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Fatma Marouf

University of Nevada, Las Vegas – William S. Boyd School of Law, fatma.marouf@law.tamu.edu

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THE RISING BAR FOR PERSECUTION IN ASYLUM CASES INVOLVING SEXUAL AND REPRODUCTIVE HARM

FATMA E. MAROUF*

Abstract

This Article argues that there is a rising bar for establishing persecution in U.S. asylum cases involving sexual and reproductive harm. Analyzing recent cases, the Article shows that adjudicators tend to apply a higher standard for physical harm in these types of cases and largely overlook nonphysical harm, including psychological suffering and the intangible harm caused by deprivation of equality, autonomy, and privacy. The Article focuses specifically on two types of cases where these patterns appear: (1) female genital mutilation (FGM); and (2) involuntary insertion of an intrauterine device (IUD). Regarding FGM, the Article discusses an emerging dispute as to whether Type I FGM (clitoridectomy) constitutes persecution. With respect to involuntary IUDs, the Article analyzes a decision by the Board of Immigration Appeals (BIA) requiring aggravating circumstances for the harm to constitute persecution, as well as recent circuit court decisions reviewing the application of this problematic precedent to other cases. The Article then argues that using international human rights law to identify and evaluate various types of harm would lead to a much more comprehensive and principled analysis of persecution and would likely lead to different results in these types of cases.

INTRODUCTION

The concept of persecution lies at the heart of what it means to be a refugee,¹ yet its definition remains highly imprecise. Judges define what actions constitute persecution on a case-by-case basis without reference to any objective norms or standards, resulting in significant discrepancies between the federal courts of appeal, as well as striking inconsistencies at

* Associate Professor of Law, University of Nevada, Las Vegas. J.D., Harvard Law School; B.A. Yale University and to my colleague Michael Kagan, for his careful eye. Deepest thanks to Deborah Anker for her inspiration and mentorship over the years. I would also like to thank the staff of the COLUMBIA JOURNAL OF GENDER AND LAW for their thoughtful comments and edits to this piece.

¹ A refugee or asylee is defined as someone who is outside his or her country of nationality and who can demonstrate "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." Immigration and Nationality Act, 8 U.S.C.A. § 1101(a)(42)(A) (West 2011). This definition in the U.S. statute adopts the definition of a refugee in the 1967 Protocol Relating to the Status of Refugees, which incorporates Articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees. 1967 Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; Convention Relating to the Status of Refugees, art. 1, *opened for signature* July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Convention].

lower levels of adjudication.² When it comes to nonphysical forms of harm, such as psychological harm, severe discrimination, or deprivation of self-determination, the divergence of opinion is even greater.

Over time, our understanding of persecution has evolved to encompass forms of harm that are related to gender and experienced primarily by women, such as rape, female genital mutilation (FGM), and domestic violence. As Deborah Anker has argued, “the [United Nations High Commissioner for Refugees (UNHCR)], practitioners, scholars and activists consciously have constructed gender asylum law on the edifice of international women’s human rights law and the work of the international women’s human rights movement.”³ Judges, however, often continue to view gender-specific forms of harm through a different lens. Thus, while great progress has been made over the past two decades in recognizing gender-related asylum claims, “we are still a long way from an adequate recognition of the specificity of women’s experiences of

² Applications for asylum can be made affirmatively to an Asylum Office or defensively in immigration court, after a person has been placed in removal proceedings. If the Asylum Office does not grant asylum, it generally refers the case to immigration court, and the immigration judge makes a *de novo* ruling on the case. Immigration judges are career civil servants in the Department of Justice. 8 U.S.C.A. § 1101(b)(4) (West 2011) (stating that an immigration judge is “an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review”). Over two-hundred and thirty-five immigration judges conduct administrative removal proceedings in fifty-nine immigration courts nationwide. The Board of Immigration Appeals in Falls Church, Virginia has jurisdiction over appeals from certain decisions of immigration judges throughout the United States, including asylum determinations. The BIA applies a “clearly erroneous” standard of review for factual findings by immigration judges and a *de novo* standard of review for all questions of law and discretion. 8 C.F.R. § 3.1(d)(3) (West 2011); *Matter of S-H-*, 23 I. & N. Dec. 462, 464 (BIA 2002). The BIA is composed of about fifteen members, who are also “attorneys appointed by the Attorney General.” 8 C.F.R. § 1003.1(a)(2). The BIA’s determinations in asylum cases may then be appealed to the U.S. Courts of Appeal. The location of the immigration court that issues the initial decision determines which circuit court has jurisdiction over the appeal.

³ Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 138–39 (2002).

persecution, as is the case for many other non-traditional forms of persecution.”⁴

This Article focuses on two types of sexual and reproductive harm about which opinions have begun to diverge. The first type of harm, FGM, which affects 100 to 140 million girls and women worldwide,⁵ was found to constitute persecution years ago by the Board of Immigration Appeals (BIA) in *Matter of Kasinga*.⁶ During the past decade, most circuit courts, as well as many other countries, have agreed that FGM constitutes persecution.⁷ Recent decisions, however, indicate that the BIA and some circuit courts might not consider *all* forms of FGM to be persecution. Specifically, there are early signs of as to whether Type I FGM (clitoridectomy), which is one of the two most common forms of the practice, rises to the level of persecution.⁸ In addition, a recent decision by the BIA suggests that FGM requires aggravating factors to constitute severe past persecution, which allows for a grant of

⁴ Ekaterina Yahyaoui Krivenko, *Muslim Women's Claims to Refugee Status Within the Context of Child Custody Upon Divorce Under Islamic Law*, 22 INT'L J. REFUGEE L. 48, 49 (2010); see also HEAVEN CRAWLEY, REFUGEES AND GENDER: LAW AND PROCESS (2001) (reporting that women asylum-seekers in the UK did not benefit equitably from the protections offered by the 1951 Refugee Convention because their experiences were marginalized by decision-makers' interpretations of the Convention, and procedural and evidential barriers impeded their claims).

⁵ Secretariat of the U.N. World Health Org., *Female Genital Mutilation: Rep. of the Secretariat*, U.N. Doc. EB122/15 (Jan. 10, 2008) [hereinafter *WHO: Female Genital Mutilation*].

⁶ *In re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996) (en banc).

⁷ See *infra* note 59.

⁸ See *infra* Part II.A for discussion of the emerging Circuit split; *Frequently Asked Questions About Female Genital Mutilation/Cutting*, UNITED NATIONS POPULATION FUND, <http://www.unfpa.org/gender/practices2.htm#3> (last visited Sept. 7, 2011) [hereinafter UNFPA] (“Types I and II are the most common, with variation among countries. Type III, infibulation, constitutes about twenty percent of all affected women and is most likely in Somalia, northern Sudan and Djibouti.”). For simplicity, this Article refers to the practice of Female Genital Mutilation/Cutting as “FGM”.

humanitarian asylum without showing a well-founded fear of future persecution.⁹

The second type of harm that the Article addresses is involuntary insertion of an intrauterine device (“IUD”), which China inflicts on millions of women as part of its population control policies.¹⁰ After the appearance of many conflicting, unpublished decisions on this issue, the Second Circuit remanded a case to the BIA specifically requesting a precedential opinion on point.¹¹ The BIA responded with *Matter of M-F-W- & L-G-*, which held that “aggravating circumstances” were required for involuntary insertion of the IUD to amount to persecution.¹² While the BIA did not define “aggravating circumstances,” its decision suggests that significant pain or multiple insertions would be required for the harm to amount to persecution.

These two lines of cases involving sexual and reproductive harm highlight several problems. First, in assessing physical harm related to women’s sexual and reproductive functions, adjudicators tend to apply a higher standard for persecution than for other types of physical harm. Instead of comparing the harm at issue to an objective standard for persecution, they compare it to the most extreme form of the relevant cultural practice, such as Type III FGM (infibulation) or forced sterilization. The Article notes that this tendency may be due, at least in part, to a specific type of cognitive bias, known as contrast bias, on the part of adjudicators.

In addition, adjudicators fail to analyze the nonphysical harm that results from practices such as FGM and involuntary insertion of an IUD, including psychological suffering, gender

⁹ *Matter of S-A-K- & H-A-H-*, 24 I. & N. Dec. 464 (BIA 2008).

¹⁰ As discussed in Part III.B.2 below, a 2001 survey showed that 46% of women in China use IUDs and 38.1% have been sterilized. By comparison, only 5.1% of Chinese men use condoms and only 7.9% have been sterilized. See *infra* notes 241–42 and accompanying text. The number of *forced* IUDs is, of course, nearly impossible to determine.

¹¹ *Zheng v. Gonzales*, 497 F.3d 201, 203–04 (2d Cir. 2007).

¹² *Matter of M-F-W- & L-G-*, 24 I. & N. Dec. 633, 642 (BIA 2008).

discrimination, deprivation of self-determination, and profound invasions of privacy. Even where the physical procedure is short and does not result in medical complications, this type of nonphysical harm is discriminatory in nature and has serious, long-term effects that should not be forgotten. The tendency to ignore nonphysical harm clouds not only the analysis of persecution but also the evaluation of “aggravating circumstances,” to the extent that consideration of such circumstances may be relevant. In pointing out these issues, the Article touches on the ways that implicit bias may also help explain why the analysis of physical harm dominates the decisions.

In Part III, the Article argues that conceptualizing persecution as a serious violation of human rights and evaluating the harms at issue under international human rights law will lead to a much more comprehensive, consistent, and equitable analysis of persecution. Applying an international human rights law analysis, the Article demonstrates that all forms of FGM, as well as involuntary insertion of an IUD, amount to persecution. The Article then discusses why an international human rights approach is superior to both an approach that focuses on violations of fundamental rights under U.S. constitutional law and an approach that creates a bifurcated standard for addressing physical and nonphysical harm, as in tort law.

Finally, the Article concludes that the circuit courts must grapple seriously with the question of how best to analyze persecution in cases involving gender-related harm. Precedential decisions will likely become necessary not only on the two issues discussed here, but also on a range of other complex issues that either mingle physical and nonphysical harm or involve nonphysical harm alone, such as forced marriages or draconian family laws that affect women’s rights to divorce and custody of children.

In 2010, the United States received 55,500 asylum applications, maintaining its status as the single largest recipient

of asylum claims among industrialized nations.¹³ The two issues highlighted in this Article—involuntary insertions of IUDs and FGM—are particularly relevant because they pertain to countries that play a significant role in our asylum process. Chinese asylum-seekers accounted for nearly one-third of U.S. asylum claims¹⁴ and comprised 38% of all asylum cases granted by U.S. immigration courts in 2010.¹⁵ No other country even comes close to China in the number of asylum cases granted.¹⁶ Given China's salient position in our asylum system, the issue of whether involuntary insertion of IUDs constitutes persecution must be addressed in a principled way by adjudicators.

Moreover, the countries of origin with the highest number of asylum cases granted by U.S. immigration courts include several places where FGM is widespread, such as Ethiopia, Egypt, Somalia, Guinea, and Eritrea.¹⁷ According to the World Health Organization (WHO), the prevalence of FGM among women ages 15–49 is seventy-four percent in Ethiopia, ninety-one percent in Egypt, ninety-eight percent in Somalia, ninety-six

¹³ U.N. HIGH COMM'N FOR REFUGEES [UNHCR], ASYLUM LEVELS AND TRENDS IN INDUSTRIALIZED COUNTRIES 2010 7 (2011), available at <http://www.unhcr.org/4d8c5b109.html> (stating that, for the fifth year in a row, the United States has the largest number of asylum claims among the forty-four industrial countries included in the report).

¹⁴ *Id.* at 7.

¹⁵ EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2010 STATISTICAL Y.B. J1 (2011) [hereinafter EOIR 2010 YB] available at <http://www.justice.gov/coir/statpub/fy10syb.pdf> [hereinafter EOIR 2010] (stating that immigration courts granted 3795 Chinese asylum cases in 2010).

¹⁶ *Id.*

¹⁷ In 2010, Ethiopia ranked second, accounting for 4.12% of the total number of asylum cases granted by U.S. immigration courts; Egypt ranked sixth, accounting for 2.19%, with 216 cases granted; Somalia ranked seventh, accounting for 2.11% with 208 cases granted; Guinea ranked tenth, accounting for 1.88%, with 186 cases granted; and Eritrea ranked twelfth (percentage not given). *Id.*

percent in Guinea, and eighty-nine percent in Eritrea.¹⁸ FGM is also common in certain parts of Cameroon, which likewise ranks among the top dozen countries in the number of asylum cases granted.¹⁹

Since the United States does not collect data on asylum cases based on the type of claim, it is unfortunately impossible to determine how many of the asylum claims from these countries involved FGM or other gender-related forms of harm. Nor do we have adequate data regarding the number of asylum claims made by females, the percentage granted, or how these statistics compare to those for males.²⁰ Data is gathered by different U.S. agencies in a haphazard and inconsistent way, such that some information regarding the gender of applicants appears in statistics on affirmative asylum decisions (i.e. those made by the U.S. Citizenship and Immigration Service's Asylum

¹⁸ See WORLD HEALTH ORG., FEMALE GENITAL MUTILATION AND OTHER HARMFUL PRACTICES: PREVALENCE OF FGM, available at <http://www.who.int/reproductivehealth/topics/fgm/prevalence/en/index.html> (last visited Sept. 7, 2011) (providing data on FGM compiled in 2005–2008).

¹⁹ EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 15, at J1 (showing that Cameroon ranked number eleven, with 196 asylum cases granted, accounting for 1.99% of the total number of the asylum grants); Agbor v. Gonzales, 487 F.3d 499, 503 (7th Cir. 2007) (finding that the “most brutal” form of FGM, infibulation, is still common in the Southern Province of Cameroon); see also *infra* notes 120–21 below and accompanying text (discussing Agbor v. Gonzales).

²⁰ The Executive Office for Immigration Review (EOIR) fails to publish asylum statistics based on gender in defensive cases (i.e. asylum claims made in immigration court during removal proceedings). Only the total number of asylum applications granted by immigration judges for individuals from these countries is available. Thus, we know that in 2010, immigration courts granted 407 of the 614 applications received from Ethiopians (66%), 208 of the 445 applications received from Somalis (47%), 216 of the 393 applications received from Egyptians (55%), 186 of the 397 applications received from Guineans (47%), and 179 of the 283 applications received from Eritreans (63%), but we do not know how many of these applications were made by women or girls. EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 15, at 2–6.

Offices)²¹ and refugee status determinations made abroad,²² but not in statistics on defensive asylum decisions (i.e. those made by immigration judges during removal proceedings).

Collecting and analyzing data that is disaggregated by gender, country of origin, and type of claims in a consistent way is an important first step to better identify and assess emerging

²¹ The Department of Homeland Security (DHS), which tracks decisions in affirmative asylum cases, provides statistics showing that forty-five percent of the principal applicants granted affirmative asylum in 2009 were female (3982 females out of 8931 applicants granted asylum). DHS fails, however, to provide disaggregated data regarding the number of asylum applications *received* by gender, thereby making it impossible to determine what percent of asylum applications filed by females were granted, or to compare that number to the percent granted for males. OFFICE OF IMMIGRATION STATS., U.S. DEP'T OF HOMELAND SECURITY, 2009 Y.B. OF IMMIGRATION STATISTICS 46 (2009), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf.

²² DHS's data shows that only thirty-three percent of the principal applicants admitted to the United States as refugees in 2009 were female, which is much smaller than the forty-five percent figure for females who are affirmatively granted asylum after arriving in the United States. *Id.* at 42. Of the 32,511 principal applicants admitted as refugees in 2009, only 10,672 were female. *Id.* This statistic may seem surprising in light of the UNHCR's observation that the percentage of females among asylum-seekers is usually "significantly lower" than the percentage of females among refugees. U.N. HIGH COMM'N FOR REFUGEES, 2005 GLOBAL REFUGEE TRENDS 30 (2006), available at <http://www.unhcr.org/4486ccb12.pdf>. Part of the explanation may be that UNHCR considers female principal applicants, as well as female dependents (spouses and children) in its calculation of the total number of refugees. If we include female dependents among those admitted to the United States as refugees, the percentage of females increases to about forty-eight percent, which comes quite close to the total percentage of females (counting principals and dependents) granted asylum in the U.S., around forty-six percent. OFFICE OF IMMIGRATION STATS., U.S. DEP'T OF HOMELAND SECURITY, 2009 Y.B. OF IMMIGRATION STATISTICS 42, 46 (2009). Among the 74,602 refugees admitted to the United States in 2009, 10,672 were female principal applicants, 11,596 were the female spouses of male principal applicants (compared to only 1844 male spouses of female principal applicants), and 13,843 were the female children of principal applicants (compared to 14,808 male children). *Id.* at 42

trends in the analysis of gender-related persecution.²³ Simply focusing on grant rates for women is not enough, as high grant rates do not necessarily indicate the absence of discrimination in the process: based on the severity of harm that women are fleeing, “[i]t may . . . be the case that they should receive a disproportionately higher rate of success in the asylum process and that even an equal or slightly higher rate reflects discrimination in outcomes.”²⁴ The specter of such discrimination looms large in the United States given the absence of a principled framework for understanding the concept of persecution.

I. The Absence of a Principled Framework for Understanding the Concept of Persecution under U.S. Asylum Law

Congress did not define persecution in the Immigration and Nationality Act. Neither the 1951 Refugee Convention nor the 1967 Protocol defines this term. Rather, our understanding of the term has evolved through case law. In general, *persecution* is understood as an “extreme concept, marked by the infliction of

²³ Among other problems, aggregated data regarding the number of women who apply for or receive asylum may mask huge disparities based on country of origin. For example, one UK study showed that women made only fourteen percent of asylum claims from Iran and Sudan, but over fifty-six percent of claims from Eritrea. REFUGEE WOMEN’S RES. PROJECT, WOMEN ASYLUM SEEKERS IN THE UK—A GENDER PERSPECTIVE: SOME FACTS AND FIGURES 35 (2003), available at <http://www.asylumaid.org.uk/data/files/publications/29/Women%20asylum%20seekers%20in%20the%20UK%20a%20gender%20perspective.pdf>.

²⁴ HEAVEN CRAWLEY & TRINE LESTER, U.N. HIGH COMM’N FOR REFUGEES COMPARATIVE ANALYSIS OF GENDER-RELATED PERSECUTION IN NATIONAL ASYLUM LEGISLATION AND PRACTICE IN EUROPE ¶¶ 59, 61 (2004), available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/openDocPDFViewer.html?docid=40c071354>. According to Crawley and Lester’s analysis, one-third of women’s asylum claims in the UK resulted in some status being granted after appeal, compared with a national average of only nineteen percent in 2001. *Id.* ¶ 69. However, only about twenty-four percent of the 71,030 asylum applications made in the United Kingdom that year were made by women. *Id.* ¶ 51. Thus, women in the United Kingdom appear to be granted asylum at a significantly higher rate than men but apply in much lower numbers. These statistics may suggest that only women facing the most severe and/or prevalent forms of harm tend to apply for asylum.

suffering or harm . . . in a manner regarded as offensive”²⁵ or for reasons “that this country does not recognize as legitimate.”²⁶ Persecution requires more than mere harassment or discrimination, and it need not amount to torture or life-threatening violence.²⁷ Within these outer bounds, however, little guidance exists to help adjudicators analyze when harm or suffering amounts to persecution.

As courts have noted, persecution is a “very fact-dependent” determination,²⁸ and “the difference between harassment and persecution is necessarily one of degree . . . [such that] the degree must be assessed with regard to the *context* in which the mistreatment occurs.”²⁹ Thus, the interpretation of persecution in the United States leaves much to

²⁵ *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (en banc) (quoting *Fisher v. I.N.S.*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc)); see also *Ivanishvili v. U.S. Dep’t of Justice*, 433 F.3d 332, 341 (2d Cir. 2006) (defining persecution as “the infliction of suffering or harm upon those who differ on the basis of a protected statutory ground”); *Tulenqky v. Gonzales*, 425 F.3d 1277, 1280 (10th Cir. 2005) (defining persecution as “the infliction of suffering or harm upon those who differ in a way regarded as offensive,” and as “require[ing] more than just restrictions or threats to life and liberty” (quoting *Chaib v. Ashcroft*, 397 F.3d 1273, 1277 (10th Cir. 2005)); *Zhao v. Gonzales*, 404 F.3d 295, 307 (5th Cir. 2005) (defining persecution as “[t]he infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive . . . in a manner condemned by civilized governments” (quoting *Abdel-Masich v. INS*, 73 F.3d 579, 583–84 (5th Cir. 1996)); *Khalili v. Holder*, 557 F.3d 429, 436 (6th Cir. 2009) (defining persecution as “the infliction of harm . . . to overcome a characteristic of the victim” (quoting *Pilica v. Ashcroft*, 388 F.3d 941, 950 (6th Cir. 2004)); *Sepulveda v. U.S. Att’y Gen.*, 401 F.3d 1226, 1231 (11th Cir. 2005) (“Persecution is an extreme concept, requiring more than a few isolated incidents of verbal harassment or intimidation . . . [m]ere harassment does not amount to persecution.” (quoting *Gonzalez v. Reno*, 212 F.3d 1338, 1335 (11th Cir. 2000)). But see *Li v. Gonzales*, 405 F.3d 171, 177 (4th Cir. 2005) (limiting persecution to “the infliction of threat of death, torture, or injury to one’s person or freedom”).

²⁶ *Begzatowski v. I.N.S.*, 278 F.3d 665, 668 (7th Cir. 2002).

²⁷ See, e.g., *Chen v. I.N.S.*, 359 F.3d 121, 128 (2d Cir. 2004) (holding that persecution means conduct that rises above “mere harassment” but can include physical abuse short of life threatening violence); *Begzatowski*, 278 F.3d at 669.

²⁸ *Cordon-Garcia v. I.N.S.*, 204 F.3d 985, 991 (9th Cir. 2000).

²⁹ *Beskovic v. Gonzales*, 467 F.3d 223, 226 (2d Cir. 2006) (internal quotation marks omitted).

the subjective assessments of judges, rather than referring to an objective, principled framework. Indeed, as the Seventh and Third Circuits have explicitly recognized, defining persecution “is a most elusive and imprecise task, one that is at the margins perhaps uniquely political in nature.”³⁰ Michelle Foster notes that “[t]he risk of subjectivity is particularly acute in cases involving gender-related persecution, where decision-makers in many jurisdictions have shown a greater propensity to dismiss claims based on the view that discrimination against women is justified by culture, religion or social norms.”³¹

Consequently, different courts have applied the concept of persecution quite differently, even in the context of physical harm. At one end of the spectrum, the Ninth Circuit consistently treats physical harm as persecution³² and generally finds that detention and confinement constitute persecution.³³ The Ninth Circuit has also found that a forced pregnancy exam constitutes persecution.³⁴ Other circuits, however, have embraced a narrower view of persecution. In one case, for example, the Tenth Circuit found no past persecution where an Indonesian-Christian suffered repeated “beatings and robberies at the hands

³⁰ *Janusiak v. I.N.S.*, 947 F.2d 46, 48 n.1 (3d Cir. 1991) (quoting *Balazoski v. I.N.S.*, 932 F.3d 638, 642 (7th Cir. 1991)).

³¹ MICHELLE FOSTER, *INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS* 38–39 (2007).

³² See, e.g., *Chand v. I.N.S.*, 222 F.3d 1066, 1073–74 (9th Cir. 2000); *Li v. Holder*, 559 F.3d 1096, 1107 (9th Cir. 2009); *Ahmed v. Keisler*, 504 F.3d 1183, 1194 (9th Cir. 2007).

³³ See *Ndom v. Ashcroft*, 384 F.3d 743, 752 (9th Cir. 2004) (finding that a Senegalese applicant who was threatened and detained twice under harsh conditions for a total of twenty-five days had established persecution), *superseded by statute*, Real ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, *as recognized in* *Parussimova v. Mukascy*, 555 F.3d 734, 739–40 (9th Cir. 2009); see also *Kalubi v. Ashcroft*, 364 F.3d 1134, 1136 (9th Cir. 2004) (finding that imprisonment in an overcrowded Congolese jail cell with harsh, unsanitary and life-threatening conditions established past persecution).

³⁴ See *Li v. Ashcroft*, 356 F.3d 1153, 1158 & 1158 n.4 (9th Cir. 2004) (en banc) (finding that a “crude” and “physically invasive” exam performed without the petitioner’s consent established past persecution even though it did not necessarily involve physical injury or result in any permanent health effects).

of Muslims.”³⁵ This case contrasts sharply with a decision of the Ninth Circuit finding past persecution based on similar, if not less severe, harm, where an Indo-Fijian was robbed multiple times, compelled to quit his job, and had his family home looted.³⁶ Moreover, the Seventh Circuit found no past persecution in the case of a Chinese petitioner even where family planning officials ordered his pregnant girlfriend to appear at a hospital for a forced abortion, “kicked and struck [him] with fists in an attempt to bring him to the police station, [hit him] on the head with a brick [causing an injury that required seven stitches, and] asked him to turn himself in after seeking treatment.”³⁷

At lower levels of decision-making, even more extreme examples abound. For example, in one case arising in the Seventh Circuit, the immigration judge found no past persecution where a violent group called the Mungiki, comprised of Kikuyus, the largest ethnic group in Kenya, broke into the petitioner’s home, killed his servant, tried to “circumcise” his wife, killed the family pets, burned two vehicles, threatened to gouge out the petitioner’s eyes, threatened to kill him, and then “kidnapped and tortured him, releasing him only after he promised to produce his wife for circumcision.”³⁸ On review, Judge Posner dismissed the immigration judge’s finding of no past persecution as “absurd,”³⁹ but the case underscores how the absence of a definitive framework for analyzing persecution leaves much to adjudicators’ discretion and can lead to shocking results.

When it comes to nonphysical forms of harm, the absence of a clear legal framework for determining what actions constitute persecution is even more striking. For example, while the Ninth Circuit and several other circuits have found that

³⁵ *Sidabutar v. Gonzales*, 503 F.3d 1116, 1118, 1124 (10th Cir. 2007).

³⁶ *See Surita v. INS*, 95 F.3d 814, 819–21 (9th Cir. 1996).

³⁷ *Zhu v. Gonzales*, 465 F.3d 316, 318 (7th Cir. 2006).

³⁸ *Gatimi v. Holder*, 578 F.3d 611, 614 (7th Cir. 2009).

³⁹ *Id.*

“[p]ersecution may be psychological or emotional, as well as physical,”⁴⁰ the Fourth Circuit has taken the position that “‘persecution’ cannot be based on fear of psychological harm alone.”⁴¹ With respect to economic harm, the Ninth Circuit has found that persecution may encompass “a deliberate imposition of substantial economic disadvantage,”⁴² and the Seventh Circuit has found that confiscation of property “might cross the line from harassment to persecution,”⁴³ whereas the Eighth and Third Circuits generally require “a showing that allegations of economic hardship *threaten the petitioner’s life or freedom in*

⁴⁰ *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004) (discussing emotional trauma suffered by an ethnic Afghan family based on anti-foreigner violence in Germany); *see also Makhoul v. Ashcroft*, 387 F.3d 75, 80 (1st Cir. 2004) (“[U]nder the right set of circumstances, a finding of past persecution might rest on a showing of psychological harm.”); *Boykov v. I.N.S.*, 109 F.3d 413, 416 (7th Cir. 1997) (expressing willingness, in rare cases, to regard mere threats as persecution); *Li Wu Lin v. I.N.S.*, 238 F.3d 239, 244 (3d Cir. 2001) (finding that persecution can include “threats to life” (quoting *Chang v. I.N.S.*, 119 F.3d 1055, 1059 (3d Cir. 1997))); *Chen v. Ashcroft*, 381 F.3d 221, 225 (3d Cir. 2004) (“[T]he persecution of one spouse by means of a forced abortion or sterilization causes the other spouse to experience intense sympathetic suffering that rises to the level of persecution.”); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 160 (2d Cir. 2006) (remanding for the agency to evaluate whether the applicant, of Mayan descent, experienced past persecution where, as a small child, he survived a massacre against Mayans, saw the soldiers who murdered his sister, her family, as well as other relatives, observed his cousin’s bullet-riddled body on the ground and lost his land and property when the massacre forced his family to relocate).

⁴¹ *Niang v. Gonzales*, 492 F.3d 505, 512 (4th Cir. 2007) (finding that the petitioner’s claim for withholding of removal failed as a matter of law because it was based solely on the psychological harm she would suffer if her daughter accompanied her to Senegal and was subjected to FGM).

⁴² *Kovac v. I.N.S.*, 407 F.2d 102, 107 (9th Cir. 1969); *see also Baballah v. Ashcroft*, 367 F.3d 1067, 1076 (9th Cir. 2004) (finding that severe harassment, threats, violence and discrimination made it virtually impossible for an Israeli Arab to earn a living). The Ninth Circuit has stressed that absolute inability is not required for economic harm to constitute persecution. *Baballah*, 367 F.3d at 1076.

⁴³ *Mitev v. I.N.S.*, 67 F.3d 1325, 1330 (7th Cir. 1995).

order to rise to the level of persecution.”⁴⁴ Noting that the BIA had also applied various standards for determining when economic harm rises to the level of persecution, the Second Circuit remanded the case of *Mirzoyan v. Gonzales* for the BIA to clarify the correct standard.⁴⁵

In 2007, the BIA issued its decision in *In re T-Z*, which held that economic harm should be evaluated under the general standard for nonphysical harm mentioned in a much older BIA case,⁴⁶ which referenced a standard “outlined in a 1978 House Report.”⁴⁷ This standard provides that “[t]he harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.”⁴⁸ While the BIA went on to explain how to apply this standard in cases involving economic harm, it did not provide any guidance regarding other forms of nonphysical harm, such as psychological harm.

Since adjudicators are often uncertain about how to handle nonphysical forms of harm, especially psychological harm, which is uniquely difficult to analyze objectively, the tendency is simply to ignore such harm in determining whether the applicant

⁴⁴ *Makatengkeng v. Gonzales*, 495 F.3d 876, 883 (8th Cir. 2007) (emphasis added) (considering the case of an Indonesian who could not find employment because of his albinism); accord *Lin v. I.N.S.*, 238 F.3d 239, 244 (3d Cir. 2001) (“Persecution can include . . . economic restrictions so severe that they constitute a real threat to life and freedom.” (quoting *Chang v. I.N.S.*, 119 F.3d 1055, 1059 (3d Cir. 1997))); see also *In re Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985), *abrogated by* *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

⁴⁵ *Mirzoyan v. Gonzales*, 457 F.3d 217, 219–20 (2d Cir. 2006) (considering whether someone who was denied admission to a prestigious college, could not find a job in her profession, and was discharged from her job as an unskilled worker on account of her ethnicity had been subjected to persecution).

⁴⁶ *In re T-Z*, 24 I. & N. Dec. 163, 170 (BIA 2007) (citing *In re Laipenicks*, 18 I. & N. Dec. 433, 457 (BIA 1983), *rev’d on other grounds*, 750 F.2d 1427 (9th Cir. 1985)).

⁴⁷ *In re T-Z* at 171.

⁴⁸ H.R. Rep. No. 95-1452, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4700, 4704.

experienced past persecution. These omissions are especially likely to occur if there are no precedents on point regarding the specific harm at issue. For instance, in *Ngengwe v. Mukasey*, which involved the “open issue” of “whether forced marriage constitutes persecution,”⁴⁹ the Eighth Circuit found that the immigration judge had “offered no analysis, and cited no law, on why the choice between forced marriage, death, or paying an unaffordable bride’s price does not constitute persecution.”⁵⁰ Moreover, the immigration judge failed to consider the cumulative significance of the harmful events and entirely failed to consider certain events, including Ngengwe’s assertion that “her in-laws confiscated all of her property and threatened to take her children.”⁵¹ The BIA had also completely failed to consider “the non-physical actions of Ngengwe’s in-laws.”⁵² The court, therefore, remanded the case so that the immigration judge could address in the first instance whether the cumulative harms, including non-physical harms, rose to the level of persecution.⁵³ On remand, the BIA’s decision in *T-Z-* is unlikely to provide much assistance regarding the in-laws’ threats to take away Ngengwe’s children since, as noted above, that decision did nothing to clarify the standard for determining when psychological harm rises to the level of persecution.

The absence of a principled framework for analyzing both physical and nonphysical harm in U.S. asylum law has led to a creeping standard regarding the degree of harm necessary to establish persecution in cases involving interference with women’s sexual and reproductive functions. Part II analyzes this rising bar for persecution with respect to two practices: female genital mutilation and involuntary insertion of an IUD.

⁴⁹ *Ngengwe v. Mukasey*, 543 F.3d 1029, 1036 (8th Cir. 2008).

⁵⁰ *Id.* at 1036–37 (citing *Goa v. Gonzales*, 440 F.3d 62, 70 (2d Cir. 2006) (calling “lifelong, involuntary marriage” persecution), *vacated on procedural grounds by Keisler v. Gao*, 552 U.S. 801 (2007)).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

II. The Rising Bar for Persecution in Cases Involving Sexual and Reproductive Harm

A. Female Genital Mutilation

Female genital mutilation (FGM) “comprises all procedures involving partial or total removal of the external female genitalia, or other injury to the female genital organs, carried out for traditional, cultural or religious reasons.”⁵⁴ As noted above, 100 to 140 million girls and women worldwide are subjected to FGM.⁵⁵ The World Health Organization (WHO) has classified FGM into three basic types: Type I, called clitoridectomy, involves partial or total removal of the clitoris; Type II, called excision, involves removal of the clitoris plus part or all of the labia minora; Type III, called infibulation, involves removal of the labia minora with the labia majora sewn together, covering the urethra and vagina.⁵⁶ Types I and II are the most common forms of the practice worldwide, although Type III dominates in certain countries.⁵⁷ The issue currently emerging in the case law is whether Type I FGM, clitoridectomy, constitutes persecution.

Until recently, there appeared to be a strong consensus among the BIA and the circuit courts that the harm associated with female genital mutilation rose to the level of persecution. Since the BIA issued its 1996 seminal decision in *In re Kasinga*, finding that FGM can constitute persecution,⁵⁸ numerous circuit

⁵⁴ U.N. HIGH COMM’N ON REFUGEES, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO FEMALE GENITAL MUTILATION, ¶ 2 (2009), available at <http://www.unhcr.org/refworld/docid/4a0c28492.html> [hereinafter U.N. HIGH COMM’N ON REFUGEES: GUIDANCE ON FGM].

⁵⁵ WHO: *Female Genital Mutilation*, *supra* note 5.

⁵⁶ WORLD HEALTH ORGANIZATION, FACT SHEET NO. 241 (2010), available at <http://www.who.int/mediacentre/factsheets/fs241/cn/index.html>; see also U.N. HIGH COMM’N ON REFUGEES: GUIDANCE ON FGM, *supra* note 54.

⁵⁷ See UNFPA, *supra* note 8.

⁵⁸ *In re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996) (en banc).

courts have reached the same conclusion.⁵⁹ While these cases note that different types of FGM exist in various countries, the courts did not distinguish between these different types in finding that FGM constitutes persecution.

Recent decisions, however, indicate some disagreement among the circuit courts, as well as between some circuits and the BIA, as to whether *all* forms of FGM amount to persecution. The Ninth, Eighth, and Fourth Circuits have clearly held that all forms of FGM constitute persecution.⁶⁰ While the Second and Sixth Circuits have not explicitly addressed this issue, their decisions on FGM suggest that they would likely reach the same conclusion.⁶¹ The First and Tenth Circuits, on the other hand, have used language indicating that they may not consider all forms of FGM to constitute persecution.⁶²

Moreover, the Ninth Circuit's recent decision in *Benjamin v. Holder*, reviewing an unpublished decision of the BIA, revealed that the BIA had found no past persecution in a case

⁵⁹ See, e.g., *Mohammed v. Gonzales*, 400 F.3d 785, 795 (9th Cir. 2005) (“[T]he range of procedures collectively known as female genital mutilation rises to the level of persecution within the meaning of our asylum law.”); *Barry v. Gonzales*, 445 F.3d 741, 745 (4th Cir. 2006) (“FGM constitutes persecution within the meaning of the Immigration and Nationality Act”); *Niang v. Gonzales*, 422 F.3d 1187, 1197 (10th Cir. 2005) (holding that “FGM constitutes persecution”); *Abay v. Ashcroft*, 368 F.3d 634, 638 (6th Cir. 2004) (“Forced female genital mutilation involves the infliction of grave harm constituting persecution”); *Balogun v. Ashcroft*, 374 F.3d 492, 499 (7th Cir. 2004) (“[T]he Agency does not dispute, at least with any force, that the type of FGM which Ms. Balogun has alleged is ‘persecution.’”); *Hassan v. Gonzales*, 484 F.3d 513, 517 (8th Cir. 2007) (“[W]e now join the growing number of our sister circuits that have considered this issue and concluded that there is ‘no doubt that the range of procedures collectively known as female genital mutilation rises to the level of persecution’”) (citing *Mohammed v. Gonzales*, 400 F.3d 785, 795 (9th Cir.2005)).

⁶⁰ See *Benjamin v. Holder*, 579 F.3d 970, 975 (9th Cir. 2009); *Hassan v. Gonzales*, 484 F.3d 513, 517 (8th Cir. 2007); *Kourouma v. Holder*, 588 F.3d 234, 244 (4th Cir. 2009).

⁶¹ See, e.g., *Abankwah v. I.N.S.*, 185 F.3d 18, 23 (2d Cir. 1999); *Abay v. Ashcroft*, 368 F.3d 634, 638 (6th Cir. 2002).

⁶² See, e.g., *Tourc v. Ashcroft*, 400 F.3d 44, 49 (1st Cir. 2005); *Niang v. Gonzales*, 422 F.3d 1187, 1193 (10th Cir. 2005).

involving Type I FGM (clitoridectomy). Given that all of the BIA's published cases on FGM involve more extreme forms of FGM and that the BIA emphasizes the atrocious nature of the harm in those cases, it remains unclear how the BIA will treat cases of Type I FGM arising outside of the circuits that have explicitly addressed this issue.⁶³ In addition, the BIA and circuit court decisions reveal that immigration judges are not consistently treating FGM, in all its forms, as persecution. After discussing these various decisions, this Article argues that the BIA is applying a higher standard for persecution in cases involving FGM. As in cases involving involuntary insertion of an IUD, it appears that the BIA is demanding a greater degree of

⁶³ If a circuit court decision conflicts with a BIA precedent, the BIA will apply the ruling of the circuit court *only* in cases arising in that circuit, and will apply its own precedent in cases arising in circuits that have not yet addressed the issue or that have taken a position consistent with that of the BIA. Consequently, if various circuits have different legal positions on a particular issue, the BIA applies conflicting legal rules based on the location of the court that initially decided the case.

physical harm than generally required and failing to give proper weight to the nonphysical forms of harm associated with FGM.⁶⁴

1. The BIA's Ambiguous Position On Whether All Forms of FGM Constitute Persecution

In its 1996 groundbreaking decision, *In re Kasinga*, the BIA held that "FGM, as practiced by the Tchamba-Kusuntu

⁶⁴ Numerous studies document the psychological harm associated with FGM. For example, a survey of 264 Egyptian women in Benha City found that "circumcised" women experienced "somatization, anxiety, and phobia" at higher rates than non-circumcised women and had a higher rate of PTSD and memory problems. See A. Elnashar & R. Abdelhady, *The Impact of Female Genital Cutting on Health of Newly Married Women*, 97 INT'L J. GYNECOLOGY & OBSTETRICS 238, 243 (2007). The study further found:

Psychological complications may be submerged deep in the child's subconscious and may trigger behavior disturbances. Women may suffer incompleteness, anxiety, depression, chronic irritability, and frigidity. Many girls and women, traumatized by their experience but with no acceptable means of expressing their fears, suffer in silence.

Id. Other studies corroborate such findings. See, e.g., Alice Behrendt & Steffen Moritz, *Posttraumatic Stress Disorder and Memory Problems After Female Genital Mutilation*, 162 AM. J. PSYCHIATRY 1000, 1001 (2005) (finding that, of forty-seven Senegalese women surveyed who had experienced FGM, "over 90% of the women described feelings of intense fear, helplessness, horror and severe pain," "over 80% were still suffering intrusive re-experiences of their circumcision," and over thirty percent had post-traumatic stress disorder, which is similar to the rate of this disorder among victims of childhood abuse); James Whitehorn, Oyedeji Ayonrinde, & Samantha Maingay, *Female Genital Mutilation: Cultural and Psychological Implications*, 17 SEXUAL & RELATIONSHIP THERAPY 161, 162 (2002) (noting that the focus on the physical harm associated with FGM often detracts from "the often neglected psychological morbidity associated with the practice of FGM"); WORLD HEALTH ORG., *ELIMINATING FEMALE GENITAL MUTILATION: AN INTERAGENCY STATEMENT* 34 (2008) (citing studies showing that FGM leads to "increased likelihood of fear of sexual intercourse, post-traumatic stress disorder, anxiety, depression, and memory loss"); see also Clara Thierfelder, Marcel Tanner & Claudia M. Kessler Bodiang, *Female Genital Mutilation in the Context of Migration: Experience of African Women with the Swiss Health Care System*, 15 EUR. J. PUB. HEALTH 86, 87-88 (2005) (examining "sexual difficulties" and "reduced sensation during sexual intercourse" among women from various countries where FGM is widespread, including Somalia, Ethiopia and Eritrea).

*Tribe of Togo and documented in the record, constitutes persecution.*⁶⁵ The BIA observed:

According to the applicant's testimony, the FGM practiced by her tribe . . . is of an extreme type involving cutting the genitalia with knives, extensive bleeding, and a 40-day recovery period. . . . The background materials confirmed that the FGM practiced in some African countries, such as Togo, is of an extreme nature causing permanent damage, and not just a minor form of genital ritual. . . . The record material establishes that FGM in its extreme forms is a practice in which portions of the female genitalia are cut away. In some cases, the vagina is sutured partially closed. This practice clearly inflicts harm or suffering upon the girl or woman who undergoes it.⁶⁶

Noting that the parties disagreed about "the parameters of FGM as a ground for asylum in future cases," the Board explicitly stated, "we decline to speculate on, or establish rules for, cases that are not before us."⁶⁷ Thus, the Board did not specifically address whether *all* forms of FGM constitute persecution. However, the Board did generally comment:

FGM is extremely painful and at least temporarily incapacitating. It permanently disfigures the female genitalia. FGM exposes the girl or woman to the risk of serious, potentially life-threatening complications. These include, among others, bleeding, infection, urine retention, stress, shock, psychological trauma, and damage to the urethra and anus. It can result in permanent

⁶⁵ *In re Kasinga*, 21 I. & N. Dec. 357, 358 (BIA 1996) (en banc) (emphasis added).

⁶⁶ *Id.* at 361.

⁶⁷ *Id.* at 358.

loss of genital sensation and can adversely affect sexual and erotic functions.⁶⁸

These remarks did not distinguish between different types of FGM, thereby leaving open the possibility—and even suggesting—that less severe forms of FGM also constitute persecution. Subsequent decisions, however, suggest that the BIA's position may be more limited.

In a 2007 decision, *In re A-T*, the BIA considered the case of a woman from Mali who had been subjected to Type II FGM (excision), involving removal of her clitoris and vulva.⁶⁹ The immigration judge had found that the woman did not experience past persecution because the FGM was inflicted when she was a young girl and she did “not even recall” the experience.⁷⁰ On appeal, the BIA did not directly address the issue of past persecution, but assumed *arguendo* that even if the applicant had demonstrated past persecution on account of her membership in a particular social group, she would nevertheless be ineligible

⁶⁸ *Id.* at 361.

⁶⁹ *In re A-T*, 24 I. & N. Dec. 296 (BIA 2007), *vacated and remanded by* Matter of A-T, 24 I. & N. Dec. 617 (BIA 2008); Carrie Acus Love, Note, *Unrepeatable Harms: Female Genital Mutilation and Involuntary Sterilization in U.S. Asylum Law*, 40 COLUM. HUM. RTS. L. REV. 173, 212 (2008) (discussing the facts of A-T that were included in the amicus brief submitted by the American College of Obstetricians and Gynecologists et al.).

⁷⁰ Matter of A-T, 24 I. & N. Dec. 617 (BIA 2008).

for withholding of removal based on her failure to show a well-founded fear of future persecution.⁷¹

In September 2008, the Attorney General vacated the BIA's denial of withholding of removal in *In re A-T*.⁷² On remand, the Department of Homeland Security (DHS) requested that the applicant present evidence "as to why her past FGM rises to the level of persecution, because she does not remember the event and her application alone should not be enough to establish that she views FGM as a persecutory action."⁷³ In denying the DHS's request, the BIA noted that "[t]he deplorable and extremely harmful nature of FGM has been long recognized by this Board and the Federal courts."⁷⁴ Nevertheless, the Board then went on to state:

In this case, the respondent presented unchallenged evidence to establish that she was subject to *a severe form of FGM*. It is difficult to think of a situation, short of a claimant asserting that she did not consider FGM to be persecution, where *the type of*

⁷¹ The immigration judge (IJ) and BIA both focused on whether the applicant was eligible for withholding of removal. They found her ineligible for asylum since she did not apply within one year of entering the United States. For the same reason, they found her ineligible for "humanitarian asylum," which requires a showing of "severe past persecution." In reaching this conclusion, the BIA rejected the Ninth Circuit's "continuing persecution theory." *In re A-T*, 24 I. & N. Dec. at 299–301. While the BIA acknowledged that "FGM is similar to forced sterilization in the sense that it is a harm that is normally performed only once but has ongoing physical and emotional effects," it proceeded to find that FGM fell into "the same category as most other past injuries that rise to the level of persecution, including those that involve some lasting disability, such as the loss of a limb." *Id.* at 300. As discussed below, this finding reflects a failure to understand the myriad ways in which FGM's long-term effects differ from that of a purely physical injury, including its impact on female sexuality, reproductive function, autonomy, and social and cultural behavior.

⁷² *Matter of A-T*, 25 I. & N. Dec. at 621.

⁷³ *Matter of A-T*, 25 I. & N. Dec. 4, 10 (BIA 2009).

⁷⁴ *Id.*

FGM suffered by the respondent, at any age, would not rise to the level of persecution.⁷⁵

While this statement confirms that the Board considers severe forms of FGM to be persecution, it simultaneously suggests that other types of FGM may not rise to the level of persecution; otherwise, the BIA could have used much broader language in rejecting the government's request.

Another published decision, *Matter of S-A-K- and H-A-H-*, likewise raises questions about how the BIA views the severity of harm in FGM cases. *S-A-K- and H-A-H-* involved a mother and daughter from Somalia, who, like *Kasinga*, have undergone Type III FGM (infibulation).⁷⁶ They filed a timely application for asylum, and one of the issues before the BIA was whether they qualified for humanitarian asylum, which may be granted based on a showing of *severe* past persecution, even if the applicants do not demonstrate a well-founded fear of future persecution. The BIA described the horrendous facts as follows:

The daughter in this case testified that she was forcibly circumcised by women brought home by her father when she was 9 years old, in a procedure similar to that suffered by her mother. The procedure was done without anesthesia and, although she recovered after 2 weeks, she has continued to have difficulty urinating and has been unable to menstruate. The aggravated nature of the procedure performed on the daughter is also apparent in that, because her vaginal opening was sewn shut with a thorn, the man she was given to in marriage, who ultimately raped her, could not penetrate her for sexual intercourse. He was only able to rape her by cutting her open, causing her to bleed for many days.

⁷⁵ *Id.*

⁷⁶ See *Matter of S-A-K- & H-A-H-*, 24 I. & N. Dec. 464, 465 (BIA 2008).

The mother, who is the lead respondent, likewise testified that she suffered great pain following her forced circumcision, particularly during child birth, and that she almost died during the actual procedure because of infection. During her earlier pregnancies, her vaginal opening was sewn shut after being opened to allow for sexual intercourse and child birth. She was sewn shut approximately five times, and two of her children died during childbirth. Of her six daughters, the three oldest have been circumcised, and she was beaten for opposing the procedure.⁷⁷

Stressing that the past persecution had taken the form of female genital mutilation *with aggravated circumstances*, the BIA found severe past persecution justifying a grant of humanitarian asylum.⁷⁸ The BIA emphasized that the applicants had suffered “an atrocious form of persecution that results in continuing physical harm and discomfort” and therefore should not be expected to return to Somalia.⁷⁹

In basing its holding on a finding of FGM with aggravated circumstances, the decision suggests that less extreme facts may not constitute “severe” past persecution meriting a humanitarian grant of asylum. In other words, the BIA’s reasoning makes it unclear whether Type III FGM alone—without the related rapes, life-threatening infections, multiple reinfibulations, and stillbirths—can constitute severe past persecution. If not, then the BIA’s decision also casts doubt on whether it would treat Type I FGM, “mere” clitoridectomy, as persecution.

These published BIA decisions, read together with the Ninth Circuit’s opinion in *Benyamin*, where the BIA found no

⁷⁷ *Id.*

⁷⁸ *Id.* at 464.

⁷⁹ *Id.*

past persecution in a case involving Type I FGM,⁸⁰ strongly suggest that the BIA does not consider all forms of FGM to rise to the level of persecution. The language used by certain circuit courts amplifies any ambiguity by the BIA on this issue.

2. Seeds of a Circuit Court Split on Whether All Forms of FGM Constitute Persecution?

In March 2005, the Ninth Circuit issued its decision in *Mohammed v. Gonzales*, which addressed the situation of a young woman from Somalia whose medical report indicated that she had “experienced Type I [FGM] in its complete form”⁸¹ by “having [her] clitoris cut off with scissors at a young age.”⁸² The BIA’s adjudication of her case had been “sloppy”⁸³ and “characterized by a series of errors.”⁸⁴ The Ninth Circuit also described one of the BIA’s decisions as “incomplete”⁸⁵ and “nonsensical,”⁸⁶ noting that it gave no indication that the BIA had even considered “the significant documentary evidence demonstrating Mohammed’s past genital mutilation.”⁸⁷ In reversing the BIA’s decision, the Ninth Circuit expressed “no doubt that the range of procedures collectively known as female genital mutilation rises to the level of persecution within the meaning of our asylum law.”⁸⁸ The court stressed the severity of

⁸⁰ See *Benyamin v. Holder*, 579 F.3d 970, 972 (9th Cir. 2009); see also discussion *infra* Part II.A.2; notes 90–104 and accompanying text *infra*.

⁸¹ *Mohammed v. Gonzales*, 400 F.3d 785, 795 n.12 (9th Cir. 2005).

⁸² *Id.* at 790.

⁸³ *Id.* at 792.

⁸⁴ *Id.* at 791.

⁸⁵ *Id.* at 792.

⁸⁶ *Id.*

⁸⁷ *Mohammed*, 400 F.3d at 792.

⁸⁸ *Id.* at 795.

FGM by treating it as a “‘permanent and continuing’ act of persecution.”⁸⁹

More recently, in *Benyamin v. Holder*, the Ninth Circuit reaffirmed that all forms of FGM constitute persecution.⁹⁰ There, the Court specifically reviewed the BIA’s finding that the “Type I” FGM inflicted on the applicant’s daughter, Annisa, when she was a five-day-old infant did not amount to persecution. The applicant’s stepmother had “ordered Annisa’s circumcision without the couple’s consent” while she was still in the hospital after her birth.⁹¹ As a result of that procedure, Annisa “continually experienced pain . . . most notably when she washe[d] her genitals.”⁹² “These complications were at their worst when Annisa was four years old, but were still ongoing as of the time of the hearing before the IJ.”⁹³ The IJ had recognized that the procedure performed on Annisa was “harm,” but distinguished it from the type of harm in *Kasinga*, observing that “the physical harm of the operation appear[s] to be minimal” in Indonesia, according to the State Department report.⁹⁴

On appeal, the BIA agreed that the procedure inflicted on Annisa “did not rise to the level of persecution, as it was less severe than the procedure described in *Kasinga* and ‘FGM as practiced in Indonesia involves minimal short-term pain, suffering, and complications’.”⁹⁵ In reaching this conclusion, “[t]he BIA highlighted a particular section of *Kasinga*, in which the Board stated that “[t]he FGM practiced by her tribe . . . is of an extreme type involving cutting the genitalia with knives, extensive bleeding, and a 40 day recovery period,’ and is of an

⁸⁹ *Id.* at 800.

⁹⁰ *Benyamin v. Holder*, 579 F.3d 970 (9th Cir. 2009).

⁹¹ *Id.* at 973.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 973, 975 (emphasis added).

⁹⁵ *Id.* at 975.

'[e]xtreme nature causing permanent damage, and not just a minor form of genital ritual'.⁹⁶

In reviewing this determination, the court found that the BIA's reasoning was "fundamentally flawed and contrary to Ninth Circuit and BIA precedent."⁹⁷ The court stressed that, sitting en banc in *Abebe v. Gonzales*, it had considered it "well-settled that FGM constitutes persecution sufficient to warrant a grant of asylum."⁹⁸ The court also quoted its decision in *Mohammed v. Gonzales*, which involved the least severe kind of FGM, as noted above.⁹⁹ Accordingly, the court found that "the BIA's attempt to parse the distinction between different forms of female genital mutilation is not only a threat to the rights of women in a civilized society, but also runs counter to our circuit precedent."¹⁰⁰

The Ninth Circuit went on to observe that the IJ's suggestion that "there is no persecution because of minimal physical harm ignores both the involuntary nature of the procedure and the very real follow-on consequences," specifically noting the severe physical complications that can result from even the "least drastic form" of FGM.¹⁰¹ The court confirmed that it would "not tolerate such line-drawing when it comes to this practice, which the Department of State deems as 'threaten[ing] the health and violat[ing] the human rights of women'.¹⁰² Using equally strong language, the court underscored how the BIA's "attempt to distinguish *Kasinga*

⁹⁶ *Benjamin*, 579 F.3d at 975.

⁹⁷ *Id.*

⁹⁸ *Id.* at 974 (quoting *Abebe v. Gonzales*, 432 F.3d 1037, 1042 (9th Cir. 2005) (en banc)).

⁹⁹ *Id.* at 976.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Benjamin*, 579 F.3d at 976.

belie[d] what *Kasinga* actually stands for.”¹⁰³ The court pointed out that *Kasinga* “does not create a floor for the requisite level of physical invasion necessary to render female genital mutilation persecution under the law,” and that “[a]ny suggestion otherwise is a betrayal of the central holding of *Kasinga*.”¹⁰⁴

In *Hassan v. Gonzales*, the Eighth Circuit agreed with the Ninth Circuit that “there is ‘no doubt that the range of procedures collectively known as female genital mutilation rises to the level of persecution within the meaning of our asylum law’.”¹⁰⁵ Moreover, in *Kourouma v. Holder*, the Fourth Circuit stressed that all forms of FGM constitute persecution.¹⁰⁶ There, the court considered the case of a woman from Guinea who had been denied asylum by the IJ and BIA based on an adverse credibility determination, despite corroborating evidence establishing that she had been subjected to FGM. Although the evidence in the record did not clearly indicate which type of FGM the petitioner had suffered,¹⁰⁷ the court apparently did not consider such evidence necessary, reasoning:

It is clear under our past precedent that *any of the methods used to conduct female genital mutilation, including clitoridectomy, excision or infibulations, would satisfy the requirements for past persecution* This Circuit has found that female genital mutilation constitutes past persecution, not because of any particular method of

¹⁰³ *Id.* at 976.

¹⁰⁴ *Id.* at 977.

¹⁰⁵ *Hassan v. Gonzales*, 484 F.3d 513, 517 (8th Cir. 2007) (quoting *Mohammed*, 400 F.3d at 795). In *Hassan*, the petitioner had been subjected to Type III FGM, which the court described as “by far the most invasive and painful form of the procedure.” *Id.* at n.1.

¹⁰⁶ *Kourouma v. Holder*, 588 F.3d 234, 245 (4th Cir. 2009).

¹⁰⁷ The evidence included two doctor’s letters, one of which indicated that Kourouma’s gynecological exam revealed “‘scattered linear scarring approximately 0.5–1 cm on upper extremity,’” and the second of which succinctly verified that Kourouma “‘had been circumcised.’” *Id.* at 238.

conducting it, but rather because of the serious mental and physical harm it inflicts on the women who endure it. . . . Thus, if Kourouma can demonstrate that she was subject to female genital mutilation *in any form*, she has met her burden to prove past persecution.¹⁰⁸

Reversing the adverse credibility finding, the court found that Kourouma had suffered past persecution.¹⁰⁹

Thus, the Ninth, Eighth, and Fourth Circuits have clearly held that all forms of FGM constitute persecution. While other circuits have not yet addressed this issue head-on, the Second and Sixth Circuits have both used language indicating that they would treat all forms of FGM as persecution. In *Abankwah v. INS*, the Second Circuit noted that “FGM is the collective name given to a series of surgical operations, involving the removal of some or all of the external genitalia,”¹¹⁰ quoted at length from *Kasinga* regarding the physical and psychological consequences of FGM, and stressed that “[t]he practice of FGM has been internationally recognized as a violation of women’s and female children’s rights,” as well as “criminalized under federal law.”¹¹¹ Similarly, in *Abay v. Ashcroft*, the Sixth Circuit recognized that “[f]orced female genital mutilation involves the infliction of grave harm constituting persecution,” quoting the same language from *Kasinga* and making the same observations about FGM as the court in *Abankwah*.¹¹² Judge Sutton’s concurrence in *Abay*, however, seems to question whether all forms of FGM constitute persecution, as it specifically notes that “the types of FGM

¹⁰⁸ *Id.* at 244.

¹⁰⁹ *Id.* at 245.

¹¹⁰ *Abankwah v. I.N.S.*, 185 F.3d 18 (2d Cir. 1999).

¹¹¹ *Id.* at 23. In *Abankwah*, it was “not disputed” that “FGM involves the infliction of grave harm constituting persecution.” *Id.*; see also *Bah v. Mukasey*, 529 F.3d 99, 112, n.1 (2d Cir. 2008) (quoting the same language from *Kasinga* and noting that the government did not dispute that the Type III form of FGM experienced by the petitioner, which the court described as “by far the worst kind,” could constitute persecution).

¹¹² *Abay v. Ashcroft*, 368 F.3d 634, 638 (6th Cir. 2002).

practiced in Ethiopia are neither uniform in nature nor uniformly debilitating to a woman's physical and psychological health."¹¹³

The decisions of the First and Tenth Circuits, on the other hand, suggest that these courts may not consider all forms of FGM to constitute persecution. In *Toure v. Ashcroft*, the First Circuit noted that "FGM may constitute persecution *under some circumstances*,"¹¹⁴ without any elaboration. In *Niang v. Holder*, the Tenth Circuit quoted the BIA's underlying decision as stating, "*we have not held that all instances of FGM will constitute past persecution*."¹¹⁵ In that case, the applicant's description of the facts surrounding her FGM, involving a physical attack by her family, was found not to be credible. However, it was clear that she had experienced past FGM. Indeed, a medical doctor, whose credibility was not questioned, testified that the applicant's "normal anatomy . . . had been obliterated essentially to the extent that her ability to engage in normal sexual intercourse was virtually impossible," that she would probably not be able to conceive children naturally, and that she would not be able to deliver children vaginally.¹¹⁶ While the BIA acknowledged that the applicant had undergone FGM and had "scarring," it nevertheless declined to find that all instances of FGM constitute past persecution and specifically found no past persecution in this case due to the "incredible testimony."¹¹⁷

Recognizing the flaw in the BIA's reasoning, the Tenth Circuit vacated the finding of no past persecution, noting that "Ms. Niang's claim of past persecution [did] not depend entirely on her account of the attack by her family," that it was "undisputed that she suffered FGM," and that "the injuries

¹¹³ *Id.* at, 644 (Sutton, J., concurring).

¹¹⁴ *Toure v. Ashcroft*, 400 F.3d 44, 49 (1st Cir. 2005) (citing *In re Kasinga*, 21 I. & N. Dec. at 358) (emphasis added).

¹¹⁵ *Niang v. Gonzales*, 422 F.3d 1187, 1193 (10th Cir. 2005) (emphasis added).

¹¹⁶ *Id.* at 1192.

¹¹⁷ *Id.* at 1193.

described by Dr. Wilson—her scarring, inability to engage in normal sexual relations, and inability to bear children naturally—would certainly be sufficiently serious to qualify her FGM as persecution.”¹¹⁸ The court therefore remanded the case for the BIA to determine whether Ms. Niang suffered persecution in the form of FGM as a result of the tribal membership, a critical issue that the BIA had never addressed.¹¹⁹ While the court’s decision to remand the case was proper, its discussion of past persecution, which focuses on the “sufficiently serious” nature of the FGM suffered by Ms. Niang, suggests that the court agreed with the BIA’s position that not all instances of FGM amount to persecution; the court merely found that in this particular situation involving extreme harm, the BIA had erred in finding no past persecution.

The Seventh Circuit has yet to address this issue. In *Agbor v. Gonzales*, where the Seventh Circuit vacated the BIA’s finding that a woman from Cameroon did not have a well-founded fear of future persecution, there did not appear to be a dispute regarding whether the type of FGM that she feared rose to the level of persecution.¹²⁰ The court noted that in the Southern Province, where the petitioner lived, “FGM is still common in its most brutal form, infibulation.”¹²¹ Likewise, in *Balogun v. Ashcroft*, the BIA “[did] not dispute, at least with any force, that the type of FGM which Ms. Balogun [] alleged is ‘persecution’.”¹²² Thus, it remains to be seen how several of the circuits will address cases involving Type I FGM. Their position may well depend on the position of the BIA, which has not

¹¹⁸ *Id.* at 1201.

¹¹⁹ *Id.*

¹²⁰ *Agbor v. Gonzales*, 487 F.3d 499, 503 (7th Cir. 2007). The BIA gave the following reasons for finding the petitioner’s fear objectively unreasonable: (1) FGM is not widely practiced in Cameroon; (2) FGM in Cameroon is usually performed on pre-pubescent girls, not married adult women, and is mainly practiced among Muslims; and (3) the government of Cameroon officially opposes FGM. *Id.* The court rejected each of these reasons. *Id.* at 503–04.

¹²¹ *Id.*

¹²² *Balogun v. Ashcroft*, 374 F.3d 492, 499 (7th Cir. 2004). In *Balogun*, the court did not describe the type of FGM that the petitioner had suffered.

directly addressed whether Type I FGM constitutes persecution in a published decision. As discussed above, however, the BIA's published decisions on other types of FGM contain language that casts doubt on whether it considers Type I FGM to be persecution.

3. Analysis of FGM Cases

The cases discussed above indicate that the BIA and some circuit courts appear to require serious bodily injury for physical harm to rise to the level of persecution when the harm at issue involves women's sexual and reproductive functions. Instead of comparing the harm in a given case to some objective standard for persecution, the BIA is comparing it to the most extreme form of the harm; thus, the BIA is erroneously comparing Type I FGM to Type III FGM, just as it compares involuntary insertion of an IUD to forced sterilization (discussed in Part II.B below), which distorts the analysis of whether the harm is serious enough to constitute persecution.

One explanation for this type of distortion is the heuristic principle of "anchoring."¹²³ Heuristics are cognitive shortcuts that help us solve complex problems by reducing them to simpler judgments.¹²⁴ Anchoring describes "the tendency of judgments to be anchored in initially presented values."¹²⁵ When an anchor leads to the systemic displacement of judgments *towards* the anchor, this is known as an "assimilation effect," whereas the displacement of judgments *away* from the anchor is

¹²³ Amos Tversky & Daniel Kahneman, Introduction, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 14 (Daniel Kahneman, Paul Slovic, & Amos Tversky eds., 1982).

¹²⁴*Id.* at 3.

¹²⁵ Paul Slovic, Baruch Fischhoff, & Sarah Lichtenstein, *Facts Versus Fears: Understanding Perceived Risk*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 481 (Daniel Kahneman, Paul Slovic, & Amos Tversky eds., 1982).

called a “contrast effect.”¹²⁶ Social psychological research has shown that when the anchor is an extreme example of a category, contrast effects emerge.¹²⁷ In fact, an extreme anchor produces contrast effects regardless of whether the event to be judged is ambiguous or unambiguous.¹²⁸ When an anchor is moderate, on the other hand, assimilation tends to occur.¹²⁹ Thus, the more extreme the anchor, the less likely it is that we will judge another related event to fall within the same category.

A seminal precedent like *Kasinga* serves as an anchor for assessing persecution in subsequent FGM cases, as it represents the initial (and most salient) example of a particular category of harm. Since *Kasinga* involved infibulation, an extreme form of FGM, we can expect contrast effects, rather than assimilation effects, to occur when judges assess other FGM cases involving less extreme forms of the practice. In other words, there appears to be a cognitive explanation for why various types of FGM may not fall within the same category of harm in the minds of

¹²⁶ Paul M. Herr, Steven J. Sherman, & Russell H. Fazio, *On the Consequences of Priming: Assimilation and Contrast Effects*, 19 J. EXPERIMENTAL & SOC. PSYCHOL. 323, 325–26 (1983); see also Barry Markovsky, *Anchoring Justice*, 51 SOC. PSYCHOL. Q. 213 (1988) (noting that studies have demonstrated contrast effects in a variety of contexts, including “estimates of hue, brightness, loudness, esthetic and ethical values, intelligence, tonal pitch, numbers of objects and severity of crimes”).

¹²⁷ Herr, Sherman & Fazio, *supra* note 126, at 327, 335; cf. Anders Kaye, *Schematic Psychology and Criminal Responsibility*, 83 ST. JOHN’S L. REV. 565, 585 (2009) (“[I]f the primed concept is ‘extreme’ . . . the primed concept may come to function as a ‘standard of comparison’ against which ambiguous stimuli pale.”) (citing GORDON B. MOSKOWITZ, *SOCIAL COGNITION: UNDERSTANDING SELF AND OTHERS* 418–20 (2005)).

¹²⁸ Herr, Sherman & Fazio, *supra* note 126, at 335.

¹²⁹ *Id.*; see also Jerry Suls & Ladd Wheeler, *Psychological Magnetism: A Brief History of Assimilation and Contrast in Psychology*, in *ASSIMILATION AND CONTRAST IN SOCIAL PSYCHOLOGY* 28 (Diederik A. Stapel & Jerry Suls eds., 2007) (“If people are primed with extreme exemplars (e.g. Hitler, Atilla the Hun), contrast effects typically result, but with moderate exemplars as primes, assimilation is more common.”).

judges.¹³⁰ Moreover, this cognitive bias may take place automatically or implicitly, and need not be based on explicit, consciously reasoned comparisons.¹³¹ Even judges who do not intend to discriminate against women or minimize forms of harm that they uniquely suffer experience automatic cognitive biases that may skew their judgments, especially in the absence of clear standards, to keep them more consciously connected to their analysis of persecution.¹³²

Cognitive bias may also help explain the BIA's failure to give proper weight to nonphysical forms of harm. We tend to overestimate the frequency of vivid events and underestimate the frequency of events that are harder to visualize.¹³³ This effect is

¹³⁰ Various scholars, both within and outside the legal field, have discussed how contrast effects may influence legal decision-making. See, e.g., Mark Kelman, Yuval Rottenstreich & Amos Tversky, *Context-Dependence in Legal Decision Making*, 25 J. LEGAL STUD. 287, 301 (1996) (discussing how "the decisions of judges or juries may be prone to . . . contrast effects"); MARK KELMAN, *THE HEURISTICS DEBATE* 29 (2011) (providing examples of how, in the view of heuristics and bias researches, contrast effects can influence legal outcomes). The influence of contrast effects on legal judgments is hardly surprising given their direct impact on a wide variety of decisions. See Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1143 (2010) (noting various areas where psychologists and behavioral economists have found contrast effects, including consumer good purchases, employment decisions, elective medical procedures, and presidential elections).

¹³¹ Herr, Sherman & Fazio, *supra* note 126, at 338 ("this study has shown that persons may automatically, without awareness, use recently activated categories as standards"); see also Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001) ("Under certain circumstances judges rely on heuristics that can lead to systematically erroneous judgments").

¹³² See Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 8–9 (2007) (discussing a "dual-process" model of judging whereby "judges make intuitive judgments" that they "might (or might not) override with deliberation"); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1222 (2009) (showing, through a study involving one-hundred and thirty-three judges, that implicit bias can influence decisionmaking but that such biases can also be overcome). For an analysis of how implicit biases may influence decision-making specifically in the context of immigration court, see generally Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417 (2011).

¹³³ HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 98–99 (Thomas Gilovich, Dale W. Griffin & Daniel Kahneman eds., 2002).

due to the *availability heuristic*, a cognitive shortcut whereby we estimate the frequency of events based on how easily specific examples come to mind.¹³⁴ Vivid events are easier to recall, so we assume they occur more frequently than events that are difficult to imagine. Consequently, judges are likely to underestimate the likelihood of abstract, nonphysical harm, such as psychological harm and violations of autonomy and privacy, which are difficult to visualize, especially when compared to the vivid imagery of the physical mutilations involved in FGM.¹³⁵

In addition to having different degrees of vividness, physical and nonphysical harm represent different informal categories that we construct in our minds. For example, when asked to evaluate the severity of harm suffered by a child whose pajamas caught fire while he was playing with matches, subjects will spontaneously compare the injury to other types of household accidents, but “other harms, such as the destruction of a reputation, or a drop in the population of dolphins, will not come to mind when the case of the burned child is considered.”¹³⁶ As Cass Sunstein and his colleagues explain, “comparisons across categories of harms are particularly difficult because they are not easily described in the same language. . . . The difficulties of cross-category comparisons inevitably lead to instability in the judgments of individuals, and to an impairment of consensus, relative to within-category comparisons.”¹³⁷ While asylum adjudicators are supposed to consider the cumulative harm that an applicant has experienced, both physical and nonphysical, the difficulties involved in finding language to describe both types of harm may contribute to omitting discussion of nonphysical harm altogether.

¹³⁴ *Id.*

¹³⁵ In one study, subjects provide higher estimates regarding their likelihood to contract a certain disease if the symptoms are concrete and easy to imagine, such as muscle aches and headaches, than when the symptoms are vague and hard to imagine, such as inflammation or a malfunctioning nervous system. Thus, even when considering purely physical symptoms, those that are easy to imagine seem more likely to occur. *Id.*

¹³⁶ Cass R. Sunstein, Dnel Khaneman, David Schkade & Ilana Ritov, *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1177 (2002).

¹³⁷ *Id.* at 1173.

Moreover, Sunstein and his colleagues point out that physical injury is more prominent than nonphysical injury.¹³⁸ They explain that prominence may be difficult to define, but it is a well-understood concept in the psychological literature. In an experiment, Sunstein and his colleagues found that subjects awarded higher punitive damages in a case involving egregious fraud (financial harm) than in a products liability case involving personal injury (physical harm) when they evaluated each case in isolation, but they gave higher awards to the personal injury case when they evaluated both cases together.¹³⁹ In other words, the financial harm appeared less severe when compared to the physical harm. Again, what we see in the asylum context is that the prominence of physical harm in the analysis of persecution not only makes nonphysical harm appear less severe, but may actually lead adjudicators to ignore this form of harm altogether.¹⁴⁰

B. Involuntary Insertion of an Intrauterine Device (IUD)

The same issues that emerge in the analysis of persecution in FGM cases appear in the BIA's analysis of the harm related to involuntary IUDs. Specifically, the BIA has applied a higher standard for physical harm and has failed to consider nonphysical harm. Under U.S. asylum law, it is clear that forced abortions and forced sterilizations constitute persecution. In fact, these acts constitute "persecution *per se*," since Congress specifically amended the Immigration and Nationality Act (INA)

¹³⁸ *Id.*

¹³⁹ *Id.*; see also Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933, 945-46 (2006) (discussing Sunstein et al.'s experiments and arguing that such contrast effects are "far more likely to affect judges, who see only one case at a time, than legislatures, who can make broader comparisons").

¹⁴⁰ Consequently, although Sunstein and his colleagues note that a cross-category comparison should "in most cases" improve "the quality of judgment" by restoring differences between categories of harms that differ in prominence, this reasoning does not seem to apply to the asylum context. Sunstein et al., *supra* note 136, at 1178. It may be that judges should award more damages in personal injury cases and less money in financial fraud cases, but the issue of damages is distinct from the question of how to evaluate physical and nonphysical harm in analyzing persecution.

to so provide.¹⁴¹ What has not been clear, however, is whether involuntary insertion of an IUD, with or without forced gynecological exams, constitutes persecution.

An IUD is a long acting contraceptive device, made of plastic and sometimes copper, that is placed inside a woman's uterus.¹⁴² Two-thirds of the world's IUD users are in China, where it is the most widely used form of birth control, surpassing sterilization.¹⁴³ In October 2008, the BIA issued its decision in *Matter of M-F-W-*, holding that involuntary insertion of an IUD, without aggravating circumstances, does not rise to the level of persecution. Prior to that decision, several circuit courts had published opinions that left open the door to the possibility that involuntary insertion of an IUD could constitute persecution. This section describes the legal landscape before *Matter of M-F-W-*, analyzes the BIA's reasoning in that case, and discusses its aftermath.

1. The Open Door Before the BIA's Decision in *Matter of M-F-W- & L-G-*

Before *Matter of M-F-W-*, several circuits recognized the possibility that involuntary insertion of an IUD could constitute persecution. The Seventh Circuit, for example, remanded two

¹⁴¹ Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996. Section 601(a) of IIRIRA amended section 101(a)(42) of the Immigration and Nationality Act to provide:

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.

8 U.S.C.A. § 1101(a)(42) (West 2011).

¹⁴² RICHARD EVAN JONES & KRISTIN H. LÓPEZ, *HUMAN REPRODUCTIVE BIOLOGY* 394 (3d. ed., 2006).

¹⁴³ *Id.*

cases to the BIA specifically so that it could address this issue. In *Lin v. Ashcroft*, where the Seventh Circuit reversed based on an adverse credibility determination, it specifically noted that “[t]he IJ did not determine whether Lin’s three involuntary IUD insertions and mandatory checkups could constitute persecution.”¹⁴⁴ Subsequently, in *Zheng v. Gonzales*, the court remanded a case where the BIA had merely “assumed that the involuntary insertion of IUDs constitutes persecution pursuant to a ‘coercive population control program’” in order for the BIA to definitively decide the issue.¹⁴⁵ Similarly, in *Yang v. U.S. Attorney General*, the Eleventh Circuit remanded a case to the BIA so that it could determine, in the first instance, whether the applicant had experienced past persecution on account of resistance to China’s coercive population control program.¹⁴⁶ In that case, the applicant alleged that she was forcibly taken to the hospital by five or six officials and was subjected to two involuntary IUD procedures.¹⁴⁷

The Fourth Circuit, which is the only circuit to squarely address a claim based on this issue, found no past persecution in *Li v. Gonzales*, where the alleged persecution was based on “the single event of insertion of the IUD” in a medically routine manner not involving force or abuse.¹⁴⁸ Significantly, the petitioner in that case “challenge[d] only the insertion of the IUD as mistreatment constituting persecution,” so the court’s holding was “correspondingly narrow.”¹⁴⁹ The court specifically noted that

Li [did] not argue that the harms and injuries associated with compelled IUD usage—such as the continuing invasion of her most intimate

¹⁴⁴ *Lin v. Ashcroft*, 395 F.3d 748, 757 (7th Cir. 2004).

¹⁴⁵ *Zheng v. Gonzales*, 409 F.3d 804, 806 (7th Cir. 2005) (emphasis added).

¹⁴⁶ *Yang v. U.S. Att’y. Gen.*, 418 F.3d 1198, 1204-05 (11th Cir. 2005)

¹⁴⁷ *Id.* at 1204.

¹⁴⁸ *Li v. Gonzales*, 405 F.3d at 179.

¹⁴⁹ *Id.*

bodily privacy and the potentially indefinite disabling of her reproductive capability—when taken together with the flagrant violation of personal privacy involved in the actual insertion of the IUD, might collectively rise to the level of “persecution.”¹⁵⁰

Thus, the court explicitly left open the possibility that, had different arguments been raised on appeal, it may have reached the opposite conclusion. Indeed, in forcefully setting forth the arguments that the petitioner *could* have made, the court appeared supportive of the idea that the collective harms associated with involuntary insertion of an IUD may rise to the level of persecution.

In 2007, the Second Circuit remanded *Zheng v. Gonzales* to the BIA so that it could articulate, in a published opinion, “its position concerning whether and under what conditions the forced insertion of an IUD constitutes persecution.”¹⁵¹ The court remarked that “the BIA ha[d] not yet opined on this issue in a published, precedential opinion, thus depriving the bench, the bar, and potential asylum applicants of guidance concerning whether and how they might approach the issue. Indeed, it appears that the BIA has taken contrary positions on this issue.”¹⁵² The court explained that “[i]n the instant case, the BIA held that the involuntary insertion of an IUD, unaccompanied by any ‘significant degree of pain or restriction’ did not constitute persecution within the meaning of the INA,” but in another non-precedential decision arising in the Seventh Circuit, mentioned above, it had assumed that the involuntary insertions of IUDs constitute persecution.¹⁵³ In remanding the case, the court specifically noted that it was “unclear from the BIA’s opinion if it considered whether emotional harm resulting from the unwanted touching attendant to the forcibly insertion of an IUD

¹⁵⁰ *Id.*

¹⁵¹ *Zheng*, 497 F.3d at 203–04.

¹⁵² *Id.* at 203.

¹⁵³ *Id.* (quoting the BIA decision in the instant case and referencing the Seventh Circuit’s decision in *Zheng*, 409 F.3d at 811 (7th Cir. 2005)).

might constitute persecution within the meaning of the BIA,” indicating that the BIA should address that issue in its opinion as well.¹⁵⁴ In response to this directive from the Second Circuit, the BIA issued its published opinion in *M-F-W-*, discussed below.

¹⁵⁴ *Id.* at 204, 204 n.1.

2. The BIA's Decision In *In re M-F-W- & L-G- Requiring "Aggravating Circumstances" for Involuntary Insertion of the IUD to Constitute Persecution*

In 2008, the BIA responded to the Second Circuit's decision in *Zheng with In re M-F-W- & L-G-*.¹⁵⁵ There, the BIA found that "examples of routine acts implementing China's family planning policy that are lacking in harm sufficient to constitute persecution include reinsertion of an IUD after the removal of an IUD" and "regularly required gynecological exams."¹⁵⁶ The Board reasoned that "[w]hile having an IUD inserted involuntarily is certainly intrusive and hinders a person's ability to control procreation, the temporary nature of its effects persuades us that such a procedure does not constitute persecution *per se*."¹⁵⁷ The BIA distinguished insertion of an IUD from forced abortion and sterilization, which, as noted above, automatically provide a basis for asylum under the statute,¹⁵⁸ reasoning that "using an IUD does not generally have permanent effects, other than the loss of time during which to conceive."¹⁵⁹ The BIA further found that, "under normal circumstances, the IUD user does not lose a child or the permanent opportunity to have a child."¹⁶⁰ Based on this reasoning, the BIA concluded that "simply requiring a woman to use an IUD, and other more routine methods of China's implementation of its family planning policy,

¹⁵⁵ Matter of M-F-W- & L-G-, 24 I. & N. Dec. 633.

¹⁵⁶ *Id.* at 641.

¹⁵⁷ *Id.* at 640 (emphasis added).

¹⁵⁸ See *supra* note 141 and accompanying text.

¹⁵⁹ Matter of M-F-W- & L-G-, 24 I. & N. Dec. at 640.

¹⁶⁰ *Id.*

do not generally rise to the level of harm required to establish persecution.”¹⁶¹ The Board clarified, “We do not intend to imply that having an IUD inserted can never be found to be persecution. However, to rise to the level of harm necessary to constitute ‘persecution,’ the insertion of an IUD must involve aggravating circumstances.”¹⁶²

While the BIA did not explain or define aggravating circumstances, it referenced its decisions in two prior unpublished cases, which, read together, provide some sense of what this term means. First, the BIA discussed the decision that the Second Circuit reviewed in *Zheng v. Gonzales*, where the BIA had found “involuntary insertion of an IUD, unaccompanied by any ‘significant degree of pain or restriction’ did not constitute persecution within the meaning of the [Act].”¹⁶³ In *Zheng*, the BIA had noted that the IUD is “a method of birth control . . . commonly used in this country as well as many other parts of the world.”¹⁶⁴ The widespread use of IUDs “compelled the BIA to find ‘nothing so inherently egregious about the procedure to lead us to conclude that the applicant was persecuted’.”¹⁶⁵ When the BIA explained its *Zheng* decision in *M-F-W-*, it offered a somewhat different rationalization, stating that it had been “relatively simple . . . to decide that past persecution had not been established,” because “[t]he alien had had an IUD inserted and waited 11 years to have it removed,” so “the alien did not appear to resist the procedure.”¹⁶⁶

Second, the BIA discussed the decision that the Seventh Circuit reviewed in *Zheng v. Gonzales* (a different case with the same name as the Second Circuit case), where the BIA had assumed that the involuntary insertion of IUDs constitutes

¹⁶¹ *Id.*

¹⁶² *Id.* at 642.

¹⁶³ *Id.* at 639 (emphasis added).

¹⁶⁴ *Zheng*, 497 F.3d at 202 (2d Cir. 2007) (quoting the BIA’s decision).

¹⁶⁵ *Id.*

¹⁶⁶ Matter of *M-F-W- & L-G-*, 24 I. & N. Dec. at 640.

persecution pursuant to a “coercive population control program.”¹⁶⁷ The BIA claimed that the different results in the Second and Seventh Circuit cases did not reflect “an inconsistent application of what we find to be persecution” but rather stemmed from differences in “the facts of each case.”¹⁶⁸ The BIA went on to explain that in the Seventh Circuit case:

[T]he alien was *repeatedly* required to submit to involuntary insertion of IUDs. The first insertion resulted in an *infection, bleeding, headaches, and fatigue* before the alien had the IUD removed by a private doctor. IUDs were then inserted on two more occasions, and the alien had them removed. She fled for the United States after the third IUD was removed. The alien also provided evidence that she and her husband were identified as “Birth Planning Targets” by local family planning officials.¹⁶⁹

The BIA’s discussion, with apparent approval, of its decisions in these cases arising in the Second and Seventh Circuits suggests that the “aggravated circumstances” mentioned in *M-F-W* require significant pain, physical complications such as infection and bleeding, and/or repeated harm, such as multiple reinsertions of an IUD. In focusing on “aggravated circumstances,” the BIA failed to mention some of the more routine physical side effects of IUDs. For example, “the average monthly menstrual flow in IUD users is more than in non IUD users,” and “[a]bdominal cramps, especially in the first few weeks after insertion, are common.”¹⁷⁰ Nor did the BIA note that, historically, widely used IUDs were later discovered to cause problems such as pelvic infections during pregnancies. When severe, “pelvic infection can take the form of *pelvic inflammatory disease*, with the danger of scarring the uterus and oviducts, resulting in

¹⁶⁷ *Id.* (quoting *Zheng*, 409 F.3d 804, 806 (7th Cir. 2005)).

¹⁶⁸ *Id.* at 639–40.

¹⁶⁹ *Id.* (citing *Zheng*, 409 F.3d at 810 (emphasis added)).

¹⁷⁰ JONES & LÓPEZ, *supra* note 142, at 394.

infertility.”¹⁷¹ Thus, significant physical harm may occur long after the insertion of the IUD. The BIA also totally ignored nonphysical aspects of the harm, as discussed further below.

3. Analysis of *In re M-F-W- & L-G-*

The BIA’s decision in *M-F-W-* is problematic for several reasons. First, insofar as it requires significant pain, bodily injury or similar aggravating circumstances for harm to amount to persecution, it deviates from the general understanding of this term. None of the definitions of persecution include such factors,¹⁷² and some circuit courts have explicitly rejected any such requirement.¹⁷³ The Seventh Circuit, for example, has “previously rejected attempts by the BIA to impose on asylum applicants the additional burden of establishing permanent or serious injuries as a result of their persecution.”¹⁷⁴ In fact, over a decade ago, the Seventh Circuit sharply criticized the BIA for applying “the wrong standard” in requiring an asylum applicant to have serious injuries in order to demonstrate persecution.¹⁷⁵ Likewise, the Ninth Circuit reversed an immigration judge’s decision finding that the applicant’s “electrocution with a rod was not sufficient to present a case of persecution, because she did not report any resulting ‘medical attention or sustained injury’.”¹⁷⁶ The court held that an individual may establish persecution “even where there are no long-term effects and the

¹⁷¹ *Id.*

¹⁷² See *supra* notes 25–26.

¹⁷³ See *Quan v. Gonzales*, 428 F.3d 883, 888–89 (9th Cir. 2005) (“Using an electrically-charged baton on a prisoner . . . may constitute persecution, even where there are not long-term effects and the prisoner does not seek medical attention.”); *Begzatowski*, 278, F.3d at 655 (7th Cir. 2002).

¹⁷⁴ *Begzatowski*, 278 F.3d at 670 (citing *Asani v. I.N.S.*, 154 F.3d 719, 722–23 (7th Cir. 1998)).

¹⁷⁵ *Asani*, 154 F.3d at 722–23 (reversing the BIA’s finding of no past persecution where an applicant was repeatedly detained and had his teeth knocked out as a result of being beaten by the police).

¹⁷⁶ *Quan*, 428 F.3d at 888.

[applicant] does not seek medical attention.”¹⁷⁷ Despite such decisions by the circuit courts, the BIA failed to explain how its new standard requiring aggravating circumstances fits with existing case law and whether it is unique to cases involving forced IUD insertion.

Second, although the IUD is placed inside a woman’s uterus and interferes with her reproductive functions, it is unclear whether the BIA considered it a form of *physical* harm. By citing its decision in *Matter of T-Z-*, a case that addresses when *nonphysical* harm amounts to persecution, the BIA indicated, rather surprisingly, that it may not even consider involuntary IUD insertion to be a form of physical harm.¹⁷⁸ Such reasoning is at odds with the Fourth Circuit’s statement that an involuntary IUD involves the “continuing invasion of [a woman’s] most intimate bodily privacy and the potentially indefinite disabling of her reproductive capability.”¹⁷⁹

Third, despite citing *T-Z-*, and despite the Second Circuit’s specific notation that the BIA should consider the emotional harm involved in forced IUD insertion in determining whether the harm rises to the level of persecution,¹⁸⁰ the BIA failed to take emotional harm into account. The BIA’s actual analysis in *M-F-W-* focused exclusively on the physical consequences of IUD insertion, completely ignoring the harmful psychological effects of an involuntary procedure that involves placing a mechanical device inside a woman’s uterus and results in her inability to make reproductive choices or bear children for an indefinite amount of time, not to mention the emotional harm involved in the forced gynecological exams that accompany the procedure. In *Li v. Ashcroft*, where the Ninth Circuit found that an aggressive forced pregnancy examination amounted to persecution, the court noted that the petitioner described her experience as “rape-like,” and further opined that, “[g]iven her refusal to consent to the physically invasive and emotionally

¹⁷⁷ *Id.*

¹⁷⁸ *Matter of M-F-W- & L-G-*, 24 I. & N. Dec. at 641.

¹⁷⁹ *Li*, 405 F.3d at 179 (4th Cir. 2005).

¹⁸⁰ *Zheng*, 497 F.3d at 204, & 204 n.1.

traumatic examination of her ‘private parts,’ this analogy is certainly not far-fetched.”¹⁸¹ Rape has long been considered a form of persecution, due not only to the physical harm, but also the “severe and long-lasting” psychological harm that it causes.¹⁸² Moreover, in cases involving forced sterilization, courts have stressed the “emotionally painful consequences” caused by being “denied a procreative life” and “the society and comfort of the child or children that might . . . have been born.”¹⁸³ In light of the reasoning in these relevant cases, it was a particularly glaring oversight for the BIA to fail to consider the emotional effects of involuntary IUD insertion.

Fourth, the BIA overlooked or minimized the involuntary nature of the procedure and the way that lack of consent prevents women from making their own decisions about their sexual and reproductive functions. In *Fatin v. INS*, the Third Circuit noted that “governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual’s deepest beliefs” may amount to persecution.¹⁸⁴ In fact, the court went further, stating that “[s]uch conduct might be regarded as a form of ‘torture.’”¹⁸⁵ The court suggested that for at least some women, “complying with Iran’s gender-specific laws would be so profoundly abhorrent that it could aptly be called persecution.”¹⁸⁶ In failing

¹⁸¹ *Li*, 356 F.3d at 1158 & 1158 n.4.

¹⁸² See, e.g., *Lopez-Galarza v. I.N.S.*, 99 F.3d 954, 962 (9th Cir. 1996); see also U.N. HIGH COMM’N FOR REFUGEES, GUIDELINES ON INTERNATIONAL PROTECTION: GENDER-RELATED PERSECUTION WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 9 (2002), available at <http://www.unhcr.org/refworld/pdfid/3d36f1c64.pdf> (“There is no doubt that rape and other forms of gender related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking, are acts which inflict severe pain and suffering—both mental and physical—and which have been used as forms of persecution, whether perpetrated by State or private actors.”).

¹⁸³ *Qu v. Gonzales*, 399 F.3d 1195, 1202 (9th Cir. 2005).

¹⁸⁴ *Fatin v. I.N.S.*, 12 F.3d 1233, 1242 (3d Cir. 1993).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

to mention deprivation of the freedom to make reproductive choices, the BIA overlooked another important aspect of the harm experienced by women subjected to forced IUDs. Thus, the BIA's decision in *M-F-W-* both raised the bar for the level of physical harm required to establish persecution and failed to analyze nonphysical forms of harm.

4. The Legal Landscape After Matter of M-F-W-

Since the BIA issued its decision in *M-F-W-*, only the Second and Third Circuits have had an opportunity to address the BIA's interpretation of persecution in that case. The Second Circuit has explicitly upheld the aggravated circumstances test, finding it to be reasonable and entitled to deference under *Chevron*,¹⁸⁷ and the Third Circuit has implicitly accepted this test by applying it in cases where it was not challenged. Recent precedential decisions from both circuits, however, highlight serious problems and inconsistencies with the BIA's application of this test that should caution other circuits against finding it reasonable.

¹⁸⁷ The principles of deference established by *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) apply to the statutory scheme of the Immigration and Nationality Act, 8 U.S.C.A. § § 1101–1503 (West 2011). See *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (stating that the BIA, which is vested with the Attorney General's discretion and authority in the cases before it, "should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication'" (quoting *Cardoza-Fonseca*, 480 U.S. at 448–49). *Chevron* provides that when "the statute is silent or ambiguous with respect to the specific issue," the reviewing court should ask "whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. Deference under *Chevron* does not apply, however, when an agency's interpretation of a statutory term conflicts with positions that it has taken in the past. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (holding that an "unexplained inconsistency is . . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice"). Some scholars have aptly questioned whether the concept of *Chevron* deference makes sense in the context of asylum cases interpreting the definition of a refugee (which includes the term "persecution"), as this definition stems from an international treaty. See Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 *DUKE L. J.* 1059 (2011) (arguing that the doctrine of deference should not be applied where the agency's interpretation conflicts with international law).

a. **The Second Circuit's Decisions in *Xia Fan Huang and Mei Fun Wong***

In *Huang*, the Second Circuit issued its first published decision in a case challenging the BIA's decision in *M-F-W-* as an impermissible interpretation of the INA.¹⁸⁸ There, the petitioner argued that *M-F-W-* was wrongly decided and not entitled to *Chevron* deference.¹⁸⁹ Specifically, she argued that "the cumulative effect of having an IUD inserted and regularly examined constitutes sterilization."¹⁹⁰ In addition, she argued that "her forced IUD insertion, an invasive procedure that left a device in her body, constitutes persecution because it is a 'flagrant violation of fundamental rights, including the right to reproductive choice and bodily integrity'."¹⁹¹ Alternatively, she argued that "even if her forced IUD insertion does not constitute persecution, the cumulative effect of the insertion plus invasive quarterly check-ups does rise to the level of persecution."¹⁹²

Applying the two-step inquiry set forth in *Chevron*, the court first asked whether Congress had directly addressed the precise issue at hand.¹⁹³ Finding that it had not done so, the court moved to the second step, which required it to determine if the agency's interpretation was a permissible construction of the statute. With respect to the petitioner's first argument, the Second Circuit found that "the BIA's conclusion that an involuntary IUD insertion is not an involuntary sterilization is permissible," noting that it was "reasonable" for the BIA to distinguish the IUD as a "temporary measure," whereas "sterilization makes one permanently incapable of having children."¹⁹⁴

¹⁸⁸ *Xia Fan Huang v. Holder*, 591 F.3d 124 (2d Cir. 2010).

¹⁸⁹ *Id.* at 129 (citing *Chevron*, 467 U.S. at 842–44).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* (quoting petitioner's brief).

¹⁹² *Id.*

¹⁹³ *Id.*; see also *Chevron*, 467 U.S. at 842–44 (1984).

¹⁹⁴ *Xia Fan Huang*, 591 F.3d at 129.

With regard to the petitioner's second argument challenging the BIA's determination that involuntary IUD insertion, or involuntary IUD insertion plus mandatory gynecological check-ups, does not constitute persecution, the court found that it did not need to reach this issue because the petitioner "[did] not challenge the BIA's conclusion that she failed to establish that the insertion of the IUD was or would be on account of her resistance to China's family planning policy."¹⁹⁵ Nor did she challenge the BIA's determination that the persecution at issue must be the result of resistance to the family planning policy in order to fall under the terms of statute. In other words, since the petitioner had failed to argue that she had satisfied the nexus requirement, which is a necessary element for obtaining asylum, the court had an independent basis for dismissing the appeal and did not need to address whether the harm that she suffered rose to the level of persecution.

In a more recent decision, *Mei Fun Wong*, however, the Second Circuit *did* reach the issue and found *no error* in the BIA's interpretation that an involuntary IUD must be accompanied by aggravating factors to constitute persecution.¹⁹⁶ While the Second Circuit properly noted some of the nonphysical harms associated with forced insertion of an IUD, including that it "involves a serious violation of personal privacy and deprives a woman of autonomy in making decisions about whether to bear a child,"¹⁹⁷ it found that the BIA had taken such harm into consideration in *M-F-W-* by "acknowledging that 'having an IUD inserted is certainly intrusive and hinders a person's ability to control procreation'."¹⁹⁸ The language used by the Second Circuit in describing the nonphysical harm is, however, strikingly different than the language quoted from *M-F-W-*, as the former indicates a serious rights violation whereas the latter suggests mere inconvenience. Nevertheless, after noting "[t]he difficulty with identifying the boundaries of such

¹⁹⁵ *Xia Fan Huang*, 591 F.3d at 130.

¹⁹⁶ *Mei Fun Wong v. Holder*, 633 F.3d 64, 76 (2d Cir. 2011).

¹⁹⁷ *Id.* at 72 (citing *Qiao Hua Li v. Gonzales*, 405 F.3d 171, 179 (4th Cir. 2005)).

¹⁹⁸ *Id.* (citing *Matter of M-F-W- & L-G-*, 24 I. & N. Dec. at 640).

as general concept [as] . . . persecution,”¹⁹⁹ the Second Circuit simply deferred to the BIA’s interpretation of ambiguous language in the statute, finding it reasonable under the two-step *Chevron* analysis.²⁰⁰

While the Second Circuit upheld the aggravating circumstances test in *Mei Fun Wong*, it found that the BIA had failed to explain adequately how it had applied that test to the particular facts of the case.²⁰¹ Specifically, the court noted that the BIA “had failed to indicate what, if any, weight, it assigned to the involuntary IUD insertion itself in the aggravating circumstances that were found to constitute persecution.”²⁰² The Court pointed out that “[b]y emphasizing that the detention preceding the IUD insertion involved no beating or injury and the IUD itself caused only ‘discomfort,’ the BIA’s decision [in *M-F-W*] might be read to demand proof of aggravating circumstances that would, by themselves, constitute persecution.”²⁰³ The court was “not certain, however, that the BIA intended to accord the involuntary procedure at issue—IUD insertion—*no* weight in its persecution determination”²⁰⁴

Urging the BIA that “it might well conclude that when such a procedure is involuntary, it bears some weight in a persecution determination,” the court noted cases recognizing in other contexts, such as rape, that “an act that may be voluntarily undertaken can become persecution where consent is absent.”²⁰⁵ Oddly, the court did not see any irony in having to point this out to the BIA, nor did it acknowledge any inconsistency between the BIA’s supposed recognition of the violations of privacy and autonomy and its apparent failure to attribute *any* harm to the

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 73.

²⁰¹ *Id.* at 75.

²⁰² *Mei Fun Wong*, 633 F.3d at 76.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

involuntary IUD insertion itself. Indeed, the BIA's decision in Wong's case undermines the notion that the BIA recognizes the serious nonphysical harms associated with forced IUDs, as it found that the facts merely "*paint a picture of discomfort* resulting from the routine implementation of the family planning policy, rather than persecution".²⁰⁶ Although Wong was detained for three days preceding the forced insertion of the IUD and forced to pay a fine, the BIA found that she "experienced no persecutory harm, as might have been the case if she had also been beaten or injured," emphasizing its myopic focus on physical injury in assessing persecution.²⁰⁷

The Second Circuit's decision in *Mei Fun Wong* highlights the practical difficulties in applying the BIA's aggravated circumstances test, even if it is accepted in theory, as well as more general inconsistencies in defining persecution. For example, the court noted that the same harm that was found insufficiently serious to constitute persecution in *Wong* was deemed persecution in another case, *Chao Qun Jiang*.²⁰⁸ In *Jiang*, a guard who committed the same acts of harm that Wong suffered was barred from asylum for engaging in "persecution of others," although the agency has not drawn any distinction in the definition of persecution when applied to the perpetrator as opposed to the victim.²⁰⁹ The Second Circuit reasoned that it could not conduct any meaningful review without "some explanation of how the two decisions can be reconciled."²¹⁰

The background context against which the Second Circuit renders its decision in *Wong* may help explain why it deferred to the BIA's aggravated circumstances test under *Chevron*, despite stressing the inconsistencies and inherent difficulties in applying

²⁰⁶ *Id.* at 75–76 (emphasis added).

²⁰⁷ *Id.* at 76.

²⁰⁸ *Mei Fun Wong*, 633 F.3d at 77 (citing *Chao Qun Jiang v. U.S. Bureau of Citizenship and Immigration Servs.*, 520 F.3d 132 (2d Cir. 2008)).

²⁰⁹ *Id.* (citing *Jiang*, 520 F.3d at 135 n.5).

²¹⁰ *Id.*

that approach.²¹¹ The court begins by subtly invoking a culturally relativistic view of human rights. In stating that “other governments’ restraints on freedom strike us as oppressive” because “few societies have valued individual liberty as strongly as our own or erected such high legal barriers to government intrusion on personal freedom,”²¹² the court suggests that any rights violations we associate with forced IUD usage (such as violations of privacy and autonomy) may be due to our own cultural values, and thereby implies that individuals from other cultures that do not share these values may not experience forced IUD usage as oppressive in the same way that we would.

The court then explicitly invokes the perennial fear of opening the floodgates, noting that China is “a country of more than 1.3 billion people,” so the “potential applicants for asylum in the United States” fleeing from the one-child policy could “easily number in the millions.”²¹³ As a matter of legal principle, of course the number of potential asylum applicants fleeing a certain form of harm is irrelevant to determining whether that type of harm constitutes persecution. Lastly, the court inflames fears of asylum fraud, commenting on “the ease with which opposition to the state’s population policy might be invoked to support asylum claims by large numbers of Chinese nationals whose real reason for seeking entry into the United States is the historic motivation for generations of immigrants: the search for better economic opportunities.”²¹⁴ As discussed in Part III *infra*, embracing a human rights approach to defining persecution would help avoid the influence of these irrelevant yet emotionally and politically compelling factors in analyzing the concept of persecution.

²¹¹ As noted above, when an agency’s interpretations are inconsistent, *Chevron* deference is not appropriate. See *supra* note 187 (discussing *Brand X*, 545 U.S. at 981).

²¹² *Mei Fun Wong*, 633 F.3d at 69 (citing *Zhou Yun Zhang v. I.N.S.*, 386 F.3d 66, 70 (2d Cir. 2004)).

²¹³ *Id.*

²¹⁴ *Id.*

b. The Third Circuit's Decision in *Fei Mei Cheng*

The Third Circuit has also recently issued a precedent decision regarding involuntary insertion of an IUD, which implicitly accepted the “aggravated circumstances” test but found that the BIA had erred in finding no past persecution.²¹⁵ The facts of *Fei Mei Cheng* once again underscore the BIA's failure to consider cumulative nonphysical forms of harm, including severe psychological harm and economic deprivation, in assessing persecution. *Fei Mei Cheng* lived in China's Fujian Province and was not permitted to marry her boyfriend, Chen, because she was under twenty-three years old.²¹⁶ After Cheng became pregnant, officials threatened to terminate her pregnancy by force.²¹⁷ When she resisted these threats by fleeing to another town, officials came to her parents' home in the middle of the night and threatened to seize her parents' family farm and truck, the source of the family's livelihood, if Cheng did not abort her pregnancy.²¹⁸ After Cheng continued to defy these threats and gave birth to her child, officials not only confiscated her family's farm but also prevented all of her family members from working on it. They also ordered that Cheng and her boyfriend be sterilized, and they detained Chen after he became involved in an altercation with a government official.²¹⁹

While Chen was detained, officials escalated the pressure on Cheng, threatening to take her baby from her and to detain her boyfriend for months if she did not comply with the sterilization order.²²⁰ The officials then “sweetened the deal” by telling Cheng she could keep the baby and that her boyfriend

²¹⁵ *Fei Mei Cheng v. U.S. Att'y Gen.*, 623 F.3d 175 (3d Cir. 2010). It does not appear that the petitioner in this case challenged the aggravated circumstances test. Rather, she challenged how it applied to her case.

²¹⁶ *Id.* at 179.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

would be released and her parents' farm and truck would be returned to them if she simply agreed to insertion of an IUD.²²¹ Under such enormous pressure, Cheng acceded to the IUD.²²² She was immediately "dragged" to a minivan and driven to a medical clinic, where she was forced to have the IUD inserted, a process that she found "very painful."²²³

After insertion of the IUD, she was "required to submit to gynecological examinations every three months in order to verify the IUD's presence."²²⁴ Missing an appointment resulted in the assessment of a fine that Cheng "could not afford to pay."²²⁵ When Cheng's daughter became old enough to enter daycare, the township initially forbade her from attending and then required Cheng to pay twice the tuition due to her violation of the family planning policy. Before fleeing to the United States, Cheng became terrified after learning that her neighbor was forcibly sterilized for attempting to have a baby in secret. Her neighbor was "treated 'like a pig'—her lands and legs were tied, she was not given sufficient anesthesia, and she screamed throughout the operation."²²⁶

The immigration judge found no past persecution in Cheng's case but initially granted asylum based on a well-founded fear of future persecution.²²⁷ After the case was remanded by the BIA, for consideration of *M-F-W-*, the IJ denied asylum and the BIA affirmed in an unpublished decision, relying on *M-F-W-*.²²⁸ The BIA reasoned that the insertion of Cheng's IUD "did not occur under sufficiently aggravating

²²¹ *Fei Mei Cheng*, 623 F.3d at 179.

²²² *Id.* at 179–180.

²²³ *Id.* at 180.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Fei Mei Cheng*, 623 F.3d at 180–81.

²²⁸ *Id.* at 181–82.

circumstances to constitute persecution,” despite officials’ repeated threats to sterilize her and her boyfriend, the confiscation of her parents farm resulting in the loss of their livelihood, her boyfriend’s detention, and the threats to take away her child, all forms of intense psychological harm distinct from the harm caused by the insertion of the IUD itself.²²⁹

On appeal, the Third Circuit, like the Second Circuit, gave deference to the BIA’s interpretation of the term sterilization as being distinct from involuntary insertion of an IUD, finding it reasonable under *Chevron’s* two-step analysis.²³⁰ However, the Third Circuit rejected the BIA’s finding that Cheng had not experienced persecution. The Third Circuit implicitly accepted the aggravated circumstances test by applying it (the decision does not indicate that Cheng challenged the test itself), but found no substantial evidence supporting the BIA’s finding that there were no aggravating circumstances, agreeing with Cheng that the BIA had missed the numerous forms of harm she had suffered.²³¹ Specifically, the Third Circuit found that the Board (1) failed to consider the serious threats leveled at Cheng, including officials’ threats to take away her child and detain her boyfriend for months; (2) failed to mention her credible testimony that “the IUD insertion procedure was performed in a hurried and improper manner that caused her extreme pain”; and (3) “did not adequately address the significance of the financial hardships imposed upon Cheng in direct response to her resistance to the family planning officials’ orders.”²³² The Third Circuit’s decision stressed the case law finding that serious threats and economic deprivation could constitute persecution.²³³ Thus, the BIA’s decision in Cheng’s case reflects both of the serious errors discussed in this Article: the failure to consider nonphysical forms of harm and the application of a higher standard for physical harm that involves women’s sexual and

²²⁹ *Id.* at 182.

²³⁰ *Id.* at 184–88.

²³¹ *Id.* at 191–93.

²³² *Id.* at 193–94.

²³³ *Fei Mei Cheng*, 623 F.3d at 193–94.

reproductive functions. Luckily for Cheng, the Third Circuit caught these errors.

Both the Second Circuit's decision in *Wong* and the Third Circuit's decision in *Cheng* flag serious problems with the way that the BIA applies the aggravated circumstances test. If the BIA cannot apply its own test properly and consistently in a way that does not conflict with federal precedents, one must question whether the test itself is clear enough to set forth a reasonable legal standard. So far, the Second Circuit's decision in *Wong* is the only published decision analyzing the aggravated circumstances test under *Chevron*, although the Third and Fourth Circuits appear to have adopted this test implicitly without analysis.²³⁴ As of the date of this writing, it remains an open question whether the other circuit courts will defer to the BIA's interpretation of persecution in *M-F-W*.

Due to the numerous inconsistencies likely to flow from *M-F-W*, and the case's profound mischaracterization of the concept of persecution, courts should find that the aggravated circumstances test is not a reasonable interpretation and does not deserve deference. Asylum applicants cannot count on the circuit courts to catch errors since only eight percent of decisions by immigration judges are appealed to the BIA,²³⁵ and only about twenty-seven percent of the BIA's decisions are appealed to the federal courts,²³⁶ which means that the chance of an IJ's decision

²³⁴ *Id.*; Huang v. U.S. Att'y Gen., 620 F.3d 372, 380 n.5 (3d Cir. 2010) ("Mandatory birth control measures short of abortion or sterilization, such as insertion of an IUD or required gynecological screenings, do not, on their own, rise to the level of persecution and therefore cannot be the sole support for an award of asylum."); Ni v. Holder, 613 F.3d 415, 430 n.12 (4th Cir. 2010) ("[T]he BIA held that requiring a woman to use an IUD does not amount to persecution absent aggravating circumstances. . . . We have since adopted that conclusion in an unpublished opinion.").

²³⁵ EOIR FY 2010, *supra* note 15.

²³⁶ See Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1658 (2010) (noting that 8,890 petitions for review of BIA decisions were filed with the circuit courts in 2009); EOIR FY 2010, *supra* note 15, (stating that the BIA completed about 33,102 cases in 2009). Combining these figures, the percent of BIA decisions appealed to the circuit courts appears to be approximately twenty-seven percent.

being reviewed by a federal judge is only around two percent. Given this low rate of judicial review, it makes no sense to adopt a test that will be extremely difficult for immigration judges to apply and that has already led to inconsistent and legally unsound results, as the decisions discussed above demonstrate. The BIA and circuit courts must find a more legally sound way to analyze persecution. As discussed below, a human rights approach to analyzing persecution provides a more principled pathway than an ad hoc test like aggravated circumstances, which applies only to certain types of harm.

III. An International Human Rights Approach to Analyzing Sexual and Reproductive Harm

U.S. adjudicators of asylum claims are clearly struggling to determine when harm rises to the level of persecution. The two examples discussed above, FGM and involuntary IUDs, suggest that adjudicators are especially hesitant to find that sexual and reproductive harm rise to the level of persecution when they are widespread and when even more extreme forms of the harm exist in the world. Such factors, however, are irrelevant to a proper legal analysis of persecution. In this section, the Article argues that U.S. asylum law would benefit from a more objective, norm-based definition of persecution and that international human rights law provides the appropriate framework. Specifically, this section contends that an international human rights framework would help ensure the consistent analysis of all types of harm, including forms of harm directed primarily at women, and would highlight the nonphysical types of harm that adjudicators currently tend to ignore, especially violations of intangible rights that go to the core of human dignity.

Applying a human rights analysis to the particular issues at hand, this section demonstrates that Type I FGM and involuntary insertion of an IUD both constitute persecution without any “aggravating factors,” and that such factors are not required for FGM to constitute “severe past persecution.” Finally, this section concludes that without a more comprehensive and coherent analysis of persecution, gender-related asylum claims in particular will be wrongfully denied.

A. Conceptualizing Persecution As a Serious Violation of Human Rights

The dominant approach in the international community when analyzing persecution is to use international human rights law as the relevant framework.²³⁷ This approach makes sense because the UN Convention on the Status of Refugees is an international treaty and should have an international meaning.²³⁸ Moreover, the text, context, and purpose of the Refugee Convention support using human rights as the relevant standard.²³⁹ In particular, the Preamble highlights the Universal Declaration of Human Rights (UDHR) and the enjoyment of “fundamental rights and freedoms without discrimination.”²⁴⁰

²³⁷ JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 108 (1991) (“The dominant view . . . is that refugee law ought to concern itself with actions which deny human dignity in any key way.”); FOSTER, *supra* note 31, at 75 (stating that “the human rights framework for interpreting key aspects of the refugee definition” has become “the dominant approach in refugee status determination”).

²³⁸ FOSTER, *supra* note 31, at 49–50.

²³⁹ *Id.* at 36–50; Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT]. Since the VCLT postdates the Refugee Convention, it is not strictly applicable. *Id.* at art. 4 (“[T]he Convention applies only to treaties which are concluded by States after the entry into force of the present Convention.”). However, the VCLT “nevertheless constitutes an authoritative statement of customary public international law on the interpretation of treaties.” Refugee Appeal No.74665/03, slip op. para. 45 (Refugee Status App. Auth. July 7, 2004) (N.Z.); *see also* Mora v. New York, 524 F.3d 183, 196 n.19 (2d. Cir. 2008) (“Although the United States has not ratified the Vienna Convention on the Law of Treaties, our Court relies upon it ‘as an authoritative guide to the customary international law of treaties,’ insofar as it reflects actual state practices. . . . The Department of State considers the Vienna Convention on the Law of Treaties an authoritative guide to current treaty law and practice.”) (citations omitted).

²⁴⁰ 1951 Convention, *supra* note 1. The permissible sources set forth in Article 31(2) of the VCLT, *supra* note 239, for examining the context of a treaty include the Preamble; *see also* UNHCR, *HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS* ¶ 60 (1992) (recognizing the significance of the preamble); *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (scr. A) at 16 (1975) (“the preamble is generally very useful for the determination of the ‘object’ and ‘purpose’ of the instrument to be construed.”).

Scholars have proposed various ways of using international human rights law to analyze the concept of persecution. James Hathaway's influential work defines persecution as a "sustained or systemic violation of basic human rights demonstrative of a failure of state protection."²⁴¹ He proposes the following hierarchy of obligation in analyzing persecution. First, a violation of rights set forth in UDHR and codified in the International Covenant on Civil and Political Rights (ICCPR), for which no derogation is permitted, almost always constitutes persecution.²⁴² Rights in this category that are often relevant to the analysis of sexual and reproductive harm include the right to be free from torture and cruel, inhuman, or degrading treatment, as well as freedom of thought, conscience, and religion.²⁴³ Second, a violation of rights set forth in the UDHR and codified in the ICCPR, from which derogation is permitted during a public emergency, generally constitutes persecution unless the derogation is strictly required and applied in a nondiscriminatory way.²⁴⁴ Relevant rights in this category include protection of

²⁴¹ HATHAWAY, *supra* note 237, at 104–05.

²⁴² *Id.* at 109.

²⁴³ See International Covenant on Civil and Political Rights art. 4(2), Dec. 16, 1996, 999 U.N.T.S. 171 [hereinafter ICCPR] ("No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision."). Article 7 of the ICCPR pertains to torture and cruel, inhuman or degrading treatment, while Article 18 pertains to freedom of thought, conscience and religion.

²⁴⁴ HATHAWAY, *supra* note 237, at 109; ICCPR, *supra* note 243, at art. 4(1) ("In time of *public emergency which threatens the life of the nation and the existence of which is officially proclaimed*, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent *strictly required by the exigencies of the situation*, provided that such measures are not inconsistent with their other obligations under international law and *do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*" (emphasis added)).

personal and family privacy and integrity, as well as the right to equal protection.²⁴⁵

Third, a violation of rights set forth in the UDHR and codified in the International Covenant of Economic, Social and Cultural Rights (ICESCR) constitutes persecution if the state ignores these interests despite the ability to respond or acts in a discriminatory way.²⁴⁶ Unlike the ICCPR, the ICESCR provides for “progressive realization” of rights, requiring states to take steps to the “maximum of available resources.”²⁴⁷ Relevant rights in this category include the right to health and protection of the family.²⁴⁸ Finally, the fourth category includes violations of rights in the UDHR that are not codified in either the ICCPR or ICESCR, which generally do not constitute persecution because these rights are not subject to binding legal obligations.²⁴⁹ Michelle Foster proposes a modification to Hathaway’s approach, focusing on the *core and periphery* of each right rather than the concept of derogation.²⁵⁰ She argues that adjudicators of asylum claims should first ask whether there is a human rights violation and, if so, determine the seriousness of the violation by looking to see if the core of the right has been violated.

²⁴⁵ ICCPR, *supra* note 243, at art. 17(1) (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.”) and art. 26 (“[T]he law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

²⁴⁶ HATHAWAY, *supra* note 237, at 110–11; International Covenant of Economic, Social, and Cultural Rights, opened for signature Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

²⁴⁷ ICESCR, *supra* note 246, at art. 2(1).

²⁴⁸ *Id.* art. 10 (“The widest possible protection and assistance should be accorded to the family. . .”); *id.* art. 12 (protecting “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”).

²⁴⁹ HATHAWAY, *supra* note 237, at 111.

²⁵⁰ FOSTER, *supra* note 31, at 201–13.

An objection that some may make to the human rights approach is that the U.S. has not ratified several of the major human rights treaties, and that it has ratified the ICCPR subject to various reservations. However, the United States' failure to ratify those treaties does not mean that the treaties cannot serve as the point of reference for interpreting another treaty that the United States has ratified, namely the 1951 Refugee Convention. The issue is not whether the U.S. or any other country has binding obligations under the human rights treaties, but whether these treaties provide appropriate guidance for interpreting the Refugee Convention. "Even Justice Scalia, generally a stalwart critic of applying foreign authority in the constitutional context, acknowledges the utility of foreign precedent when the Court interprets treaties."²⁵¹ It seems especially appropriate to use an international human rights framework in evaluating asylum cases related to gender since gender-based persecution entered U.S. law through this type of human rights analysis. As Deborah Anker has explained, it was the advent of gender issues that pioneered the human rights approach.²⁵² Indeed, many circuit courts have already acknowledged that the practice of FGM is internationally recognized as a violation of the rights of women

²⁵¹ Steven Arrigg Koh, "Respectful Consideration" After *Sanchez-Llamas v. Oregon: Why the Supreme Court Owes More to the International Court of Justice*, 93 CORNELL L. REV. 243, 249 (2007) (citing *Olympic Airways v. Husain*, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting) ("We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties.")).

²⁵² Anker, *supra* note 3, at 138.

and girls.²⁵³ Courts also routinely cite the UNHCR Handbook, which links persecution to a breach of human rights.²⁵⁴

B. Applying An International Human Rights Law Analysis To Sexual and Reproductive Harm

Sexual and reproductive autonomy represents “[o]ne of the most important fronts in the struggle for women’s human rights,” as well as one of “the most challenging issues for human rights defenders.”²⁵⁵ These issues remains so challenging, in part, due to “widespread deference to cultural and religious values when it comes to issues of sexuality and women’s control over their reproductive choices.”²⁵⁶ Defenders of women’s sexual and reproductive rights seek not only to end gender-based violence, but also to affirm “an emancipatory vision of human rights, one which sees bodily and sexual integrity as integral to human flourishing, well-being and dignity as freedom of

²⁵³ *Abay v. Ashcroft*, 368 F.3d 634, 638 (6th Cir. 2004) (citing U.N. Comm. on the Elimination of Discrimination Against Women, CEDAW General Recommendation No. 14: Female Circumcision, ¶ 438, U.N. DOC. A/45/38 (1990); Declaration on the Elimination of Violence Against Women art. 2(a), G.A. Res. 48/104, U.N. DOC. A/RES/48/104 (Dec. 20, 1993) [hereinafter DEVAW] (including female genital mutilation as an example of violence covered by the resolution); Traditional or Customary Practices Affecting the Health of Women and Girls, G.A. Res. 56/128, U.N. Doc. A/RES/56/128 (Jan. 30, 2002). (reaffirming that female genital mutilation “constitutes a definite form of violence against women and girls and a serious violation of their human rights”)); *Mohammed*, 400 F.3d at 795 (“The practice has been internationally recognized as a violation of the rights of women and girls.”).

²⁵⁴ U.N. HIGH COMM’N FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, ¶ 51, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1992) (“[A] threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights—for the same reasons—would also constitute persecution.”).

²⁵⁵ *Defenders of Sexual and Reproductive Rights*, AMNESTY INT’L (Nov. 10, 2007), <http://www.amnesty.org/cn/human-rights-defenders/issues/challenges/srr-defenders>.

²⁵⁶ *Id.*

conscience or belief. Indeed, autonomy of one's intimate, affective and family life is itself an issue of conscience."²⁵⁷

Gathering in Cairo in 1994, one-hundred and eighty nations signed the International Conference on Population and Development Action Plan, a historic agreement that set forth numerous principles on women's rights. This was the first time that an international document clearly stated that women had the right to determine their own reproduction.²⁵⁸ It was also "the first major UN document that defined women as independent sexual beings, not merely child-bearers or mothers."²⁵⁹ Since then, numerous treaties and declarations have reaffirmed women's rights to sexual and reproductive autonomy. As discussed below, both FGM and involuntary IUDs, which restrict and control women's sexuality and reproductive capacity, constitute serious violations of women's human rights and therefore rise to the level of persecution.

1. Applying a Human Rights Analysis to FGM

If we apply an international human rights analysis to the issue of FGM, it becomes clear that all types of FGM constitute persecution. The United Nations Human Rights Committee, which is charged with interpreting and monitoring states' compliance with the ICCPR, has found that FGM violates Article 7's prohibition on torture and cruel, inhuman, or

²⁵⁷ *Id.*

²⁵⁸ Report of the International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, *Principles*, princ. 4, U.N. Doc. A/CONF.171/13, Annex ch. II (Oct. 18, 1994).

²⁵⁹ Kavita N. Ramdas, President of the Global Fund for Women, Op-Ed., *Why Women's Reproductive Freedom Ensures Our Survival*, INTER PRESS SERV., Jan. 8, 2010, available at <http://ipsnews.net/news.asp?idnews=49913>.

degrading treatment,²⁶⁰ as well as Article 3 and Article 24, which provide for the equal treatment of men and women and the

²⁶⁰ U.N. Human Rights Comm., General Comments Adopted by the Human Rights Committee Under Article 40, Paragraph 4 of the International Covenant on Civil and Political Rights: General Comment No. 28: Equality of Rights Between Men and Women (article 3), ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000); *see also* U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee: Uganda, ¶ 10, U.N. Doc. CCPR/CO/80/UGA (May 4, 2004); U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee: Mali, ¶ 11, U.N. Doc. CCPR/CO/77/MLI (Apr. 16, 2003); U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee: Sweden, ¶ 8, U.N. Doc. CCPR/CO/74/SWE (Apr. 24, 2002); U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee: Yemen, ¶ 11, U.N. Doc. CCPR/CO/84/YEM (Aug. 9, 2005); U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee: Gambia, ¶ 10, U.N. Doc. CCPR/CO/75/GMB (Aug. 12, 2004); U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee: Lesotho, ¶ 12, U.N. Doc. CCPR/C/79/Add.106 (Apr. 8, 1999); U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee: Netherlands, ¶ 11, U.N. Doc. CCPR/CO/72/NET (Aug. 27, 2001).

protection of children.²⁶¹ Moreover, the UN Special Rapporteur on Torture has stated, “[l]ike torture, female genital mutilation (FGM) involves the deliberate infliction of severe pain and suffering.”²⁶² He points out the psychological and physical harm caused by FGM, stressing that “[t]he pain inflicted by FGM does not stop with the initial procedure, but often continues as ongoing torture throughout a woman’s life.”²⁶³ He also underscores the “element of powerlessness,” noting that FGM is torture even if the procedure is medicalized and performed in a hospital.²⁶⁴ This represents a very different way of understanding harm than focusing simply on the extent of pain, bodily injury, and any medical complications, as asylum adjudicators tend to

²⁶¹ For concluding observations regarding violations of Article 3 see U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee: Central African Republic, ¶ 11, U.N. DOC. CCPR/C/CAF/CO2 (July 27, 2006); U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee: Nigeria, ¶¶ 291, 296, U.N. DOC. CCPR/C/79/Add.65 (July 24, 1996); U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee: Senegal, ¶ 12, U.N. DOC. CCPR/C/79/Add.82 (Nov. 19, 1997); U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee: Zimbabwe, ¶ 12, U.N. DOC. CCPR/C/79/Add.89 (Apr. 6, 1998).

For concluding observations regarding violations of Article 24 see U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee: Sudan, ¶ 10, U.N. DOC. CCPR/C/79/Add.85 (Nov. 19, 1997); U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee: Zimbabwe, ¶ 12, U.N. DOC. CCPR/C/79/Add.89 (Apr. 6, 1998).

²⁶² U.N. Human Rights Comm., Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 50 U.N. DOC. A/HRC/7/3 (Jan. 15, 2008) (citations omitted).

²⁶³ *Id.* ¶ 51.

²⁶⁴ *Id.*

do. By taking the firm position that “any act of FGM would amount to torture,” the Special Rapporteur clearly rejects distinctions based on the type of FGM performed.²⁶⁵

Applying Hathaway’s method of analyzing persecution with the UN’s interpretations in mind, must conclude that all forms of FGM amount to persecution as violations of both the nonderogable and derogable provisions of the ICCPR. This understanding of FGM is also consistent with the interpretation of the UNHCR, which is the highest international authority for interpreting the Refugee Convention. In May 2009, the UNHCR issued a Guidance Note stating that it “considers FGM to be a form of gender-based violence that inflicts severe harm, both mental and physical, and amounts to persecution.”²⁶⁶ Recognizing that “[a]ll forms of FGM are considered harmful”²⁶⁷ and that “[a]lmost all those who are subjected to FGM experience extreme pain and bleeding,²⁶⁸ the UNHCR concluded that “[a]ll forms of FGM violate a range of human rights of girls and women.”²⁶⁹ Specifically, the UNHCR noted that FGM violates the right to non-discrimination,²⁷⁰ to protection from physical and mental violence,²⁷¹ to the highest

²⁶⁵ *Id.* ¶ 53.

²⁶⁶ U.N. HIGH COMM’N ON REFUGEES: GUIDANCE ON FGM, *supra* note 54, ¶ 7.

²⁶⁷ *Id.* ¶ 4.

²⁶⁸ *Id.* ¶ 5; *see also id.* ¶ 4 (stating “[o]ther health complications include shock, psychological trauma, infections, urine retention, damage to the urethra and anus, and even death.”).

²⁶⁹ *Id.* ¶ 7.

²⁷⁰ *Id.* (citing International Covenant on Civil and Political Rights art. 3, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; CEDAW arts. 2, 5).

²⁷¹ *Id.* (citing CRC art. 19; Declaration on the Elimination of Violence Against Women art. 2(a), G.A. Res. 48/104, U.N. DOC. A/RES/48/104 (Dec. 20, 1993) [hereinafter DEVAW]).

attainable standard of health,²⁷² and, “in the most extreme cases, to the right to life.”²⁷³

The interpretations of other UN Committees, including the Committee on the Elimination of Discrimination Against Women (CEDAW Committee), the Committee on Economic, Social and Cultural Rights (ESCR Committee), and the Committee on the Rights of the Child (CRC Committee), further deepen our understanding of the harms caused by FGM by emphasizing both physical and nonphysical aspects of the harm. For example, without differentiating between different types of FGM, the CEDAW Committee has noted the “serious health and other consequences” of FGM²⁷⁴ and listed it among “practices involving violence or coercion,”²⁷⁵ explaining that such practices stem from “[t]raditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles” and constitute “a form of . . . control of women.”²⁷⁶ In its concluding

²⁷² *Id.* (citing International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 1966, 993 U.N.T.S. 3; CRC art. 24).

²⁷³ *Id.* (citing ICCPR art. 6; CRC art. 6).

²⁷⁴ U.N. Comm. on the Elimination of Discrimination Against Women, CEDAW General Recommendation No. 14: Female Circumcision, U.N. Doc. A/45/38 (1990); *see also* U.N. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination Against Women, on Temporary Special Measures, U.N. Doc. HRI/GEN/Rev.7 (2004) (using the term “female genital mutilation” rather than “female circumcision,” which was previously used).

²⁷⁵ U.N. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19: Violence Against Women, ¶ 11, U.N. Doc. A/47/38. (1993) [hereinafter General Recommendation No. 19].

²⁷⁶ *Id.*

observations on country reports, the CEDAW Committee has also stressed that FGM discriminates against women.²⁷⁷

The CEDAW Committee goes on to describe the full range of ways that such violence affects women, stating that “[t]he effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms” and that “the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to the low level of political participation and to their lower level of education, skills and work opportunities.”²⁷⁸ The Committee stressed that gender-based violence has many aspects, including “physical, mental or sexual harm or suffering,” and enumerated the various rights that such acts violate, including the right to life, the right not to be subject to torture or to cruel, inhuman or degrading treatment, the right to liberty and security of person, the right to equal protection under the law, the right to equality in the family, and the right to the highest standard attainable of physical and mental health.²⁷⁹

The ECSR Committee has likewise condemned “harmful traditional cultural practices and norms” such as FGM that “deny [women] their full reproductive rights.”²⁸⁰ CESCR has explained that the right to health encompasses “the right to

²⁷⁷ See, e.g., Rep. of the Comm. on the Elimination of Discrimination Against Women, 22d Sess., Jan. 17–Feb. 4, 2000, 23d Sess., June 12–30, 2000, U.N. Doc. A/55/38; GAOR, 57th Sess., Supp. No. 38 (2000) [hereinafter CEDAW Rep. 2000] (reporting on Burkina Faso); CEDAW Rep. 2000 ¶¶ 54–54 (reporting on Cameroon); CEDAW Rep. 2000 ¶ 215 (reporting on the Democratic Republic of the Congo); Rep. of the Comm. on the Elimination of Discrimination Against Women, at 66, ¶ 207, U.N. Doc. A/49/38; GAOR, 49th Sess., Supp. No. 38 (1994) (reporting on the Netherlands); Rep. of the Comm. on the Elimination of Discrimination Against Women, 13th Sess., ¶ 721 U.N. Doc. A/29/38; GAOR, 49th Sess., Supp. No. 38 (Apr. 12, 1994).

²⁷⁸ General Recommendation No. 19, *supra* note 275, ¶ 11.

²⁷⁹ *Id.* ¶ 6.

²⁸⁰ *Id.* ¶ 21. Likewise, with respect to children and adolescents, the Committee noted the “need to adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls, including . . . female genital mutilation.” *Id.* ¶ 30.

control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation."²⁸¹ Accordingly, the CESCR has found that States are "obliged . . . to prevent third parties from coercing women to undergo traditional practices, e.g. female genital mutilation; and to take measures to protect all vulnerable or marginalized groups of society, in particular women, children, adolescents and older persons, in the light of gender-based expressions of violence."²⁸² Indeed, in addressing the equal right of men and women to the enjoyment of all economic, social and cultural rights, the ESCR Committee has declared that states must, at a minimum, remove "legal and other obstacles that prevent men and women from accessing and benefiting from health care *on a basis of equality*," which "includes . . . the prohibition of female genital mutilation."²⁸³ Its concluding observations also recognize the discriminatory nature of

²⁸¹ *Id.* ¶ 8.

²⁸² *Id.* ¶ 35.

²⁸³ U.N. Comm. on Economic, Social and Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 16: Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights, ¶ 29, U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005) [hereinafter U.N. Comm. on Economic, Social and Cultural Rights, Gen. Comment 16].

FGM,²⁸⁴ which is consistent with the interpretation of the Committee on the Rights of the Child.²⁸⁵

Due to the discriminatory way in which it violates the right to health, FGM represents a category 3 violation under Hathaway's analysis, as well as category 1 and 2 violations. FGM also constitutes a core violation of the right to health under Foster's approach. The Human Rights Council, a relatively new intergovernmental body within the UN, has emphasized "protect[ing] and promot[ing] sexual and reproductive health as integral elements of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."²⁸⁶ Thus, far from lying at the periphery of the right to health, sexual and reproductive well-being is at its center.

By addressing the multiplicity of harms associated with FGM, including its discriminatory nature and the way in which it violates individual autonomy, the U.N. Committees connect the practice to a range of human rights violations, rather than

²⁸⁴ See, e.g., U.N. Comm. on Economic, Social and Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Cameroon, ¶ 33, U.N. DOC. E/C.12/1/Add.40 (Dec. 8, 1999) [hereinafter U.N. Comm. on Economic, Social and Cultural Rights Rep.: Cameroon]; U.N. Comm. on Economic, Social and Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Egypt, ¶ 13, U.N. DOC. E/C.12/1/Add.44 (May 23, 2000) [hereinafter U.N. Comm. on Economic, Social and Cultural Rights Rep.: Egypt]; U.N. Comm. on Economic, Social and Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Nigeria, ¶ 39, U.N. DOC. E/C.12/1/Add.23 (May 13, 1998) [hereinafter U.N. Comm. on Economic, Social and Cultural Rights Rep.: Nigeria].

²⁸⁵ U.N. Comm. on the Rights of the Child, General Comment No. 7: Implementing Rights in Early Childhood, U.N. DOC. CRC/C/GC/7/Rev.1 (Sept. 20, 2006) (recognizing FGM as a "serious" violation of the rights of the girl child).

²⁸⁶ U.N. Human Rights Council, Resolution 6/29, ¶ 4(h) U.N. DOC. A/HRC/Res/6/29 (Dec. 14, 2007) (emphasis added); *id.* ¶ 2(f) (encouraging the Special Rapporteur to "continue to pay attention to sexual and reproductive health as an integral element of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health").

treating it as an isolated physical incident, which is how many asylum adjudicators mistakenly view the practice. In other words, drawing on the comments and observations of the UN bodies that interpret human rights treaties would help asylum adjudicators better understand that “[t]he human rights of women include their *right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.*”²⁸⁷

2. Applying a Human Rights Analysis to Involuntary IUDs

If we examine the issue of involuntary insertion of an IUD under international human rights law, different aspects of the harm emerge that may not be immediately apparent to an asylum adjudicator. The issue of involuntary IUDs has not received nearly as much international attention as FGM, so there isn’t the same level of guidance from the U.N. committees as to whether this practice violates the prohibition on torture and cruel, inhuman, or degrading treatment. While the U.N. Committee Against Torture has expressed concern at reports of women undergoing involuntary sterilization²⁸⁸ and has recommended that states parties investigate such claims,²⁸⁹ it has not directly addressed the issue of involuntary IUDs. Similarly, the Human Rights Committee requires information about state parties’ actions to prevent forced sterilizations in order to assess their compliance with Article 7 of the ICCPR, but it has not

²⁸⁷ Report of the Fourth Conference on Women, Beijing, Sept. 4–15, 1995, Beijing Declaration and Platform of Action, ¶ 96, U.N. DOC. A/CONF.177/20/Rev.1 (1997) [hereinafter Beijing Declaration and Platform of Action].

²⁸⁸ See U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Articles 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture: Czech Republic, ¶ 5(k), U.N. DOC. CAT/C/CR/32/2 (June 3, 2004) [hereinafter Comm. Against Torture Rep.: Czech Republic]; U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Articles 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture: Peru, ¶ 23, U.N. DOC. CAT/C/PER/CO/4 (July 25, 2006).

²⁸⁹ Comm. Against Torture Rep.: Czech Republic, *supra*, note 288, ¶ 6(n).

specifically addressed whether involuntary insertion of an IUD violates Article 7.²⁹⁰

Some of the Human Rights Committee's comments, however, certainly support the argument that involuntary insertion of an IUD violates Article 7, which not only prohibits torture and cruel inhuman or degrading treatment, but goes on to state, "[i]n particular, no one shall be subjected without his free consent to medical or scientific experimentation."²⁹¹ In condemning the forced sterilization of Romani women in Slovakia, the Human Rights Committee has invoked both the right to informed consent under Article 7 and the right to equal protection/non-discrimination under Article 26.²⁹² The same reasoning should apply to involuntary insertion of an IUD, which also violates the informed consent provision of Article 7 and therefore represents a "category 1" violation under Hathaway's approach, constituting persecution. It makes no difference that involuntary IUDs are generally inserted in a medical setting, since the Human Rights Committee has stressed that Article 7's prohibitions apply in "medical institutions."²⁹³

²⁹⁰ U.N. Human Rights Comm., General Comments Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on the Civil and Political Rights: General Comment No. 28: Equality of Rights Between men and Women (Article 3), U.N. DOC. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000).

²⁹¹ ICCPR, *supra* note 243, art. 7 (emphasis added). *Cf.* Convention of the Prevention of Genocide, art. II(d), Dec. 9, 1948, 377 U.N.T.S. 277 (entered into force Jan. 12, 1951) (stating that genocide includes "[i]mposing measures intended to prevent births within the group").

²⁹² See U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Observations of the Human Rights Committee: Slovakia, ¶ 12, U.N. DOC. CCPR/CO/78/SVK (Aug. 22, 2003); see also INT'L FED. FOR HUMAN RIGHTS, COMMENTS TO THE FOURTH PERIODIC REPORT OF THE SLOVAK REPUBLIC: ON PERFORMANCE OF THE OBLIGATIONS ARISING FROM THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 4-12 (2008), available at http://www2.ohchr.org/english/bodies/ccdaw/docs/ngos/CFIDH_Slovakia_41.pdf.

²⁹³ U.N. Human Rights Comm., General Comment 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment): Replaces General Comment No. 7, U.N. DOC. HRI/GEN/1/Rev.9 (Vol. I) (Mar. 10, 1992).

Even if there is no violation of non-derogable Article 7, however, involuntary insertion of an IUD clearly violates several of the derogable rights in the ICCPR, most notable Article 17's prohibition on arbitrary or unlawful interference with privacy and family, and Article 23, which affirms the right of men and women to found a family.²⁹⁴ Even if we assume that China's population problems create an emergency situation that permits derogation, the discriminatory nature of requiring women to use IUD's means that China is violating its obligations.²⁹⁵ While China's "[p]opulation control regulations routinely repeat that 'both spouses have the obligation to practice planned birth,' . . . the policy fails to insure male participation."²⁹⁶ According to a 2001 survey, 46% of women in China use IUDs and 38.1% have been sterilized.²⁹⁷ By comparison, only 5.1% of Chinese men use condoms and only 7.9% have been sterilized.²⁹⁸ Thus, women disproportionately bear the burden of implementing China's population control policies.

²⁹⁴ICCPR, *supra* note 243, art. 17 ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."); ICCPR, art. 23.2 ("The right of men and women of marriagable age to marry and to found a family shall be recognized.").

²⁹⁵ *Id.* at art. 4(1) (stressing that derogation during a public emergency must not "involve discrimination solely on the ground of race, color, sex, language, religion or social origin").

²⁹⁶ Human Rights in China, *Caught Between Tradition and the State: Violations of the Human Rights of Chinese Women*, 17 WOMEN'S RTS. L. REP. 285, 296 (1996) (providing an abridged version of report released by Human Rights in China that marks the Fourth World Conference on Women, Beijing).

²⁹⁷ Kristina Sivelic, *Every Woman's Choice—Chinese Women, Birth Control, and the Contraceptive Pill*, ALL CHINA'S WOMEN'S FED. (NOV. 10, 2006), <http://www.womenofchina.cn/html/report/82797-1.htm>.

²⁹⁸ *Id.*; see also *Chinese Men Shy Away From Birth Control*, ALL CHINA WOMEN'S FED. (June 2, 2010), <http://www.womenofchina.cn/html/report/105336-1.htm> (stating that the rate of condom use across China is just 4.9%, and only 37.5 million men have had vasectomies compared to 221.5 million women who have undergone tubal ligation; finding that women bear nearly 90% of the responsibility for using contraceptive measure among couples of childbearing age).

Interestingly, in its General Comments, the Human Rights Committee has analyzed reproductive rights largely through the lens of the right to privacy. For example, in discussing women's right to equality in exercising their privacy rights, the Human Rights Committee has expressed concern over requirements that women have a certain number of children, that they have a husband's authorization, or that they meet age requirements in order to undergo sterilization.²⁹⁹ The Human Rights Committee has called on states to report on and eliminate such laws and policies that interfere with women's equal enjoyment of the right to privacy.³⁰⁰ Thus, the Human Rights Committee has applied an equal protection analysis to the right to privacy, rather than treating it simply as impermissible sex-based discrimination under Article 26 of the ICCPR. By focusing on the right to privacy, the Human Rights Committee's analysis resembles how the Supreme Court has addressed reproductive rights issues, as discussed below.³⁰¹ However, by recognizing the inequality aspect of the rights violation, the Committee actually goes further than the Supreme Court, which has yet to invoke equality principles in striking down restrictions on reproductive freedom.

The discriminatory nature of involuntary IUDs makes this practice not only a category 2 violation of the ICCPR under Hathaway's approach, but also a category 3 violation of the ICESCR. The ESCR Committee's General Comment 16 clearly considers legal restrictions on reproductive health services as a form of discrimination against women.³⁰² As a "discriminatory practice[] relating to women's health status and needs,"

²⁹⁹ U.N. Human Rights Comm., General Comment 28: Article 3 (The Equality of Rights Between Men and Women): Replaces General Comment No. 4, ¶ 20, U.N. Doc. No. HRI/GEN/1/Rev.9 (Vol. I) (Mar. 29, 2000).

³⁰⁰ *Id.*

³⁰¹ See *infra* Part III.C.1.

³⁰² U.N. Comm. on Economic, Social and Cultural Rights, Gen. Comment 16, *supra* note 283. For conclusions of the UNCESCR interpreting General Comment 16 in particular national contexts see, e.g., U.N. Comm. on Economic, Social and Cultural Rights Rep.: Cameroon, *supra* note 284, ¶ 33; U.N. Comm. on Economic, Social and Cultural Rights Rep.: Egypt, *supra* note 284, ¶ 13; U.N. Comm. on Economic, Social and Cultural Rights Rep.: Nigeria, *supra* note 284, ¶ 39.

involuntary insertion of IUDs would violate the basic duty to “respect” the right to health.³⁰³ The obligation to respect the right to health also includes refraining “from applying coercive medical treatments.”³⁰⁴ While the ESCR Committee has expressed concern over forced sterilization of women and forced abortions as coercive medical treatments, it has yet to address directly the issue of involuntary IUDs.³⁰⁵ However, the same reasoning that led the Committee to conclude that “States should refrain from limiting access to contraceptives and other means of maintaining sexual and reproductive health” supports the argument that States should refrain from *forcing* women to use certain invasive forms of contraception, since such coercive measures violate the right to health by “preventing people’s participation in health-related matters.”³⁰⁶

Like the ESCR Committee, the CEDAW Committee has drawn particular attention to the problem of discrimination in the areas of family planning and pregnancy.³⁰⁷ In finding that coercive implementation of population policies and family planning programs are a form of violence against women, the

³⁰³ *Id.* at ¶ 34

³⁰⁴ *Id.*

³⁰⁵ *See, e.g.*, U.N. Comm. on Economic, Social and Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Brazil, ¶ 27, U.N. Doc. E/C.12/1/Add.87 (May 23, 2003); U.N. Comm. on Economic, Social and Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: People’s Republic of China (including Hong Kong and Macao), ¶ 27, U.N. Doc. E/C.12/1/Add.107 (May 13, 2005).

³⁰⁶ U.N. Comm. on Economic, Social and Cultural Rights, General Comment No. 14: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), ¶ 34, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

³⁰⁷ U.N. Comm. on the Elimination of Discrimination Against Women, General Recommendation 24: Article 12: Women and Health, ¶ 2, U.N. Doc. A/54/38/Rev.1 ch. I (Feb. 5, 1999) [hereinafter U.N. Comm. on the Elimination of Discrimination Against Women: Gen. Rec. 24].

CEDAW Committee has emphasized the principles of equality and reproductive choice,³⁰⁸ noting that “the equal rights of women and men to decide freely and responsibly on the number and spacing of children are fundamental to women’s rights in marriage.”³⁰⁹ In response to reports of forced pregnancies, abortions, and sterilizations, the Committee has stressed that “[d]ecisions to have children or not, while preferably made in consultation with spouse or partner, must not nevertheless be limited by spouse, parent, partner or Government.”³¹⁰ In fact, in *A.S. v. Hungary*, a case that involved the involuntary sterilization of a Hungarian woman of Roma origin, the CEDAW Committee found that the failure to provide the woman with reproductive health information and to ensure that A.S. gave her full and informed consent to be sterilized violated her most basic human rights, including the rights to non-discrimination in the fields of education (Article 10(h)) and healthcare (Article 12), as well as

³⁰⁸ Comm. on the Elimination of Discrimination Against Women, Rep. on its 20th and 21st Sess. Jan 19–Feb. 5, 1999, June 7–25, 1999, ¶¶ 274, 299(b), U.N. Doc. A/54/38/Rev.1; GAOR, 54th Sess., Supp. No. 38 (1999) (reporting on China).

³⁰⁹ U.N. Comm. on the Elimination of Discrimination Against Women: Gen. Rec. 24, *supra* note 307, ¶ 28. Sources of “soft law” also stress the role of self-determination in family planning and sexual health as an essential part of reproductive health care. *See, e.g.*, Beijing Declaration and Platform of Action, *supra* note 287, ¶ 96 (the human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.”).

³¹⁰ U.N. Comm. on the Elimination of Discrimination Against Women, General Recommendation 21: Equality in Marriage and Family Relations, ¶ 22, U.N. Doc. A/49/38 (Apr. 12, 1994); *see also* U.N. Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Czech Republic, ¶¶ 23–24, U.N. Doc. CEDW/C/CZE/CO/5 (Oct. 22, 2010) (expressing concern regarding the sterilization of women without informed consent and calling for adoption of legislative changes regarding forced sterilization, as well as mandatory trainings on patients’ rights and compensation of victims of coercive sterilization).

the right to determine the number and spacing of one's children (Article 16(1)(e)).³¹¹

Turning to Michelle Foster's approach of focusing on the core and periphery of a given right, it is worth noting that the ESCR Committee has identified the core obligations that arise from the right to health as including the "right of access to healthcare facilities without discrimination" and the "equitable distribution of all health facilities, goods and services."³¹² These minimum core obligations are non-derogable, such that "a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations."³¹³ In enumerating other obligations "of comparable priority" to minimum core obligations, the ESCR Committee includes "ensur[ing] reproductive . . . health care."³¹⁴ Thus, equitable access to reproductive healthcare lies at the core of the right to health.

The above discussion shows that the main U.N. treaty bodies—the Human Right Committee, the ESCR Committee, and the CEDAW Committee—have all recognized the discriminatory aspects of restrictions on women's reproductive functions. Drawing on the interpretations of these committees, a compelling argument exists for finding that forced IUDs constitute a serious violation of human rights rising to the level of persecution.

³¹¹ U.N. Comm. on the Elimination of Discrimination Against Women, Views Communication No. 4/2004: Views on the Elimination of Discrimination Against Women Under Article 7, Paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, ¶¶ 11.2–11.4, U.N. Doc. CEDAW/C/36/D4/2004 (Aug. 29, 2006).

³¹² U.N. Comm. on Economic, Social and Cultural Rights, General Comment No. 14: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), ¶ 43, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

³¹³ *Id.* ¶ 47.

³¹⁴ *Id.* ¶ 44. As noted above, the Human Rights Council has also found sexual and reproductive rights to be "integral" to the right to health. See U.N. Human Rights Council, Resolution 6/29, *supra* note 286.

C. Alternatives to a Human Rights Approach

1. Violations of Fundamental Rights As Persecution

If U.S. adjudicators are reluctant to draw on international human rights norms in analyzing persecution, an indirect way of incorporating some of the same principles would be to at least remain mindful of “fundamental rights” under U.S. constitutional law. Just as human dignity and self-determination are core concepts of human rights law, many fundamental rights derive from the principle of respect for individual dignity and autonomy, including rights related to sexuality and reproduction. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, for example, the Supreme Court found it “settled . . . that the constitution places limits on a State’s right to interfere with a person’s most basic decisions about family and parenthood . . . as well as bodily integrity.”³¹⁵ The Court went on to explain:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, childrearing, and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, *choices central to personal dignity and autonomy*, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning of the universe, and of the mystery of human life.³¹⁶

Similarly, in *Lawrence v. Texas*, where the Court protected sexual freedom by striking down sodomy laws that criminalized same-sex acts, Justice Stevens, writing for the majority, acknowledged that “adults may choose to enter upon this

³¹⁵ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 849 (1992).

³¹⁶ *Id.* at 851 (emphasis added).

relationship in the confines of their homes and their own private lives *and still retain their dignity as free persons.*"³¹⁷

Asylum adjudicators should, at minimum, acknowledge that actions such as forced IUDs and FGM (in situations where the State is unable or unwilling to stop the practice) violate fundamental rights to make life's most intimate choices. The elevated position of these rights under U.S. constitutional law signals the severity of the harm associated with restricting or impeding them. While U.S. courts have not yet drawn on the concept of fundamental rights in analyzing persecution, Canada's Federal Court has done so in rejecting its Immigration and Refugee Board's finding that forced usage of an IUD does not constitute persecution.³¹⁸ Specifically, in dismissing the Board's reasoning that forced usage of an IUD was not persecution because it was "a law of general application," the Federal Court relied on decisions finding that "a woman's reproductive liberty is a basic right ranking high on our scale of values."³¹⁹ Unlike the BIA, the Federal Court of Canada did not require the presence of any "aggravating factors" for forced usage of an IUD to amount to persecution. If the United States were to follow Canada's example and consider the fundamental nature of the rights being violated, as articulated by the Supreme Court, adjudicators would be more likely to see the corresponding severity of the harm resulting from the violation.

Examining the violation of fundamental rights in analyzing persecution may seem like a strange proposition to most US jurists, but there are at least two reasons why doing so might make sense. First, as Kenji Yoshino discusses in his article on *The New Equal Protection*, our country is plagued by pluralism anxiety, the sense that there are "too many groups" and that

³¹⁷ *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (emphasis added).

³¹⁸ *Zheng v. Canada (Minister of Citizenship & Immigration)*, [2009] F.C. 327, ¶ 13 (Can. Ont.).

³¹⁹ *Id.* ¶¶ 13–14. The Court stressed that the state's ability to "legislate in the area of family planning and population control [was] not the issue"; what mattered was "the means by which the state's objectives are achieved The more coercive or physically intrusive the approach the more likely it is that the state's conduct will be seen to be persecutory." *Id.* ¶ 13.

these groups are splintering the nation.³²⁰ This pluralism anxiety manifests acutely in the asylum context, where judges fear opening the floodgates to a seemingly endless array of sundry individuals fearing persecution based on race, religion, nationality, political opinion, or the terrifyingly vague “particular social group.” Yoshino describes how the US Supreme Court has dealt with its own pluralism anxiety by “shift[ing] from its traditional equal protection jurisprudence toward a liberty-based dignity jurisprudence.”³²¹ He notes that the liberty-based analysis has created new ways to vindicate the equality concerns of groups such as women and gays by “fram[ing] rights at a high [] level of generality”³²² and “focus[ing] on rights that sound in a universal register,”³²³ rather than stressing the distinctions that underlie equal protection claims. Similarly, bringing a focus on fundamental rights into the analysis of “persecution” in asylum cases may mollify the fear of “too many groups” invoked by the “particular social group” portion of the refugee definition.

Moreover, this shift in focus would force adjudicators to “imagine a world in which they are denied the right,”³²⁴ which could possibly help shift their perspectives from cognitively skewed comparisons to extreme forms of harm to a more objective assessment of a given form of harm. Another advantage of a liberty-based dignity analysis which Yoshino notes is that it is less likely to essentialize the identity of group members and thereby propagate stereotypes about them.³²⁵ Numerous scholars have sharply critiqued the role of such stereotypes in the presentation and adjudication of asylum cases, which commonly perpetuate “an essentialized narrative of

³²⁰ Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

³²¹ *Id.* at 802.

³²² *Id.* at 794.

³²³ *Id.* at 793.

³²⁴ *Id.* at 794.

³²⁵ *Id.* at 795.

persecution.”³²⁶ A fundamental-rights perspective could help transform the current situation by shifting the focus to the nature of the rights-violation rather than the identity of the asylum applicant.

While focusing on fundamental rights has these potential advantages, one of its main drawbacks is that it would not lead to as comprehensive an analysis of harm as applying human rights law. Certainly, the liberty-based dignity analysis smacks of universal human rights, with some U.S. Supreme Court cases looking explicitly at international and comparative law,³²⁷ but international human rights law goes beyond a U.S. liberty-based dignity analysis in some important respects. For example, nondiscrimination is a core concept in international human rights law, but falls out of the picture when courts shift from an equality focus to a liberty focus. While not talking or thinking about discrimination may help assuage anxiety, it can also leave out a critical aspect of someone’s claim, especially in cases involving sexual and reproductive harm.

³²⁶ Sarah Hinger, *Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims*, 19 COLUM. J. GENDER & L. 367, 402 (2010). Specifically, Hinger observes that “an applicant must anticipate and perform certain stereotypes in her own application as the surest means of gaining asylum.” *Id.* at 389. Further, she argues that “[c]ourts have reacted by asserting the fundamental, universal nature of the identity and an essentialized narrative of persecution.” *Id.* at 402. See also Susan Musarrat Akram, *Orientalism Revisited in Asylum and Refugee Claims*, 12 INT’L J. REFUGEE L. 7 (2000) (discussing how advocates and judges perpetuate stereotypes about Muslims and Middle Eastern society in asylum and refugee cases, such as the belief that there are “such things as an Islamic society, an Arab mind, an Oriental psyche.”); Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 LAW & SEXUALITY 135, 147 (2006) (discussing how factors such as “membership in gay organizations, subscriptions to gay publications, and participation in gay pride parades” may play a greater role in gaining asylum than testimony about the applicant’s personal plight); Jacqueline Bhabha, *Internationalist Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights*, 15 HARV. HUM. RTS. J. 155, 162–63 (2002) (describing the difficulty of “advancing asylum claims on behalf of claimants who do not fit the prevailing stereotype, such as women who experienced persecution “based on activist modes of behavior” rather than as “submissive, voiceless victims”).

³²⁷ See Yoshino, *surpa* note 320 (noting that several of the “paradigmatic examples of the ‘new equal protection’ look to international and comparative law, including the cases of *Lawrence v. Texas*, 539 U.S. 558 (2003), *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005)).

As Justice Ruth Bader Ginsburg explained decades ago when she was a federal appeals court judge, the Supreme Court “has treated reproductive autonomy under a substantive due process/personal autonomy headline not expressly linked to discrimination against women.”³²⁸ Starting with its 1965 decision in *Griswold v. Connecticut*, the Supreme Court linked reproductive rights to the right to privacy rather than the right to equality. Specifically, the Court struck down Connecticut’s ban against the use of contraceptives as an infringement of the right to marital privacy.³²⁹ The Court later extended its reasoning to unmarried couples in *Eisenstadt v. Baird*.³³⁰ In 1973, the Court issued its groundbreaking decision in *Roe v. Wade*, basing the right to an abortion on principles of patient-physician autonomy and privacy, rather than gender equality.³³¹ Likewise, the Court has linked sexual rights to privacy instead of equality. In *Lawrence v. Texas*, mentioned above, the majority opinion stressed that the sodomy laws at issue touched upon “the most private human conduct, sexual behavior, and in the most private of places, the home.”³³² The Court did not base this decision on principles of equality.³³³

Justice Ginsburg has aptly criticized this line of reasoning grounded in the notion of privacy. Her dissent in *Gonzales v. Carhart*, a 2007 case involving partial-birth abortions, explicitly

³²⁸ Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 376 (1985).

³²⁹ *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965). The Court later struck down a ban forbidding *unmarried* couples from using contraceptives under the Equal Protection Clause. *Eisenstadt v. Baird*, 405 U.S. 438 (1972). In *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977), the Court found that constitutional protection also extended to the sale and distribution of contraceptives.

³³⁰ *Eisenstadt*, 405 U.S. 438.

³³¹ *Roe v. Wade*, 410 U.S. 113 (1973).

³³² *Lawrence*, 539 U.S. at 567.

³³³ *Id.* (“It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”).

connects a woman's right to autonomy to her right to equality.³³⁴ Drawing on *Casey's* language regarding a woman's "control over her [own] destiny," Justice Ginsburg wrote:

Women, it is now acknowledged, have the talent, capacity, and right to "participate equally in the economic and social life of the Nations." . . . Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives." . . . Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.³³⁵

Her dissent in *Carhart* echoes her earlier criticism that the reasoning of *Roe* was weakened "by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective."³³⁶ In the same way that medicalizing the reproductive rights issues in *Roe* led the Court to lose sight of the equality principle, the BIA's myopic focus on the extent of physical injury and medical complications in cases involving FGM and involuntary IUDs masks the underlying harm of sex discrimination. Focusing on fundamental rights, as the U.S. Supreme Court currently views them, would not remedy this situation. As Yoshino notes, the "risk of effacing enduring forms of group-based subordination" may be particularly high "in contexts where differences between

³³⁴ *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007).

³³⁵ *Id.* at 171–72 (citations omitted).

³³⁶ Ginsburg, *supra* note 328, at 386; see also Cass Sunstein, Op-Ed., *Ginsburg's Dissent May Yet Prevail*, L.A. TIMES, Apr. 20, 2007, available at <http://articles.latimes.com/2007/apr/20/opinion/oc-sunstein20/>; Yoshino, *supra* note 320, at 799 (noting that "[t]he *Carhart* decision . . . still stands as a cautionary tale against the dangers of a liberty-based dignity jurisprudence").

the relevant groups are both persistent and differentiating, as in the contexts of sex or disability.”³³⁷

Losing sight of the role of discrimination in asylum cases would be particularly problematic because U.S. case law clearly recognizes that severe discrimination may amount to persecution, whereas the BIA and circuit courts have yet to find persecution based on a serious violation of privacy. Moreover, since the right to privacy remains relatively vague, under both international human rights law and U.S. constitutional law, the extent of the harm may remain hidden or elusive when characterized as a violation of this right. Discrimination, on the other hand, is a clearer concept, making the resulting harm easier for adjudicators to recognize and evaluate. Accordingly, in analyzing practices that interfere with women’s sexual and reproductive rights, asylum adjudicators should pay attention to the discriminatory context in which these acts occur and the particular impact that they have on women, rather than viewing them as isolated events. Relying on the U.S. Supreme Court’s interpretation of fundamental rights is therefore of limited use only; it helps expose some types of nonphysical harm that currently go unnoticed in asylum cases (e.g. violations of the right to privacy, autonomy, and dignity) but reinforces omission of other types of nonphysical harm, such as sex-based discrimination.

2. Bifurcated Standards: Nonphysical and Physical Harm

Another approach to addressing the failure of asylum adjudicators to consider nonphysical forms of harm may be to create separate, specific standards for determining when different types of harm amount to persecution. As noted above, the BIA’s decision in *T-Z* provides some guidance in evaluating economic harm but does not do much to help clarify the standard for other forms of nonphysical harm. Thus, a cursory review of the case law may suggest that what is needed is a clear standard for evaluating emotional harm. One area of law in which such different standards exist is tort law, which has traditionally drawn a “dichotomy . . . between physical harm and emotional

³³⁷ Yoshino, *supra* note 320, at 799.

harm.”³³⁸ However, as Martha Chamallas argues, this split reflects “a hierarchy of values that privileges physical injury over emotional and relational harm”³³⁹ and “tend[s] to place women at a disadvantage because important and recurring injuries in women’s lives are more often classified as lower-ranked emotional or relational harms.”³⁴⁰

Moreover, the pattern that has emerged in both tort law and asylum law is that judges tend to look for physical harm even when severe nonphysical harm is present. For example, many states have imposed a “physical manifestation” requirement to recover for negligent infliction of emotional distress,³⁴¹ a tort that often implicates “fundamental rights of sexual autonomy, reproductive choice, and intimate family relationships.”³⁴² In much the same way, the BIA has focused only on the extent of physical injury and the presence of “aggravating factors,” such as pain and medical complications, in determining whether FGM and involuntary IUDs amount to persecution, although these practices also involve serious nonphysical harm. While the trajectory in tort law is to move away from this physical manifestation requirement,³⁴³ it appears that the BIA is actually moving closer to it by ignoring emotional harm in its analysis of persecution and arbitrarily requiring the presence of “aggravating factors” for certain types of harm to amount to persecution.

This trajectory in asylum law must change. The human rights approach to analyzing persecution, discussed above, sets

³³⁸ Martha Chamallas, *Unpacking Emotional Distress: Sexual Exploitation, Reproductive Harm, and Fundamental Rights*, 44 WAKE FOREST L. REV. 1109, 1110 (2009).

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.* at 1113.

³⁴² *Id.* at 1111.

³⁴³ As Chamallas notes, the RESTATEMENT (THIRD) OF TORTS § 46(b) (Tentative Draft No. 5, 2007) rejects the physical manifestation requirement. *Id.* at 1113.

forth a practical and meaningful standard for determining whether any type of harm—physical or nonphysical—amounts to persecution. Following this single, unified approach would be more comprehensive, consistent, and equitable than having separate standards for analyzing physical and nonphysical harm, or possibly even different tests for different types of nonphysical harm (e.g. economic harm vs. emotional harm). Many types of harm have both physical and nonphysical components, and it is all too easy for adjudicators to focus on the former and neglect the latter unless they are looking for violations of particular rights. By presenting a “catalogue” of potential violations, the major human rights treaties help highlight *all* types of harm.

Establishing different standards for different types of harm also would not address the problem of “raising the bar” for physical harm in certain types of cases. The way in which this tends to happen in cases involving sexual and reproductive harm is visible in tort law as well as asylum law. For example, in 2001, a Maryland court found in *Robinson v. Cutchin* that the involuntary sterilization of a black woman through tubal ligation after a C-section was not a battery, reasoning that it “was not harmful because it did not cause any additional physical pain, injury, or illness other than that occasioned by the C-section procedure.”³⁴⁴ The court completely failed to recognize the loss of reproductive functions itself as a form of physical harm, just as the BIA has failed to recognize the serious harm caused by forced IUD usage without the presence of “aggravating factors” such as pain and bleeding. The court in *Cutchin* even concluded that the sterilization was not something that should offend the plaintiff’s “reasonable sense of personal dignity” simply because she already had six children.³⁴⁵ As Chamallas points out, the court’s decision in this case “reveals a disconcerting tendency to devalue the plaintiff’s procreative interests and to minimize her

³⁴⁴ *Robinson v. Cutchin*, 140 F. Supp. 2d 488, 493 (D. Md. 2001).

³⁴⁵ *Id.*

suffering.”³⁴⁶ These are the same blindspots that we see in asylum decisions evaluating reproductive harm.³⁴⁷

These examples from tort law suggest that creating separate standards to analyze when various types of harm amount to persecution is unlikely to address the concerns raised in this article. To begin with, the physical and nonphysical components in cases involving sexual and reproductive harm are often closely intertwined, and it would be a Herculean task to tease them apart in order to apply different standards to each aspect of the harm. A human rights analysis provides the most holistic approach by considering all aspects of the harm in a cohesive manner. Indeed, in discussing violence against women, the CEDAW Committee has explicitly blurred any boundaries between different types of harm, defining gender-based violence as “violence that is directed against a woman because she is a woman or that affects women disproportionately” and specifying that it “includes acts that inflict *physical, mental or sexual harm* or suffering, threats of such acts, coercion and other deprivations of liberty.”³⁴⁸ By integrating mental and physical harm into the definition of violence, the CEDAW Committee avoids creating a hierarchy of harms that privileges the physical. Integrating different types of harms in this way helps ensure gender equality in asylum adjudications.

CONCLUSION

The foundation for following a human rights approach to analyzing gender-related persecution already exists in the United States. In fact, the INS Gender Guidelines, issued in 1995, specifically provide that “[t]he evaluation of gender-based claims must be viewed within the framework provided by

³⁴⁶ Chamallas, *supra* note 338, at 1129.

³⁴⁷ Perhaps the United States’ own history of sterilizing poor women has numbed adjudicators to the harm related to restrictions on women’s reproductive functions. Chamallas discusses how, “prior to the late 1970s, the practice of performing unnecessary hysterectomies and tubal ligations on poor women without their knowledge or consent was widespread in the North as well as in the Deep South.” *Id.* at 1123.

³⁴⁸ U.N. Comm. on the Elimination of Discrimination Against Women, Gen. Rec. 19, *supra* note 275, ¶ 6 (emphasis added).

existing international human rights instruments and the interpretation of these instruments by international organizations.”³⁴⁹ Adjudicators simply have not followed this approach in an explicit or consistent way. While the traditional understanding of persecution as “serious harm” may be sufficient to evaluate many forms of violence against women, such as rape and severe forms of FGM, the inherent vagueness of this standard, which turns on a particular adjudicator’s idea of what actions are harmful, will not serve as a solid bridge to analyzing the more complex questions that are emerging in the case law. The existence of salient precedents involving extreme forms of gender-related harm compounds the problem by creating contrast effects that skew adjudicators’ judgments regarding the severity of less extreme forms of harm.

As this Article has shown, differences in opinion are already apparent regarding the level of harm associated with Type I FGM and involuntary IUDs. Other pressing issues that may soon require precedent decisions include forced marriages and draconian family laws governing divorce and custody of children.³⁵⁰ In order to properly address these issues, adjudicators need better tools to perform a comprehensive analysis of physical and nonphysical harm. Indeed, in the case of discriminatory laws that deprive women of custody of their children, the harm may be exclusively nonphysical yet quite severe. Similarly, as the UNHCR has recognized, criminal laws prohibiting same-sex consensual relations between adults, even if not enforced, are relevant to the analysis of persecution because they “have been found to be both discriminatory and to constitute a violation of the right to privacy.”³⁵¹ Indeed, the UNHCR has gone even further, stating, “[a] law can be considered persecutory *per se*, for instance, where it reflects

³⁴⁹ Memorandum from Phyllis Coven, Office of Int’l Affairs, U.S. Dep’t of Justice to All I.N.S. Office/rs, HQASM Coordinators (May 26, 1995), available at http://cgrs.uchastings.edu/documents/legal/guidelines_us.pdf.

³⁵⁰ See, e.g., Krivenko, *supra* note 4 (discussing claims to refugee status presented by divorced Muslim women around issues of child custody and divorce).

³⁵¹ U.N. HIGH COMM’N ON REFUGEES, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO SEXUAL ORIENTATION AND GENDER IDENTITY, ¶ 17 (2008), available at <http://www.unhcr.org/refworld/pdfid/48abd5660.pdf>.

social or cultural norms which are not in conformity with international human rights standards.”³⁵² Thus, the UNHCR has placed enormous emphasis on discrimination as a form of persecution, a standard that, while recognized in the United States, is not rigorously applied.

Canada and New Zealand have taken the lead in finding persecution in cases brought by women involving primarily non-physical harm,³⁵³ but the United States will likely lag behind unless it develops a more nuanced and comprehensive method of analyzing all types of harm. This Article has argued that international human rights law provides such a method. While a human rights approach is by no means perfect and certainly has gray areas of its own, it still provides a more comprehensive framework of analysis than the current U.S. approach and would lead to more consistent interpretations of persecution not only among U.S. courts, but also among all of the asylum-granting countries throughout the world. If U.S. adjudicators want to take more gradual steps towards this approach, they could combine an international human rights analysis that highlights the importance of discrimination with one based on the fundamental rights protected by our own Constitution, much as Canada looks to both international law and its Charter of Rights and Freedoms.³⁵⁴

While, in some cases, international human rights law can provide an immediate answer regarding whether a particular harm such as FGM constitutes persecution, in other situations, such as involuntary insertion of IUDs, applying international human rights law will simply provide deeper insight into the analysis of the harm and help ensure that the cumulative harm is considered. Reproductive harm represents an area where refugee law and human rights law could truly help push each other forward in developing a more sophisticated analysis of the rights at stake. As noted above, none of the UN treaty bodies have directly addressed the issue of involuntary IUDs. Asylum decisions finding forced IUDs to constitute persecution may

³⁵² *Id.* ¶ 18.

³⁵³ See Krivcnko, *supra* note 4.

³⁵⁴ *Id.*

therefore help set the stage for the Human Rights Committee to find that the practice violates Article 2's prohibition against torture or cruel, inhuman, or degrading treatment.

Since human rights have been traditionally defined "according to what men fear will happen to them," its norms often "obscure the most pervasive harms done to women."³⁵⁵ We have seen the same problem surface in asylum cases, where adjudicators often focus on the types of physical harm feared by men and shy away from harm related to female sexuality and reproductive rights. While great strides have been made in recognizing certain forms of gender-related harm as persecution, recent cases remind us that we are still at the early stages of this effort and may even be slipping backwards with respect to issues such as FGM. The focus of many scholars writing about gender-related asylum has turned to other challenging areas, such as showing that the persecution is on account of a protected ground; that it was performed by the state or private individuals whom the state was unable or unwilling to control; and the assessment of well-founded fear, especially in cases where the

³⁵⁵ Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 69-70 (1993). According to one rights group, "[d]espite two decades of sustained effort, sexual and reproductive rights are poorly understood and articulated." See generally REALISING RIGHTS, <http://www.realising-rights.org/> (last visited Oct. 9, 2011). Other groups have a more optimistic outlook, noting that the human rights norms that support reproductive rights continue to develop as "global recognition and understanding of those rights are growing and deepening." CTR. FOR REPRODUCTIVE RIGHTS, TWELVE HUMAN RIGHTS KEY TO REPRODUCTIVE RIGHTS 5, available at <http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/V4Repro%20Rights%20Arc%20Human%20Rights%20-%20FINAL.pdf> (last visited Oct. 9, 2011) (noting that the continued development of human rights norms supporting rights is "evidenced by the recently adopted Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity, agreed upon by twenty-nine human rights experts, and the Asian Human Rights Charter, a civil society initiative aimed at laying the foundation for a regional human rights treaty").

harm is ongoing.³⁵⁶ We must remember, however, that the core concept of persecution also remains a pressing issue. The time has come for asylum law to push forward on some of the more complex issues regarding persecution, drawing on international human rights law in order to develop a coherent analysis of this core concept in gender-related cases.

³⁵⁶See, e.g., Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DE PAUL L. REV. 777 (2008).

Hinger, *supra* note 326, at 368 (arguing that “the implicit search for fixed and fundamental characteristics to identify a particular social group creates a limited narrative of how identity is shaped and operates within culture”); Martina Pomeroy, *Left Out in the Cold: Trafficking Victims, Gender, and Misinterpretation of the Refugee Convention’s “Nexus” Requirement*, 16 MICH. J. GENDER & L. 453, 463–70, 476 (2010) (discussing the challenges in establishing a protected ground in asylum cases involving trafficking and arguing that the greatest hurdle in these cases is the nexus requirement); Allison W. Reimann, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199, 1240–58 (2009) (discussing why sexual violence against Guatemalan women constitutes persecution on account of membership in a “particular social group”); Love, *supra* note 69, at 174–76 (discussing well-founded fear is situations that the author describes as “unrepeatedable harms”, including involuntary sterilization and FGM).