The Obama Administration’s Policy Change Grants Asylum to Battered Women: Female Genital Mutilation Opens the Door for All Victims of Domestic Violence

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ABSTRACT

Throughout his Presidential campaign in 2008 and at his inauguration on January 20, 2009, President Obama repeatedly promised the American people one absolute: change. Change would come in many forms, and on April 13, 2009, change came to immigration law and to victims of domestic violence. President Obama’s administration filed a supplemental appeal brief outlining its policies for victims of domestic violence seeking asylum in the U.S. This policy completely reversed the Bush administration’s position on the issue. Yet, how did this change come about? In the preceding decade before President Obama took office, the Board of Immigration Appeals and the Federal Circuit Courts had made changes too. However, changes by these judicial entities lacked the sweeping abruptness of the Executive and only affected a subset of domestic violence: female genital mutilation. These changes afforded greater asylum protection to victims of female genital mutilation and influenced and “opened the door” for President Obama’s change.

I. INTRODUCTION

In 1996, the Board of Immigration Appeals decided the landmark case of In Re Kasinga. The decision granted asylum to a young woman from Togo who feared that deportation to her country would mean she would undergo Female Genital Mutilation (FGM). However, the Board applied a narrow holding, specific to the applicant’s situation. In the upcoming decade, the Board of Immigration (BIA) and the Circuit

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Courts addressed numerous pleas for asylum from FGM victims. Throughout that time, the BIA and the Circuit Courts have expanded the groundwork laid in *Kasinga* to offer broader protection to women persecuted by FGM. Yet, progress in granting asylum to women subjected to domestic violence has been limited to victims of FGM. Similar asylum has been denied to women facing other forms of domestic violence. Policy debates have raged over the last three Presidential administrations over whether to extend asylum to victims of domestic violence universally.

Executive policy granting asylum to victims of domestic violence commenced with the Clinton administration, recognizing that victims of domestic violence could successfully apply for asylum in the U.S.\(^2\) Since that time, the Bush administration has steadfastly opposed granting asylum to victims of domestic violence.\(^3\) Opponents against granting asylum to victims of domestic violence have asserted three arguments against such a policy.\(^4\)

The first argument claimed that women of domestic violence cannot be “persecuted” as defined by immigration law because their condition arises from their culture or religion.\(^5\) Such cultural or religious oppression as the accepted societal norm could not constitute “persecution” as a requirement for granting asylum.\(^6\) Second, an applicant can only obtain asylum if she fits into a “particular social group” that has faced persecution. Opposition has been raised that women faced with domestic violence do


\(^6\) *Id.*
not fit within a protected social group that asylum affords protection to. Third, public policy concerns restricted expanding asylum status to victims of domestic violence. Specifically, public concerns arose that if the U.S. granted asylum to all women facing domestic violence, the immigration floodgates would open, and such a consequence should be avoided. However, with change in administrations, policies regarding asylum for all domestic violence victims have also changed.

Recently, the Obama administration filed a supplemental brief involving an asylum application of a domestic violence victim from Mexico. The brief outlined the Obama administration’s policy regarding domestic violence victims and reversed the Bush administration’s stance on the issue. One legal commentator stated that the Obama administration’s new policy “really opens the door to the protection of women who have suffered these kinds of violations.” Such change in policy came, in large part, because of the progress victims of FGM had obtained to gain asylum in the U.S.

Progress in granting asylum to victims of FGM have helped “open the doors” to granting asylum to all victims of domestic violence. The development of asylum law to protect victims of FGM has removed significant obstacles that prevented previous administrations from extending asylum protection to battered women. Recent cases involving FGM have provided legal precedence and have removed public policy concerns for allowing victims of domestic violence to successfully apply for asylum in the U.S. These judicial developments have detracted from the three main arguments

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proffered by opponents to extending asylum to victims of domestic violence. This, in turn, has provided the Obama administration opportunity and justification to revise immigration policy regarding victims of domestic violence. Offering asylum to these women reinforced America’s commitment to humanitarian aid and international human rights. Because recent cases have expanded statutory definitions required for asylum to include victims of FGM and extending asylum to FGM victims has disproved public policy concerns, granting asylum to victims of FGM has opened the doors for the Obama administration to grant asylum to all victims of domestic violence.

II. BACKGROUND TO FEMALE GENITAL MUTILATION

Female Genital Mutilation (FGM) encompasses “all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons.” The removal of external genitalia reduces the girl’s sexual desire and is used to enforce chastity and maintain virginity. FGM most often occurs when a girl is between the ages of four and fourteen. FGM is most commonly practiced within western, eastern, and northeastern regions in Africa, and some countries in Asia and the Middle East. In many of the cultures that practice FGM, a young woman cannot marry without the procedure. As a consequence, a girl’s family commonly performs FGM on her. The World Health Organization estimates that three million young girls are at risk for FGM each year. To present date, between 100 to

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12 Id.
13 Niang, 422 F.3d at 1191.
14 Id.
15 Id.
16 Id.
140 million women and girls have been subjected to FGM. Female Genital Mutilation entails long-term debilitating effects on women both physically and psychology, and the procedure itself involves substantial health concerns.

FGM “is often performed under unsanitary conditions with highly rudimentary instruments.” Instruments often include scissors, pieces of glass, or razor blades. Because cultures that practice FGM have little access to antiseptics or anesthetics, family members must hold a young girl down to prevent her from struggling. Sometimes, the girl is gagged to prevent her from screaming. The procedure can cause infections, difficulty urinating, disrupted menstruation, incontinence, sexual dysfunction, birth defects, and even death. Therefore, evidence existed “that many women who undergo female genital mutilation continue to suffer daily pain throughout their lives.” However, the adverse health effects of FGM extend beyond physical consequences. Young girls learning that they will undergo the procedure experience extreme fright and anxiety. Because a girl’s family often performs FGM upon her, young women subjected to FGM often experience a sense of betrayal. After undergoing FGM, sex can be frightening and extremely painful. The psychological

18 Id.
19 Id.
20 Bah v. Mukasey, 529 F.3d 99, 102 (2nd Cir. 2008), citing Abankwah v. INS, 185 F.3d 18, 23 (2nd Cir. 1999).
21 Id.
22 Id.
23 Id.
24 Id.
25 Id.
26 Id.
27 Id.
28 Id.
29 Id.
effects perpetuate throughout a woman’s life as permanent and painful reminders of her traumatic past.\textsuperscript{30}

III. LEGAL BACKGROUND

A. Immigration and Nationality Act of 1994\textsuperscript{31}

The Immigration and Nationality Act passed in 1994 recognized that particular social groups could be considered “refugees” warranting asylum protection by the United States.\textsuperscript{32} For an alien to establish asylum, she must prove that 1) she has been persecuted, 2) she reasonably fears future persecution, 3) she belonged to a particular social group, and 4) her fear of persecution is related to membership in that social group.\textsuperscript{33} Once those elements have been established, the government may deny asylum by rebutting this evidence in either two ways. First, the government must prove by a preponderance of the evidence that conditions in the applicant’s country have changed to such an extent that the applicant no longer has a well founded fear of being persecuted if he or she were to return.\textsuperscript{34} This rebuttal evidence must prove that the applicant’s homeland can protect her from the form of persecution that she fears.\textsuperscript{35} Second, the government may also prove by a preponderance of the evidence that “[t]he applicant could avoid future persecution by relocating to another part of the applicant’s country of nationality…and under the circumstances, it would be reasonable to expect the applicant to do so.”\textsuperscript{36}
B. FGM as a Form of “Persecution”

For an applicant to gain asylum, she must prove that she has been persecuted in the past.\(^\text{37}\) However, proof of past persecution alone is insufficient for granting asylum.\(^\text{38}\) To meet the standard of “persecution” as required for a grant of asylum, an applicant must prove both persecution in the past and potentially in the future.\(^\text{39}\) In the landmark case of *In Re Kasinga*, the BIA established that the act of FGM was undeniably a form of persecution.\(^\text{40}\) Applicant alleged and the BIA agreed that if she were to return to Togo, she likely would be forced to undergo FGM.\(^\text{41}\) Applicant claimed that her family was looking for her and would force her to undergo FGM.\(^\text{42}\) The BIA noted that Togo was 22,000 square miles.\(^\text{43}\) With such a small area, applicant’s family could likely find applicant and force FGM upon her.\(^\text{44}\) Therefore, the BIA concluded that applicant had a reasonable fear of future persecution.\(^\text{45}\) *In Re Kasinga* remains significant because for the first time, FGM was designated as an act of “persecution.”\(^\text{46}\)

*In Re Kasinga* also established that FGM constituted a cultural practice.\(^\text{47}\) Because FGM represented a cultural practice, *In Re Kasinga* held for the first time that a cultural practice could constitute an act of “persecution.”\(^\text{48}\) Specifically, when tribes

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\(^\text{37}\) Bah v. Mukaskey, 529 F.3d 99, 111 (2d Cir. 2008).
\(^\text{39}\) Id.
\(^\text{40}\) Kasinga, 21 I & N Dec. at 365.
\(^\text{41}\) Id. at 366.
\(^\text{42}\) Kasinga, 2 I. & N. Dec. at 367.
\(^\text{43}\) Id.
\(^\text{44}\) Id.
\(^\text{45}\) Id.
perform FGM on a young girl, they “believe that they are simply performing an important cultural rite that bonds the individual to society.”\textsuperscript{49} The government argued that Congress never intended “application of [asylum laws] to broad cultural practices of the type involved here.”\textsuperscript{50} However, the BIA found that a perpetrator’s “subjective punitive or malignant intent is not required for harm to constitute persecution.”\textsuperscript{51} However, the applicant in \textit{Kasinga} was distinct from other asylum applicants because she had not had FGM performed on her.\textsuperscript{52} The \textit{Kasinga} BIA left open the issue of whether women already subjected to FGM had reasonable fear of future persecution. Future decisions answered affirmatively. 

In \textit{Mohammed v. Gonzales}, the government argued that FGM was a one-time occurrence.\textsuperscript{53} The government asserted that women who have been subjected to FGM had no reasonable fear of future persecution because the procedure could not be repeated.\textsuperscript{54} The Ninth Circuit rejected this argument on two grounds. First, FGM could be compared to forced sterilization.\textsuperscript{55} The Ninth Circuit cited several holdings that forced sterilization “should not be viewed as a discrete, onetime act…sterilization is better viewed as a permanent and continuing act of persecution.”\textsuperscript{56} The Ninth Circuit found several similarities between forced sterilization and FGM.\textsuperscript{57} Both “disfigures a woman, causes long term health problems, and deprives her of a normal and fulfilling

\textsuperscript{49} Id.
\textsuperscript{50} Kasinga, 21 I. & N. at 371.
\textsuperscript{51} Kasinga, 21 I & N. at 365.
\textsuperscript{52} Id.
\textsuperscript{53} Mohammed v. Gonzales, 400 F.3d. 785, 796-97 (9th Cir. 2005).
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Citing Qu v. Gonzales, 399 F.3d 1195, 1202 (9th Cir. 2005); In Re Y-T-L, 23 I. & N. 601, 606 (B.I.A. 2003); Ge v. Ashcroft, 367 F.3d 1121, 1127 (9th Cir. 2004); He v. Ashcroft, 328 F.3d 593, 604 (9th Cir. 2003).
\textsuperscript{57} Mohammed, 400 F.3d at 799.
sexual life.”58 Furthermore, the Ninth Circuit noted that “we have consistently found “persecution” where, as here, the petitioner was physically harmed.”59 Therefore, the Ninth Circuit wrote, “our precedent compels the conclusion that genital mutilation, like forced sterilization is a permanent and continuing act of persecution.”60

Second, the Ninth Circuit pointed to the cultural prevalence of FGM in Somalia to find that the applicant had been “persecuted.”61 The Ninth Circuit relied in part on the BIA’s finding “that female genital mutilation is not simply an isolated act of violence but rather a form of gender persecution.”62 In defining gender persecution, the Ninth Circuit found to that FGM “is deeply imbedded in the culture throughout the nation and performed on approximately 98 percent of all females.”63 Because FGM is a cultural custom and the applicant had been subjected to FGM as result of that culture, the Ninth Circuit held that the applicant was entitled to a presumption of a reasonable fear of future persecution.64 Prior to the BIA’s holding in In Re Kasinga and other cases involving FGM, cultural practices could not constitute “persecution” as defined for purposes of establishing asylum.65 Mohammed reaffirmed In Re Kasinga that cultural conditions within a country could create “persecution” as defined under asylum laws. However, Mohammed went one step further than In Re Kasinga and proffered more justifications for expanding “persecution” to include cultural acts.

58 Id.
59 Mohammed, 400 F.3d at 796.
60 Mohammed, 400 F.3d at 800.
61 Mohammed, 400 F.3d at 797.
62 Id. at 800.
63 Id.
64 Mohammed, 400 F.3d at 802.
The government in *Mohammed* argued that FGM victims could not allege persecution because “it is widely-accepted and widely-practiced.” However, the Ninth Circuit disagreed, echoing similar reasoning used by the BIA in *In Re Kasinga*. Specifically, whether a practice is widespread or not is immaterial for purposes of determining asylum. The Ninth Circuit explained that the “persecution” definition “simply requires that the perpetrator cause the victim harm and does not require that perpetrator believe the victim has committed a crime or some wrong.” Viewing whether an act constitutes persecution from the perspective of the perpetrator forms the inappropriate inquiry. The proper interrogatory focuses on whether harm came to the alleged victim. Therefore, the Ninth Circuit expressly rejected the argument that a cultural practice and an act of “persecution” could not be one in the same. The Ninth Circuit’s holding opened the doors for other cultural practices, such as domestic violence, to be included as forms of “persecution.”

**C. Expansion of “Particular Social Group”**

Asylum applicants must prove that her “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.” For purposes of FGM, an applicant must prove that she belongs to “to a particular social group.” Traditionally, the definition of “particular social group” lacked clear standards. So, what social group do victims of FGM belong

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66 *Mohammed*, 400 F.3d at 796.
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.*
71 Niang, 422 F.3d at 1195.
72 *Kasinga*, 21 I & N at 365.
73 Thomas Alexander Alienikof et al., Immigration and Citizenship Process and Policy 897 (6th ed. 2008) (“During the past decade the number of attempts to give meaning to this phrase seems to have increased geometrically.”).
to? The Tenth Circuit defined “social group” as derived from shared characteristics, “whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to be change because it is fundamental to their individual identities or consciences.” The BIA in \textit{Kasinga} took a narrow approach in defining social group. The BIA characterized the applicant in \textit{Kasinga} as belonging to the group of “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who opposes the practice.” By limiting “social group” to only include women who had escaped FGM, lived in specific ethnic groups, and politically resisted FGM, the BIA restricted applicability of its holding for many future cases. In subsequent decisions, Circuit Courts began expanding the classifications of FGM victims within a “particular social group.”

The Tenth Circuit in \textit{Niang v. Gonzales} expanded the definition of social group to include women that had already undergone FGM. The Ninth Circuit held that applicant, although already subjected to FGM, belong to a protected social group. The Tenth Circuit reasoned that “a shared characteristic…might be a shared past experience.” The particular group that the Tenth Circuit found was a “female Tukulor Fulani.” Although ethnic group served as a relevant consideration for narrowly constructing “social group,” the Tenth Circuit found an applicant’s political views regarding FGM irrelevant. Rather, “[t]he persecution at issue in these cases-the

\begin{footnotesize}
\begin{itemize}
  \item[74] Niang, 422 F. 3d at 1199.
  \item[75] \textit{Id.}
  \item[76] Niang v. Gonzales, 422 F.3d 1187, 1199 (10th Cir. 2005).
  \item[77] Niang, 422 F.3d at 1202.
  \item[78] \textit{Id.}
  \item[79] Niang, 422 F.3d at 1201
  \item[80] \textit{Id.}
\end{itemize}
\end{footnotesize}
forcible, painful cutting of a female’s body parts—is not a result of woman’s opposition to the practice but rather a result of her sex and her clan membership and/or nationality.”

While Niang discarded consideration of a girl’s political views regarding FGM or whether a girl had already undergone FGM to determine “particular social group,” other decisions expanded the definition even further.

Mohammed further expanded the narrowing characteristics of protected class under FGM. The Ninth Circuit recognized that they could define their applicant within a protected social group in two separate ways. First, the applicant could be classified within “young girls in the Benardi clan.” Second, the applicant could be classified as “all Somalian females.” This alternative construction remains consistent with the BIA’s previous finding of “gender as an example of a prototypical immutable characteristic that could form the basis for a social group.” Thus, Ninth Circuit concluded that, “sexual orientation and sexual identity can be the basis for establishing a particular social group.” Mere consideration of a broad classification of “particular social group” to include all women within a country opened the door for other Circuit Courts to choose broader classifications than the constricted construction offered in Kasinga. By expanding “particular social group” to include all women, Mohammed broadened the scope of asylum law considerably.

IV. Obama Administration’s Policy for Victims of Domestic Violence

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81 Id.
82 Mohammed v. Gonzales, 400 F.3d. 785, 796-97 (9th Cir. 2005).
83 Id.
84 Mohammed v. Gonzales, 400 F.3d 785,
85 Id. At 798.
86 See Hassan v. Gonzales, 484 F.3d 513 (8th Cir. 2007), see Hassan v. Gonzales, 484 F.3d 513 (8th Cir. 2007).
Recently, a Mexican woman and victim of domestic violence, referred to as L.R., appealed to the BIA in denying her petition for asylum. The Obama administration used the case as an opportunity to outline their policy over similar asylum claims. The administration filed a brief that “it is possible” that the Mexican applicant “and other applicants who have experienced domestic violence could qualify for asylum.”

Women’s Advocacy groups have praised the Obama administration for creating a policy that considers asylum claims from victims of domestic violence. Yet, victims of domestic violence still face substantial obstacles before the U.S. will grant them asylum.

In order for victims of domestic violence to obtain asylum, the Obama administration requires that applicants prove four elements. First, applicants must prove that domestic violence is widely tolerated within their country. Second, applicants must show that “they are treated by their abuser as subordinates and little better than property.” Third, applicants must demonstrate that their home countries cannot afford them protection. Fourth, applicants must prove that they cannot escape the persecution by relocating to another area within their native country. The latter two requirements mirror the government’s two rebuttal provisions found in the Immigration

88 Id.
89 Id.
92 Id.
93 Id.
94 Id.
95 Id.
and Nationality Act. Resolution of issues regarding FGM has supported and influenced the Obama administration’s change in policy regarding victims of domestic violence.

V. COMMENT

The Bush Administration “had strict standards for asylum seekers, making it especially hard for women to escape their abuse.” The Bush administration proffered three reasons, justifying their position against granting asylum to victims of domestic violence. First, prior to In Re Kasinga and other decisions dealing with FGM, cultural acts of a society could not constitute “persecution.” Second, victims of domestic violence did not fit into a “particular social group” that asylum law protected. Last, opening asylum to domestic violence victims would “open the floodgates” to U.S. immigration. Resolving issues regarding asylum and victims of FGM effectively negated these arguments by the government.

Without justifications that asylum should be denied to victims of domestic violence, opposition against protecting battered women has ebbed. Without this opposition, the Obama administration has changed Executive policy regarding the status of victims of domestic violence. This change was fueled, in large part, due to developments in asylum law for victims of FGM. The resolution of key issues regarding FGM victims seeking asylum has heavily influenced the Obama Administration’s asylum

96 Supra accompanying text to notes 33-34.
policy requirements for victims of domestic violence. Because recent cases have expanded statutory definitions required for asylum to include victims of FGM and extending asylum to FGM victims has disproved public policy concerns, granting asylum to victims of FGM has opened the doors for the Obama administration to grant asylum to all victims of domestic violence.

A. Cultural Acts as “Persecution”

Prior to *In Re Kasinga*, immigration law refused to protect battered woman through asylum.¹⁰¹ Specifically, “the courts held that the[se] women were victims of cultural oppression and that was not grounds for asylum because they were not...persecuted.”¹⁰² Legal authority on immigration “had taken the position that [domestic violence] can’t be persecution as required by refugee law because it [existed as] a cultural or religious requirement” in the countries from which these women came.¹⁰³ Because “such abuses are not outside of what is considered ‘normal’ or ‘standard’ for that country,” acts of domestic violence were not considered “persecution.”¹⁰⁴ Due to this precedence, domestic violence victims faced substantial obstacles to gain asylum.¹⁰⁵ Yet, similar difficulties concerning FGM as a cultural act existed.

Professor Musalo stated that although the BIA realized that FGM was cultural, “the board of immigration said it doesn’t matter that it’s a cultural rite—if it’s a violation of


¹⁰² Id.


human rights and objectively an egregious harm, it’s persecution.” The BIA first declared this position, to which Professor Musalo refers to, in the landmark decision of *In Re Kasinga.* *Kasinga* broke from traditional precedent that cultural acts could not constitute “persecution.” *Kasinga* bridged an insurmountable legal gap for victims of domestic violence. If the cultural violence that FGM victims had suffered constituted “persecution,” victims of domestic violence too could qualify for asylum. However, opening U.S. borders to protect abused women has not come without controversy.

Some legal scholars agree that U.S. policy should not interfere with other cultures. Professor John Press comments that yes, “women circumcise their daughters in these cultures and think it is right. We should not judge them or invade their countries to change them…it is not our business to tell other nations what their cultures should look like.” Other scholars disagree, arguing that granting asylum to oppressed social groups is not cultural imperialism. Professor Linarelli argues that human rights are universal, and a woman applying for asylum in the U.S. has chosen to espouse the values of her native society. Although scholarly arguments exist on both sides, the executive brief filed in L.R.'s case clearly reflects the Obama administration’s stance on the issue.

Risking allegations of cultural imperialism, the Obama administration crafted its policy to require that domestic violence exist as a pervasive aspect of applicant’s native country before granting these applicants asylum in the U.S. This requirement only

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106 Id.
109 Id. John Press is an adjunct professor at New York University School of Law.
111 Id.
allows successful asylum claims from applicants living in countries where domestic violence exists within the cultural fabric of that society. Only if such violence against women is “widely tolerated” can a woman successfully seek asylum in the U.S.\footnote{Julia Peterson, \textit{New Policy Permits Asylum for Batter Women}, N.Y. Times, July 16, 2009, at A1, available at http://www.nytimes.com/2009/07/16/us/16asylum.html?_r=2.} As the BIA and Ninth Circuit reiterated, the inquiry is not whether the perpetrators feel that they have committed wrong but rather, whether there has been physical harm to the applicant?\footnote{See supra accompanying text to notes 66-70.} Victims of domestic violence surely suffer physical harm. Furthermore, harm to domestic violence victims often have deleterious psychological effects, similar to victims of FGM.\footnote{See Albert R. Roberts ed., Handbook of Domestic Violence Intervention Strategies: Policies, Programs, and Legal Remedies 13 (2002).} Therefore, the Obama administration’s policy correctly recognizes that societal norms within a country should not serve as the deciding factor as to whether “persecution” has occurred. President Obama’s policy change has made an ardent statement to the international community that certain cultural practices, such the violence and abhorrent abuse of women, cannot and will not ignored by the United States.

America should not stand idly by as human rights and women’s rights are violated abroad and domestically. Research shows that cultural acceptance of domestic violence can lead to increased prevalence of domestic violence.\footnote{Carl G. Buzawa, Domestic Violence: The Criminal Justice Response 44 (3d ed. 2003).} If executive policy ignores such research, passivity in allowing foreign countries to continue persecuting victims of domestic violence may be viewed as
support of such practices. This surely is not the message that America wishes to communicate to the international community. By affording victims of domestic violence potential asylum in the U.S., the Obama administration is making an affirmative statement on the issue, preventing any ambiguous interpretations regarding U.S. policies.

After all, the effective purpose of asylum law overall is to displace an applicant from their native culture, so long as persecution exists. If a culture abuses and harms its citizens, asylum law should be implemented to protect these women. Such policy is justified by the humanitarian recognition that egregious harm should not be committed on individuals, regardless if foreign societies condone such harm or not. Because asylum laws regarding FGM victims have expanded “persecution” to include cultural acts like domestic violence, granting asylum to FGM victims has opened the door for the Obama administration to expand asylum to include all victims of domestic violence.

B. Women as “Particular Social Group”

Traditional social groups protected by asylum law involved “race, religion, nationality, [or] political question.” Naturally, “[t]he extended legal argument has been whether abused women could be part of any social group that would be eligible under those terms.” This debate remained “extended” in large part because no precedence had been established that abused women constituted a “particular social group.” Yet, opponents to granting asylum to domestic violence victims could point to favorable precedence. For example, as recent as 2005, the Sixth Circuit held that all victims of domestic violence do not form a protected group purely based on their shared

118 Id.
experience of abuse. The Sixth Circuit wrote that “a social group may not be circularly defined by the fact that is suffers persecution. The individuals in the group must share a narrowing characteristic other than their risk of being persecuted.” Because those opposed to opening asylum to domestic violence victims had judicial precedence to rely on and domestic violence advocates had no such precedence, *stare decisis* provided the Bush administration justification in denying asylum to battered women. If a common experience of abuse could not serve as grounds for forming a “particular social group”, Circuit Courts deciding FGM applications had to expand the definition of social group to afford FGM victims asylum.

The Ninth Circuit in *Mohammed* created such an alternative construction by designating all women within a country that practiced FGM as a “particular social group.” By including all women within a “particular social group”, the Ninth Circuit’s construction of “social group” could prospectively translate to victims of domestic violence as well. Inclusion of all women within a nation would naturally include all women experiencing domestic violence in the nation. Yet, the practice of FGM appears less frequently than acts of domestic violence. Although gender can be viewed as a "sort of shared characteristic that could define a particular social group," some legal authorities felt that gender was too broad of a category for purposes of domestic violence. The Obama administration acknowledged this argument by crafting a policy

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120 Id.
that reflected the differences between FGM and domestic violence, that the latter encompassed the former.

President Obama’s policy required that applicants prove that they were treated as subordinates, no better than property.\footnote{Supra note 93.} This requirement narrowed asylum eligibility for victims of domestic violence. But did the administration go too far? Does the policy place too high a standard for asylum applicants to prove? At first blush, this would seem to be a high burden for applicants to establish. Upon closer scrutiny, however, the administration clearly understood the nature of domestic violence when crafting this requirement.

Domestic violence rarely exists as an isolated act, but rather, exists as a pattern of vindictive and violent behavior.\footnote{Carl G. Buzawa, Domestic Violence: The Criminal Justice Response 5 (3d ed. 2003).} Often, abusers attempt to exert control and power over their victims and such behavior extends over a period of time, often involving years after years of abuse.\footnote{Nicky A. Jackson ed., Encyclopedia of Domestic Violence 449 (2008).} Domestic violence is a continuous cycle.\footnote{See Albert R. Roberts ed., Handbook of Domestic Violence Intervention Strategies: Policies, Programs, and Legal Remedies 27 (2002).} Common behavior by domestic abuser’s reflects this attitude. Abusers often threaten, isolate, economically control, and constantly watch over their victims, all “behaviors used to maintain fear, intimidation and power.”\footnote{Safety for Women: Self Defense Tips and Tricks for Women, September 25, 2005, \url{http://www.safetyforwomen.com/domestic.htm}.} In effect, this coercion makes these victims little better than the abuser’s property, or at the very least, the abuser’s subordinates. Furthermore, advocates and victims of domestic violence have commonly reported and described abusers treating their victims as property.\footnote{See Margi L. McCue, Domestic Violence: A Reference Handbook 126 (2d ed. 2008); See also Caroline Young, \textit{My Story}, Safety for Women: Self Defense Tips and Tricks for Women, September 26, 2005,} Proof of such treatment would
establish that these applicants have been continuously abused, a defining factor in most domestic violence cases.

Therefore, the Obama administration has balanced the need to narrow the class of asylum eligible while maintaining a reasonable standard to which asylum applicants could prove. However, the administration may not have been able to reach such a balance without the existence of favorable precedence establishing female victims of FGM as a class. The creation of new precedence allowed the Obama administration to ignore earlier precedence relied upon by the Bush administration. Because asylum laws regarding FGM victims have expanded “particular social class” to include all women, granting asylum to FGM victims has opened the door for the Obama administration to expand asylum to include all victims of domestic violence.

C. Immigration Floodgates Remain Closed

The Bush administration cautioned that allowing victims of domestic violence to gain asylum in the U.S. would “open up the floodgate of asylum petitions from battered women across the globe.”\(^\text{130}\) Issues regarding immigration law often include such concerns. The primary fear of “opening the floodgate” rests upon the assumption that by expanding asylum to victims of domestic violence, far more aliens will file asylum petitions. Similar fears existed over extending asylum to FGM applicants. The effects of granting asylum to victims of FGM provided an illustration of the public policy ramifications of expanding asylum to victims of domestic violence. Professor Karen Musalo stated “people who were opposed to a grant of asylum said millions of women

[are] subjected to female genital cutting a year, and if we establish a precedent that this is a basis for asylum, these millions of women are going to arrive in the U.S.”131 Yet, when asylum law expanded to include victims of FGM, the concern of “opening the floodgate” proved unfounded.

Counter to the concern that applications would increase dramatically, lawyers handling FGM cases have reported that opening asylum to victims of FGM has not lead to more applications filed.132 Other statistics show that the number of immigrants entering the U.S. through asylum has actually decreased.133 These statistics tend to disprove the hypothesized impact of extending asylum to unprotected groups. Far from “opening the floodgate,” granting asylum to FGM victims has maintained if not decreased the number of applicants seeking asylum.134 This evidence undermines the Bush administration’s public policy concern that opening asylum to victims of domestic violence will “open the floodgate” to asylum applications. Because expanding asylum to victims of FGM has not lead to more asylum applications, public fears of increasing asylum petitions from victims of domestic violence have abated. Once again, policy considerations must take into account that domestic violence exists on a much broader scope than FGM. In response to this concern, the Obama administration’s policy has attempted to place additional safeguards to insure that asylum applications from victims of domestic violence do not overwhelm the immigration resources of the United States.

134 Id.
The third and fourth requirements of Obama’s policy require that applicant’s prove that their native countries cannot protect them from domestic violence and that they cannot relocate to other areas within the homeland to escape their violent situations.\textsuperscript{135} Although these requirements are designed to narrow the class eligible for asylum, for practical purposes, they may only serve as boiler-plate safeguards. First, if an applicant proves that domestic violence exists as the cultural norm within their native land, proof that their native governments cannot protect them seems extraneous. If domestic violence is so widespread that society accepts this form of violence, the practical implication is that the government either has no laws in place or refuses to enforce the laws to protect victims of domestic violence. Second, the nature of domestic violence makes relocation an unlikely solution to a battered woman’s plight. Stalking has been reported as a common characteristic of domestic abusers.\textsuperscript{136} Violent abusers often will follow their victims wherever their victims may go.\textsuperscript{137} Often times, when a victim leaves, an abuser’s violence may increase in severity, putting the victim in greater danger than before.\textsuperscript{138} If domestic violence follows the victim wherever they may flee and victims may be in more danger if they do flee, why then should victims of domestic violence be required to prove relocation as an ill alternative?

Perhaps, one answer is that the Obama administration is treading on novel grounds by potentially offering asylum to battered women. Such new policy requires the administration take steps to placate public fears of massive influxes of immigration hordes. By incorporating the government’s rebuttal opportunities found in the

\textsuperscript{135} See supra accompanying text to notes 94-96.
\textsuperscript{138} Id. at 29; See also Nicky A. Jackson ed., Encyclopedia of Domestic Violence 40 (2008).
Immigration and Nationalization Act of 1994 into executive policy\textsuperscript{139}, the administration’s last two policy requirements may calm such fears.

Granting asylum to FGM victims has served as a miniature experiment on the effects of granting asylum to previously unprotected groups. The administration should feel confident in relying on the results of granting asylum to FGM victims as indicative of the potential effects of granting asylum to all victims of domestic violence. If applications have not increased from victims of FGM, there is little reason to believe that granting asylum to battered women would open the immigration floodgates. Because extending asylum to FGM victims had disproved public policy concerns involved with extending asylum to victims of domestic violence, granting asylum to FGM victims has opened the door for the Obama administration to expand asylum to include all victims of domestic violence.

V. CONCLUSION

Since Kasinga, several subsequent cases have expanded asylum protection to FGM victims. First, by holding that FGM constituted “persecution,” In Re Kasinga \textit{established that cultural acts could constitute “persecution” as defined by asylum law.} Second, the classification of FGM as a social group has expanded beyond characteristics of tribal lineage, age, and political beliefs regarding FGM. All women within a nation can belong to a “particular social group.” Third, extending asylum to FGM refugees has not lead to an increase in asylum applications. This result substantially disproves concerns that granting domestic violence victims asylum would “open the floodgate” to U.S. immigration. Each development has detracted from the

three main legal and policy arguments against granting asylum to victims of domestic violence.

With these arguments negated or diminished, the door opened for President Obama to take a different stance than that of his predecessors. Such policy diverges significantly from the position of the Bush administration. In so doing, President Obama’s new policy affords protection to abused women who had no such hope in the past. Without asylum law’s progression of recognizing victims of FGM as deserving of asylum, the door may have never opened for the Obama administration to make such policy changes. The inclusion of FGM victims as deserving of U.S. asylum protection has helped shape President Obama’s policy in allowing victims of domestic violence to seek asylum. Without such a policy change, women across the world would continue to suffer the atrocious effects of domestic violence without humanitarian protection. Only time can tell how the administration’s policy will be implemented, but at for least now, women across the world have hope that they can escape their tragic circumstances to a better life, a life free of violence.