

RECOGNIZING THE NEED FOR REFORM: ASYLUM LAW STANDARDS FOR VICTIMS OF PAST FEMALE GENITAL MUTILATION

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I. INTRODUCTION

The United States currently reviews asylum claims based on persecution for “race, religion, nationality, membership in a particular social group, or political opinion.”¹ While this approach encompasses many of the rationales for aliens fleeing persecution in their home countries, immigration statutes remain silent on persecution on account of gender. This silence prompts confusion and frustration among female applicants for asylum who are often victims of gender persecution such as female genital mutilation (“FGM”) or domestic violence within their home countries. Women fleeing gender persecution such as FGM encounter difficulty in defining the basis for their asylum claims to ensure that those claims meet one of the five grounds enumerated in the statute.

However, on June 13, 1996, the Board of Immigration Appeals (“BIA”) formally recognized FGM as a form of persecution on account of membership within a particular social group, thus allowing a showing of FGM to serve as the basis for a successful asylum claim.² This landmark decision allowed women to qualify for asylum by demonstrating a fear of being persecuted and a likelihood of undergoing mutilation upon return to their home country, even though they had not yet been subjected to FGM.³ Actual victims of FGM, however, have not been as successful because courts have struggled to develop a consistent method of evaluating asylum applications.⁴ Recently, the BIA’s denial of a victim of FGM’s

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1. 8 U.S.C. § 1101(a)(42) (2006).

2. See *In re Fauziya Kasinga*, 21 I. & N. Dec. 357, 365-68 (B.I.A. 1996) (finding that young women who belonged to a tribe that practiced FGM but opposed and had not been subject to that practice qualified as a social group).

3. *Id.* at 368.

4. See *Hassan v. Gonzales*, 484 F.3d 513, 518-19 (8th Cir. 2007) (reversing BIA denial of asylum and remanding for reconsideration); *Mohammed v. Gonzales*, 400 F.3d 785, 796-98 (9th Cir. 2005) (remanding for reconsideration of FGM victim’s asylum claim); *Oforji v. Ashcroft*, 354 F.3d 609, 617 (7th Cir. 2003) (denying asylum to victim of FGM).

withholding of removal claim⁵ caught the attention of Congress.⁶ As a result, former Attorney General Michael Mukasey examined the appropriate treatment of past FGM within the context of current asylum and vacated the BIA's decision.⁷ This article examines the split between some circuit courts and the BIA over the treatment of asylum applicants who have already been subjected to FGM.

Section II will provide a background of FGM and asylum law, including the methods through which both victims of past FGM and those that have not been mutilated, but fear mutilation upon return to their home countries, can establish a basis for asylum claims. Section III will examine the circuit split on interpreting asylum claims for past victims of FGM based on the "singular harm" theory,⁸ "continuing persecution" theory⁹ and "related persecution"¹⁰ theory.

Section IV will provide a critique of each of the three theories. It will examine a flaw of the singular harm theory, arguing that a past incidence of FGM does not

5. *In re A-T-*, 24 I. & N. Dec. 296 (B.I.A. 2007). For a definition of withholding of removal claims, and the distinction between withholding of removal and asylum, see *infra* text accompanying notes 137-41.

6. Letter from Members of U.S. Congress to Michael Mukasey, U.S. Attorney General (Dec. 20, 2007), http://cgrs.uchastings.edu/pdfs/DOC3-%20Addendum_FGM%20Letter_HOUSE-032408.pdf.

7. *In re A-T-*, 24 I. & N. Dec. 617 (A.G. 2008).

8. The Third, Fifth and Seventh Circuits and the BIA have developed the singular harm theory. This theory states that since FGM is a singular harm that has already occurred and cannot be repeated in the future, it does not create the "well founded fear of persecution" required for a successful asylum claim. *Oforji*, 354 F.3d at 617; see also *Kane v. Gonzales*, 123 F. App'x. 518, 520 (3d Cir. 2005) (holding that it is not irrational to find that a victim of FGM does not have a reasonable fear of future persecution); *Olowo v. Ashcroft*, 368 F.3d 692, 700 (7th Cir. 2004) (holding that a victim of FGM did not show that she fears future persecution); *Seifu v. Ashcroft*, 80 F. App'x. 323, 323-24 (5th Cir. 2003) (finding no significant evidence that the victim of FGM should fear future persecution).

9. The Ninth Circuit developed the continuing persecution theory by comparing FGM to forced sterilization. *Mohammed*, 400 F.3d at 799-800. BIA precedent in forced sterilization cases is to view forced sterilization not as a "discrete, onetime act" but as "a permanent and continuing act of persecution" that deprives a couple of future physical and emotional benefits. *In re Y-T-L-*, 23 I. & N. Dec. 601, 607 (B.I.A. 2003). The Ninth Circuit adopted that view, *Qu v. Gonzales*, 399 F.3d 1195, 1203 (9th Cir. 2005), and later compared the ongoing disfigurement, medical complications, and psychological trauma of victims of FGM to the ongoing consequences of forced sterilization, *Mohammed v. Gonzales*, 400 F.3d 785, 799-800 (9th Cir. 2005). Judge Straub of the Second Circuit developed his own version of the continuing persecution theory, positing that FGM should be considered a form of continuing persecution because, like sterilization, it aims to oppress the basic characteristics of a protected group. *Bah v. Mukasey*, 529 F.3d 99, 123 (2d Cir. 2008) (Straub, J., concurring).

10. The Eighth Circuit stated that even if FGM is considered a onetime act, the "presumption that [the victim] also possesses a well-founded fear of future persecution" is not automatically rebutted because she could be subject to other forms of persecution that were prevalent among women in her homeland. *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007). To be entitled to such a presumption, the woman simply had to show that she had been subject to past persecution on account of her race, religion, nationality, membership in a particular social group or political opinion. *Id.* at 516.

automatically create a “fundamental change in circumstances”¹¹ and rebut the presumption of a well-founded fear of future persecution. It will show that since FGM is often conducted multiple times upon the same woman, mutilated women have a well-founded fear of future mutilation and thus demonstrate a well-founded fear of future persecution.¹² It will also show that in some countries, women may be subjected to more extensive forms of FGM (for example, excision and infibulations) over time as a form of punishment for extramarital sex and other sexual offenses.¹³ In conclusion, I will argue that U.S. courts should adopt the Eighth Circuit’s related persecution view in evaluating asylum applications from victims of FGM because it presents a better interpretation of the asylum standard¹⁴ and has gained wider acceptance.¹⁵ Victims of past FGM should be awarded asylum based on past persecution because FGM is indicative of other forms of gender discrimination prevalent within certain societies.¹⁶

II. FEMALE GENITAL MUTILATION

A. *Female Genital Mutilation Defined*

Female genital mutilation is an archaic practice that is prevalent within African countries, the Middle East, and parts of the Amazon Basin.¹⁷ Methods of FGM range from pricking the clitoris to removing all of the external genitalia.¹⁸ The three most common forms of FGM are clitoridectomy, excision, and infibulation.¹⁹ Clitoridectomy involves the partial or complete removal of the clitoris.²⁰ Excision entails the removal of the entire clitoris and the inner lips of the labia.²¹ Infibulation, the most severe form of FGM, involves the removal of all of

11. 8 C.F.R. § 1208.13(b)(1)(i)(A) (2009).

12. *See Bah*, 529 F.3d at 114 (“[F]emale genital mutilation is not necessarily a one time event . . . record evidence reveals that genital mutilation, such as infibulation, is often repeated in Guinea.”); *see also Bah v. Gonzales*, 462 F.3d 637, 644 n.3 (6th Cir. 2006) (Gibbons, J., concurring) (“In several cases asylum applicants have successfully produced evidence indicating a risk of further mutilation.”).

13. *Mohammed*, 400 F.3d at 800-01.

14. 8 C.F.R. § 1208.13.

15. *See Mohammed v. Gonzales*, 400 F.3d 785, 800 (9th Cir. 2005) (noting that the applicant’s home country systematically subordinated women and that rape was common); *Bah v. Mukasey*, 529 F.3d 99, 116-17 (2d Cir. 2008) (noting that women in the applicant’s home country could be subject to domestic violence, rape and sex trafficking).

16. *See Hassan v. Gonzalez*, 484 F.3d 513, 518 (8th Cir. 2007) (finding that a victim of FGM may be subject to “other prevalent forms of persecution” in her home country).

17. Tiffany Ballenger, *Female Genital Mutilation: Legal and Non-Legal Approaches to Eradication*, 9 J. L. & SOC. CHALLENGES 84, 85 (2008).

18. World Health Organization, *Female Genital Mutilation*, <http://www.who.int/mediacentre/factsheets/fs241/en/> (last visited Oct. 26, 2009) [hereinafter “WHO Fact Sheet”].

19. *Id.*

20. *Id.*

21. *Id.*

the external genitalia, the clitoris, labia minor and labia majora.²² The two sides of the vulva are then stitched together, leaving a tiny opening for urination and menstruation.²³

FGM often causes serious side effects, such as urinary infections, complications during childbirth, decreased fertility, hemorrhaging and wound infection.²⁴ Because the procedure is often performed in an unhygienic environment with previously used blades, it increases the risk of transmitting HIV.²⁵ FGM can also cause psychological effects such as depression, anxiety, and frigidity.²⁶ Women who undergo infibulation, the most severe form of FGM, often have to be cut open to allow for sexual intercourse and childbirth.²⁷

FGM is conducted primarily for cultural and social reasons.²⁸ Some cultures view it as a rite of passage into womanhood and conduct it in a ceremonial fashion.²⁹ Other societies practice FGM for aesthetic purposes, believing that the external female genitalia are dirty and unattractive.³⁰ Many cultures use FGM as a form of control over women and their sexuality.³¹ These societies view women as fundamentally sexual, naturally promiscuous creatures.³² They use FGM to prevent women from acting upon sexual desires and to protect them from the sexual aggression of others.³³ Women who do not undergo this practice often face ostracism from society and are deemed undesirable for marriage.³⁴

B. Asylum law and Female Genital Mutilation

In 1980, Congress enacted the Refugee Act³⁵ in order to codify the 1967 United Nations Protocol Relating to the Status of Refugees into U.S. refugee and asylum law.³⁶ To qualify for asylum, an applicant must first obtain refugee status.³⁷

22. Amnesty International USA, Female Genital Mutilation: A Fact Sheet, <http://www.amnestyusa.org/violence-against-women/female-genital-mutilation--fgm/page.do?id=1108439> (last visited Oct. 26, 2009) [hereinafter "Amnesty International Fact Sheet"].

23. *Id.*

24. WHO Fact Sheet, *supra* note 18.

25. Amnesty International Fact Sheet, *supra* note 22.

26. Ballenger, *supra* note 17, at 86.

27. Amnesty International Fact Sheet, *supra* note 22.

28. *Id.*

29. *Id.*

30. Ballenger, *supra* note 17, at 88.

31. Amnesty International Fact Sheet, *supra* note 22.

32. Ballenger, *supra* note 17, at 89.

33. Amnesty International Fact Sheet, *supra* note 22.

34. Ballenger, *supra* note 17, at 88.

35. Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C. and 22 U.S.C.).

36. *Fatin v. I.N.S.*, 12 F.3d 1233, 1239 (3d Cir. 1993) (quoting *I.N.S. v. Cardozo-Fonseca*, 480 U.S. 421, 436-37 (1987)).

37. 8 C.F.R. § 1208.13(a) (2009).

The U.S. adopted the definition of a refugee as outlined by Article 1 (A) (2) of the 1951 U.N. Convention on the Status of Refugees by enacting 8 USC § 1101(a)(42) (2000), which states that the meaning of “refugee” includes:

[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .³⁸

U.S. law further states that an asylum applicant can qualify as a refugee either because she has suffered past persecution or because she has a well-founded fear of future persecution.³⁹ The BIA has defined persecution as a “threat to the life or freedom of or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.”⁴⁰ In order to demonstrate past persecution, an applicant must:

[E]stablish that he or she has suffered persecution in the past in the applicant’s country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution.⁴¹

Once the applicant has demonstrated past persecution, he or she is “presumed to have a well-founded fear of persecution on the basis of the original claim.”⁴² The presumption of persecution may be rebutted if an asylum officer or immigration judge makes one of the following findings:

(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant’s country of nationality or, if stateless, in the applicant’s country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or

(B) The applicant could avoid future persecution by relocating to another part of the applicant’s country of nationality or, if stateless, another part of the applicant’s country of last habitual residence, and

38. 8 U.S.C. § 1101(a)(42) (2006).

39. 8 C.F.R. § 1208.13(b) (2000).

40. Valeena Elizabeth Beety, *Reframing Asylum Standards for Mutilated Women*, 239 J. GENDER RACE & JUST. 239, 247 (2008) (quoting *In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1995)).

41. 8 C.F.R. § 1208.13(b)(1).

42. *Id.*

under all the circumstances, it would be reasonable to expect the applicant to do so.⁴³

If an applicant has not suffered past persecution, he or she can qualify for refugee status if he or she demonstrates a well-founded fear of future persecution.⁴⁴ An applicant establishes a well-founded fear of future persecution if:

(A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and

(C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.⁴⁵

In addition to offering proof of past persecution or a well-founded fear of future persecution, an applicant for asylum must demonstrate membership in a protected class of individuals on account of race, religion, nationality, social group or belief in a political opinion, and must prove that his or her well-founded fear of future persecution is based on his or her membership in one of the aforementioned groups.⁴⁶ 8 U.S.C. § 1101(a)(42) did not originally correlate any particular forms of persecution with the five enumerated categories of race, religion, nationality, social group or belief in a political opinion.⁴⁷ However, in 2001 Congress amended the statute to allow victims of coercive population practices, such as forced sterilization or abortion, to base their asylum claim on persecution as a result of political opinion, such that

[A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.⁴⁸

43. *Id.* § 1208.13(b)(1)(i).

44. *Id.* § 1208.13(b).

45. *Id.* § 1208.13(b)(2)(i).

46. YULE KIM, ASYLUM LAW AND FEMALE GENITAL MUTILATION: RECENT DEVELOPMENTS, at 2 (2008), available at <http://fas.org/sgp/crs/misc/RS22810.pdf>.

47. See generally 8 U.S.C. § 1101(a)(42) (2000); see also *In re A-T-* at 300 (recognizing that while “ persons who suffered [forced sterilization] have been singled out by Congress as having a basis for asylum in the “refugee” definition of section 101(a)(42) of the Act on the strength of the past harm alone . . . Congress has not seen fit to recognize FGM (or any other specific kind of persecution) in similar fashion with special statutory provisions.”).

48. 8 U.S.C. § 1101(a)(42)(B) (2006).

Applicants who have succeeded in their asylum claims by demonstrating a well-founded fear of future persecution in the form of FGM have based their asylum claims on their membership within a particular social group.⁴⁹ Since 8 U.S.C. § 1101(a)(42) does not explicitly cite gender as one of the protected categories, this group is often defined as women of a particular tribe that oppose the practice of FGM.⁵⁰

The BIA first explicitly recognized FGM as a form of persecution based on membership within a particular social group in *In re Fauziya Kasinga*.⁵¹ The court held that Kasinga successfully qualified for asylum by demonstrating her well-founded fear of being subjected to FGM as a form of persecution on the grounds of her membership in a particular social group, which the court defined as “young women of the Tchamba-Kunsuntu tribe who have not had female genital mutilation . . . and who oppose the practice.”⁵² A “particular social group” is defined by “common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities.”⁵³ In writing for the majority, Judge Schmidt recognized that Kasinga’s characteristics of being a young woman and a member of the Tchamba-Kunsuntu tribe are immutable and that the “characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.”⁵⁴

In re Fauziya Kasinga allowed a woman to demonstrate a well-founded fear of persecution as a result of her membership within a particular social group, comprised of women who oppose FGM and are also members of a particular tribe that endorses the practice.⁵⁵ Some courts have relied on *In re Fauziya Kasinga* as precedent and awarded asylum to women who have not undergone FGM but have demonstrated a well-founded fear of persecution based on their membership within a broader social group beyond their particular tribe.⁵⁶

While *In re Fauziya Kasinga* may have set the precedent for women who have not been mutilated, it has not resolved the asylum dilemma for those applicants who have already been mutilated and are seeking asylum from past

49. See *In re Fauziya Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996) (finding that young women who belonged to a tribe that practiced FGM but were opposed to and had not been subject to that practice qualified as a social group); see also *Abay v. Ashcroft*, 368 F.3d 634, 640 (granting Petitioner refugee status because she was a woman and FGM was a near-universal practice in her home country) (6th Cir. 2004); *Abankwah v. I.N.S.*, 185 F.3d 18, 24-26 (finding that Petitioner was eligible for asylum because she was a woman who objectively feared FGM if returned to her home country).

50. *In re Fauziya Kasinga*, 21 I. & N. Dec. at 367.

51. *Id.*

52. *Id.* at 365.

53. *Id.* at 366.

54. *Id.*

55. *Id.*

56. *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004); *Abankwah v. I.N.S.*, 185 F.3d 18, 24-26 (2d Cir. 1999).

persecution.⁵⁷ The standards for evaluating the asylum claims of victims of past FGM have not been as consistent as those for applicants like Kasinga who have not been mutilated but demonstrate a well-founded fear of being mutilated in the future.⁵⁸

To claim asylum based on past persecution, an applicant must show that she is a victim of past persecution on account of race, religion, nationality, membership in a social group, or political opinion and that “a reasonable person in the same circumstances would fear persecution if returned to the [applicant’s] native country.”⁵⁹ Once past persecution is established, the applicant is automatically granted the presumption of a well-founded fear of persecution.⁶⁰ The government can rebut this presumption by demonstrating a “fundamental change in circumstances,” such that the applicant no longer has a well-founded fear of being persecuted, or that she can avoid future persecution by relocating elsewhere within her home country.⁶¹

The BIA and some federal courts have held that the unrepeatable, one-time act of past FGM is the very “fundamental change in circumstances” needed to rebut the presumption of well-founded fear of persecution and have thus denied asylum to previously mutilated women.⁶² These holdings are based on the rationale that since the applicant has already undergone FGM, she no longer has a fear of FGM since the act has already occurred.⁶³ This “singular harm” theory posits that FGM is a one-time, unrepeatable harm and therefore constitutes a “fundamental change in circumstances” that rebuts the presumption of future persecution, leading to the denial of asylum.⁶⁴

57. *Compare* *Olowo v. Ashcroft*, 368 F.3d 692, 701 (7th Cir. 2005) (stating that the Petitioner who had already suffered FGM failed to show that she would face persecution as a result of membership in a social group), *Kane v. Gonzales*, 123 F. App’x. 518, 520 (3d Cir. 2005) (upholding a BIA decision to deny asylum to women who have already undergone FGM), *Oforji v. Ashcroft*, 354 F.3d 609, 617 (7th Cir. 2003) (denying asylum in part because applicant had already undergone FGM), *and* *Seifu v. Ashcroft*, 80 F. App’x. 323, 323-24 (5th Cir. 2003) (denying asylum to victim of FGM because the mutilation itself qualifies as a fundamental change that rebuts the presumption of persecution), *with* *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (granting asylum based on FGM because petitioner does not need to show a well-founded fear of repetition of the exact harm she suffered in the past) *and* *Mohammed v. Gonzales*, 400 F.3d 785, 800 (9th Cir. 2005) (granting asylum to a victim of FGM by equating FGM with the type of continuing harm produced by forced sterilization).

58. *See e.g.*, *Seifu*, 80 F. App’x. at 323-24; *Kane*, 123 F. App’x. at 520.

59. *Oforji*, 354 F.3d at 613 (quoting *Bhatt v. Reno*, 172 F.3d 978, 982 (7th Cir.1999)).

60. 8 C.F.R. § 1208.13(b)(1) (2009).

61. *Id.* § 1208.13(b)(1)(i)(A)(B).

62. *Seifu v. Ashcroft*, 80 F. App’x. 323, 323-24 (5th Cir. 2003) (denying asylum to victim of FGM because the mutilation itself qualifies as a fundamental change that rebuts the presumption of persecution); *see also* *Olowo v. Ashcroft*, 368 F.3d 692, 701 (7th Cir. 2005); *Kane v. Gonzales*, 123 F. App’x. 518, 520 (3d Cir. 2005); *Oforji*, 354 F.3d at 617.

63. *See e.g.*, *Seifu*, 80 F. App’x. at 323-24.

64. *In re A-T-*, 24 I. & N. Dec. 296, 299 (B.I.A. 2007) (stating that a presumption of future FGM persecution is rebutted by the fundamental change in the respondent’s situation arising from

However, other jurisdictions view FGM as an “ongoing harm” or a form of “continuing persecution” because of the long-term and continuous psychological, emotional, and physical side effects that accompany the mutilation.⁶⁵ These courts argue that even though the mutilation occurred in the past, the victim still faces future persecution as a result of the debilitating side effects from the procedure.⁶⁶ They compare FGM to other one-time affronts to sexual autonomy, such as forced sterilization and abortion, which harm victims for the rest of their lives.⁶⁷

Forced sterilization and abortion have been explicitly recognized by statute as forms of persecution on account of political opinion.⁶⁸ In 2001, Congress amended the 8 U.S.C. § 1101(a)(42) (2000) through the Illegal Immigration Reform and Immigrant Responsibility Act,⁶⁹ requiring those individuals who were forced to undergo abortions or sterilization to be placed within the category of persons persecuted on account of political opinion when seeking asylum.⁷⁰ The amended act states that “. . . 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. . . .”⁷¹ This permitted those fleeing China’s intrusive population control policies a ground for asylum within the United States.⁷²

Prior to the amendment, the BIA had ruled in *Matter of Chang* and *Matter of G* that victims of forced sterilization could not qualify for asylum because forced sterilization was not considered a form of persecution based on any of the five enumerated categories for asylum within 8 U.S.C. § 1101(a)(42).⁷³ The BIA itself called for congressional action, stating that “[w]hether [China’s population control policies] are such that the immigration laws should be amended to provide . . . relief from deportation to all individuals who face the possibility of forced

the reprehensible, but one-time, infliction of FGM upon her); see also *Olowo*, 368 F.3d at 701; *Kane*, 123 F. App’x. at 520; *Seifu*, 80 F. App’x. at 323-24; *Oforji*, 354 F.3d at 617.

65. See *Bah v. Mukasey*, 529 F.3d 99, 117-20 (2d Cir.2008) (Straub, J., concurring) (finding that the BIA erred in assuming that FGM is a “one-time” act); *Mohammed v. Gonzales*, 400 F.3d 785, 799-800 (9th Cir. 2005) (finding that FGM is a continuing persecution because it permanently disfigures, causes long-term health problems and deprives a woman of a normal life).

66. See e.g., *Bah*, 529 F.3d at 116.

67. *Mohammed*, 400 F.3d at 799; *Bah*, 529 F.3d 117-18.

68. 8 U.S.C. § 1101(a)(42)(B) (2000) (stating that “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. . . .”).

69. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 1996 U.S.C.C.A.N. (110 Stat 3009) 1, 689.

70. *In re G*, 20 I. & N. Dec. 764, 778 (B.I.A. 1993) (applicant was required to show that China’s one couple, one child policy was being selectively applied against him as a member of a social group or being used to punish him because of his race, nationality or political opinion); *In re Chang*, 20 I. & N. Dec. 38, 44 (B.I.A. 1989) (stating that “[w]e cannot find that implementation of the ‘one couple, one child’ policy in and of itself . . . is persecution or creates a well-founded fear of persecution” on account of one of the five categories.).

71. *Id.*; 8 U.S.C. § 1101 (a)(42)(B).

72. *Bah v. Mukasey*, 529 F.3d 99, 117 (2d Cir. 2008).

73. *In re G*, 20 I. & N. Dec. 764, 778 (B.I.A. 1993).

sterilization . . . is a matter for Congress to resolve legislatively.”⁷⁴ Shortly thereafter, Congress amended the Immigration and Nationality Act to state that victims of forced sterilization “shall be deemed to have been persecuted on account of political opinion.”⁷⁵

Since the amendment, the BIA and other courts have granted asylum to victims of forced sterilization based on persecution on account of political opinion.⁷⁶ These holdings are based primarily on the rationale that forced sterilization or abortion are forms of “continuing persecution,” since they affect victims psychologically and emotionally for the rest of their lives.⁷⁷ Some courts have held that FGM, like forced sterilization, is a form of continuing persecution since it affects the applicant’s sexual autonomy for the rest of her life.⁷⁸ These judges have applied the continuing persecution theory as used in the forced sterilization/abortion context to the FGM context.⁷⁹

Alternatively, the Eighth Circuit has held that an asylum applicant does not have to demonstrate a well-founded fear of the exact same form of persecution that she suffered in the past in order to qualify for asylum.⁸⁰ This holding gave rise to the “related harm theory” which focuses on whether the applicant has a well-founded fear of future persecution on the same grounds, such as nationality or race, as the past persecution.⁸¹ In contrast to the singular harm theory,⁸² the related harm theory considers other forms of persecution the applicant may face upon return to

74. *In re Chang*, 20 I. & N. Dec. at 47.

75. I.N.A. § 101 (a)(42)(B) (2000); 8 U.S.C. § 1101(a)(42)(B) (2000).

76. *Qu v. Gonzales*, 399 F.3d 1195, 1203 (9th Cir 2005) (granting withholding of removal because involuntary sterilization is a form of continuing persecution which creates a well-founded fear of persecution that cannot, as a matter of law, be altered by a change in conditions); *see also Ge v. Ashcroft*, 367 F.3d 1121, 1127 (9th Cir. 2004) (stating that the statute’s protections apply to the husband of a woman who has been forced to undergo abortion or sterilization”).

77. *In re Y-T-L-*, 23 I. & N. Dec. 601, 607 (B.I.A. 2003) (declaring that “[c]oerced sterilization is . . . a permanent and continuing act of persecution that has deprived a couple of the natural fruits of conjugal life.”).

78. *Bah v. Mukasey*, 529 F.3d 99, 120 (2d Cir.2008) (declaring that “female genital mutilation, like forced sterilization, is a continuing act of persecution”); *Mohammed v. Gonzales*, 400 F.3d 785, 799 (9th Cir. 2005) (stating that FGM, like sterilization, is a “continuing harm that renders a petitioner eligible for asylum, without more”).

79. *Bah*, 529 F.3d at 120; *Mohammed v. Gonzales*, 400 F.3d 785, 799 (9th Cir. 2005).

80. *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (noting that the Eighth Circuit has never held that a petitioner must fear that exact same harm suffered in the past in order to demonstrate a well-founded fear of future persecution); *see also Beety, supra* note 40, at 263 (“If the basis of genital mutilation is openly recognized as gender within a specific culture, then FGM can be understood by courts as one act of gender related violence within a spectrum of harms against women in that culture.”); *id.* at 266 (“Once a woman can claim she suffered FGM as persecution because she is a woman in a specific culture, she will have the opportunity to make a claim that she faces future persecution on the same basis, for example, forced prostitution, forced marriage, further genital mutilation, or economic persecution.”).

81. *Hassan*, 484 F.3d at 518.

82. *See* discussion *infra* Section III.

her native country, rather than simply determining whether or not the applicant will be subjected to the same exact harm she suffered in the past.⁸³

III. CIRCUIT COURT SPLIT ON ASYLUM CLAIMS FOR VICTIMS OF PAST PERSECUTION: SINGULAR HARM THEORY VS. CONTINUING PERSECUTION AND RELATED HARM THEORIES

A. *Singular Harm Theory*

1. *Oforji v. Ashcroft*

In *Oforji v. Ashcroft*, the Immigration Judge denied asylum to Oforji, a Nigerian citizen, in part because she had already suffered FGM and therefore could not claim the requisite fear of future persecution needed for a successful asylum claim.⁸⁴ Oforji based her asylum claim on past persecution, asserting that she had already been subjected to FGM and was a member of a particular social group, the Ogoni tribe, which requires all women to undergo FGM, with refusal punishable by death.⁸⁵ The BIA affirmed and adopted the Immigration Judge's decision.⁸⁶ The Seventh Circuit affirmed the prior decisions and denied Oforji asylum in part because she failed to show that she had a well-founded fear of future persecution.⁸⁷ Judge Manion, in writing for a unanimous court, distinguished *Oforji* from *In re Fauziya Kasinga*, stating that "*Kasinga* made specific findings that the alien applicant for asylum had a 'well-founded fear of persecution,' a fear that is obviously not present in Oforji's case since she has already been subjected to FGM."⁸⁸

The judges viewed FGM as a harm that can only occur once and cannot be imposed upon the same woman twice.⁸⁹ If a woman has already been mutilated, the judges averred that she no longer has a well-founded fear of persecution, that is, a fear of future FGM, since it can only occur once.⁹⁰ The court held that since the mutilation has already occurred, thereby vitiating the fear of future mutilation and essentially rebutting the presumption of a well-founded fear of persecution, asylum should be denied.⁹¹

83. *Id.*

84. *Oforji v. Ashcroft*, 354 F.3d 609, 612 (7th Cir. 2003) (asylum request denied primarily because of an adverse credibility finding with regard to applicant's testimony).

85. *Id.*

86. *Id.*

87. *Id.* at 617.

88. *Id.* (noting in dicta on 615 that "Oforji has testified that she had already undergone FGM before entering this country, thus there is no chance that she would be personally tortured again by the procedure when sent back to Nigeria.").

89. *Oforji*, 354 F.3d 609, at 615.

90. *Id.*

91. *Id.*

2. **Olowo v. Ashcroft**

In *Olowo v. Ashcroft*,⁹² the Seventh Circuit reaffirmed its position of denying asylum to victims of past FGM because they could not demonstrate a fear of future persecution.⁹³ The applicant, Ms. Olowo, was a Nigerian woman who claimed to be a member of the Yoruba tribe, a group that practices FGM. “The [Immigration Judge] denied Ms. Olowo’s application for asylum because she has already been subjected to FGM, and therefore no longer has a well-founded fear of persecution based on any social group comprised of women who feared FGM.”⁹⁴ The Seventh Circuit relied on *Oforji* as precedent and affirmed the Immigration Judge’s decision, noting that “Ms. Olowo did not demonstrate that, if removed to Nigeria, she herself would face persecution on account of her membership in a social group.”⁹⁵ The court thus affirmed the Immigration Judge’s opinion that because Olowo has already been mutilated, she lacked fear of it reoccurring, and therefore had no well-founded fear of future persecution.⁹⁶

3. **Seifu v. Ashcroft**

The Fifth Circuit adopted the singular harm theory⁹⁷ in an unpublished opinion, *Seifu v. Ashcroft*.⁹⁸ Helen Seifu, a victim of FGM, applied for asylum on the basis of past persecution as a member of a particular social group – women living in an oppressive culture.⁹⁹ She attempted to demonstrate the requisite fear of future persecution on the basis of gender by showing that the practices of marital rape, wife-beating, FGM, and abduction as a form of marriage, were prevalent within her home country.¹⁰⁰ The court affirmed the Immigration Judge’s denial of asylum, finding that because her husband had been deported, her fear of gender persecution based on domestic violence such as marital rape and wife-beating was attenuated.¹⁰¹

The court also found that Seifu failed to demonstrate a fear of future gender persecution, stating that “the act of female genital mutilation is unfortunately the very fundamental change required to rebut the presumption of persecution created by the showing of past persecution.”¹⁰² Thus, the Fifth Circuit adopted the Seventh

92. *Olowo v. Ashcroft*, 368 F.3d 692, 701 (7th Cir. 2005) (ordering deportation to Nigeria of petitioner who had suffered FGM because she no longer had a well-founded fear of persecution).

93. *Id.* at 697-98.

94. *Id.* at 698.

95. *Id.* at 701.

96. *Id.*

97. *Seifu v. Ashcroft*, 80 F. App’x. 323, 323-24 (5th Cir. 2003); *see also supra* note 8 and accompanying text.

98. *Seifu*, 80 F. App’x. at 323-24.

99. *Id.* at 323.

100. *Id.*

101. *Id.*

102. *Id.* at 323-24.

Circuit's reasoning that mutilated women could not succeed in their asylum claims based on past persecution because their previous mutilation automatically rebuts their fear of future persecution since their fear of future genital mutilation is automatically nullified by the fact that the mutilation has already occurred.¹⁰³ In this case, the applicant attempted to show that she would be subject to forms of gender persecution other than FGM such as marital rape upon return to her home country.¹⁰⁴

This case is another example of how narrowly courts construe the circumstances surrounding individual applicants who have undergone past FGM, overlooking other general practices prevalent in certain cultures that constitute forms of gender persecution. The court summarily concluded that because immediate threats of gender persecution had been removed on account of her husband's deportation and past mutilation, Seifu essentially had no future persecution to fear upon return to her home country.¹⁰⁵ While the court acknowledged that Seifu may face a threat of employment discrimination and general gender based persecution,¹⁰⁶ it concluded that "the decision to deny asylum is not substantially unreasonable."¹⁰⁷ The court failed to examine broader circumstances surrounding Seifu's return to her home country, such as the prevalent culture of oppression, and denied asylum on the basis of past act of FGM itself.¹⁰⁸

4. Kane v. Gonzales

In an unpublished decision, the Third Circuit denied asylum to Nafissatou Kane, a Malian citizen who underwent FGM at the age of one to two weeks.¹⁰⁹ Kane claimed that she had suffered past persecution on account of her membership within a particular social group, and defined her social group as "women who have been forced to undergo FGM."¹¹⁰ She argued that "she also has a well-founded fear of future persecution due to her inability to accept the traditional, oppressed role of a Muslim woman in a Muslim society."¹¹¹ She based this claim on the fact that "her family shunned her because she rejected her family's values and because of her education and willingness to speak out against the rules that govern Muslim women in Mali."¹¹² The court affirmed the BIA decision, stating, "Kane defines her social group as women who have been forced to undergo FGM, and she defines the persecution as the FGM itself. But the 'particular social group' must

103. *Id.* at 323; *see also* Oforji v. Ashcroft, 354 F.3d 609, 617 (7th Cir. 2003).

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

105. *Id.*

106. *Id.* at 324.

107. *Id.*

108. *Id.* at 323-24.

109. Kane v. Gonzales, 123 F. App'x 518, 519 (3d Cir. 2005).

110. *Id.* at 520.

111. *Id.* at 519.

112. *Id.*

have existed before the persecution began.¹¹³ “It is a logical impossibility for Kane to have been a member of the social group of women subjected to FGM prior to the time when she underwent FGM (as a one-week-old infant).”¹¹⁴

This case typifies the difficulty that previously mutilated women encounter when attempting to prove persecution on the grounds of membership in a particular social group, since they often cannot define a particular social group. Because FGM frequently takes place at a young age,¹¹⁵ victims are often too young to have any awareness of the procedure itself. Even if they are aware of FGM in their society, they often are too young to oppose it or to form a group of women opposed to the practice of FGM. Since Kane suffered FGM when she was only one-week old, it is impossible for her to have been considered, at the time the persecution occurred, part of any particular social group, such as “westernized women” because of her young age.¹¹⁶ Many applicants claiming past persecution based on completed FGM rely on tribal affiliations to further define the particular social group they belong to so that they can succeed on their asylum claims.¹¹⁷ Although gender persecution is often imposed upon women in cultures that are known to oppress women, and FGM has been recognized as a form of gender persecution,¹¹⁸ very few courts have explicitly determined that women living in oppressive cultures constitute membership within a particular social group.¹¹⁹

B. Continuing Persecution Theory

1. *Mohammed v. Gonzales: The Ninth Circuit*

In *Mohammed v. Gonzales*, the Ninth Circuit recognized that a claim of past persecution through FGM could provide a valid basis for asylum.¹²⁰ Mohammed, a Somali victim of FGM and a member of the Benadiri clan, filed an asylum claim based on past persecution.¹²¹ The court found that Mohammed could qualify for asylum because of past persecution based on one of the statutorily protected

113. *Id.* at 520 (quoting *Lukwago v. Ashcroft*, 329 F. 3d 157, 172 (3d Cir. 2003)).

114. *Id.* at 520.

115. Amnesty International Fact Sheet, *supra* note 22.

116. *Kane v. Gonzales*, 123 F. App'x 518, 519 (3d Cir. 2005) (the Immigration Judge found that Kane had “a well-founded fear of future persecution based on her status as a ‘westernized woman.’” Kane divorced her husband and moved to Saudi Arabia where she studied language, education and computer programming and eventually found a job. She was shunned by her family because of her education and willingness to speak out against the rules that govern Muslim women in Mali).

117. *See In re Fauziya Kasinga*, 21 I. & N. Dec. 357, 358 (B.I.A. 1996).

118. U.N. High Comm'r for Refugees, *Guidelines on International Protection No. 2: “Membership within a Particular Social Group” Within the Context of Article 1A(2) of the Convention and/or its 1967 Protocol Relating to the Status of Refugees*, para. 12 HCR/GIP/02/02 (May 7, 2002); *see also Mohammed v. Gonzales*, 400 F.3d 785, 795 (9th Cir. 2005).

119. *But see Kasinga*, 21 I & N. Dec. at 357; *Mohammed*, 400 F.3d at 797.

120. *Mohammed*, 400 F.3d at 798.

121. *Id.* at 789.

grounds, membership in a particular social group, since she is a member of the particular social group of young girls forced to suffer mutilation in the Benadiri clan.¹²² The court also found that “because the practice of female genital mutilation in Somalia is not clan specific, but rather is deeply imbedded in the culture throughout the nation and performed on approximately [ninety-eight] percent of all females, the [BIA] could define the social group as that of Somalian females.”¹²³

Judge Reinhardt, writing for a unanimous court, broadened the definition of a membership in a particular social group as set forth in *In re Fauziya Kasinga* from a tribal clan that opposes FGM¹²⁴ to females living within a culture that practices FGM,¹²⁵ noting that “opposition is not required in order to meet the ‘on account of’ prong in female genital mutilation cases . . . the shared characteristic that motivates the persecution is not the opposition, but the fact that the victims are female in a culture that mutilates the genitalia of its females.”¹²⁶ He even goes so far to state that females alone can be considered to be a social group in evaluating asylum claims based on past FGM, noting that although the Ninth Circuit has “not previously expressly recognized females as a social group, the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application of our law.”¹²⁷ Judge Reinhardt relies on the BIA’s own Gender Guidelines and the U.N. High Commissioner of Refugees Guidelines on International Protection: Membership of a Particular Social Group in support of the rationale that gender alone can form the basis of a particular social group.¹²⁸

Judge Reinhardt rejected the singular harm theory and held that “female genital mutilation is similar to forced sterilization and, like that other persecutory technique, must be considered a continuing harm that renders a petitioner eligible for asylum, without more.”¹²⁹ In doing so, the Ninth Circuit became the first court to apply the continuing persecution theory as developed in the forced sterilization context to the FGM context. Judge Reinhardt relied on case precedent set forth in *Qu v. Gonzales*¹³⁰ where the Ninth Circuit held that forced sterilization, although

122. *Id.* at 797.

123. *Id.*

124. *Id.* at 796-97 (citing *Kasinga*, 21 I. & N. Dec. at 357).

125. *Mohammed*, 400 F.3d at 797 n.16.

126. *Id.*

127. *Id.* at 797.

128. *Mohammed*, 400 F.3d at 797-98 (“[T]he [BIA’s] own ‘Gender Guidelines’ . . . state that gender is an immutable trait that can qualify under the rubric of ‘particular social group.’”) (quoting INS Office of Int’l Affairs, *Gender Guidelines, Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (May 26, 1995)); U.N. High Comm’r for Refugees, Guidelines on International Protection No. 2, “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, para 15 HCR/GIP/02/02 (May 7, 2002) (“women may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic.”).

129. *Mohammed*, 400 F.3d at 799.

130. *Id.* at 799 (citing *Qu v. Gonzales*, 399 F.3d at 1202).

generally performed once, nevertheless produces long-term psychological and physical effects that constitute future persecution.¹³¹ It stated that “forced sterilization should not be viewed as a discrete, onetime act Coerced sterilization is better viewed as a permanent and continuing act of persecution.”¹³² The court further explained that “applicants who have suffered forced . . . sterilization necessarily have an inherent well-founded fear of future persecution because such persons will be persecuted for the remainder of their lives.”¹³³ In comparing FGM to forced sterilization, *Mohammed v. Gonzales* proclaimed that “[l]ike forced sterilization, genital mutilation permanently disfigures a woman, causes long term health problems, and deprives her of a normal and fulfilling sexual life.”¹³⁴ Judge Reinhardt concluded that “our precedent compels the conclusion that genital mutilation, like forced sterilization is a ‘permanent and continuing’ act of persecution which cannot constitute a change in circumstances sufficient to rebut the presumption of a well-founded fear.”¹³⁵

2. *Bah v. Mukasey*: The Second Circuit - Alternative View of Continuing Persecution Theory

Judge Straub, in his concurring opinion in *Bah v. Mukasey*, advanced his own interpretation of the application of the “continuing persecution” within the FGM context.¹³⁶ In *Bah v. Mukasey*, the Second Circuit examined the withholding of removal claims for three different cases involving victims of past FGM from Guinea.¹³⁷ While the court did not review the asylum claims since they were time-barred, the majority reviewed the withholding of removal claims which have a substantially similar regulatory framework and requirements as asylum claims.¹³⁸ Withholding of removal is a form of relief similar to asylum that is usually applied for simultaneously with asylum.¹³⁹ Though similar, there are clear distinctions between withholding and asylum; “[u]nlike asylum, withholding does not lead to legal permanent residence in the U.S.”¹⁴⁰ Instead, it simply prevents applicants from being removed to another country, usually their previous country of residence. An alien may not be removed to a country if “the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”¹⁴¹ In addition, applicants for withholding of removal that have suffered past persecution

131. *Qu v. Gonzales*, 399 F.3d 1195, 1202 (9th Cir 2005).

132. *Id.* (citing *In re Y-T-L-*, 23 I. & N. Dec. 601, 607 (BIA 2003)).

133. *Id.*

134. 400 F.3d at 799.

135. *Id.* at 800.

136. *Bah v. Mukasey*, 529 F.3d 99, 116 (2d Cir. 2008) (Straub, J., concurring).

137. *Id.* at 101.

138. *Id.*

139. *See id.* at 104-07.

140. Immigration Equality, *Glossary of Immigration Terms*, <http://www.immigrationequality.org/template.php?pageid=26> (last visited Sept. 29, 2009).

141. 8 U.S.C. § 1231(b)(3)(a) (2006).

are granted a presumption similar to the presumption of well-founded fear of future persecution granted to applicants claiming asylum on the basis of past persecution.¹⁴²

If [an] applicant [for withholding of removal] is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim.¹⁴³

While the majority did not discuss the BIA's rejection of the "continuous persecution" theory as advanced by *In re Y-T-L* and applied to the FGM context by the Ninth Circuit in *Mohammed v. Gonzales*, the concurring opinion by Judge Straub addressed this issue, finding that the "BIA erred in failing to recognize female genital mutilation as a form of continuous persecution."¹⁴⁴ Judge Straub stated that FGM is similar to forced sterilization because persecutors aiming to suppress the particular characteristics of the protected group carry out both of those particular types of harms.¹⁴⁵ He noted that:

[I]n the genital mutilation context, as in the forced sterilization context, the form of persecution itself—and consequently the harm suffered by the victim—is directly related to the victim's protected group and the 'characteristic[s] [the] persecutor seeks to overcome,' i.e., in the forced sterilization context, the ability to have children, and in the genital mutilation context, the woman's 'sexual characteristics . . .'¹⁴⁶

He distinguishes forced sterilization and FGM from other permanent types of harm, such as loss of limb or organ, by noting that the harm suffered by victims of forced sterilization and FGM is "directly related to the protected ground on account of which the victim was persecuted."¹⁴⁷ Victims of past FGM continue to be harmed as a result of the past acts of persecution (i.e., FGM), but they also continue to be persecuted; the mutilation itself suppressed and continues to suppress their sexual characteristics, the basis upon which they were persecuted, for the rest of their lives.¹⁴⁸ Judge Straub further argued that in order to invoke the continuing persecution reasoning, "victims of past persecution would have to show that they continue to be *persecuted*—not merely *harmed*—as a result of the form of persecution. . . ."¹⁴⁹ Thus, those victims would be required to demonstrate that the particular characteristics that "their persecutors sought to 'overcome' continue to be suppressed or overcome into the future as a result of the method of past

142. *Id.*

143. *Bah v. Mukasey*, 529 F.3d 99, 111 (2d Cir. 2008) (quoting 8 C.F.R. C 1208.16(b)(1)(i) (2009)).

144. *Id.* at 117 (Straub, J., concurring).

145. *Id.* at 123.

146. *Id.* (quoting *Matter of Acosta*, 19 I. & N. Dec. 211, 213 (B.I.A. 1985); *In re Fauziya Kasinga*, 21 I. & N. Dec. 357, 367 (B.I.A. 1996)).

147. *Id.*

148. *Id.*

149. *Bah v. Mukasey*, 529 F.3d 99, 124 n.10 (2d Cir. 2008).

persecution.”¹⁵⁰ Judge Straub also noted that after its decision *In re Y-T-L-* and prior to its decision *In re A-T-*, the BIA granted asylum and withholding of removal to victims of female genital mutilation based on the continuous persecution theory.¹⁵¹

3. *Hassan v. Gonzales: The Eighth Circuit*

Like the Ninth Circuit, the Eighth Circuit rejected the singular harm theory in evaluating asylum claims for victims of past FGM.¹⁵² In *Hassan v. Gonzales*, the court rejected the government’s argument that, because Hassan had already suffered from FGM, she no longer had a well-founded fear of persecution.¹⁵³ The Eighth Circuit recognized that FGM is not the “only form of persecution in Somalia” and that Hassan may still be “at risk of other prevalent forms of persecution.”¹⁵⁴ The court noted further that they had “never held that a petitioner must fear the repetition of the exact harm that she has suffered in the past” in order to demonstrate the requisite well-founded fear of future persecution.¹⁵⁵ The Eighth Circuit’s view encompasses the broader perspective that victims of FGM typically come from cultures that oppress women and that they are often subjected to other forms of gender persecution and related harms.¹⁵⁶ This view focuses not on the actual harm itself, the act of FGM, but on persecution based on membership within a particular social group, women living in a culture known for its widespread oppression of women.¹⁵⁷

IV. CRITIQUE

A. *Singular Harm Theory*

One of the fundamental flaws of the singular harm theory is the assumption that FGM can only be imposed on the same woman once and subsequent to the initial act of mutilation, she no longer has a well-founded fear of future persecution and should be denied asylum.¹⁵⁸ There is substantial evidence indicating that FGM can be inflicted on the same woman multiple times, often as a form of punishment for extra-marital sex and other types of sexual behavior deemed offensive within

150. *Id.*

151. *Id.* at 120 (citing *Bosede Olawumi*, No. A70 651 (B.I.A. 2003)); *In re Mariama Dalanda Bah*, No. A97 166 (B.I.A. 2005), *In re Aisatou Sillah*, No. A72 784 (B.I.A. 2005).

152. *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 518-19.

157. *Id.*

158. *See Kane v. Gonzales*, 123 F. App’x. 518 (3rd Cir. 2005); *Olowo v. Ashcroft*, 368 F.3d 692 (7th Cir. 2004); *Oforji v. Ashcroft*, 354 F.3d 609 (7th Cir. 2003); *Seifu v. Ashcroft*, 80 F. App’x. 323 (5th Cir. 2003).

certain societies.¹⁵⁹ Moreover, females living in a culture that practices FGM are often subject to other forms of persecution based on the same ground; that is, their membership within a particular social group.¹⁶⁰

Other courts have recognized that FGM is not a one-time act that cannot be repeated in the future, since mutilated woman can be subjected to more severe forms of FGM, such as infibulations, if returned to their home countries.¹⁶¹ The Ninth, Seventh and Second Circuits have each granted asylum to victims of past FGM victims on such grounds.¹⁶² In *Mohammed v. Gonzales*, the Ninth Circuit found that although she had already been mutilated, Mohammed had a well-founded fear of future persecution because she was “at risk for further genital mutilation, specifically infibulation, because she has engaged in extramarital sex.”¹⁶³ In *Tunis v. Gonzales*, even the Seventh Circuit, a proponent of the singular harm theory, determined that the applicant had demonstrated fear that she would be forced to undergo FGM again upon return to Sierra Leone.¹⁶⁴ Additionally, in *Bah v. Mukasey*, the Second Circuit recognized that “genital mutilation, such as infibulation, is often repeated in Guinea.”¹⁶⁵

Because the singular harm theory views past FGM as a discrete, non-repeatable event, its proponents argue that such past FGM constitutes the very “fundamental change in circumstances” needed to rebut the presumption of a well-founded fear of future persecution, thus warranting a denial of asylum.¹⁶⁶ However, the BIA itself and other circuits have concluded that considering a past

159. See WHO Fact Sheet *supra* note 18.

160. See *Mohammed*, 400 F.3d at 800 (“The State Department Reports in the record make clear that the subordination and persecution of women in Somalia is not limited to genital mutilation. Rather, ‘[w]omen are subordinated systematically in the country’s overwhelmingly patriarchal culture,’ and ‘[r]ape is commonly practiced in inter-clan conflicts.’”) (quoting U.S. Department of State Country Report on Human Rights Practices- Somalia 2005 available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61592.htm> (last visited Nov. 6, 2009); see also Hassan v Gonzales *infra* note 205 at 518 (“The government’s argument erroneously assumes that FGM is the only form of persecution in Somalia and that having undergone the procedure, [the applicant], as a Somali woman, is no longer at risk of other prevalent forms of persecution.”); see also U.S. Department of State Country Report on Human Rights Practices- Sudan 2007 available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78759.htm> (highlighting violence and discrimination against women, including the practice of female genital mutilation (FGM) as human rights abuses prevalent throughout Sudan).

161. *Bah v. Mukasey*, 529 F.3d 99, 114 (2d Cir. 2008); *Tunis v. Gonzales*, 447 F.3d 547, 551 (7th Cir. 2006); *Mohammed v. Gonzales*, 400 F.3d 785, 800 (9th Cir. 2005).

162. *Bah*, 529 F.3d at 117; *Tunis*, 447 F.3d at 551; *Mohammed*, 400 F.3d at 800.

163. *Mohammed*, 400 F.3d at 801.

164. *Tunis*, 447 F.3d at 551.

165. *Bah*, 529 F.3d at 114 (“[f]emale genital mutilation is not necessarily a one time [sic] event . . . record evidence reveals that genital mutilation, such as infibulation, is often repeated in Guinea.”); see also *Bah v. Gonzales*, 462 F.3d 637, 644 n.3 (6th Cir. 2006) (Gibbons, J., concurring) (“In several cases asylum applicants have successfully produced evidence indicating a risk of further mutilation.”).

166. See *Kane v. Gonzales*, 123 F. App’x. 518, 521 (3d Cir. 2005); *Seifu v. Ashcroft*, 80 F. App’x. 323 (5th Cir. 2003).

act of persecution as a “fundamental change in circumstances” would be inconsistent with the statutory and regulatory framework of asylum law.¹⁶⁷ In *In Re Y-T-L-*, the BIA directly addressed the issue of whether a one-time act of forced sterilization constitutes the fundamental change in circumstances needed to rebut the presumption of future fear of persecution.¹⁶⁸ The BIA examined the language and legislative history of amendments to 8 C.F.R. § 208.13 (b)(1)(i)(A) to determine what exactly constitutes a “fundamental change in circumstances.”¹⁶⁹

Prior to the 2001 amendment to 8 C.F.R. § 208.13(b)(1)(A), the presumption of a well-founded fear of persecution could be only be rebutted by “changed circumstances within the applicant’s country of nationality such that he no longer has a well-founded fear of persecution.”¹⁷⁰ In amending the statute to require a showing of “fundamental change in circumstances,” the supplementary information indicated:

By adopting that language rather than that requiring a showing of changed country conditions to overcome the presumption, other changes in the circumstances surrounding the asylum claim, included a fundamental change in personal circumstances, may be considered, so long as those changes are fundamental in nature and go to the basis of the fear of persecution.¹⁷¹

The Immigration Judge had previously denied Y-T-L- asylum, finding that the actual non-repeatable act was a fundamental change in circumstances, particularly a fundamental change in personal circumstances, necessary to rebut the presumption of well-founded fear of future persecution.¹⁷² The BIA rejected the Immigration Judge’s holding, stating the judge’s rationale “could lead to the anomalous result that the act of persecution itself would also constitute the change in circumstances that would result in the denial of asylum to persons such as respondent.”¹⁷³

Because the act of sterilization is not considered a fundamental change in circumstances, the Second and Ninth Circuits argue that the act of FGM should

167. *See* *Bah v. Mukasey*, 529 F.3d 99, 111 (2d Cir. 2008) (“[U]nder the governing regulations the fact that an applicant has undergone female genital mutilation in the past cannot, in and of itself, be used to rebut the presumption that her life or freedom will be threatened in the future”); *Mohammed*, 400 F.3d at 800 (“[G]enital mutilation, like forced sterilization, is a “permanent and continuing” act of persecution, which cannot constitute a change in circumstances sufficient to rebut the presumption of a well-founded fear.”); *In Re Y-T-L-*, 23 I. & N. Dec. 601, 606 (B.I.A. 2003) (“Were it the intention of the Attorney General to compel a different paradigm for deciding such cases, based on the theory that past sterilization constituted ‘fundamental change in circumstances’ that could preclude granting of asylum, we expect that the regulation, or the supplementary information accompanying it, would have so stated.”).

168. *In re Y-T-L-*, 23 I. & N. Dec. at 614-15 (Filppu, J., dissenting) (regulatory presumption rebuttable once the overall conditions in the applicant’s country changed).

169. *Id.* at 605.

170. 8 C.F.R. § 208.13 (b)(1)(i) (1997).

171. Asylum Procedures, 65 Fed. Reg. at 76,121-01, 76,127-01 (Dec. 6, 2000).

172. *In re Y-T-L-*, 23 I. & N. Dec. at 603.

173. *Id.* at 605.

also not be considered the fundamental change in circumstances.¹⁷⁴ Apart from the FGM context, no other type of asylum case has denied asylum to applicants on the basis that their past acts of persecution constituted the very fundamental change in circumstances necessary to rebut the presumption of a well-founded fear of future persecution.¹⁷⁵ Judge Reinhardt, in *Mohammed v. Gonzales*, noted that the government “urges the same anomalous result in this case [as it did in *re Y-T-L-*], that Mohammed’s experience of genital mutilation should constitute the change in circumstances that would result in the denial of her asylum claim.”¹⁷⁶ Judge Straub, in his concurring opinion in *Bah v. Mukasey*, supported the BIA’s reasoning in *In re Y-T-L-*, stating that, “It stands to reason that the change contemplated by the regulations must have occurred since the past persecution occurred; otherwise, the ‘fundamental change in circumstances’ portion of the regulations would be superfluous.”¹⁷⁷

B. Continuous Persecution theory as applied within the Female Genital Mutilation Context

In *In re A-T-*, the BIA justified its refusal to apply the continuous persecution theory it developed in *In re Y-T-L-*, a forced sterilization case,¹⁷⁸ to the FGM context.¹⁷⁹ The appeals board stated that Congress, in amending 8 U.S.C. § 1101(a)(42), explicitly intended the statute to require victims of forced sterilization to qualify for relief, whereas it had remained silent regarding the issue of female genital mutilation.¹⁸⁰ The BIA advocated the continuing persecution theory within the forced sterilization context in *In re Y-T-L-* because,

[I]t would have contradicted Congress’s purpose to find that the very act that constituted persecution under the coerced population control provisions was itself a fundamental change in circumstances that obviated a future of well-founded fear. The statute defined victims of forced sterilization . . . as qualifying for relief. Thus, it would have been anomalous to rule that the sterilization also formed a basis for denying relief.¹⁸¹

174. *Bah v. Mukasey*, 529 F.3d 99, 119 (2d Cir.2008); *Mohammed v. Gonzales*, 400 F.3d 785, 799 n.21 (9th Cir. 2005).

175. *Bah*, 529 F.3d at 115 (court asked the parties to “provide examples of any case outside this genital mutilation context where the BIA held that the presumption of fear of future persecution or threats to life or freedom had been rebutted simply by virtue of the fact that the exact same act of persecution – such as removal of a limb or organ – physically could not be repeated.” The parties could not offer a single example.).

176. *Mohammed*, 400 F.3d at 799 n.21.

177. *Bah*, 529 F.3d at 119 n.2.

178. *In re Y-T-L-*, 23 I. & N. Dec. 601, 607 (B.I.A. 2003) (granting asylum to the husband of a woman forced to undergo sterilization because of the “special nature” of the harm and the permanent, continuing effects of denying the couple children).

179. *In re A-T-*, 24 I. & N. Dec. 296, 299 (B.I.A. 2007).

180. *Id.* at 300.

181. *Id.*

However, the legislative history of the amendment to 8 U.S.C. § 1101(a)(42) demonstrates that its sole purpose was not to automatically grant victims of forced sterilization immediate asylum, but to determine whether forced sterilization can be considered a form of persecution on account of one of the five grounds protected under the INA.¹⁸² Both the Ninth Circuit and Second Circuits noted that the BIA's interpretation of the congressional intent for amending the statute may have been incorrect.¹⁸³

The BIA also argued that the continuing persecution theory should not be applied within the FGM context because of the nature of the harm.¹⁸⁴ It stated "the act of forced sterilization should not be viewed as a discrete onetime act, comparable to a term in prison or an incident of severe beating or even torture." The BIA went on to state, "[c]oerced sterilization is better viewed as a permanent and continuing act of persecution that has deprived a couple of the natural fruits of conjugal life. . . ."¹⁸⁵

In subsequent decisions, the BIA and other Immigration Judges have distinguished forced sterilization from FGM, arguing that FGM is more akin to the loss of a limb and does not cause the same type of special and continuing harm as forced sterilization.¹⁸⁶ Yet prior to its holding in *In re A-T-*, the BIA itself applied the continuing persecution theory to the FGM context and granted withholding of removal and asylum to victims of FGM in several unpublished decisions.¹⁸⁷ The day after the BIA issued its opinion in *In re Y-T-L-* and developed the continuing persecution theory within the forced sterilization context, it applied the theory to the FGM context in *In re Bosede Olawumi*.¹⁸⁸ It noted that "[f]orced female genital mutilation is better viewed as a permanent and continuing act of persecution that

182. See, e.g., H.R. REP. NO. 104-469, at 173-74 (1996) ("The primary intent of [the amendment] is to overturn several decisions of the [BIA] principally *Matter of Chang* and *Matter of G-*. . . Nothing in [the amendment] is intended to lower the evidentiary burden of proof for any alien, no matter how serious the nature of the claim.").

183. See *Bah v. Mukasey*, 529 F.3d 99, 121 (2d Cir. 2008) (Straub, J., concurring) ("Congress, in effect, did for forced sterilization claims what the BIA did in *In re Fauziya Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996), for genital mutilation claims: it provided for basic qualification for asylum and withholding of removal by defining forced sterilization as persecution on account of one of the protected grounds, without altering the regulatory framework for assessing such claims."); see also *Mohammed v. Gonzales*, 400 F.3d 785, 800 n.2 (9th Cir. 2005) ("[T]he statute, which was enacted in order to overcome BIA rulings to the effect that forced abortions and sterilizations did not constitute persecution on account of one of the five reasons enumerated in the INA . . . does not in its text provide for automatic asylum upon a showing of past sterilization.").

184. *In re A-T*, 24 I. & N. Dec. 296 (B.I.A. 2007).

185. *In Re Y-T-L-*, 23 I. & N. Dec. 601, 607 (B.I.A. 2003).

186. *Bah*, 529 F.3d at 120.

187. *In re A-T-*, 24 I. & N. Dec. at 296; see also *Qu v. Gonzales*, 399 F.3d 1195, 1203 (9th Cir. 2005) ("Involuntary sterilization irrevocably strips persons of one of the most important liberties we possess as humans: our reproductive freedom."); *Seifu v. Ashcroft*, 80 F. App'x. 323 (5th Cir. 2003); *In re Y-T-L-*, 23 I. & N. Dec. 601, 608 (B.I.A. 2003) (Filppu, J., dissenting).

188. See *Bah v. Mukasey*, 529 F.3d at 120 (citing *In re Bosede Olawumi*, No. A70 651 (B.I.A. May 23, 2003)).

has permanently removed from a woman a physical part of her body.”¹⁸⁹ In *In re Mariama Dalanda Bah*, the BIA concluded that “The persecution resulting from the FGM is therefore continuous and permanent. [W]e find that the presumption of future harm has not been adequately rebutted simply because the procedure may not be repeated.”¹⁹⁰ The BIA also granted asylum to Aisatou Sillah, stating that “The [IJ] noted that there was no indication that the effects of her persecution would dissipate and may be taken as permanent . . . We find that the [IJ]’s observations are fully consistent with our decision in *Matter of Y-T-L-*.”¹⁹¹

While the Ninth Circuit chose to apply the continuing persecution theory within the FGM context, in *Mohammed v. Gonzales*, it based its comparison of FGM to forced sterilization on the continuing physical and psychological effects upon the victims.¹⁹² However, this argument could have been strengthened further had the court recognized that FGM imposes similar reproductive limits upon women as forced sterilization.

Like victims of forced sterilization and even forced abortion, victims of FGM suffer severe harm upon their reproductive systems, such as infections of the vagina and cervix, which can later lead to infertility and complications during childbirth.¹⁹³ A World Health Organization (“WHO”) report on FGM and its impact upon obstetrics in six African countries concluded that victims of FGM had a higher probability of sustaining obstetric complications such as postpartum hemorrhage, episiotomy, extended maternal hospital stay, resuscitation of infant, obstructed labor, fresh stillbirth, and inpatient perinatal death.¹⁹⁴ The study also noted that those women with more extensive mutilation, such as infibulation and excision, have an even greater likelihood of sustaining adverse outcomes.¹⁹⁵ The

189. *See id.* (quoting *In re Bosede Olawumi*, No. A70 651 629 (B.I.A. May 23, 2003) (per curiam) (“Forced female genital mutilation is better viewed as a permanent and continuing act of persecution that has permanently removed from a woman a physical part of her body, deprived her of the chance for sexual enjoyment as a result of such removal, and has forced her to [sic] potential medical problems relating to this removal.”).

190. *See id.* (quoting *In re Mariama Dalanda Bah*, No. A97 at 217) (per curiam) (“The persecution resulting from FGM is therefore continuing and permanent. Considering the continuing effects of such persecution, we find that the presumption of future harm has not been adequately rebutted simply because the procedure may not be repeated on the [applicant].”).

191. *See Bah v. Mukasey*, 529 F.3d at 120 (quoting *In re Aisatou Sillah*, No. A72 784 955 (B.I.A. Nov. 7, 2005) (per curiam) (“[T]he [IJ] observed in his decisions that the [applicant], who had been subjected to FGM, had suffered past persecution on account of a protected ground. The [IJ] noted that there was no indication that the effects of her persecution would dissipate and may be taken as permanent . . . We find that the [IJ]’s observations are fully consistent with our decision in *Matter of Y-T-L-*.”) (citations omitted) (granting asylum and withholding of removal to victim of past FGM based on the continuous persecution theory).

192. *Mohammed v. Gonzales*, 400 F.3d 785, 800 (9th Cir. 2005).

193. *See* WHO Fact Sheet, *supra* note 18.

194. World Health Organization, *Female Genital Mutilation and Obstetric Outcome: WHO Collaborative Prospective Study in Six African Countries* 6, <http://www.who.int/reproductivehealth/publications/fgm/fgm-obstetric-study-en.pdf>. (last visited Nov. 19, 2009).

195. *Id.* at 3.

WHO discerned these risks even though the study examined only those women who were in a health clinic or hospital upon giving birth.¹⁹⁶ Because the majority of women in these African countries do not have access to adequate healthcare, the researchers suggest that there is an even higher prevalence of adverse obstetric outcomes within the countries.¹⁹⁷

Additionally, the WHO reports that the death rates for babies during or shortly after childbirth for women who have undergone FGM compared to non-mutilated women is fifteen percent higher for those whose mothers had Type I (clitoridectomy), thirty-two percent higher for those with Type II (excision) and fifty-five percent higher for those with Type III (infibulations).¹⁹⁸ Researchers estimate that about one to two babies per one hundred deliveries die as a result of their mother's FGM.¹⁹⁹ Amnesty International, as well as various medical researchers, recognizes a strong link between sterility, types of infertility, and FGM.²⁰⁰ Thus, FGM goes beyond severely limiting sexual and bodily autonomy and deprives the woman of the "natural fruits of conjugal life."²⁰¹ FGM, like forced sterilization, should qualify as a "special type of harm" that warrants the application of the continuing persecution theory since it deprives women of their fundamental human interest in procreating and giving birth to healthy babies.

The Eighth Circuit argument, as developed in *Hassan v. Gonzales*, is perhaps the best theory under which asylum claims for victims of past mutilation should be examined because it is well-grounded in the language of the asylum statute.²⁰² Instead of focusing on the actual harm of FGM, and determining whether it is a form of continuing persecution, the Eighth Circuit makes more of a statute-based argument.²⁰³ Judge Smith, writing for the majority in *Hassan*, highlighted a flaw in the singular harm theory. He noted that the Eighth Circuit has never held that the government can rebut the presumption of well-founded fear simply by demonstrating that the applicant no longer fears the exact harm she previously suffered.²⁰⁴ Instead, the court recognized that a well-founded fear of persecution exists if the applicant shows that she may be subjected to other forms of

196. *Id.* at 1.

197. *Id.*

198. WHO Fact Sheet, *supra* note 18.

199. *Id.*

200. Amnesty International Fact Sheet, *supra* note 22, at 1; Layla M. Shaaban & Sarah Harbison, *Reaching the Tipping Point Against Female Genital Mutilation*, 366 THE LANCET 347, 348 (2005).

201. *In re Y-T-L-*, 23 I. & N. Dec. 601, 607 (BIA 2003) (finding that coerced sterilization is a "continuing act of persecution that has deprived a couple of the natural fruits of conjugal life.").

202. *Hassan v. Gonzales*, 484 F.3d 513, 516-19 (8th Cir. 2007); *see also* 8 C.F.R. § 1208.13(b)(1)(iii) (2009).

203. *Hassan*, 484 F.3d at 516-19.

204. *Id.* at 518 ("We have never held that a petitioner must fear the repetition of the exact harm that she has suffered in the past. Our definition of persecution is not that narrow.").

persecution based on the same grounds as her previous persecution.²⁰⁵ The court further recognized that women living in a culture that practices FGM are often subject to other forms of persecution based on their membership within that particular social group.²⁰⁶

Other Circuit Courts' interpretations of the statutory framework for asylum align with the Eighth Circuit's interpretation. In *Mohammed v. Gonzales*, the Ninth Circuit suggested that even if FGM is considered distinct from forced sterilization and constitutes a one-time act of harm, Mohammed could still qualify for asylum based on past persecution because she might be subject to other forms of gender persecution prevalent within Somali culture upon her return.²⁰⁷ Thus, the government would not be able to rebut the presumption of Mohammed's well-founded fear of future persecution.²⁰⁸ Similarly, Judge Reinhardt previously recognized, in *Qu v. Gonzales*,²⁰⁹ that victims of past persecution can have a well-founded fear of other forms of persecution based on the same grounds as the past persecution. While he noted that forced abortion constitutes continuing persecution because of the permanent deprivation of a child, he posited that a stronger argument could be made that the applicant could still face other forms of persecution such as "more forced abortions, involuntary sterilization, and other coercive population control practices."²¹⁰ Although *Mohammed* and *Qu* were decided before *Hassan*, Judge Reinhardt's recognition of other forms of persecution on the same grounds as past persecution gives support to the Eighth Circuit's determination that FGM is indicia of other forms of gender persecution within a society.²¹¹

The Second Circuit also supports the notion that even if an act is considered a one-time harm, it cannot be used to rebut the presumption of well-founded fear of future persecution since the applicant may still be at risk for other acts of persecution based on the same grounds, membership within a particular social group.²¹² The Second Circuit agreed with the Eighth Circuit's reasoning that the singular harm theory is unsupported by the statutory framework, stating that,

205. *Id.* ("The government's argument erroneously assumes that FGM is the only form of persecution in Somalia and that having undergone the procedure, [the applicant], as a Somali woman, is no longer at risk of other prevalent forms of persecution.").

206. *See id.*

207. *Mohammed v. Gonzales*, 400 F.3d 785, 799-800 (9th Cir. 2005); *see also In re Fauziya Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996) (holding FGM constitutes "persecution" under the relevant asylum statutes).

208. *See Mohammed*, 400 F.3d at 798.

209. *Qu v. Gonzales*, 399 F.3d 1195, 1202 (9th Cir. 2005) ("[A]pplicants who have suffered forced or involuntary sterilization necessarily have an inherent well-founded fear of future persecution because such persons will be persecuted for the remainder of their lives due to the sterilization to which they have been subjected.").

210. *Id.* at 1202-03 n.8.

211. *Hassan v. Gonzales*, 484 F.3d 513, 518(8th Cir. 2007).

212. *Bah v. Mukasey*, 529 F.3d 99, 114-15 (2d Cir. 2008).

“[N]othing in the regulation suggests that the future threats to life . . . must come in the same *form* or be the same *act* as the past persecution.”²¹³

In its Order for Reconsideration for *In re A-T-*, the BIA itself realized that victims of FGM may be subjected to other forms of persecution, such as forced marriage based on the grounds of membership within a particular social group.²¹⁴ The BIA conceded that the applicant demonstrated that FGM and forced marriage were both forms of persecution on the same grounds, and that “[FGM] is a single type of harm in a series of injuries inflicted on account of one’s membership in a particular social group.”²¹⁵ The BIA also admitted that because of her fear of forced marriage, the applicant, a victim of FGM, had a well-founded fear of future related harm.²¹⁶ However, the BIA still denied her application for withholding of removal.²¹⁷

Former Attorney General Mukasey supported the Eighth Circuit’s reasoning in a signed opinion dated September 22, 2008 that vacated the BIA’s holding in *In re A-T-* and remanded it back to the BIA.²¹⁸ He stated that the Board erred in focusing on whether the applicant had a fear of being subjected to identical harm; instead, Mukasey asserted, the Board should have focused on whether she had a fear of future persecution on the grounds of her membership within a particular social group.²¹⁹ He noted that asylum and withholding of removal regulations “provide that a person who has established past persecution on account of [five enumerated grounds] shall be presumed to have a well-founded fear of future persecution on account of those same grounds.”²²⁰ Additionally he stated that it was the government’s burden to demonstrate that the fundamental change in circumstances obviated the fear of future persecution²²¹

While not unreasonable, the Ninth Circuit’s continuing persecution rationale for evaluating asylum claims, unlike the Eighth Circuit’s related persecution view, falls outside of the asylum regulations and has been used mostly in the forced sterilization context.²²² The Eighth Circuit’s reasoning focuses on evaluating asylum claims based on existing statutory grounds for persecution, whereas the

213. *Id.* at 115 (emphasis in original).

214. *In re A-T-*, 24 I. & N. Dec. 296 (BIA 2007), *vacated*, 24 I. & N. Dec. 617 (A.G. 2008).

215. *In re A-T-*, 24 I. & N. Dec. 617, 621 (A.G. 2008) (quoting unpublished order).

216. *Id.* at 621 (citing an unpublished order)(discussing the findings of the Board that FGM is a single type of harm in a series of injuries).

217. *Id.*

218. *Id.* at 617.

219. *Id.* at 621-22.

220. *Id.* at 622 (citing Asylum Procedures, 65 Fed. Reg. 76,121 (Dec. 6, 2000); *see generally* 8 U.S.C. § 1101(a)(42) (2006) (defining “refugee” in terms of a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .”).

221. *In re A-T-*, 24 I. & N. Dec. 617, 622-23 (A.G. 2008).

222. *See In re A-T-*, 24 I. & N. Dec. 296 (BIA 2007) (“[We] consider Matter of Y-T-L- to represent a unique departure from the ordinarily applicable principles regarding asylum and withholding of removal.”); *Mohammed v. Gonzales*, 400 F.3d 785, 799-800 n.22 (9th Cir. 2005).

continuing persecution theory automatically grants asylum based solely on the type of harm suffered, arguing that certain harms (forced sterilization/abortion and, in some cases, FGM) are “ongoing” and therefore continue to persecute applicants into the future.²²³ In those particular cases, the presumption of well-founded fear of future persecution cannot be rebutted simply because of the special nature of the harm.²²⁴

The BIA developed the continuous persecution theory within the forced sterilization/abortion context in order to reconcile its interpretations of two statutory amendments: (1) that Congress intended to grant asylum automatically to victims of forced sterilization,²²⁵ and (2) the infliction of a one-time unrepeatable harm, such as forced sterilization, is the very fundamental change in circumstance that rebuts the presumption of fear of future persecution.²²⁶ In order to satisfy congressional intent and grant asylum to victims of forced sterilization, the BIA circumvented the government’s argument that the act of forced sterilization negates any future fear of persecution and held that forced sterilization should be considered an ongoing harm that continues to harm the applicant in the future.²²⁷

However, Congress never intended to grant asylum automatically to victims of forced sterilization. In amending 8 U.S.C. § 1101 (a)(42), Congress simply allowed forced sterilization to fall into the category of persecution based on “political opinion,” so that victims of forced sterilization could base their asylum claims on one of the enumerated categories.²²⁸ In amending 8 C.F.R. § 208.13 (b)(1)(i)(A), Congress only intended to expand the type of evidence that can be submitted to rebut the presumption of fear of future persecution.²²⁹ As a result of the amendment, personal circumstances, as well as changed conditions within a country, could be considered to determine the presence of a “fundamental change in circumstances.”²³⁰ Outside the FGM context, the BIA and federal courts do not require that the applicant demonstrate a fear of suffering the exact past harm in the

223. See *In re Y-T-L-*, 23 I. & N. Dec. 601, 614 (BIA 2003) (Filppu, J., dissenting); *Qu v. Gonzales*, 399 F.3d 1195, 1202 (9th Cir. 2005); *Mohammed*, 400 F.3d at 799.

224. *In re Y-T-L-*, 23 I. & N. Dec. at 614; *Qu*, 399 F.3d at 1202; *Mohammed*, 400 F.3d at 799.

225. 8 U.S.C. § 1101(a)(42) (2006); see also *In re Y-T-L-*, 23 I. & N. Dec. at 607 (past victims of coercive family planning methods eligible for asylum); *In re A-T-*, 24 I. & N. Dec. 296, 300 (BIA 2007) (“[I]nvoluntary sterilization and abortion . . . constituted continuing persecution because persons who suffered such harm have been singled out by Congress as having a basis for asylum . . .”).

226. See 8 C.F.R. § 1208.13(b)(1)(i)(A) (2009).

227. *In re Y-T-L-*, 23 I. & N. Dec. at 607.

228. See *Illegal Immigration Reform and Immigration Responsibility Act of 1996*, Pub. L. No. 104-208, § 601, 110 Stat. 546, 689.

229. *Asylum Procedures*, 65 Fed. Reg. 76, 127 (Dec. 6, 2000) (“[C]ircumstances surrounding the asylum claim, including a fundamental change in personal circumstances, may be considered, so long as those changes are fundamental in nature and go to the basis of the fear of persecution.”).

230. *Id.*

future to qualify for asylum.²³¹ Nor have any courts held that a one-time unrepeatabe act constitutes the very fundamental change in circumstances necessary to rebut the fear of future persecution.²³²

Applicants who have suffered other types of ongoing harm such as severe torture or loss of limb would be inclined to invoke the continuing persecution theory as support for their asylum claims, thus potentially opening the floodgates to asylum claims outside the forced sterilization/abortion and FGM context.²³³ If courts adopt a more narrow view of the continuing persecution theory, such as the one advanced by Judge Straub, then the danger of this influx of other asylum claims would be averted.²³⁴ Judge Straub framed continuing persecution in terms of persecution aimed at suppressing the basic characteristics of members of the protected group.²³⁵ Alternatively, if courts were to apply the continuing persecution theory to only those asylum cases where the past persecution affects a fundamental human right, such as the right to procreate, as forced sterilization/abortion and FGM do, then this would narrow the number of asylum claims that could qualify under this theory.²³⁶ Although the continuing persecution theory can be narrowed to apply to only certain asylum claims, the theory itself still presents other concerns.

In providing blanket grants of asylum based solely on the particular type of harm suffered, the continuing persecution theory would lead courts to effectively prioritize certain forms of persecution over others and not provide individualized, objective, and unbiased review of asylum applications.²³⁷ The continuing persecution theory indirectly bypasses the statutory framework by granting asylum based solely on the type of harm suffered without taking into consideration any “fundamental changes in circumstances” such as a change in country conditions or personal circumstances of the applicant.²³⁸ In evaluating asylum claims, courts have traditionally reviewed Country reports from the Department of State in determining the existence of a fundamental change in circumstances that would rebut the presumption of a fear of future persecution.²³⁹ However, when the

231. *See Bah v. Mukasey*, 529 F.3d 99, 115 (2d Cir. 2008); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007).

232. *See Bah*, 529 F.3d at 114-15; *Hassan*, 484 F.3d at 518.

233. *See In re Y-T-L-*, 23 I. & N. Dec. 601, 608-09 (BIA 2003) (Filppu, J., dissenting).

234. *See Bah*, 529 F.3d at 117 (Straub, J., concurring).

235. *Id.* at 118.

236. *See In re Y-T-L-*, 23 I. & N. Dec. at 613 (Filppu, J., dissenting) (“[T]he majority will need to explain why a deprivation of the ability to procreate is to be given special treatment in comparison to other permanent injuries that can arise from acts of persecution.”).

237. *See id.* at 614. (Filppu, J., dissenting) (“As serious as forced sterilization is, the majority offers no sound reason to give it special treatment among the range of atrocities having permanent and ongoing consequences that victims of persecution may be forced to endure their entire lives.”).

238. *Id.* at 612 (“Relief, however, should not be automatic, even for the actual victims of forced sterilizations. Traditional asylum considerations are appropriate.”).

239. *See Mohammed v. Gonzales*, 400 F.3d 785, 790, 798 (9th Cir. 2005); *Bah v. Mukasey*, 529 F.3d 99, 116 (2d Cir. 2008).

continuing persecution theory is applied, judges consider the past harm suffered to be a form of ongoing harm that automatically rebuts any argument raised by the government that the applicant no longer has a fear of future persecution.²⁴⁰

C. *Recommendation*

Courts should adopt the Eighth Circuit's related persecution view in evaluating asylum claims of victims of past FGM. The Eighth Circuit's view complies with the existing statutory framework, is more comprehensive than the continuing persecution theory, and grants asylum depending on the circumstances surrounding the applicant and not just the type of harm they suffered in the past.²⁴¹ Courts subscribing to the Eighth Circuit's theory adopt a strict statutory view of evaluating asylum claims and consider whether applicants will be subjected to future persecution based on the same grounds – nationality, race, and membership within a particular group, political opinion, and religion – as the past persecution.²⁴² Unlike the continuing persecution theory, the related persecution view does not make exceptions to particular types of harms, but rather applies existing asylum law equally to all asylum claims, no matter what type of harm the applicant suffered. It also does not categorize certain harms as ongoing harms that automatically override any argument demonstrating a fundamental change in circumstances.

The related persecution view allows for objective review of asylum claims on an equal, individualized basis and does not provide blanket asylum for particular asylum claims, such as those involving forced sterilization. The Eighth Circuit's view also recognizes that a one-time unrepeatable harm such as forced sterilization/abortion or FGM does not constitute the very fundamental change in circumstances required to rebut the presumption of fear of persecution.²⁴³ Instead, the Eighth Circuit recognizes that applicants need not have a future fear of the exact past harm they suffered, but rather a future fear of persecution based on the same grounds as the past persecution, in order to qualify for asylum.²⁴⁴

Unlike the continuing persecution theory that has been applied to FGM, the Eighth Circuit's view has gained wide acceptance.²⁴⁵ The Second and Ninth Circuits and the BIA itself have conceded this view, whereas the Ninth Circuit is the only Circuit Court to adopt the continuing persecution theory within the FGM context.²⁴⁶ The Eighth Circuit's related persecution view essentially evaluates past FGM claims as it does other asylum claims based on past persecution and interprets 8 C.F.R. § 1208.13 (b)(1)(a) to extend a rebuttable presumption of a well-

240. See *In Re Y-T-L-*, 23 I. & N. Dec. at 604; *Mohammed*, 400 F.3d at 801.

241. *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007).

242. 8 U.S.C. § 1101(a)(42) (2009).

243. *Hassan*, 484 F.3d at 518-19.

244. *Id.* at 518.

245. *Mohammed v. Gonzales*, 400 F.3d 785, 800 (9th Cir. 2005); *Bah v. Mukasey*, 529 F.3d 99, 112 (2d Cir. 2008).

246. *Mohammed*, 400 F.3d at 800; *Bah*, 529 F.3d at 112.

founded fear of future persecution based on the same grounds as the past persecution. This method of evaluating asylum claims of victims of past FGM should be uniformly adopted by the BIA and all Circuit Courts since it conforms to the existing statutory framework governing asylum law.