where he or she relocated, and social and cultural restraints, such as *gender*. 8 C.F.R. § 208.13.

62. *Awale*, 384 F.3d at 531 (citing 8 C.F.R. § 208.13(b)(3)).

63. 8 C.F.R. § 208.13.

64. Asani v. INS, 154 F.3d 719, 722 (7th Cir. 1998) (quoting *In re* Chen, 20 I. & N. Dec. 16, 19 (BIA 1989)).

past persecution, but not proof of a well-founded fear of future persecution.[65] In *Brucaj v. Ashcroft*, the Seventh Circuit remanded an alien's case for better explanation of why her claim for humanitarian asylum had been denied.[66] In the court's opinion, the severe abuse that the applicant had experienced—a brutal gang-rape, beating, and abandonment—was sufficient to show she would probably suffer severe psychological distress upon return to her country.[67] The court opined that if the BIA wished to withhold humanitarian asylum, it would have to distinguish Brucaj's claims from other presumably similar cases in which it had granted asylum.[68] In applying for humanitarian asylum, the alien does not need to show "objective" or expert evidence that she would experience psychological harm upon return to the home country; as with a grant of asylum, her credible testimony may suffice.[69]

E. Persecution

Under both asylum and withholding of deportation, the applicant must show—to a greater or lesser degree—that she may be persecuted. There is no universally accepted definition of "persecution," and "attempts to formulate such a definition have met with little success."[70] The Ninth Circuit has offered the very broad proposition that persecution is "the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive."[71] The same court has stated that rape or sexual assault may constitute persecution.[72] Additionally, in May 1995, the Immigration and Naturalization Service (INS) itself officially recognized sexual abuse and rape as possible forms of persecution.[73]

Persecution, however, should not be equated with harassment or mere ill-treatment. For example, the First Circuit has articulated that a brief detention

65. *See* Brucaj v. Ashcroft, 381 F.3d 602, 608 (7th Cir. 2004). Thus, even if the presumption of future persecution has been rebutted, "an alien may have suffered such severe or atrocious forms of persecution at the hands of the former regime such that it would be inhumane to require the alien to return to his home country." *Id.*

66. *Id.* at 611.

67. *Id.* at 610.

68. *Id.*

69. *Id.*

70. Smith, *supra* note 55, at § 4; *see also* UNITED NATIONS HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 51 (1992), *available at* http://www1.umn.edu/humanrts/instree/refugeehandbook.pdf.

71. Desir v. Ilchert, 840 F.2d 723, 726–27 (9th Cir. 1988) (quoting Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969)).

72. Lopez-Galarza v. INS, 99 F.3d 954, 959 (9th Cir. 1996).

73. *Id.* at 963.

on several occasions did not rise to the level of persecution.[74] Rather, persecution "encompasses more than threats to life or freedom, but less than mere harassment or annoyance."[75] Other courts have defined persecution even more strictly, as not "encompass[ing] all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional."[76] The Third Circuit seemingly limits persecution to "threats to life, confinement, torture, and economic restrictions so severe that they constitute a real threat to life or freedom."[77]

Courts have also stated that persecution must be inflicted either by the government or by groups that the national government was unwilling or unable to control.[78] Thus, where the source of the treatment is personal hostility, it is usually considered outside the realm of "persecution," and asylum is denied.[79] Moreover, a showing that one would suffer persecution as a result of generally harsh conditions in one's home country usually does not secure a grant of asylum.[80] These limitations on the definition of persecution may be particularly disadvantageous to women. Women's conditions in many developing and undeveloped countries, for example, are "generally harsh," and their basic rights are likely to be violated. Such a broad group (women from a particular region or country) would most likely be excluded from the "persecution" definition. Finally, "persecution" is limited to the infliction of harm for reasons that this country does not recognize as legitimate.[81] Thus, punishments or prosecutions for crimes that the applicant had committed would most likely not be considered "persecution."[82]

It is important to keep in mind that once the alien establishes persecution, he or she must then show that the persecution was visited upon him or her *on account* of membership in a particular social group.[83] This means that the petitioner "must present some evidence, direct or circumstantial, of the persecutor's motive."[84] Thus, because marital rape and spousal abuse, very significant problems facing women, arise out of personal relationships, they could be classified as "arising out of personal hostilities," and not on account

74. Fesseha v. Ashcroft, 333 F.3d 13, 19 (1st Cir. 2003). In that case, the woman was only "detained, not imprisoned," was held for only twenty-four hours, and was never harmed. *Id.*

75. *Id.* at 18 (quoting Aguilar-Solis v. INS, 168 F.3d 565, 570 (1st Cir. 1999)).

76. Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993).

77. Lin v. INS, 238 F.3d 239, 244 (3d Cir. 2001) (quoting Chang v. INS, 119 F.3d 1055, 1066 (3d Cir. 1997)).

78. *E.g.*, McMullen v. INS, 658 F.2d 1312, 1315 (9th Cir. 1981).

79. Zayas-Marini v. INS, 785 F.2d 801, 806 (9th Cir. 1986).

80. Smith, *supra* note 55, at § 4.

81. Procedures for Asylum and Witholding of Removal, 8 C.F.R. § 208.18 (2004).

82. *Id.* This is true as long as the lawful punishments or sanctions inflicted on a person do not "defeat the object and purpose of the Convention Against Torture to prohibit torture." *Id.*

83. *Id.* at § 208.16.

84. Canas-Segovia v. INS, 970 F.2d 599, 601 (9th Cir. 1992).

of the woman's membership in a particular social group. Yet if a specific social group consisting of "women in certain situations" or "of certain status or beliefs" can be established, it may be fairly easy to prove that membership in the group is the reason for which they are persecuted. Alternatively, if the government fails to take appropriate action against individuals who thus deprive women of their human rights, one can argue that it is complicit in the persecution.

F. Standard of Review

The standard of judicial review of BIA determinations is narrow. The basic theory is that the attorney general should have broad discretion to determine which aliens are allowed to remain in the country and which must leave. "[Immigration law] authorizes the Attorney General, in his discretion, to grant asylum to an alien . . . ."[85] Notably, this role is not constitutionally granted to the attorney general, nor even generally to the executive branch. On the other hand, it is also worth noting that there continue to be cases which, even under the deferential "plenary power doctrine," effectively reverse the BIA's decisions, thus limiting its discretionary power.[86]

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[87] allows for a system of "expedited removal" for arriving aliens who do not possess appropriate identification. As some practitioners have noted, "[a]lthough IIRIRA was promoted as an illegal immigration bill, it's [sic] far reaching provisions have had a serious impact on legal immigration as well."[88] The IIRIRA establishes a screening program that allows INS officers to conduct an evaluation of an alien's admissibility, if that alien is just arriving in the United States or if he or she has not been continually present in the country for more than two years.[89] If the officer determines the alien is inadmissible, the officer can remove the alien from the United States *with no further review*, unless the alien indicates at that time that he or she wishes to apply for asylum status.[90]

85. INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992) (citing section 208(a) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a) (1988)).

86. *See, e.g.*, Brucaj v. Ashcroft, 381 F.3d 602, 611 (reversing and remanding to the BIA when it disregarded the valid humanitarian asylum option for an alien).

87. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

88. Henry J. Chang, The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, http://www.americanlaw.com/1996law.html (last visited Nov. 6, 2005).

89. *The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 4 (2001) [hereinafter *Expedited Removal Study*].

90. Illegal Immigration Reform and Immigrant Responsibility Act § 304; *see also Expedited Removal Study*, *supra* note 89, at 5–6 (citing INA § 212(a)(9)(A)(i)).

Even if the alien does indicate to the INS officer that she wishes to apply for asylum status, she will only be assigned an "asylum officer."[91] That officer then conducts another screening, this time to determine if the alien has a credible fear of persecution.[92] But if the officer finds there is no credible fear, then the alien is deported without further proceedings.[93] If the alien requests a prompt review by an immigration judge, the judge may review the case, as long as the review is accomplished within seven days of the officer's determination.[94] The INS officer thus practically retains almost complete discretion; the alien being deported would have to have her wits firmly about her and her knowledge of the law clear: she must first request a grant of asylum, and then a prompt review by an immigration judge. The chances of this seem slim at best.[95]

Studies have shown that "the expedited removal system that Congress implemented in 1996 has had a disparate impact on women asylum seekers."[96] Statistically, more women are removed subject to this process than are their male counterparts.[97] This may be because women, due to cultural norms, are less likely to possess documentation such as identification, or to be articulate enough to comply with legal standards of proof.[98] This is especially likely to be true given the narrow window of time that Congress has provided before expedited removal is carried out.[99]

IV. FGM DECISIONS AND OTHER CLAIMS TO "SOCIAL GROUP"

A. The Elusive Nature of "Social Group"

Because women are not entitled to a separate ground for asylum because of persecution based on their sex, women have had to attempt to fit their claims into the most flexible of the available statutory grounds—social group.[100] A

91. *Expedited Removal Study*, *supra* note 89, at 5–6.

92. *Id.* at 6.

93. *Id.* at 8.

94. *Id.* at 7.

95. Section 306 of the IIRIRA lists the types of judicial review options now eliminated by its enactment. Illegal Immigration Reform and Immigrant Responsibility Act § 306. For example, with few exceptions, no court now has jurisdiction over orders of removal. *See id.* Courts are mostly stripped of jurisdiction to review any action that is discretionary with the attorney general. *See id.* Likewise, when an order of removal has been given, habeas corpus actions are only sustainable to determine whether the petitioner is an alien and ordered removed and whether the alien can prove that he or she is a lawfully admitted alien. *Id.*

96. Nessel, *supra* note 43, at 96.

97. *Id.*

98. *Id.* at 95.

99. *See id.* at 96.

100. Nessel has called this requirement of showing membership in a smaller group of women the "gender-plus" protected group. *Id*. at 76.

comprehensive definition of "social group" proves challenging at best. "There is a tendency on the part of applicants to view 'social group' in an expansive manner, while the INS tends to view it in a restrictive manner."[101] As the Ninth Circuit has noted, "The case law regarding the definition of 'particular social group' is not wholly consistent."[102] As a general statement, however, the Ninth Circuit has stated that the concept "is a flexible one which extends broadly to encompass many groups who do not otherwise fall within the other categories of race, nationality, religion, or political opinion."[103] Working within the confines of existing law, the social group category offers a practical way for women to obtain asylum.

The First, Third, and Seventh Circuits have adopted the BIA's approach, which defines social group as being composed of individuals who share a common, immutable characteristic.[104] The Third Circuit has laid out three specific requirements to qualify for membership in a particular social group: the alien must identify a particular social group; the alien must establish that he or she is a member of the group; and the alien must show that he or she was persecuted because of membership in the group.[105] In a decision by the Third Circuit, the court held that Ugandian children who were formerly enslaved as child soldiers by guerilla groups, and who escaped their enslavement, constituted a particular social group for the purpose of granting asylum.[106] The court emphasized that this categorization was based on the children's shared experiences: being kidnapped, being persecuted at the hands of guerrilla groups, and subsequently escaping from the group.[107] The alien was unable to change his past role as a child soldier, and therefore this was considered the "immutable characteristic" upon which a social group was formed.[108] Further, because escaped child soldiers were likely to be killed upon their return, they also could adequately demonstrate a fear of future persecution based on their social group.[109]

In contrast, the Ninth Circuit originally held that to belong to a particular social group, a "voluntary associational relationship" was necessary.[110] Recently, however, that circuit has expanded its definition to harmonize it with the BIA's immutability requirement; it currently defines "social group" as a

101. Smith, *supra* note 55, at § 9. The U.N. Handbook defines a social group in a broad manner as well, as made up of persons of similar background, habits, or social status. *Id.*

102. Hernandez-Montiel v. INS, 225 F.3d 1084, 1091 (9th Cir. 2000).

103. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986).

104. *See* Lwin v. INS, 144 F.3d 505, 511 (7th Cir. 1998).

105. Lukwago v. Ashcroft, 329 F.3d 157, 170 (3d Cir. 2003).

106. *Id*. at 183.

107. *Id.* at 178.

108. *Id.*

109. *Id.* at 179.

110. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986).

group either "united by a voluntary association . . . *or* by an innate characteristic that is . . . fundamental to the identities or consciences of its members."[111] The Second Circuit, meanwhile, has adopted the Ninth Circuit's *previous* "voluntary association" test, while adding a requirement that the members of a social group must be externally distinguishable.[112]

The Sixth Circuit has adopted the approach taken by the First, Third, and Seventh Circuits. In *Castellano-Chacon*,[113] the applicant, a tattooed twenty-seven-year-old, argued he should be considered part of a "particular social group" that was being persecuted by the government.[114] Using the "immutable characteristic" test, the Sixth Circuit held that "tattooed youth" could not be considered a social group for purposes of meeting INA requirements, as the youths had no common background or innate characteristic to distinguish them, beyond the tattoos which they had chosen to acquire.[115] While recognizing that "the definition of a 'social group' is a flexible one," the court held that "the term cannot be without some outer limit, outside of which tattooed youth surely falls."[116]

The "immutability requirement" adopted by many of the circuits is a positive move in the direction of granting asylum to victimized women. By basing the term on a fundamental characteristic that cannot be changed, the door is theoretically opened to claims of asylum for women who share a sufficiently similar background, for example, being from a region in which women are persecuted. Thus, in *Awale v. Ashcroft*, the Eighth Circuit granted a Somali woman, whose clan was under attack, asylum because of persecution based on social group.[117] The court held that clans could constitute a social group as clans are the "key social group for virtually all Somalis."[118] The regional or specialized characteristics usually necessary to achieve social group classifications are clearly demonstrated by the FGM cases.

B. Using "Social Group" in the FGM Context

In re Kasinga was the first case to hold that forced FGM involved an infliction of grave harm constituting persecution on account of membership in a social group.[119] There, the BIA recognized a social group comprised of young women of the Tchamba-Kunsuntu tribe in Northern Togo who had not

111. Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000).

112. Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991).

113. Castellano-Chacon v. INS, 341 F.3d 533 (6th Cir. 2003).

114. *Id.* at 538–39, 545–46. The persecution consisted of extra-judicial killings of those with tattoos, commonly thought to belong to gangs. *Id.*

115. *Id.* at 549.

116. *Id.*

117. Awale v. Ashcroft, 384 F.3d 527, 532 (8th Cir. 2004).

118. *Id.* at 529.

119. *In re* Fauziya Kasinga, 21 I. & N. Dec. 357, 365–66 (1996).

undergone FGM and who opposed the practice.[120] Other cases have similarly recognized the category of women who have not undergone FGM, and who are opposed to it, as comprising a social group for purposes of refugee status.[121]

Even where FGM is involved, the door is not completely open. For instance, the Fifth Circuit has taken a hard-line approach regarding women who have already undergone FGM and are trying to establish a claim for persecution based on social group.[122] In a non-precedential decision, the court declared that because the applicant had already undergone FGM, a "fundamental change" in her circumstances—required to rebut the presumption that past persecution would occur again in the future—was present.[123] The result points to a more limited view of social groups: women who are likely to be persecuted and have undergone one drastic example of persecution are nonetheless deemed not to have sufficiently established a clear probability that they will be persecuted again on the basis of their gender. Because FGM is only performed once, there was no danger that the applicant would have been subjected to the *same* persecution again. The court thus declined to expand the social group to these women who were likely to experience other, different forms of persecution—in this case marital rape, wife-beating, and abduction by marriage.[124]

C. The Success of Non-FGM Claims: "Social Group" or "Political Beliefs"?

FGM, which has received much attention in the media and on human rights groups' agendas, seems to fare fairly well as the basis for a "social group." Other claims involving women at risk for gross human rights violations in the area of reproductive rights have also been successful. For example, in *Zhu v. Ashcroft*, a young Chinese woman sought a withholding of deportation by establishing a claim of "social group" based on reproductive restrictions applied to women in China.[125] Zhu, an unmarried woman, already had one abortion in China, upon threat of being jailed if she refused.[126] While in the United States, she gave birth to another child.[127] The Immigration Judge (IJ)

120. *Id.* at 356–59. Clearly, this is a slim, very well-defined group.

121. *See* Abay v. Ashcroft, 368 F.3d 634, 638 (6th Cir. 2004) (stating "forced female genital mutilation . . . can form the basis of a successful claim for asylum"); Abankwah v. INS, 185 F.3d 18, 26 (2d Cir. 1999) (holding that applicant had a reasonable fear of being subjected to FGM, as she was a non-virgin in her tribe and FGM was punishment for pre-marital sex, and that this constituted persecution).

122. Seifu v. Ashcroft, 80 F. App'x 323, 323–24 (5th Cir. 2003).

123. *Id.* It is unclear if the court considered granting humanitarian asylum in this case.

124. *Id.*

125. 382 F.3d 521, 522–23 (5th Cir. 2004). In China, an unmarried woman may not obtain permission to have a child. *Id.* at 524.

126. *Id*. at 523.

127. *Id.*

remarked that forced abortion and sterilization are on the decline in China, and Zhu could therefore not show by a clear probability that she would be persecuted.[128] The Fifth Circuit criticized the IJ's statements as both "moralistic" and "sexist."[129] The case was ultimately remanded to determine whether the meaning of the word "forced" applied to Zhu's first abortion, putting her in the category of persecuted persons, and whether the situation in China was such as to make it likely Zhu would experience persecution in the future.[130]

The case represents a greater sensitivity to the problem of reproductive restrictions in China and other nations. Although the abortion may not have been literally or physically "forced," it was certainly coerced (by the looming threat of jail—according to Zhu, a typical punishment for women who give birth out of wedlock).[131] If "forced" is given a broader definition, then the claims of many women seeking asylum on this ground will be strengthened. Most of the forced abortion cases, however, have been based not on the "social group" designation, but have been classified as persecution on the basis of political opinion. Applicants who are granted asylum or withholding of deportation often succeed on the ground that their political ideology is opposed to China's restricted parenthood policy.[132] The social group designation could potentially work for these women, but they have had no need to utilize it, as their claims have been addressed statutorily. On the other hand, women who are denied other reproductive freedoms in their own country, such as women from regions where contraception is outlawed or largely unavailable, could potentially use the social group designation to their advantage.

Under the current trend, which for the most part utilizes the "immutable characteristic" definition of "social group," the prospects for expanding the definition of "social group" to include more groups of persecuted women seems good at first glance. As all women share the characteristic of sex, and though this quality is unfortunately (unlike race or religion) not a foundation

128. *Id.* at 525. If the conditions in China had so changed, this would override the rebuttable presumption to which a refugee candidate is normally entitled. Namely, when such a person has been persecuted in the past, she has a well-founded fear of future persecution and should be granted asylum. 8 U.S.C. § 1101(a)(42) (2000); *see also* Brucaj v. Ashcroft, 381 F.3d 602, 606 (7th Cir. 2004). However, even if the government does rebut the presumption of future persecution, the attorney general may still grant asylum as a matter of discretion if the alien has suffered an atrocious form of persecution. Procedures for Asylum and Witholding of Removal, 8 C.F.R. § 208.13(b)(1)(iii)(A) (2004).

129. *Zhu*, 382 F.3d at 526 n.2. Among other things, the IJ had suggested that Zhu could "join a group of people living in China's 'floating population' to avoid persecution." *Id.* at 525.

130. *Id.* at 527–28.

131. *Id.* at 523.

132. The reason for this designation is that asylum law states: "[A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization . . . shall be deemed to have been persecuted on account of political opinion." *Id.* at 527 n.5 (quoting 8 U.S.C. § 1101(a)(42)).

for refugee status in itself, when coupled with a shared background or set of experiences this should place many women squarely within the definition of "social group."

Decisions like *Seifu* and *Zubeda* appear to limit the expansiveness of the term, however.[133] The *Shoafera* and *Angoucheva* decisions, both cited by the *Zubeda* court, do address rape and sexual violence, two of the main concerns of disadvantaged women worldwide.[134] However, they do not portend much hope for an expansion of the social group category. In *Angoucheva*, a Bulgarian woman asserting her Macedonian heritage was beaten and, on another occasion, sexually assaulted by members of the armed forces.[135] She was granted asylum, but not on the basis of the social group designation. Rather, the fact that Macedonians were viewed as political dissidents—and further that the alien was a member of a politically active Macedonian group—gave Angoucheva a claim based on political beliefs.[136] Therefore, this decision does not represent an expansion of the social group category. Nor does it address the case of women who are sexually assaulted by non-state actors. Indeed, like *Zubeda*, the case appears to rest on official government involvement.[137] The fact that Angoucheva was sexually assaulted appears to be merely a "side issue" in the court's real concern with political freedom—again public rights are emphasized while private rights are minimized. Similarly, in *Shoafera*, an Ethiopian citizen of Amharic ethnicity was raped by a government official.[138] The Ninth Circuit rested its decision on the fact that the alien had been raped because of her ethnicity.[139] Though positive, the fact that these cases involve both government officials and ethnic or political elements renders them off-point to private party rape cases and domestic violence concerns.

D. "Private-Party" Rape Cases and Domestic Violence

In cases of "private party" rape and domestic violence, it therefore remains unclear if women can successfully bring asylum or withholding of deportation claims under a social group designation. Yet in such cases, it is no less vital

133. Again, however, *Seifu* is not a precedential decision and, accordingly, has limited value. *See* Seifu v. Ashcroft, 80 F.App'x 323 (5th Cir. 2003). *Zubeda*, while a precedential decision, recognizes the possibility of rape constituting sufficient persecution to support a claim for asylum, even though the court does not base its decision on this ground. Zubeda v. Ashcroft, 333 F.3d 463, 473 (3d Cir. 2003).

134. Shoafera v. INS, 228 F.3d 1070 (9th Cir. 2000); Angoucheva v. INS, 106 F.3d 781 (7th Cir. 1997).

135. 106 F.3d at 783.

136. *Id.* at 789–90.

137. *See id.*

138. 228 F.3d at 1072.

139. *Id.* at 1075–76.

that women be able to seek asylum and withholding of deportation under statutory provisions. From a victim's perspective, a rape is likely equally degrading, traumatizing, or criminal whether it is perpetrated by a soldier or a civilian. At least one case, not to mention numerous psychological and sociological studies, has documented the long-lasting psychological and physical effects of rape.[140] The court noted that "the suffering of rape survivors is strikingly similar . . . to the suffering endured by torture survivors,"[141] drawing no distinction between private-party rape and government-perpetrated rape. Further, the court cited common long-term symptoms of rape as "chronic anxiety . . . sexual dysfunctions, physical distress, mistrust of others, phobias, depression, hostility, and suicidal thoughts."[142]

As noted above, women in certain parts of the African continent are at high risk for becoming infected with HIV through marital rape or abusive partners who refuse to use protection during sex.[143] Social spurning, illness, and eventual death can be added to the list of "symptoms" these women will experience as a result of rape. Because of the severe harm occasioned by rape, women who seek asylum should not be denied based on the identity of their rapist. Rather, if a woman can prove that she is likely to be raped upon return to her home country, it should be irrelevant, for purposes of granting the woman asylum, whether the perpetrator would act with government consent or acquiescence.

It is also currently unclear whether women who are persecuted in the domestic context could be entitled to protection under the social group designation; in the event that the government takes no action in response to women's claims of domestic violence—by shrugging the violence off as "a private matter" for instance—such women could potentially use the social group designation to their advantage. One case that has raised the social group categorization in regard to abused women is *Rusovan v. INS.*[144] There, the Seventh Circuit held that the woman in question could not use the desired social group as a means to remain in the United States.[145] Critically, the court held that the beatings by Rusovan's husband were a private matter, and since Rusovan had not sought protection from the government, she could not establish that such abuse was "uncontrolled" by the government.[146]

140. Lopez-Galarza v. INS, 99 F.3d 954, 962–63 (9th Cir. 1996).

141. *Id.* at 963 (quoting Evelyn Mary Aswad, *Torture by Means of Rape*, 84 GEORGETOWN L.J. 1913, 1931 (1996)).

142. *Id.* (citing Am. Med. Ass'n Council on Scientific Affairs, *Violence Against Women: Relevance for Medical Practitioners*, J. AM. MED. ASS'N 3184 (1992)).

143. *See supra* note 8 and accompanying text.

144. No. 97–2819, 1998 WL 789999, at *1 (7th Cir. Feb. 19, 1998).

145. *Id.*

146. *Id.* at *2.

This decision does allow at least a potential social group classification for women in domestic violence situations, as long as they first seek help from the government. However, the decision fails to take into account that many women, aware of their government's lack of attention to domestic violence, may rightly despair of any help coming from their government and may thus fail to pursue local remedies. Again, the reliance on the traditional public/private motivation for the persecution demonstrates the Western and male-dominated view of human rights.

Legislation has recently been enacted in the United States in order to combat the recognized problem of domestic violence within this country. In 2000, Congress enacted the Violence Against Women Act of 2000 (VAWA).[147] Under Title V of VAWA ("Battered Immigrant Women Protection Act of 2000"), spouses of American citizens who are victims of domestic violence may seek withholding of removal, naturalization, or asylum.[148] VAWA is certainly to be applauded for its effort to protect women suffering under domestic violence. Aliens who are seeking refuge from an abusive spouse abroad have not found protection under VAWA, however—at least in the Ninth Circuit. In *Alfaro-Rodriguez v. INS*, the applicant for asylum had been abused, threatened, and harassed by guerillas in El Salvador—one of whom was her common-law husband.[149] The court denied the alien's claim for suspension of deportation under VAWA.[150] It stated that "the relevant statutory provisions apply narrowly to women who have lived in the United States with, and who are abused by, spouses who are American citizens or permanent residents."[151] Since Alfaro-Rodriguez had come to the United States alone to escape domestic violence, she did not fit the statutory mold.[152] Thus, VAWA is insufficient to protect a woman in the refugee context when her spouse is of non-American nationality, rendering it a closed avenue—at least at present—for women seeking asylum.

E. How Far Can the Social Group Category Expand?

Although such an expansion of "social group" might seem as though it would grant a blanket blessing for any woman seeking entry to the United States, I think this country is unlikely to experience a mass influx of women refugees. It is important to keep in mind that a woman must still offer

147. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat 1464. The Act is split into three divisions: (A) Trafficking Victims Protection Act of 2000, (B) Violence Against Women Act of 2000, (C) Miscellaneous Provisions. *Id.*

148. Victims of Trafficking and Violence Protection Act § 1504.

149. 203 F.3d 830 (9th Cir. 1999) (unpublished table decision), No. 98-70289, 1999 WL 1091990, at *1.

150. *Id.* at *2.

151. *Id.* at *3 n.4.

152. *Id.* at *2, *3 n.4.

evidence that she is likely to be the subject of rape or abuse, either statistically by her status as a woman in a particular area, or as a result of her past experiences or reasonable current belief that she will be subjected to such torture. Therefore, broadening the definition of social group should not be conceived of as tantamount to saying any woman who wants to gain entry to—or remain in—the United States may do so. At its potential broadest, a better conception of "social group" could be formulated as: "women who offer good evidence that they are likely to be persecuted because of their gender."

Indeed, there is probably much more reason to think that the categories will remain somewhat under-inclusive—that the category of social group as pertaining to women in dangerous situations will remain too narrow to afford protection to all endangered women. *Safaie v. INS* seems to indicate such a result.[153] Safaie, an Iranian alien, asserted that Iranian women, "by virtue of their innate characteristic (their sex) and the harsh restrictions placed upon them, are a particular social group."[154] However, the Eighth Circuit held that all Iranian women could not constitute a social group for the purposes of granting asylum.[155] Even though the restrictions placed on the women were clearly because of their sex, the court held that not all of the women could establish a well-founded fear of persecution on a personal level.[156]

It is important to note at this point that, although this Comment deals with human rights abuses against women, many men also suffer from persecution based on sexual identity or affinity. Use of the social group category should, of course, not be limited to just *women* who can show a likelihood of gender or sexual identity-related abuse in their country of origin. Such a limitation would be inherently sexist. Rather, any man who can similarly show such persecution should also be granted asylum or withholding of deportation. For example, men seeking asylum because of persecution for their sexual orientation should be granted the same degree of protection as persecuted women.[157] Along these lines, gay men with female sexual identities—a group

153. 25 F.3d 636 (8th Cir. 1994).

154. *Id.* at 640.

155. *Id.* (stating that this group was too "overbroad" to constitute a social group).

156. *Id.* However, the narrower group of Iranian women who refuse to conform to Iranian laws, and who would experience persecution because of their opposition, may be protected by the "social group" designation, at least according to the Third Circuit. *Id.* at 640. Safaie, however, was held not to fit the criteria, as she had conformed her dress to some degree, and had only been imprisoned for brief periods of time, not constituting "persecution." *Id.* at 640–41.

157. Indeed, then-Attorney General Janet Reno confirmed in 1994 that homosexuals could seek asylum as a persecuted class, included under the definition of social group. *See* Bonnie Miluso, Note, *Family "De-Unification" in the United States: International Law Encourages Immigration Reform for Same-Gender Binational Partners*, 36 GEO. WASH. INT'L L. REV. 915, 923 (2004).

which is often persecuted in Mexico—have been held to constitute a social group for the purpose of granting asylum.[158]

V. CLAIMS FOR DERIVATIVE ASYLUM: ISSUES IN LINE-DRAWING

The question of derivative asylum in women's human rights claims—women, who so often must take on the burden of caring for children and the elderly and probably have a higher number of dependents—doubtless raises the specter of unassociated persons "latching on" to women's valid asylum claims. Thus, in advocating derivative asylum, the question of line-drawing arises in regard to the "deriving" individual's claim. For example, if spouses and children are allowed derivative asylum, should brothers and sisters also be? What about first cousins, or aunts and uncles? One solution would be to allow derivative claims for children, spouses, and parents or guardians, but deny it for more attenuated relationships, in light of the uniquely close relationship of spouses, and the unique need of a child for his or her guardian.

FGM cases illustrate issues in close-relationship derivative asylum cases. These cases have commonly raised problems for parents who fear their children will be subjected to the practice, but who have no independent basis for asylum themselves. When such parents are deported to their country of origin, they are left with the moral dilemma of taking their children with them (and likely exposing them to FGM), or leaving them in the care of, in many instances, strangers in the United States. Again, the federal circuits differ on whether claims for derivative asylum should be granted in FGM cases. The Seventh Circuit, for example, appears to have taken a rather restrictive view of when derivative asylum will be granted for parents.[159] In *Oforji v. Ashcroft*, the Seventh Circuit held that an alien could not establish a derivative claim for asylum by showing potential hardship to her children, who were, at that time, citizens of the United States.[160] Oforji sought to establish her derivative claim under the United Nations Convention Against Torture, on the basis of her daughter's likelihood of being forced to undergo FGM.[161] The court relied on the doctrine of "constructive deportation" and refused to expand the category of cases that fell within the guidelines of the doctrine.[162] Under the doctrine of constructive deportation, only if the child would be deported along with the

158. Hernandez-Montiel v. INS, 225 F.3d 1084, 1094 (9th Cir. 2000).

159. *See* Oforji v. Ashcroft, 354 F.3d 609 (7th Cir. 2003).

160. *Id.* at 618.

161. *Id.* at 614–15.

162. *Id.* at 615–16. The court stated, "It is important to understand that claims of constructive deportation are cognizable only if such a claim falls squarely within the narrow holdings of the cases creating the doctrine." *Id.* at 615. The claim of derivative asylum/constructive deportation was based on the United Nations Convention Against Torture, as implemented in 8 C.F.R. §§ 208.16(c) and 208.18(b)(2). *Oforji*, 354 F.3d at 614–15.

parent should asylum be granted to the parent.[163] The court in three ways distinguished Oforji's case from an earlier case in which it had granted derivative asylum. First, Oforji's two female children were legal residents of the United States and were not at risk for being deported.[164] Second, Oforji did not enter the United States legally.[165] Third, she did not remain in the United States for the required period of seven years to meet an "exceptional hardship claim" for her child.[166] The court thus held that an alien parent with no other basis for asylum cannot establish a derivative claim by "pointing to potential hardship to the alien's United States citizen child in the event of the alien's deportation."[167]

The concurring opinion in *Oforji* recognized that using a rigid, time-based rule (the seven-year rule) did not adequately measure the amount of hardship that would be imposed on a child, were his or her parent to be deported.[168] Rather, "[w]hat is true is that the longer the children have lived in the United States, the greater the hardship of them being sent back to their parent's native country . . . ."[169] Thus, the concurrence argued that determining the amount of hardship imposed on a child should take into account realistic factors, such as the age of the child and whether the child had previously lived in the native country.[170]

In *Olowo v. Ashcroft*, the Seventh Circuit applied the principles it had established in *Oforji*.[171] Because, in this case, both Olowo's daughters and their father were legal residents of the United States, the court found no reason to withhold Olowo's deportation.[172] Moreover, the court was highly critical that Olowo would contemplate taking her daughters back to Nigeria, where they were likely to be subjected to FGM, rather than arrange for them to live in the United States.[173] As in *Oforji*, the court ignored the practical aspects of being forced to make such a difficult choice, in favor of a rigidly applied citizen vs. non-citizen rule. It failed to take into account the psychological and emotional impact on both the woman and children involved.

Similarly, the Ninth Circuit recently held in *Abebe v. Ashcroft*, that parents living in Ethiopia—a country where FGM is allegedly decided upon by family

163. *See id.* at 614–15.
164. *Id.* at 617.
165. *Id.*
166. *Id.*
167. *Id.* at 618.
168. *Oforji*, 354 F.3d at 619–21 (Posner, J., concurring).
169. *Id.* at 620.
170. *Id.*
171. Olowo v. Ashcroft, 368 F.3d 692 (7th Cir. 2004).
172. *Id.* at 701.
173. *Id.* at 701–02.

units—failed to establish a claim for derivative asylum.[174] The problem was with the "well-founded fear" standard as applied to the facts of the case. The court took the statements of Mengistu and Abebe (the parents in the case) that they were opposed to FGM, and that they would try to prevent FGM being performed on their daughter, to mean that there was a high probability she would never undergo the procedure.[175] The dissent in *Abebe* argued that there was no evidence that the parents would actually be able to prevent FGM, regardless of their personal opposition to the practice.[176] Importantly, the dissent recognized the quandary in which such parents find themselves.[177] Parents must either testify that they are powerless to stop the persecution, thus "risking court-ordered removal of their children in the event their asylum claims are rejected," or lose the very basis of their asylum claim.[178] The dissent specifically criticized the *Olowo* decision from the Seventh Circuit, which, "blind to the Hobson's choice its own decision imposed, lambasted Olowo for seeking to take her daughters with her."[179] Finally, the dissent noted that "the Supreme Court has long protected, under due process principles, the integrity of the family and the right of the parents to raise their children," in support of maintaining family unity by keeping parents and children together in the same country.[180]

On the other hand, the Sixth Circuit, in *Abay v. Ashcroft*, took a far more liberal view of derivative asylum.[181] There, the court first determined that Amare, Abay's nine-year-old daughter, would very likely be subjected to FGM, and that the evidence compelled a finding that she should be granted asylum.[182] The Court then turned to the issue of whether Abay's asylum claim, based on her fear that her daughter would be subjected to FGM, should be granted.[183] Abay relied heavily on *In re C-Y-Z*[184] for her position.[185] In the case *In re C-Y-Z*, an alien seeking asylum argued that the forced sterilization of his wife should grant him derivative asylum as well.[186] The BIA accepted the "past persecution" argument and also granted the alien husband refugee status.[187] The Sixth Circuit cited *In re C-Y-Z* favorably, stating, "[I]t is not

174. 379 F.3d 755, 757, 760 (9th Cir. 2004).
175. *Id.* at 759.
176. *Id.* at 761 (Ferguson, J., dissenting).
177. *Id.*
178. *Id.*
179. *Abebe*, 379 F.3d at 762.
180. *Id.* at 763.
181. 368 F.3d 634 (6th Cir. 2004).
182. *Id.* at 640.
183. *Id.* at 640–41.
184. 21 I. & N. Dec. 915 (1997).
185. *Abay*, 368 F.3d at 641.
186. 21 I. & N. Dec. at 916.
187. *Id.* at 918.

unusual . . . that the applicant should be granted asylum although the harm experienced was not by him, but by a family member."[188] The court further reasoned that no one would expect a mother to be forced to leave her child in the United States in order to avoid persecution.[189]

The Sixth Circuit thus found sufficient authority to support a parent's derivative asylum based on a well-founded fear that his or her child would undergo FGM if the parent was deported. The fact that FGM was outlawed in Ethiopia was unpersuasive to this court, as these laws were not enforced as a practical matter.[190] Similarly unpersuasive was the fact that Abay was opposed to FGM, since the evidence tended to show that it is the in-laws who usually insist upon FGM before marriage.[191] *Abay* was a significant step forward for both FGM cases and derivative rights for parents. Unlike the decisions of the Ninth and Seventh Circuits, this quite recent case recognizes the practical concerns associated with granting asylum to underage children while withholding it from parents. In so doing, it promotes stability in family units and prevents emotional trauma in both parents and children.

Sometimes courts have drawn lines quite firmly in the context of derivative asylum. For example, in *Chen v. Ashcroft*, the Third Circuit upheld the BIA's decision to deny derivative asylum to Chen based on the past persecution that his fiancée had suffered in China—a forced abortion in her eighth month of pregnancy.[192] Although the court recognized that Chen would have a valid claim to derivative asylum if the couple were married, the fact that they were only engaged barred his claim.[193] While this example may seem strict to the point of injustice, it is worth noting that courts can and do draw lines in recognizing derivative asylum—this undermines the argument that admitting parents, guardians, or spouses through derivative asylum will result in a flood of unassociated persons wrongly using the asylum claim.

188. *Abay*, 368 F.3d at 641 (quoting *In re* C-Y-Z, 21 I. & N. Dec. at 926 (Rosenberg, J., concurring)).

189. *Id.* at 642.

190. *Id.* at 639.

191. *Id.* at 639–40.

192. 381 F.3d 221, 223, 229 (3d Cir. 2004).

193. *Id.* at 228. The court kept the firm distinction of married vs. unmarried even in light of the fact that China's restrictive social laws had prevented the couple from marrying—the minimum age for marriage is 23 for women, and 25 for men. *See Id.* at 223, 228. The Ninth Circuit reached a contrary result on a similar set of facts in *Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004). In *Ma*, the court held that the asylum applicant could establish persecution based on the forced abortion of his unborn child, notwithstanding the fact that he and the child's mother were unmarried because of the high age restrictions on marriage in China. *Id.* at 560–61.

In some cases, derivative asylum status may also be provided for by statute. In the Victims of Trafficking and Violence Protection Act of 2000,[194] Congress explicitly addressed the case of current or past victims of a "severe form" of trafficking in persons.[195] Where such an alien has not yet reached the age of majority—twenty-one—his or her parents, spouse, and children may also be granted derivative asylum.[196] Where the alien is an adult, a spouse or children may accompany him or her.[197] Thus, as regards victims of trafficking, derivative line-drawing has already been done for the courts; it has been accomplished in such a way that parents, children, and spouses, typically the closest connections one has, are automatically granted asylum along with the affected alien. The same kind of statutory initiative could be pursued for other refugees as well.

A more difficult question along the same lines as *Chen* would involve homosexual "life partners." Because they are not currently granted the same legal status as married heterosexual couples—at least in the United States—the claim that life partners share the same sort of unique relationship that justifies marital derivative status could be unworkable. There are some indications, however, that homosexual partners may be granted derivative status at some point. One such sign is the B-2 Visa status classification that was extended to all "cohabitating partners," not explicitly limited to spouses.[198] In 2001, then-Secretary of State Colin Powell issued a cable to diplomatic posts outlining a process whereby non-immigrants could accompany their non-immigrant partners to the United States.[199] Through such measures, the potential for

194. Pub. L. No. 106-386, 114 Stat. 1464. The applicable provision of this Act, section 107 (e)(1), thus amends section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(15) (2000)).

195. The term "severe form of trafficking in persons" is defined under the Victims of Trafficking and Violence Protection Act section 103(8) as:

> (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or
>
> (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

Victims of Trafficking and Violence Protection Act § 103(8)(A) and (B).

196. *Id.* § 107(e)(1)(C)(I).

197. *Id.*

198. See Miluso, *supra* note 157, at 923–24 for a discussion of the B-2 Visa option.

199. *Id.* B-2 visas are issued to non-immigrants who wish to "travel for pleasure." *Id.* at 923. There is also pending legislation which, if passed, would allow U.S. citizens in committed relationships to sponsor their partners for immigration purposes. *See* Thomas Prol & Daniel Weiss, *Lifting a Lamp: Will New Jersey Create a Safe Harbor for Gay and Lesbian Immigration Rights?*, N.J. LAW, Apr. 2004, at 22, 25. Prol and Weiss note that the Permanent Partners Immigration Act (PPIA), if passed, would also probably facilitate derivative asylum claims of life partners by generating acceptance for immigration partner claims in general. *See id.*

asylum through their partners' claims may well increase for women and men from countries where homosexual relationships are outlawed or where homosexuals are persecuted because of their sexuality.

VI. CONCLUSION

While advances have been made in recognizing women's human rights claims, refugee laws as currently written and applied still help retain the status quo of women's second-class citizenship, to a certain degree. This is evidenced most clearly in the failure of the legislature to recognize sex as a valid basis, on its own, for granting asylum. Although diverse groups of women have been granted asylum under the "social group" designation, the groups that have succeeded in doing so have been confined to specific regions, or consist of women who are in some way "different" from the rest of their society. Thus groups of uncovered women, who have been unable to demonstrate a "gender-plus" justification for their asylum claim, fall through the cracks of refugee law. Moreover, while there is general societal acknowledgement that the United States must use asylum law to protect women against gender-based violence, including domestic abuse, there is still reluctance on the part of courts to overcome the historic public–private distinction to award these claims the same kind of weight as traditional civil and political rights. Further, the implementation of the IIRIRA reduces women's opportunity to advocate asylum claims in a meaningful way.

The most straightforward way for the United States to demonstrate its commitment to women's human rights in refugee law would be to establish sex and sexual identity as independent bases for asylum. Failing that, the next best solution may be to enact legislation to statutorily bring gender-based claims under the protection of asylum law. The Trafficking Victims Protection Act of 2000,[200] which allows withholding of deportation for any alien who has been or is a victim of severe trafficking in persons, could be a model for future legislation. This may be a slow process, dealing with one or two women's rights issues at a time. At the same time, the legislature could ensure more consistent results in derivative asylum claims by statutorily defining the family members eligible for derivative asylum. In so doing, Congress must also keep in mind the importance of maintaining family unity and protecting the emotional welfare of those who have already experienced trauma. Where there is no existing legislation for derivative asylum on a certain issue, the role necessarily shifts to the courts to become more sensitive to the particular facts of each applicant's situation. A model to follow may be the *Abay* approach, as opposed to the overly strict "seven-year rule" or like standards.

200. This Act is "Division A" of the Victims of Trafficking and Violence Protection Act.

Finally, courts may choose to expand the social group definition beyond its current state, so that in effect it covers the majority of women who are persecuted. Although to this point courts have seemed unwilling to do so, greater public attention to the seriousness of women's human rights violations, and resulting cultural changes in American society, may render the judiciary more open to accepting this designation as a workable substitute for "gender or sex-based claims." The FGM decisions have forged a path in the direction of hope and freedom for women who would otherwise experience grave violations of some of their most valuable rights. Advocates, judges, and Congress must continually work together to achieve the same recognition and opportunities for women with other plights.

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