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FEMALE GENITAL MUTILATION ASYLUM CLAIMS IN THE AFTERMATH OF *MATTER OF A-B-*

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ABSTRACT

On June 11, 2018, then Attorney General Jeff Sessions issued Matter of A-B-, *a precedential decision overruling the 2014 decision* Matter of A-R-C-G-, *which had held that victims of non-state violence, including domestic violence and gang violence, were entitled to asylum in the United States. Sessions asserted that these claims were not protected by the Immigration and Nationality Act ("INA") because they did not involve government persecution, calling into question decades of U.S. asylum case law. Although much of the decision, including the most damaging parts, was dicta (and therefore nonbinding),* Matter of A-B- *immediately sparked outrage and panic. Asylum seekers, their lawyers, and women's rights and immigration advocates were concerned about its potential for far-reaching and long-lasting consequences, particularly for women and girls fleeing female genital mutilation ("FGM"). To their relief, Sessions's decision was vacated in June 2021. Yet there remains a lack of procedural safeguards, and the potential for another damaging decision like* Matter of A-B- *continues to be a looming concern. This Note highlights the need for such protections, including limiting the attorney general's referral authority power and amending the INA.* Matter of A-B- *no longer poses an immediate threat to FGM asylum seekers, but the decision's ability to create the threat that women and girls would be stranded in countries where they would be mutilated indicates an urgent need for stronger asylum protections specific to FGM survivors.*

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I. INTRODUCTION

When she was twelve years old, Severina Lemachokoti underwent female genital mutilation ("FGM").[1] Living in Kenya with her family at the time, her mother took her early in the morning to a ceremony where girls from their village were to be cut.[2] At the ceremony, several women removed her clothes, poured milk and water over her, held her down, and then cut off part of her genitals with a razor.[3] Lemachokoti is just one of many who have been cut—more than 200 million girls and women across

1. Sonya Collins, *In U.S., Female Genital Mutilation's Lasting Scars*, WEBMD (Mar. 8, 2019), https://www.webmd.com/women/news/20190308/in-us-female-genital-mutiliations-lasting-scars.
2. *Id.*
3. *Id.*

the globe have been subjected to FGM at least once during their lifetime,[4] and each year 4 million more are at risk of joining them.[5] Most of them are subjected to the procedure as children.[6]

FGM has been practiced for thousands of years in cultures and societies all across the world, with evidence of its use in ancient Egypt, Ethiopia, and Greece.[7] Some forms of FGM were practiced in the United States as treatment for delusions and hysteria even up until the 1960s.[8] FGM remains common to this day and occurs in almost every nation.[9] In countries such as Tanzania, Somalia, Sierra Leone, Iran, India, and Malaysia, FGM is particularly prevalent,[10] although approximately half of all FGM cases take place in Egypt, Ethiopia, and Indonesia.[11]

Proponents of FGM justify its practice in a variety of ways. Although no religion explicitly requires it, small minority factions of Christians and Muslims assert that it is a religious obligation.[12] Cultural beliefs also commonly play a part. Parents and practitioners justify the practice by citing reasons such as cleanliness, ensuring a good marriage for their daughters, boosting fertility, and sexual pleasure for future husbands.[13] Other justifications include deterring promiscuity, rite of passage for becoming a woman, enhancing femininity, and the belief that if the baby's head touches the clitoris during birth, the baby will die.[14]

There are several different forms of FGM and a variety of ways the forms are classified. The World Health Organization's method is the most

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4. Olalekan Olugbenga Awolola & N.A. Ilupeju, *Female Genital Mutilation; Culture, Religion, and Medicalization, Where Do We Direct Our Searchlights for It Eradication: Nigeria as a Case Study*, 31 TZU CHI MED. J. 1, 1 (2019).

5. *Female Genital Mutilation: Female Genital Mutilation Is an Internationally Recognized Human Rights Violation*, UNICEF (June 2021), https://www.unicef.org/protection/female-genital-mutilation. *See generally* Henrietta Fore & Natalia Kanem, *2 Million Additional Cases of Female Genital Mutilation Likely to Occur over Next Decade Due to COVID-19*, UNICEF (Feb. 5, 2021), https://www.unicef.org/press-releases/2-million-additional-cases-female-genital-mutilation-likely-occur-over-next-decade ("Two million additional cases of female genital mutilation may occur over the next decade as COVID-19 shutters schools and disrupts programmes that help protect girls from this harmful practice.").

6. *Female Genital Mutilation: Female Genital Mutilation Is an Internationally Recognized Human Rights Violation*, *supra* note 5.

7. Nawal M. Nour, *Female Genital Cutting: A Persisting Practice*, 1 REVS. OBSTETRICS & GYNECOLOGY 135, 136 (2008).

8. *Id.*

9. Awolola & Ilupeju, *supra* note 4, at 1.

10. *Id.*

11. *Female Genital Mutilation: Female Genital Mutilation Is an Internationally Recognized Human Rights Violation*, *supra* note 5.

12. *Id.*; Awolola & Ilupeju, *supra* note 4, at 2.

13. Nour, *supra* note 7, at 137.

14. *Id.*; Awolola & Ilupeju, *supra* note 4, at 2.

widely used.[15] Type I refers to clitoridectomy, where the clitoris and/or prepuce is completely removed.[16] Type II is called excision and involves removal of the clitoris and some of the prepuce.[17] Type III is known as infibulation and is the most severe form, involving removal of part or all of the external genitalia as well as suturing the vaginal opening.[18] Any other form of damage to the genitalia, including piercing, cutting, scraping, or burning, is classified as Type IV.[19] A girl who has been subjected to a lesser form of FGM may still be subject to a more severe form at a later time.[20]

FGM cases often follow a similar pattern: midwives, birth attendants, older women, or even medical professionals arrive at the site of the procedure with knives, razors, scissors, chemicals, or hot objects, which are unsterile and will be reused on several girls.[21] The girls often do not receive anesthesia before or antibiotics after having their genitals cut.[22] Once the procedure is over, the girls are sewn up with needle and thread, and oil, honey, or tree sap is applied to staunch the bleeding.[23]

In addition to the excruciating pain from the procedure itself, there can be severe complications.[24] Immediate complications may include uncontrolled bleeding, infection, sepsis, and even death.[25] Long-term complications may include chronic, recurring infections, infertility, difficulties with labor and delivery, and sexual dysfunction.[26] Women who underwent Type III FGM may have their vaginal orifices opened at marriage or for labor, then later be re-sealed.[27] Unsurprisingly, many FGM survivors experience long-lasting emotional trauma.[28]

Driven by the prevalence and severity of the practice, women and girls who have been cut or are at risk of being cut have sought refuge in

15. Awolola & Ilupeju, *supra* note 4, at 1.
16. Nour, *supra* note 7, at 137; S. Cottler-Casanova et al., Commentary, *Coding Female Genital Mutilation/Cutting and Its Complications Using the International Classification of Diseases: A Commentary*, 127 INT'L J. OBSTETRICS & GYNAECOLOGY 660, 661 (2020).
17. Nour, *supra* note 7, at 136; Cottler-Casanova et al., *supra* note 16, at 661.
18. Nour, *supra* note 7, at 136; Cottler-Casanova et al., *supra* note 16, at 661.
19. Nour, *supra* note 7, at 136; Cottler-Casanova et al., *supra* note 16, at 661.
20. U.N. High Comm'r for Refugees, UNHCR Guidance Note on Refugee Claims Relating to Female Genital Mutilation ¶ 6 (May 2009), https://www.refworld.org/docid/4a0c28492.html [hereinafter *UNHCR Guidance Note*].
21. Nour, *supra* note 7, at 136; Awolola & Ilupeju, *supra* note 4, at 1–2.
22. Nour, *supra* note 7, at 136.
23. *Id.*
24. *See id.* at 137.
25. *Id.*
26. *Id.* at 137–38.
27. *See UNHCR Guidance Note*, *supra* note 20, ¶ 6.
28. *Id.* ¶¶ 5–6.

countries far from their homes.[29] U.S. asylum law has long recognized the debilitating effects of FGM—in 1996, FGM was for the first time formally recognized as a valid basis for asylum claims and for years after continued to be widely recognized as such.[30]

Yet, during the Trump administration, FGM's validity as a basis for asylum claims was called into question. In 2018, then Attorney General Jeff Sessions issued a precedential decision, *Matter of A-B-* (*Matter of A-B- I*), which involved a Salvadoran woman seeking asylum in the United States after having suffered lifelong domestic abuse in El Salvador.[31] Sessions rejected her asylum application and in sweeping language, indicated that violence perpetrated by non-state actors, such as domestic violence and gang-violence, would likely no longer qualify as viable bases for asylum claims.[32] Although he did not explicitly address FGM, immigration advocates and asylum seekers feared that the decision would nevertheless negatively impact FGM asylum applicants.[33]

For the next two and a half years, the Trump administration worked steadily to dismantle refugee protections, including proposed regulations based on Sessions's *Matter of A-B-* decision and a second *Matter of A-B-* decision (*Matter of A-B- II*), which reiterated and reinforced the most damaging parts of Sessions's decision.[34] Fears that FGM asylum seekers would be denied protections came dangerously close to becoming a reality[35] before Attorney General Merrick Garland finally vacated both

29. *See* Bianca Gutierrez, *FGM Victims Deserve Better U.S. Asylum Protections*, PA. STATE L. JLIA BLOG (Nov. 4, 2019), https://sites.psu.edu/jlia/fgm-victims-deserve-better-u-s-asylum-protections/.

30. *See infra* Part III.

31. 27 I&N Dec. 316, 321 (A.G. 2018).

32. *See id.* at 317, 337.

33. Reade Levinson & Sarah N. Lynch, *U.S. Attorney General Curbs Asylum for Immigrant Victims of Violence*, REUTERS (June 11, 2018, 8:42 PM), https://news.trust.org/item/20180611204225-cen5c. FGM is considered a non-state practice, as the people who perform it are community members unaffiliated with the government. *See Female Genital Mutilation (FGM) Frequently Asked Questions*, U.N. POPULATION FUND (Feb. 2022), https://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions#who_performs.

34. *See, e.g.*, *A Timeline of the Trump Administrations' Efforts to End Asylum*, NAT'L IMMIGRANT JUST. CTR. (Jan. 2021), https://immigrantjustice.org/sites/default/files/content-type/issue/documents/2021-01/01-11-2021-asylumtimeline.pdf; 28 I&N Dec. 199 (A.G. 2021).

35. *See, e.g.*, *A Timeline of the Trump Administrations' Efforts to End Asylum*, *supra* note 34; *Asylum Under Threat: The AG's Review of* Matter of A-B-, TAHIRIH JUST. CTR. (Mar. 14, 2018), https://www.tahirih.org/wp-content/uploads/2018/03/Background-on-Asylum-for-Survivors-of-Violence-1.pdf ("The impact [of *Matter of A-B-*] could be much broader, however, and result in asylum denials for those claiming protection against other forms of gender-based violence, such as . . . female genital mutilation/cutting . . . .").

Matter of A-B- I and *Matter of A-B- II* on June 16, 2021,[36] returning asylum matters to their pre-Trump administration state and setting immigration law on a more progressive and humane track.[37]

Nevertheless, the United States should renew its commitment to offering asylum to FGM victims as well as other victims of gender-based violence. The very existence of *Matter of A-B- I* and *Matter of A-B- II* and the ensuing chaos evinces the need for more concrete safeguards to ensure such decisions do not threaten the safety of FGM survivors again.

Part I of this Note provides background information on United States asylum law, including what elements must be met for a successful asylum claim. Part II discusses three seminal cases in which women fleeing FGM in their home countries were granted asylum in the United States—these cases provided the foundation for widespread acceptance of FGM as a valid basis for asylum. Part III discusses the attorney general's "referral and review power," otherwise known as referral authority, and its use during the Trump administration compared to prior administrations. Part IV introduces the three *Matter of A-B-* decisions: Sessions's initial decision, then acting Attorney General Jeffrey Rosen's follow-up decision, and Garland's vacatur of both Sessions and Rosen's decisions. Part V discusses how *Matter of A-B-*, particularly through its dicta, had the potential to negatively impact other bases for asylum claims, such as FGM, in addition to the domestic violence and gang-related claims it explicitly addresses. Part VI emphasizes that FGM must remain a valid basis for asylum and details how FGM asylum seekers can meet each of the requisite asylum elements. Finally, Part VII introduces several proposals to better protect FGM asylum seekers and to prevent future decisions similar to *Matter of A-B- I* and *Matter of A-B- II*.

II. UNITED STATES ASYLUM LAW

Asylum is just one protection offered under United States immigration law. A grant of asylum provides people who are physically in the United States (either already in the country or arriving at the border) protection from persecution either in their home country or in another location abroad.[38] In addition to being physically in the United

36. Matter of A-B- (Matter of A-B- III), 28 I&N Dec. 307, 307 (A.G. 2021).

37. *See* Jeffrey S. Chase, *First Steps*, JEFFREY S. CHASE BLOG (June 21, 2021), https://www.jeffreyschase.com/blog/2021/6/21/first-steps ("Let's hope that the Attorney General views his recent action as only the first steps on a longer path to a correct application of the law.").

38. VERONICA GARCIA, HUMANITARIAN FORMS OF RELIEF PART II: ASYLUM & SIJS 1 (2019).

States, an asylum seeker must demonstrate that she falls under the definition of a refugee as set forth by the Immigration and Nationality Act ("INA").[39] A refugee is:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[40]

The most common way asylum seekers have their cases heard is through affirmative asylum, where a foreign national who has not been placed in removal proceedings by the U.S. government may apply for asylum through the U.S. Citizenship and Immigration Services ("USCIS").[41] A USCIS asylum officer reviews the application; if asylum is denied at this stage, the applicant is moved to the immigration court for removal proceedings, where she may reapply for asylum under the defensive asylum process.[42]

If an immigration judge denies an asylum case, the asylum seeker may appeal to the Board of Immigration Appeals ("BIA"), which reviews immigration judges' decisions regarding asylum applications and other removal and relief issues.[43] If the BIA denies the case, the asylum seeker may file a petition for review of the BIA's decision in the U.S. Court of

39. 8 U.S.C. § 1101(a)(42). The INA's definition of a refugee is derived from the 1951 UN Convention Relating to the Status of Refugees (while not a signatory to the Convention, the United States incorporated the Convention by signing the 1967 Protocol Relating to the Status of Refugees), which mandates that state parties protect people within their borders from harm based on race, religion, nationality, membership in a particular social group, or political opinion and forbids said state parties from sending these people to countries where they will experience such harm. *See Asylum Law and Procedure*, HUM. RTS. FIRST, http://www.humanrightsfirst.org/asylum/asylum-law-and-procedure (last visited Mar. 22, 2022).

40. § 1101(a)(42)(A).

41. *See Asylum in the United States*, AM. IMMIGR. COUNCIL (June 11, 2020), http://www.americanimmigrationcouncil.org/research/asylum-united-states.

42. *Id.* Another route through which an asylum seeker may have her case heard is defensive asylum (although this is much less common), which occurs when a foreign national whom the U.S. government has placed in removal proceedings applies for asylum via the immigration courts housed under the Department of Justice. *Id.* The asylum seeker in such cases utilizes asylum as a defense against the government's charge that she should be removed from the country. *See id.*

43. 8 C.F.R. § 1003.1 (2022) (delineating organization, jurisdiction, and powers of the BIA).

Appeals in the same circuit as the immigration judge who initially denied the claim.[44]

In addition to proving that they meet the definition of a refugee under the INA § 101(a)(42)(A), asylum applicants must meet five other elements to be granted asylum.[45] Firstly, an applicant must demonstrate that the harm feared or suffered rises to the level of persecution.[46] The BIA has supplemented the INA's lack of a definition of persecution by defining persecution as "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive."[47] The applicant's fear must be based on either past persecution or a well-founded fear of persecution.[48] An applicant establishes fear based on past persecution by showing that she suffered harm consistent with the persecution definition in her home country; establishing this past harm also gives rise to a presumption of a well-founded fear of future persecution in the applicant's home country.[49] An applicant may also establish a well-founded fear of future persecution independent of past persecution by showing that the fear is both subjectively held and objectively reasonable (that a reasonable person in her position would hold the same fear if removed from the United States) and that if forced to return to her prior country, there is a "reasonable possibility" that she will be subjected to persecution.[50]

The applicant must next demonstrate a nexus, meaning that the persecution she suffered was on account of one of the five protected grounds: race, religion, nationality, political opinion, or membership in a particular social group[51] (a particular social group is a group of people

44. AM. IMMIGR. COUNCIL, PRACTICE ADVISORY: HOW TO FILE A PETITION FOR REVIEW 1 (2015), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/how_to_file_a_petition_for_review_2015_update.pdf.

45. GARCIA, *supra* note 38, at 2.

46. *Id.*

47. Matter of Acosta, 19 I&N Dec. 211, 222 (BIA 1985).

48. GARCIA, *supra* note 38, at 2.

49. *Id.*

50. *Id.*; *see, e.g.*, Liang v. Holder, No. 09-60093, 2010 WL 677781 (5th Cir. 2010); Immigr. & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987); Chen v. U.S. Immigr. & Naturalization Serv., 195 F.3d 198, 201–02 (4th Cir. 1999).

51. Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); *see* Cardoza-Fonseca, 480 U.S. at 423, 428; Immigr. & Naturalization Serv. v. Elias-Zacarias, 502 U.S. 478, 481 (1992); Lopez de Hincapie v. Gonzales, 494 F.3d 213, 217 (1st Cir. 2007); Gomez-Rivera v. Sessions, 897 F.3d 995, 998 (8th Cir. 2018). For example, the particular social group "married indigenous Guatemalan women" is made up of people who have the shared characteristics of gender, relationship status, tribal affiliation, and nationality. Matter of A-B- *Information Sheet: What Does the U.S. Attorney General's Recent Decision Mean for Domestic Violence Survivors?*, CTR. FOR GENDER & REFUGEE STUD.,

that share characteristics they "cannot change or should not be required to change because it is fundamental to their individual identities or consciences.").[52]

The applicant must also show that she is unable or unwilling to avail herself of her home country's protection because the government cannot or will not protect her from the harm she fears.[53] A primary issue under this element is whether the persecutor was a state actor or a non-state actor.[54] If the persecutor is a state actor, the applicant is not required to demonstrate that she reported the harm or to explain why she did not report the harm.[55] If the persecutor is a private actor, the applicant may be required to show that she reported the persecution to government authorities but they failed to protect her.[56] However, if the country conditions reports demonstrate that informing government officials of the persecution would be dangerous or futile, the applicant is not required to show that she reported the private actor.[57] An asylum applicant must also explain why it would not be reasonable for her to relocate to another part of her home country.[58]

Finally, an applicant must demonstrate that she is not statutorily barred from being granted asylum.[59] Things that may bar an applicant include failing to file the asylum application within one year of entry into

https://cgrs.uchastings.edu/sites/default/files/Matter%20of%20A-B-_One%20Pager_Non%20Legal%20Audiences_FINAL_3.PDF (last visited Mar. 22, 2022). Other examples of particular social groups include "Honduran women" or "Salvadoran women in domestic relationships." *Id.* Political opinion refers to any strongly held beliefs an asylum seeker has or the persecutor believes they have; crucially, involvement in politics is not necessary for an opinion to qualify as a political opinion. *Id.* Examples of political opinions include opposition to patriarchal attitudes or holding feminist beliefs. *Id.*

52. Matter of Acosta, 19 I&N Dec. 211, 233 (BIA 1985).

53. GARCIA, *supra* note 38, at 4; *see* Bringas-Rodriguez v. Sessions, 850 F.3d 1051, 1066–67 (9th Cir. 2017); Hernandez-Avalos v. Lynch, 784 F.3d 944, 953 (4th Cir. 2015) (holding that a woman who had been threatened by gangs in El Salvador had satisfied the requirement of proving that the government was unwilling or unable to protect her and that this was supported by country conditions specific to El Salvador); Valdiviezo-Galdamez v. Att'y Gen., 502 F.3d 285, 288 (3d Cir. 2007).

54. GARCIA, *supra* note 38, at 4.

55. *Id.*

56. *Id.*

57. *Id.*; Matter of S-A-, 22 I&N Dec. 1328, 1335 (BIA 2000) (holding that reporting to government authorities is unreasonable and unnecessary in some situations, such as when the applicant's family is watching her every move).

58. Matter of A-B- *Information Sheet: What Does the U.S. Attorney General's Recent Decision Mean for Domestic Violence Survivors?*, *supra* note 51. An applicant may establish that internal relocation is unreasonable because she does not have a support network in other parts of the country or that the perpetrator may nevertheless still be able to locate her. *Id.*

59. GARCIA, *supra* note 38, at 4.

the country,[60] reentering the country after having previously been removed, and having previously persecuted others.[61] Adjudicators have a measure of discretion in determining whether they believe an applicant to be deserving of asylum.[62]

III. THE HISTORY OF FGM IN UNITED STATES ASYLUM LAW

A. Matter of Kasinga

Matter of Kasinga, decided in 1996, was the first precedential BIA decision to formally recognize FGM as a basis for asylum claims in the United States.[63] The asylum applicant, Fauziya Kasinga, was a nineteen-year-old member of the Tchamba-Kunsuntu Tribe in Togo.[64] She testified that while most girls in her tribe are subjected to FGM at age fifteen, her father, who was influential in the tribe, protected her from having to undergo the procedure.[65] However, when her father died, her aunt became head of the family and her mother was banished to Benin.[66] Her aunt forced her into a marriage with a man twenty-eight years her senior and in accordance with tribal custom, arranged for her to undergo FGM before being married.[67] Fearing "imminent mutilation," the applicant fled to Ghana, but afraid that her aunt would follow her there, traveled to Germany and then the United States, where she immediately requested asylum upon arrival at Newark International Airport on December 17, 1994.[68]

The BIA granted Kasinga asylum and ordered that she be admitted into the United States as an asylee.[69] First, the BIA held that FGM rises to the level of persecution within the meaning of § 101(a)(42)(A) of the

60. *Id.*; 8 C.F.R. § 208.4(a)(2) (2022). The requirement that applicants must file for asylum within one year of entry into the United States is subject to exceptions. GARCIA, *supra* note 38, at 4. Changed circumstances, for example in the applicant's home country, affecting the applicant's asylum eligibility, and extraordinary circumstances out of the applicant's control, may excuse a filing in excess of one year from entry. *See* § 208.4(a)(4)(i).

61. *See* 8 U.S.C. § 1158(b)(2)(A)(i) (denial based on "persecut[or]" status); 8 C.F.R. § 1208.13(d)(2)(I) (denial based on previous removal); GARCIA, *supra* note 38, at 4.

62. *See* Matter of A-B- *Information Sheet: What Does the U.S. Attorney General's Recent Decision Mean for Domestic Violence Survivors?*, *supra* note 51.

63. *Female Genital Cutting*, CTR. FOR GENDER & REFUGEE STUD., https://cgrs.uchastings.edu/our-work/female-genital-cutting (last visited Mar. 22, 2022).

64. Matter of Kasinga, 21 I&N Dec. 357, 358 (BIA 1996).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 358–59.

69. *Id.* at 368.

INA due to the severity of the practice.[70] Second, the BIA found that Kasinga belonged to the particular social group of "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice."[71] The BIA also found that Kasinga had established a well-founded fear of persecution if forced to return to Togo on account of her membership in a particular social group, one of the INA's protected grounds.[72] Finally, the BIA held that if forced to return to Togo, Kasinga would not be safe even if she moved to another region of the country, as Togo has a small geographic area, the police would refuse to protect her, and her aunt and husband were still searching for her.[73]

Matter of Kasinga was influential because it legally recognized for the first time a particular social group for women fleeing FGM.[74] It paved a way forward for women fleeing this particular form of gender-based violence, perpetrated not by the government, but by their own families and communities.[75]

B. Bah v. Mukasey

Although *Matter of Kasinga* provided invaluable guidance for asylum applicants fleeing FGM, it involved a woman who had not yet been cut.[76] The question of whether past subjection to FGM could be a basis for asylum remained unanswered.[77]

Bah v. Mukasey came before the Second Circuit Court of Appeals in 2008.[78] The case involved three applicants; the first applicant, Bah, was a citizen of Guinea who entered the United States in 2003 without proper documentation.[79] She alleged that when she was eleven years old, her mother and aunt physically restrained her while five women cut her with

70. *See id.* at 365.

71. *Id.* at 366. ("The characteristics of being a 'young woman' and a 'member of the Tchamba-Kunsuntu Tribe' cannot be changed. The characteristics of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.").

72. *Id.* at 366–67.

73. *Id.* at 367.

74. *See* Theresa A. Vogel, *Critiquing* Matter of A-B-*: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence*, 52 U. MICH. J.L. REFORM 343, 363–64 (2019).

75. *See id.* ("*Kasinga* continues to be one of the most important authorities analyzing a gender-based asylum claim. The decision in *Kasinga* has continued to be validated by the BIA . . . .").

76. *See* 21 I&N at 358.

77. *See id.*

78. *See generally* 529 F.3d 99 (2d Cir. 2008).

79. *Id.* at 104.

knives and without anesthesia or sanitary precautions.[80] Her recovery took weeks and as an adult, she had menstrual problems, complications during childbirth, and sexual dysfunction.[81]

The second applicant, Mariama Diallo, was also a citizen of Guinea and was a member of the Fulani ethnic group.[82] She claimed that her aunt and grandmother had forced her to undergo FGM against her parents' wishes.[83] Like Bah, she suffered from long-term consequences such as persistent pain, difficult childbirth, sexual dysfunction, and miscarriages.[84] She also feared that if forced to return to Guinea her daughters would also have to undergo FGM.[85]

The third applicant, Haby Diallo, was also a member of the Fulani ethnic group in Guinea; she testified that at eight years old, her grandmother and three other women had held her down and mutilated her with a knife, and that as an adult, she was "definitely" against FGM.[86] She was not hospitalized despite heavy bleeding, and as an adult, suffered from menstrual problems and sexual dysfunction.[87]

The BIA denied all three women's claims, stating that their fear of future persecution was rebutted by the fact that they had already undergone FGM—the panel held that having already been subjected to FGM, the women no longer had reason to fear for their lives or freedom in the future.[88] The Second Circuit rejected this argument, citing two asylum grants where the BIA had found that FGM was not merely a one-time occurrence.[89] In one of the decisions, the applicant had undergone FGM five times when her vaginal opening was opened and shut on multiple occasions for intercourse and childbirth.[90] In the other, the asylum seeker, whose vaginal opening had been sewn shut with a thorn, was raped by her husband; when he could not penetrate her, he cut her open, causing severe bleeding.[91]

The Second Circuit held that FGM was not necessarily a one-time occurrence because victims could still be subject to further mutilation, and it was the government's burden to prove otherwise.[92] The Second

80. *Id.*
81. *Id.*
82. *Id.* at 105.
83. *Id.* at 105–06.
84. *Id.* at 106.
85. *Id.*
86. *Id.* at 106–07.
87. *Id.* at 107.
88. *Id.* at 114.
89. *Id.*
90. *Id.* (citing Matter of S-A-K- and H-A-H-, 24 I&N Dec. 464 (BIA 2008)).
91. *Id.*
92. *See id.* at 114–15.

Circuit furthermore held that in order to rebut a presumption of future persecution, the government must also prove that conditions in the applicant's home country have changed in such a way that the applicant no longer has a basis for fearing for her life or freedom.[93] Additionally, proving only that the same past harm will not recur does not rebut the presumption, because the victim may be subject to other forms of persecution in the future, such as rape and sex trafficking.[94] The government carries the burden of proving that a FGM victim is not at risk for other non-FGM forms of persecution.[95]

C. Matter of A-T-

The attorney general decided *Matter of A-T-* shortly after the Second Circuit decided *Bah v. Mukasey*.[96] A-T- was a twenty-eight-year-old applicant from Mali and a member of the Bambara tribe.[97] She had been subjected to FGM as a child, was against the practice as an adult, and feared that if forced to return to Mali, any daughter of hers would be subject to FGM as well.[98]

The BIA denied her request for asylum.[99] Distinguishing this case from *Kasinga*, the BIA followed a similar reasoning as it originally had in *Bah*: the applicant had already undergone FGM, which rebutted the presumption of future persecution.[100]

The justice department rejected the BIA's reasoning.[101] The attorney general reiterated that once an applicant has shown past persecution, she is then entitled to a mandatory presumption of future persecution, which the government may attempt to rebut.[102] The attorney general emphasized that evidence of past persecution creates a presumption of future persecution "on account of the *same statutory ground*" and that the feared future harm need not be exactly the same as the past harm in order for the presumption of future persecution to arise.[103] The attorney general stated, "the 'original claim' was not '[female genital mutilation]

93. *Id.* at 115.
94. *Id.* at 115–16.
95. *Id.* at 116.
96. 24 I&N Dec. 617 (A.G. 2008). *Bah* was decided in June 2008, and *Matter of A-T-* was decided in September 2008.
97. *Id.* at 619.
98. *Id.*
99. *Id.* at 619–20.
100. *Id.* at 620; *see also Bah*, 529 F.3d at 114.
101. *Matter of A-T-*, 24 I&N Dec. at 621.
102. *Id.* at 622.
103. *Id.*

persecution,' . . . but rather persecution on account of membership in a particular (albeit not clearly defined) social group."[104]

These three cases laid out protections available to both women fleeing FGM and women who had been subjected to FGM. Asylum seekers basing their claims on the FGM protections affirmed in the prior three cases seemed to have a clear path moving forward until 2018, when then Attorney General Sessions used the power of referral authority to self-refer *Matter of A-B-*.[105]

IV. THE ATTORNEY GENERAL'S POWER OF REFERRAL AUTHORITY OVER IMMIGRATION CASES

As head of the Department of Justice, the attorney general has significant authority in matters relating to immigration and naturalization of migrants to the United States.[106] Under the power to execute and enforce immigration laws,[107] the attorney general has the wide discretion to undertake a number of measures in the name of carrying out and enforcing immigration policy.[108] An example of one of these measures is the BIA.[109] As a creation and delegate of the attorney general, the BIA generally has not had independent statutory authority[110] although it has been tasked with independent decision-making.[111]

The attorney general also has "referral and review power," or "referral authority,"[112] which gives him the authority to direct the BIA to

104. *Id.*

105. *See* 27 I&N Dec. 316, 317 (A.G. 2018).

106. *See* 8 U.S.C. § 1103(g).

107. *See* § 1103(g)(2) ("The Attorney General shall establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.").

108. *See* § 1103(g).

109. *See id.*; Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3502, 3503 (Sept. 4, 1940) (codified at 8 C.F.R. pt. 90).

110. Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647, 669 (2008).

111. 8 C.F.R. § 1003.1(d)(1)(ii) (2020) ("Subject to the governing standards . . . [b]oard members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board . . . .").

112. *See* § 1003.1(h)(1); SARAH PIERCE, MIGRATION POL'Y INST., OBSCURE BUT POWERFUL: SHAPING U.S. IMMIGRATION POLICY THROUGH ATTORNEY GENERAL REFERRAL AND REVIEW 1 (2021).

refer cases to him for review.[113] The statute requires no specific procedures other than a simple direction to refer the case, and there are no qualifications for when an attorney general may do so; as such, attorneys general have virtually unfettered discretion in deciding which cases to review.[114] Furthermore, the attorney general may conduct his review de novo and is not required to consider any prior decisions.[115] Once a case has been referred to the attorney general, other decisions on the matter, such as from the BIA, become non-final and the migrant's removal is stayed pending further proceedings.[116] An attorney general's decision is binding on the government and on parties, but may be reviewed by a federal court of appeals.[117]

Since the creation of the referral authority in 1940,[118] attorneys general have tended to reserve the power for cases with the potential for far-reaching consequences, including those likely to impact both domestic and foreign affairs and those likely to lead to the creation of new legal standards.[119] In other words, although attorneys general are not limited in what cases they are allowed to consider, they have generally focused on cases that could have significant implications for U.S. policy and U.S. law.[120]

As such, most attorneys general have mostly used referral authority sparingly—until recently.[121] Use of referral authority began its upward trend starting in the early 2000s under the George W. Bush administration, during which three attorneys general—John Ashcroft, Alberto Gonzales (who only served about two and a half years), and Michael Mukasey (who only served about two years)—self-referred nine cases, up from just one during the Clinton administration.[122] It was

113. § 1003.1(h). The BIA and the Secretary of the Department of Homeland Security may also refer immigration cases to the attorney general. *Id.*

114. *See* Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 860 (2016).

115. Immigr. & Naturalization Serv. v. Doherty, 502 U.S. 314, 327 (1992).

116. Gonzales & Glen, *supra* note 114, at 853.

117. *Id.* at 856–58.

118. *Id.* at 850.

119. Brittany Stevenson, Note, *Building Legal Walls: Limiting Attorney General Referral Authority over Immigration Cases*, 81 OHIO ST. L.J. 315, 321–22 (2020).

120. *Id.*; Gonzales & Glen, *supra* note 114, at 860 ("[C]ases have tended to focus on those whose resolution would have continuing importance—the decision of a legal question that would potentially affect many cases or the setting of policy that would likewise have significant effects beyond the case at issue.").

121. Stevenson, *supra* note 119, at 320–21.

122. Jennifer S. Breen, *Labor, Law Enforcement, and "Normal Times": The Origins of Immigration's Home Within the Department of Justice and the Evolution of Attorney General Control over Immigration Adjudications*, 42 U. HAW. L. REV. 1, 42–47, 44 n.195

during the Bush administration when attorneys general first began using referral authority to effectuate the administration's policy goals, moving immigration law away from what was often well-established and widely-accepted precedent.[123] For example, in *Matter of Silva-Trevino*, Mukasey claimed that federal courts had failed to apply a uniform standard in deciding whether a criminal conviction automatically rendered an immigrant removable from the United States.[124] In a clear attempt to increase the number of findings of deportable crimes, Mukasey held that judges could consider additional evidence other than the statute under which the immigrant had been convicted.[125]

During the Obama administration, Attorneys General Eric Holder and Loretta Lynch self-referred a mere four cases between them.[126] Two of Holder's decisions vacated two of Mukasey's decisions,[127] and in his third self-referred case, Holder referred the matter to the BIA to decide on the constitutionality of the Defense of Marriage Act in the immigration context.[128] Lynch's single self-referred case also remanded the matter at hand to the BIA, this time in light of an intervening Supreme Court decision.[129] To be clear, Attorneys General Holder and Lynch utilized the referral authority for two purposes: to return immigration law to what it had been prior to the Bush administration, and to remand the matters at issue to the BIA for further consideration.[130] They did not use referral authority to establish new standards or create new immigration law.[131]

The attorneys general of the Trump administration (Jeff Sessions and William Barr, as well as acting Attorneys General Matthew Whitaker and Jeffrey Rosen) built on the Bush administration's

(2019); *Attorney General: Michael B. Mukasey*, U.S. DEP'T OF JUST. (Oct. 10, 2018), https://www.justice.gov/ag/bio/mukasey-michael-b; PIERCE, *supra* note 112, at 7.

123. *See* Breen, *supra* note 122, at 42. For example, Ashcroft issued three consolidated cases, Matter of Y-L-, Matter of A-G-, Matter of R-S-R, 23 I&N Dec. 270 (A.G. 2002), to overturn Matter of S-S-, 22 I&N Dec. 458 (BIA 1999), which had been decided by a unanimous en banc BIA.

124. 24 I&N Dec. 687, 688 (A.G. 2008), *vacated*, 26 I&N Dec. 550 (A.G. 2015).

125. PIERCE, *supra* note 112, at 8. Six federal circuit courts of appeals rejected Mukasey's holding, and the Supreme Court refused to apply it before it was vacated in 2015. *Id.*; *see* Matter of Silva-Trevino, 26 I&N Dec. 550 (A.G. 2015).

126. Breen, *supra* note 122, at 46–47.

127. *Id.* at 46; *see* Matter of Compean, Bangaly & J-E-C-, 25 I&N Dec. 1 (A.G. 2009); Matter of Silva-Trevino, 26 I&N Dec. 550.

128. Breen, *supra* note 122, at 46; *see* Matter of Dorman, 25 I&N Dec. 485 (A.G. 2011).

129. Breen, *supra* note 122, at 46–47; *see* Matter of Chairez & Sama, 26 I&N Dec. 686 (A.G. 2015); Matter of Chairez & Sama, 26 I&N Dec. 796 (A.G. 2016).

130. Breen, *supra* note 122, at 47.

131. *Id.*

approach, using the referral authority seventeen times over four years.[132] Unlike their predecessors, who focused almost solely on substantive immigration issues, those in the Trump administration largely focused on immigration court operations and procedures.[133] This had the effect of stripping immigration judges of much of their discretion in both deciding cases and managing their docket, presumably for one purpose—to ensure an outcome predetermined by the attorney general himself.[134] Sessions in particular used referral authority to strong-arm his way into routine matters, deciding cases in a way that allowed him to assert and expand the power of his office.[135]

Similar to the Bush administration, Trump's attorneys general used referral authority in order to effectuate the administration's policy goals; unlike the Bush administration, however, the Trump-era attorneys general's approach was almost singularly focused on reversing years of agency framework.[136] Many of the cases selected were legally insignificant and chosen in order to issue a specific finding rather than to address the actual issue at hand.[137] In particular, the attorneys general hand-selected several cases specifically to complement the administration's anti-immigrant policies and reduce asylum grants.[138]

The first *Matter of A-B-* decision, which Sessions issued in 2018,[139] exemplified the Trump attorneys general's aggressive approach to referral authority and their attempts to curb access to asylum.

132. PIERCE, *supra* note 112, at 7; Breen, *supra* note 122, at 48.

133. *See* PIERCE, *supra* note 112, at 7; Breen, *supra* note 122, at 48–49.

134. PIERCE, *supra* note 112, at 12.

135. *See* Breen, *supra* note 122, at 50; *see also* Matter of Castro-Tum, 27 I&N Dec. 271, 292 (A.G. 2018) ("[I]mmigration judges and the Board have no such inherent authority [of administrative closure]. They act on behalf of the Attorney General in adjudicating immigration cases, and can exercise only the specific powers that statutes or the Attorney General delegate.").

136. *See* PIERCE, *supra* note 112, at 12–13; Breen, *supra* note 122, at 48–49.

137. *See* PIERCE, *supra* note 112, at 12 (discussing how Sessions self-referred Matter of M-G-G-, 27 I&N Dec. 475 (A.G. 2018) to decide the issue of bond for asylum seekers, but when the migrant was deported and the issue became moot, quickly moved on to a similar case in order to decide the same issue); Breen, *supra* note 122, at 48.

138. *See, e.g.*, Matter of E-F-H-L-, 27 I&N Dec. 226 (A.G. 2018) (holding that asylum seekers are not entitled to a full evidentiary hearing and that immigration judges could rule on asylum cases before asylum seekers have a chance to present evidence or testify); Matter of L-E-A-, 27 I&N Dec. 581, 595–97 (A.G. 2019) (holding that membership in a family where some members have been persecuted, a long accepted basis for asylum, will not suffice for a claim of persecution on account of membership in a particular social group unless the immediate family has "societal import").

139. 27 I&N Dec. 316, 316 (A.G. 2018).

V. *MATTER OF A-B-*

A. Matter of A-B- I

1. Case Background

The asylum seeker in the case, A-B-, was a native and citizen of El Salvador.[140] She met her future husband in her early twenties, and after they married, he began abusing her.[141] For fifteen years, he beat and raped her regularly, often wielding a gun or a knife and threatening to kill her.[142] He continued this abuse even while she was pregnant, at one point even threatening to hang her with a rope from their roof.[143] He also verbally abused her, belittling and demeaning her.[144] He treated her like a slave and frequently accused her, falsely, of cheating on him, forcing her to show him her genitals so he could determine if she had been with another man.[145] Overall, much of respondent A-B-'s life was spent in fear and was characterized by severe brutalization and abuse.[146]

A-B- sought help from the Salvadoran authorities but was unsuccessful; although she was granted two restraining orders against her husband, neither was enforced.[147] Even after she fled to a town two hours away, her husband followed her, and the abuse continued.[148] After she filed for divorce, her husband intensified the threats to her life, and when the divorce was finalized, he and his brother, a police officer, accosted her, said the divorce was meaningless, and again threatened to kill her.[149] The threats persisted and a week before fleeing to the United States, A-B-'s ex-husband again physically assaulted her.[150] With no protection from the Salvadoran authorities and in danger wherever she turned, A-B- escaped to the United States.[151]

140. *Backgrounder and Briefing on* Matter of A-B-, CTR. FOR GENDER & REFUGEE STUD. (Aug. 2018), https://cgrs.uchastings.edu/matter-b/backgrounder-and-briefing-matter-b.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *See id.*

147. *Id.* ("While she was able to obtain two restraining orders against her husband, they went completely unenforced, and he continued to abuse and threaten her. After one particularly terrifying incident in which her husband attacked her with a large knife, Ms. A.B. went to the police and they refused to help, saying instead 'if you have any dignity, you will get out of here.'").

148. *Id.*

149. *Id.*

150. *Id.*

151. *See id.*

In July 2014, A-B- entered the United States without proper documentation and was apprehended by U.S. Customs and Border Protection agents.[152] She was entered into removal proceedings and later filed for asylum, withholding of removal, and withholding of removal under the Convention Against Torture.[153]

After a finding by the asylum officer that she had a credible fear of persecution, A-B-'s case was sent to the Charlotte Immigration Court.[154] A-B- argued that she should be granted asylum because she had been persecuted on account of her membership in the purported particular social group, "El Salvadoran women who are unable to leave their domestic relationships where they have children in common," since her ex-husband continuously abused her and because she had three children with him.[155] Immigration Judge V. Stuart Couch denied her asylum claim and ordered her to be removed to El Salvador for four reasons: (1) he thought A-B- was not credible; (2) the particular social group in which she claimed membership was not cognizable under 8 U.S.C. § 1101(a)(42)(A);[156] (3) even if it was cognizable, A-B- failed to establish

152. Matter of A-B- (Matter of A-B- I), 27 I&N Dec. 316, 320 (A.G. 2018).

153. *Id.* at 320–21.

154. *Backgrounder and Briefing on* Matter of A-B-, *supra* note 140; NAT'L IMMIGRANT JUST. CTR., PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER *MATTER OF A-B-* 8 (2021), https://immigrantjustice.org/for-attorneys/legal-resources/file/practice-advisory-applying-asylum-after-matter-b-0 ("A-B- I's case was initially heard and denied by Immigration Judge Couch at the Charlotte Immigration Court, a court that is notorious for its harsh attitude toward asylum seekers. Judge Couch had a greater than 85 percent denial rate in asylum cases."); *Matter of A-B- I*, 27 I&N Dec. at 321.

155. *Matter of A-B- I*, 27 I&N Dec. at 321. To be granted asylum, an applicant must show that she fears persecution (either an independent fear of future persecution or a presumption of future persecution stemming from a showing of past persecution) on the basis of one of the five protected grounds: race, religion, nationality, political opinion, or membership in a particular social group; A-B- claimed membership in a particular social group as the basis for her fear of future persecution. *See Backgrounder and Briefing on* Matter of A-B-, *supra* note 140; *see also supra* Part II. Similarly situated women claiming fear of future persecution based on membership in a particular social group have been successful in their asylum applications (when able to fulfill the other asylum requirements as well). *Backgrounder and Briefing on* Matter of A-B-, *supra* note 140. The BIA issued a precedential decision, *Matter of A-R-C-G-*, in 2014, holding that women escaping domestic violence may qualify for asylum. Matter of A-R-C-G-, 26 I&N Dec. 388, 388–89, 395–96 (BIA 2014). The BIA recognized that due to societal norms in Guatemala relegating women to second-class status and a widespread cultural acceptance toward gender-based violence, the particular social group "married women in Guatemala who are unable to leave their relationship," defined by gender, nationality, and relationship status, is an acceptable particular social group for a grant of asylum. *Id.* at 392–94. Other cases have adopted the BIA's holding and have ruled favorably for similar particular social groups. *See Backgrounder and Briefing on* Matter of A-B-, *supra* note 140.

156. Despite the fact that particular social groups similar to A-B-'s proposed group have been widely accepted in the past, Judge Couch chose to ignore precedent and declare "El

that this membership was the central reason for her persecution; and (4) A-B- failed to show that the El Salvadoran government was unable or unwilling to protect her.[157]

On appeal in December 2016, the BIA reversed Judge Couch's decision.[158] The BIA held that the lower court's adverse credibility determination was erroneous and found that A-B-'s proposed particular social group was similar enough to the widely accepted social group from *Matter of A-R-C-G-*, "married women in Guatemala who are unable to leave their relationship,"[159] to be cognizable.[160] The BIA also found that Judge Couch had erred in finding that A-B-'s status as a Salvadoran woman unable to leave her relationship was not a central reason for her ex-husband's persecution.[161] Furthermore, the BIA held that the El Salvadoran government was in fact unwilling or unable to protect A-B-.[162] The BIA remanded the case back to Judge Couch to perform background checks on A-B- and then grant her asylum.[163] However, Judge Couch refused, purporting that *Matter of A-R-C-G* was no longer good law, and that several courts of appeals had refused asylum to domestic violence victims based on their membership in particular social groups.[164]

Pursuant to the attorney general's power of referral authority over immigration cases,[165] Sessions directed the BIA to refer A-B-'s case to him for review, allowing both parties and any other interested parties to present briefs on the question of "[w]hether, and under what circumstances, being a victim of private criminal activity constitutes a

Salvadoran women who are unable to leave their domestic relationships where they have children in common" incognizable under 8 U.S.C. § 1101(a)(42)(A). *Matter of A-B- I*, 27 I&N Dec. at 321; *Backgrounder and Briefing on* Matter of A-B-, *supra* note 140.

157. *Matter of A-B- I*, 27 I&N Dec. at 321.

158. *Id.*; DEAN EYLER ET AL., ADVOCS. FOR HUM. RTS., GENDER-BASED ASYLUM CLAIMS IN THE WAKE OF *MATTER OF A-B-*: A SUPPLEMENT FOR PRACTICE IN THE EIGHTH CIRCUIT 3 (2019) [hereinafter EIGHTH CIRCUIT SUPPLEMENT].

159. 26 I&N Dec. at 392.

160. *Matter of A-B- I*, 27 I&N Dec. at 321; EIGHTH CIRCUIT SUPPLEMENT, *supra* note 158, at 3.

161. *Matter of A-B- I*, 27 I&N Dec. at 321.

162. *Id.*

163. *Id.* at 322.

164. *Id.* Even after the Department of Homeland Security completed A-B-'s background checks as ordered, Judge Couch, in an unusual move, tried to recertify the case back to the BIA, questioning the "legal validity" of *Matter of A-R-C-G-*. *Backgrounder and Briefing on* Matter of A-B-, *supra* note 140.

165. *See* 8 C.F.R. § 1003.1(h)(1)(i) (2019); *see also supra* Part IV.

cognizable 'particular social group' for purposes of an application for asylum or withholding of removal."[166]

2. *Matter of A-B- I* Decision

Former Attorney General Sessions issued his decision denying A-B-asylum on June 11, 2018.[167] His decision also overruled *Matter of A-R-C-G-*, stating that the BIA should not have issued it as a precedential decision.[168] Sessions held that the BIA had improperly analyzed the issues in *Matter of A-R-C-G-* by erroneously recognizing the particular social group, "married women in Guatemala who are unable to leave their relationship."[169] In terms of particularity, Sessions stated that "[s]ocial groups defined by their vulnerability to private criminal activity likely lack . . . particularity . . . given that broad swaths of society may be susceptible to victimization" and that "[p]articular social group definitions that seek to avoid particularity issues by defining a narrow class . . . will often lack sufficient social distinction to be cognizable as a distinct social group."[170] As such, because A-B-'s particular social group was based on the particular social group from *Matter of A-R-C-G-*, which was no longer legally sound, A-B-'s particular social group was now also incognizable.[171]

Sessions also found that the BIA erred in overruling Judge Couch's decision that A-B- had failed to show that the El Salvadoran government was unable or unwilling to protect her from the harm inflicted by her ex-husband.[172] He said that "perfect protection" is not required, as no country is able to provide complete safety from private crime.[173]

166. *Matter of A-B- I*, 27 I&N Dec. at 323. Both A-B-'s counsel and the Department of Homeland Security submitted briefs, as did twelve amici. *Id.* Eleven of the twelve amicus briefs, submitted by groups such as the American Bar Association, Harvard Immigration and Refugee Clinical Program, former immigration judges and Board of Immigration Appeals members, and the Tahirih Justice Center supported A-B-. *Backgrounder and Briefing on* Matter of A-B-, *supra* note 140.

167. *Matter of A-B- I*, 27 I&N Dec. at 316–17.

168. *Id.* at 333 ("*A-R-C-G-* was wrongly decided and should not have been issued as a precedential decision. DHS conceded almost all of the legal requirements necessary for a victim of private crime to qualify for asylum based on persecution on account of membership in a particular social group. To the extent that the Board examined the legal questions, its analysis lacked rigor and broke with the Board's own precedents."). Sessions said that precedential rules and opinions should not be based on DHS concessions. *Id.* at 333–34.

169. *Id.* at 335; EIGHTH CIRCUIT SUPPLEMENT, *supra* note 158, at 3.

170. *Matter of A-B- I*, 27 I&N Dec. at 335–36 (discussing the insufficiency of the particular social group, "Guatemalan women who are unable to leave their domestic relationships where they have children in common").

171. *See id.* at 340.

172. *Id.* at 343.

173. *Id.*

Moreover, Sessions found that because domestic violence is difficult to prevent and prosecute, El Salvador's domestic violence issue, albeit persistent, does not indicate that the Salvadoran government is unable or unwilling to protect A-B- from her ex-husband.[174] Sessions believed that A-B- had failed to show that the Salvadoran government was unable to protect her because "not only [had she] reached out to police, but received various restraining orders and had [her ex-husband] arrested on at least one occasion."[175] But Sessions did not address the reality of A-B-'s situation, instead choosing to ignore the fact that despite the restraining orders, A-B-'s ex-husband was still able to find her in other parts of the country and continued to terrorize her with both threats and brutal physical abuse.[176]

Perhaps the most troubling part of the decision was Sessions's dicta about private violence, or harm inflicted by a non-governmental actor.[177] Federal courts have listed domestic abuse, murder, beating, and FGM as examples of private violence that can constitute persecution.[178] Ignoring these well-settled principles, Sessions stated, "[i]t can be especially difficult . . . for victims of private violence to prove persecution because 'persecution is something a government does,' either directly or indirectly by being unwilling or unable to prevent private misconduct."[179]

Sessions cited BIA precedent, opining that proving persecution requires proving three elements.[180] Firstly, persecution involves "an intent to target a belief or characteristic."[181] However, Sessions attempted to qualify this by saying that "private criminals are motivated more often by greed or vendettas than by an intent to 'overcome the

174. *Id.* at 343–44 ("The persistence of domestic violence in El Salvador, however, does not establish that El Salvador was unable or unwilling to protect A-B- from her husband, any more than the persistence of domestic violence in the United States means that our government is unwilling or unable to protect victims of domestic violence.").

175. *Id.* at 343.

176. *Backgrounder and Briefing on* Matter of A-B-, *supra* note 140.

177. *See Matter of A-B- I*, 27 I&N Dec. at 337.

178. Charles Shane Ellison & Anjum Gupta, *Unwilling or Unable? The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act*, 52 COLUM. HUM. RTS. L. REV. 441, 446 (2021) (stating that the BIA has recognized these types of harm inflicted by non-governmental actors as persecution); *see UNHCR Guidance Note*, *supra* note 20, ¶ 28 ("FGM is typically perpetrated by private actors."); Brian D. Earp & Sara Johnsdotter, *Current Critiques of the WHO Policy on Female Genital Mutilation*, 33 INT'L J. IMPOTENCE RSCH. 196, 203–04 (2020) (describing non-state actors as being the main perpetrators); CTR. FOR REPROD. RTS., FEMALE GENITAL MUTILATION: AN ADVOCATE'S GUIDE TO ACTION 1, 17 (2006).

179. *Matter of A-B- I*, 27 I&N Dec. at 337 (quoting Hor v. Gonzales, 400 F.3d 482, 485 (7th Cir. 2005) (emphasis omitted)).

180. *See id.*

181. *Id.* (quoting Matter of L-E-A-, 27 I&N Dec. 40, 44 n.2 (BIA 2017)).

protected characteristic of the victim.'"[182] Secondly, Sessions said, to be considered persecution, the harm must be severe; he conceded that private violence may fulfill this element.[183] Finally, Sessions stated that the harm must be inflicted either by the government or private actors or organizations that the government was unable or unwilling to control.[184] However, this analysis is incorrect—the elements of an overall asylum claim are separate from the persecution definition and should not be analyzed together.[185]

Sessions went on to say that to demonstrate persecution, an applicant must show something more than the fact that the government simply had difficulty controlling the private actor or organization.[186] Curiously, and contrary to both the INA and years of consistent jurisprudence, Sessions then attempted to raise the standard for establishing a government's inability or unwillingness to assist victims when the persecutor is a private actor.[187] He stated that "[t]he applicant must show that the government condoned the private actions 'or at least demonstrated a *complete helplessness* to protect the victims.'"[188] Sessions plowed on, stating that in his view, "[t]he fact that the local police have not acted on a particular report . . . does not necessarily mean that the government is unwilling or unable to control crime . . . [t]here may be many reasons why a particular crime is not successfully investigated and prosecuted."[189] This "complete helplessness" standard is significantly heightened from the long-accepted standard, which requires an applicant

182. *Id.* (quoting Matter of Kasinga, 21 I&N Dec. 357, 365 (BIA 1996)). Sessions gave an example of what he believed to be motivation by vendetta rather than an intent to target a belief or characteristic by citing *Matter of R-A-*, where R-A-'s husband targeted her not because she was a member of a broader group of women whom he targeted for the sole purpose of their membership in said group but because she was his wife. *Id.*; *see* Matter of R-A-, 22 I&N Dec. 906, 920 (A.G. 2001).

183. *Id.* ("Private violence may well satisfy the standard, and I do not question that A-R-C-G-'s claims of repugnant abuse by her ex-husband were sufficiently severe.").

184. *Id.*

185. EIGHTH CIRCUIT SUPPLEMENT, *supra* note 158, at 14.

186. *Matter of A-B- I*, 27 I&N Dec. at 337 (citing Menjivar v. Gonzales, 416 F.3d 918, 921 (8th Cir. 2005)).

187. *Attorney General Issues Precedent Decision,* Matter of A-B-*, Seeking to Limit Protection for Asylum Seekers*, CATH. LEGAL IMMIGR. NETWORK (June 28, 2018), https://cliniclegal.org/resources/asylum-and-refugee-law/attorney-general-issues-precedent-decision-matter-b-seeking-limit; *see* Immigration and Nationality Act § 101(a), 8 U.S.C. § 1101(a) (2022).

188. *Matter of A-B- I*, 27 I&N Dec. at 337 (emphasis added) (citing Galina v. Immigr. & Naturalization Serv., 213 F.3d 955, 958 (7th Cir. 2000)).

189. *Id.* at 337–38.

to show that her home country's government is "unable or unwilling" to protect its citizens facing non-governmental inflicted persecution.[190]

At least part of the reason for Sessions's attempts to set forth new asylum rules in the context of private violence was what he perceived to be confusion surrounding the *Matter of A-R-C-G-* opinion.[191] In his belief, the *A-R-C-G-* opinion generated confusion because it recognized "an expansive new category of particular social groups based on private violence."[192] But the particular social group in *A-R-C-G-* is not expansive; rather, it is a small, tightly defined group,[193] so it is unclear why Sessions concluded that there had been confusion surrounding *A-R-C-G-*.[194] In fact, Sessions's conclusion that there was "confusion" appears to have been manufactured in an attempt to diminish immigration protections.[195]

B. Matter of A-B- II

In early 2021, then Acting Attorney General Jeffrey Rosen issued a second *Matter of A-B-* decision (*Matter of A-B- II*) in response to several circuit splits.[196] After *Matter of A-B- I*, federal courts had been conflicted about what standard to apply in deciding non-state actor persecution.[197] While some courts decided that the heightened standard Sessions proposed was "arbitrary and capricious" and continued using the prior "unwilling-or-unable" standard, other courts decided that "complete helplessness" was simply a different interpretation of the "unwilling-or-unable" standard and thus permissible.[198]

Moreover, circuits were split on how they viewed *Matter of A-B-* generally. Some circuits viewed the decision in a favorable manner and

190. GARCIA, *supra* note 38, at 4.

191. *Matter of A-B- I*, 27 I&N Dec. at 319.

192. *Id.*

193. Vogel, *supra* note 74, at 371 ("In reality, the particular social group category—'married women in Guatemala who are unable to leave their relationship'—was restrictive.").

194. *See id.* at 375. There is no evidence in subsequent decisions of either this supposed confusion or of any new "expansive categor[ies] of particular social groups" being used, as adjudicators, the DHS, and the international community agree that women who have suffered domestic violence in their home countries may be able to make successful asylum claims. *Id.*

195. *See id.*

196. 28 I&N Dec. 199 (A.G. 2021); PIERCE, *supra* note 112, at 113 n.51.

197. Ellison & Gupta, *supra* note 178, at 442.

198. *Id.* Under the "complete helplessness" standard, asylum seekers fleeing private violence would have faced an almost insurmountable obstacle. *Id.*; *see also AILA Policy Brief: USCIS Guidance on* Matter of A-B- *Blocks Protections for Vulnerable Asylum Seekers and Refugees*, AM. IMMIGR. LAWS. ASS'N (July 23, 2018), https://www.aila.org/infonet/uscis-matter-of-a-b-asylum-refugees.

handed down decisions consistent with Sessions's opinion. The Second, Fourth, Fifth, and Eleventh Circuits issued decisions stating their belief that *Matter of A-B- I* was not "arbitrary and capricious," that Sessions's interpretation of "persecution" was reasonable, and that Sessions provided sufficient support for the changes he invoked with the decision.[199] Some federal courts decided differently, however, and declined to apply Sessions's new standards. The First Circuit found *Matter of A-B- I*'s blanket rejection of particular social groups based on members' inability to leave a relationship to be arbitrary,[200] and the Sixth Circuit held that the social group "married women in Guatemala who are unable to leave their relationship" from *Matter of A-R-C-G-*[201] was indeed cognizable, as the BIA had previously found.[202]

Matter of A-B- II addressed three issues: (1) whether *Matter of A-B- I* changed the "unwilling or unable" standard in determining persecution by non-governmental actors; (2) whether a government who makes some attempts to stop persecution can be said to be "unable or unwilling"; and (3) whether a protected ground must be more than simply a but-for cause to be considered "one central reason" for the persecution when deciding if the nexus requirement has been satisfied.[203] On the first issue, Rosen insisted that the pre-*Matter of A-B- I* "unable or unwilling" standard remained intact and that *Matter of A-B- I* had merely "reiterated" the standard.[204] On the second issue, Rosen alluded to the raised "complete helplessness" standard, stating that "[w]here the government is actively engaged in protecting its citizens, failures in particular cases or high levels of crime do not establish a breach of the government's duty to protect its citizenry."[205] Finally, Rosen held that to satisfy the nexus requirement, not only must the protected ground be a but-for cause, it must also play "more than a minor role" that is neither "incidental nor tangential" to another potential reason for the persecution.[206] Like *Matter of A-B- I*, *Matter of A-B- II* was met with significant criticism, including accusations that Rosen ignored contrary

199. *See, e.g.*, Scarlett v. Barr, 957 F.3d 316, 326, 332–33 (2d Cir. 2020); Del Carmen Amaya-De Sicaran v. Barr, 979 F.3d 210, 217 (4th Cir. 2020); Gonzales-Veliz v. Barr, 938 F.3d 219, 233 (5th Cir. 2019); Amezcua-Preciado v. Att'y Gen., 943 F.3d 1337, 1344 (11th Cir. 2019).

200. *See* De Pena-Paniagua v. Barr, 957 F.3d 88, 93 (1st Cir. 2020).

201. 26 I&N Dec. 388, 388–89 (BIA 2014).

202. *See* Antonio v. Barr, 959 F.3d 778, 792 (6th Cir. 2020).

203. 28 I&N Dec. 199, 200 (A.G. 2021).

204. *Id.* at 200, 213.

205. *Id.* at 204.

206. *Id.* at 208, 211.

federal court decisions, such as *Grace v. Whitaker*,[207] that a "complete helplessness" standard was a virtually impossible burden to meet,[208] and that the decision, like its predecessor, would significantly decrease the number of asylum grants.[209]

C. Matter of A-B- *Vacated (*Matter of A-B- III*)*

Five months into the Biden Administration, Attorney General Merrick Garland issued a third *Matter of A-B-* decision (*Matter of A-B- III*) vacating both *Matter of A-B- I* and *Matter of A-B- II* in their entirety.[210] Using the attorney general's referral and review power, Garland directed adjudicators to follow pre-*Matter of A-B- I* and *Matter of A-B- II* law, including *Matter of A-R-C-G-*.[211] Citing President Biden's February executive order directing the attorney general and Secretary of Homeland Security to implement regulations addressing when an asylum seeker may be considered a member of a particular social group,[212] Garland opined that vacating both *Matter of A-B-* decisions would create a blank slate and allow for the most flexibility for the rulemaking process.[213] At the time this Note is being written, the regulations have yet to be published, but immigration advocates and practitioners have reacted to *Matter of A-B- III* with enthusiasm and optimism.[214]

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207. *See* 344 F. Supp. 3d 96, 146 (D.D.C. 2018) (holding that the new "credible fear policies" implemented based on *Matter of A-B- I* were "arbitrary, capricious, and in violation of the immigration laws"); Geoffrey A. Hoffman, *The "Complete Helplessness" of* Matter of A-B- *and One More Last Ditch Effort to Torpedo Asylum*, LEXISNEXIS LEGAL NEWSROOM (Jan. 19, 2021), https://www.lexisnexis.com/LegalNewsRoom/immigration/b/insidenews/posts/the-complete-helplessness-of-matter-of-a-b--and-one-more-last-ditch-effort-to-torpedo-asylum.

208. Hoffman, *supra* note 207 ("Consider for a moment the reality of a 'complete helplessness' standard and what kind of unfair burden that would impose on litigants . . . . The AG apparently would be very happy to see a rule which requires all litigants to prove they are completely and utterly helpless, the police are totally inept, and the country is without police protection at all. One has to wonder if the AG desires such a rule because such a situation can rarely if ever be proven.").

209. PIERCE, *supra* note 112, at 15 n.64.

210. *See* 28 I&N Dec. 307 (A.G. 2021).

211. *Id.* at 309.

212. 86 Fed. Reg. 8267, 8271 (Feb. 2, 2021).

213. *Matter of A-B- III*, 28 I&N Dec. at 308.

214. *See, e.g.*, Matter of A-B- / Matter of A-B- II *and* L-E-A- II *Are Vacated. What Next?*, NAT'L IMMIGRANT JUST. CTR. (June 17, 2021, 12:00 PM), https://immigrantjustice.org/for-attorneys/legal-resources/copy/matter-b-b-ii-and-l-e-ii-are-vacated-what-next; Victoria Neilson, *Attorney General Garland Vacates* Matter of A-B- *and* Matter of L-E-A-, CATH. LEGAL IMMIGR. NETWORK (July 28, 2021), https://cliniclegal.org/resources/attorney-general-garland-vacates-matter-b-and-matter-l-e.

VI. *MATTER OF A-B-*'S POTENTIAL IMPACT ON FGM ASYLUM CLAIMS

United States asylum law has long recognized that many refugees and asylum seekers with valid claims, such as women who have been or are at risk of being subjected to FGM, are fleeing persecution by non-governmental actors, against whom their governments cannot or will not protect them.[215] Despite widespread acceptance of this concept, *Matter of A-B-* attempted to water it down and implied that asylum applications claiming persecution from non-state actors were outliers and unlikely to be successful.[216]

Also well-established in United States asylum case law is that women fleeing FGM have a well-founded fear of persecution and a valid claim to a grant of asylum.[217] Since *Matter of Kasinga* was decided in 1996, more and more women have sought asylum in the United States to escape FGM.[218] However, under the standards proposed in *Matter of A-B- I*, the success of FGM asylum seekers' cases was threatened, and well-established cases involving FGM-based asylum claims like *Kasinga* may have been decided differently.[219] As Karen Musalo, one of A-B-'s lawyers, said of the case's vacatur, "[*Matter of A-B- I*] is not just about domestic

215. NAT'L IMMIGRANT JUST. CTR., *supra* note 154, at 9; *see, e.g.*, 8 C.F.R. § 1208.13 (2021) (stating the requirements for establishing asylum eligibility); Matter of Kasinga, 21 I&N Dec. 357, 357 (BIA 1996) (holding that Fauziya Kasinga, a teenaged citizen of Togo, could be granted asylum because she was fleeing FGM).

216. NAT'L IMMIGRANT JUST. CTR., *supra* note 154, at 10; *see* Matter of A-B- (Matter of A-B- I), 27 I&N Dec. 316, 320 (A.G. 2018) (stating that Sessions believed that victims of private violence would be unable to satisfy the statutory requirement showing that their government is unable or unwilling to protect them).

217. *See supra* Part III; Gutierrez, *supra* note 29.

218. 21 I&N Dec. at 357; Katherine Wikholm et al., *Female Genital Mutilation/Cutting as Grounds for Asylum Requests in the US: An Analysis of More than 100 Cases*, 22 J. IMMIGRANT & MINORITY HEALTH 675, 678 (2020) (finding "anecdotally" that using FGM as a basis for asylum claims is a "growing trend in asylum claims"); *see supra* Part III.

219. *See* Levinson & Lynch, *supra* note 33 ("The decision could have wide-ranging impacts on immigrants seeking refuge in the United States from violence in their home countries."); *Our Statement on the Attorney General's Decision in the* Matter of A-B-, FLORENCE IMMIGRANT & REFUGEE RTS. PROJECT (Jan. 18, 2019), https://firrp.org/es/our-statement-on-the-attorney-generals-decision-in-the-matter-of-a-b/ ("This decision will . . . potentially undermine many other valid asylum claims in which perpetrators are non-government actors, including victims of . . . female genital mutilation."); *see also AILA Policy Brief: USCIS Guidance on* Matter of A-B- *Blocks Protections for Vulnerable Asylum Seekers and Refugees*, *supra* note 198, at 1; Sherizaan Minwalla, *New Proposed Asylum Regulations Would Endanger Women's Lives*, LAWFARE BLOG (July 7, 2020, 9:28 AM), https://www.lawfareblog.com/new-proposed-asylum-regulations-would-endanger-womens-lives.

violence. What Sessions is doing is a broader, frontal assault on women's rights."[220]

Sessions's decision combined with immigration judges' discretion had the potential to make denying FGM asylum claims easier. In fact, before they were vacated, *Matter of A-B- I* and *Matter of A-B- II* paved the way for a USCIS policy memorandum instructing USCIS officers to comply with Sessions's blanket presumption against private violence as a basis for persecution[221] and a set of regulations, which although blocked in federal court in 2021,[222] would have affected almost every aspect of asylum law and procedure and would have made it nearly impossible to succeed on an asylum claim, especially for women and girls fleeing gender-based violence like FGM.[223]

Furthermore, FGM asylum claims, while generally accepted for decades, have never been guaranteed success, even before *Matter of*

220. Levinson & Lynch, *supra* note 33.

221. *See* Policy Memorandum PM-602-0162 from U.S. Citizenship & Immigr. Servs., Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-* (July 11, 2018), https://www.uscis.gov/sites/default/files/document/memos/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.PDF.

222. Michelle Hackman, *Federal Judge Blocks Trump Administration's Proposed Asylum Restrictions*, WALL ST. J. (Jan. 9, 2021, 6:43 PM), https://www.wsj.com/articles/federal-judge-blocks-trump-administrations-proposed-asylum-restrictions-11610235823.

223. Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274, 80277 (Dec. 11, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, 1235) ("These changes would codify in the regulations the current practice and provide a clear requirement to immigration judges that they must consider and apply all applicable law, including . . . decisions of the Attorney General . . . ."); Jennie Guilfoyle, *Trump's 'Death to Asylum' Rule Will Go into Effect Days Before He Leaves Office*, IMMIGR. IMPACT (Dec. 10, 2020), https://immigrationimpact.com/2020/12/10/trump-asylum-rule-2021/ (naming some of the regulation's most damaging provisions, including letting immigration judges to deny asylum applications without a hearing, sharply narrowing the definition of terms such as "political opinion," "persecution," and "particular social group," and restricting the types of evidence that asylum seekers may present); Bill Frelick, *The Trump Administration's Final Insult and Injury to Refugees*, HUM. RTS. WATCH (Dec. 11, 2020, 6:00 AM), https://www.hrw.org/news/2020/12/11/trump-administrations-final-insult-and-injury-refugees ("[T]he rule creates insurmountable procedural barriers, evidentiary burdens, and qualification standards to prevent three groups especially, from being able to exercise their right to seek . . . asylum in the United States; . . . women and others fleeing domestic violence."); *see* Minwalla, *supra* note 219 ("First, [the proposed regulations] arbitrarily limit the ability of women to present claims based on gender-persecution or gender-specific political opinion. Second, the regulations would also include procedural barriers for women presenting claims that involve gender-based persecution, which are already more difficult to present. . . . [E]ven a Yazidi survivor of rape perpetrated as part of the Islamic State's genocidal attacks in Iraq would face significant hurdles to securing protection.").

A-B-.[224] While there are guidelines, such as the Gender Persecution Guidelines published by the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") in 1996, which suggest various protections for victims of gender-based violence, their impact is minimal.[225] Such protections are not binding on immigration officials, and immigration judges have wide discretion in deciding FGM-based asylum claims.[226] Additionally, there is scant guidance, even under United States law, to protect victims of gender-based violence.[227] Under asylum law, an applicant must show that she was persecuted on account of one of the five protected grounds—but gender is not one of them.[228]

As such, asylum seekers claiming gender-based violence usually present their claims using membership in a particular social group.[229] But in *Matter of A-B-*, Sessions attempted to narrow the range of characteristics that can define a social group.[230] Sessions stated that "[a] particular social group must not be 'amorphous, overbroad, diffuse, or subjective,' and 'not every "immutable characteristic" is sufficiently precise to define a particular social group.'"[231] He opined that "[s]ocial groups defined by their vulnerability to private criminal activity likely lack the particularity required under *M-E-V-G-*, given that broad swaths of society may be susceptible to victimization."[232] Additionally, proposed

224. *See* Gutierrez, *supra* note 29.

225. *See INS Asylum Gender Guidelines*, AM. IMMIGR. LAWS. ASS'N (May 26, 1995), https://www.aila.org/infonet/ins-asylum-gender-guidelines; Gutierrez, *supra* note 29.

226. Gutierrez, *supra* note 29; Eva N. Juncker, Comment, *A Juxtaposition of U.S. Asylum Grants to Women Fleeing Female Genital Mutilation and to Gays and Lesbians Fleeing Physical Harm: The Need to Promulgate an INS Regulation for Women Fleeing Female Genital Mutilation*, 4 J. INT'L LEGAL STUD. 253, 275 (1998).

227. *See* Minwalla, *supra* note 219.

228. *Id.* ("The drafters did not include 'gender' as a protected ground, likely because the male drafters did not recognize the role of the state in sanctioning violence against women through state laws and policies."). The UNHCR, in its guidelines about international protection, recognized that a particular social group can be defined by women, but again, this is not binding on United States immigration officials. *Id.*

229. Kenneth D. Law, Jr., Note, *Out of Options: The Obstructions Hindering Victims of Non-State Actor Violence Under Current Asylum Law*, 85 BROOK. L. REV. 513, 514 (2020); *see* Minwalla, *supra* note 219.

230. *See* Matter of A-B- (Matter of A-B- I), 27 I&N Dec. 316, 334–36 (A.G. 2018).

231. *Id.* at 335 (quoting Matter of M-E-V-G-, 26 I&N Dec. 227, 239 (BIA 2014)). Sessions opined that the proposed social group from *Matter of A-R-C-G-*, "married women in Guatemala who are unable to leave their relationship," was not "defined by characteristics that provide a clear benchmark for determining who falls within the group." *Id.* If this proposed social group was deemed to be overbroad, a group defined by gender probably would be deemed overbroad as well.

232. *Id.*; *see* Law, *supra* note 229, at 526. Sessions supplied *Constanza v. Holder* as an example, which found that groups of people who are susceptible to gang violence are "too diffuse to be recognized as a particular social group." *Matter of A-B- I*, 27 I&N Dec. at 335 (citing Constanza v. Holder, 647 F.3d 749, 754 (8th Cir. 2011)).

social groups cannot be defined too broadly, but they also cannot be defined too narrowly; as Sessions warned, "[p]articular social group definitions that seek to avoid particularity issues by defining a narrow class . . . will often lack sufficient social distinction to be cognizable as a distinct social group, rather than a description of individuals sharing certain traits or experiences."[233] Based on this language, an immigration judge could determine that proposed social groups premised on characteristics like being a woman and being at risk of or having been subjected to FGM are invalid under *Matter of A-B-* and that the asylum claim should fail.[234]

Furthermore, under the "complete helplessness" standard Sessions hoped would gain traction, FGM asylum applicants would have faced an extra, perhaps impossible, hurdle.[235] FGM is usually a form of "private" violence, as it is commonly performed by non-state actors, including family members or members of the community[236]—for example, in Burkina Faso, private citizens continue to cut girls despite an official government ban on the practice.[237] Under Sessions's proposed standard, the fact that Burkina Faso's government has officially banned FGM would have been evidence that the government is not completely helpless to stop FGM.[238] As such, FGM asylum applicants fleeing countries that

233. *Matter of A-B- I*, 27 I&N Dec. at 336. Sessions's example of an overly narrow social group that lacks sufficient social distinction was "Guatemalan women who are unable to leave their domestic relationships where they have children in common." *Id.*

234. *See* PIERCE, *supra* note 112, at 15 ("With just *Matter of A-B-* and *Matter of L-E-A-*, Trump administration attorneys general significantly curtailed asylum—especially asylum based on membership in a particular social group.").

235. *See Matter of A-B- I*, 27 I&N Dec. at 337; *AILA Policy Brief: USCIS Guidance on* Matter of A-B- *Blocks Protections for Vulnerable Asylum Seekers and Refugees*, *supra* note 198.

236. *See UNHCR Guidance Note*, *supra* note 20, ¶¶ 22–27; Earp & Johnsdotter, *supra* note 178, at 201.

237. *AILA Policy Brief: USCIS Guidance on* Matter of A-B- *Blocks Protections for Vulnerable Asylum Seekers and Refugees*, *supra* note 198; *Burkina Faso: Urgent Need to Protect Girls from FGM and Forced Marriage*, AMNESTY INT'L (Oct. 10, 2018, 4:36 PM), https://www.amnesty.org/en/latest/news/2018/10/burkina-faso-urgent-need-to-protect-girls-from-and-forced-marriage/ (discussing how, although FGM has been banned since 1996, tradition and custom still compel people to perform FGM in secret).

238. *AILA Policy Brief: USCIS Guidance on* Matter of A-B- *Blocks Protections for Vulnerable Asylum Seekers and Refugees*, *supra* note 198. Although an FGM asylum applicant from Burkina Faso would fail to establish her claim under the "complete helplessness" standard because Burkina Faso has an official ban on the practice, she might succeed under the "unable or unwilling" standard. While the government instituted a ban, they have not taken real measures to enforce it, indicating that the government is either unable to enforce the policy or is unwilling to go beyond a merely symbolic FGM ban. *See id.*

have undertaken any kind of measure to stop FGM, no matter how negligible or inadequate, would have failed on this element.[239]

VII. FGM MUST REMAIN A RECOGNIZED BASIS FOR ASYLUM

Despite heightened awareness of the practice and the lifelong pain and trauma that can result, FGM remains a common practice around the world.[240] As such, and notwithstanding moral and humanitarian considerations, there are numerous reasons for why FGM should remain a recognized basis for asylum claims in the United States.

Principally, FGM as a basis for asylum is consistent with congressional intent regarding asylum protections. Congress passed the Refugee Act of 1980 to comply with its obligations as a party to the 1951 UN Convention Relating to the Status of Refugees.[241] As such, U.S. asylum law must remain in compliance with the policies and guidelines of the United Nations High Commissioner for Refugees ("UNHCR").[242] While each country can decide for itself who may immigrate into and stay within its borders, these decisions must be compatible with its treaty obligations.[243] The UNHCR has made clear its attitude toward women seeking asylum on FGM-related grounds—such asylum-seekers are likely to qualify for refugee status under the 1951 Convention Relating to the Status of Refugees.[244] The United States' commitment to UNHCR guidance strongly indicates that it should adopt the UNHCR's stance and guidance on FGM asylum claims.[245]

239. *See id.* Worldwide, at least fifty-nine countries have banned FGM. There are twenty-six countries in Africa (where FGM is primarily practiced) that have some form of law prohibiting FGM. *FGM and the Law Around the World*, EQUAL. NOW (June 19, 2019), https://web.archive.org/web/20210308090513/https://www.equalitynow.org/the_law_and_fgm. The punishments range from fines to prison time, but many countries struggle to enforce these laws. *Id.* These countries could not be considered "completely helpless" in protecting its women and girls against FGM but could be considered either unwilling or unable.

240. Awolola & Ilupeju, *supra* note 4, at 1.

241. *Slamming the Door on Domestic Violence Survivors:* Matter of A-B-, CTR. FOR GENDER & REFUGEE STUD. (July 2019), https://www.immigrantwomentoo.org/wp-content/uploads/Matter-of-A-B-_One-Pager_FOR-CANDIDATES_7_19_2019.pdf; *see Grace v. Whitaker*, 344 F. Supp. 3d 96, 126 (D.D.C. 2018) ("A general rule that effectively bars the claims based on certain categories of persecutors (i.e., domestic abusers or gang members) or claims related to certain kinds of violence is inconsistent with Congress' intent to bring 'United States refugee law into conformance with the [Refugee Act of 1980].'" (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 436–37 (1987))).

242. *Slamming the Door on Domestic Violence Survivors:* Matter of A-B-, *supra* note 241.

243. *Id.*

244. *UNHCR Guidance Note*, *supra* note 20, ¶ 1.

245. *See Slamming the Door on Domestic Violence Survivors:* Matter of A-B-, *supra* note 241.

Additionally, starting with *Matter of Kasinga* and prior to *Matter of A-B-*, the trend in United States asylum case law was acceptance of FGM as a basis for asylum.[246] Courts tended to look favorably at asylum claims using particular social groups defined by various aspects related to FGM.[247] *Matter of A-B- I* and *Matter of A-B- II*'s disdain for victims of persecution inflicted by non-state actors was an outlier approach. Most United States adjudicators have a record of supporting women and girls fleeing FGM and of recognizing FGM-based claims.[248]

Furthermore, women and girls fleeing FGM meet the elements for a successful asylum claim. Firstly, FGM asylum applicants can show that the harm they faced or will face in their home country is severe enough to rise to the level of persecution.[249] In the case of women and girls who have not yet been subjected to FGM but are at risk, the threat of severe pain and trauma both short-term and long-term as well as physical and psychological, is enough to constitute a well-founded fear of persecution.[250] Women and girls who have already been subjected to FGM can also establish a well-founded fear of persecution.[251] In addition to a presumption of well-founded fear of persecution that arises once past persecution has been established, FGM may be a continuing form of persecution.[252] A woman who has already been cut may be subjected to

246. *See supra* Part III; Wikholm et al., *supra* note 218, at 676; Zsaleh E. Harivandi, Note, *Invisible and Involuntary: Female Genital Mutilation as a Basis for Asylum*, 95 CORNELL L. REV. 599, 608 (2010); Pooja Shah, Note, *Cutting Female Genital Mutilation from the United States: A European-Influenced Proposal to Alter State and Federal Legal Responses When Affording Relief to Somali Victims in Minnesota*, 22 CARDOZO J.L. & GENDER 583, 594 (2016).

247. Harivandi, *supra* note 246, at 608–09 (discussing Niang v. Gonzales, 422 F.3d 1187 (10th Cir. 2005), which said that the definition of the particular social group did not need to include opposition to FGM because gender and tribal membership sufficed, and Mohammed v. Gonzales, 400 F.3d 785 (9th Cir. 2005), which likened FGM to forced sterilization because it 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 of persecution").

248. *See supra* Part III; Harivandi *supra* note 246, at 608–09; Shah, *supra* note 246, at 601.

249. *See, e.g.*, Matter of Kasinga, 21 I&N Dec. 357, 358 (BIA 1996).

250. *See supra* Part I; Harivandi, *supra* note 246, at 611; *UNHCR Guidance Note*, *supra* note 20, ¶ 7.

251. *See* Matter of A-T-, 24 I&N Dec. 617, 622 (A.G. 2008) ("[W]here an alien demonstrates that she has suffered past persecution on account of one of the statutory bases, it is 'presumed' that her life or freedom would be threatened in the future.").

252. *UNHCR Guidance Note*, *supra* note 20, ¶¶ 13–15; Anjum Gupta, *Doctrinal Mutilation: The Board of Immigration Appeals' Flawed Analysis of the "Continuing Persecution" Doctrine in Claims Based on Past Female Genital Mutilation*, 23 GEO. IMMIGR. L.J. 39, 50 (2008) ("Female genital mutilation, like forced sterilization . . . continues to persecute its victim beyond the initial act.").

another form of FGM at a later time and may experience various consequences long after the procedure is performed.[253]

FGM asylum applicants can also establish that their fear of being cut is motivated by their race, religion, nationality, political opinion, or membership in a particular social group.[254] Generally, as demonstrated in recent case law, FGM asylum applicants assert that their fear of FGM is motivated by their membership in a particular social group.[255] In countries and communities where FGM is a common practice, persecutors target women who have not yet been cut, and the fear these women have of being subjected to FGM constitutes an immutable characteristic.[256] Women who have been cut also constitute a social group because they share the immutable characteristic of having experienced FGM[257] and the possibility of being targeted for further mutilation.[258] Moreover, both groups could meet the social distinction requirement because evidence that group members in particular are subject to persecution shows that the group is perceived or treated in a manner distinct from others in society.[259] The fact that in certain communities, women in particular are targeted for FGM is evidence that they are perceived as socially distinct.[260] Furthermore, in countries with laws

253. Gupta, *supra* note 252, at 50–51 ("[A]s several Courts of Appeals have acknowledged, female genital mutilation is often performed in order to preserve virginity before marriage or ensure fidelity during marriage by permanently eliminating sexual pleasure in its victims. Accordingly, even after the initial act of mutilation or forced sterilizations, victims of both practices continue to be persecuted for the rest of their lives."); *UNHCR Guidance Note*, *supra* note 20, ¶¶ 13–15; Harivandi, *supra* note 246, at 611; *Female Genital Mutilation*, WORLD HEALTH ORG. (Feb. 3, 2020), https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation (stating that even after the initial procedure there may be "later surgeries: for example, the sealing or narrowing of the vaginal opening (Type 3) may lead to the practice of cutting open the sealed vagina later to allow for sexual intercourse and childbirth (deinfibulation). Sometimes genital tissue is stitched again several times, including after childbirth, hence the woman goes through repeated opening and closing procedures, further increasing both immediate and long-term risks").

254. 8 U.S.C. § 1101(a)(42).

255. Harivandi, *supra* note 246, at 612. In United States case law, FGM asylum applicants have never argued their claims based on race, nationality, or religion, but in some situations, may be able to argue that they were subjected to FGM on account of their political opinion. *Id.*

256. *Id.* at 616 (stating that even if it is possible to eliminate or diminish this fear, a woman should not be forced to do so because it is an important part of her "identit[y] or conscience[]").

257. *Id.* at 612.

258. *See supra* note 253 and accompanying text.

259. CTR. FOR GENDER & REFUGEE STUD., CGRS ADVICE—FEMALE GENITAL CUTTING ASYLUM CASES 9 (2012), https://cgrs.uchastings.edu/sites/default/files/CGRS_FGC_Advisory_April_2012.pdf.

260. *Id.*

against FGM, those laws are evidence of social distinction because they were enacted to protect a specific group.[261]

Oftentimes, governments are unable or unwilling to protect women from FGM. While governments are not required to protect its citizens from "*all* risk[s] of harm, they are obligated to take effective and appropriate measures" to protect against FGM.[262] These measures may include legislation barring FGM, prosecuting and punishing those who continue to perform the practice, and raising awareness and informing public opinion against FGM.[263] Yet while many governments have undertaken such measures, FGM remains prevalent.[264] Few perpetrators are prosecuted or punished, as FGM is heavily ingrained in many societies and cultures.[265] Religious leaders, many of whom uphold FGM as a necessary practice, often have a significant amount of power, which can influence how willing the government proves to be in punishing those who perform FGM, as many officials may be reluctant to interfere with tradition.[266] So although FGM may officially be designated a crime, it is not treated like one, indicating that the government is unable or unwilling to protect many women and girls against FGM.[267]

FGM asylum applicants can also establish that it is unreasonable for them to relocate within their home country instead of relocating to the United States. Women and girls from countries where FGM is widespread throughout will easily be able to show that internal relocation is unreasonable—they are still likely to be subjected to FGM no matter where they go.[268] For women from countries where FGM is not widespread but instead localized, moving to another part of the country where it is less prevalent may still not be a reasonable option, as family and other community members who want her to undergo FGM may be able to find her in her new location.[269] Furthermore, although she may internally relocate to a region where FGM is less common, other forms of

261. *See id.*
262. *UNHCR Guidance Note*, *supra* note 20, ¶ 19.
263. *Id.*
264. *Id.* ¶¶ 20–21.
265. *Id.*
266. *See id.*
267. *Id.* ("For protection to be considered available, States must display active and genuine efforts to eliminate FGM, including appropriate prevention activities as well as systematic and actual (not merely threatened) prosecutions and punishment for FGM-related crimes. Factors indicating an absence of protection include a lack of effective legislative protection, lack of universal State control, and pervasive influence of customary practices.").
268. *See id.* ¶¶ 28–32.
269. *Id.*

persecution such as gender-based violence may nevertheless be prevalent.[270]

Moreover, adjudicators exercising their discretion should find that people fleeing FGM are well-deserving of asylum protection, considering the extreme pain and trauma associated with the practice.[271] As such, absent any statutory bars to asylum,[272] many, if not most, FGM asylum applicants should be granted asylum.

Finally, until *Matter of A-B-*, United States asylum law had been consistent with the international community in viewing FGM as a human rights abuse.[273] The international community has signaled strong support for FGM as a basis for asylum.[274] Broadly, FGM is considered a violation of various international agreements, including the Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child.[275] The European Court of Human Rights is in agreement, finding that forcing women and girls to undergo FGM is a violation of Article 3 of the 1950 European Convention on Human Rights.[276] Moreover, beginning in the 1990s, individual countries have followed the trend of recognizing FGM as a viable basis for asylum claims—the United Kingdom's House of Lords, France's Commission des Recours des Réfugiés, Canada's Immigration and Refugee Board, Australia's Refugee Review Tribunal, and other similar courts in Austria, Germany, and Belgium have all adopted this approach.[277] The United States should put an end to the legal flip-flopping, solidify its place within this group by reaffirming its commitment to protecting women and girls fleeing FGM, and unequivocally recognize FGM as a valid basis for asylum.

270. *Id.*

271. Matter of A-B- *Information Sheet: What Does the U.S. Attorney General's Recent Decision Mean for Domestic Violence Survivors?*, *supra* note 51 ("In addition to meeting the above requirements, you must also be found to be deserving of asylum.").

272. *Id.* (examples of statutory bars to asylum include having previously persecuted other people or having filed for asylum more than a year after entry into the United States).

273. Wikholm et al., *supra* note 218, at 676.

274. *See* Gutierrez, *supra* note 29.

275. Wikholm et al., *supra* note 218, at 676.

276. *UNHCR Guidance Note*, *supra* note 20, at 7.

277. *Id.* at 6–7.

VIII. PROPOSALS

Protections for women fleeing FGM had been widely established and generally accepted for years before *Matter of A-B-*.[278] Although *Matter of A-B- I* and *Matter of A-B- II* have been vacated and asylum law has been restored to its prior state, the decisions' very existence and the ability of a single attorney general to wreak havoc on the immigration system indicate a dire need for new and more concrete protections for FGM asylum seekers. Although the United States does have some protections for FGM victims, including the Gender Persecution Guidelines published by the then Immigration National Services[279] and IIRIRA, which recognizes gender persecution as a basis for asylum,[280] these protections have proven to be insufficient in protecting women and girls fleeing FGM both domestically and abroad. For example, the IIRIRA criminalized FGM in the United States,[281] but in 2018, a Michigan federal judge struck down the FGM criminalization provision on the grounds that that Congress had overstepped its authority because the decision to criminalize FGM was one for the states rather than for the federal government.[282] The Gender Persecution Guidelines, while helpful in explicitly recognizing the unique harm women and girls face, are not binding in relation to FGM asylum seekers.[283] These deficiencies illustrate a gap in protections.[284]

There are several potential options to simultaneously reduce the possibility of another damaging decision like *Matter of A-B-* as well as create stronger asylum protections for women and girls fleeing FGM. These options include basing FGM claims on grounds other than

278. *See supra* Part III; Gutierrez, *supra* note 29.

279. Gutierrez, *supra* note 29; *INS Asylum Gender Guidelines*, *supra* note 225.

280. Gutierrez, *supra* note 29; *see* HENRY HYDE, ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996, H.R. REP. NO. 104-828 (1996) (Conf. Rep.).

281. H.R. REP. NO. 104-828, § 645 (making it a crime to "knowingly circumcise[], excise[], or infibulate[] 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").

282. United States v. Nagarwala, 350 F. Supp. 3d 613, 630–31 (E.D. Mich. 2018). The U.S. Department of Justice declined to appeal the decision, accepting the ruling that the law is unconstitutional. Kate Ryan, *U.S. Government Backs Off Case of Female Genital Mutilation*, REUTERS (Apr. 12, 2019, 5:06 PM), https://www.reuters.com/article/us-usa-womensrights-fgm/u-s-government-backs-off-case-of-female-genital-mutilation-idUSKCN1RO2LA.

283. Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. REGUL. 165, 168 & n.6 (2019) ("[G]uidance . . . is not binding on the agency or the public."); Juncker, *supra* note 226, at 274–75 ("Guidelines . . . do not carry the force of law."); *see* Gutierrez, *supra* note 29.

284. *See* Gutierrez, *supra* note 29.

membership in a particular social group, limiting the attorney general's referral authority, and amending the INA.

A. Alternative Arguments for FGM Claims

Immigration practitioners should consider how to best structure FGM-based claims to fully communicate a FGM asylum seeker's circumstances. For example, FGM is rarely an isolated incident—women and girls who have been or who will be subjected to FGM are more likely than not to have suffered from abuse in addition to FGM-related incidents.[285] FGM might be considered merely a piece of the bigger problem of gender-based violence and is oftentimes a sign of other types of gender-based violence.[286] As such, in cases where the asylum seeker has been subjected to other forms of abuse, it may be good practice to base asylum claims involving FGM on a greater pattern of persecution and not solely on FGM. Basing an asylum claim on repeated and multiple forms of violence and abuse, one of which is FGM, may present a stronger case.

Another way to frame an FGM asylum application is to use political opinion as the basis for persecution, rather than on account of a particular social group.[287] A practitioner might argue, for example, that a Somali woman fleeing FGM, which is especially widespread in Somalia,[288] is being persecuted on account of her political opinion—her opposition to the practice of FGM.[289] The practitioner might also argue persecution on account of religion, race, or nationality; for example, a practitioner might posit that a woman who is from Indonesia and who adheres to the Shafi'i school of Sunni Islam, which makes FGM

285. Wikholm et al., *supra* note 218, at 680. A study discussed in this article reviewed 119 affidavits of women from twenty-two African and Middle Eastern countries who had either been subjected to FGM or who had been threatened with FGM. *Id.* at 677. Eighty-seven percent of the women had also suffered other types of gender-based abuse other than FGM. *Id.* at 677, 680.

286. *Id.* at 680.

287. *See id.* at 676; IMMIGRANT LEGAL RES. CTR., *MATTER OF A-B-* CONSIDERATIONS (2018).

288. *See* Emma Batha, *Somalia Sees "Massive" Rise in FGM During Lockdown and Ramadan*, REUTERS (May 18, 2020, 2:20 PM), https://www.reuters.com/article/somalia-coronavirus-fgm/somalia-sees-massive-rise-in-fgm-during-lockdown-and-ramadan-idUSL8N2D05H2 (finding that 98% of Somali women have been cut).

289. *See* Law, *supra* note 229, at 533; *see also* IMMIGRANT LEGAL RES. CTR., *supra* note 287, at 3.

obligatory, will be subjected to FGM on account of her nationality and her religion.[290]

B. Limiting the Attorney General's Power of Referral Authority

It is important to ensure that another decision like *Matter of A-B-* is not allowed to inflict so much damage and suddenly deny protections to those whom the United States had previously offered refuge. *Matter of A-B-* would not have happened without the attorney general's unlimited referral authority under the INA.[291] While referral authority has been used to produce decisions aiding asylum seekers, such as Garland's self-referral and subsequent vacatur of both *Matter of A-B- I* and *Matter of A-B- II*, its use during the Trump administration has shown its potential for detrimental harm.[292] Decisions from the attorney general effect sweeping immigration policy changes, affecting many of those looking to seek refuge in the United States.[293] This creates significant uncertainty for immigrants like FGM asylum seekers in determining exactly where their case might stand and puts them in a sort of legal limbo, all based on one person's seemingly political whim.[294]

Referral authority comes with significant due process concerns, as there is strong incentive, as a political appointee, for the attorney general to be biased.[295] That there are no statutorily required procedures for referral authority's use only makes the power seem secretive, and the lack of transparency undermines the public's confidence in the

290. *See generally* William G. Clarence-Smith, *Islam and Female Genital Cutting in Southeast Asia: The Weight of the Past*, 3 FINNISH J. ETHNICITY & MIGRATION 14 (2008); KEVIN W. FOGG, INDONESIA'S ISLAMIC REVOLUTION 29–30 (2019).

291. *See* Cyrus Mehta, *Advancing a "Social Group Plus" Claim After* Matter of A-B-, INSIGHTFUL IMMIGR. BLOG (Mar. 9, 2019), http://blog.cyrusmehta.com/2019/03/advancing-a-social-group-plus-claim-after-matter-of-a-b.html ("[Sessions] abused his authority as Attorney General.").

292. *See supra* Part IV.

293. PIERCE, *supra* note 112, at 3.

294. *See* Vogel, *supra* note 74, at 364.

295. Stevenson, *supra* note 119, at 336–37. In fact, Sessions himself acknowledged and attempted to address his alleged impartiality in *Matter of A-B-*, stating:

> The respondent and some amici complain that I have advanced policy views on immigration matters as a U.S. Senator or as Attorney General, but the statements they identify have no bearing upon my ability to faithfully discharge my legal responsibilities in this case. I have made no public statements regarding the facts of respondent's case.

Matter of A-B- (Matter of A-B- I), 27 I&N Dec. 316, 324–25 (A.G. 2018).

immigration system.[296] As such, reforming or limiting the attorney general's referral authority in regards to immigration policy may be one way to prevent another *Matter of A-B-* situation.[297] One such reform should include the establishment of procedures for the use of referral authority.[298] These procedures should focus on public transparency[299] and enable the public to submit feedback.[300] Some scholars have suggested procedures modeled after those from 8 C.F.R. § 1003.7, which addresses certification of cases to the BIA; such procedures would require the attorney general to provide notice to the public and the parties, including information on the issue(s) at hand, a briefing schedule, and the BIA decision, if it is not publicly available.[301] The notice must include sufficient information for both parties to be able to formulate appropriate arguments, request oral arguments, submit a brief, and object to the referral if warranted.[302] Additionally, the notice should be publicly available so that interested amici may submit feedback and also object to the referral.[303] Furthermore, should additional issues arise after the

296. Laura S. Trice, Note, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766, 1797 (2010).

297. *See* Stevenson, *supra* note 119, at 338 ("[I]n the span of about three years, Attorneys General have used the referral authority to upset years of well-established precedent in a multitude of ways, and with little transparency or regard for the due process rights of noncitizens. As such, this area of immigration law needs reform.").

298. PIERCE, *supra* note 112, at 23; Trice, *supra* note 296, at 1797. *But see* Gonzales & Glen, *supra* note 114, at 912–14. Gonzales and Glen discuss how the attorney general has "maximum flexibility" in deciding which cases to refer to themselves and suggest that this wide discretion benefits both the attorney general and immigrants. *Id.* Gonzales and Glen posit that because both parties may benefit and because, in their opinion, there are no benefits to limiting the referral authority, the attorney general should be allowed wide discretion in determining how to approach each case. *Id.* However, this article was published pre-Trump administration and thus before *Matter of A-B-* and similar decisions. Since Gonzales and Glen's article was published, the only party benefitting from the referral authority is the Executive Branch. Also, the benefit of limiting referral authority may be keeping the attorney general's power in check and ensuring that immigration law and policy continue on the trajectory set by years of case law, its treaty obligations, and international trends.

299. In the past, many decisions, including *Matter of A-B- I* and *Matter of A-B- II*, have appeared to be predetermined—public transparency would help avoid the public perception that the case's outcome was predetermined. *See* PIERCE, *supra* note 112, at 23.

300. *Id.*

301. *Id.*

302. Trice, *supra* note 296, at 1797–98 (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950)) ("[B]ecause due process requires notice that is more than 'mere gesture,' a one-paragraph order merely notifying the immigrant's counsel that the case has been certified is not sufficient.").

303. *Id.* at 1798 ("Granting the parties and amici the right to object to certification would permit them some minimal participation in the selection process, allowing them to argue either that a particular issue does not merit review at all or that the case selected does not

attorney general has referred a case to himself, both the interested parties and amici should be allowed to submit supplemental briefings addressing these new issues.[304] Not only would the parties and the public have the opportunity to participate in decisions that may affect thousands of immigrants, the attorney general would also have access to a wider range of considerations in order to make a more informed decision.[305]

Eliminating the referral authority may be an additional way to prevent the attorney general from unilaterally making seismically damaging changes to immigration law and policy.[306] Referral authority could be replaced by notice-and-comment rulemaking: a Notice of Proposed Rulemaking would be published in the *Federal Register*, and the public would be allowed to participate by submitting comments, which the proposing party must consider before publishing the final version of the rule.[307] Notice-and-comment rulemaking (also called informal rulemaking) is common, with federal agencies frequently using the process to promulgate rules and regulations as required by the Administrative Procedure Act.[308] Without referral authority and instead being limited to notice-and-comment rulemaking, the attorney general would not have virtually unilateral power, and although the danger of a future *Matter of A-B-* situation might not be completely erased, there is a reduced risk of significant damage.

C. INA Amendment

Additionally, Congress should consider amending the INA. An amendment clarifying certain definitions would provide greater certainty and would prevent inconsistent, and some blatantly incorrect, interpretations.[309] Clarifying the definitions of "particular social group"

present the issues fully."); David A. Martin, *Improving the Exercise of the Attorney General's Immigration Referral Power: Lessons from the Battle over the "Categorical Approach" to Classifying Crimes*, 102 IOWA L. REV. 1, 8 (2016) (stating that allowing for amici input would "equip the Attorney General with a more robust exploration of the real stakes and the full ramifications of choosing one eligible interpretation over another"); PIERCE, *supra* note 112, at 23.

304. Trice, *supra* note 296, at 1799.

305. *See id.*

306. *See* Stevenson, *supra* note 119, at 344.

307. Administrative Procedure Act, 5 U.S.C. § 553(b)–(d). Notice-and-comment rulemaking creates a record of the decision-making process, forcing the attorney general to make a more informed decision and provides significantly more transparency than referral authority. Stevenson, *supra* note 119, at 339.

308. *See* MAEVE P. CAREY, CONG. RSCH. SERV., RL32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW 5–6 (2013); Administrative Procedure Act § 553.

309. *Slamming the Door on Domestic Violence Survivors:* Matter of A-B-, *supra* note 241.

and "nexus", and even "refugee," would help prevent another situation like *Matter of A-B-* where the terms were interpreted in an "anti-immigrant, anti-woman" manner, resulting in long-term damage to immigration and asylum policy.[310]

An even stronger method for protecting women fleeing FGM would be an INA amendment laying out protections specific to FGM-based asylum claims.[311] For years, the United States has indicated its disapproval of the practice of FGM and has granted asylum accordingly.[312] *Matter of A-B-* and the ensuing flurry of regulations demonstrated that despite this long-held belief, immigration law and policy can still be pulled in the opposite direction. To protect against the minority seeking to curb these asylum protections, the INA should include solid legislative protections for FGM asylum applicants.[313] Without them, immigration judges have the discretion to deny FGM asylum claims (in some instances, at the whim of the attorney general), which contradicts years of case law.[314] There is no reason to wait for sweeping system-wide immigration reform to solidify FGM's place as a valid basis for asylum (although sweeping immigration reform is needed as well). An INA amendment officially locking in FGM as a basis for asylum would simply be the next step in the United States' history of offering protections to women and girls fleeing FGM.

This would not be the first amendment to the INA providing protections for specific groups of asylum claims.[315] Congress passed the IIRIRA in 1996, which, among other things, spelled out specific protections for individuals fleeing China's coercive family planning measures.[316] Congress could likewise amend the INA to specifically state,

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310. *Id.*; Vogel, *supra* note 74, at 413.

311. Gutierrez, *supra* note 29; Juncker, *supra* note 226, at 278–79; *see* Vogel *supra* note 74, at 413.

312. *See supra* Part III; Juncker, *supra* note 226, at 274–75, 278–79 (discussing how even as early as 1995 before *Kasinga* was decided, the INS issued a report with guidelines stating that FGM could be considered a form of persecution under the INA; however, again, guidelines are not binding).

313. Gutierrez, *supra* note 29.

314. *Id.*

315. Vogel, *supra* note 74, at 413.

316. *Id.*; *see* HENRY HYDE, ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996, H.R. REP. NO. 104-828, at 161 (1996) (Conf. Rep.). In *Matter of Chang*, the BIA determined that forced sterilization under China's "one couple, one child" policy was not inflicted on account of one of the five protected grounds under the INA, meaning that the asylum applicant had failed to establish the nexus requirement. Matter of Chang, 20 I&N Dec. 38, 47 (BIA 1989). As such, asylum applicants fearing forced sterilization if returned to China could not use that fear as a basis for their asylum claim. *Id.* The BIA requested that Congress amend the INA to provide "temporary or permanent relief from deportation to all individuals who face the possibility of forced sterilization as

for example, that women and girls applying for asylum on FGM grounds who have established a well-founded fear of persecution shall be deemed to have been persecuted on account of political opinion.[317] An amendment of this type would help reduce uncertainty, strengthen protections, and promote the widely accepted principle that women and girls fleeing FGM should be offered refuge.

IX. CONCLUSION

Matter of A-B- launched a series of events that left women and girls fleeing FGM without sure protection and in serious danger of being forced to return to their home countries, where they would almost certainly have been cut.[318] It was a callous opinion filled with unsupported, cruel language, and was a clear attempt to disparage the many people who flee to the United States seeking refuge. As one practitioner described it, "*Matter of A-B-* was a cowardly decision based on Session's [sic] personal bias. He abused his authority as attorney general to overturn an established precedent that has provided protection to thousands of victims . . . in the United States."[319] While the immediate threat to women and girls fleeing FGM has subsided, the need for solid asylum protections remains. The United States must honor its statutory and international law obligations to ensure FGM asylum seekers get their day in court.

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part of a country's population control program." *Id.*; Gupta, *supra* note 252, at 41–42. Subsequently, Congress passed the IIRIRA, which amended the INA's definition of a "refugee" to provide that:

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

See Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42).

317. Vogel, *supra* note 74, at 413 ("[A]mendments may be related to the particular social group ground, the nexus between the persecution and the particular social group, persecution by non-state actors when the government is unable or unwilling to provide protection, and the proper analysis of the viability of relocation, as well as credibility determinations.").

318. *See supra* Section IV.

319. Mehta, *supra* note 291.

Severina Lemachokoti,[320] who was cut in her native Kenya at the age of twelve, is now an adult living in Wichita, Kansas.[321] She still has not received medical care to treat the physical consequences of the cutting, nor has she received therapy for the psychological consequences.[322] She says that she continues to feel pain and resentment for what happened to her as a child.[323]

320. *See supra* Part I.
321. Collins, *supra* note 1.
322. *Id.*
323. *Id.*