

Continuing Persecution: An Argument for Doctrinal Codification in Light of *In re A-T-* and *Brand X*

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ABSTRACT: In its September 2007 decision In re A-T- the Board of Immigration Appeals (“BIA” or the “Board”) announced that unlike forced sterilization, female genital mutilation (“FGM”) should not be viewed as a continuing form of persecution. Thus, an asylum applicant who claims persecution in the form of past FGM no longer has a well-founded fear of future persecution for the paradoxical reason that FGM cannot be performed again. In re A-T- was fraught with analytical errors, and, by publishing it as precedent, the BIA inadvertently inspired a community of immigration advocates to take action. This Note tells the story of this case and the response to it—a response so swift that new developments occurred before each draft was complete. As of this writing, the Attorney General has vacated and remanded the decision to the BIA for reconsideration. While immigration advocates viewed the Attorney General’s decision as a victory, it may merely signify a battle won, but not the war. In order to prevent a decision like In re A-T- from happening again, Congress should codify the continuing persecution doctrine by providing a statutory definition of “persecution.” The fact that the continuing persecution doctrine was developed in the context of forced-sterilization cases should not preclude the extension of its logic to other forms of persecution. Such doctrinal codification may be the safest way to ensure consistent and fair treatment of all noncitizens in our immigration courts.

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I. INTRODUCTION

Two forms of persecution have received an extraordinary amount of attention over the past several decades from academics, advocates, human-rights activists, and politicians spanning the ideological spectrum: coercive population control policies¹ and the ritualistic practice of female genital mutilation (“FGM”).² The administrative adjudication of asylum cases in the United States involving victims of these practices and those who fear becoming victims is best described as schizophrenic. The evolution of the coercive population control cases should serve to inform the treatment of FGM cases—if only for the reason that the two forms of persecution are comparably horrific and have similarly permanent consequences—but the Board of Immigration Appeals³ seems wholly determined to repeat history, including past mistakes.⁴

Although the Immigration and Nationality Act (“INA”) does not define “persecution,” the BIA and federal courts developed the doctrine of continuing persecution in the context of asylum cases involving victims of coercive population control policies.⁵ The doctrine’s premise is straightforward: the fact that a particular form of persecution, such as forced sterilization, can only be performed once cannot preclude an applicant who has already been subjected to that form of persecution from obtaining asylum relief, as long as that persecutory act has permanent and continuing consequences.⁶

In its 2007 decision *In re A-T* the Board refused to extend the continuing persecution doctrine to a victim of FGM, even though it had previously extended the doctrine to other FGM victims in prior unpublished

1. See *infra* Part III.A. For an overview of the political events surrounding the United States’ response to China’s One-Child Policy, see Shoshanna Malett, *Affirmative Asylum Claims from China Based on Coercive Family Planning*, 06-06 IMMIGR. BRIEFINGS 1 (June 2006).

2. See *infra* Part III.B. FGM, also referred to as female genital cutting (“FGC”) or female circumcision, involves “[the] partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons.” World Health Org., Fact Sheet No. 241: Female Genital Mutilation, <http://www.who.int/mediacentre/factsheets/fs241/en/index.html> (last visited Nov. 15, 2008). An estimated 100 million to 140 million women, primarily in Africa, Asia, and the Middle East, have undergone some form of this procedure, and an estimated three million girls in Africa are at risk of undergoing FGM every year. *Id.*

3. The BIA is a quasi-judicial, quasi-administrative body whose primary responsibility is to review decisions of the nation’s immigration judges and issue precedential decisions. DORSEY & WHITNEY LLP, BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT 9 (2003), http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf (citing 8 C.F.R. § 3.1 (1999)).

4. See *infra* Part III.

5. See *infra* Part III.A.

6. See *infra* Part III.A (discussing the BIA’s holding in *In re Y-T-L-*, 23 I. & N. Dec. 601, 607 (B.I.A. 2003), which announced the continuing persecution doctrine).

decisions.⁷ The Board held that because FGM is normally only performed once, the fact that a person has already been subjected to it constitutes a “fundamental change in circumstances” such that an asylum applicant no longer has a well-founded fear of persecution.⁸ The Board announced that FGM should not be viewed as a “continuing persecution,” tantamount to forced sterilization, for the primary reason that Congress has not expressly addressed victims of FGM in the way that it addressed victims of coercive population control policies.⁹ In reaching this decision, the Board misinterpreted the legislative purpose behind the 1996 amended definition of “refugee” and failed to follow its own regulatory framework.¹⁰

The potential harm of *In re A-T* stretched beyond its facts because the BIA chose to publish it as one of forty precedent decisions in 2007,¹¹ making this decision binding on all immigration judges as well as the Board.¹² While publishing such a clearly flawed decision as precedent can be criticized as a poor policy choice by the BIA, the silver lining to this cloud is that *In re A-T* galvanized a community of immigration advocates from across the country who joined forces to “right a wrong.”¹³ The attention these advocates brought to the case shone a light not only on the plight of FGM victims who seek refuge in this country, but also on the BIA’s inconsistent treatment of certain noncitizens and on the pressing need for both procedural and statutory reform.¹⁴ On September 22, 2008, Attorney General Michael Mukasey heeded the call of these advocates and members of Congress by vacating *In re A-T* and remanding the case to the BIA for reconsideration.¹⁵ His opinion echoed several of the issues raised by immigration advocates, but he expressly declined to address the BIA’s position on the continuing persecution doctrine and its applicability to victims of FGM.¹⁶

The circuit courts are split on the issue of applying the continuing persecution doctrine to victims of FGM.¹⁷ Normally, the BIA follows circuit

7. *In re A-T*, 24 I. & N. Dec. 296, 296 (B.I.A. 2007). For a discussion of the Board’s unpublished decisions, see *infra* Part III.B.2.

8. *In re A-T*, 24 I. & N. Dec. at 296.

9. *Id.* at 296, 300.

10. *Id.* at 300; see *infra* Part IV.B.

11. Juan P. Osuna & Jean C. King, *Precedent Decisions of the Board of Immigration Appeals in Fiscal Year 2007*, 84 INTERPRETER RELEASES 2461, 2461 (2007).

12. 8 C.F.R. § 1003.1(g) (2006).

13. See *infra* Part IV.A.

14. See *infra* Parts III.B, V.A (discussing the “slippery slope”-type fears raised in extending the continuing persecution doctrine to FGM victims).

15. *In re A-T*, 24 I. & N. Dec. 617, 623 (A.G. 2008).

16. *Id.* at 620 n.3.

17. See *infra* Part III.B.3–4; see also Valena Elizabeth Beety, *Reframing Asylum Standards for Mutilated Women*, 11 J. GENDER RACE & JUST. 239, 249–50 (2008) (discussing the conflicting views of the Seventh and Ninth Circuits, as well as unpublished opinions from the Third and Fifth Circuits).

law in cases arising within that circuit.¹⁸ In recent years, however, government immigration attorneys have relied on a 2005 Supreme Court decision, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, to reclaim judicial deference where the BIA's interpretation of an ambiguous statute differs from a circuit court's prior interpretation of that statute.¹⁹ Thus, even in a circuit that extended the continuing persecution doctrine to FGM victims in the past, there is a chance that, under *Brand X*, the very same court may be required to defer to an agency's "reasonable interpretation" of its statute and refuse to extend the doctrine in the future.²⁰

Three days after the Attorney General remanded *In re A-T*, he remanded another asylum case to the BIA, *In re R-A*, in which he cited *Brand X* in defining the parameters of the Board's review: "Insofar as a question involves interpretation of ambiguous statutory language, the Board is free to exercise its own discretion and issue a precedent decision establishing a uniform standard nationwide."²¹ The Attorney General noted that prior to *Brand X*, "the Board had held that it was generally bound to apply existing circuit precedent in cases arising in that circuit. . . . [T]hose decisions are no longer good law with respect to cases involving the interpretation of ambiguous statutory provisions."²² *In re R-A* can potentially impact the BIA's reconsideration of *In re A-T* since both cases involve similar issues of statutory interpretation.²³ In both cases, the Board must determine whether a victim of a "persecution" (FGM in *In re A-T* and domestic violence in *In re R-A*) has met the statutory definition of "refugee" (and is, thus, eligible for relief) by establishing that she was persecuted on account of her "membership in a particular social group."²⁴ While immigration advocates applauded the Attorney General's remand of *In re A-T*, the subsequent remand of *In re R-A* may have rendered any celebration premature.²⁵

18. REGINA GERMAIN, AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 15–16 (3d ed. 2003).

19. See *infra* Part II.C.

20. See *infra* Part V.C.

21. *In re R-A*, 24 I. & N. Dec. 629, 631 (A.G. 2008).

22. *Id.* at 631 n.4 (internal citations omitted).

23. The most critical statutory phrase that the Board will have to interpret in both cases is "membership in a particular social group," which is discussed *infra* Part II.

24. See *In re R-A*, 24 I. & N. Dec. at 630–31 (lifting the stay on *In re R-A* and cases involving "similarly situated aliens" and instructing the Board to revisit the issues in these cases, which include interpreting the statutory terms "persecution," "on account of," and "particular social group"); *In re A-T*, 24 I. & N. Dec. 617, 623 (A.G. 2008) (instructing the Board to determine whether the applicant "has established past persecution on account of membership in a particular social group").

25. See Letter from Reps. John Conyers and Zoe Lofgren to Attorney Gen. Michael Mukasey (Sept. 23, 2008), available at http://judiciary.house.gov/News/PDFs/Conyers-Lofgren_080923.pdf (commending the Attorney General for his decision to vacate and remand *In re A-T*); Press Release, Ctr. for Gender & Refugee Studies, Univ. of Cal., Hastings Coll. of the Law,

This Note follows the trajectory of *In re A-T* as a vehicle through which to explore the development of the continuing persecution doctrine and the BIA's refusal to extend this doctrine to victims of FGM. Part II of this Note provides an overview of asylum law in the United States and the adjudication of immigration cases.²⁶ This Part also explores how government attorneys are relying on *Brand X* to obtain judicial deference for the Board's decisions.²⁷ Part III examines the evolution of the continuing persecution doctrine through a review of the coercive population control cases and FGM cases by the BIA and the federal circuit courts.²⁸ Part IV outlines the most critical flaws in *In re A-T* and describes the response this case generated from immigration advocates and members of Congress.²⁹

Finally, Part V discusses the initial concerns raised in classifying FGM as a form of persecution and how those concerns drove the subsequent opposition to extending the continuing persecution doctrine to victims of FGM.³⁰ This Part ultimately proposes that Congress amend the governing statute by adding a definition of "persecution" that codifies the essential logic of the continuing persecution doctrine.³¹ Statutory clarification may be the only way to ensure the consistent and fair treatment of all victims of persecution who seek relief in the immigration courts.³²

II. ASYLUM LAW, ADJUDICATION OF IMMIGRATION CASES, AND JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

Asylum law, unlike any other area of law in the United States, is fundamentally grounded in international law.³³ Statutes and domestic cases—both federal and administrative—govern the adjudication of asylum cases.³⁴

Under the INA, a "refugee" is defined as:

[A]ny person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of

New Ruling by Attorney General Mukasey May Endanger Rights of Women Asylum Seekers, available at http://cgcs.uchastings.edu/documents/media/press%20release/R-A-Mukasey_press_release_oct_08.pdf (expressing concern over the Attorney General's decision).

26. See *infra* Part II.A–B.

27. See *infra* Part II.C.

28. See *infra* Part III.A–B.

29. See *infra* Part IV.

30. See *infra* Part V.

31. See *infra* Part V.

32. See *infra* Part V.

33. GERMAIN, *supra* note 18, at 1.

34. *Id.* at 2.

persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.³⁵

The INA does not define persecution, but the BIA has interpreted it as “harm or suffering that is inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome.”³⁶ Federal courts and the BIA have recognized that persecution can be inflicted by “a government, or persons a government is unwilling or unable to control.”³⁷ Private acts of violence “can be considered persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.”³⁸

While persecution based on race, religion, nationality, and political opinion can be clearly identified, “membership in a particular social group” is a much more nebulous concept.³⁹ Courts have interpreted “particular social group” to include families, homosexuals, members of tribes, parents of student dissidents, former police officers, government workers, and union members, to name a few.⁴⁰ Gender is too broad a category to constitute a “particular social group,” although the BIA has recognized that gender can form the basis for this classification.⁴¹ In recent years, several BIA opinions have set forth a “social visibility” test that requires that the community at large recognize the shared characteristic of the particular social group.⁴² As there is no definition of this phrase in the INA, the law surrounding what

35. 8 U.S.C. § 1101(a)(42)(A) (2000).

36. *In re Acosta*, 19 I. & N. Dec. 211, 211–12 (B.I.A. 1985). In 2006, the BIA reaffirmed *Acosta* in *In re C-A*, 23 I. & N. Dec. 951, 955 (B.I.A. 2006). Shoshanna Malett, *Asylum Law—A Primer Part I*, 07-08 IMMIGR. BRIEFINGS 1 & n.50 (Aug. 2007). Although Congress did not define “persecution,” it noted that the term meant

the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (e.g., race, religion, political opinion, etc.), in a manner condemned by civilized governments. The 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.

H.R. REP. NO. 95-1452, at 5 (1978).

37. *Pitcherskaia v. INS*, 118 F.3d 641, 647 (9th Cir. 1997) (quoting *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996)).

38. OFFICE OF THE U.N. HIGH COMM’R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 65, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992), available at <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf>.

39. Michael G. Daugherty, Note, *The Ninth Circuit, the BIA, and the INS: The Shifting State of the Particular Social Group Definition in the Ninth Circuit and Its Impact on Pending and Future Cases*, 41 BRANDEIS L.J. 631, 638 & n.51 (2003).

40. GERMAIN, *supra* note 18, at 39–40.

41. *In re Acosta*, 19 I. & N. Dec. at 233; *see infra* Part III.B.

42. *In re S-E-G*, 24 I. & N. Dec. 579, 586 (B.I.A. 2008); *In re A-M-E- & J-G-U*, 24 I. & N. Dec. 69, 74 (B.I.A. 2007); *In re C-A*, 23 I. & N. Dec. 951, 959–60 (B.I.A. 2006).

constitutes “membership in a particular social group” will continue to evolve.

A. *FORMS OF RELIEF: ASYLUM AND WITHHOLDING OF REMOVAL*

The INA provides two forms of relief to those seeking refuge in the United States: asylum and withholding of removal.⁴³ Asylum provides a more permanent form of relief and is more desirable, whereas withholding of removal has a much higher burden of proof and only ensures that the successful applicant will not be removed to his or her feared home country.⁴⁴ A grant of asylum, however, is discretionary, whereas if an applicant meets the more stringent standards of withholding of removal, he or she *cannot* be returned to his or her home country.⁴⁵ Asylum applicants are also considered to be applicants for withholding of removal, but their eligibility for withholding will only be addressed if they are not eligible for asylum relief.⁴⁶

A noncitizen can obtain asylum by demonstrating that he or she (1) is a refugee, as defined by statute, (2) is not subject to any statutory bars to asylum, and (3) merits a favorable discretionary grant of asylum.⁴⁷ The Attorney General has the discretion to grant asylum to a person who establishes an unwillingness or inability to return to his or her home country because of past persecution or a well-founded fear of future persecution.⁴⁸ The applicant bears the burden of establishing eligibility and can satisfy this burden by demonstrating the existence of a “reasonable possibility” of persecution.⁴⁹ The persecution must be “on account of” one of the five grounds enumerated in the INA’s definition of “refugee.”⁵⁰ An asylum applicant does not have to prove the precise motive of her persecutor, but must “provide *some* evidence of it, direct or circumstantial.”⁵¹ This “on account of” requirement is sometimes referred to as the “nexus” requirement, and these terms will be used interchangeably throughout this Note.

43. GERMAIN, *supra* note 18, at 22–23.

44. *Id.*

45. *Id.* at 23.

46. *Id.*

47. Anwen Hughes, *Asylum and Withholding of Removal—A Brief Overview of the Substantive Law*, in *BASIC IMMIGRATION LAW 2008*, at 304, 309 (2008).

48. Immigration and Nationality Act § 208(a), 8 U.S.C. § 1158(a) (2000); GERMAIN, *supra* note 18, at 22.

49. GERMAIN, *supra* note 18, at 22 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438–39 (1987)).

50. *Id.* at 33.

51. *Id.* (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992)).

Establishing past persecution creates the presumption of a well-founded fear of future persecution.⁵² The burden then shifts to the government to rebut the presumption by showing that either (1) the fear is not well-founded due to a fundamental change in circumstances or (2) the applicant can reasonably relocate to another part of his or her home country.⁵³ Even if the government rebuts the presumption, the applicant may be eligible for a discretionary grant of “humanitarian asylum” if the past persecution was particularly severe or upon demonstrating that he or she will face some “other serious harm” if forced to return.⁵⁴

If an applicant is not eligible for asylum, his or her application may be considered for withholding of removal.⁵⁵ Obtaining withholding of removal is more difficult (and less desirable) than asylum; it requires an applicant to establish a “clear probability” that he or she will be persecuted on account of one of the five enumerated grounds if deported to his or her home country.⁵⁶ Past persecution creates a rebuttable presumption of a well-founded fear of future persecution, but the “clear probability” standard makes the applicant’s burden a heavy one to prove.⁵⁷ If the applicant successfully meets this burden, the Attorney General must withhold removal; relief is mandatory, not discretionary.⁵⁸ The applicant cannot be deported to his or her feared home country, but *can* be removed to any other “hospitable country” that is willing to accept him or her.⁵⁹ Unlike asylum, there is no “humanitarian” withholding of removal; no matter how severe the past persecution, the applicant must demonstrate a clear probability of future persecution in order to obtain withholding of removal.⁶⁰

52. *Id.* at 32 (citing 8 C.F.R. § 208.13(b)(1) (2003)).

53. *Id.* (citing 8 C.F.R. § 208.13(b)(1)(i)–(ii)).

54. GERMAIN, *supra* note 18, at 32 (citing 8 C.F.R. § 208.13(b)(1)(iii)). A grant of humanitarian asylum requires that:

(A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or

(B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

Id.

55. *Id.* at 23.

56. *Id.* (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987); *INS v. Stevic*, 467 U.S. 407, 429–30 (1984)).

57. *Id.* at 32 (citing 8 C.F.R. § 208.16(b)(1)(i)–(ii)).

58. *Id.* at 23.

59. GERMAIN, *supra* note 18, at 23.

60. *Id.*; see also *In re A-T*, 24 I. & N. Dec. 296, 298 n.1 (B.I.A. 2007) (“[T]he regulations governing withholding of removal do not provide for a discretionary grant of relief based solely on the severity of past harm.”).

In addition to clearing these statutory hurdles, noncitizens must navigate the bureaucracies of the relevant decision-making entities and follow established processes to obtain different forms of relief.

*B. THE REMOVAL PROCESS AND THE ORGANIZATIONAL STRUCTURE
OF IMMIGRATION ADJUDICATORS*

A noncitizen can apply for asylum affirmatively (usually within one year of arriving in the United States) or defensively (once removal proceedings have begun).⁶¹ An asylum officer interviews the affirmative applicant in a nonadversarial setting and may grant, deny, or refer the applicant to an immigration judge (“IJ”) for review, if the applicant has no other lawful basis to be in the country.⁶² If the application is denied or referred, the noncitizen receives a hearing in front of an IJ, whose decision can then be appealed to the BIA.⁶³

The IJs and the BIA are part of the Executive Office for Immigration Review (“EOIR”), which is within the Department of Justice (“DOJ”).⁶⁴ Both IJs and Board members are appointed by and serve at the pleasure of the Attorney General.⁶⁵ The BIA is a quasi-judicial body that serves two purposes: to decide appeals and issue precedential opinions.⁶⁶ While the BIA issues both published and unpublished decisions, only published decisions are binding on IJs and Board members.⁶⁷ Decisions rendered by either a three-member or en banc panel of the Board may be selected for publication by a majority of the Board’s permanent members.⁶⁸ The BIA is bound by its own precedent and normally follows a circuit court’s prior holdings in cases that arise within that circuit’s jurisdiction.⁶⁹ If the BIA

61. GERMAIN, *supra* note 18, at 103, 111.

62. *Id.* at 106–09.

63. *Id.* at 123. Both the applicant and the government can appeal an IJ’s decision to the BIA. *Id.* at 162.

64. Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 371–72 (2006). In 1983, IJs were transferred from the now-defunct Immigration and Naturalization Service (“INS”) to the EOIR. *Id.* at 372. The BIA was “created by the Attorney General in 1940 [and] was moved to the EOIR in 1983.” *Id.* at 375.

65. *Id.* at 372–74; *see also* EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL app. C, *available at* <http://www.usdoj.gov/eoir/vll/qapracmanual/apptmtn4.htm> [hereinafter BIA PRACTICE MANUAL] (providing an illustration of the organizational structure of all the immigration-related agencies).

66. DORSEY & WHITNEY, *supra* note 3, at 9 (citing 8 C.F.R. § 3.1 (1999)).

67. 8 C.F.R. § 1003.1(g) (2006).

68. *Id.* In deciding which decisions to publish, the Board considers whether the case meets one or more of the following criteria of this non-exhaustive list: “[T]he resolution of an issue of first impression; alteration, modification, or clarification of an existing rule of law; reaffirmation of an existing rule of law; resolution of a conflict of authority; and discussion of an issue of significant public interest.” BIA PRACTICE MANUAL, *supra* note 65, § 1.4(d) (i) (A).

69. GERMAIN, *supra* note 18, at 15–16.

disagrees with a particular circuit, however, it will not follow that decision in other circuits.⁷⁰

Subject to certain limitations, an applicant has a right to judicial review of an adverse BIA decision.⁷¹ If the adverse decision was an asylum case, the noncitizen may seek review directly in the court of appeals in the federal circuit in which the case arose.⁷² Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, courts must defer to administrative agency decisions in certain circumstances.⁷³ When reviewing an agency's interpretation "of the statute which it administers," *Chevron* requires a court to first determine "whether Congress has directly spoken to the precise question at issue."⁷⁴ If so, the court is not required to defer to the agency's decision because both the court and the agency "must give effect to the unambiguously expressed intent of Congress."⁷⁵ If the court finds that the statute is ambiguous, *Chevron* requires the court to defer to the agency's "permissible construction of the statute."⁷⁶ *Chevron* presumes that Congress intended the agency, and not the courts, to fill in any ambiguous gaps in statutory provisions.⁷⁷

Over the past several years, petitions for judicial review of BIA decisions surged.⁷⁸ Scholars have attributed this surge to the Attorney General's 2002 reforms of the BIA's procedures.⁷⁹ These reforms successfully reduced the BIA's enormous backlog of cases, but commentators and judges have criticized the reforms for diminishing the quality of the BIA's decisions.⁸⁰ In

70. *Id.*; see also *In re Anselmo*, 20 I. & N. Dec. 25, 31 (B.I.A. 1989) ("Where we disagree with a court's position on a given issue, we decline to follow it outside the court's circuit.").

71. Legomsky, *supra* note 64, at 372.

72. Carlos Ortiz Miranda, *Administrative Appeals and Judicial Review in Immigration Law: Where Matters Stand at the Beginning of the 21st Century*, 55 CATH. U. L. REV. 917, 918 (2006).

73. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

74. *Id.* at 842.

75. *Id.* at 842–43.

76. *Id.* at 843.

77. See *id.* at 843–44. As the Court in *Chevron* stated:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Id.

78. John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13, 19–20 (2006–2007).

79. See generally John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 3, 6–7 (2005) (proposing a three-prong hypothesis to explain the surge).

80. See, e.g., Legomsky, *supra* note 64, at 375 n.33 (citing *Recinos de Leon v. Gonzales*, 400 F.3d 1185, 1187 (9th Cir. 2005); *Iao v. Gonzales*, 400 F.3d 530, 533 (7th Cir. 2005)). See generally Peter J. Levinson, *The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9

January 2006, Attorney General Alberto Gonzales responded to this criticism by initiating “a comprehensive review of the Immigration Courts and the Board.”⁸¹

C. THE EOIR’S PROPOSED RULES OF 2008 AND THE USE OF BRAND X
TO OBTAIN JUDICIAL DEFERENCE

On June 18, 2008, the EOIR proposed amendments to the regulations governing the Board’s review procedures.⁸² Among the proposed rules are amendments that would give the Board greater flexibility in deciding whether to issue an “affirmance without opinion” (“AWO”),⁸³ in which a single Board member affirms an IJ’s decision without writing an opinion.⁸⁴ The proposed rules encourage written opinions by single members over AWOs, but reiterate the Board’s position that the decision to issue an AWO is within the agency’s discretion and is nonreviewable by a court.⁸⁵ The amendments would also allow a single Board member to refer a case to a three-member panel for review and encourage the increased publication of precedential decisions by allowing a majority of a three-member panel to

BENDER’S IMMIGR. BULL. 1154 (2004) (discussing the lack of decisional independence in immigration cases).

81. Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654–55 (proposed June 18, 2008) (to be codified at 8 C.F.R. pt. 1003) [hereinafter Proposed Rules].

82. *Id.* at 34,655. As of this writing, these rules have not yet been finalized. The House of Representatives’ Committee on the Judiciary held hearings on September 23, 2008. *See Hearing On: The Executive Office for Immigration Review Before the H. Comm. on the Judiciary*, 110th Cong. (2008), available at http://judiciary.house.gov/hearings/hear_080923.html (last visited Oct. 18, 2008) (providing links to the prepared statements of the Department of Justice and immigration scholars).

83. Proposed Rules, *supra* note 81, at 34,655–56. The rules detail the history of AWOs and state that:

Attorney General Gonzales directed the Board to increase the use of single-member written opinions to address immigration judge decisions that are poor in quality and cases in which the immigration judge’s conduct during the hearing was intemperate or abusive. This rule meets that objective by providing the Board with greater flexibility to issue decisions that respond to the concerns expressed by the federal circuit courts.

Id. at 34,656.

84. AWOs were initially challenged in the federal courts as unconstitutional due-process violations, but the challenges were not sustained. *See* Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 46 (2006–2007) (citing decisions in the First, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits that have rejected such challenges, but noting cases in the First, Third, and Fifth Circuits that have “raised questions as to the propriety of the use of the streamlining provisions in certain circumstances”).

85. *See* Proposed Rules, *supra* note 81, at 34,657 (“[T]he decision to issue an AWO is discretionary and is based on an internal agency directive created for the purpose of efficient case management that does not create any substantive or procedural rights.”).

designate a decision as precedent.⁸⁶ Under the current regulations, only a majority of the Board's permanent members can select a decision for publication.⁸⁷

In explaining the importance of publishing more precedential decisions, the proposed rules recognize that the Second and Ninth Circuits, in which more than half of all immigration cases arise, do not afford deference to unpublished decisions.⁸⁸ In addition, the proposed rules point to the Supreme Court's 2005 decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services* as a compelling reason to publish more precedent decisions.⁸⁹ Under *Brand X*, "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."⁹⁰ Therefore, unless the reviewing court first finds that the statute in question is clear, an "agency is free to adopt a contrary interpretation" that courts must then defer to as long as it is "permissible" under *Chevron's* second step.⁹¹ In his dissent in *Brand X*, Justice Scalia described this as "yet another breathtaking novelty: judicial decisions subject to reversal by executive officers."⁹²

The proposed rules note that *Brand X* enables the Board to "reclaim *Chevron* deference" even if its interpretation conflicts with a previously issued circuit-court decision.⁹³ The BIA has already cited *Brand X* in cases where its decisions may conflict with existing circuit law.⁹⁴ In addition, circuit courts have cited *Brand X* when remanding cases to the BIA to clarify interpretive issues.⁹⁵

The Second Circuit has cited *Brand X* on several occasions when remanding to the BIA—notably, for clarification on "whether affluent Guatemalans constitute a 'particular social group'" and to define "the

86. *Id.* at 34,655, 34,658–59.

87. 8 C.F.R. § 1003.1(g) (2006).

88. Proposed Rules, *supra* note 81, at 34,660.

89. *Id.* at 34,659–60.

90. *Id.* at 34,660 (quoting *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005)).

91. *Id.*

92. *Brand X*, 545 U.S. at 1016 (Scalia, J., dissenting).

93. See Proposed Rules, *supra* note 81, at 34,661 ("*Brand X Internet* offers an important opportunity for the Attorney General and the Board to be able to reclaim *Chevron* deference . . ."); Papu Sandhu, *Brand X Application to Immigration Cases*, IMMIGR. LITIG. BULL. (U.S. Dep't of Justice, Wash., D.C.), Apr. 2008, at 1, 18, available at http://www.bibdaily.com/pdfs/DOJ - Immigration Monthly - April_2008.pdf ("Brand X provides the Attorney General with a useful tool to render authoritative interpretations of provisions in the INA even where a court has previously addressed the issue and reached a different result.").

94. Am. Immigration Law Found., *Brand X* in Immigration Cases, http://www.aifl.org/lac/clearinghouse_brandx.shtml (last visited Sept. 9, 2008).

95. *Id.*

standard governing economic persecution claims.”⁹⁶ The Attorney General also cited *Brand X* when remanding *In re R-A-* to the BIA to determine whether a victim of domestic violence can claim persecution on account of “membership in a particular social group.”⁹⁷ These remands are relevant to this Note as they turn to the BIA for guidance on the statutory definitions of “membership in a particular social group” and “persecution,” both of which are implicated when discussing continuing persecution as applied to FGM victims.⁹⁸

III. THE EVOLUTION OF THE CONTINUING PERSECUTION DOCTRINE THROUGH CASE LAW

During the mid-1990s, two issues mobilized human-rights activists and political forces from both the left and right: China’s coercive population control policy and gender-based persecution, particularly in the form of FGM.⁹⁹ The BIA and the federal courts developed the doctrine of continuing persecution in the context of the coercive population control cases, and its evolution was tumultuous.¹⁰⁰ The subsequent extension of this doctrine to FGM cases has been similarly rocky, as the following two Sections illustrate.

A. COERCIVE POPULATION CONTROL POLICIES AND THE BIRTH OF THE CONTINUING PERSECUTION DOCTRINE

Before 1996, a person fleeing China’s population control policy¹⁰¹ might have been denied asylum because he or she could not establish that the persecution (past or future) was linked to one of the five enumerated grounds by which a person is deemed a refugee.¹⁰² Immigration judges and the BIA routinely held China’s population control policy to be a facially nonpersecutory response to its exploding population problem.¹⁰³ The Board

96. *Id.* (citing *Ucelo-Gomez v. Gonzales*, 464 F.3d 163 (2d Cir. 2006); *Mirzoyan v. Gonzales*, 457 F.3d 217 (2d Cir. 2006)).

97. *In re R-A-*, 24 I. & N. Dec. 629, 630–31 (A.G. 2008).

98. *See supra* Part II (discussing the statutory definition of “refugee”); *infra* Part III.B (applying this definition to FGM cases).

99. Lori K. Walls, *The Persecutor Bar in U.S. Immigration Law: Toward a More Nuanced Understanding of Modern “Persecution” in the Case of Forced Abortion and Female Genital Cutting*, 16 PAC. RIM L. & POL’Y J. 227, 227 (2007).

100. *See infra* Part III.A.

101. For an historical overview of China’s One-Child Policy, see Jamie Jordan, *Ten Years of Resistance to Coercive Population Control: Section 601 of the IIRIRA of 1996 to Section 101 of the REAL ID Act of 2005*, 18 HASTINGS WOMEN’S L.J. 229, 231–35 (2007).

102. *In re Chang*, 20 I. & N. Dec. 38, 44 (B.I.A. 1989). As stated *supra* Part II, those grounds are “race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42)(A) (2000).

103. *In re Chang*, 20 I. & N. Dec. at 43–44. The Board noted that the policy applies to everyone and “does not prevent couples from having children but strives to limit the size of the family.” *Id.* at 44.

recognized that the policy could potentially be applied in a persecutory manner, but “[t]o the extent, however, that such a policy is solely tied to controlling population . . . we cannot find that persons who do not wish to have the policy applied to them are victims of persecution.”¹⁰⁴

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), which dramatically revised U.S. asylum law.¹⁰⁵ After years of pressure from a unique coalition of abortion foes and human-rights activists, Congress amended the definition of “refugee” to expressly include those who have either experienced or who fear being subjected to a country’s coercive population control policy.¹⁰⁶ IIRIRA declared that those who have been “forced to abort a pregnancy or to undergo involuntary sterilization” or persecuted for resisting such procedures “shall be deemed to have been persecuted on account of political opinion.”¹⁰⁷ The amendment did not provide for an automatic grant of asylum.¹⁰⁸ Rather, the drafters intended the amendment to provide these applicants with an enumerated ground (“political opinion”) upon which to base a claim for relief.¹⁰⁹

Even after IIRIRA revised the definition of “refugee,” administrative adjudicators relied on a paradoxical theory to deny asylum claims: those who had been forcibly sterilized could not claim to fear future persecution because they could not be sterilized *again*.¹¹⁰ The adjudicators considered the act of past sterilization to be a change in personal circumstances such

104. *Id.* at 44.

105. GERMAIN, *supra* note 18, at 11.

106. See generally Malett, *supra* note 1, for an in-depth chronology of the political, judicial, and legislative events leading up to and surrounding the passage of IIRIRA.

107. GERMAIN, *supra* note 18, at 11.

108. See *Mohammed v. Gonzales*, 400 F.3d 785, 800 (9th Cir. 2005). As the Ninth Circuit noted:

[T]he statute, which was enacted in order to overcome BIA rulings to the effect that forced abortions and sterilizations did not constitute persecution on account of one of the five reasons enumerated in the INA, does not in its text provide for automatic asylum upon a showing of past persecution.

Id.

109. See Respondent’s Motion to Reconsider at 20, *In re A-T-*, 24 I. & N. Dec. 296 (B.I.A. 2007) (No. A-72-169-850) [hereinafter Respondent’s Motion], available at http://graphics8.nytimes.com/packages/pdf/national/20071105_Motion_for_Reconsideration.pdf (last visited Oct. 20, 2008). Congress’s purpose in amending the statutory definition of “refugee” was to recognize that “forced abortion, forced sterilization or persecution for resistance to such measures are ‘persecution on account of political opinion.’” *Id.* (quoting H.R. REP. NO. 104-478, at 136 (1996) (Conf. Rep.)).

110. Malett, *supra* note 1, at 5–6. Malett describes “an interesting paradigm” in which applicants who had already been sterilized were able to demonstrate past persecution, but not a well-founded fear of future persecution and were, therefore, not granted asylum. *Id.* On the other hand, “applicants who were able to escape being sterilized were found to still have a well-founded fear of future persecution and were grantable.” *Id.*

that the applicant no longer had a well-founded fear of future persecution.¹¹¹ In order to succeed in an asylum claim based on forced sterilization, applicants had to prove either that the past persecution was phenomenally severe or that they feared other forms of persecution in the future.¹¹²

In 1997, the BIA held in *In re C-Y-Z* that the “regulatory presumption of a well-founded fear of future persecution” could only be rebutted by a change in country conditions, and not because the applicant had already been sterilized.¹¹³ In 2000, the Attorney General issued a new regulation that allowed the government to rebut the presumption of a well-founded fear by showing either that there had been a “fundamental change in circumstances” or that the applicant could possibly relocate within his or her home country.¹¹⁴ The new regulation enabled immigration judges to find that the act of sterilization constituted a “fundamental change in circumstances” and that the nonrepetitive nature of sterilization removed any fear of future persecution.¹¹⁵

In 2003, the BIA addressed the issue with seeming finality in an en banc decision, *In re Y-T-L*, holding that:

[I]n light of Congress’s specific intent regarding the eligibility for asylum of past victims of coercive family planning practices . . . such an act of persecution cannot constitute a ‘change in circumstances’ for purposes of the regulation Coerced sterilization is better viewed as a permanent and continuing act of persecution that has deprived a couple of the natural fruits of conjugal life, and the society and comfort of the child or children that might eventually have been born to them.¹¹⁶

The continuing persecution doctrine, announced in *In re Y-T-L*, resonated with the federal courts; in 2005, the Ninth Circuit reversed a BIA decision that had denied withholding of removal to a man whose wife had been forcibly sterilized.¹¹⁷ On review, the court declared that “[b]ecause the

111. *Id.*

112. *Id.*

113. *In re C-Y-Z*, 21 I. & N. Dec. 915, 915 (B.I.A. 1997).

114. Lory Diana Rosenberg, *Aggressive Circuit Court or Administrative Neglect: Just Who Is Failing to Follow BIA Asylum Precedent?*, 10 BENDER’S IMMIGR. BULL. 863, 866 (2005).

115. *Id.* (quoting an IJ’s ruling that “personal circumstances can be considered in changed circumstances and I find that once you’re sterilized you can’t be sterilized again”).

116. *In re Y-T-L*, 23 I. & N. Dec. 601, 607 (B.I.A. 2003) (citing *In re G-*, 20 I. & N. Dec. 764 (B.I.A. 1993); *In re Chang*, 20 I. & N. Dec. 38 (B.I.A. 1989)). The Board also noted the potential inconsistency in granting asylum to “those subjected to a forced abortion, while denying relief to those subjected to a forced sterilization, simply because only the former act of persecution is one capable of repetition.” *In re Y-T-L*, 23 I. & N. Dec. at 607.

117. *Qu v. Gonzales*, 399 F.3d 1195, 1196, 1203 (9th Cir. 2005). The BIA denied the applicant withholding of removal because he had “remained in China for eleven years after the sterilization and had no reason to fear returning.” *Id.* at 1201.

persecution is ongoing, . . . it is not possible, as a matter of law, for conditions to change . . . [in a way] that would eliminate a well-founded fear of persecution.”¹¹⁸ Thus, the court held that the forced sterilization of an applicant or his or her spouse was sufficient to entitle the applicant to withholding of removal.¹¹⁹ Cases involving victims of FGM served as the next logical frontier in which to test the continuing persecution doctrine.

B. ASYLUM CLAIMS BASED ON FGM: THE APPROACH OF THE BIA
AND THE FEDERAL COURTS

In 1995, the United States became the second country in the world to issue guidelines for gender-related claims,¹²⁰ recognizing that persecution “based wholly or in part” on gender can serve as a possible ground for asylum.¹²¹ The guidelines, while highly instructive, have no legally binding effect on “immigration judges, the Board of Immigration Appeals, or the federal courts.”¹²²

Even before the guidelines were issued, the BIA recognized that gender can form the basis of “membership in a particular social group.”¹²³ The BIA decision *In re Acosta* interpreted “persecution on account of membership in a particular social group” as

persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties [W]hatever the common

118. *Id.* at 1203.

119. *Id.* On May 15, 2008, Attorney General Michael Mukasey overruled *In re C-Y-Z* when he announced, in *In re J-S*, that the spouse of a person who has undergone forced sterilization or abortion “is not per se entitled to refugee status.” *In re J-S*, 24 I. & N. Dec. 520, 520 (A.G. 2008). Nothing in this decision, however, altered the basic holding of *In re Y-T-L*—that past persecution cannot be used to rebut the presumption of well-founded fear of future persecution.

120. Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 779 (2003). In 1983, the Office of the United Nations High Commissioner for Refugees “recommended that States develop appropriate guidelines for gender claims Canada was the first to develop guidelines in 1993, followed by the United States (1995), Australia (1996), the United Kingdom (2000), and Sweden (2001).” *Id.* at 779–80.

121. Memorandum from Phyllis Coven, Office of Int’l Affairs, U.S. Dep’t of Justice, to All INS Asylum Officers and HQASM Coordinators, *Considerations for Asylum Officers Adjudicating Claims from Women* (May 26, 1995), available at http://cgrrs.uchastings.edu/documents/legal/guidelines_us.pdf. This memorandum provides an overview of the evolution of gender-related claims, describes human rights and cultural issues affecting women applicants, and details how gender-based claims can be analyzed within the confines of U.S. law.

122. Danette Gómez, Note, *Last in Line—The United States Trails Behind in Recognizing Gender-Based Asylum Claims*, 25 WHITTIER L. REV. 959, 963 (2004).

123. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985). The Board applied the doctrine of *ejusdem generis* to define “membership in a particular social group” in the context of the other four enumerated grounds, “race, religion, nationality, and political opinion.” *Id.* (internal quotations omitted).

characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.¹²⁴

Several federal circuits have adopted *Acosta's* “immutable characteristic” definition.¹²⁵ In doing so, they have further refined and advanced the concept of gender as constituting a basis for “membership in a particular social group.”¹²⁶

Despite this recognition, applicants who claimed gender-based persecution still faced the challenge of establishing a nexus “between the gender-defined social group and the feared persecution.”¹²⁷ One substantial impediment to establishing this nexus is the Supreme Court’s decision in *INS v. Elias-Zacarias*,¹²⁸ which requires evidence that the persecutor intended “to persecute because of one of the five grounds.”¹²⁹ This can be difficult to establish in FGM cases, where the “persecutor” in question is performing a customary tribal ritual and may even be a family member.¹³⁰

1. Establishing the Nexus Between FGM and Membership in a Particular Social Group: *In re Kasinga*

The BIA decision *In re Kasinga* was a breakthrough for those claiming to fear persecution in the form of FGM. In *Kasinga*, the BIA granted asylum to

124. *Id.* at 233. The Board emphasized the concept of immutability throughout its decision, repeatedly stating that the characteristic responsible for the persecution must be one “that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed.” *Id.* at 234.

125. See Malett, *supra* note 36, at 1 n.50 (“[T]he First, Third, Sixth and Seventh Circuits have specifically adopted *Acosta*.”); see also Shoshanna Malett, *Gender as a Ground for an Asylum Claim: Can You? Should You?*, 07-05 IMMIGR. BRIEFINGS 1, 5 (May 2007) (“The Ninth Circuit initially added a required ‘voluntary associational relationship’ among its members but later recognized that sharing immutable characteristics such as familial ties or sexual identity can also be considered a social group.”).

126. See Gómez, *supra* note 122, at 966–69 (discussing *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1574–76 (9th Cir. 1986) (developing a four-part test to determine whether a woman seeking asylum was a member of a “particular social group” and concluding that this category could include people who were related “even if only by a common interest”)); see also *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993) (accepting *Acosta's* definition of “membership in a particular social group” and recognizing that women can attempt to use gender to satisfy this definition).

127. Musalo, *supra* note 120, at 785.

128. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

129. See Musalo, *supra* note 120, at 799–800 & n.126 (noting that *Elias-Zacarias* has been criticized on two major points: the difficulty in establishing “the state of mind or motivation of the persecutor” and the fact that while the *purpose* of imposing the harm may not be directly attributable to one of the five grounds, that may be the ultimate *effect* of the persecution).

130. See Walls, *supra* note 99, at 247–52 (arguing that applying the INA’s persecutor bar to FGM practitioners is overinclusive given that “most of its practitioners believe that they are simply performing an important cultural rite”).

a woman from Togo based on her well-founded fear of being subjected to FGM.¹³¹ The BIA recognized that FGM can “constitute ‘persecution’ within the meaning of [the INA].”¹³² This aspect of the decision relied on testimony and background material in the record that described the extreme form of FGM practiced in Togo, as well as FGM’s immediate and long-term effects.¹³³

The decision then defined her “particular social group” as “[y]oung women of the Tchamba-Kunsuntu Tribe, who have not had FGM, as practiced by that tribe, and who oppose the practice.”¹³⁴ The decision stated that:

[T]here is no legitimate reason for FGM. . . . Record materials state that FGM “has been used to control a woman’s sexuality.” It is also characterized as a form of “sexual oppression” that is “based on the manipulation of women’s sexuality in order to assure male dominance and exploitation.” . . . [T]he practice is a “severe bodily invasion” that should be regarded as meeting the asylum standard even if done with “subjectively benign intent.”¹³⁵

The extensive evidence in the record enabled the BIA to find that “FGM is practiced, at least in some significant part, to overcome sexual characteristics of young women of the tribe who have not been, and do not wish to be, subjected to FGM” and, thus, “the persecution the applicant fears in Togo is ‘on account of’ her status as a member of the defined social group.”¹³⁶

While both parties in *Kasinga* agreed that FGM could constitute persecution,¹³⁷ the government raised “slippery slope”-type concerns regarding the millions of women around the world who have already been

131. *In re Kasinga*, 21 I. & N. Dec. 357, 357 (B.I.A. 1996).

132. *Id.* at 365.

133. *Id.* at 361–62. The decision stated:

[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 [T]he 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 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 loss of genital sensation and can adversely affect sexual and erotic functions.

Id. at 361.

134. *Id.* at 365.

135. *Id.* at 366 (internal citations omitted).

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

137. *Id.*

subjected to FGM.¹³⁸ To address the feared surge of FGM-based asylum claims, the government offered a familiar argument: the fact that the procedure cannot be repeated constitutes a fundamental change in circumstances sufficient to rebut a well-founded fear of future persecution.¹³⁹ Relying on this argument, the government urged the Board to adopt an analytical framework “that would support grants of asylum to persons who may prospectively face FGM, but would not routinely make asylum available to persons who have simply previously suffered FGM.”¹⁴⁰ Given that *Kasinga* involved a woman who had not yet been subjected to FGM, but credibly feared it, the Board declined to adopt the government’s proposed framework,¹⁴¹ although one Board member noted that “it may be anomalous to have a binding presumption of future persecution where the act of persecution will never again take place for the individual past victim.”¹⁴²

Kasinga has been hailed as a landmark decision for those seeking refuge from gender-based persecution, particularly in the form of FGM.¹⁴³ However, by properly refusing to define an analytical framework under which to assess *all* FGM-based claims, the BIA left open the question of this decision’s applicability to women who have already undergone FGM.¹⁴⁴

2. The BIA Extends the Continuing Persecution Doctrine to FGM Victims in Unpublished Decisions

In several prior unpublished decisions, single Board members granted women asylum based on past FGM.¹⁴⁵ These decisions recognized the

138. *Id.* at 370 (Filppu, Board Member, concurring) (noting that it is “estimated that over eighty million females have been subjected to FGM”). The government further argued that “there is ‘no indication’ that ‘Congress considered application of [the asylum laws] to broad cultural practices of the type involved here’” and that the Board “cannot simply grant asylum to all who might be subjected to a practice deemed objectionable or a violation of a person’s human rights.” *Id.* at 370–71 (internal citations omitted).

139. *Id.* at 371 (“[INS] references 8 C.F.R. § 208.13(b)(1) (1995), and notes ‘that a woman once circumcised cannot ordinarily be subjected to FGM a second time.’” (internal citation omitted)).

140. *Id.* at 372.

141. *In re Kasinga*, 21 I. & N. Dec. at 368–69.

142. *Id.* at 371 (Filppu, Board Member, concurring).

143. *See* Gómez, *supra* note 122, at 970–71 (noting that “[t]he nexus in *Kasinga* is monumental because the persecution of *Kasinga* was carried out by non-state actors” and referring to the decision as “a landmark case in gender-asylum jurisprudence”).

144. *In re Kasinga*, 21 I. & N. Dec. at 368–69. The requirement of “social visibility” in defining “membership in a particular social group” may strongly impact the classification of past FGM victims as members of a particular social group. *See infra* Part V.A (discussing the “social visibility” requirement and its relevance to FGM victims).

145. *See In re Anonymous* (B.I.A. Nov. 7, 2005) (single-member unpublished opinion granting a woman from Gambia asylum based on her past FGM) (on file with the Iowa Law Review), *available at* <http://cgrs.uchastings.edu/assistance> (submit request with reference to Case No. 1162); *In re Anonymous* (B.I.A. May 23, 2003) (single-member unpublished decision

ongoing nature of the persecution and either paraphrased or quoted *In re Y-T-L*, thus demonstrating the Board's willingness to extend the continuing persecution doctrine to cases involving past FGM.¹⁴⁶

The first decision, issued only one day after *In re Y-T-L*, granted asylum to a Nigerian woman, stating that "[t]he act of forced female genital mutilation cannot be viewed as a discrete, one-time act Forced [FGM] is better viewed as a permanent and continuing act of persecution"¹⁴⁷

In another decision, issued in 2005, the Board stated that "[t]he persecution resulting from FGM is therefore continuing and permanent. Considering the effects of such persecution, we find that the presumption of future harm has not been adequately rebutted simply because the procedure may not be repeated."¹⁴⁸

Two months later, the Board granted asylum to a woman from Gambia who had also been subjected to FGM in the past.¹⁴⁹ The opinion compared the permanent ramifications of FGM to forced sterilization, concluding that "there was no indication that the effects of her persecution would dissipate and may be taken as permanent," and added that the immigration judge's "observations are fully consistent with our decision in *Matter of Y-T-L*."¹⁵⁰

While the above decisions represent the Board's (or at least individual Board Members') capacity to extend the logic of *In re Y-T-L* to FGM victims in the past, the BIA did not consistently grant asylum or withholding of removal to all victims of FGM. Applicants who were denied asylum or withholding of removal petitioned their respective circuits for review—and those circuits proceeded to split in their approaches to victims of past FGM.

3. The Seventh and Ninth Circuits Split on Whether to Extend the Continuing Persecution Doctrine to FGM Victims

The Seventh and Ninth Circuits have adopted conflicting views on whether to extend the doctrine of continuing persecution to cases involving past FGM.¹⁵¹ At the heart of this split is a conflict over the nature of the

granting a Nigerian woman asylum based on her past FGM) (on file with the Iowa Law Review), available at <http://cgrrs.uchastings.edu/assistance> (submit request with reference to Case No. 201). Unpublished BIA decisions can be challenging, but not impossible, to find. The Center for Gender and Refugee Studies at the University of California, Hastings College of the Law, is a valuable resource and will quickly respond to requests for unpublished decisions via the above-mentioned website. See also *Bah v. Mukasey*, 529 F.3d 99, 120–21 (2d Cir. 2008) (Straub, J., concurring) (discussing the above two cases, as well as a third case, *In re Mariama Dalanda Bah*).

146. *In re Anonymous* at 2 (B.I.A. Nov. 7, 2005); *In re Anonymous* at 2 (B.I.A. May 23, 2003).

147. *In re Anonymous* at 2 (B.I.A. May 23, 2003).

148. *Bah*, 529 F.3d at 120 (internal citation omitted).

149. *In re Anonymous* at 2 (B.I.A. Nov. 7, 2005).

150. *Id.*

151. See generally Beety, *supra* note 17, at 249–56 (discussing the primary cases in the Seventh and Ninth Circuits, as well as ancillary cases in the Third, Fifth, Eighth, and Tenth Circuits).

harm of FGM itself. The Seventh Circuit views FGM as a “one-time act” that cannot be repeated and thus rebuts the presumption of a well-founded fear of future persecution.¹⁵² The Ninth Circuit considers the ongoing ramifications of FGM to be a continuing form of persecution that affects the victim for the rest of her life.¹⁵³

In *Oforji v. Ashcroft*, the Seventh Circuit affirmed an immigration judge’s denial of asylum to a Nigerian woman who had undergone FGM in the past and feared her two daughters would be forced to submit to FGM if they returned to Nigeria.¹⁵⁴ The court accepted the government’s argument that since Oforji had already experienced FGM, there was “no chance that she would be personally tortured again by the procedure when sent back to Nigeria.”¹⁵⁵ The court also held that since her daughters were born in the United States, they were citizens and could stay—even if Oforji herself was deported.¹⁵⁶

The Seventh Circuit reaffirmed *Oforji* in 2004 in *Olowo v. Ashcroft*, which held that a victim of past FGM could no longer fear persecution in the form of FGM and was thus ineligible to claim asylum relief based on this past persecution.¹⁵⁷ Additionally, the Third and Fifth Circuits both seem to have embraced the Seventh Circuit’s approach, albeit in unpublished decisions.¹⁵⁸

In 2005, the Ninth Circuit addressed the issue of past FGM in a case involving a woman from Somalia who had undergone FGM as a young girl.¹⁵⁹ *Mohammed v. Gonzales* rejected the Seventh Circuit’s rationale in *Oforji*, instead holding that “genital mutilation, like forced sterilization, is a ‘permanent and continuing’ act of persecution, which cannot constitute a change in circumstances sufficient to rebut the presumption of a well-founded fear.”¹⁶⁰ The *Mohammed* court relied on prior forced-sterilization cases—both its own decisions and the BIA’s—in finding that the “reasoning [of those cases] would appear to apply equally to the case of genital

152. *Id.* at 249–51 (discussing the Seventh Circuit’s opinions in *Oforji v. Ashcroft*, 354 F.3d 609 (7th Cir. 2003), and *Olowo v. Ashcroft*, 368 F.3d 692 (7th Cir. 2004)).

153. *Id.* at 249, 252–55 (discussing the Ninth Circuit’s opinion in *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005)).

154. *Oforji*, 354 F.3d at 611–12.

155. *Id.* at 615.

156. *Id.* at 616. Claims of derivative asylum or constructive deportation that arise in cases involving children who are U.S. citizens but whose parents are noncitizens are highly controversial and beyond the scope of this Note, which focuses on the claim of the applicant only.

157. *Olowo*, 368 F.3d at 700–01.

158. *Beety*, *supra* note 17, at 251–52.

159. *Mohammed v. Gonzales*, 400 F.3d 785, 790 (9th Cir. 2005).

160. *Id.* at 800.

mutilation.”¹⁶¹ Thus, the Ninth Circuit expressly extended the continuing persecution doctrine to victims of FGM.¹⁶²

4. The Second and Eighth Circuits Consider Other Forms of Persecution Faced by Victims of FGM

The Second and Eighth Circuits have taken a more holistic approach to assessing persecution, and have criticized the BIA for assuming that women who have been subjected to FGM in the past face no other forms of persecution in the future.¹⁶³

In 2007, the Eighth Circuit joined a growing number of circuits that recognize FGM as “persecution within the meaning of our asylum law.”¹⁶⁴ *Hassan v. Gonzales* involved the asylum application of a Somali woman who had undergone FGM as a child.¹⁶⁵ The government raised its familiar argument: because FGM cannot be performed again, Hassan no longer had anything to fear in Somalia.¹⁶⁶

Hassan did not expressly adopt the Ninth Circuit’s continuing persecution rationale, but it did criticize the Board for failing to apply its established burden-shifting framework in analyzing the case.¹⁶⁷ First, the court stated that the “establishment of past persecution creates a presumption [of] . . . a well-founded fear of future persecution.”¹⁶⁸ Once this is established (and in this case it was not in dispute), the burden of proof should have “shifted to the government to show by a preponderance of the evidence that conditions in Somalia have changed” such that Hassan should no longer fear persecution.¹⁶⁹ The court stated that:

The government’s argument erroneously assumes that FGM is the only form of persecution in Somalia and that having undergone the procedure, Hassan, as a Somali woman, is no longer at risk of other prevalent forms of persecution. *We have never held that a*

161. *Id.* at 799–800 n.22 (citing *Qu v. Gonzales*, 399 F.3d 1195 (9th Cir. 2005); *In re Y-T-L-*, 23 I. & N. Dec. 601 (B.I.A. 2003)).

162. *Id.*

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

164. *Hassan*, 484 F.3d at 517 (quoting *Mohammed*, 400 F.3d at 795, and citing *Barry v. Gonzales*, 445 F.3d 741, 745 (4th Cir. 2006); *Niang v. Gonzales*, 422 F.3d 1187, 1197 (10th Cir. 2005); *Balogun v. Ashcroft*, 374 F.3d 492, 499 (7th Cir. 2004); *Abay v. Ashcroft*, 368 F.3d 634, 638 (6th Cir. 2004)).

165. *Hassan*, 484 F.3d at 515.

166. *Id.* at 518.

167. *Id.* (“The record is clear that the BIA failed to shift the burden of proof from Hassan to the government.”).

168. *Id.*

169. *Id.*

*petitioner must fear the repetition of the exact harm that she suffered in the past.*¹⁷⁰

Hassan further recognized that Somalia’s “societal discrimination and violence against women” would make the government’s burden a challenging one to meet.¹⁷¹ Thus, the Eighth Circuit recognized that victims of FGM can face other forms of persecution on account of their membership in a particular social group.¹⁷² On remand, “the government must prove, by a preponderance of the evidence, that conditions in Somalia have changed to such an extent that *Hassan* no longer has a well-founded fear of the infliction or threat of death, torture, or injury to her person or freedom.”¹⁷³

The Second Circuit similarly criticized the BIA for failing to follow its own regulatory framework and also adopted a more holistic approach to the forms of persecution that can be inflicted upon victims of past FGM.¹⁷⁴ *Bah v. Mukasey* involved the consolidated review of three BIA decisions that denied withholding of removal to three women from Guinea who had been subjected to FGM in the past.¹⁷⁵ It is significant to note that *Bah* involved withholding of removal and not asylum, since this is precisely the form of relief the Board denied the applicant in *In re A-T*.¹⁷⁶ While declining to address the continuing persecution question, the Second Circuit explicitly criticized the BIA’s approach to victims of FGM, stating that it was “deeply disturbed by what we perceive to be fairly obvious errors” and concluding that “the fact that an applicant has undergone female genital mutilation in the past cannot, in and of itself, be used to rebut the presumption that her life or freedom will be threatened in the future.”¹⁷⁷

The court found that the BIA erred in two significant ways: first, by assuming that FGM “is a one-time act” and, second, by not considering other

170. *Hassan*, 484 F.3d at 518 (internal citations omitted and emphasis added).

171. *Id.* at 518–19. The decision expands upon the challenge:

The 2005 Somalian Report on Human Rights Practices prepared by the Department of State . . . states that “[l]aws prohibiting rape exist; however, they generally were not enforced. There were no laws against spousal rape. There were no reports that rape cases were prosecuted during the year. Police and militia members raped women, and rape was commonly practiced in inter-clan conflicts. In Somaliland there was an increase in incidents of gang rape in urban areas, primarily by youth gangs, members of police forces and male students.”

Id. at 519 n.2 (internal citations omitted).

172. *Id.* at 518–19.

173. *Id.*

174. *Bah v. Mukasey*, 529 F.3d 99, 111, 115 (2d Cir. 2008).

175. *Id.* at 101.

176. *Id.*; see also *supra* Part II.A (discussing the differences between asylum and withholding of removal); *infra* Part IV (analyzing the Board’s decision in *In re A-T*).

177. *Bah*, 529 F.3d at 111.

forms of persecution that may befall a victim of FGM.¹⁷⁸ With respect to the “one-time” nature of FGM, the *Bah* court noted that the procedure often is repeated to allow for sexual intercourse and childbirth.¹⁷⁹ With respect to considering other forms of persecution, the *Bah* court repeated the sentiment that had been expressed in both *Mohammed* and *Hassan*: “We have never held that a petitioner must fear the repetition of the exact harm that she has suffered in the past. Our definition of persecution is not that narrow.”¹⁸⁰ Citing an amicus brief filed in support of the petitioners, the court noted that:

[I]t would be incongruous to hold, for example, that the fact that an applicant’s tongue was severed because he spoke out against the government in and of itself rebutted the presumption that his life or freedom would be threatened in the future simply because his tongue could not be cut off again.¹⁸¹

To emphasize its point, the court actually gave the parties extra time to find a non-FGM case where the presumption “had been rebutted simply by virtue of the fact that the exact same act of persecution—such as removal of a limb or organ—physically could not be repeated. The parties, not surprisingly, were unable to find any such case.”¹⁸²

Because the BIA did not publish the decisions that the Second Circuit reviewed in *Bah*, the *Bah* decision is based primarily on the BIA’s rationale in *In re A-T*, which is discussed in the following Part.¹⁸³

IV. THE BIA’S DECISION IN *IN RE A-T*

On September 27, 2007, a three-member panel¹⁸⁴ of the BIA held that:

178. *Id.* at 114–16.

179. *Id.* at 114 (quoting a BIA decision involving an applicant whose “vaginal opening was sewn shut [approximately five times] after being opened to allow for sexual intercourse and child birth”).

180. *Id.* at 115.

181. *Id.*

182. *Bah*, 529 F.3d at 115.

183. *See id.* at 112 n.15 (stating that even though the court does not defer to unpublished agency decisions, it reviewed this case under a deferential standard since the BIA had previously published *In re A-T*, which covered many of the same issues that arose in *Bah*).

184. The three Board members who decided this case were Patricia A. Cole, Lauri Steven Filppu, and Roger Pauley. *In re A-T*, 24 I. & N. Dec. 296, 296 (B.I.A. 2007). All three have prosecutorial backgrounds. *See* Executive Office for Immigration Review, U.S. Dep’t of Justice, Board of Immigration Appeals Fact Sheet, <http://www.usdoj.gov/eoir/fs/biabios.htm> (last visited Nov. 15, 2008) (providing biographical information on members of the BIA). Ms. Cole was a former trial attorney for the INS, and later served as the agency’s assistant general counsel. Mr. Filppu was a deputy director in the Department of Justice’s Office of Immigration Litigation. Prior to his appointment, Mr. Pauley was a director in the Office of Policy and Legislation of the DOJ’s Criminal Division. *Id.*

- (1) Because female genital mutilation . . . is a type of harm that generally is inflicted only once, the procedure itself will normally constitute a “fundamental change in circumstances” such that an asylum applicant no longer has a well-founded fear of persecution based on the fear that she will again be subjected to FGM.
- (2) Unlike forcible sterilization, a procedure that also is performed only once but has lasting physical and emotional effects, FGM has not been specifically identified as a basis for asylum within the definition of a “refugee” under section 101(a)(42) of the Immigration and Nationality Act . . . so FGM does not qualify as “continuing persecution.”¹⁸⁵

Alima Traore, age twenty-eight, had been subjected to FGM in her home country of Mali as a young girl.¹⁸⁶ She came to the United States in 2000 on a B-2 visitor visa and was later granted an F-1 student visa.¹⁸⁷ When her visa expired in 2003, she told her father she would return to Mali to apply for a new student visa.¹⁸⁸ Her father then informed her of her pending arranged marriage to her first cousin.¹⁸⁹

Ms. Traore based her asylum claim on her past FGM and well-founded fear of future persecution in the form of forced marriage if she returned to Mali.¹⁹⁰ She also claimed to oppose FGM and feared that if she had daughters in the future, they would be subjected to this practice.¹⁹¹ Because she failed to file for asylum within one year of her arrival, as required by section 208(a)(2)(B) of the INA, the IJ found her statutorily ineligible for asylum and only considered her application for withholding of removal and protection under the Convention Against Torture, both of which are more difficult standards to meet than asylum.¹⁹²

Although the Board “recognized that FGM can be a form of persecution,” it refused to apply the continuing persecution doctrine to

185. *In re A-T*, 24 I. & N. Dec. at 296.

186. Respondent’s Motion, *supra* note 109, at 4.

187. *Id.* at 5.

188. *Id.*

189. *Id.*

190. *In re A-T*, 24 I. & N. Dec. at 296–97. The issue of forced marriage is beyond the scope of this Note, which focuses solely on Ms. Traore’s FGM-based claim.

191. *Id.* at 298–99.

192. *Id.* at 297; *see also supra* Part IIA (describing asylum and withholding of removal). The U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“Convention Against Torture” or “CAT”) is a form of relief that prohibits removal to the country where the applicant would likely be tortured, but does not extend permanent residency or derivative status to the applicant’s spouse or children. GERMAIN, *supra* note 18, at 189. Seeking relief under CAT is a viable option to those who would otherwise not qualify for asylum or withholding of removal because of statutory bars or who cannot establish the nexus of their feared persecution to one of the five enumerated grounds. *Id.* at 189–90.

cases involving past FGM.¹⁹³ The Board cited the Seventh Circuit's holding in *Oforji v. Ashcroft* ("there is no chance that she would be personally [persecuted] again by the procedure")¹⁹⁴ and announced that "[a]ny presumption of future FGM persecution is thus rebutted by the fundamental change in the respondent's situation arising from the reprehensible, but one-time, infliction of FGM upon her."¹⁹⁵

The Board rejected the Ninth Circuit's analysis in *Mohammed v. Gonzales*, which analogized FGM to the continuing persecution of forced sterilization. The Board then distinguished its own continuing persecution analysis of *In re Y-T-L-* by noting that Congress had "singled out" victims of coercive population control policies when it amended the definition of "refugee" in 1996, but had not done so for FGM victims.¹⁹⁶ Thus, the Board announced that the experience of past FGM *can* rebut the presumption of a well-founded fear of future persecution, simply because *that act* cannot be performed again.¹⁹⁷

A. IMMIGRATION ADVOCATES RESPOND TO *IN RE A-T-*

News of *In re A-T-* spread throughout the immigration-advocacy community from the moment the decision was issued. Within days, fifteen legal clinics across the country offered to help with the appeals.¹⁹⁸ Immigration advocates attacked this decision on four fronts: the BIA, the Attorney General, Congress, and the Fourth Circuit Court of Appeals. Although the BIA denied their motion to reconsider,¹⁹⁹ the advocates convinced a bipartisan group of over forty members of Congress to sign a letter requesting the Attorney General certify the case for review.²⁰⁰ The

193. *In re A-T-*, 24 I. & N. Dec. at 299, 301.

194. *Id.* at 299 (quoting *Oforji v. Ashcroft*, 354 F.3d. 609, 615 (7th Cir. 2003)).

195. *Id.* (citing 8 C.F.R. § 1208.16(b)(1)(i)(A)). This regulation states that the presumption of a well-founded fear based on past persecution

may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country.

8 C.F.R. § 1208.16(b)(1)(i)(A) (2008).

196. *In re A-T-*, 24 I. & N. Dec. at 299.

197. *Id.*

198. E-mail from Bryan Longan, Visiting Assistant Clinical Professor, Ctr. for Soc. Justice, Seton Hall Univ. Sch. of Law (Feb. 13, 2008, 08:30 EST) (on file with the Iowa Law Review).

199. *See Bah v. Mukasey*, 529 F.3d 99, 108 n.10 (2d Cir. 2008) (citing *In re Alima Traore*, No. A72 169 850 (B.I.A. Apr. 14, 2008)).

200. Letter from Rep. Steven R. Rothman to Attorney Gen. Michael Mukasey (Mar. 24, 2008), available at <http://cgrs.uchastings.edu/campaigns/matterofat.php> (scroll down to "Advocacy Materials" to access letters) (requesting reversal of *In re A-T-*); Letter from Reps. John

New York City Bar Association and Physicians for Human Rights echoed this request for certification.²⁰¹ Finally, the advocates petitioned the Fourth Circuit Court of Appeals for review; the brief was drafted by a coalition of immigration-law professors from across the country.²⁰² On September 22, 2008, the Attorney General vacated *In re A-T* and remanded the case to the BIA.²⁰³ The Attorney General apparently agreed with immigration advocates and members of Congress in finding that *In re A-T* could not stand due to its legal and analytical errors.²⁰⁴

B. ANALYSIS OF THE BIA'S DECISION

In re A-T is the result of the Board's desire to confine the continuing persecution doctrine to the realm of forced-sterilization cases, and its refusal to extend this doctrine's logic to cases involving FGM.²⁰⁵ In its eagerness to make this policy statement, the Board issued as precedent an arbitrary decision that ignores its own prior cases, misconstrues legislative intent, and fails to follow its own established regulatory framework. The following Sections describe this case's most critical—and criticized—flaws.

1. The Board Failed to Evaluate Past Persecution Within the Proper Regulatory Framework

Under the pertinent regulations, an applicant for withholding of removal bears the burden of proving that “his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion.”²⁰⁶ The successful demonstration of past persecution creates the presumption “that the applicant's life or freedom would be threatened in

Conyers and Zoe Lofgren to Attorney Gen. Michael Mukasey (Jan. 28, 2008), available at <http://lofgren.house.gov/PRArticle.aspx?NewsID=1879>.

201. Letter from Barry M. Kamins, President, Ass'n of the Bar of the City of N.Y. to Attorney Gen. Michael Mukasey (Jan. 4, 2008), available at <http://cgrs.uchastings.edu/campaigns/matterofat.php> (scroll down to “Advocacy Materials” to access letters); Letter from Robert S. Lawrence, M.D., Chair of the Bd. of Dirs., Physicians for Human Rights to Attorney Gen. Michael Mukasey (Mar. 6, 2008), available at <http://cgrs.uchastings.edu/campaigns/matterofat.php> (scroll down to “Advocacy Materials” to access letters).

202. Lonegan, *supra* note 198. Aside from recognizing FGM as persecution in *Barry v. Gonzales*, 445 F.3d 741, 745 (4th Cir. 2006), the Fourth Circuit has not been receptive to asylum or withholding claims based on past FGM. See *Dieng v. Mukasey*, No. 06-1622, 2008 WL 2647575, at *8 n.4 (4th Cir. July 7, 2008) (declining to extend the continuing persecution doctrine to a victim of FGM since it was “foreclosed by the BIA's decision in *In re A-T*”); *Niang v. Gonzales*, 492 F.3d 505, 512 (4th Cir. 2007) (denying withholding of removal to a victim of past FGM who based her claim on the psychological harm she would suffer if her daughter was forced to undergo FGM).

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

204. *Id.* at 621–22.

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

206. 8 C.F.R. § 1208.16(b) (2008).

the future in the country of removal on the basis of the original claim.”²⁰⁷ Once past persecution is established, the burden shifts to the government to rebut the presumption by demonstrating either “a fundamental change in circumstances such that the applicant’s life or freedom would not be threatened” or that there is a viable internal-relocation option available to the applicant.²⁰⁸ If the fear of future persecution “is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm.”²⁰⁹

The Board failed to follow this regulatory framework in analyzing *In re A-T*. First, it failed to analyze the nexus between the persecution and the claimed ground for the persecution.²¹⁰ Second, once past persecution was established (which it was), the Board failed to shift the burden to the government to rebut the presumption of a well-founded fear of future persecution.²¹¹

Instead of following the regulatory framework—and analyzing the nexus of the persecution and the claimed ground—the Board merely “assume[d] arguendo that she is a member of a particular social group who has suffered past persecution.”²¹² This assumption prevented the Board from taking the first critical step in its analysis: it failed to determine whether Ms. Traore was subjected to FGM *on account of her membership in a particular social group*.²¹³ Had the Board taken this step, it could then analyze whether she was at risk of other forms of persecution *because of her membership in that particular social group*.²¹⁴

According to the respondent’s motion to reconsider, the Board’s failure to take this step was not due to a lack of evidence in the record.²¹⁵ The record contained ample evidence of the short- and long-term effects of FGM²¹⁶ and sufficient documentation to support an argument that Ms. Traore was at risk of other forms of persecution on account of her membership in this particular social group.²¹⁷

207. *Id.* § 1208.16(b)(1).

208. *Id.* § 1208.16(b)(1)(i)–(ii).

209. *Id.* § 1208.16(b)(1)(iii).

210. Respondent’s Motion, *supra* note 109, at 14 (“By failing to follow its regulations and determine whether Ms. Traore had established past persecution and nexus, the Board’s entire regulatory analysis was flawed from the start.”).

211. *Id.* at 15–16 (citing 8 C.F.R. § 1208.13(b)(1)(i)(A, B)).

212. *Id.* at 14 (quoting *In re A-T*, 24 I. & N. Dec. at 299).

213. *Id.* at 15–16; *see also supra* Part II (discussing the nexus requirement).

214. Respondent’s Motion, *supra* note 109, at 16.

215. *Id.* at 4, 17.

216. *Id.* at 4 n.2 (quoting the World Health Organization’s list of effects that include cysts, abscesses, scarring, painful sex, and problematic childbirth).

217. *Id.* at 17. According to the motion:

The record demonstrates that as a FGM victim in Mali, Ms. Traore would endure subjugation in a culture where FGM is a tool used to control women and their

Women and girls who are members of tribes that practice FGM and who have been subjected to FGM, like Ms. Traore, may experience various other harms *on account of their membership in a particular social group*, including violence, rape, and forced marriage.²¹⁸ The fact that FGM is generally only performed once should not have prevented the Board from assessing the probability that Ms. Traore would face other forms of persecution in the future.²¹⁹

Furthermore, as noted earlier, some victims of FGM are subjected to the procedure *more than once*.²²⁰ In countries like Mali, which practice the most extreme forms of FGM, women can be forced to submit to the procedure repeatedly—before their wedding night, to allow for intercourse, and both before and after childbirth.²²¹

Once past persecution was established, the Board should have shifted the burden to the government to rebut the presumption of a well-founded fear.²²² Instead of requiring the government to meet its statutory rebuttal burden, the Board accepted the government's position that past FGM categorically constitutes a change in circumstances that, in and of itself, rebuts the presumption of a well-founded fear of future persecution.²²³ In its haste to confine the continuing persecution doctrine to victims of forced sterilization, the Board essentially ignored its regulatory framework.

In *Bah v. Mukasey*, the Second Circuit refused to adopt the Board's rationale in *In re A-T*—due to the agency's erroneous “application of its own regulatory framework.”²²⁴ The *Bah* court noted that the Board exacerbated its error when it denied Ms. Traore's motion to reconsider by stating that *she*

sexuality. Scholars have noted that at its core, FGM is a ritual designed to control women's sexual autonomy, perpetuate “an inaccurate stereotype of women as irrational individuals, incapable of making decisions about their own sexuality” and “maintain male dominance over essential aspects of a woman's life, i.e. freedom.”

Id. (internal citations omitted).

218. See U.S. Dep't of State, Mali, Country Reports on Human Rights Practices 2006, <http://www.state.gov/g/drl/rls/hrrpt/2006/78745.htm> (last visited Nov. 15, 2008) (“Domestic violence against women, including spousal abuse, was tolerated and common [S]pousal rape is not illegal. . . . Family law favored men, and women were particularly vulnerable in cases of divorce, child custody, and inheritance rights.”).

219. See *supra* Part III.B.4 (discussing two circuit-court decisions that remanded cases to the BIA for failing to consider other forms of persecution faced by victims of FGM).

220. *Bah v. Mukasey*, 529 F.3d 99, 114 (2d Cir. 2008); see *supra* Part III.B.4.

221. Integrated Reg'l Info. Networks, In-Depth: Razor's Edge—The Controversy of Female Genital Mutilation (Mar. 2005), <http://www.irinnews.org/InDepthMain.aspx?InDepthId=15&ReportId=62462>.

222. 8 C.F.R. § 1208.16(b)(1)(ii) (2008).

223. Respondent's Motion, *supra* note 109, at 16.

224. *Bah*, 529 F.3d at 111. The Second Circuit based much of its review on *In re A-T*, since the government argued that *In re A-T* foreclosed the petitioners' arguments and the Board's reasons for denying their claims were “substantially similar” in both cases. *Id.* at 107–11.

had not met *her* burden of proof. “The regulations clearly provide [] that the burden is on the *government* to show that her life or freedom would *not* be threatened, or that she *could* safely relocate.”²²⁵ On remand, the Board must determine whether Ms. Traore is entitled to the regulatory presumption of a well-founded fear of future persecution “because she has established past persecution on account of membership in a particular social group” or one of the other enumerated grounds.²²⁶ If so, the burden would shift to the government to prove that her life or freedom would not be threatened or that she can relocate to another part of her country.²²⁷

2. The Board Misinterpreted the Legislative Intent Behind the 1996 Amended Definition of “Refugee”

In re A-T- rejected the Ninth Circuit’s reasoning that FGM was a permanent and continuing form of persecution, analogous to forced sterilization, primarily because Congress “singled out” victims of coercive population control policies, but “has not seen fit to recognize FGM . . . with special statutory provisions.”²²⁸

The Board misinterpreted Congress’s intent. The purpose of the 1996 amendment is facially apparent: victims of coercive population control “shall be deemed to have been persecuted *on account of* political opinion.”²²⁹ The revised definition is clearly directed at the nexus requirement, which is something the Board itself recognized in 2003, in *In re Y-T-L-*:

In the long course of administrative rulings, Presidential directives, proposed regulations, and congressional action that has marked the consideration of asylum claims based on coerced sterilization, the profound and permanent nature of such harm has rarely, if ever, been called into question. *The principal issue of contention, rather, was whether such harm was on account of a ground protected under the Act.*²³⁰

Two members of Congress who urged Attorney General Michael Mukasey to certify *In re A-T-* for review elaborated on Congress’s intent behind the 1996 amendment:

. . . Congress never intended to create a distinction between FGM and forced sterilization or abortion through the “refugee” definition. To the contrary, in referring to forced sterilization and abortion in the definition, Congress actually meant to *equate* such

225. *Id.* at 116.

226. *In re A-T-*, 24 I. & N. Dec. 617, 623 (A.G. 2008).

227. *Id.* at 622, 624.

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

229. 8 U.S.C. § 1101(a)(42)(B) (2000) (emphasis added).

230. *In re Y-T-L-*, 23 I. & N. Dec. 601, 607 (B.I.A. 2003), *quoted in* Respondent’s Motion, *supra* note 109, at 20–21.

forms of persecution with FGM. The references to forced sterilization and abortion were meant to ensure that such acts were understood as persecution, a determination that the BIA had already made with respect to FGM in *Kasinga* and which obviated the need for further clarification by Congress.²³¹

The Second Circuit in *Bah* echoed this rationale by stating that

Congress, in effect, did for forced sterilization claims what the BIA did in *In re Kasinga* for genital mutilation claims: it provided the basic qualification for asylum and withholding of removal by defining forced sterilization as persecution on account of one of the protected grounds, without altering the regulatory framework for assessing such claims.²³²

In addition to misinterpreting Congress's purpose and ignoring its own prior holding, the Board failed to acknowledge that Congress *has* addressed FGM—by making it a crime in the U.S. subject to fines and/or imprisonment of up to five years.²³³

In re A-T clearly misinterpreted the congressional intent behind the amended definition of “refugee” and relied on this misinterpretation to confine the continuing persecution doctrine to forced-sterilization cases. If the BIA's rationale is allowed to stand, it could be used against *any* form of persecution that is not clearly enumerated in the statute, which, incidentally, includes *every* form of persecution, other than forced sterilization.²³⁴

3. The Board Acted Arbitrarily When It Redefined Its Own Established Doctrine and Ignored Its Prior Decisions

In re A-T stated that “we treated sterilization as continuing persecution [in *In re Y-T-L*] because it would have contradicted Congress's purpose to find that the very act that constituted persecution . . . was itself a ‘fundamental change in circumstances’ that obviated a future well-founded fear.”²³⁵ This rationale fails to recognize that Congress did not create the

231. Letter from Reps. John Conyers and Zoe Lofgren, *supra* note 200.

232. *Bah v. Mukasey*, 529 F.3d 99, 121 (2d Cir. 2008) (Straub, J., concurring).

233. 18 U.S.C. § 116(a) (2000). The statute provides that “whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both.” *Id.* “In making such mutilation a criminal offense, Congress found that the procedure ‘often results in the occurrence of physical and psychological health effects that harm the women involved.’” *Mohammed v. Gonzales*, 400 F.3d 785, 795 (9th Cir. 2005) (quoting Pub. L. No. 104-208, 110 Stat. 3009–546 (1996)).

234. The INA does not enumerate any other form of persecution. 8 U.S.C. § 1101(a)(42) (2000).

235. *In re A-T*, 24 I. & N. Dec. 296, 300 (B.I.A. 2007) (citing *In re Y-T-L*, 23 I. & N. Dec. 601 (B.I.A. 2003)).

continuing persecution doctrine—the BIA and the federal courts did.²³⁶ While this doctrine was developed within the context of the forced-sterilization cases, it could and should apply equally to any form of persecution that has ongoing ramifications, including FGM.²³⁷

Not only did the BIA create the continuing persecution doctrine, it also extended it to FGM victims in several unpublished decisions.²³⁸ Although the Board is free to ignore its unpublished decisions,²³⁹ it must “resolve cases in an impartial manner and consistent with the [INA] regulations . . . and has acknowledged its need to issue consistent decisions in cases.”²⁴⁰ There is nothing in the regulations stating that the Board can treat the same legal issue differently in different cases.²⁴¹ The First Circuit has directly addressed this point: “[W]e see no earthly reason why the mere fact of nonpublication should permit an agency to take a view of the law in one case that is flatly contrary to the view it set out in earlier (yet contemporary) cases, without explaining why it is doing so.”²⁴² If a Board’s decision conflicts with a prior unpublished decision “involving similar facts and issues, with no reason to explain the inconsistency, such a decision may be partial and conflict with the [INA] and regulations.”²⁴³

The panel that decided *In re A-T* misconstrued the BIA’s own continuing persecution doctrine and ignored its prior decisions that

236. Respondent’s Motion, *supra* note 109, at 21; *see also supra* Part III.A (discussing *In re Y-T-L* and the development of the continuing persecution doctrine).

237. The long-term physical and emotional effects of FGM are well documented. *See generally* HUMAN RIGHTS WATCH, POLICY PARALYSIS: A CALL FOR ACTION ON HIV/AIDS-RELATED HUMAN RIGHTS ABUSES AGAINST WOMEN AND GIRLS IN AFRICA 53–54 (Dec. 2003), *available at* <http://www.hrw.org/reports/2003/africa1203/africa1203.pdf> (describing FGM practices); World Health Org., Health Risks and Consequences of Female Genital Mutilation, <http://www.who.int/reproductive-health/fgm/impact.htm> (last visited Sept. 25, 2008) (documenting immediate and long-term consequences of FGM). In addition to ongoing physical, sexual, and emotional problems, women who have been subjected to FGM are fifty percent more likely to lose their babies or die during childbirth. Elisabeth Rosenthal, *Genital Cutting Raises by 50% Likelihood Mothers or Their Newborns Will Die, Study Finds*, N.Y. TIMES, June 2, 2006, at A10. Certainly, this constitutes a “continuing persecution” that is at least comparable to the ongoing persecution felt by a person who has been forcibly sterilized.

238. *See supra* Part III.B.2.

239. 8 C.F.R. § 1003.1(g) (2008); *see also* BIA PRACTICE MANUAL, *supra* note 65, § 1.4(d)(ii) (“Unpublished decisions are binding on the parties to the decision but are *not* considered precedent for unrelated cases.”).

240. ANNA MARIE GALLAGHER & THOMAS HUTCHINS, IMMIGRATION PLEADING AND PRACTICE MANUAL § 2:22 (2006) (citing 8 C.F.R. § 1003.1(d)(1) (2006); *In re Efrain Amaya-Castro*, 21 I. & N. Dec. 583, 586 n.3 (B.I.A. 1996)).

241. *See Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994) (“[T]he prospect of a government agency treating virtually identical legal issues differently in different cases, without any semblance of a plausible explanation, raises precisely the kinds of concerns about arbitrary agency action that the consistency doctrine addresses . . .”).

242. *Id.* at 5–6.

243. GALLAGHER & HUTCHINS, *supra* note 240, § 2.22.

extended the logic of that doctrine to cases involving victims of past FGM.²⁴⁴ By publishing *In re A-T-* as precedent without addressing these prior decisions, the Board acted arbitrarily. Considering the profound nature of the interests at stake in asylum cases, precedent decisions should be issued with the greatest of care and with explicit and reasoned explanations for any change in policy, regardless of whether the departure is from published or unpublished decisions. In vacating and remanding *In re A-T-*, the Attorney General merely acknowledged the BIA's position on "continuing persecution," but expressly refused to address that aspect of the Board's decision.²⁴⁵ Thus, the question of this doctrine's extension beyond forced-sterilization cases remains unanswered.

C. THE BIA LIMITS THE APPLICATION OF *IN RE A-T-*

On March 5, 2008, the BIA amended and published as precedent a decision it had previously issued in July 2007, prior to the publication of *In re A-T-*.²⁴⁶ The case, *In re S-A-K- & H-A-H-*, involved a mother and daughter from Somalia who were both subjected to FGM and who based their asylum applications on past persecution on account of membership in a particular social group.²⁴⁷ The immigration judge denied their applications, but the Board reversed and granted them humanitarian asylum.²⁴⁸ The BIA cited the extensive evidence of their early, initial "circumcisions" and the repeated procedures that both the mother and daughter were forced to endure to allow for sexual intercourse and childbirth.²⁴⁹ The Board stated that "they have suffered an atrocious form of persecution that results in continuing physical pain and discomfort, and we conclude that they should not be expected to return to Somalia."²⁵⁰

Two of the three Board members who decided *In re S-A-K-* were also on the panel that decided *In re A-T-*.²⁵¹ By designating *In re S-A-K-* as precedent,

244. See Respondent's Motion, *supra* note 109, at 23 n.16 ("The 2003 [unpublished] decision was released the day after *Y-T-L-*, further indicating that the distinction between FGM and forced sterilization in *Matter of A-T-* is not only wrong, but inconsistent with the Board's outlook and reasoning when *Matter of Y-T-L-* was drafted.")

245. *In re A-T-*, 24 I. & N. Dec. 617, 620 (A.G. 2008).

246. *In re S-A-K- & H-A-H-*, 24 I. & N. Dec. 464, 464 n.1 (B.I.A. 2008).

247. *Id.* at 465.

248. *Id.* at 464–65.

249. *Id.* at 465.

250. *Id.* at 465–66.

251. *BIA Finds Female Genital Mutilation May Warrant Humanitarian Asylum*, 85 INTERPRETER RELEASES 770, 770 (Mar. 10, 2008). Board Members Roger Pauley and Patricia A. Cole and Temporary Board Member M. Christopher Grant decided *In re S-A-K-*. *Id.* *In re A-T-* was decided by Pauley, Cole, and Board Member Lauri Steven Filppu. *In re A-T-*, 24 I. & N. Dec. 296, 296 (B.I.A. 2007).

they seemed to be limiting the application of *In re A-T*,²⁵² possibly in response to the overwhelming criticism the case received.

In a footnote, the Board stated that “nothing in *Matter of A-T* precludes the result reached herein” because asylum, and thus humanitarian asylum, was not available to Ms. Traore.²⁵³ The Attorney General reiterated this distinction when he vacated and remanded *In re A-T*, noting that *In re S-A-K* “involved a ‘humanitarian’ grant of asylum based on ‘the severity of the past persecution,’ a form of discretionary relief that is unavailable in the withholding-of-removal context.”²⁵⁴ Confining the rationale of *In re A-T* to withholding of removal cases does not cure it of its analytical ills. Withholding of removal requires the same analysis as asylum; the Attorney General recognized this when he vacated and remanded *In re A-T* and instructed the Board to follow its regulatory framework.²⁵⁵

V. EXTENDING THE LOGIC OF THE CONTINUING PERSECUTION DOCTRINE TO VICTIMS OF FGM

In re A-T is the result of the BIA’s arbitrary refusal to extend the continuing persecution doctrine to victims of FGM. The reason for this refusal can be traced back to *In re Y-T-L*, *In re Kasinga*, and the “slippery slope”-type fears of mass immigration that the government raised and that Board members alluded to in concurring and dissenting opinions in both cases.²⁵⁶ Two of the Board members who dissented in *In re Y-T-L* were also on the panel that decided *In re A-T*.²⁵⁷ Their dissenting opinions demonstrate their long-held objections to the continuing persecution doctrine—even within the context of forced sterilization²⁵⁸—which may explain their subsequent refusal to extend the doctrine to victims of FGM.

252. See *In re S-A-K*, 24 I. & N. Dec. at 464 n.1 (noting that *In re A-T* does not preclude the result in *In re S-A-K*, since the applicant in *In re A-T* was not eligible for humanitarian asylum).

253. *Id.*; see also *In re A-T*, 24 I. & N. Dec. at 297, 301–02 (discussing the one-year bar to asylum in Immigration and Nationality Act § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (2000)).

254. *In re A-T*, 24 I. & N. Dec. 617, 622 n.5 (A.G. 2008) (internal citation omitted).

255. *Id.* at 622–23.

256. See *In re Y-T-L*, 23 I. & N. Dec. 601, 608–11, 613–14 (B.I.A. 2003) (Filppu, Board Member, dissenting) (objecting to the continuing persecution doctrine); *In re Kasinga*, 21 I. & N. Dec. 357, 371 (B.I.A. 1997) (Filppu, Board Member, concurring) (acknowledging the government’s argument regarding past FGM).

257. *In re A-T*, 24 I. & N. Dec. at 296; *In re Y-T-L*, 23 I. & N. Dec. at 608–18 (Filppu, Board Member, dissenting); *id.* at 618–20 (Pauley, Board Member, dissenting). Board Member Lauri S. Filppu authored *In re A-T*. *In re A-T*, 24 I. & N. Dec. at 296.

258. In his dissent in *In re Y-T-L*, Board Member Filppu argued vigorously against the “majority’s new perpetual persecution doctrine” stating that it “is not supported by our past case law, and it certainly is not reflected in the regulatory structure controlling asylum determinations.” *In re Y-T-L*, 23 I. & N. Dec. at 608 (Filppu, Board Member, dissenting). Board Member Pauley joined Filppu’s dissent and also dissented on other grounds. *Id.* at 618 (Pauley, Board Member, dissenting).

A. MASS IMMIGRATION FEARS DO NOT JUSTIFY UNFAIR
TREATMENT OF NONCITIZENS

In *In re Kasinga*, the government implicitly raised the concern that classifying FGM as a form of persecution would result in millions of new refugees seeking asylum in the United States.²⁵⁹ These fears were alluded to in *Bah v. Mukasey*²⁶⁰ and may have contributed to the flawed decision of *In re A-T*.²⁶¹

These fears are groundless. Contrary to the government's warnings, there has not been an "appreciable increase in the number of claims based on FGM" since the BIA's decision in *In re Kasinga*.²⁶² Scholar Karen Musalo, the attorney who argued *In re Kasinga* before the BIA, offers three reasons to explain why these fears have not (and likely *will not*) come true:

First, women who would have legitimate claims for gender asylum often come from countries where they have little or no rights Second, they are frequently—if not always—primary caretakers for their children and extended family Finally, women asylum seekers often have little control over family resources, making it impossible for them to have the means to travel to a country where they might seek asylum.²⁶³

Fears that hordes of aliens will flood the country claiming continuing persecution do not justify the refusal to extend the logic of the continuing persecution doctrine to victims of other forms of persecution that have ongoing effects.²⁶⁴ The purpose of the continuing persecution doctrine is not to provide aliens with a "Get into the Country Free Card." The purpose of the doctrine is to ensure that immigration adjudicators do not use the fact of past, "one-time" persecution to bypass their regulatory framework and automatically rebut the presumption of a well-founded fear of future persecution.²⁶⁵

259. *In re Kasinga*, 21 I. & N. Dec. at 370–71; *supra* note 138 and accompanying text.

260. *See Bah v. Mukasey*, 529 F.3d 99, 125 (2d Cir. 2008) (Sotomayor, J., concurring) (explaining that it was imprudent to decide the continuing persecution matter as it "could have far reaching implications in other types of cases where ongoing physical or emotional harm from a prior persecutory act is alleged").

261. *See supra* note 258 and accompanying text.

262. Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 132–33 (2007) (quoting Press Release, Immigration and Naturalization Servs., Questions and Answers: The R-A- Rule (Dec. 7, 2000), http://www.uscis.gov/files/pressrelease/R-A-Rule_120700.pdf).

263. *Id.* at 133.

264. *See id.* (further noting that Canada, which recognizes gender-based persecution, has not seen an "explosion of claims").

265. This concept has been raised in every case that has addressed the issue of continuing persecution. *See Bah v. Mukasey*, 529 F.3d 99, 111 (2d Cir. 2008) ("[T]he fact that an applicant has undergone female genital mutilation in the past cannot, in and of itself, be used to rebut the presumption that her life or freedom will be threatened in the future."); *Hassan v.*

In his opinion vacating and remanding *In re A-T-* to the BIA, the Attorney General instructed the Board to follow the regulatory framework by first determining whether Ms. Traore is “entitled to the [regulatory] presumption . . . because she has established past persecution on account of membership in a particular social group” or one of the other enumerated grounds.²⁶⁶ In making this determination, the Board must first consider Ms. Traore’s “membership in a particular social group”²⁶⁷ and cannot simply “assum[e] arguendo that she is a member of a particular group who has suffered past persecution.”²⁶⁸

Under *In re Acosta*’s widely accepted definition, “persecution” is “harm or suffering that is inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome.”²⁶⁹ In his concurring opinion in *Bah v. Mukasey*, Judge Straub urged the court to extend the continuing persecution doctrine to victims of FGM based on *Acosta*’s definition of persecution.²⁷⁰ Limiting the continuing persecution doctrine to forms of persecution that are directly related to the protected ground and to suppressing related characteristics—such as forced sterilization and FGM—is in harmony with existing case law, governing statutes, and regulations.²⁷¹ As Judge Straub discussed, FGM is perpetrated with the intent to suppress a woman’s sexual characteristics for life.²⁷² The abundant evidence of FGM’s ongoing physical and emotional ramifications demonstrates that it is very successful in achieving that goal.²⁷³ Victims of other forms of physical persecution may experience long-term effects, but “the characteristics their persecutors ‘seek [] to overcome’ will not have been suppressed or overcome for life based solely on the method of

Gonzales, 484 F.3d 513, 518 (8th Cir. 2007) (“The government’s argument erroneously assumes that FGM is the only form of persecution in Somalia and that having undergone the procedure, Hassan, as a Somali woman, is no longer at risk of other prevalent forms of persecution.”); Mohammed v. Gonzales, 400 F.3d 785, 800 (9th Cir. 2005) (“[FGM] cannot constitute a change in circumstances sufficient to rebut the presumption of a well-founded fear.”); *In re Y-T-L-*, 23 I. & N. Dec. 601, 605 (B.I.A. 2003) (noting “the anomalous result that the act of persecution itself would also constitute the change in circumstances that would result in the denial of asylum”).

266. *In re A-T-*, 24 I. & N. Dec. 617, 623 (A.G. 2008).

267. *Id.* at 622.

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

269. *In re Acosta*, 19 I. & N. Dec. 211, 211–12 (B.I.A. 1985); see *supra* note 36 and accompanying text.

270. *Bah*, 529 F.3d at 123 (Straub, J., concurring).

271. See discussion *supra* Parts II, III.B (defining “refugee” and detailing *In re Acosta*’s interpretation of “persecution on account of membership in a particular social group”). *In re Acosta* is quoted throughout Judge Straub’s concurring opinion in *Bah*. *Bah*, 529 F.3d at 122–25 (Straub, J., concurring).

272. See *Bah*, 529 F.3d at 123 (Straub, J., concurring) (quoting the BIA’s finding in *In re Kasinga* that “FGM is practiced, at least in some significant part, to overcome sexual characteristics of young women” (internal quotations and citations omitted)).

273. See World Health Org., *supra* note 237 and accompanying text (discussing the long-term consequences of FGM).

persecution.”²⁷⁴ FGM, “like forced sterilization and unlike most other forms of persecution . . . is only performed once because it *need* only be performed once: even after the initial act of mutilation, the persecution endures.”²⁷⁵

The “social visibility” requirement that the BIA has layered onto determinations of “membership in a particular social group” may make it more of a challenge for past victims of FGM to establish persecution on account of such membership.²⁷⁶ Just how visible are these women in a society that treats a high percentage of its female population in this manner—especially considering that FGM is often performed on infants and young girls?²⁷⁷ Must they have protested their own FGM in order to achieve the requisite social visibility—or is it enough for them to oppose FGM in general?

It is conceivable that the BIA, fearful of mass immigration, will attempt to confine the holding of *In re Kasinga* to women who have not yet been subjected to FGM but fear FGM in the future.²⁷⁸ The “social visibility” requirement may further compel the distinction between past and future victims of FGM. Those who fear and oppose FGM may be in a better position to establish their “social visibility” as “un-cut” women in a society that commonly performs this procedure. Under such a strict reading of *In re Kasinga*, women who have already been subjected to FGM would not be able to claim persecution on account of their membership in a particular social group—unless they could establish that they feared being subjected to FGM repeatedly, as did the women in *In re S-A-K- & H-A-H*.²⁷⁹ Such a strict interpretation of what constitutes membership in a particular social group would be driven by fears that are unfortunate, irrational, and wholly unfounded.

*B. THE PROPOSED PROCEDURAL REFORMS ARE INSUFFICIENT TO ENSURE
CONSISTENT TREATMENT OF NONCITIZENS*

The proposed rules for administrative-review procedures announced in June 2008 seem more intent on enabling the BIA to “reclaim deference” from the federal courts than on ensuring fair and consistent adjudicatory treatment of all noncitizens.²⁸⁰

In order to encourage parity of treatment for victims of all forms of persecution, Congress may need to reevaluate administrative review of

274. *Bah*, 529 F.3d at 123 (Straub, J., concurring).

275. *Id.* at 124.

276. *See supra* Part II (noting the “social visibility” test in determining “membership in a particular social group”).

277. *See supra* notes 2, 221, 237 and accompanying text (describing FGM and its effects).

278. *See supra* Part III.B.1 (discussing *In re Kasinga*).

279. *See supra* Part IV.C (discussing *In re S-A-K- & H-A-H*).

280. *See Proposed Rules discussed supra* Part II.C.

immigration decisions.²⁸¹ This would help to ensure that the BIA applies the law consistently in cases involving similar issues and facts. In such a review, Congress may need to amend the 2002 streamlining procedures.²⁸²

One possible revision would be to require the BIA to review certain decisions en banc, particularly cases involving issues that have generated conflicting opinions in the circuit courts.²⁸³ The proposed rules allow a single Board member more discretion to refer a case for review to a three-member panel, but do not encourage en banc review.²⁸⁴ A three-member panel would certainly provide more enhanced review than a single member, but there may be cases that warrant en banc review. Increased use of en banc review would enable independent voices to at least draft a concurrence or dissent, which may not be as likely to occur in a three-member panel. Of the forty decisions published as precedent in 2007, not a single case was heard en banc.²⁸⁵

Additionally, there is no reason why the Board should not recognize its unpublished decisions as persuasive authority.²⁸⁶ Not only would this foster consistency in the immigration courts, this would also reduce applicant (and advocate) confusion, since most immigration advocates can access these decisions.²⁸⁷ The BIA need not be bound by its unpublished decisions, but in cases involving the same issues and similar facts, the Board should be required to explain why its decision in one case is different from prior decisions, even if those decisions are unpublished.²⁸⁸

281. Stanley Mailman & Stephen Yale-Loehr, *Immigration Appeals Overwhelm Federal Courts*, 10 BENDER'S IMMIGR. BULL. 45, 46 (2005).

282. See *supra* Part II.C. The 2008 Proposed Rules expressly state that "the Department is not reopening or seeking public comment on the existing final regulations that were adopted in 2002," even though much of the criticism of the BIA has resulted from those streamlining procedures. Proposed Rules, *supra* note 81, at 34,655.

283. See *supra* Part III.B.3-4 (noting the circuit split regarding the continuing persecution doctrine's applicability to FGM victims).

284. The proposed revision to 8 C.F.R. § 1003.1(e)(6) states that "[c]ases may be assigned for review by a three-member panel if the case presents one of [several enumerated] circumstances." Proposed Rules, *supra* note 81, at 34,663. The only mention of en banc review is in a footnote regarding the development of "concise interpretive guidance on the meaning of the Act and regulations." *Id.* at 34,659 n. 3.

285. See Executive Office for Immigration Review, U.S. Dep't of Justice, Attorney General and BIA Precedent Decisions, <http://www.usdoj.gov/eoir/vll/intdec/nfvol24.htm> (last visited Sept. 28, 2008) (documenting Interim Decisions 3545-80 and 3582-85; Interim Decision 3581 is a decision of the Attorney General).

286. See *supra* Part IV.B.3 (discussing the value of unpublished decisions).

287. The Center for Gender and Refugee Studies ("CGRS") at the University of California, Hastings College of the Law has a database of gender-related asylum cases that users can search by the country of decision and by the asylum seeker's country. CGRS will email decisions upon request. Ctr. for Gender & Refugee Studies, Univ. of Cal., Hastings Coll. of the Law, <http://cgrs.uchastings.edu/law> (last visited Nov. 1, 2008).

288. The Eighth Circuit's late Richard Arnold noted the irony in disregarding unpublished opinions: "We are perfectly free to depart from past opinions if they are unpublished, and

The proposed rule that would enable a majority of a three-member panel to designate a decision as precedent is worrisome, given the inconsistent quality of opinions issued by the Board.²⁸⁹ The current regulations require a majority of permanent Board members to designate a decision as precedent—and this rule is sound.²⁹⁰ The urge to publish more precedential decisions appears to be driven by a desire to “reclaim deference” from the federal courts.²⁹¹ By encouraging increased publication, the proposed rules emphasize the need to put forth the agency’s determination of an issue before a circuit court announces its “own interpretation, which then may become binding with respect to other immigration cases arising within that circuit.”²⁹²

The proposed rules expressly recognize the role of *Brand X* in inspiring the agency to issue more precedential decisions: “the Supreme Court has made clear that an administrative agency is free to adopt a new interpretation of an ambiguous statutory provision, even though a federal court may have already issued a decision adopting a different interpretation of that same statute.”²⁹³ The purpose of publishing precedential decisions should be to provide consistent guidance to applicants, advocates, and judges. While the proposed rules note this goal,²⁹⁴ more time is spent discussing the need to “reclaim deference” from the federal courts.²⁹⁵ This goal should not outweigh the desire to publish high-quality opinions that are consistent with the statutes and regulations.

C. THE USE OF BRAND X TO RECLAIM DEFERENCE DEMANDS STATUTORY REFORM

Shortly after the Supreme Court announced its decision in *Brand X*, the circuit courts began citing this decision when remanding cases to the BIA.²⁹⁶ When the Second Circuit remanded *Bah v. Mukasey* to the BIA, however, the court did not cite *Brand X*. The only mention of the case was in Judge Straub’s concurring opinion, in which he emphasized that an agency must

whether to publish them is entirely our own choice.” David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817, 818 (2005). The result has been a “vast underground body of law . . . disavowed by the very judges who are producing it.” *Id.*

289. Proposed Rules, *supra* note 81, at 34,655; *see also supra* note 80 and accompanying text.

290. 8 C.F.R. § 1003.1(g) (2006).

291. Proposed Rules, *supra* note 81, at 34,659 (“The courts of appeals have been issuing hundreds of precedent decisions each year in reviewing cases decided by the Board.”).

292. *Id.*

293. *Id.* at 34,660.

294. *Id.* at 34,659 (“Given that there are approximately 220 immigration judges around the country who are adjudicating 350,000 cases annually, there is an important need not only to provide clear guidance but also to promote a degree of national uniformity and consistency in the disposition of these cases.”).

295. *Id.* at 34,659–61.

296. *See supra* Part II.C (discussing *Brand X*).

“adequately explain” why it is reversing policy in order to obtain *Chevron* deference.²⁹⁷ The *Bah* court reviewed the combined cases under *Chevron*’s deferential standard and still concluded that the Board’s decision was clearly erroneous.²⁹⁸

Therefore, in the Second, Eighth, and Ninth Circuits, the government would not be able to use past FGM alone to rebut the presumption that an applicant’s “life or freedom will be threatened in the future.”²⁹⁹ For now.

In all the other circuits where such cases arise, government attorneys can continue to argue that a victim of past FGM no longer fears persecution by virtue of the fact that she has already been “cut.” As they finesse their arguments, they can revisit the issue in the Second, Eighth, and Ninth Circuits—and, under *Brand X*, those circuits are required to defer to the agency’s permissible interpretation, regardless of prior holdings in *Bah*, *Hassan*, and *Mohammed*.³⁰⁰

The Attorney General cited *Brand X* in an opinion he issued three days after vacating and remanding *In re A-T*.³⁰¹ On September 25, 2008, the Attorney General remanded *In re R-A*, in which the BIA had denied asylum to a victim of domestic violence who claimed persecution based on membership in a particular social group.³⁰² On remand, the BIA must reconsider this “membership in a particular social group” classification in light of relevant court decisions.³⁰³ The Attorney General reminded the BIA that it “is free to exercise its own discretion” when interpreting “ambiguous statutory language” even in the face of conflicting circuit-court opinions.³⁰⁴ Given the “social visibility” requirement the courts and the BIA have layered onto determinations of “particular social group,” this remand does not bode well for victims of gender-based persecution in general. As with victims of FGM, it may be a challenge for victims of domestic violence to establish the requisite “social visibility.”³⁰⁵ The Board’s review of *In re R-A* may affect the outcome of *In re A-T*, especially with respect to any new interpretation of what constitutes persecution on account of membership in a particular social group.

297. *Bah v. Mukasey*, 529 F.3d 99, 122 (2d Cir. 2008) (Straub, J., concurring).

298. *Id.* at 110 n.15, 111.

299. *Id.* at 111; *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007); *Mohammed v. Gonzales*, 400 F.3d 785, 800 (9th Cir. 2005).

300. *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005); see *supra* Part III.B.3–4 (discussing *Mohammed v. Gonzales*, *Hassan v. Gonzales*, and *Bah v. Mukasey*).

301. *In re R-A*, 24 I. & N. Dec. 629, 631 (A.G. 2008).

302. *Id.* at 629–30.

303. *Id.* at 630–31.

304. *Id.* at 631.

305. See *supra* Part V.A (discussing the “social visibility” requirement with respect to FGM victims).

In light of *Brand X*, the safest way to ensure that past FGM alone cannot rebut the presumption of a well-founded fear of future persecution is through statutory clarification. It is unlikely that Congress will amend the definition of “refugee” again³⁰⁶ to provide relief expressly for victims of FGM, nor should this be necessary. The INA need not and cannot enumerate every possible form of persecution that deserves relief. The definition of “refugee” is adequate; the Board simply must interpret and apply it consistently.

Congress should, however, consider codifying the continuing persecution doctrine in one of two ways. First, Congress can add a definition of persecution to the INA. This definition could codify the widely accepted definition from *In re Acosta*,³⁰⁷ as well as the essential logic of the continuing persecution doctrine: that past persecution alone cannot rebut the presumption of a well-founded fear of future persecution.³⁰⁸ Alternately, Congress can order the Attorney General to amend the regulations to codify the continuing persecution doctrine and echo what several circuit courts have already stated: that past persecution alone cannot rebut the presumption of a well-founded fear of future persecution.³⁰⁹

A statutory or regulatory amendment would serve the same purpose: to ensure the consistent and fair treatment of all refugees in the immigration courts and upon review of those decisions that so profoundly impact their lives.

VI. CONCLUSION

The choice to publish as precedent a decision that ignores its own prior case law, misconstrues legislative intent, and fails to analyze uniformly all the cases before it within its own regulatory framework was a poor policy decision by the BIA.³¹⁰ In its haste to confine the continuing persecution doctrine to the context in which it was developed, the BIA issued as precedent a legally and analytically flawed decision.³¹¹

Immigration advocates certainly had cause to celebrate when the Attorney General vacated and remanded *In re A-T*.³¹² The celebration was cut short, however, when the Attorney General remanded *In re R-A*—three

306. See *supra* Part III.A (discussing the 1996 revised definition of “refugee”).

307. See *In re Acosta*, 19 I. & N. Dec. 211, 211–12 (B.I.A. 1985) (defining persecution as “harm or suffering that is inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome”).

308. See *supra* Parts III, V.A–B (explaining the continuing persecution doctrine).

309. *Bah v. Mukasey*, 529 F.3d 99, 111 (2d Cir. 2008); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007); *Mohammed v. Gonzales*, 400 F.3d 785, 800 (9th Cir. 2005).

310. See *supra* Part IV (discussing the flaws in *In re A-T*).

311. See *supra* Part IV.

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

days later.³¹³ In that opinion, he reminded the Board that while it “should of course consider relevant courts of appeals decisions,” it is “free to exercise its own discretion and issue a precedent decision establishing a uniform standard nationwide.”³¹⁴ In other words, as long as the statute in question is ambiguous, the agency is free to establish its own interpretation to which the courts must defer in the future.³¹⁵ Evidence of statutory ambiguity abounds: it is found in the circuit split concerning the application of the continuing persecution doctrine to victims of FGM;³¹⁶ it is found in the absence of a definition of persecution in the INA;³¹⁷ and it is found in the ongoing dilemma of defining “membership in a particular social group.”³¹⁸

In light of *Brand X* and its capacity to enable administrative agencies to reverse circuit law, Congress should amend the INA to codify the continuing persecution doctrine so that its logic is extended to all forms of persecution that have ongoing and permanent ramifications, including FGM.³¹⁹ The fact that the BIA developed this doctrine in the context of coercive population control cases should not preclude the extension of the doctrine to other forms of persecution.³²⁰ Such a rule of construction is excessively and unnecessarily narrow.

The fear that extending this doctrine would result in mass immigration is unfounded.³²¹ The vast majority of the millions of women who have already been subjected to FGM unfortunately lack the means to visit the United States, let alone apply for asylum.³²² For those who are able to reach American soil—and who apply for asylum—our immigration laws should extend to them the same privileges afforded victims of coercive population control policies and other forms of persecution with permanent and continuing effects. Extending the logic of the continuing persecution doctrine would provide consistent and fair treatment to all noncitizens seeking refuge from past persecution, while ensuring that immigration adjudicators abide by their regulatory framework.

313. *In re R-A*, 24 I. & N. Dec. 629, 629 (A.G. 2008).

314. *Id.* at 631.

315. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005).

316. *See supra* Part III.B.3–4.

317. *See supra* Part II.

318. *See supra* Parts II, V.A.

319. *See supra* Part V.C.

320. *See supra* Part III.A.

321. *See supra* Part V.A.

322. *See supra* Part V.A.