

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

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“What would you do if you were forcibly subjected to the ritual of cutting? You would be left only to dream about what could have been before your life was stolen. When a basic part of me was cut away and stolen by a culture that deemed the theft a ‘gift,’ my spirit began to drift to a place far, far away. A place where it could not root itself, could not attach itself to those things the rest of the women around the world take for granted. Hearing the sound of the scissors cutting away the flesh between my legs made me feel the curse, the curse of being born into a female body.”¹

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¹ SONAYA MIRE, *THE GIRL WITH THREE LEGS: A MEMOIR* 369 (2011). In her memoir, Mire discusses her personal experience of growing up in a traditional Somali family where girls’ and women’s basic human rights were violated on a daily basis. As a victim herself, at the age of thirteen, she was forced to undergo the procedure and then marry her abusive cousin, only to grow to empower others with the challenges she has overcome and fight a long-standing battle of violent global oppression of women and girls.

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INTRODUCTION

In many nations worldwide, the value of women is minimal.² Consequently, women typically are stripped of their autonomy and human rights.³ These individuals do not have comparable voting, property, education, individual and marital privileges like their male counterparts.⁴ One such issue that illuminates this inequality is Female Genital Mutilation (“FGM”), often also known as female circumcision or colloquially as “cutting,” a procedure that intentionally alters or causes injury to the female genital organs for non-medical reasons.⁵ FGM encompasses all procedures that involve partial or total removal of the external female genitalia for non-medical purposes.⁶ FGM is a global problem and a direct violation of women’s human rights.⁷

The World Health Organization (“WHO”), the entity in charge of providing leadership on global health matters, shaping the health research agenda, and developing health authority within the United Nations system, has long classified FGM into four types.⁸ The first type is clitoridectomy, which is the partial or total removal of the clitoris, a small, sensitive and erectile part of the female genitals; in very rare cases, the prepuce (the fold of the skin surrounding the clitoris) is also removed.⁹ The second type is excision, also known as “sunna-circumcision,”

² See *Gender-based Discrimination: Demand Equality*, AMNESTY INT’L, <http://www.amnestyusa.org/our-work/issues/women-s-rights/gender-based-discrimination> (last visited Mar. 21, 2016).

³ *Id.*

⁴ *Id.*

⁵ Frances A. Althaus, *Female Circumcision: Rite of Passage or Violation of Rights?*, 23 INT’L FAM. PLAN. PERSP. 130, 130 (1997), <http://www.guttmacher.org/pubs/journals/2313097.html>.

⁶ *Id.*

⁷ *Id.*

⁸ *Classification of Female Genital Mutilation*, WORLD HEALTH ORG., <http://www.who.int/reproductivehealth/topics/fgm/overview/en/> (last visited Mar. 21, 2016).

⁹ Jessica Saras, *What Is a Clitoridectomy?*, WISEGEEK (Jan. 2, 2015), <http://www.wisegeek.com/what-is-a-clitoridectomy.htm>.

which results in the partial or total removal of the clitoris or the labia minora surrounding the vagina.¹⁰ The third type is infibulation, which is the narrowing of the vaginal opening through the creation of a covering seal.¹¹ The seal is formed by cutting and repositioning the inner or outer labia, with or without removal of the clitoris.¹² The fourth type encompasses all other harmful procedures to the female genitalia for non-medical purposes, including pricking, piercing, incising, scraping and cauterizing the genital area.¹³

According to WHO, no aspect of any FGM procedure provides any health benefits to the women who undergo FGM; in fact, FGM can cause severe bleeding, problems during urination, infertility, ovarian cysts, open sores in the genital region, hemorrhages, and bacterial infections (tetanus or sepsis) during and after pregnancy, and increased risk of newborn deaths.¹⁴ According to United Nations Children's Fund ("UNICEF"), an organization devoted to defending, promoting, and protecting children's rights,¹⁵ about 125 million girls and young women in twenty-nine countries undergo FGM, and consequently suffer from its physical and psychological consequences.¹⁶

With such glaringly painful and sometimes life-threatening consequences, it is imperative to understand why this procedure is conducted in the first place. Justification of FGM includes a mix of ideological, cultural, religious, and traditional implications. The practice has historically been observed in communities in the Middle East and many African countries.¹⁷ Until recently, the topic of FGM has been met with hushed whispers and widespread silence, in part due to the cultural perception that it is a "rite of passage" or a process specifically designed to transform and prepare a girl for adulthood and marriage.¹⁸ In many conservative and socially underdeveloped regions in Africa and the Middle East, girls are taught that purity is maintained through premarital virginity and marital fidelity.¹⁹ Consequently, there is a huge emphasis on an intact hymen, which

¹⁰ *What Is FGM?*, DESERT FLOWER FOUND. (DFF), <http://retteinekleinewuestenblume.de/en/what-is-fgm.html> (last visited Jan. 2, 2015).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Classification of Female Genital Mutilation*, *supra* note 8.

¹⁵ *What Is UNICEF?*, UNITED NATIONS BRUSSELS PARTNERING WITH THE EUROPEAN UNION, <http://www.unbrussels.org/agencies/unicef.html> (last visited Jan. 2, 2015).

¹⁶ UNITED NATIONS CHILDREN'S FUND (UNICEF), *FEMALE GENITAL MUTILATION/CUTTING: A STATISTICAL OVERVIEW AND EXPLORATION OF THE DYNAMICS OF CHANGE 3* (2013), http://www.unicef.org/media/files/FGCM_Lo_res.pdf. Victims of FGM range in age from infancy to fifteen years old. *Id.*

¹⁷ CTR. FOR REPROD. RIGHTS, *LEGISLATION ON FEMALE GENITAL MUTILATION IN THE UNITED STATES* (2004), http://reproductiverights.org/sites/default/files/documents/pub_bp_fgmlawsusa.pdf.

¹⁸ Althaus, *supra* note 5.

¹⁹ Ashenafi Moges, *What Is Behind the Tradition of FGM?*, AFRICAN-WOMEN.ORG (Sept. 15, 2003), <http://www.african-women.org/documents/behind-FGM-tradition.pdf>.

symbolizes chastity.²⁰ Further, in many regions FGM is a very “feminine” and “beauty-related” surgery that is closely associated with a specific concept of modesty that emphasizes the idea that women are beautiful only if parts of their bodies that are perceived as “impure” or “unclean” are removed or modified.²¹ If a girl loses her virginity prior to marriage, she is thought to have no value or dignity and is considered a disgrace to her family and community.²²

Other non-cultural and non-historical reasons for perpetuating FGM also exist. For example, regions like Mali, Burkina Faso, and most of West Africa, perceive the clitoris as a “dangerous” organ and hence require its removal.²³ Because the clitoris is viewed as “poisonous,” some believe that it could cause a man to become ill or die if it comes in contact with his penis, and that uncut clitoris creates impotency and kills babies at delivery.²⁴ Performing FGM is perceived as a way to minimize a woman’s libido and help her resist sexual activity by preventing her from acting promiscuously, thereby making her more appealing to her future husband.²⁵ Some cultures erroneously believe that FGM prevents the face from turning yellow, prevents a woman from contracting vaginal cancer, helps a mother’s milk remain innocuous, and prevents a woman from excessively masturbating or becoming a lesbian.²⁶

Many communities also wrongly assume that FGM is required by religion, or that certain religious practices encourage this practice.²⁷ However, there is no compulsory connection between FGM and religion.²⁸ There is evidence that female circumcision occurs among Muslims, Christians, animists, and one Jewish sect, but there is no requirement found among any of the respective religious scriptures.²⁹ For instance, there is nothing in the Quran that mentions FGM, yet midwives and mothers insist that it is “sunnah” (a highly regarded opinion of Islamic clerics) or a religiously recommended practice.³⁰ The misconception as to

²⁰ B.A. Robinson, *Female Genital Mutilation: Debates About FGM in Africa, the Middle East & Far East*, RELIGIUSTOLERANCE.ORG (Apr. 11, 2015), http://www.religioustolerance.org/fem_cirm.htm

²¹ *Female Genital Mutilation (FGM) in the United States*, EQUALITY NOW, http://www.equalitynow.org/sites/default/files/EN_FAQ_FGM_in_US.pdf (last visited Jan. 12, 2015).

²² *Id.*

²³ Moges, *supra* note 19.

²⁴ Frederick Reese, *Female Genital Mutilation: An International Crisis that Continues Despite Human Rights Violations*, MINTPRESS NEWS (Nov. 21, 2012), <http://www.mintpressnews.com/female-genital-mutilation-an-international-crisis-that-continues-despite-human-rights-violations/41240/>.

²⁵ *Id.*

²⁶ Hank Pellissier, *Liberating Egypt from Female Genital Mutilation*, INST. FOR ETHICS & EMERGING TECH. (Feb. 25, 2011), <http://icet.org/index.php/icet/more/pellissier20110225>.

²⁷ Sami A. Aldeeb Abu Sahlich, *To Mutilate in the Name of Jehovah or Allah: Legitimization of Male and Female Circumcision*, 13 MED. & L. 575, 578 (1994).

²⁸ Thomas von der Osten-Sacken & Thomas Uwer, *Is Female Genital Mutilation an Islamic Problem?*, 14 MIDDLE E.Q. 29, 29 (2007).

²⁹ *Religious Views on Female Genital Mutilation*, SAVOIR OU SE FAIRE AVOIR (Apr. 4, 2014), <http://www.blog.sami-aldeeb.com/2014/04/04/religious-views-on-female-genital-mutilation/>; see also Althaus *supra* note 5.

³⁰ Claudette Clarke, *Cultural and Religious Practices, the Lack of Educational Resources, and*

the religious implications of FGM have often been linked with the moral “benefits” attributed to FGM, such as purity, virginity, and a chaste moral compass, which Islam greatly worships.³¹ In order to discourage FGM from being linked with religion, many religious personnel are increasing involvement intervention strategies to dissuade their local communities from continuing this practice. Mainly, Islamic leaders in predominantly African Muslim countries are stepping up.³² Despite these universal misconceptions, myths, and “justifications” for the continuance of FGM, according to UNICEF’s statistics published in 2015, the percentage of women who undergo FGM varies; in some countries like Uganda, 1% are subjected to FGM, while in places like Somalia, about 98% of its women are cut.³³

Part I of this Note explores the history and evolution of African immigration to the United States, with a focus on immigrants from Somalia, where 97.9% of the female population undergoes genital mutilation.³⁴ The reason that the Somalians are the prime focus is because of the statistically high prevalence of FGM within this community. By implementing effective legislation that discourages and even bans Somalians from continuing to practice FGM, regulation can discourage other immigrant populations from practicing FGM. Part II addresses the legal responses currently implemented in the United States, including asylum, as a remedy granted by immigration courts, as well as state statutes that explicitly criminalize FGM. This Part will also examine the weak sentencing provisions that state statutes have established and how they do not properly punish perpetrators. Part III discusses in-depth 18 U.S.C. § 116, the federal statute that criminalizes FGM in the United States (“FGM Criminalization Statute”).³⁵ This Part will criticize the statute for failing to afford a proper remedy to African immigrant communities. Finally, Part IV proposes an alternative structure for providing effective remedy for FGM survivors and punishment for offenders; this proposal is influenced by European models, specifically that of France and Great Britain. The proposal additionally

Their Role in the Perpetuation of Female Genital Mutilation, 6 UNDERGRADUATE REV. 40, 40 (2003).

³¹ AFR. WOMEN’S ORG., *THE OTHER FACE OF FGM: MORAL AND SOCIAL ELEMENTS 4-5* (2003), http://intact-network.net/intact/cp/files/1387187480_other-face-of-FGM.pdf. See also Imad-ad Dean Ahmad, *Female Genital Mutilation: An Islamic Perspective*, MINARET.ORG (2000), <http://www.minaret.org/fgm-pamphlet.htm> (discussing how Islamic law does not mandate FGM and only tolerates the mildest form of circumcision.) The Quran does not contain explicit language suggesting FGM, but says the following: “A woman used to perform circumcision in Medina [*Madina*]. The Prophet (peace be upon him) said to her: Do not cut severely as that is better for a woman and more desirable for a husband.” *Id.*

³² ELS LEYE, *BEHAVIOUR CHANGE TOWARDS FEMALE GENITAL MUTILATION: LESSONS LEARNED FROM AFRICA AND EUROPE* (2006), http://ec.europa.eu/justice_home/daphnetoolkit/files/projects/2003_028/icrh_behaviour_change_towards_female_genital_mutilation.pdf (discussing how the Quran, the Islamic text, does not require FGM and consequently, it is imperative that Islamic religious leaders utilize a religious approach to spearhead a campaign against this harmful traditional practice).

³³ UNICEF, *FEMALE GENITAL MUTILATION/CUTTING: A GLOBAL CONCERN* (2012), http://www.unicef.org/media/files/FGMC_2016_brochure_final_UNICEF_SPREAD.pdf.

³⁴ *Female Genital Mutilation and Other Harmful Practices*, WHO, <http://www.who.int/reproductivehealth/topics/fgm/prevalence/en/> (last visited Jan. 12, 2015).

³⁵ 18 U.S.C. § 116 (2012).

suggests ways to disperse information and educate communities about the consequences of FGM, discusses FGM from a public health perspective, including ways to minimize and reduce sanitary and medical risks during the procedure, and consequently provide ways to alter and modify the American criminal justice system.

I. DISPERSION OF FGM IN THE U.S. AND THE INCREASE OF SOMALIAN IMMIGRANTS

In the United States, immigration from Africa has quadrupled between 1990 and 2011, from 26,000 to 1.6 million individuals; as of 2010, about 85,700 immigrants are Somalians.³⁶ Since the mid-1800s, Somalia, a long, narrow country on Africa's eastern coast with a population of ten million people, has faced periods of political and social turmoil, including continued anarchy, clan warfare, border disputes, corrupted government, violence, torture and rape.³⁷ Due to these overwhelming factors, at least one million Somalis have fled to neighboring countries of Djibouti, Kenya, Ethiopia, Burundi, and Yemen.³⁸ The first recorded arrival of Somali immigrants in the United States was in the 1920s, when Somali sailors settled in New York, later followed by students travelling for education purposes in the 1960s.³⁹ It was not until the 1990s that a small percentage of Somali were admitted as refugees, allowing for 55,036 Somali refugees to resettle in the United States between 1983 and 2004.⁴⁰ Sociologists have identified the twin cities of Minneapolis and St. Paul as containing the heaviest concentrations of Somalis, followed by Washington, D.C.; Columbus, Ohio; New York City, Buffalo, New York; Kansas City, San Diego, San Francisco, and other Seattle Metro areas.⁴¹ Other states with notable Somali populations are Phoenix, Arizona, Georgia, Texas, Massachusetts, Maryland, Virginia, Illinois, Colorado, and Florida.⁴²

Dense population of Somalis migrated to Minnesota because they were assigned refugee status there (in addition to Minnesota's good economy and low unemployment).⁴³ The U.S. State Department ultimately decides where refugees will live, but local voluntary agencies commonly known as VOLAGS, which are private and state agencies that have cooperative agreements with the U.S. State Department to provide reception and placement services for refugees arriving in the

³⁶ Elizabeth Dunbar, *Survey: Nearly 1 in 3 US Somalis Live in Minnesota*, MPR NEWS (Dec. 14, 2010), <http://www.mprnews.org/story/2010/12/14/american-community-survey-initial-findings>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Somali Americans Demographics*, ALLIED MEDIA CORP., http://www.allied-media.com/Somali_American/Somali_American_demographics.html (last visited Jan. 12, 2015).

⁴² *Id.*

⁴³ *Somalis in Minnesota*, ALLIED MEDIA CORP., <http://arriveministries.org/who-we-serve/refugee-populations/somalis/> (last visited Jan. 12, 2015).

United States, establish locations for these individuals.⁴⁴ Minnesota, the “model” state for the purposes of this Note, has very active VOLAGS, including Lutheran Social Services, Catholic Charities, World Relief, International Institute of Minnesota, and Minnesota Council of Churches: Refugee Services.⁴⁵ Consequently, close to 84,000 Somali refugees have been admitted to the United States over the past twenty-five years, and 40% live in Minnesota, in part due to the efforts of VOLAGS and other non-profit organizations.⁴⁶ Besides relocation services, the Minnesota State Department of Health also collaborates with a number of federal partners (such as Centers for Disease Control and Prevention or Bureau of Population, Refugees, and Migration) to provide health and social services to refugees.⁴⁷ These services include helping refugees to settle in the new country, learn English, find housing and employment, receive psychiatric and physical health treatments, and essentially begin a new life here in the United States.⁴⁸

Somalia has been without a central government since former dictator Mohamed Siad Barre fled the country in 1991.⁴⁹ In 1988, the Siad Barre government forbade any form of FGM in government hospitals and adopted an anti-FGM policy to eradicate all forms of this practice.⁵⁰ However, in the absence of any central leadership, the policy was not effectively implemented.⁵¹ In 1977, Raqiya Haji Dualeh Abdalla, a Somali sociologist and politician, formed the Somali Women’s Democratic Organization (“SWDO”).⁵² The goal of SWDO was to provide a “comprehensive vision of how to address FGM in our society” starting with government action to combat the practice at a national level; for the first eight years of the Siad Barre regime, women participated in government rallies, gave speeches at orientation centers, and participated in numerous education and human rights campaigns.⁵³ Despite these valiant efforts, when the Somalian government

⁴⁴ Jason DeRusha, *Good Question: Why Did Somalis Locate Here?*, MINNESOTA.CBSLOCAL.COM (Jan. 19, 2011), <http://minnesota.cbslocal.com/2011/01/19/good-question-why-did-somalis-locate-here/>.

⁴⁵ *Resettlement*, MINN. DEP’T OF HEALTH (Dec. 16, 2013), <http://www.health.state.mn.us/divs/idepc/refugee/topics/resettlement.html>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Somalia Civil War*, GLOBAL SEC. (Oct. 5, 2013), <http://www.globalsecurity.org/military/world/war/somalia.htm> (discussing Somalia’s war-torn history and connection with the United Nations amidst war and political turmoil).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² ROGAIA MUSTAFA ABUSHARAF, *FEMALE CIRCUMCISION: MULTICULTURAL PERSPECTIVES* 203 (2006). The author’s collection of articles presents current international, cultural and ideological debates against the practices in Africa and their impact in Europe and North America. *Id.* The practice of female circumcision is examined through the lens of African activists and empowers women to speak about their unique experiences. *Id.*

⁵³ Zainab Mohamed Jama, *Silent Voices: The Role of Somali Women’s Poetry in Social and Political Life*, 9 ORAL TRADITION 185 (1994), <http://journal.oraltradition.org/articles/download/91?article=jama>.

fell in 1991, the SWDO dissolved; FGM was not banned in Somalia until March 8, 2014, after much controversial debate over the issue. However, the fight to end this practice has been spearheaded⁵⁴ by Sahra Mohammed Ali Samatar, the Minister of Women Affairs, who announced ways to reintroduce law to prohibit FGM in August 2015.⁵⁵

Over the last three decades since their resettlement to the United States, Somalis have spread their culture via unique spices, food, and clothing. However that cultural dispersion also extends to the practice of FGM.⁵⁶ In fact, about 98% of Somali girls between the ages of four to ten are circumcised.⁵⁷ Somali people classify this practice into two types: the Sunna form (“gudniinka sunniga ah”), the first, a “mild” form, and the second, a Pharaonic form (“gudniinka fircooniga ah”), which is considered to be severe and involves suturing the “side fleshes” as to leave only a small opening for urine and menstrual blood to pass.⁵⁸ Although FGM is not necessarily motivated by religious factors, an overwhelming number of Somalis are of Islamic faith and hold that it is their religious obligation to honor their families. The religious and cultural convictions surrounding the Somalian women cause them to think that without FGM, they “may be considered to be harlots and command a lower bride price or dowry.”⁵⁹ In fact, the term “Sunna” literally means “tradition” in Arabic, which the Somalis interpret as any tradition that Prophet Mohamed and His followers preserve, although it should be noted that this religious interpretation is generally outdated among the Muslim population.⁶⁰

To understand better the practice of FGM among the Somalis, The Population Council, an organization seeking to improve the well-being and reproductive health of current and future generations around the world,⁶¹ with support from USAID or Kenya, developed FRONTIERS, a program that carried out two studies in 2005 in the North Eastern Province.⁶² The studies confirmed

⁵⁴ Abdirizak Shiino, *Somalies: Puntland Bans Female Genital Mutilation*, HORSESEED MEDIA (Mar. 11, 2014, 11:51 AM), <http://horseseedmedia.net/2014/03/11/puntland-bans-fgm/>.

⁵⁵ Abdirahman. A, *Somalia to Introduce Law to Prohibit Female Genital Mutilation*, HORSESEED MEDIA (Aug. 3, 2015, 1:14 PM), <https://horseseedmedia.net/2015/08/03/somalia-to-introduce-law-prohibiting-female-genital-mutilation/>.

⁵⁶ Carol Stephenson, *KIN- Somalia*, IMMIGRANT INFO., <http://www.immigrantinfo.org/kin/somalia.htm> (last visited Jan. 12, 2015).

⁵⁷ Abdi A. Gele, Bente P. Bo & Johanne Sundby, *Attitudes Toward Female Circumcision and Women in Two Districts in Somalia: Is It Time to Rethink Our Eradication Strategy in Somalia?*, 2013 OBSTETRICS & GYNECOLOGY INT’L 1, 1-3 (2012), <http://www.hindawi.com/journals/ogi/2013/312734/>.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *About the Population Council*, POPULATION COUNCIL, <http://www.popcouncil.org/about> (last visited Jan. 12, 2015).

⁶² MARYAM SHEIKH ABDI & IAN ASKEW, A RELIGIOUS ORIENTED APPROACH TO ADDRESSING FEMALE GENITAL MUTILATION/CUTTING AMONG THE SOMALI COMMUNITY OF WAJIR, KENYA (2009), http://pdf.usaid.gov/pdf_docs/Pnado630.pdf (discussing two studies that the FRONTIER program conducted). The first study by FRONTIER was conducted in 2004 in Mandera and Wajir districts and the second, baseline study, was carried out in six locations in the Central Division of the Wajir District. *Id.* Both studies collected data from interviews and focus group discussions with community and

that FGM is deeply rooted and widely supported Somali tradition; therefore, reducing the prevalence of FGM requires a religious oriented approach to educate the community “and generate discussion with respect to the position of Islam on FGM and build consensus among the religious scholars.”⁶³ This finding once again confirms that part of eliminating FGM in Somalian communities is to disentangle the influence of religion from the practice.

Undeniably, there is a clash of cultural values between American and Somali societies; as a result, integration and interaction is often difficult.⁶⁴ Author Keyah Davis best illustrates this juxtaposition in her written work entitled *Prenatal Care Among Southeast Asian Women in Saint Paul and Minneapolis*.⁶⁵ As part of a 1997 study for the Urban Coalition of Minneapolis, Davis, a registered nurse and author, met with thirty to fifty Somalian women who were “circumcisers”—often women who are midwives, occasional healers, barbers, nurses or doctors.⁶⁶ She reports how angry the women are for not having the choice to decide whether to enforce their cultural practices.⁶⁷ Instead, “circumcisers” were forced to perform FGM on their daughters or granddaughters—even those individuals who were strictly against the practice.⁶⁸ Those surveyed believe that FGM is a “private family matter” and refused to display publicly their support for the practice for fear of facing social ostracism, and community backlash.⁶⁹ What this report shows is that even if members of the Somalian community want to stop the practice of FGM, they are afraid to do so for fear of retaliation from their peers or family members.⁷⁰ Other participants of the study shared tragic stories of how even if the practice was specifically banned in Minnesota, Somalian “uncut” girls would be returned to their homeland for visits and then “abducted and infibulated against their parents’ wishes.”⁷¹ This is a clear demonstration of how FGM still occurs, regardless of individual desires, because of prevailing social pressures and pressures of tradition.⁷²

religious leaders, and confirmed that FGM/C is not necessarily a rite of passage, but more a cultural and ritual practice. *Id.* As a result of these studies, FRONTIERS developed a religious oriented approach to educate and engage the community about the myths and misconceptions around the practice. *Id.*

⁶³ *Id.*

⁶⁴ Bradley Farless, *Culture Clash: Small-Town American vs. Somali Immigrant Culture*, ADVENTURES OF BRADLEY, <http://www.bradleyfarless.com/culture-clash-small-town-american-vs-somalian-immigrant-culture/> (last visited Mar. 7, 2015).

⁶⁵ KEYAH DAVIS, *PRENATAL CARE AMONG SOUTHEAST ASIAN WOMEN IN SAINT PAUL AND MINNEAPOLIS: A SURVEY OF CAMBODIAN, HMONG, LAOTIAN AND VIETNAMESE WOMEN IN THE TWIN CITIES* 55 (1997).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Lauren Gilbert, *Citizenship, Civic Virtue, and Immigrant Integration: The Enduring Power of Community-Based Norms*, 27 *YALE L. & POL'Y REV.* 335, 338 (2009).

⁷⁰ *Id.*

⁷¹ Kay Harvey, *A Mother's Dilemma*, LIMITSTOGROWTH.ORG (Mar. 4, 1999), <http://www.limitstogrowth.org/WEB-text/mother-dilemma.html>.

⁷² *Id.*

II. ASYLUM AS A LEGAL RESPONSE FOR SOMALIAN VICTIMS OF FGM

Asylum is a form of legal protection that allows an individual who suffered persecution in the person's country of origin to enter or remain within the United States. The Secretary of Homeland Security or the Attorney General in his or her discretion awards asylum, insofar as the applicant qualifies as a refugee according to the Immigration and Nationality Act ("INA").⁷³ The INA defines a refugee as:

(A) 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.⁷⁴

An asylum claim consists of three elements: (1) proof of persecution or a well-founded fear of persecution; (2) proof of membership in a race, religion, nationality or social group, or belief in a political opinion; and (3) proof that the well-founded fear of persecution is "on account of" the applicant's membership in the protected class of individuals.⁷⁵

Applicants may also seek the more limited form of relief—i.e., withholding of removal, which prevents an applicant from being removed from a country if she demonstrates that her "life or freedom would be threatened."⁷⁶ However, unlike asylum, withholding of removal merely grants the applicant the right not to be removed to her country of origin (or another country if the government deems suitable), rather than an affirmative right to stay within the United States.⁷⁷ Withholding of removal also carries a higher burden of proof than asylum because an applicant must show "clear probability" of future persecution, or in other words, there must be better than 50% chance of threat (on account of race, religion, nationality, membership in a social group or political opinion) to an individual's well-being.⁷⁸ An applicant seeking asylum may automatically be deemed to be seeking withholding of removal; however, withholding of removal on its own is not

⁷³ YULE KIM, ASYLUM LAW AND FEMALE GENITAL MUTILATION: RECENT DEVELOPMENTS, (2008), <http://fas.org/sgp/crs/misc/RS22810.pdf> (discussing how the federal courts and Board of Immigration Appeals classify persecution, which is imperative in receiving successful asylum claims).

⁷⁴ Immigration and Nationality Act of 1952, 8 U.S.C. § 1101(a)(42)(B) (2006).

⁷⁵ *Id.*

⁷⁶ *Asylum and Withholding of Removal*, LAW OFFICES OF JACOB J. SAPOCHNICK, <http://www.h1b.biz/asylum-and-withholding-of-removal.html> (last visited Jan. 15, 2015).

⁷⁷ YULE KIM, CRS REPORT TO CONGRESS RL34587, FEMALE GENITAL MUTILATION AS PERSECUTION: WHEN CAN IT CONSTITUTE A BASIS FOR ASYLUM AND WITHHOLDING OF REMOVAL? 2-12 (2008), <http://www.ilw.com/immigrationdaily/news/2009,1230-crs.pdf>.

⁷⁸ See *INS v. Stevic*, 467 U.S. 407, 413 (1984); 8 C.F.R. § 1208.16(b)(2) (2007) (discussing how an Attorney General *may* grant asylum at his or her discretion, but withholding of removal is an easier relief to get). The Supreme Court has also held that "clear probability" means "more likely than not" or is the equivalent to the preponderance of evidence standard. *Stevic*, 467 U.S. 407.

a sufficient relief because it does not lead to the legal permanent residence (or “green card”), nor does it give the individual the ability to travel anywhere.⁷⁹

A. Persecution as Grounds for Asylum

Persecution is the infliction of harm or suffering in a way that is offensive.⁸⁰ It must be something more than mere inconvenience or threats of harm, including human rights violations, detention coupled with physical harm, torture, or rape.⁸¹ An applicant who is seeking asylum can establish persecution in two ways: first, the person can provide evidence of past persecution.⁸² Second, an applicant can show that she has a well-founded fear of future persecution.⁸³ In terms of future persecution, “an asylum applicant must demonstrate that he is unable to avail himself of the protection of his country because of persecution or a well-founded fear of persecution.”⁸⁴

“Well-founded fear” of persecution encompasses both an objective and a subjective component. To meet the requirement of objective fear, the applicant must show that “a reasonable person in [like] circumstances would fear persecution if returned to her country of origin.”⁸⁵ To satisfy the subjective component, an applicant must demonstrate a genuine fear of returning home.⁸⁶ Once an applicant has demonstrated subjective fear, she can demonstrate objective fear by showing that her fear is “grounded in reality.”⁸⁷

If documentary evidence is unavailable, the applicant’s credible testimony referring to specific facts is sufficient to meet the evidentiary standard.⁸⁸

To establish eligibility for asylum on the basis of past persecution, an applicant must show evidence of: (1) an incident that rises to the level of persecution; (2) that was “on account of” one of the statutorily protected grounds; and, (3) was committed by the government or forces the government is either unable or unwilling to control.⁸⁹ Once an immigrant has shown past persecution, she is presumed to have a well-founded fear of future persecution,⁹⁰ or in other words, there is a rebuttable assumption that the victim might suffer the same harm

⁷⁹ *Asylum and Withholding of Removal*, *supra* note 76.

⁸⁰ *Asylum and Persecution*, JOSEPH LAW FIRM, P.C., http://www.immigrationissues.com/practice_areas.php?action=view&id=4 (last visited Jan. 12, 2015).

⁸¹ *Id.*

⁸² *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004).

⁸³ *Id.*

⁸⁴ *Id.* (internal citations omitted).

⁸⁵ *Carcamo-Flores v. I.N.S.*, 805 F.2d 60, 68 (2d Cir. 1986) (quoting *Guevara Flores v. I.N.S.*, 786 F.2d 1242, 1250 (5th Cir. 1986)).

⁸⁶ *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 450 (1987).

⁸⁷ *Melendez v. U.S. Dep’t of Justice*, 926 F.2d 211, 215 (2d Cir. 1991).

⁸⁸ *Id.*

⁸⁹ *Mohammed v. Gonzales*, 400 F.3d 785, 794-95 (2005).

⁹⁰ 8 C.F.R. § 1208.13(b)(1) (2007).

in the future.⁹¹ In these cases, the burden of proof then shifts to the Department of Homeland Security to rebut the presumption of the well-founded fear, by demonstrating through preponderance of evidence that there has been a “fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution (such as change in location, passing of the abuser, or other).”⁹² If the government successfully rebuts the presumption, the burden shifts back to the applicant who then has to demonstrate a well-founded fear of future persecution.⁹³

Asylum, by its nature, “is a forward-looking form of relief that provides prophylactic protection” for individuals who might face persecution in the future;⁹⁴ therefore, past persecution plays more of a “regulatory rather than statutory role” in the asylum and withholding of removal framework by serving as evidence that the applicant may suffer future persecution.⁹⁵ Past persecution, in itself, does not warrant asylum or withholding of removal.⁹⁶ If a person has experienced past persecution, but does not have a well-founded fear of future persecution, she may obtain only refugee status if she demonstrates compelling justification for not being able to return to her country due to the severity of the past persecution or a reasonable possibility that she will face serious harm in the future.⁹⁷

B. Female Genital Mutilation and Asylum

There is a great deal of discussion about the connection between FGM and asylum. The Board of Immigration Appeals (“BIA”) and several federal circuits have recognized FGM as a form of persecution.⁹⁸ The BIA explicitly characterizes it as a form of “sexual oppression.”⁹⁹

Mohammed v. Gonzales is one example of where a victim was granted asylum on grounds of past persecution.¹⁰⁰ In this case, a native and citizen of Somalia sought asylum on the grounds that she had a well-founded fear of future persecution on account of her membership in a social group, the Benadiri clan.¹⁰¹ Although she was denied eligibility for asylum, she later reopened her claims based on *past* persecution of FGM because she had been “mutilated” as a child.¹⁰² The court treated FGM not as an isolated incident, but instead as a “permanent and continuing” act of persecution the petitioner Mohamed might be at risk for in the

⁹¹ *Id.*

⁹² 8 C.F.R. § 1208.13(b)(1)(i)(A) (1997).

⁹³ *Id.*

⁹⁴ *Id.* at 298 (quoting *In re N-M-A-*, 22 I. & N. Dec. 312, 318 (BIA 1998)).

⁹⁵ KIM, ASYLUM LAW AND FEMALE GENITAL MUTILATION, *supra* note 73.

⁹⁶ *Id.*

⁹⁷ See *In re N-M-A-*, 22 I. & N. Dec. at 318.

⁹⁸ *Id.* at 299.

⁹⁹ See *In re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996).

¹⁰⁰ *Mohammed v. Gonzales*, 400 F.3d 785, 789 (9th Cir. 2005).

¹⁰¹ *Id.* at 790.

¹⁰² *Id.*

future.¹⁰³ The government argued that since the woman has already suffered the harms of FGM, it is unlikely that she would be inflicted with the procedure in the future.¹⁰⁴ The Ninth Circuit likened FGM to forced sterilization in that it is a “permanent and continuing” act of persecution, which cannot constitute a change in circumstances, and, therefore, the government cannot rebut the presumption of a well-founded fear; consequently, the petitioner was successful on her claim for asylum.¹⁰⁵

However, courts are split over whether FGM can be categorized as past persecution to gain asylum relief.¹⁰⁶ In *In Re A-T-*, a 28-year-old Mali woman who underwent FGM as a young girl, asserted that she had a well-founded fear of persecution if she returned to Mali and “may someday give birth to a daughter who will also be subjected to FGM.”¹⁰⁷ The Executive Office for Immigration Review and BIA disagreed with the holding in *Gonzales* and instead “deem it consistent with the statutory and regulatory scheme to perceive FGM categorically as other past injuries that rise to the level of persecution, including those that involve some lasting disability.”¹⁰⁸ The Court in *In re A-T-* rejected the continuing persecution theory and was “unable to find the respondent eligible for withholding of removal based on her past experience with FGM.”¹⁰⁹ Additionally, in 2007, the BIA denied asylum to three Guinean women and one Malian woman, all who had been circumcised at young ages, arguing that this was a “one-time occurrence.”¹¹⁰ These denials challenged the trend of women winning U.S. asylum to avoid FGM,¹¹¹ and also exemplified how FGM, as past persecution, is not sufficient to guarantee a successful relief for asylum because courts are split on this matter.¹¹²

C. Alternative Grounds for Seeking Asylum

As asylum is currently defined, female victims of FGM cannot achieve asylum status by using their gender to establish membership as part of a “particular social group,” a concept understood as an identifiable group of people viewed by government as a threat.¹¹³ However, a successful formulation of a social group

¹⁰³ *Id.* at 799-801.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Rima Zaman, *Female Genital Mutilation: Membership in a “Particular Social Group” and Past v. Future Persecution a Comparative Look at Asylum Laws for Women who Have Been Subjected to FGM in the United States and the United Kingdom*, 16 NEW ENG. INT’L & COMP. L. 225, 238 (2010).

¹⁰⁷ *In re A-T-*, 24 I. & N. Dec. 296 (BIA 2007).

¹⁰⁸ *Id.* at 300.

¹⁰⁹ *Id.* at 301.

¹¹⁰ Zainab Zakari, *FGM Asylum Cases Forge New Legal Standard*, WE NEWS (Nov. 25, 2008), <http://womensenews.org/story/genital-mutilation/081125/fgm-asylum-cases-forge-new-legal-standing>.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993). See also 8 U.S.C. § 1101(a)(42)(A) (2012) (“Social group” refers to a group of persons all of whom share a common, immutable characteristic . . . the common characteristic that defines the group must be one that the members of the group cannot

used in an FGM asylum claim is “women opposed to FGM who belong to an ethnic group that practices FGM.”¹¹⁴ Under this rationale, an applicant must show that: (1) she is a female; (2) she belongs to a particular ethnic group; and, (3) that ethnic group widely practices FGM.¹¹⁵

Some courts, however, hold that women who are subjected to FGM belong to a special group of people, who are potentially eligible for asylum. In *Hassan v. Gonzales*, the petitioner, a native and citizen of Somalia, applied for asylum, claiming that being a victim of FGM granted her asylum status and that her daughters would be subject to FGM if they returned to Somalia with her.¹¹⁶ Although the BIA denied her claim for asylum, the United States Court of Appeals for the Eighth Circuit granted the petition on the basis that Hassan belonged to a “particular social group”—Somali females.¹¹⁷ Yet, categorization based on particular social oppression is typically overbroad.¹¹⁸ However, the Court in *Hassan* held that the petitioner Hassan was persecuted on account of her membership in the social group known as Somali females, and, therefore, had a well-founded fear of persecution given the prevalence of FGM.¹¹⁹ Though not always applied, some courts in FGM cases have interpreted the “particular social group” requirement as satisfied when the applicant can make a sufficient showing of her gender and tribal membership.¹²⁰

Clearly, asylum as a legal remedy is granted very sparsely and is not guaranteed to every applicant for a few reasons. First, since the BIA serves as an important gatekeeper in making the determination of whether an individual receives asylum relief, the majority of applicants who have already suffered FGM will likely have their asylum claims rejected without an adequate showing that this past harm will be repeated.¹²¹ Additionally, David Smith, consultant to the U.S. Committee for Refugees and Immigrants in Washington, D.C., commented that the number of women seeking asylum “has remained small and will likely stay that way,” because most of the girls who are circumcised were cut when they were young and are not in a position to seek asylum because they do not face future harm.¹²² Many advocates who support granting asylum to FGM victims suggest that clinicians with knowledge of mental and physical conditions of FGM survivors should

change, or should not be required to change because it is fundamental to their individual identities or consciences.”)

¹¹⁴ See *In re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996) (holding that persecution was on account of applicant’s membership of a social group comprising of the young women of the Tchamba-Kunsuntu Tribe).

¹¹⁵ KIM, FEMALE GENITAL MUTILATION AS PERSECUTION, *supra* note 77.

¹¹⁶ *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007).

¹¹⁷ *Id.* at 519.

¹¹⁸ *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994).

¹¹⁹ *Id.*

¹²⁰ KIM, FEMALE GENITAL MUTILATION AS PERSECUTION, *supra* note 77, at 11-12 (quoting *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2007)).

¹²¹ *Id.*

¹²² Zainab, *FGM Asylum Cases Forge New Legal Standard*, *supra* note 110.

contribute clinical evidence that these women should not be sent back to their native homelands, because their inability to return would strengthen their asylum claim. However, because the issue remains controversial and the law is unclear as to whether women who have already undergone FGM should be granted asylum,¹²³ it is imperative that there are other more effective legal responses to dealing with FGM as well as relief for FGM victims to escape future harm or to be remedied for past victimization.

D. State Law Criminalization of FGM and Legal Remedies for Victims of FGM

Asylum and withholding of removal are remedies available for individuals who are aspiring to leave their country of origin where they suffered the harm of FGM to enter the United States for protection. However, because FGM may also occur within the United States, it is imperative to have state legislation to criminalize the practice and prosecute those who perform it. To date, twenty-two states have prohibited the practice of FGM and instituted criminal sanctions on perpetrators: California, Colorado, Delaware, Florida, Georgia, Illinois, Kansas, Louisiana, Maryland, Minnesota, Missouri, Nevada, New Jersey, New York, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, West Virginia, and Wisconsin.¹²⁴

Several states have amended their criminal codes. However, the provisions do not provide relief to every individual affected by FGM. The first state to enact legislation prohibiting FGM was Minnesota in 1994.¹²⁵ Minnesota amended its criminal code explicitly to prohibit the performance of FGM on adult women and minors.¹²⁶ Under, Minnesota Statute section 609.2245:

[W]hoever knowingly circumcises, excises, or infibulates, in whole or in part, the labia majora, labia minora, or clitoris of another is guilty of a felony. Consent to the procedure by a minor on whom it is performed or by the minor's parent is not a defense to a violation of this subdivision.¹²⁷

Section 144.3872, passed in 2013, also mandated the Commissioner of Health to carry out community outreach to educate and prevent communities that traditionally practice all forms of FGM and work with those communities to obtain private funds to finance the initiatives to reduce and ultimately eliminate the practice of FGM.¹²⁸

California, for example, remains a high-risk state for young girls who may be

¹²³ *Id.*

¹²⁴ *Female Genital Mutilation (FGM) in the United States*, *supra* note 21.

¹²⁵ CTR. FOR REPROD. RIGHTS, *supra* note 17, at 7.

¹²⁶ Layli Miller Bashir, *Female Genital Mutilation: in the United States: An Examination of Criminal and Asylum Law*, 4 AM. U. J. GENDER & L. 415, 431 (1996), <https://www.wcl.american.edu/journal/genderlaw/04/bashir.pdf>.

¹²⁷ MINN. STAT. § 609.2245 (West 1994).

¹²⁸ MINN. STAT. § 144.3872 (West 1994).

targeted victims of FGM.¹²⁹ California passed the California Prohibition of Female Genital Mutilation Act in 1996, which became effective on January 1, 1997.¹³⁰ California FGM Law amended the State Penal Code, by also adding a provision for children who are victims of FGM that states,

any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering . . . shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four or six years.¹³¹

The statute also explicitly addresses the conduct of a parent or guardian who allows FGM to be performed on his or her own daughter.¹³² Furthermore, the legislature declared its commitment to join with other states, nations, and major health care and human rights organizations in condemning FGM.¹³³

Colorado, on May 24, 1999, amended its criminal code to classify FGM as a form of child abuse.¹³⁴ Under this statute, a “child” is defined as a person under the age of sixteen years old. The law provides that a person commits child abuse if he or she “excises or infibulates, in whole or in part, the labia majoria, labia minoria, vulva, or clitoris of a female child.”¹³⁵ Colorado also does not allow defenses to the FGM procedure: custom, ritual or standard practice, consent of the minor or his parent, or legal guardian.¹³⁶ The penalty is a class three felony that is punishable by a minimum of four years of imprisonment.¹³⁷

For the remaining twenty-nine states that have not yet passed criminal prohibition against FGM, the AHA Foundation (founded in 2007 by Ayaan Hirsi Ali to help protect and defend the rights of women in the U.S. from religiously and culturally instigated oppression) has undertaken a campaign to encourage the state legislators to introduce prohibitions to FGM.¹³⁸ In the past three years, the AHA Foundation has successfully worked with New Jersey and Louisiana legislators to draft and introduce bills on this matter. New Jersey State Senate unanimously passed a bill that went into effect on January 17, 2014, and Louisiana in 2012 added a “vacation cutting” provision to prevent girls from being sent to their home countries to undergo FGM usually during school vacations.¹³⁹ The AHA Foundation worked with Pennsylvania State Representative Thomas Murt to pass

¹²⁹ CTR. FOR REPROD. RIGHTS, *supra* note 17.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 4.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Female Genital Mutilation (FGM) in the United States*, *supra* note 21.

¹³⁹ *Id.*

House Bill 1018 in March 2013.¹⁴⁰ The Bill amends the Pennsylvania Consolidated Statutes to prohibit FGM and mirrors the language of some of the previously passed amendments.¹⁴¹

III. CURRENT FEDERAL LEGISLATION AND A LOOK INTO THE FUTURE

A. Evolution of Federal Legislation

In the United States, FGM started in the early nineteenth century when male doctors developed the (incorrect) notion that women were “particularly susceptible to insanity because of their body’s eccentric dominance over their mind.”¹⁴² At first, doctors believed that they could cure psychological disorders through gynecological operations; unsurprisingly, physicians abandoned the surgery after it failed to achieve its intended purpose.¹⁴³

Federal legislation on FGM has evolved over time but most developmental change occurred in the early 1990s. In 1995, Representative Patricia Schroeder and Senator Harry Reid introduced the Immigrant Responsibility Act, which would outlaw FGM.¹⁴⁴ The bill provides penalties for violating the law, and contains an educational component that mandates the Secretary of Health and Human Services to develop recommendations for the education of medical and osteopathic medical students about FGM and its medical complications.¹⁴⁵ Following the enactment of this federal law, various states also passed laws against the practice.¹⁴⁶

Congress also intended to eradicate FGM on a global level and, therefore, Congress enacted 18 U.S.C. § 116 to criminalize the behavior, intending for more global effects.¹⁴⁷ Title 18 of the United States Code is crucial, as it is the criminal and penal code that deals with federal crimes and criminal procedure.¹⁴⁸ Although the Immigrant Responsibility Act was a first step towards eliminating the practice, the bill lacked guidance for Health and Human Services to implement it. Critics also noted that there was a lack of cultural competency in understanding how immigrant communities are affected by the practice of FGM.¹⁴⁹ However, despite preliminary progress, advocates have fought to “tighten” the 1996 federal law

¹⁴⁰ *Id.*

¹⁴¹ H.B.-1018, Gen. Assemb., Reg. Sess. 2013, § 3131 (Pa. 2013).

¹⁴² Vanessa Ortiz, *Culture Shock: Expanding the Current Federal Law Against Female Genital Mutilation*, 3 FIU L. REV. 423, 433 (2008).

¹⁴³ *Id.*

¹⁴⁴ Karen Hughes, Note, *The Criminalization of Female Genital Mutilation in the United States*, 4 J.L. & POL’Y 321, 370 (1995).

¹⁴⁵ Kadhijah F. Sharif, *Female Genital Mutilation: What Does the New Federal Law Really Mean?*, 24 FORDHAM URB. L.J. 419, 420 (1996).

¹⁴⁶ *Id.*

¹⁴⁷ Allen E. White, *Female Genital Mutilation in America: The Federal Dilemma*, 10 TEX. J. WOMEN & L. 129, 143 (2001).

¹⁴⁸ *Conspiracy Against Rights*, DEP’T OF JUSTICE, <http://www.justice.gov/crt/about/crm/241fin.php> (last visited Jan. 12, 2015).

¹⁴⁹ Sharif, *supra* note 145, at 422-23.

banning FGM, and permanently terminate the FGM practice and prosecute perpetrators who perform the cutting or are involved in persuading female individuals to undergo the process.¹⁵⁰

Other initiatives include Representatives Joseph Crowley of New York and Mary Bono Mack of California tirelessly leading the House to strengthen the 1996 federal ban.¹⁵¹ Additionally, in 2011, Senate Majority Leader Harry Reid of Nevada introduced the Girls Protection Act in the Senate.¹⁵² This bill aims to amend title 18 to establish penalties for transporting minors in foreign commerce for the purposes of FGM.¹⁵³ The Act provides that the conduct that “occurred within the United States, or attempts to do so, shall be fined under this title or imprisoned not more than 5 years, or both.”¹⁵⁴ This amendment is now known as National Defense Authorization Act section 1092, or the “Transport for Female Genital Mutilation.”¹⁵⁵ Because the existing federal law did not protect girls from being taken outside the U.S. to undergo FGM, President Barack Obama added subsection (d) to 18 U.S.C. § 116 to incorporate the extraterritoriality legislation or “vacation provision” in January 2013.¹⁵⁶ Those found guilty of moving girls out of the country to circumcise them can now be fined and imprisoned for up to five years.¹⁵⁷ The statute does, however, provide an exemption for any surgical operations if the operation is (1) “necessary to the health of the person on whom it is performed . . . [by] a medical practitioner,”¹⁵⁸ as well as is (2) “performed on a person in labor or who has just given birth and is performed for medical purposes connected with that labor.”¹⁵⁹

B. Understanding the Federal Ban on FGM

Thousands of immigrants arrive into the United States from regions or countries that practice and allow FGM procedures.¹⁶⁰ Though no longer in their

¹⁵⁰ *Id.*

¹⁵¹ Shelby Quast, *Equality Now Applauds Congressional Passage of Law Criminalizing Transport of U.S. Girls Abroad for FGM*, EQUALITY NOW (Dec. 21, 2012), http://www.equalitynow.org/press_release/equality_now_applauds_passing_of_federal_law.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ 18 U.S.C. § 116(d) (West 1994).

¹⁵⁷ *Id.*

¹⁵⁸ *See id.* § 116(b)(1) (West 1994).

¹⁵⁹ *See id.* § 116(b)(2) (West 1994).

¹⁶⁰ ARCHANA PYATI & CLAUDIA DE PALMA, *FEMALE GENITAL MUTILATION IN THE UNITED STATES: PROTECTING GIRLS AND WOMEN IN THE U.S. FROM FGM AND VACATION CUTTING* 7 (2013), <http://www.sanctuaryforfamilies.org/wp-content/uploads/sites/18/2015/07/FGM-Report-March-2013.pdf> (discussing how immigrant parents and relatives living in the U.S. who continue to adhere to the practice of FGM do so as a means to reinforce their culture in a foreign land). Besides cultural traditions, other reasons include pressure from spouses, elders, and homeland traditions. *Id.* Other times, individuals are forced to trick or abandon their daughters into the care of relatives who forcibly cut them without their consent. *Id.* Vacation cutting is the equivalent of taking young immigrants, those

native homelands, communities practicing FGM continue to carry their traditions and practices in the United States, hence allowing FGM to remain prevalent in the immigrant communities in the United States.¹⁶¹ According to the last known FGM study, conducted by the Centers for Disease Control and Prevention in 1997,¹⁶² an estimated 230,000 young women annually were at risk for FGM in the United States,¹⁶³ and that number is likely to have increased significantly since then.¹⁶⁴ Due to this influx, it is crucial that the U.S. takes actions to criminalize FGM.

Accordingly, since 1996, the United States has criminalized FGM under the federal law, 18 U.S.C. § 116.¹⁶⁵ The statute provides:

(a) Except as provided in subsection (b), whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both.

(b) A surgical operation is not a violation of this section if the operation is—

(1) necessary to the health of the person on whom it is performed, and is performed by a person licensed in the place of its performance as a medical practitioner; or

(2) performed on a person in labor or who has just given birth and is performed for medical purposes connected with that labor or birth by a person licensed in the place it is performed as a medical practitioner, midwife, or person in training to become such a practitioner or midwife.

(c) In applying subsection (b)(1), no account shall be taken of the effect on the person on whom the operation is to be performed of any belief on the part of that person, or any other person, that the operation is required as a matter of custom or ritual.

(d) Whoever knowingly transports from the United States and its territories a person in foreign commerce for the purpose of conduct with regard to that person that would be a violation of subsection (a) if the conduct occurred

who are permanent residents or U.S. citizens and sending them abroad to have this procedure performed on them. *Id.* at 8.

¹⁶¹ *Id.*

¹⁶² Annabel Roberts & Marian Smith, *Horrible Taboo: Female Circumcision on the Rise in the U.S.*, NBC NEWS (Mar. 30, 2014), <http://www.nbcnews.com/news/world/horrific-taboo-female-circumcision-rise-u-s-n66226>.

¹⁶³ Nina Strohlic, *America's Underground Female Genital Mutilation Crisis*, DAILY BEAST (June 11, 2014), <http://www.thedailybeast.com/articles/2014/06/11/america-s-underground-female-genital-mutilation-crisis.html> (discussing how FGM is not just an international issue, but affects many Americans on American soil, a number that has been increasing for fifteen years since the last known study).

¹⁶⁴ *Id.*

¹⁶⁵ 18 U.S.C. § 116 (1996).

within the United States, or attempts to do so, shall be fined under this title or imprisoned not more than 5 years, or both.¹⁶⁶

Section 116(d), enacted in January 2013, prohibits the knowing transport of a girl out of the country for the purpose of undergoing FGM, more colloquially known as “vacation cutting.”¹⁶⁷ This provision targets immigrant communities that intentionally take girls living in the United States to their parents’ countries of origin during school breaks and holidays, to undergo FGM.¹⁶⁸

The fact that the United States has criminalized FGM speaks volumes to the changing philosophy and legal strategies employed to combat this problem. Further, on a local level, many states have also criminalized FGM, demonstrating movement towards eradicating FGM in the United States. However, two main issues still remain: (1) not all states have enacted state law to ban FGM; and, (2) the federal sentencing guidelines¹⁶⁹ are weak and do not afford proper relief for victims of FGM or punishment for criminals.

C. Flaws in Federal Law Prohibiting FGM

Despite state and federal laws in the United States criminalizing FGM, the judicial system has adjudicated very few cases against the perpetrators who have performed FGM on young girls or women. The Human Rights and Special Prosecutions Section is aware of only one prosecution, *United States v. Bertrang*.¹⁷⁰ In this case, two California defendants were charged with conspiracy to violate the FGM Criminalization Statute (18 U.S.C. § 116).¹⁷¹ Defendant Bertrang used the Internet to advertise his medical expertise and knowledge in performing various surgical procedures, including FGM.¹⁷² An undercover FBI agent offered Todd Cameron Bertrang and Robyn Faulkinbury \$8,000 to perform the procedure to his fictitious daughters, two underage girls.¹⁷³ In 2004, Todd Bertrang was sentenced to five years in federal prison, and his girlfriend, Robyn Faulkinbury, was sentenced to two years in prison.¹⁷⁴

¹⁶⁶ *Id.*

¹⁶⁷ *What Is Female Genital Mutilation (FGM)*, AHA FOUND., <http://theahafoundation.org/issues/female-genital-mutilation/> (last visited Jan. 12, 2015).

¹⁶⁸ *Id.*

¹⁶⁹ *Federal Sentencing Guidelines*, CORNELL U. L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/federal_sentencing_guidelines (last visited Jan. 12, 2015). The federal sentencing guidelines are non-binding rules that set out a uniform sentencing policy for defendants convicted in the United States federal court system that became effective in 1987. *Id.* The Guidelines provide a “very precise calibration of sentences.” *Id.*

¹⁷⁰ *Female Genital Mutilation—18 U.S.C. § 116*, DEPT. OF JUSTICE (2014), <http://www.justice.gov/sites/default/files/criminal-hrsp/legacy/2014/08/14/HR-Newsletter-July-2014.pdf>.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Genital Mutilators Sentenced*, DAILY NEWS (June 9, 2005), <http://www.thefreelibrary.com/GENITAL+MUTILATORS+SENTENCED.-a0133122265>.

¹⁷⁴ *Id.*

Bertrang is certainly a good starting point as to the direction in which criminalization of FGM needs to go, but there are no other interpretations of the FGM Criminalization Statute; therefore, it is hard to quantify the success of the laws attempting to curb the practice of FGM, especially within immigrant communities.¹⁷⁵ The lack of cases before courts may be attributed in part to the series of inherent problems present in the federal statute that need to be further scrutinized for their inefficiencies.

First, looking at the federal statute as a whole, it appears as if the statute is written to punish those who perform FGM instead of providing relief for “victims” or survivors.¹⁷⁶ This raises an integral question of what justice means and whether it is more important to give support to FGM victims or to reprimand their circumcisers. Our society has varying notions of justice, but many scholars contend that in the face of human rights violation, there should be a transnational “women’s rights as humans rights” movement.¹⁷⁷ Justice, especially in the context of FGM and other social injustices to women should allow for protection for victims and punishment for perpetrators.¹⁷⁸ In other words, there should be valiant efforts on the part of both state and federal legislation to eliminate FGM, so that a greater population of women is given relief.¹⁷⁹

There are inherent issues with the federal statute 18 U.S.C. § 116. For example, according to section 116(a), the law does not afford relief to those women over the age of eighteen who were victims of FGM.¹⁸⁰ Section 116(a) provides that the statute punishes “whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majoria or labia minora or clitoris of another person who [did] not attained the age of 18 years shall be fined under this title or imprisoned not more than five years, or both.”¹⁸¹ Since FGM is a practice deeply rooted in culture and tradition, it is entirely possible that women over the age of eighteen who immigrate to the United States may still suffer the harm if they have not been cut already—there should be more flexibility within the statute to accommodate this subset of women.¹⁸² As author Patricia Broussard pointed out, “the omission of adult women from the statute is problematic when familial

¹⁷⁵ ANIKA RAHMAN & NAHID TOUBIA, FEMALE GENITAL MUTILATION: A GUIDE TO LAWS AND POLICIES WORLDWIDE 15-39 (2000). See also Jennifer J. Rasmussen, Note, *Innocence Lost: The Evolution of a Successful Anti-Female Genital Mutilation Program*, 41 VAL. U.L. REV. 919, 919 (2006).

¹⁷⁶ 18 U.S.C. § 116(d) (West 1994).

¹⁷⁷ Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1201 (2001).

¹⁷⁸ Laura Bates, *Defining Justice when the Law is Unjust: How Gender Imbalance Affects Women Around the World*, WOMEN’S MEDIA CTR. (Apr. 25, 2012), <http://www.womenundersiegeproject.org/blog/entry/defining-justice-when-the-law-is-unjust-how-gender-imbalance-affects-women>.

¹⁷⁹ Sally Engle Merry, *Transnational Human Rights and Local Activism: Mapping the Middle*, 108 AM. ANTHROPOLOGIST 38, 48 (2006), <http://scar.gmu.edu/sites/default/files/Transnational%20Human%20Rights%20and%20Local%20Activism%20Mapping%20the%20Middle.pdf>.

¹⁸⁰ 18 U.S.C. § 116(a) (West 1994).

¹⁸¹ *Id.*

¹⁸² Moges, *supra* note 19.

coercion or some other force is used to compel a woman, who had escaped being cut in her homeland, to undergo FGM before she can marry in her new homeland.”¹⁸³ In other words, just because she was not cut as a child does not mean that women over the age of eighteen are protected against future cutting. Consequently, the statutory language should not be limited to just female minors, but should include victims of all ages who have been previously cut or may be at high risk of future cutting.

Next, the language of section 116(b)(1) provides medical exemptions to the prohibition against FGM if it is necessary for the welfare of women, or performed by a licensed medical practitioner.¹⁸⁴ Determining whether something is “necessary to the health of the person on whom it is performed” is subjective and not easily determined.¹⁸⁵ According to many practitioners, “medically necessary” is a vague, subjective standard that is open to infinite interpretations based on who is reading the statute. Furthermore, this standard discusses whether the cost of treatment justifies the chances that the patient will reach a desired level of relief or functional improvement, and whether the treatment will mitigate the patient’s risk of suffering an even worse outcome if the current condition is left untreated.¹⁸⁶ There is the possibility that the medical practitioner belongs to a group that is culturally rooted in dispersing FGM, creating an ulterior motive for performing the surgery.¹⁸⁷ This is not unheard of, for example, in March 2014, Dr. Dhanuson Dharmasena (with the help of Hasan Mohamed) was prosecuted in the United Kingdom for carrying out FGM on a young mother after she gave birth.¹⁸⁸ The young woman was subject to FGM at the age of six in Somalia, but was “re-stitched” after giving birth, even though the procedure was deemed “medically unnecessary.”¹⁸⁹ Despite this, Dr. Dhanuson was acquitted following Britain’s first landmark FGM trial.¹⁹⁰ This example serves as a reminder of the need for stricter guidelines to determine under what medical circumstances, if any, FGM should be permitted, or may even be beneficial to women. One possible solution to combat concerns related to this vague standard is to have multiple doctors support a

¹⁸³ Patricia A. Broussard, *The Importation of Female Genital Mutilation to the West: The Cruellest Cut of All*, 44 U.S.F. L. REV. 787, 801 (2010).

¹⁸⁴ 18 U.S.C. § 116(b)(1) (West 1994).

¹⁸⁵ Brooke Andrus, *The Great Medically Necessary Discussion and How to Use ABNS*, WEBPT (Mar. 12, 2014), <http://www.webpt.com/blog/post/great-medically-necessary-discussion-and-how-use-abns>.

¹⁸⁶ *Id.*

¹⁸⁷ James Randerson, *Female Genital Mutilation Denies Sexual Pleasure to Millions of Women*, GUARDIAN (Nov. 13, 2008), <http://www.theguardian.com/science/blog/2008/nov/13/female-genital-mutilation-sexual-dysfunction>.

¹⁸⁸ Oliver Wheaton, *Doctor Accused of Performing Female Genital Mutilation on New Mother in a British Hospital*, METRO (Jan. 19, 2015), <http://metro.co.uk/2015/01/19/doctor-accused-of-performing-female-genital-mutilation-on-new-mother-in-a-british-hospital-5028322/?ito=facebook>.

¹⁸⁹ *Id.*

¹⁹⁰ Emma Batha, *British Doctor Acquitted in Landmark FGM Trial*, REUTERS (Feb. 5, 2015), <http://www.reuters.com/article/2015/02/05/us-britain-fgm-trial-idUSKBN0L921Q20150205>.

determination of whether the practice is medically necessary.

In regards to section 116(d) (the extraterritoriality component that makes FGM punishable even if conducted by non-United States citizen),¹⁹¹ if a female is forced to undergo FGM during her “vacation,” individuals not within United States borders cannot be punished in an American court.¹⁹² Gaining relief in the International Criminal Court (“ICC”), the intergovernmental and international tribunal that sits in Hague in the Netherlands, is limited and unsuccessful in regards to FGM claims, even though the purpose of the ICC is to exercise its jurisdiction when national courts are unwilling or unable to prosecute criminals.¹⁹³ The provision to eliminate “vacation cutting” is crucial, but there should be a principle of extradition¹⁹⁴ that makes FGM punishable outside of the borders of this country. Extradition is the removal of a person from a requested state to another requesting state for criminal prosecution or punishment.¹⁹⁵ Since it is infeasible to punish so many individuals abroad, FGM circumcisers should not be able to use that as a loophole to get around the law.¹⁹⁶ In fact, recently a woman, who had suffered FGM as a child, feared her two daughters would endure the same harm if deported back to Nigeria.¹⁹⁷ Due to online petitioners and outpouring of support from FGM campaigners, she was able to obtain temporary reprieve, or a postponement of her deportation to Nigeria.¹⁹⁸ This one instance exemplifies the potential success an extradition principle may create.

¹⁹¹ Yasmin Wahba, *Legislative Reform to Support the Abandonment of Female Genital Mutilation/Cutting*, UNICEF (2010), http://www.unicef.org/policyanalysis/files/UNICEF_-_LRI_Legislative_Reform_to_support_the_Abandonment_of_FGMC_August_2010.pdf.

¹⁹² John R. Wilson, *Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation*, 65 OHIO ST. L. J. 659, 664 (2004) (discussing how foreign plaintiffs seeking justice in the United States must determine whether their nationality may prevent them from filing claims in American courts and how they will be treated in comparison to domestic plaintiffs).

¹⁹³ CHARLES MWALIMU, ANALYSIS OF THE INTERNATIONAL CRIMINAL COURT RULES OF PROCEDURE 1 (2010). The International Criminal Court was established in 2002, and is located in Hague, Netherlands, as a permanent tribunal to prosecute individuals for genocide, crimes against humanity, and war crimes. *Id.* Note that Female Genital Mutilation is not one of the offenses that the ICC commonly prosecutes. The process to commence an ICC investigation or proceeding is quite tedious. *Id.* at 2-3. Moreover, there are multiple limitations on ICC procedures, including issues global criminal prosecution, fragmentation between pre-trial and post-trial proceedings, and lastly integration of international criminal procedure to harmonize the differing local rules. *Id.*

¹⁹⁴ *Extradition*, CORNELL U. L. SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/wex/extradition> (last visited Jan. 12, 2015). Extradition is the removal of a person from a requested state to another requesting state for criminal prosecution or punishment. *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Katie Rucke, *Female Genital Mutilation Survivors: Procedure Is US Issue Too*, MINTPRESS NEWS (Mar. 11, 2013), <http://www.mintpressnews.com/female-genital-mutilation-survivors-procedure-is-us-issue-too/52995/>.

¹⁹⁷ Ewan Palmer, *Victory for FGM Campaigners as Afusat Saliu Deportation Put on Hold*, INT'L BUS. TIMES (May 30, 2014), <http://www.ibtimes.co.uk/afusat-saliu-deportation-put-hold-1450543>.

¹⁹⁸ *Id.*

IV. PRIOR ATTEMPTS AT LEGISLATIVE REFORM AND A PROPOSAL FOR AN
ALTERNATIVE FGM LEGISLATION

A. Attempts Made by the United Nations

Multiple attempts have been made to eradicate the practice of FGM and eliminate other violations of women's human rights internationally; opponents of FGM cite to the Universal Declaration of Human Rights ("UDHR") for protection of individuals' rights to life, liberty, and the security.¹⁹⁹ The UDHR protects the "right to personal security," which is directly relevant to the practice of FGM.²⁰⁰ Additionally, on December 18, 1979, the United Nations General Assembly adopted the United Nations Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), which became effective on September 3, 1981.²⁰¹ The CEDAW, which defines what constitutes discrimination against women and sets up an agenda for international action to end this discrimination, is a powerful tool towards abolition of FGM.²⁰² The CEDAW's underlying philosophy is that "discrimination against women violates the principles of equality of rights and respect for human dignity."²⁰³ Article 5 of the CEDAW requires state parties to take measures to achieve "the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes."²⁰⁴

However, both of these international tools to combat FGM are flawed and do not necessarily achieve their intended purpose. The weakness with the UDHR, which serves as the cornerstone of modern human rights system, consists of gender-neutral language, which is problematic because traditional interpretations do not consider focus on violations specifically targeted towards women.²⁰⁵ Amnesty International best characterizes this oversight as "[arising] from a common misconception that states are not responsible for human rights abuses committed within the home or the community."²⁰⁶ Although the CEDAW is intended to change the "social and cultural patterns of conduct of men and women,"

¹⁹⁹ G.A. Res. 217A (III), Universal Declaration of Human Rights (Dec. 10, 1948).

²⁰⁰ Jaimee K. Wellerstein, *In the Name of Tradition: Eradicating the Harmful Practice of Female Genital Mutilation*, 22 LOY. L.A. INT'L & COMP. L. REV. 99, 116 (1999).

²⁰¹ Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

²⁰² Patricia A. Broussard, *The Importation of Female Genital Mutilation to the West: The Cruellest Cut of All*, 44 U.S.F. L. REV. 787, 795 (2010).

²⁰³ *Id.*

²⁰⁴ CEDAW, *supra* note 201. The Convention states that State Parties shall take all appropriate measures: (a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles of men and women.

²⁰⁵ *Id.*

²⁰⁶ AMNESTY INT'L, FEMALE GENITAL MUTILATION AND INTERNATIONAL HUMAN RIGHTS STANDARDS 1 (1997), <https://www.amnesty.org/en/documents/act77/014/1997/en/>.

not all countries are willing participants.²⁰⁷ Somalia is one of the few countries, in addition to Iran, Oman, and Sudan that have neither signed nor ratified this Convention.²⁰⁸ An overwhelming 186 countries are party to the CEDAW, but Somalia's refusal to ratify these points indicate an unwillingness to recognize certain basic human rights, which poses a problem because Somalia continues to be the country with the highest record of FGM victimization.²⁰⁹ Somalia's lack of participation in the CEDAW may also suggest that the country's political activity and traditions need to evolve from a legislative approach.

B. Examining the French Model on FGM

Perhaps the most compelling model is that of France who has had forty FGM trials, and convicted two practitioners and more than one hundred parents.²¹⁰ France is home to up to 30,000 women who have been circumcised, many of which are from West African countries.²¹¹ France criminalizes mutilation and abuse of minors according to articles 221 and 222 of its Penal Code.²¹² Moreover, FGM was "defined as a crime under French Law since 1983, with the threat of 10 years in prison, or up to 20 years for cutting a girl under the age of 15."²¹³ Besides legislation, it is likely that most of France's success is spurred by victims of FGM who have insisted on trials for the perpetrators.²¹⁴ What makes the French approach a good model is their approach towards preventing FGM, which also includes an extraterritoriality provision where high-risk girls are checked before they leave the country to ensure that parents are made aware of the serious health and legal consequences of performing the FGM procedure on their child.²¹⁵ It is important to note that "high-risk," according to the French, often refers to areas in France with high immigration levels from countries that typically perform FGM. Although multiculturalism is popular throughout France, FGM is strictly

²⁰⁷ Ortiz, *supra* note 142.

²⁰⁸ *Id.*

²⁰⁹ Nealan Afsari, *What do Somalia, Sudan, Iran and the U.S. Have in Common?*, PBS (Dec. 3, 2010), <http://www.pbs.org/wnet/need-to-know/opinion/what-do-somalia-sudan-iran-and-the-u-s-have-in-common/5518/>.

²¹⁰ Megan Rowling, *France Reduces Genital Cutting with Prevention, Prosecutions-Lawyer*, THOMAS REUTERS FOUND. NEWS (Sept. 27, 2012), <http://www.trust.org/item/?map=france-reduces-genital-cutting-with-prevention-prosecutions-lawyer/>.

²¹¹ *Id.*

²¹² *Id.*

²¹³ Kim Willsher, *France's Tough Stance on Female Genital Mutilation Is Working, Say Campaigners*, GUARDIAN (Feb. 10, 2014), <http://www.theguardian.com/society/2014/feb/10/france-tough-stance-female-genital-mutilation-fgm>.

²¹⁴ Rasmussen, *supra* note 175, at 949 n.138 (discussing how in France, there have been at least seven trials, including eighteen families and both parents and excisors have received suspended jail sentences). France's Penal code imposes stringent penalties. *Id.*

²¹⁵ Rhona Scullion, *FGM First UK Prosecution Follows French Example*, GUARDIAN LIBERTY VOICE (Mar. 22, 2014), <http://guardianlv.com/2014/03/fgm-first-uk-prosecution-follows-french-example/>.

intolerant.²¹⁶

The system implemented in France is a “triple approach,” which according to attorney Linda Weil-Curiel can best be described as “preventing through education, shaming with publicity, and punishing.”²¹⁷ On the prevention front, the *Protection Maternelle et Infantile*²¹⁸ conducts check-ups of pregnant women and children in the first six years of their lives in order to identify high-risk victims (*Protection Maternelle et Infantile* translates to the Maternal and Child Health, a departmental service under the President of the General Council).²¹⁹ These examinations typically occur once a month for the first six months of a child’s life, again at nine months, three times during the second year, and twice a year until the sixth year, during which a female child’s genitals are inspected for FGM.²²⁰ If a doctor discovers a victim of FGM, he or she is legally bound, under the Professional Secrecy Law, which typically protects classified information from patients, to report the FGM violation to authorities, a process that allowed for successful number of prosecutions.²²¹ As for punishment, French law even criminalizes acts of omission, and non-assistance to a person in danger that can lead to five years of imprisonment and a stringent fine.²²² For the French, receipt of social security is contingent on these inspections.²²³

The Child Protection Law and the Domestic Violence Act charge offenders who commit FGM-related crimes against minors and punish them more severely.²²⁴ The French investigative judge remains present in all cases dealing with serious crimes and has wide powers of supervision over the police investigation.²²⁵ Consequently, in the past three decades, there have been twenty-nine trials that have led to one hundred convictions.²²⁶ Further, the penalties are severe in France, and often those convicted serve prison sentences of up to thirteen

²¹⁶ Willsher, *supra* note 209.

²¹⁷ *Id.*

²¹⁸ *La Protection Maternelle et Infantile (PMI)*, MINISTÈRE DES AFFAIRES SOCIALES ET DE LA SANTÉ (Jan. 31, 2014), <http://drees.social-sante.gouv.fr/etudes-et-statistiques/open-data/aide-et-action-sociale/la-protection-maternelle-et-infantile-pmi/article/la-protection-maternelle-et-infantile-pmi> (Fr.).

²¹⁹ Eleonara Bottini, *Is Juridicization of Female Genital Mutilation an Effective Way of Eliminating It?: Western Democracies Facing the Violation of Female Integrity and Dignity: Illegal FGM as an Integration Problem*, JURA GENTIUM (2009), <http://www.juragentium.org/forum/mg/sunna/en/bottini.htm>.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ Sinéad Costeoloe, *Policy Regimes Toward Female Genital Mutilation: A Comparative Analysis of the Strategies for Eradication in France and The Netherlands* 44 (1998), (M.A. thesis, Univ. of Victoria British Columbia), <https://dspace.library.uvic.ca:8443/bitstream/handle/1828/2983/Thesis%2027August%202010%20DSpace.pdf?sequence=1>.

²²⁵ *Id.*

²²⁶ Martin Bentham, *Diane Abott Calls for Mandatory Checks on Schoolgirls to Secure Prosecutions for FGM*, EVENING STANDARD (Mar. 11, 2014), <http://www.standard.co.uk/news/london/diane-abott-calls-for-mandatory-checks-on-schoolgirls-to-secure-prosecutions-for-fgm-9184171.html>.

years.²²⁷ Additionally, positive contributing factors such as high levels of activism, and successful media attention over court cases are helpful towards legislative control of FGM in France.²²⁸ French Justice Minister Rachita Dati best describes the no-tolerance policy towards FGM in the following manner: “[FGM] has no foundation in any religion, philosophy or sociology. It is a serious and violent abuse of a female. It cannot be justified. FGM is a crime.”²²⁹

Unlike France, other European countries such as Austria, Belgium, Denmark, Italy, Spain, Sweden, and the United Kingdom have chosen to make FGM prosecutable under a specific legal provision of their country’s statutes.²³⁰ However, implementation of these statutes is not always strictly enforced. For example, research related to FGM prosecution in Belgium found no evidence of any police records, prosecution, child protection or criminal court interventions with regard to FGM.²³¹ What this entails is that individuals do not find it necessary to report suspected cases to the police.²³² Most FGM practicing communities also choose to conduct this procedure in secrecy.²³³ For instance, the United Kingdom has criminalized FGM for thirty years, yet the first prosecution did not happen until 2014.²³⁴ In fact, since 2003, anyone taking a child out of the United Kingdom to “be cut” faces fourteen years in prison, but there has yet to be a single conviction. The closest incident was related to an individual accused of carrying out FGM on a five-week old baby, but the case did not advance because according to the police, there was “insufficient evidence to proceed.”²³⁵

Despite the variety of efforts of anti-FGM programs, the lack of enforcement remains an issue because it is difficult to apply international law to a domestic setting.²³⁶ One of the shortcomings states face in regulating FGM in immigrant populations is lack of successful monitoring mechanisms, weak implementation programs, and lack of community awareness of the dangers of the procedure.²³⁷ An unspoken problem is that survivors of FGM hoping to prosecute their

²²⁷ Sue Lloyd-Roberts, *Migrants from Europe Bringing Girls to Tolerant Britain for Genital Mutilation*, INDEPENDENT (July 23, 2012), <http://www.independent.co.uk/news/uk/home-news/migrants-from-europe-bringing-girls-to-tolerant-britain-for-genital-mutilation-7965148.html>.

²²⁸ *Id.*

²²⁹ Willsher, *supra* note 209.

²³⁰ Els Leye et al., *An Analysis of the Implementation of Laws With Regard to Female Genital Mutilation in Europe*, 47 CRIME L. & SOC. CHANGE 1, 1 (2009), http://www.academia.edu/176577/An_analysis_of_the_implementation_of_laws_with_regard_to_female_genital_mutilation_in_Europe.

²³¹ *Id.* at 9.

²³² *Id.*

²³³ *Id.*

²³⁴ *Breakthrough: The UK Prosecutes Its First FGM Cases*, AHA FOUND. (Apr. 1, 2014), http://give.theahafoundation.org/blog-0/bid/159925/Breakthrough-The-UK-Prosecutes-Its-First-FGM-Cases#_ftn2.

²³⁵ Alexandra Topping & Mary Carson, *FGM Is Banned But Very Much Alive in the UK*, GUARDIAN (Feb. 6, 2014), <http://www.theguardian.com/society/2014/feb/06/female-genital-mutilation-foreign-crime-common-uk>.

²³⁶ *Id.*

²³⁷ *Id.*

circumcisers tend to be disempowered girls who lack social or legal resources to file official complaints.²³⁸ Moreover, since FGM tends to be a cultural tradition, many family members who witness this injustice tend to be bystanders who fear the repercussions of reporting FGM.²³⁹ Additionally, with bystanders, it is difficult to identify who should be subject to criminal liability, whether it is those who are instigators who encourage the cutting, or whether it is the individual who has actually inflicted the injury on the female.²⁴⁰

*C. Proposal to Consolidate the FGM Criminalization Statute and
Minnesota State Law on FGM*

The small legal and implementation victories of national and international organizations over the years should be minute steps towards future modifications in both policy and the law. In terms of enacting a federal statute banning FGM, the most effective solution will be a combination of Minnesota State criminal law with the FGM Criminalization Statute (18 U.S.C. § 116), supplemented by European-influenced public policy and social reforms. The reason why Minnesota remains the focus of this proposal is because the state is home to the largest population of Somali immigrants and refugees who have been or currently are subject to the highest percentage of FGM. A new federal law, influenced by Minnesota state law, could set precedent for all immigrant populations who would see the stringent steps taken to minimize the harm associated with FGM. The ultimate goal is to minimize and ultimately eradicate the practice of FGM entirely.

1. Mandatory Sentencing

The first way to make modifications is by enacting stricter penalties for violation of the federal law on FGM: (1) regardless of whether the females are under the age of eighteen; and, (2) for an imprisonment period greater than five years. With the current federal law, the federal court system allows federal judges to use their discretion to make a determination on sentencing.²⁴¹ Usually, prior statutes passed by Congress are used as a “source of advice” to influence the judge’s sentencing decisions.²⁴² However, because there is a lack of legislative history and jurisprudence on FGM issues, federal penalties should be determined by looking at other sentencing decisions. For the majority of the states that have criminalized FGM, most prison sentences are greater than five years, and if they are

²³⁸ Dexter Dias, Felicity Gerry & Hilary Burrage, *10 Reasons why Our FGM Law Has Failed and 10 Ways to Improve It*, GUARDIAN (Feb. 7, 2014), <http://www.theguardian.com/commentisfree/2014/feb/07/fgm-female-genital-mutilation-prosecutions-law-failed>.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *How Cases Move Through Federal Courts: Criminal Cases*, FED. JUDICIAL CTR., <http://www.fjc.gov/federal/courts.nsf/autoframe!openform&nav=menu1&page=/federal/courts.nsf/page/> (last visited Jan. 12, 2015).

²⁴² *Id.*

not, there is an extraordinarily high fine.²⁴³ For instance, Oregon's sentencing guidelines make FGM a class B felony, impose an imprisonment sentence for up to ten years or a fine of \$250,000.²⁴⁴ Imposing such high penalties places potential perpetrators on notice of the dangers of conducting this procedure on females. Although there is not known record of prosecution of FGM in Minnesota yet (despite having over 13,000 victims), Minnesota also considers FGM a felony, offering the most rigid penalty for violation of its law, with imprisonment for up to life or a fine.²⁴⁵

As a result, a proposed act, "Protection of Female Genital Mutilation Victims Act of 2016" that includes stricter sentencing can be as follows:

(a) Except as provided above, whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person *regardless of age* shall be *deemed a felony and accordingly fined under this title or imprisoned for up to life, or both fined and imprisoned.*

2. Limited Defenses

Furthermore, the federal law should contain explicit statutory language that eliminates all forms of defenses, including, but not limited to, parental, religious, cultural customs, or unexplained medical defenses. The language could mirror the examples of Delaware and Minnesota state laws that eliminate consent as a defense, by stating that "it is not a defense to a violation that the conduct described in subsection (a) of this section above as a matter of religion, cultural, personal or tribal custom, ritual or standard practice."²⁴⁶ Accordingly, the statutory language of 18 U.S.C. § 116 should read:

3. (c) In applying subsection (b)(1), no account shall be taken of the effect on the person on whom the operation is to be performed of any belief on the part of that person, or any other person, that the operation is required as a matter of custom or ritual, *or standard practice, or that the individual, if a minor, on whom it is performed or the minor's parent or legal guardian consented to the procedure. It is not a defense to a violation that the conduct described in subsection (a) of this section is a result of parental, religious, cultural, unjustified medical reason or other unsupported assertion.*²⁴⁷

²⁴³ *Female Genital Mutilation (FGM) in the United States*, *supra* note 21.

²⁴⁴ *Female Genital Mutilation (FGM) Statues in the United States & United Kingdom*, AHA FOUND. (2010), <http://www.theahafoundation.org/pdf/FGMLAWSFINA.pdf>.

²⁴⁵ *Female Genital Mutilation (FGM) in the United States*, *supra* note 21.

²⁴⁶ *E.g.*, DEL. CODE ANN. tit. 11, § 780(c) (1996) (eliminating consent as a defense); MINN. STAT. § 609.2245(1) (1996) (stating that consent is no defense); N.Y. PENAL LAW § 130.85 (McKinney 1998) (eliminating consent based on custom or ritual as a defense); TENN. CODE ANN. § 39-13-110(a) (1996) (indicating that consent is no defense); WIS. STAT. ANN. § 146.35(4)(a) (1997) (prohibiting consent as a defense).

²⁴⁷ *See* 18 U.S.C. § 116 (2012) (emphasis added).

Lastly, it is apparent from France's model that its success is partly due to it being the first country in the world to hold parents who have allowed their daughters to undergo FGM to be legally accountable, as well as those individuals who perform the procedure.²⁴⁸ The United States should mirror the French federal law to prosecute parents of the victims (as child abuse) or individuals with knowledge of the FGM procedure.²⁴⁹ Somalian immigrants, like many immigrant populations practicing FGM carry with them their traditions when they relocate to the United States; consequently, parents who either give birth to children in the United States or immigrate with them are likely to subject their daughters to FGM, thus committing the felony of child abuse.²⁵⁰

Nahid Toubia, director of Rainbo, an organization that protects the human rights of women and children, characterizes FGM as a form of child abuse modeled after the Prohibition of Female Circumcision Act of 1985, passed in the United Kingdom.²⁵¹ Anyone acting as an "accomplice" to performance of FGM, whether this takes the form of requesting the procedure, assisting, advising, or procuring support for anyone else in carrying out the procedure, should be punished under the law, even if the punishment is less for accomplices than it is for the actual *excisor*. The important thing is to punish those who could have reduced or eliminated the harm.²⁵²

D. Policy Reform and Public Health Initiatives on FGM

Policy reform and public health initiatives in the overall movement towards eradicating FGM are important to consider. Educational reforms are an area of FGM legislation that should not be overlooked because there is an inherent importance in raising awareness and educating communities about what FGM

²⁴⁸ Rasmussen, *supra* note 175, at 949.

²⁴⁹ Leyla Hussein, *Female Genital Mutilation is Child Abuse. We are Failing Young British Girls*, GUARDIAN (Nov. 5, 2013), <http://www.theguardian.com/commentisfree/2013/nov/05/female-genital-mutilation-fgm-child-abuse-british-girls> (discussing how the Tackling Female Genital Mutilation in the UK report launched in the House of Commons treats FGM as a safeguard, child abuse issue). See also *Female Genital Mutilation Cases Should be Child Abuse: Report*, HUFFINGTON POST (Nov. 5, 2013), http://www.huffingtonpost.com/2013/11/06/fgm-child-abuse-report_n_4221191.html (discussing how medical professionals are urged to treat patients subjected to FGM as child abuse victims).

²⁵⁰ Federal Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106(g) (2012). The Act defines child abuse and neglect as: "Any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation; or an act or failure to act which presents an imminent risk of serious harm." *Id.*

²⁵¹ NAHID TOUBIA, *FEMALE GENITAL MUTILATION: A CALL FOR GLOBAL ACTION* 48 (1995) (discussing an approach that involves health professionals working together to ensure that children are supported and kept safe within family networks). If a family is identified as "at risk", the midwife, other health professionals and advocacy workers have a responsibility to ensure that the woman is safe. *Id.* See also Amanda Cardenas, Note, *Female Circumcision: The Road to Change*, 26 SYRACUSE J. INT'L L. & COM. 291, 306 (1999) (discussing how Rainbo is successful in part because it takes the "outsider" perspective and breaks through the "insiders" through various programs).

²⁵² *Criminalization of Aiding and Abetting the Performance of FGM*, UN WOMEN (2012), <http://www.endvawnow.org/en/articles/707-criminalization-of-aiding-and-abetting-the-performance-of-fgm.html>. Note that the legislation should clearly state that the victim herself cannot be identified as an accomplice. See *id.*

entails and what can be done individually and collectively to fight against FGM. In many of the communities in which FGM is performed, the women and girls undergoing these procedures have little say in the matter.²⁵³ In lieu of a lack of educational resources, many times local figures of power such as community leaders, religious figures, and “professional” circumcisers uphold the practice based on their positions in the social hierarchies.²⁵⁴ The women often succumb to what their elders advise them to do and hope that their future husbands or male figures in their lives will respect them once they are aware that their wives or daughters have “been cut.”²⁵⁵

One solution is to gain an understanding in the deeply rooted cultural, religious beliefs of practitioners, and then creating programs that incorporate solutions based on these beliefs.²⁵⁶ The *Innocenti Digest*, a compilation created by the UNICEF International Child Development Centre, details six necessary elements of a successful implementation programs towards curbing FGM.²⁵⁷ These steps include: (1) a “non-coercive and non-judgmental approach;” (2) community awareness that FGM causes harm; (3) a collective decision to abandon FGM by the village as a whole; (4) an “explicit, public affirmation on the part of communities of their collective commitment to abandon FGM”; (5) the ability of communities to spread their decision to abandon FGM; and lastly, (6) an “environment that enables and supports change.”²⁵⁸ A successful anti-FGM employs as many of these key elements as possible.²⁵⁹

A successful implementation method that embodies two key ingredients: a legal scheme and an execution process that works together to foster human rights, community awareness, public declarations, and communication among communities through a legal framework.²⁶⁰ One example of this approach is Tostan, an international non-governmental organization founded in the United States in 1991 and operating primarily in Senegal,²⁶¹ which utilizes a holistic approach to work with communities to discuss the health consequences for female genital mutilation and raise awareness to make progress towards realizing the inherent dangers of the practice.²⁶²

²⁵³ Topping et al., *supra* note 235; *see also* Dias et al., *supra* note 238.

²⁵⁴ *Myths and Justifications for the Perpetuation of FGM*, AFRICAN-WOMEN.ORG, <http://www.african-women.org/FGM/myths.php> (last visited Jan. 12, 2015) (discussing how the role of religious leaders in FGM intervention strategies at the local level is indispensable since they are the sole interpreters of the scriptures as their words as religious leaders carry heavy weight in rural communities).

²⁵⁵ *Id.*

²⁵⁶ Cardenas, *supra* note 251, at 302.

²⁵⁷ Rasmussen, *supra* note 175, at 966-67.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Dignity for All*, TOSTAN.ORG, <http://www.tostan.org/female-genital-cutting> (last visited Jan. 6, 2015).

²⁶² Rasmussen, *supra* note 175, at 964.

However, despite having a framework to inspire anti-FGM programs, many communities will refuse to deviate from this practice due to century-old traditions, and as a result there are multiple public health initiatives that need to be considered.²⁶³ A number of professionals with extensive research experience stressed the importance of reducing the harm of FGM when total abandonment is not possible, by allowing health workers to perform the procedure in a hygienic environment.²⁶⁴ In fact, a WHO's study demonstrates that 18% of all girls in countries from which data is available are cut by health professionals.²⁶⁵ Performance of FGM by health professionals is intended to reduce the harm and "cut" females without causing permanent, unnecessary tissue damage.²⁶⁶ This is of course not to say that health professionals should promote, advocate, or support the dispersion of FGM, but in communities that will refuse to eradicate the practice, performance by health professionals is most hygienically and medically prudent.

The National Society for the Prevention of Cruelty to Child ("NSPCC") in Britain launched a 24-hour helpline whose objective is to report concerns about a child's safety to skilled counselors.²⁶⁷ Lisa Harker, the NSPCC's head of strategy states,

in one of the most significant developments in efforts to combat FGM in recent years, the helpline will provide a means to tackle this form of complex and secretive abuse: We hope that this (helpline) will prove to be the tipping point that will stop this barbaric abuse of children.²⁶⁸

Specially trained advisors and counselors staff the 24-hour anonymous helpline, but are obligated to release information to the police or social services that could help protect a child.²⁶⁹ Similarly, the United States Department of Justice does maintain an anonymous hotline and resources for anyone who believes they are at risk of FGM, have undergone FGM, have information about someone who is performing FGM in the U.S., or knows someone who may be at risk here or outside the U.S.²⁷⁰ This hotline would be a safe option and resource, and a part of the solution of permanently eliminating FGM, but more people need to be aware of the hotline and need to utilize the resource.

²⁶³ *In-depth: Razor's Edge-the Controversy of Female Genital Mutilation*, IRIN (Mar. 1, 2005), <http://www.irinnews.org/in-depth/62462/15/razor-s-edge-the-controversy-of-female-genital-mutilation>.

²⁶⁴ Gele et al., *supra* note 57.

²⁶⁵ WORLD HEALTH ORG., WHO/RHR/10.9, GLOBAL STRATEGY TO STOP HEALTH-CARE PROVIDERS FROM PERFORMING FEMALE GENITAL MUTILATION 3 (2010), http://apps.who.int/iris/bitstream/10665/70264/1/WHO_RHR_10.9_eng.pdf.

²⁶⁶ Gele et al., *supra* note 57.

²⁶⁷ *Report Abuse*, NSPCC.ORG, <http://www.nspcc.org.uk/what-you-can-do/report-abuse/> (last visited Jan. 12, 2015).

²⁶⁸ Emma Batha, *UK Gets FGM Hotline to Tackle "Barbaric Child Abuse"*, THOMSON REUTERS FOUND. (June 24, 2013), <http://www.trust.org/item/20130623202034-xuwey?view=print>.

²⁶⁹ *Id.*

²⁷⁰ *Female Genital Mutilation or Cutting (FGM/C)*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/humanitarian/female-genital-mutilation-or-cutting-fgmc> (last visited Jan. 12, 2015).

Lastly, political intervention can be a fruitful advancement towards solving the global FGM issue. Many politicians now have established platforms that encompass crucial women's rights and human rights issues. For instance, former Secretary of State, and current Democratic Presidential candidate Hillary Clinton has long been an advocate of anti-FGM movement, even stating how "female genital mutilation was a crime against humankind and must be stopped."²⁷¹ Clinton has even spoken out on several different occasions against FGM while attending a conference in Senegal, which influenced Senegalese administration to criminalize FGM going forward.²⁷² The purpose in creating political urgency is to evoke a need to participate and be part of the movement, in whatever way possible, steps that we are all entitled and qualified to do.

CONCLUSION

At its core, female circumcision is a rigorous procedure inflicted upon innocent young girls and women stemming from cultural, religious, social, and traditional roots. This practice remains prevalent primarily in underdeveloped countries abroad, in regions in Africa and the Middle East, yet is dispersed throughout the United States as a result of immigrant influx from practicing countries. Somalia, statistically, remains at the forefront of highest prevalence of FGM. Though drafters of state legislation and federal law 18 U.S.C. § 116 intended to curb FGM, the objective for the ultimate ban in the United States simply cannot be fulfilled because of inherent flaws in the statutory language and sentencing provisions. A persuasive framework for addressing FGM involves crafting legislation that combines elements of Minnesota State Criminal Law (the most stringent of criminal provisions outlawing FGM), as well as components of the European approach. This proposal is entitled Protection of Female Genital Mutilation Victims Act of 2016 and should offer stringent criminal penalties to those individuals who are involved with instigating the procedure or performing it. This legislative proposal will make a positive impact towards first helping Somali immigrants who remain the most affected immigrant population and would set a precedent for other countries, as well as the remaining states in the U.S., to enact legislation to eliminate FGM permanently.

However, simply to be passive and leave the solution in the hands of legislators and lawmakers is not enough, because it is also our individual civic duty to be part of the movement and to advocate for ways to help those individuals who have been harmed by FGM.

²⁷¹ Cynthia J. Wood, *International Crisis: Female Genital Mutilation*, AM. DIPL. (2015), http://www.unc.edu/depts/diplomat/item/2015/0106/ca/wood_fgm.html.

²⁷² *Id.*

