

Cultural Culprits

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In 2007, Olivia Nabalwala, a Ugandan national, sought political asylum in Minnesota on the grounds of sexual orientation and social group membership.¹ Nabalwala alleged that her parents and extended family were outraged by her lesbian sexual orientation and arranged for her to be raped *en famille* to convert her into a heterosexual woman.² In 2006, Khalid Adem, a 30-year-old Ethiopian immigrant, was convicted of genitally mutilating his two-year-old daughter, Amirah.³ Although Adem was convicted under Georgia's child battery statute, the practice of female genital cutting has been criminalized by federal statute in the United States since 1996.⁴ Consonant with the U.S.'s condemnatory stance toward the practice of female genital cutting in African⁵ and Asian countries,

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1. Nabalwala v. Gonzales, 481 F.3d 1115, 1117 (8th Cir. 2007).

2. *Id.*

3. State v. Adem, No. 04-B-1291-5 (Gwinnett County Super. Ct. Nov. 2, 2006).

4. 18 U.S.C. § 116 (2006); 22 U.S.C. § 262K-2 (2006). For commentary on the Female Genital Mutilation Act, see Erika Sussman, *Contending with Culture: An Analysis of the Female Genital Mutilation Act of 1996*, 31 CORNELL INT'L L.J. 193 (1998). For a review of other human rights instruments to bring tort claims against FGM in U.S. courts, see Adam Karp, *Genitoris in the Global Context: Female Genital Mutilation as a Tort under the Alien Tort Claims Act, the Torture Victim Protection Act, and the Foreign Sovereign Immunities Act*, 18 WOMEN'S RTS. L. REP. 315 (1997).

5. Female genital cutting is for the most part practiced in Africa, although it is found in communities in India, Malaysia, the Arabian Peninsula and Indonesia, and among resettled refugee and immigrant communities within Europe and North America. Rogaia Mustafa Abusharaf, *Introduction: The Custom in Question*, in FEMALE CIRCUMCISION: MULTICULTURAL PERSPECTIVES 1, 3 (Rogaia Mustafa Abusharaf ed., 2006). I have not seen any asylum cases brought by Asian women. In the context of asylum litigation and

U.S. immigration authorities also view individual opposition to female genital cutting⁶ as a potential ground for political asylum to young women who seek refuge in this country.⁷ In 1996, Fauziya Kassindja⁸ was granted political asylum based on her fear of genital mutilation and resistance to an arranged marriage with an older wealthy man.⁹ Most recently, a US court (after waffling on the issue of whether past female genital mutilation constituted an ongoing harm¹⁰ on par with forced sterilization), granted asylum to three Guinean women

international eradication campaigns, the focus is on African women and girls. However, the singular focus on Africa may be changing. In early 2008, reporter Nicholas Birch alerted readers to the prevalence of female genital cutting in Northern Iraq among Kurds. See Nicholas Birch, *An End to Female Genital Cutting?*, TIME, Jan. 4, 2008, <http://www.time.com/time/world/article/0,8599,1700191,00.html>.

6. My use of “female genital cutting” is intended to be as bland and clinically accurate as possible, given the polemical nature of the labeling of circumcision, the diversity in the forms of genital modification, and my unfamiliarity with the subtleties of African nomenclature for the practice beyond *irua* and *tahur*. I follow Christine Walley’s observation that all existing usages are embedded within binary perspectives: “*circumcision* signaling relativistic tolerance and *mutilation* implying moral outrage.” Christine Walley, *Searching for ‘Voices’: Feminism, Anthropology, and the Global Debate over Female Genital Operations*, 12 CULTURAL ANTHROPOLOGY 405, 408 (1997). The issue of labeling has been exhaustively contested in the literature. The attitudes one demonstrates toward the practice of female genital cutting are premised on whether one uses “mutilation,” “circumcision,” “cutting,” “surgeries,” or “modification.” Within the U.S. court system, no such subtleties are embraced. As Judge Reinhardt querulously objected in *Mohammed v. Gonzalez*, 400 F. 3d 785, 794 n.2 (9th Cir. 2005), “We see no need for using initials rather than the full three word phrase. We are short neither of paper or ink. If it has any effect, it serves only to dull the senses and minimize the barbaric nature of the practice.” Quite reasonably, African women have been offended by the labeling of their genitalia as “mutilated.” As Fuumbai Ahmadu has recently urged,

While I do not deny the freedom of anti-FGM campaigners to attempt to dissuade women to abandon a practice they perceive as harmful or morally objectionable, I must stress that there ought to be some respect and sensitivity to Sierra Leonean women and our culture. . . . For those Sierra Leonean women who see themselves and wish to define their genitalia as ‘mutilated’ they are welcome to do so in private or among those who are like-minded. . . .

Fuumbai Ahmadu, *Hurray for Bondo Women in Kailahun*, THE PATRIOTIC VANGUARD, Mar. 13, 2008, http://www.thepatrioticvanguard.com/article.php?id_article=2434.

7. See, e.g., American Immigration Lawyers Association, INS Asylum Gender Guidelines Fact Sheet, May 26, 1995, <http://www.aiala.org/content/default.aspx?docid=13813> (stating that “the INS is joining the United Nations and Canada in recognizing that women may experience discrimination unique to their gender and that is [sic] some instances, such discrimination can meet the standards for refugee status”).
8. Kassindja’s name appears in all official documents with the phonetic spelling Kasinga. Kassindja later corrected the spelling in her autobiography, FAUZIYA KASSINDJA & LAYLI MILLER BASHIR, *DO THEY HEAR YOU WHEN YOU CRY?* (1998).
9. *In Re Fauziya Kasinga*, 21 I. & N. Dec. 357, 366 (B.I.A. 1996) (holding that female genital mutilation constitutes persecution within the meaning of the Act and constitutes “persecution on account of membership in a particular social group”).
10. *Mohammed v. Gonzalez*, 400 F. 3d 785 (9th Cir. 2005). Cf. *Hassan v. Gonzalez*, 484 F.3d 513 (8th Cir. 2007); *Olowo v. Ashcroft*, 368 F. 3d 692, 698 (7th Cir. 2004); *Ofori v. Ashcroft*, 354 F. 3d 609 (7th Cir. 2003); *In Re A.-T.-*, 24 I. & N. Dec. 296 (B.I.A. 2007) (distinguishing these holdings from *Kasinga* and *Mohammed* because the applicants had already undergone FGM, while recognizing that FGM constitutes a continuing harm for purposes of asylum according to *Mohammed*). On the contradictory interpretations with respect to FGM as a one-time or continuing harm for statutory purposes, see Valena Beety,

based on their experience of female genital cutting.¹¹ Despite their differences, in these cases “culture”—particularly “African culture”—is on trial in US courtrooms. This culture is sweepingly condemned as primordial, misogynistic, homophobic—capable of inflicting unspeakable harms *on one’s own children*. Such modes of viewing “African culture” are uncritically reproduced in documentaries and other popular media¹² and richly illustrate the ways in which ideas about culture—like race—consolidate certain institutional practices.¹³

This article examines the ways in which questions of agency, victimization, and cultural essentialism are framed and acted upon in U.S. asylum adjudication and cultural defense cases¹⁴ specifically and in international human rights law more broadly. My examination of “culture as culprit” is informed by larger concerns of institutionalizing feminist social activism in international modes of governance raised recently by Janet Halley and other feminist scholars with specific regard to asylum law and jurisprudence.¹⁵ Cultural and gendered essentialisms have become entrenched components of asylum law and advocacy, even as feminist activists claim victories in gender-based asylum cases. Asylum law and advocacy are structurally dependent on victimhood and rescue, and essentialism is key to the construction of “savages-victims-saviors.”¹⁶

Reframing Asylum Standards for Mutilated Women, 11 J. GENDER RACE & JUST. 239 (2008).

11. *Bah v. Mukasey*, 281 F. App’x 26 (2d Cir. 2008).
12. See, e.g., *WARRIOR MARKS* (Women Make Movies 1993).
13. On the notion of Africa as exemplifying “absolute otherness,” see ACHILLE MBEMBE, *ON THE POSTCOLONY 2* (A.M. Berrett trans., University of California Press 2001).
14. The cultural defense uses evidence of normatively acceptable behavior within an individual’s cultural context to mitigate or absolve the criminal charges leveled against her. To date, no jurisdiction has formally codified the cultural defense in a manner similar to the battered women’s defense, nor has there been any attempt to incorporate the cultural defense into the Model Penal Code, but given the increasing immigration within the United States, the availability of the cultural defense raises important questions about immigrants’ rights within a multicultural society. The literature on the subject is considerable. See ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* (2004); Daina Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053 (1994); Elaine Chiu, *Culture as Justification, not Excuse*, 43 AM. CRIM. L. REV. 1317 (2006); Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals’ Dilemma*, 96 COLUM. L. REV. 1093 (1996); Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911 (2007); Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36 (1995); Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311 (1991); James Sing, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 YALE L.J. 1845 (1999); Sharan K. Suri, *A Matter of Principle and Consistency: Understanding the Battered Woman and Cultural Defenses*, 7 MICH. J. GENDER & L. 107, 107-138 (2000); Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89 (2000); Jeremy Waldron, *One Law for All? The Logic of Cultural Accommodation*, 59 WASH. & LEE L. REV. 3 (2002); Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986).
15. Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 336 (2006).
16. See Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42

I began writing about the cultural defense to think critically about the issue of cultural essentialism in asylum law.¹⁷ The cultural defense enables newly-arrived immigrants, ethnic minorities, and indigenous groups within pluralist liberal democracies to submit evidence about practices and beliefs commonly held by other members of their society that either explain or mitigate the reprehensible and/or criminal character of their actions.¹⁸ Cultural persecution claims indict certain practices that are commonly found within a geographic region, nation, or ethnic group as inflicting harm on an individual that rises to the level of a specifically targeted human rights violation.¹⁹ The cultural defense is justified, its adherents claim, because culture is an irreducible social good and an intrinsic feature of individual identity that should not be surrendered in the assimilationist imperative.²⁰ However, factored into the equation of culture as a social good are other foundational tenets of liberalism: autonomy, egalitarianism, and democratic participation.²¹ Despite the accommodations granted with regard to language, religious practices, education of children, and medical treatment, when it comes to practices like female genital cutting feminist critics denounce the cultural defense as a “euphemism for restricting or denying women’s rights.”²² Proponents of female genital cutting may hold culturally endorsed motivations for modifying the genitalia of young girls, and their actions may be legal within their natal communities, but within liberal multicultural societies—and the global institutions in which they wield power—female genital cutting represents the limit of liberal tolerance for cultural diversity.²³

HARV. INT’L L.J. 201 (2001).

17. The racist effects of essentialism in asylum claims have been analyzed by ANTHONY GOOD, *ANTHROPOLOGY AND EXPERTISE IN THE ASYLUM COURTS* (2007); Susan Akram, *Orientalism Revisited in Asylum and Refugee Claims*, 12 INT’L J. REFUGEE L. 7 (2000); Jennifer Coffman, *Producing FGM in US Courts: Political Asylum in the Post-Kasinga Era*, 53 AFRICA TODAY 58 (2006); Gaurav Desai, *Isn’t Multiculturalism Bad for Asylum?*, 41 TEX. INT’L L.J. 507 (2006); Corinne Kratz, *Circumcision Debates and Asylum Cases: Intersecting Arenas, Contested Values, and Tangled Webs*, in *ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES* 309 (Richard Shweder, Martha Minow & Hazel Rose Markus eds., 2002); Hope Lewis & Isabelle Gunning, *Cleaning Our Own House: “Exotic” and Familiar Human Rights Violations*, 4 BUFF. HUM. RTS. L. REV. 123 (1998); Charles Piot, *Representing Africa in the Kasinga Asylum Case*, in *FEMALE CIRCUMCISION: MULTICULTURAL PERSPECTIVES*, *supra* note 5 at 224; Kamala Visweswaran, *Gendered States: Rethinking Culture as a Site of South Asian Human Rights Work*, 26 HUM. RTS. Q. 483 (2004).
18. See sources cited *supra* note 14.
19. See, e.g., Karp, *supra* note 4 (arguing that FGM constitutes privately inflicted torture on a massive scale backed by state (in)action).
20. WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995); Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* (Amy Gutmann ed., 1994) (building on John Rawls’s theory of social goods, which are liberty, opportunity, income, and wealth, to make a case for cultural recognition as intrinsic to one’s self-worth, autonomy, and individual dignity).
21. SARAH SONG, *JUSTICE, GENDER AND THE POLITICS OF MULTICULTURALISM* (2007).
22. Susan Moller Okin, *Feminism, Women’s Human Rights and Cultural Difference* 13 *HYPATIA* 32, 36 (1998).
23. Audrey Macklin, *The Double-Edged Sword: Using the Criminal Law Against Female*

Cultural defense claims are routinely asserted in less notorious civil cases (e.g., child custody and divorce²⁴ and employment discrimination cases²⁵), but they tend to assume greater visibility in criminal cases where gendered practices are suspect: marriage by capture,²⁶ child-parent suicide,²⁷ spousal murder,²⁸ under-age betrothal and marriage,²⁹ and statutory rape.³⁰ As Judge Pincus asserted in his acquittal of the defendant in *People v. Chen*,

Were this crime committed by the defendant as someone who was born and raised in America, or born elsewhere but primarily raised in America, even in the Chinese American community, the Court would have been constrained to find the defendant guilty of manslaughter in the first degree. But, this Court cannot ignore . . . the very cogent forceful testimony of Doctor Pasternak, who is, *perhaps, the greatest expert in America on China and interfamilial relationships* . . . [Chen] was the product of his culture . . . the culture was never an excuse, but it is something that made him crack more easily. That was the factor, the cracking factor.³¹

The invocation of “culture” as a “cracking factor” or as a justification for criminal behavior in U.S. courtrooms reinforces an already widely held assumption about the incommensurability of gender equality and non-western cultures—i.e., that non-western cultures are inherently more sexist, brutal,

Genital Mutilation in Canada, in FEMALE CIRCUMCISION: MULTICULTURAL PERSPECTIVES, *supra* note 5, at 207, 208.

24. See D. MARIANNE BLAIR & MERLE WEINER, FAMILY LAW IN THE WORLD COMMUNITY: CASES, MATERIALS & PROBLEMS IN COMPARATIVE AND INTERNATIONAL FAMILY LAW 289-306, 553-76 (2003); ANN LAQUER ESTIN & BARBARA STARK, GLOBAL ISSUES IN FAMILY LAW (2007); Ann Laquer Estin, *Families and Children in International Law*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 271 (2002).
25. *Rogers v. Am. Airlines, Inc.*, 527 F. Supp 229 (S.D.N.Y. 1981); *Mitchell v. Marriott*, No-88-151 P (CN), (Washington, D.C. Office of Human Rights, Apr. 25, 1988), *discussed in* RENTELN, *supra* note 14, at 144-45.
26. *People v. Moua*, No. 315972-0 (Fresno County Super. Ct. Feb. 7, 1985), *discussed in* SONG, *supra* note 21, at 87, 89-93.
27. *People v. Kimura*, No. A-091133 (L.A. Super. Ct. Nov. 21, 1985), *discussed in* RENTELN, *supra* note 14, at 25.
28. *People v. Chen*, No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988), *discussed in* SONG, *supra* note 21, at 93-100. For an analysis of a British case in which the cultural defense and the battered woman syndrome were used to secure the acquittal of a South Asian woman who murdered her, see Miriam Ticktin, *Selling Suffering in the Courtroom and Marketplace: An Analysis of the Autobiography of Kiranjit Ahluwalia*, POL. & LEGAL ANTHROPOLOGY REV., May 1999, at 24.
29. Leti Volpp compares the various cultural interpretations attributed to underage marriages arranged by an Iraqi resettled refugee father (Al-Saidy) and a Mormon father (Compton). See *generally* Volpp, *supra* note 14. With particular regard to the *People v. Chen* case, see Volpp, *(Mis)Identifying Culture: Asian Women and the Cultural Defense*, 17 HARV. WOMEN'S L.J. 57, 64-77 (1994).
30. *Alhaji Mohamed v. Knott*, [1969] 1 Q.B. 1, *discussed in* RENTELN *supra* note 14, at 116.
31. Record at 301-02, *People v. Dong Lu Chen*, No. 87-7774 (N.Y. Sup. Ct. 1988) (emphasis added). As Volpp observed, Boris Pasternak's credentials as the most eminent U.S. expert in Chinese kinship relations were totally unsubstantiated by his modest anthropological reputation. Volpp, *supra* note 29, at 70.

illiberal, and intolerant—and that these attitudes and practices are better left behind in the “old country” than in the land of the free.³² Thus, as an initial step, the ideas of culture should be challenged. Culture is wielded in the courtroom as a monolithic, explicable construct that motivates people to “crack”—or act in certain ways. Unlike religion, or the even more ephemeral “values” which have achieved an a priori level of questioning as a means of explaining behavior, culture is fixed.

The furor over the admissibility of cultural evidence in the courtroom (where all too frequently the victims are women and children) raises a set of concerns about internal power dynamics within ethnic minority or immigrant groups that potentially pit multiculturalists against feminists.³³ Beyond gender concerns, the cultural defense is also assailed on constitutional grounds. Liberal feminists and social contractarians worry that the availability of a cultural defense violates equal protection principles,³⁴ given that everyone (theoretically) is entitled to the same constellation of rights under American law. Of course, one might reasonably argue that equal protection is largely illusory for immigrants in the criminal law, where class, wealth, national origin, English language proficiency, and phenotype make a profound difference in access to competent legal services (let alone justice). However, it is the interplay of the cultural norms of immigrants and refugees with American law that illuminates the tension between equal application of laws to crimes and the crimes in a larger context of cultural intelligibility.

I have no abiding interest or intellectual investment in “defending the cultural defense” beyond reiterating that law is a deeply ingrained cultural construct that is “raced” and “gendered” even more so by the immigrant status of the defendant.³⁵ Moreover, as Sarah Song and Cynthia Lee have both argued, the cultural defense is most successfully deployed when it reaffirms gender-biased and racist assumptions of mainstream liberal societies.³⁶ Thus, my appropriation of the cultural defense departs in important ways from its conventional scholarly

32. See Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 7 (Joshua Cohen et al. eds., 1999). It should be noted that prominent liberal theorists like Will Kymlicka and Charles Taylor who defend multiculturalism do not address the rights of immigrants (whom they regard as having voluntarily relinquished their cultural rights—a tenuous proposition), but rather their concern is with the cultural rights of ethnic minorities and First Nations within larger, dominant monolingual societies.

33. See, e.g., Coleman, *supra* note 14, at 1129-35; Maguigan, *supra* note 14, at 41.

34. Coleman, *supra* note 14, at 1135-44; see also Waldron, *supra* note 14, at 10.

35. Indeed, detractors from the cultural defense base their objections on the grounds of what the law should be rather than what it is in clinging to the laudable ideal that the criminal law should be neutrally applied without regard to race, gender, age, class, and national origin. See Maguigan, *supra* note 14, at 38-40. The equal protection objections are consistently raised in constitutional arguments, and are well documented and debated in the scholarly literature and the policy/legislative arena. See Coleman, *supra* note 14, at 1148-50.

36. SONG, *supra* note 21, at 95-100 (arguing that the cultural defense often builds on gender-biased “heat of passion” and provocation defenses); Lee, *supra* note 14 (using Derrick Bell’s convergence theory to highlight the reiteration of ideas of “black rage,” Asian passivity, and the “foreigner’s” inscrutable cultural habits in cultural defense cases).

focus. The cultural defense cases address crimes that are committed *within* the United States, while those fearing persecution seek protection from harms committed *outside* of the country. Nevertheless, both kinds of cases animate the same conceptual framework about “culture” as a monolithic set of norms and practices that prompt actions and behaviors that Americans denounce as deviant or persecutory. My interest here is twofold: first, to point out the ways that essentialist ideas frame and usher in cultural persecution and cultural defense claims; and second, to explore the ways that both of these genres of cases partake of and fortify a broader global imperialist narrative.

The issue of cultural essentialism in asylum jurisprudence inevitably entailed a renewed look at female genital cutting—a task I approached with considerable reluctance. In this post-CEDAW³⁷, Cairo+14, Beijing+15, gender-mainstreamed moment, it seemed unduly regressive to examine an issue that had defined the terrain of international women’s human rights for over two decades. As many analysts of female genital cutting have observed, the practice of female genital cutting has been exhaustively debated because it encompasses so many thorny issues in human rights: “[T]he sacredness of the family; women’s rights as human rights; state obligations in the ‘private’ sphere; human sexuality; . . . the West’s view of people in other cultures as ‘exotic Others’; postmodern colonialism; and cultural autonomy.”³⁸ Yet, the institutionalization of feminist inspired human rights that was evidenced by (increasingly) favorable asylum decisions based on FGM,³⁹ forced marriage,⁴⁰ state-sponsored coercive sterilization,⁴¹ sexual orientation,⁴² and domestic violence applications⁴³ was

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37. The Committee on the Elimination of Discrimination Against Women, the body that oversees the implementation of CEDAW by its signatory countries, has explicitly targeted the eradication of female circumcision as one of its primary goals within the UN. See U.N. Comm. on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination Against Women (Ninth Session)*, ¶ 438, U.N. Doc. A/45/38 (June 6, 1990).
 38. ELIZABETH HEGER BOYLE, FEMALE GENITAL CUTTING: CULTURAL CONFLICT IN THE GLOBAL COMMUNITY 19 (2005).
 39. *Mohammed v. Gonzales*, 400 F.3d 785, 796-97 (9th Cir. 2005); *Niang v. Gonzales*, 422 F.3d 1187, 1201 (10th Cir. 2005); *Abay v. Ashcroft*, 368 F.3d 634, 638 (6th Cir. 2004); *Nwaokolo v. INS*, 314 F.3d 303, 308 (7th Cir. 2002); *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999) (uncovered as fraudulent claim in 2000); *In re Fauziya Kasinga*, 21 I. & N. Dec. 357, 367-68 (B.I.A. 1996). *But see In re A.-T.-*, 24 I. & N. Dec. 296 (B.I.A. 2007); *Bah v. Mukasey*, 281 F. App’x 26 (2d Cir. 2008) (overturning *In re A.-T.-*). For an invaluable annotated bibliography of gender-based asylum claims, see E. Dana Neacsu, *Gender-Based Persecution as a Basis for Asylum: An Annotated Bibliography, 1993-2002*, 95 LAW LIBR. J. 191 (2003). The Center for Refugee and Gender Studies also maintains a database of gender-based asylum claims. See Center for Refugee and Gender Studies, <http://cgrs.uchastings.edu> (last visited Oct. 16, 2009).
 40. *Hong Ying Gao v. Gonzales*, 440 F.3d 62 (2d Cir. 2006).
 41. The B.I.A. held in *In re Chang* that forced sterilization did not constitute persecution on account of any of the protected grounds, but it also urged Congress to issue legislation regarding China’s one couple-one child policy. “Whether [China’s population control policies] are such that the immigration laws should be amended to provide temporary or permanent relief from deportation to all individuals who face the possibility of forced sterilization as part of a country’s population control program is a matter for Congress to

intriguing, given the intense moral condemnation and counter-accusations of human rights imperialism that had characterized the debates around these issues during the 1980s and 1990s.⁴⁴ The Pyrrhic victory won by feminist asylum advocates had to be tempered by a sobering realization that the approval of these claims was firmly embedded within a cultural essentialist framework—one which trafficked very easily in signs of victimization and racialization.⁴⁵

Feminist scholars and advocates have voiced concerns with regard to the insufficient questioning about the issue of cultural essentialism in portrayals of gender-based persecution and its infelicitous appropriation as a discursive tool to legitimate our various twenty-first century wars (terror, fundamentalism, drugs,

resolve legislatively.” *In re Chang*, 20 I. & N. Dec. 38, 47 (B.I.A. 1989). Congress subsequently reformed the statutory definition of a refugee in 1996 to include those who had brought asylum claims based on forced sterilization and abortion, and authorized a grant of up to 1,000 approvals per year. The amended act stipulates a finding of persecution on the grounds of political opinion if an applicant for asylum has been forced to submit to coercive fertility measures, or if an applicant has refused to submit to these measures. 8 U.S.C. § 1101 or INA 101(a)(42) (2006). For representative cases, see *In re Y-T-L*, 23 I. & N. Dec. 601 (B.I.A. 2003).

42. See, e.g., *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005); *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000); *In re Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990); *In re Tenorio*, No. A72 093 558 (EOIR Immigration Court, July 26, 1993). Cf. *Mockeviciene v. Attorney Gen.*, No. 06-12334, 2007 WL 1827836 (11th Cir. June 26, 2007) (denying appeal based on sexual orientation holding that *Mockeviciene’s* alleged detentions, beating, and illegal eviction did not rise to the level of persecution on account of social group membership); *Paredes v. Attorney Gen.*, No. 06-13944, 2007 WL 634424 (11th Cir. Mar. 5, 2007) (denying claim of HIV positive petitioner and citizen of Venezuela based on that country’s affirmative steps toward protecting homosexual and HIV positive individuals). Victoria Neilson notes that since *Toboso-Alfonso*, more than 2,000 sexual orientation asylum applications have been filed. See Victoria Neilson, *Homosexual or Female? Applying Gender Based Asylum Jurisprudence to Lesbian Asylum Claims*, 16 STAN. L. & POL’Y REV. 417, 418 n.5 (2005).
43. Favorable grants of asylum are much less frequent in domestic violence cases. The rationale given for the U.S. courts’ reluctance to grant asylum for cases of domestic violence ranges from conventional floodgates arguments to line-drawing at state sponsored vis-à-vis private violence. See generally Haley Schaffer, Note, *Domestic Violence and Asylum in the United States: In re R-A-*, 95 NW. U. L. REV. 779 (2001). Gregor Noll suggests that the United States’ own poor record on domestic violence makes it difficult to maintain a condemnatory stance toward other countries with similarly high rates of intimate battery. See Gregor Noll, *Asylum Claims and the Translation of Culture into Politics*, 41 TEX. INT’L L. J. 491, 495 (2006). Geopolitical concerns and *constructions of family* also factor into the approval of family violence claims; consider the grant of asylum to a young Moroccan woman fleeing an abusive extremist Muslim father, *In re S-A-*, 22 I. & N. Dec. 1328 (B.I.A. 2000), vis-à-vis the repeated denials of Guatemalan petitioner, Rodi Alvarado’s application for asylum based on the spousal abuse she suffered, *In re R-A-*, 22 I. & N. Dec. 906 (B.I.A. 1999).
44. Leslye Amede Obiora summarizes the strength of Abusharaf’s collection as one that investigates and features a series of abandonment programs undertaken by Africans for Africans that builds on a tradition of dissent, subversion, and historical modifications to the practice of genital cutting. See Obiora, *Afterword: Safe Harbor and Homage*, in FEMALE CIRCUMCISION: MULTICULTURAL PERSPECTIVES, *supra* note 5, at 239. Implicit in Obiora’s description of past resistance is a refutation of the idea that African women were sado-masochists who needed prompting by an international outcry to confront the ravages of mutilation. *Id.* at 238.
45. See sources cited *supra* note 17.

crime, trafficking, AIDS).⁴⁶ Indeed, while the institutionalization of women's rights as human rights authorizes the approval of gender-based asylum claims—and should be rightfully claimed as a success of the feminist movement—it should also be treated with a healthy degree of skepticism, caution, and ambivalence.⁴⁷

Janet Halley has coined the term “governance feminism”⁴⁸ to describe the institutionalization of feminist human rights in legal settings, observing that, as feminism “accedes to governance . . . [it] disappears into legal technologies that we recognize under other rubrics (universalism, American hegemony, technocratic best practices . . .).”⁴⁹ These are precisely the unintended effects of realist bargains that imperil global anti-racist politics. In the spirit of feminist praxis, critical scholars have probed the implications of broader feminist incursions in international human rights—whether in terms of wartime rape,⁵⁰ gender and transitional justice,⁵¹ domestic violence law reforms,⁵² femicide,⁵³ sexual and reproductive health,⁵⁴ or the associated dynamics of migration and trafficking for sex work and domestic work.⁵⁵ The impressive achievements of

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46. Inderpal Grewal, *Transnational America: Feminisms, Diasporas, Neoliberalisms* (2005); Lila Abu-Lughod, *Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and its Others*, 104 AM. ANTHROPOLOGIST 783 (2002); Jacqueline Bhaba, *Border Rights and Rites: Generalisations, Stereotypes and Gendered Migration*, in *WOMEN AND IMMIGRATION LAW: NEW VARIATIONS ON CLASSICAL FEMINIST THEMES 15* (Sarah van Walsum & Thomas Spijkerboer eds., 2006); Visweswaran, *supra* note 17.
47. See, e.g., Karen Engle, “Calling in the Troops”: *The Uneasy Relationship Among Women's Rights, Human Rights, and Humanitarian Intervention*, 20 HARV. HUM. RTS. J. 189 (2007); Halley et al., *supra* note 15; Mats Utas, *Victimcy, Girlfriending, Soldiering: Tactic Agency in a Young Woman's Social Navigation of the Liberian War Zone*, 78 ANTHROPOLOGICAL Q. 403 (2005); Note, *Saving Amina Lawal: Human Rights Symbolism and the Dangers of Colonialism*, 117 HARV. L. REV. 2365 (2004); Julietta Hua, *Trafficking Women's Human Rights*, paper presented at Annual Meeting of Association for the Study of Law, Culture & Humanities, Berkeley, CA, Mar. 28, 2008.
48. According to Halley, “[governance feminism] define[s] a wrong happening to women, [and] then either criminalize[s] [that wrong] with the goal of eliminating it, or decriminalize[s] women's participation in the [“wrong”] with the goal of liberating them in it.” Halley et al., *supra* note 15, at 420.
49. See *id.* at 422.
50. Karen Engle, *Feminism and its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT'L L. 778 (2005); Vesna Kesic, *A Response to Catharine Mackinnon's Article “Turning Rape into Pornography: Postmodern Genocide,”* 5 HASTINGS WOMEN'S L. J. 267 (1994); Vasuki Nesiiah, *From Berlin to Bonn to Baghdad: A Space for Infinite Justice*, 17 HARV. HUM. RTS. J. 75 (2004).
51. Kimberly Theidon, *Gender in Transition: Common Sense, Women and War*, 6 J. HUM. RTS. 453 (2007).
52. Michelle McKinley, *Emancipatory Politics and Rebellious Practices: Incorporating Global Human Rights in Family Violence Laws in Peru*, 39 N.Y.U. J. INT'L L. & POL. 75 (2006).
53. See Deborah Weissman, *The Political Economy of Violence: Toward and Understanding of the Gender-Based Murders of Ciudad Juárez*, 30 N.C. J. INT'L L. & COM. REG. 795 (2005).
54. See Michelle McKinley, *Planning Other Families: Negotiating Population and Identity Politics in the Peruvian Amazon*, 10 IDENTITIES: GLOBAL STUD. IN POL. & CULTURE 30 (2003).
55. DENNIS ALTMAN, *GLOBAL SEX* (2001); NICOLE CONSTABLE, *MAID TO ORDER IN HONG KONG: STORIES OF FILIPINA WORKERS* (1997); GENDER, MIGRATION AND DOMESTIC

the feminist movement in inserting these issues into the security-sovereignist realm of international human rights and foreign policy—indeed their simultaneity in international institutional settings—provides the evidence that women’s rights *are* human rights even if global sisterhood is a negligible proposition.⁵⁶ But the charges of ethnocentrism, hyper-criminalization, and elite/white feminist monopolization within international law scholarship, advocacy, and institutional practice still smolder beneath the surface. Inderpal Grewal and Caren Kaplan have denounced the “hegemony of first world women’s groups to affect women’s lives worldwide by creating a ‘common agenda’ that produced women as their subjects and as a target population.”⁵⁷ Pragmatic feminists fight the battles in the rarefied ambience of global governance, often impatient with and offended by the interrogation of their motives and representational practices by more cautious or critical analysts. In the context of female genital cutting, the rationale is that *mutilation* is a violative act, particularly when performed on young girls incapable of consent. Even though the strident tenor of the anti-FGM activists has become somewhat muted

SERVICE (Janet Henshall Momsen ed., 1999); GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION (Kemala Kempadoo & Joe Doezema eds., 1998); GLOBAL WOMAN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2003); ARLIE RUSSELL HOCHSCHILD, THE COMMERCIALIZATION OF INTIMATE LIFE: NOTES FROM HOME AND WORK (2003); PIERETTE HONDAGNEU-SOTELO, DOMÉSTICA: IMMIGRANT WORKERS CLEANING AND CARING IN THE SHADOWS OF AFFLUENCE (2001); KEMALA KEMPADOO, SUN, SEX AND GOLD: TOURISM AND SEX WORK IN THE CARIBBEAN (1999); RHACEL SALAZAR PARREÑAS, SERVANTS OF GLOBALIZATION: WOMEN, MIGRATION, AND DOMESTIC WORK (2001); Rutvica Andrijasevic, *Problematising Trafficking for the Sex Sector: A Case of Eastern European Women in the EU*, in WOMEN AND IMMIGRATION LAW: NEW VARIATIONS ON CLASSICAL FEMINIST THEMES 86 (Sarah van Walsum & Thomas Spijkerboer eds., 2007); Michelle McKinley, *Moral Geographies and Intimate Spaces*, 9 OR. REV. INT’L L. 29 (2008); Chitraporn Vanaspong, *A Portrait of the Lady: The Portrayal of Thailand and its Prostitutes in the International Media*, in TRANSNATIONAL PROSTITUTION: CHANGING GLOBAL PATTERNS 139, 144 (S. Thorbek & B. Pattanaik eds., 2002).

56. On the androcentric nature of the security-sovereignty paradigm in public international law, see Hilary Charlesworth, *Feminist Critiques of International Law and their Critics*, THIRD WORLD LEGAL STUD. 1 (1994) and Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 68 (1993).
57. GREWAL, *supra* note 46, at 143; *see also* Chandra Mohanty, *Feminist Encounters: Locating the Politics of Experience*, in DESTABILISING THEORY, CONTEMPORARY FEMINIST DEBATES 74 (Michèle Barrett & Anne Phillips eds., 1992) (critiquing Robin Morgan’s assertions of global sisterhood for its generalizing about “woman’s experience” across cultures, its inattention to contemporary imperialism, and Morgan’s lack of self-reflexivity in her analysis of international female bonding). Indeed, the early years of second-wave feminist internationalism were marked by the patronizing attitude of First World activists who assumed that Third World women were in need of benevolent protection, and made no attempt to distinguish between the foreign policies of the U.S. and Europe and the politics of the international feminist movement itself. This led to an impasse between First and Third World feminism, which contributed to the emergence of a rich discursive tradition of post-colonial feminism, but also led to inevitable intransigence in global networking that was often co-opted by conservative nationalism and further isolationism and a reluctance to theorize globally about women’s condition. *See* Okin, *supra* note 22, and response by Uma Narayan, *Essence of Culture and a Sense of History: A Feminist Critique of Cultural Essentialism*, 13 HYPATIA 86 (1998).

by dialogue with African activists and a chastened awareness of post-coloniality, most activists rely unflinchingly upon a universalist human rights paradigm to guide their eradication campaigns against the constellation of practices labeled *female genital mutilation or female genital torture*.⁵⁸

My sense (as a former lowercase g-feminist) is that while g-feminists need more critical social theory and less self-righteous unreflective action, there is fertile collaboration underway amongst the halls of governance, academia, and activist organizations.⁵⁹ While it may seem as if uppercase G-feminists are a monolithic group of handmaidens in servitude to Bush-Blair hegemony, in fact, g-feminists are as diverse as their academic counterparts, and their institutional contexts are similarly varied.⁶⁰ On one hand it is true that all g-feminists are involved in an encompassing biopolitical enterprise “producing technologies of welfare within regimes of disciplinary and sovereign power.”⁶¹ This enterprise is co-optable through institutionalization (*a.k.a.* “mainstreaming” in the technocratic parlance of global governance).⁶² On the other hand, many g-feminists work in a zone of engagement described as the grassroots, at the margins of well-funded, prestigious institutions, often scrambling to find funding for riskier projects that are more aligned with the transformative goals of empowerment, social justice, and gender equity. Positionality is intrinsic to the ways that g-feminists view their work and their imbrication in larger projects that shuttle between hegemonic governance, grassroots advocacy, and institutional insurrection. None of this suggests that g-feminism is (or should be) exempt from critical interrogation, or will (or should) remain comfortable with its too-easy accommodation of technocracy, bio-power, and propensity to duplicate hierarchies. Partly because of the calls to “study up,” we see “insider” scholarship that is directed at studying the process of governance—which includes ethnographies of the governors and not just the governed.⁶³

58. On nomenclature and polemics, see *supra* note 6.

59. See, e.g., Carla Makhlof Obermeyer, *The Health Consequences of Female Circumcision: Science, Advocacy, and Standards of Evidence*, 17 MED. ANTHROPOLOGY Q. 394 (2003) (using the methods of demography, epidemiology, and anthropology to analyze and gather data on the health effects of female genital cutting, and problematizing those data that do not conform to prevalent views of disproportionate health-associated risks that support the goals of anti-FGM advocates).

60. My attempt to distinguish among uppercase feminists in IGOs and state governments from lowercase “grassroots” governance feminists is designed to urge a more nuanced view of the interests and identities of actors involved in the global feminist movement.

61. GREWAL, *supra* note 46, at 125.

62. For a critical review of gender mainstreaming and its deradicalization of gendered claims of inequality in global governance, see Hilary Charlesworth, *Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 HARV. HUM. RTS. J. 1 (2005).

63. See, e.g., ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT* (1999); JAMES FERGUSON, *THE ANTI-POLITICS MACHINE: ‘DEVELOPMENT,’ DEPOLITICIZATION, AND BUREAUCRATIC POWER IN LESOTHO* (1990); GRAHAM HANCOCK, *LORDS OF POVERTY: THE POWER, PRESTIGE, AND CORRUPTION OF THE INTERNATIONAL AID BUSINESS* (1989); JENNIFER HYNDMAN, *MANAGING DISPLACEMENT: REFUGEES AND THE POLITICS OF HUMANITARIANISM* (2000); James Ferguson & Akil Gupta, *Spatializing States: Toward an*

Although two decades of mainstreaming is too short a period for any sustained analysis of social change, I agree with Halley that we should be vigilant against the annexation of feminist projects, in their plurality, and mindful of the power and knowledge effects that are part of the institutionalization process no matter how sincere, participatory, and empowering their agents profess to be. Halley has suggested that feminists take a break from feminism⁶⁴—perhaps even see other people. I do not mean that feminist theorists and advocates should inhabit each other's roles in the anthropological sense. I do mean a mutually supportive collaboration that acknowledges disagreements but is fundamentally committed to the contentions of feminist praxis.⁶⁵ As Nancy Fraser has written in the context of feminist social theory more broadly, "critical social theory frames its research program and its conceptual framework with an eye to the aims and activities of those oppositional social movements with which it has a partisan, though not uncritical, identification."⁶⁶

I begin this article by providing the longer historical backdrop of colonial interventions, which, as Gayatri Spivak famously stated, were devised "to save brown women from brown men."⁶⁷ Positioned within a maternalist imperial paradigm,⁶⁸ these interventions have assumed a cyclical pattern in the ecology of

Ethnography of Governmentality, 29 AM. ETHNOLOGIST 981 (2002). For a critical study of the intellectually uninteresting field of "WID/WAD/GAD," see Celestine Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 HARV. INT'L L. J. 381 (2000). See also Kerry Rittich, *Distributive Justice and the World Bank: The Pursuit of Gender Equity in the Context of Market Reform*, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS (Veijo Heistaneen & Jean Marc Coicaud eds., 2001).

64. JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2008).
65. See Obermeyer, *supra* note 59, at 396.
66. NANCY FRASER, *UNRULY PRACTICES, POWER, DISCOURSE AND GENDER IN CONTEMPORARY SOCIAL THEORY* 113 (1989).
67. Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271, 296 (Cary Nelson & Lawrence Grossberg eds., 1988). On the rhetorical appeal of women's vulnerability within the British Empire, see SUDIR CHANDRA, *ENSLAVED DAUGHTERS: COLONIALISM, LAW AND WOMEN'S RIGHTS* (1998); Lata Mani, *Cultural Theory, Colonial Texts: Reading Eyewitness Accounts of Widow Burning*, in *CULTURAL STUDIES* 392, 404 (Lawrence Grossberg, Cary Nelson & Paula Treichler eds., 1992).
68. Susan Pedersen describes maternalism as "women's activism over empire" that developed a framework for action "whereby educated and usually well-to-do women, drawing equally on their faith in women's superior moral and motherly capacities and on a long experience of single-sex philanthropic work, sought to protect those women and children who were presumed to be less fortunate or more vulnerable." Susan Pedersen, *The Maternalist Moment in British Colonial Policy: The Controversy over 'Child Slavery' in Hong Kong 1917-1941*, 171 *PAST AND PRESENT* 161, 180 (2001). With particular regard to the suffragist and abolitionist movements as historical precursors to contemporary transnational feminist advocacy, see MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998). On maternalism as an imperial strategy in India, see also Barbara Ramusack, *Cultural Missionaries, Maternal Imperialists, Feminist Allies: British Women Activists in India 1865-1945*, 13 *WOMEN'S STUDIES INT'L F.* 309 (1990). For maternalist imperial campaigns against female circumcision in Sudan and

colonial and post-colonial human rights, framing the vulnerability of women's position as a legitimizing strategy for continued occupation and the broader violations of the rights of the population.⁶⁹ Not all maternalist interventions are covered here; that would be insane, if not tediously grim, and many other post-colonial scholars have exhaustively and beautifully covered the subject.⁷⁰ Rather, I focus my historical analysis on the unsuccessful British interventions in Kenya to eradicate female genital cutting beginning in 1906. I indulge in a longer comparative analysis to reiterate the repetitive framing of "culture as culprit" and the calls for rescue within the inherited normative and political universes of asylum, refugee, and humanitarian law. And I regard asylum—the discretionary grant of sovereign protection—as the paradigmatic example of post-colonial rescue and the contemporary extension of the maternal imperialist project.⁷¹ Asylum has always been a tool of foreign policy,⁷² and with the

Kenya respectively, see JANICE BODDY, *CIVILIZING WOMEN: BRITISH CRUSADES IN COLONIAL SUDAN* (2007) and LYNN THOMAS, *POLITICS OF THE WOMB: WOMEN, REPRODUCTION AND THE STATE IN KENYA* (2003). For a review of maternalism coupled with medical hygiene as a vibrant area of research within the field of colonial studies, see GENDER, SEXUALITY AND COLONIAL MODERNITIES (Antoinette Burton ed., 1999). On maternalism and class reproduction and surveillance in Britain in the early 1900s, see Anna Davin, *Imperialism and Motherhood*, in *TENSIONS OF EMPIRE: COLONIAL CULTURES IN A BOURGEOIS WORLD* 87 (Frederick Cooper & Ann Stoler eds., 1997) [hereinafter *TENSIONS OF EMPIRE*].

69. THOMAS, *supra* note 68; Lynn Thomas, *Ngaitana (I Will Circumcise Myself): Lessons from Colonial Campaigns to Ban Excision in Meru, Kenya*, in *FEMALE "CIRCUMCISION": CULTURE, CONTROVERSY, AND CHANGE*, 129 (Bettina Shell-Duncan and Ylva Herlund eds., 2000) [hereinafter Thomas, *Ngaitana*]; Deborah Weissman, *The Human Rights Dilemma: Rethinking the Humanitarian Project*, 35 *COLUM. HUM. RTS. L. REV.* 259 (2004); Note, *Saving Amina Lawal*, *supra* note 47.
70. The following is a selective review of maternal imperial interventions: for foot binding, see Dorothy Ko, *The Body as Attire: The Shifting Meanings of Footbinding in 17th Century China*, 8 *J. WOMEN'S HIST.* 8 (1997); for child slavery, see Sarah Paddle, *The Limits of Sympathy: International Feminists and the Chinese 'Slave Girl' Campaigns of the 1920s & 1930s*, 4 *J. COLONIALISM & COLONIAL HIST.* 1 (2003) and Pedersen, *supra* note 68; for *suttee* or Hindu widow immolation, see Lata Mani, *supra* note 67 and Lata Mani, *Contentious Traditions: The Debate on Sati in Colonial India*, *CULTURAL CRITIQUE*, Fall 1987, 119; for child marriage, see CHANDRA, *supra* note 67; for female genital cutting see BODDY, *supra* note 68; for breastfeeding, see Nancy Rose Hunt, 'La bébé en brousse' [babies in the bush]: *European Women, African Birth Spacing and Colonial Intervention in Breast Feeding in the Belgian Congo*, in *TENSIONS OF EMPIRE*, *supra* note 68, at 287; for abortion, see Lynn Thomas, *Imperial Concerns and "Women's Affairs" State Efforts to Regulate Clitoridectomy and Eradicate Abortion in Meru Kenya c. 1910-1950*, 39 *J. AFRICAN HIST.* 121 (1998).
71. By equating the current asylum regime with colonial rescue, I do not imply legal continuities in remedies. Although female circumcision was raised as an issue of concern in Whitehall and among humanitarian allies in the 1920s, it would have been inconceivable to make it a basis for protection before the feminist dismantling of the androcentric refugee regime in the mid-1990s. The idea of asylum for gender-based persecution would have been difficult to formulate, let alone agree upon a century ago. Colonial rescue was clearly a localized "field" within the Dual mandate, orchestrated from London, but implemented by those physically present within the territories.
72. On asylum and refugee policy as a foreign policy tool during the Cold War, see GIL LOESCHER & JOHN SCANLAN, *CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF OPEN DOOR 1945-PRESENT* (1986). On the human rights implications of statelessness and

insertion of feminist concerns into international lawmaking and governance, female genital cutting became a logical target for inclusion in the pantheon of human rights violations against which women could seek protection. Thus, I next examine the anti-FGM campaign during the 1980s that culminated in the passage of the Federal Female Genital Mutilation Act of 1996⁷³ as an instance of feminist reshaping of American foreign policy and asylum law. The grant of asylum for past or feared female genital cutting is critical to the credibility of the U.S.'s condemnatory and punitive stance against the practice.⁷⁴ The Female Genital Mutilation Act conditions the receipt of foreign aid among debt-strapped African nations upon the adoption of criminal sanctions against female genital cutting and the implementation of behavioral modification programs intended to eradicate the practice.⁷⁵ In response to these pressures, African governments adopted a number of reforms designed to reduce, eradicate, and criminalize the practice of female genital cutting in the 1990s. In the final section, I look in greater depth at asylum law and its deployment of culture in the adjudication of contemporary asylum cases that claim culture as a basis for persecution. My point there is to illustrate the ways in which culture is increasingly used as a proxy for race in the developing jurisprudence of refugee and asylum law. Ironically, the politically correct substitution of culture for race in the contemporary period is eerily reminiscent of the erstwhile colonial justifications for outlawing customs "repugnant to natural justice and morality."⁷⁶ In sum, this article explores the intersection of asylum claims based on "cultural persecution," which ultimately encodes a racialized view of culture, with humanistic and ethnographic approaches to the processes of identity formation, alterity, and membership.

Instead of creating a triumphalist account of asylum decisions upholding the formulation of improbable social groups,⁷⁷ I explore the workings of the

asylum seekers, see John Edwards, *Asylum Seekers and Human Rights*, 7 RES PUBLICA 159 (2001).

73. 18 U.S.C. § 116; 22 U.S.C. § 262K-2.

74. See Editorial, *Not so Harsh on Refugees*, N.Y. TIMES, Apr. 22, 1996, at A12 (stating that a positive decision in the pending Kasinga case would send a powerful message to strengthen congressional efforts to criminalize female genital mutilation).

75. Sussman, *supra* note 4, at 244-50.

76. *Tabitha Chiduku v. Chidano*, 1922 S.R. 55, at 58; INS Counsel recommended adopting a new standard of repugnancy that "shock[ed] the conscience" of the society from which asylum is sought to guide judges in adjudicating FGM claims. Kratz, *supra* note 17, at 324-25. For colonial jurisprudence elaborating the Repugnancy Clause, see Matiyenga & Mamire v. Chinamura, 1958 S.R.N. 829, at 832; *Tabitha Chiduku*, 1922 S.R. at 58; C.O. Akgampo, *A "Woman to Woman" Marriage and the Repugnancy Clause: A Case of Putting New Wine into Old Bottles*, 14 AFR. L. STUD. 87 (1977).

77. The 1951 Convention Relating to the Status of Refugees defines a refugee as any person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion is outside of the country of his nationality, and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country" Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. Persecution based on membership in a particular social group is a somewhat elastic concept and is the enumerated ground on which most gender-based and

administrative state in rendering the “legibility”⁷⁸ of cultural subjects through the adjudication of asylum claims alleging persecution based on cultural practices. My objective is to scrutinize the asylum process as a critical site for the production and deployment of culture as it relates to citizenship, state protection, and humanitarian intervention. As Gregor Noll has observed, culture and asylum “co-produce each other” throughout the legal proceedings with hearings, affidavits, and pleadings that are “culture creating” rather than merely “culture evaluating.”⁷⁹ Indeed, it is the administrative state, in the hands of bureaucrats, that both operationalizes and naturalizes “culture” through the decisions of immigration judges, interviewing asylum officers, consular officials, and a host of other low and mid-level agency workers within the asylum and refugee legal system. These bureaucrats are largely removed from the loftier conversations about rights and citizenship that occur among academic political philosophers, yet their decisions are critical to enforcing decisions about refugee and asylum status, and, by extension, the effective enjoyment of citizenship.⁸⁰

sexual orientation claims rely. See Kathleen Anderson, *Expanding & Redefining “Membership within a Particular Social Group”: Gender and Sexual Orientation Based Asylum*, 7 NEW ENG. INT’L. & COMP. L. ANN. 243 (2001); Peter Godfrey, *Defining the Social Group in Asylum Proceedings: The Expansion of the Social Group to Include a Broader Class of Refugees*, 3 J.L. & POL’Y 257 (1994); Melanie Randall, *Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution*, 25 HARV. WOMEN’S L.J. 281 (2002). Courts have combed the scant legislative history for guidance in applying the concept to the cases before them. The *travaux préparatoires* reveal that the drafters of the Convention intended the category as a flexible one. See ATLE GRAHLMADSEN, *THE STATUS OF THE REFUGEE IN INTERNATIONAL LAW* 219 (Vol. 1 1966). The definition in U.S. asylum jurisprudence is set out in *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985), where social group membership was deemed an “immutable status or condition.” Persecution was directed toward an individual on the basis of that immutable characteristic and could be either imputed or self-ascribed. Following *Acosta*, immigration courts rely on immutability to determine characteristics such as race, gender, or a prior elected position, status or condition, such as a shared experience like former military leadership or land ownership. *Id.* Because of the constant fear of being bound by too liberal an interpretation of the already broad category, courts seek to define the social group in very limited terms, while at the same time expanding immutability in the areas of sexual orientation and gender. Thus, in *Lukwago*, the appropriate social group was “children from Northern Uganda who have escaped from involuntary servitude after being abducted and enslaved by the LRA [Lord’s Resistance Army, a group of anti-government guerrillas].” *Lukwago v. Ashcroft*, 329 F.3d 157, 171 (3d Cir. 2003). In *Kasinga*, the social group was, “young women of the Tchambakunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.” *In re Kasinga*, 21 I. & N. Dec. 357, 358 (B.I.A. 1996). And in *Gomez-Zuluaga*, the petitioner’s membership in a particular social group was “[Colombian] women who have the shared past experience of relationships with military and police men.” *Gomez-Zuluaga v. Attorney Gen.*, 527 F.3d 330, 340 (3d Cir. 2008). As Charles Piot comments, ironically, because asylum law demands a social group analysis and because the government fears being inundated with claims from similarly situated petitioners, lawyers often invent a “social group” category that fits only the applicant herself. Piot, *supra* note 17, at 228.

78. See generally JAMES SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (1998). Scott explains legibility to refer to “arrang[ing] the population in ways that simplified the classic state functions.” *Id.* at 2.

79. See Noll, *supra* note 43, at 497.

80. For the bureaucratic production of “citizens” through the refugee resettlement process, see LYNN FUJIWARA, *MOTHERS WITHOUT CITIZENSHIP* (2008); AIWHA ONG, *BUDDHA IS*

To this end, the final section is a review of case transcripts, affidavits, and media coverage involving immigrants and asylum seekers in which “culture” is on trial. Among the cases I consider is the 2006 case of Khalid Adem, who, as mentioned previously, was convicted for cutting off his daughter’s clitoris with the aid of an unidentified man. Adem vociferously denied any role in the circumcision of his daughter, claiming the accusation was a result of a bitter fight with his ex-wife over the custody of the child. I compare *State v. Adem* with *In re Fauziya Kasinga*, the first successful FGM asylum case granted in 1996, situating the *Kasinga* decision as part of (indeed integral to) the impetus surrounding the passage of the Female Genital Mutilation Act of 1996.⁸¹

As I demonstrate in the final section of the article, the prosecutor’s focus in *Adem* was explicitly child battery and abuse, concertededly avoiding any discussion of the practice of circumcision in the African context. What the prosecution sought to establish was that no matter what you do “over there” (in Africa), here, circumcision was reprehensible child abuse and battery consistent with the criminal law and special protection accorded to children by the courts.⁸² Children as cultural asylees are particularly problematic in multicultural societies, as judges must balance the jurisprudential deference to parental rights with the legislature’s definition of traditional harmful practices.⁸³ Most criminal laws will penalize parents for willfully inflicting harm on their children, but the issue of criminality is difficult to determine when parents claim they are acting in their children’s best interest.⁸⁴

Although FGM has been criminalized by statute since 1996, *State v. Adem* is the first case involving a criminal conviction in a U.S. court. However, the

HIDING: REFUGEES, CITIZENSHIP, THE NEW AMERICA (2003).

81. Within the text of the Federal Female Genital Mutilation Act, the focus of concern is on children, particularly those of young age. Senator Paul Wellstone remarked, “[T]his mutilation is an horrific form of child abuse, and it is a human rights violation.” 140 CONG. REC. S14242-44 (Oct. 5, 1994) (statement of Sen. Paul Wellstone). The emphasis on children was expedient for the passage of the Act, given the concerns about the lack of consent and the respected Convention on the Rights of the Child that had not been acceded to by the United States and was a continuing source of humiliation in the human rights community. See Isabelle Gunning, *Female Genital Surgeries and Multicultural Feminism: The Ties that Bind; the Differences that Distance*, THIRD WORLD LEGAL STUD. 17, 30 (1994-1995).
82. Consideration of the cultural rationale for female genital cutting is explicitly forbidden by the Federal Female Genital Mutilation Act: “No account shall be taken of the effect on the person on whom the operation is 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.” 18 U.S.C. § 116(c) (2006).
83. See Peter Marguiles, *Children, Parents and Asylum*, 15 GEO. IMMIGR. L. J. 289 (2001-2002) (using the controversy over Elian Gonzalez’s return to his Cuban father to compare court intervention in ordering life-saving medical treatment over parental opposition, and in upholding asylum cases where one parent favors the genital cutting of his/her daughter over the other parent’s opposition). Marguiles juxtaposes the Court’s traditional deference to First Amendment religious objection that reflects the parents’ “right to raise children in a fashion that reflects their values” in the medical treatment cases with the judicial line drawn at genital cutting. *Id.* at 296. See also Jeremy Waldron, *How to Argue for a Universal Claim*, 30 COLUM. HUM. RTS. L. REV. 305 (1998-1999).
84. See RENTELN, *supra* note 14, at ch. 4.

scholarly attention to the issue of female genital cutting is extensive.⁸⁵ *Adem* and *Nabulwala* raise important questions for multicultural debates that voice concerns about the internal vulnerability of sub-groups—notably women, children, and sexual minorities *within* immigrant communities.⁸⁶ The varying uses of “culture” by feminists, universalists, and relativists (and the contested visions of “culture” that surface inside and outside of the courtroom) illuminates its multivalence. Nabulwala’s case is part of an emerging trend in asylum jurisprudence that narrowly recognizes persecution on the grounds of sexual orientation as it is linked with social group membership.⁸⁷ Sexual orientation cases like Nabulwala’s perform a related though distinct function to *Adem* or *Kasinga*. Extreme African homophobia, as opposed to diffident acceptance (don’t ask, don’t tell) distinguishes the United States as an enlightened, tolerant society vis-à-vis barbaric, intolerant Africa. Crackpot evangelical homophobia (of the Fred Phelps vintage) is still too marginal to de-center the genteel distaste of the heteronormative mainstream. As Wendy Brown notes:

In the mid-nineteenth through mid-twentieth centuries, the West imagined itself as standing for civilization against primitivism, and in the cold war years

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85. It would be nearly impossible to catalogue all the scholarship that has been devoted to female genital cutting in the past two decades. The following is a representative sample of the more oft-cited articles and books. FEMALE CIRCUMCISION: MULTICULTURAL PERSPECTIVES, *supra* note 5; BOYLE, *supra* note 38; FRAN HOSKEN, FEMALE SEXUAL MUTILATIONS: THE FACTS AND PROPOSALS FOR ACTION (1980); HANNY LIGHTFOOT-KLEIN, PRISONERS OF RITUAL: AN ODYSSEY INTO FEMALE GENITAL CIRCUMCISION IN AFRICA (1989); NAHID TOUBIA, FEMALE GENITAL MUTILATION: A CALL FOR GLOBAL ACTION (1993); Fuumbai Ahmadu, *Rites and Wrongs: An Insider/Outsider Reflects on Power and Excision, in FEMALE “CIRCUMCISION”*: CULTURE, CONTROVERSY, AND CHANGE 283 (Bettina Shell-Duncan & Ylva Hernlund, eds., 2000); Karen Engle, *Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, 26 NEW. ENG. L. REV. 1509 (1992); Isabelle Gunning, *Arrogant Perception, World Traveling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189 (1991-1992); Hope Lewis, *Between Irua and “Female Genital Mutilation”*: *Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995); Leslye Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign against Female Circumcision*, 47 CASE W. RES. L. REV. 275 (1997).
86. See AYELET SHACHAR, MULTICULTURAL JURISDICTIONS (2001); SONG, *supra* note 21; Waldron, *supra* note 14; Waldron, *supra* note 83 (using the examples of FGM and torture to identify baseline universals that elicit condemnation across cultures, and recognizing from an abstract point of view the culturally rooted endorsement of female genital mutilation).
87. For sexual orientation cases, see cases cited *supra* note 42. For an insightful analysis of sexual orientation and gender based asylum claims alleging private sphere persecution, see Neilson, *supra* note 42. Neilson argues that lesbians are more likely to face private sphere persecution like Nabulwala whereas gay men like Toboso-Alfonso are likely to suffer harm in the public sphere, particularly from police and the military and conform more closely to the Convention’s idea of persecution than lesbians. *Id.* at 420. In sexual orientation cases, the intent of the persecutor is clearly punitive; as such, it is distinguished from the “benign intent” of the genital cutting cases. See, e.g., *INS v. Pitcherskaia*, 118 F. 3d 641 (9th Cir. 1997) (rejecting the benign intent of the persecutors to reform/cure petitioner of her lesbian sexual orientation). Both genres of cases illustrate the complexities of private sphere violence, the difficulties in adducing the intent of the persecutor versus the effect on the petitioner, and how advocates have piggy-backed on the awareness of intimate violence to reorient the outcomes of gender-based and sexual orientation asylum claims.

for freedom against tyranny; now these two recent histories are merged in the warring figures of the free, the tolerant, and the civilized on one side, and the fundamentalist, the intolerant, and the barbaric on the other.⁸⁸

In another, somewhat unrelated vein, Bonnie Honig has pointed out the rejuvenating role that the “foreigner” plays in democratic debates.⁸⁹ Indeed, liberal democracy depends on new recruits to assuage doubts about persistent poverty and gendered and racialized inequalities among the domestic poor.⁹⁰ In the context of asylum and refugee protection, I argue that the claims brought by cultural refugees like Fauziya Kasinga,⁹¹ Olivia Nambulwala, and Salimatou Bah succeed because they appeal to the host nation’s normative ideals of citizenship, tolerance, and individual autonomy while reaffirming widely held ideas about the differences between “our society and theirs.”⁹² Women seeking refuge based on the cultural practices of their social group are racialized “others” whose rescue is effectuated without great monetary cost to the United States and with extraordinary political benefits. To paraphrase Achille Mbembe, Africa constitutes a powerful metaphor through which the West asserts its difference from the rest of the world—its apologetic concerns and its exclusionary and brutal practices towards others.⁹³

Let us take a minute to consider the case of Waris Dirie, an influential contemporary African anti-FGM campaigner. By her own account, Dirie lived among nomadic livestock herders, “without clocks or calendars,” in harmony with giraffes, lions, and zebras. Dirie is described by her biographers as having “disfigured feet from scars that she acquired trekking across the desert to escape from a forced marriage to a 60 year old man who bought her for the price of five camels.”⁹⁴ Thus we have the standard cast of characters in the dysfunctional African family: the predatory old man flush in cattle/camels/other appropriate

88. WENDY BROWN, REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE 6 (2006).

89. BONNIE HONIG, DEMOCRACY AND THE FOREIGNER (2001).

90. *Id.* See also Evelyn Nakano Glenn, *Citizenship and Inequality: Historical and Global Perspectives*, 47 SOC. PROBS. 1 (2000).

91. For a post-structuralist analysis of *Kasinga*, see Denise Ferreira da Silva, *Mapping Territories of Legality: An Exploratory Cartography of an Emerging Female Global Subject*, in CRITICAL BEINGS: LAW, NATION & THE GLOBAL SUBJECT 203 (Peter Fitzpatrick & Patricia Tuitt eds., 2004).

92. See Uma Narayan, *Undoing the “Package Picture” of Cultures*, 25 SIGNS 1083 (2000) (arguing that in their anxiety to avoid gender essentialism, First World feminists adopted culturally essentialist portrayals of women in “This or That Culture” with little or no recognition of the harm of such hegemonic representational categories and practices, concluding that the universal category of “woman” was improved only slightly).

93. MBEMBE, *supra* note 13, at 2.

94. Waris Dirie is the Somali model and activist who is the co-author of a series of books in which she describes her quest to eradicate female genital mutilation and her interviews with victims of FGM in Europe. See WARIS DIRIE, *DESERT CHILDREN* (2007); WARIS DIRIE & JEANNE D’HAEM, *DESERT DAWN* (2004); WARIS DIRIE & CATHLEEN MILLER, *DESERT FLOWER: THE EXTRAORDINARY JOURNEY OF A DESERT NOMAD* (1999). Her latest book is WARIS DIRIE, *LETTER TO MY MOTHER* (2007).

ruminants adding rapaciously to his wife-stock, the desperately poor and despotic father who exchanges his beautiful prepubescent virgin daughter with the perverted old man, and the mute mother defenseless under the yoke of patriarchal tradition. Yet, Patriarchal Despot and Beatific Mom have influential and well-placed family connections outside of their bucolic idyll, for Dirie's uncle secured an ambassadorial post in the Somali embassy in London.⁹⁵ At that point, Dirie fled to Mogadishu where she secured a passport (we assume now aided by clocks and calendars) and went to London to launch what appears to have been an extremely successful modeling and acting career.⁹⁶ Dirie presents herself as the exotic desert flower—rather than say, an insider critic of a misogynistic commercial fashion industry. Her latest book *Letter to My Mother* is couched in ethnographic banalities and “pop” psychology that shows a distancing between herself and her mother/culture, an acceptance and rebirth in a new culture—which is of course, liberal, tolerant, and advanced. At some level, Dirie is an African subject whom Mbembe refers to as always represented in a slightly “thinglike” and slightly human way,⁹⁷ which through a process of domestication and training can become almost human.

A strikingly similar level of objectification occurs in the courtroom during cultural persecution and cultural defense cases. Adem's trial court proceedings in fact begin with an introduction to the dysfunctional African family with the painstaking process of the court reporter and judge trying to pronounce and spell their impossible last names and places and countries of birth. When examining Fortunate Adem, the prosecutor asked: “For those of us who don't know our world geography . . . maybe you can help up us. South Africa is on—that's a country; correct? And it is part of a continent? What is the name of the continent? So the big continent has South Africa as one of its countries.”⁹⁸ Ms. Adem dutifully illuminated the prosecutor's geographic knowledge of Africa and identified her tribal affiliation as Sulu [sic]. When ascertaining the Adems' marital status, the prosecutor asked the defendant if it was true that he went “down there to Ethiopia with a bunch of women to get married to Fortunate.”⁹⁹

A review of these cases and their progeny highlight the ways that notions of culture are ossified and castigated in exchange for protection. Immigrant communities that are susceptible to surveillance and hostility are no more protected or welcome in the United States by exercising their right of exit. The legal system that granted relief to Salimatou Bah, Mariama Diallo, and Haby Diallo¹⁰⁰—three Guinean women awarded asylum based on their experience of

95. This is obviously a premium Foreign Service position for a Somali diplomat, exceeded in rank only by an ambassadorial post in Rome or Washington.

96. Dirie's biography is also available on the website of her Foundation. Waris Dirie Foundation, <http://www.waris-dirie-foundation.com> (last visited June 30, 2008).

97. See MBEMBE, *supra* note 13, at ch. 4.

98. Transcript of Record at 106, *State v. Adem*, No. 04-B-1291-4 (Gwinnett County Superior Court Oct. 23, 2006).

99. *Id.* at 172.

100. *Bah v. Mukasey*, 281 F. App'x 26 (2008).

genital cutting—also acquitted four officers *of all charges* in the death of Amadou Diallo, the male Guinean immigrant who was fired on forty-one times as he cowered, unarmed, in the entryway to his Bronx apartment building.¹⁰¹ These types of inconsistencies reaffirm Sherene Razack's observation that "while Muslim men have been the target of an intense policing, Muslim women have been singled out as needing protection from their violent and hyper-patriarchal men."¹⁰²

The right of exit celebrated by liberal discourse reifies the only options available under dominant views of culture—exit or silence—leaving little room for negotiation within immigrant communities. Ironically, deliberation—the hallmark of enlightened democratic practice—is not an option in these cases since it is presumed that reason is the exclusive property of liberal, tolerant, culturally temperate societies.¹⁰³ Corinne Kratz shows that media coverage of *Kasinga* and its progeny was devoid of any mention that the practice of circumcision was contested and debated within African nations, despite the fact that the widely publicized asylum cases animated discussions within the countries whose circumcising "cultural traditions" were pejoratively reviewed.¹⁰⁴ In all likelihood, if the media had mentioned the internal debates that occur in African societies and communities, it would imperil the claim that African people are cultural automatons incapable of rational reflection on their actions. Ironically, the need for asylum within the United States would be vitiated if high-incidence countries both adopted anti-genital cutting laws and proved modifications in the practice as a result of national policies and reflexive debate.¹⁰⁵

The asylum context brooks no ambivalent attachments: the realist logic is that people persecuted in one country seeking the protection of another simply do not deserve that protection if they demonstrate allegiance to the country (read: culture/religion) from which they flee. Protection is extended in exchange for *total* cultural repudiation. Given this scenario, the complex issues raised by balancing the needs of asylum clients for legal immigration status and protection with the goals of transformative anti-racist politics are implicit in the broader challenges of critically engaged, global feminist advocacy. Can the asylum process serve as an outlet that provides opportunities for dissent and undertakes

101. Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting are Acquitted of all charges*, N.Y. TIMES, Feb. 26, 2000, at A1, available at 2000 WLNR 3236832; Jonathon Wallace, *Amadou Diallo and Rudy Giuliani*, THE ETHICAL SPECTACLE, March 2000, <http://www.spectacle.org/0300/diallo.html>.

102. SHERENE RAZACK, CASTING OUT: THE EVICTION OF MUSLIMS FROM WESTERN LAW AND POLITICS 4 (2008).

103. Here I draw on Leti Volpp's insights that immigrants, orthodox religious communities, and ethnic minorities are portrayed as suffering from an "excess" of culture while white Protestant Americans (for example) are people without culture. See Leti Volpp, *Feminism versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1191-92 (2001).

104. Kratz, *supra* note 17, at 324.

105. Coffman, *supra* note 17, at 62.

localized cultural negotiations given the geopolitical disparities between asylee/refugee producing and resettlement countries? Can we separate the geopolitical tensions that underwrite the zeal with which lawmakers¹⁰⁶ and practitioners embrace these cases that highlight a gaping chasm between “our culture and theirs” (given the apocalyptic prediction of a clash of civilizations)? Seemingly besieged by Islamic fundamentalism and torn apart by divisive immigration debates, these cases act as a conduit for mainstream America’s cultural anxieties and (national) insecurities. As Leti Volpp has repeatedly shown, similar crimes are portrayed as cultural pathologies or individual aberrations depending on the ethnic status of the perpetrators.¹⁰⁷

The cases also highlight what Makau Mutua has called the need for “savages, victims and saviors” within the human rights movement.¹⁰⁸ Indeed, within conventional understandings of refugee and human rights law, the “savage slot,” filled by genocidal dictators, depends upon the stateless victim who then appeals to the West for rescue.¹⁰⁹ As with refugee law’s continued reliance on state sovereignty, asylum law still retains its commitment to state persecution; however, the jurisprudence has largely shifted from the totalitarian state as persecutor to the state as accomplice in persecution.¹¹⁰ In a sense, the positivist insistence on state-sponsored persecution for favorable asylum determinations is eroded not only by feminist insights about the slippery public/private dualism, but also by the eroding state itself. Today’s refugees and asylum seekers generally flee from Southern states characterized by their incapacity and economic non-viability, which render them evermore incapable of protection.¹¹¹ The causes of state failure (an unfortunately patronizing

106. Bi-partisan bills for expanding gender-based asylum claims for instance have been sponsored by Congressman Chris Smith (R-New Jersey) and Senator Sam Brownback (R-Kansas), whose feminist credentials are less than awe-inspiring. *See Senate Immigration Bill Passes, But Puts Refugees at Risk*, HUMAN RIGHTS FIRST, http://www.humanrightsfirst.org/asylum/asylum_12_reform.aspx (last visited Dec. 9, 2009); *Take Action to Protect Women Seeking Asylum: Restore Asylum for Those Subjected to Female Genital Cutting*, PHYSICIANS FOR HUMAN RIGHTS, <http://physiciansforhumanrights.org/asylum/board-of-immigration-letter.html> (last visited Dec. 9, 2009).

107. *See* Volpp, *supra* note 14, at 90.

108. *See* Mutua, *supra* note 16.

109. As Mutua notes, a similar anthropomorphic model exists in the human rights literature dealing with state behavior: the savage predatory state tortures its victim (civil society) and its rescue is effectuated by the liberal human rights movement. *Id.* at 202-04. For discussion on the ethnocentrism of civil society studies that privilege the Eurocentric historical experience of political agitation, see MAHMOOD MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* 13, 13-16 (1996).

110. Noll, *supra* note 43, at 495.

111. An in-depth analysis of the causes of state failure is far beyond the scope of this article. In the African context—where the term is generally applied—Achille Mbembe has written forcefully that state failure is as much a collaborative kleptocratic enterprise between former colonial powers and post-Independence elites than is generally assumed. *See* Mbembe, *On Politics as a Form of Expenditure*, in *LAW AND DISORDER IN THE POSTCOLONY* 299 (Jean Comaroff & John Comaroff eds., 2006).

neologism) are varied and complex,¹¹² but they do pose challenges for the classification of the type of harms from which refugees and asylum seekers seek protection. The 1969 OAU Refugee Convention¹¹³ expressly attributes refugee status to anyone who, “owing to external aggression, occupation, foreign domination or events seriously disturbing public order . . . is compelled to leave his habitual place of residence in order to seek refuge in another place”¹¹⁴ This expanded definition of a refugee is also adopted in the Cartagena Declaration on Refugees¹¹⁵—both regional instruments that recognize the geopolitical conditions producing refugee flows. It is important to note however, that neither the OAU Convention nor the Cartagena Declaration has a gendered component—rather they are instruments of a neo-colonial (and anti-imperial) struggle that reflect their drafters’ attribution of particular kinds of threats to state security.¹¹⁶

More than two decades ago, Hilary Charlesworth and Christine Chinkin noted in their critique of the gendered dimension of international law that,

Women’s lives are generally conducted within the sphere deemed outside the scope of international law, indeed also often outside the ambit of “private” (national) law.

. . . In the major human rights treaties, rights are defined according to what men fear will happen to them, those harms against which they seek guarantees. The primacy traditionally given to civil and political rights by Western international lawyers and philosophers is directed toward protection for men within their public life—their relationship with government. . . . [T]hese are not the harms from which women most need protection.¹¹⁷

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112. Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT’L L. & POL’Y 903 (1997).
113. Organization of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45, available at <http://www.unhcr.org/refworld/docid/3ae6b36018.html> [hereinafter OAU Convention]. The OAU Convention has been hailed by many scholars as embracing a more expansive definition of “refugee” than the 1951 Convention, see Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, and also for its elaboration of the right to seek and obtain asylum in other countries. By far the most celebrated feature of the OAU Convention is its connection between state insecurity and refugee status. See George Okoth-Obbo, *Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspect of Refugee Problems in Africa*, 20 REFUGEE SURV. Q. 79, 100-01 (2001).
114. OAU Convention, *supra* note 113, Art. 1.
115. Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Nov. 22, 1984, available at <http://www.unhcr.org/refworld/docid/3ae6b36ec.html>.
116. Okoth-Obbo, *supra* note 113.
117. Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 69-70 (1993). Charlotte Bunch similarly contended that the violations of men’s civil and political rights in the public sphere “has been privileged in human rights work [because men] did not fear . . . violations in the private sphere of the home . . . [as] masters of that territory.” Charlotte Bunch, *Transforming Human Rights from a Feminist Perspective*, in WOMEN’S

Although Charlesworth and Chinkin's critique was targeted at an international legal apparatus unresponsive to recognizing women's human rights, two decades of concerted feminist mobilization within international institutions, tribunals, and legal education have certainly reoriented the hierarchy of *jus cogens* principles within the state-centricity of international law.¹¹⁸ This is not to suggest that the conditions that sustained an institutional resistance to women's human rights have changed as dramatically as the institutional compliance with gender mainstreaming. Nor is it to suggest that gender mainstreaming is tantamount to gender equality—the preferred institutional approach described recently by Charlesworth as a “bland bureaucratic . . . method . . . [that] has deployed the idea of gender in a very limited way and allowed the mainstream to tame and deradicalize claims to equality.”¹¹⁹ It does establish however, that feminist successes have indubitably changed the ways that the legal community addresses rape, female genital cutting, forced sterilization, and intimate violence in adjudicating asylum claims. As a result of high-profile litigation strategies like those undertaken in *Kasinga*, feminist critiques, and organizing among resettled refugee communities, political asylum has been extended to women fleeing domestic violence (although less frequently), homophobia, forced circumcision, rape and sexual assault, and other forms of gender-based persecution in their home countries. This reflects a broader understanding of “politics” to encompass the activities and particular forms of persecution that more accurately account for gender and power relations in line with Charlesworth and Chinkin's observations cited earlier. The recognition of these harms as human rights violations substantiates the claims of women who seek asylum in Western states. As a senior asylum officer recently said to me:

A lot of people got really excited about gender based asylum claims about ten years ago. But since *Kasinga*, we [at the asylum office] don't think they are such a big deal when we get them. We check the facts and if we don't find anything conflicting in the interview, we approve them.¹²⁰

RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 11, 13 (Julie S. Peters & Andrea Wolper eds., 1995).

118. Halley et al., *supra* note 15.

119. Charlesworth, *supra* note 62, at 2.

120. Interview, Vincent Ferri, Quality Assurance/Trainer, San Francisco Asylum Office (March 24, 2008). Verification is an important part of the asylum process and may imperil a claim for asylum. Prior to approving her petition for asylum, U.S. Embassy personnel and officials from the Togolese government interviewed *Kasinga*'s family members in Lomé to verify her story. No such verification took place in the later decided case of *Adelaide Abankwah*. In *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999), the 27-year-old claimant alleged that she faced the threat of FGM as the daughter of a Nkumssa Queen who was no longer a virgin. Subsequently the claimant's testimony was discovered to be fraudulent: her real name was Regina Danson, and she was indicted for perjury, passport fraud, and false statements. See Coffman, *supra* note 17, at 71; Kratz, *supra* note 17, at 328-29 (comparing the evidentiary standards in both *Kasinga* and *Abankwah* and commenting on the obvious disparities in *Danson*'s affidavit that were glibly presented as “cultural facts” to the Court). INS Counsel in *Kasinga* David Martin has written insightfully about the unfolding of both cases. See

In sum, feminist interpretations of human rights law have profoundly influenced the scholarship and practice of asylum, refugee, and humanitarian law, reorienting our concerns to violations and gendered inequities (and the power dynamics) within the domestic and intimate. The approval of gender-based asylum claims reflects fifteen years of successful litigation, public advocacy, and strategic alliances with humanitarian, human rights, and public international law constituencies. It also reflects, in a less noble narrative, the appropriation of certain types of claims to victimhood that raise the stature of asylum-granting states as human rights saviors.

Critical approaches to human rights law repudiate the victimhood/agency dichotomy that characterizes the field.¹²¹ This coeval representation of the victim with the domestic animates two analytical problems. The first is a strong desire to attribute agency within the realm of individual action that only regards certain types of actions as agentive and rational. Second, the human rights system enables certain types of action to be represented as coercion (victimhood) and denounces other actions as expressions of false consciousness. The emphasis on agency is certainly preferable to the paternalistic portrayals of passive victims enduring the cruelties of their persecutors, but the dichotomous framework is used to characterize markedly ambivalent human action, especially in situations of structural violence. This is most evident in the contexts of material support and trafficking for sex work,¹²² but the victimhood/agency binary also contaminates the FGM/C/S debate. In the depiction of genital cutting for instance, endorsement or continued support for the practice is regarded as patriarchal child abuse, blind adherence to despotic tradition, or sheer stupidity. Plainly speaking, African parents who are capable of maiming, mutilating, and murdering their female children are invariably cruel, backward, loathsome, or cowardly.¹²³ It is inconceivable that their resistance to enlightened eradication campaigns could be construed as *agency*.

From the perspective of the defenders of genital cutting (or at least those who are, like myself, extremely uncomfortable with the self-pronounced omniscience of the anti-FGM global campaign), consent, contention, and agency

David A. Martin, *Adelaide Abankwah, Fauziya Kasinga, and the Dilemmas of Political Asylum*, in IMMIGRATION STORIES 245 (David A. Martin & Peter Schuck eds., 2005).

121. See BHUPINDER S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES (1993); DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM (2004); BALAKRISHAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE (2003); Mutua, *supra* note 16.
122. See Andrijasevic, *supra* note 55; Utas, *supra* note 47 (problematizing the formulation of "material support" as sexual slavery in international criminal law with data from ethnographic research among former girlfriends of combatants who purposefully pursued sexual alliances with Liberian soldiers in the civil war).
123. On this point, see Richard Shweder, *When Cultures Collide: Which Rights? Whose Tradition of Values? A Critique of the Global Anti-FGM Campaign*, in GLOBAL JUSTICE AND THE BULWARKS OF LOCALISM: HUMAN RIGHTS IN CONTEXT 181 (Christopher Eisgruber & Andrés Sajó eds., 2005).

are social facts that are bound up with the continued endorsement, adoption,¹²⁴ abandonment of, and modifications to the practice. But we are unduly constrained by the victimhood/agency dichotomy even as critics of the process. I do agree that there are theoretical trends inspired by post-structuralism and intersectionality that influence the skepticism with which critical scholars regard victimization portrayals, but we need to be more vigilant about the context of our critique. As Benita Parry has cautioned, we should not replace one totalizing paradigm for another when examining distinct modes of oppression.¹²⁵ Over-agentivizing is just as pernicious as passivity, particularly when it privileges dissent and exit as the only permissible manifestations of agency. It also ignores strategic uses of victimhood narratives by applicants themselves who exploit the astonishing lack of knowledge about African cultures (and modernities) and frame their experiences in the agreed-upon script to gain asylum.¹²⁶ This script naturalizes global asylum flows from the poverty-stricken, intolerant, barbaric South to the affluent, tolerant North while ignoring the way that these flows depend on the profoundly inequitable global distribution of financial resources and the heightened risk of unauthorized presence in Europe and North America. The script also stymies our recognition of the way that issues like genital cutting have galvanized discussions about gender, colonization, cultural integrity, and poverty more broadly within countries and multicultural societies where the practice is debated. As Rogaia Abusharaf stated, “The well-informed efforts of African men and women to extirpate female circumcision are an obvious sign of significant social transformations that testify to new and emerging forms of internal self-criticism and cultural change.”¹²⁷ Clearly, then, the binary construction encompassed by victimhood/agency is analytically insufficient.

The global anti-FGM campaign marshals a powerful set of political arguments, financial resources, and institutional actors that can be recruited for a variety of purposes for gender-based politics given the foregrounding of rights, consent, and bodily integrity in the debate.¹²⁸ The contemporary anti-FGM

124. Elizabeth Heger Boyle describes the recent adoption of female genital cutting in southern Chad among girls whose mothers had not experienced the procedure or engaged in the practice. BOYLE, *supra* note 38, at 31.

125. Benita Parry, *Problems in Current Theories of Colonial Discourse*, 9 OXFORD LITERARY REV. 34 (1987).

126. See Michelle McKinley, *Life Stories, Disclosure and the Law*, 20 POL. & LEGAL ANTHROPOLOGY REV. 70 (1997). On the strategic essentialism in the affidavit submitted in *Abankwah*, see Coffman, *supra* note 17, and Kratz, *supra* note 17.

127. Rogaia Mustafa Abusharaf, *Introduction: The Custom in Question*, in FEMALE CIRCUMCISION: MULTICULTURAL PERSPECTIVES, *supra* note 5, at 1, 4. See also BOYLE, *supra* note 38, at 18.

128. The intense passion that genital cutting elicits also incites broader discussions among men and women in communities where the practice is contested. See BOYLE, *supra* note 38, for a neo-institutional analysis of the global anti-FGM campaign. See also FEMALE CIRCUMCISION: MULTICULTURAL PERSPECTIVES, *supra* note 5; FEMALE CIRCUMCISION AND THE POLITICS OF KNOWLEDGE (Obioma Nnaemeka ed., 2005) (describing internal discussions between elite and non-elite women about rights and gender politics, and the ways that African feminists have used donor interest to encourage national dialogue about

campaign is a platform that can be wielded as an instrument of hegemonic governance as well as a means of local accommodation, resistance, and indifference. Those “Third World” voices that are leading the campaign are discursively legitimate only to the extent that they address issues like female genital cutting, domestic violence, or women’s legal rights within an aligned frame¹²⁹ of poverty, underdevelopment, and geopolitical hierarchies: a new indigenized maternalist discourse. While extolling “African voices and choices” in the campaign, contemporary activists have couched reforms and modification within the consortium of gender and development programs to posit women’s economic empowerment as a fundamental criterion of abandonment programs.¹³⁰ The emphasis is on abandonment, not eradication—as part of an integral approach to community health, development, and welfare. As with all imperial processes—maternal or masculinist—the attempt to recruit reproductive sexuality and fertility to impose a gendered social order invariably leads to contrary and multilayered results. The contemporary call for geopolitical equity, transnational dialogue, and cultural deference is a very different way of framing resistance to female genital cutting from say, clitoral deprivation or female castration. This is especially the case when the interlocutors are elite women because of the association of these concerns with Western arrogance and hegemony.¹³¹ This observation may unwittingly reaffirm hegemonic or oppositional tendencies by alluding to something called “Third World feminist discourse,” which I instinctively regard as a suspect appellation with regard to

women’s development programs); Obiora, *supra* note 85.

129. Frame alignment is the term used by Keck and Sikkink to highlight the visibility of certain issues within larger contexts in transnational advocacy networks.
130. Tostan, a Senegalese NGO that administers a number of community development and women’s rights projects, documents the negligible results of its efforts to provide traditional excisors with alternative forms of income generation. Women who are known as traditional excisors face competition from trained health personnel who offer their services at a higher cost, but under sterile conditions with the putative benefit of medical training. See Nafissatou Diop & Ian Askew, *Strategies for Encouraging the Abandonment of Female Genital Cutting: Experiences from Senegal, Burkina-Faso, and Mali*, in *FEMALE CIRCUMCISION: MULTICULTURAL PERSPECTIVES*, *supra* note 5, at 125, 137-39. Other abandonment/eradication efforts in high prevalence areas in Kenya report more encouraging results from another model of behavior change projects called “Alternative Rite of Passages” but note the competition from trained nurses and health personnel in genital cutting. In sum, parents are responding to parts of the ARP campaign in terms of health safety but not abandonment. It is important to situate the successes of the Kenyan ARP program within the context of a highly politicized and polarized environment with regard to foreign involvement in female genital cutting. See Asha Mohammed, Samson Radeney & Karin Ringheim, *Community-Based Efforts to End Female Genital Mutilation in Kenya: Raising Awareness and Organizing Alternative Rites of Passage*, in *FEMALE CIRCUMCISION: MULTICULTURAL PERSPECTIVES*, *supra* note 5, at 75.
131. See SALLY MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006); see also Gunning, *supra* note 85. At the international women’s conferences of the 1980s and 1990s, which served as major networking outlets for feminist interventions in human rights policy and governance, it became clear that one of the few issues that transcended North/South divides was violence against women. This created an opportunity (albeit a controversial one) to cast female genital cutting as privately inflicted domestic violence.

voice and representation.¹³² With the caveat that any label that smacks of homogeneity and hegemony should be treated critically, “Third World feminists” cannot legitimately address genital cutting as ancient, patriarchal mutilation without alienating themselves from the constituencies in whose name they purport to speak and whose welfare they seek to ensure. In the same way, U.S.-based scholars who identify as feminists of color—myself included—cannot look at these issues outside of the frame of racism and the perilous twenty-first century U.S. imperialism, nor can we ally ourselves unconditionally with the more intransigent interlocutors of “the” Western feminist position.¹³³

How then are we to navigate the complexities of human behavior, structural geopolitical realities, without reproducing the dichotomies of “victims and saviors” and their attendant essentialist and imperialist baggage?¹³⁴ Infibulation, marital rape, intimate partner and family violence, and trafficking for sexual slavery are arguably extreme manifestations of patriarchy, female dependence, and the deprivation of sexual rights. However, they are also manifestations of the myriad ways that oppression is experienced and compounded by the systemic inequities of poverty, warlordism, insurgency, and other humanitarian crises like politically-induced famine and ethnic cleansing,

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132. To clarify my own position: I owe my intellectual debt to the field of post colonial feminism—understood here as a critique of Western imperialism, cultural hegemony, and the representational practices of alterity, and I have been inspired by writers like Chandra Mohanty, Gayatri Spivak, bell hooks, Cherrie Moraga, and Lata Mani among others who situate the female subaltern subject within the “hegemonic feminist narrative” to complicate and contest it. Mohanty’s work has been criticized for articulating a counter-hegemonic Third World female “voice.” Mohanty has been indicted by that curious yet predictable move in academic philosophy that experience/situated locality is necessary but not sufficient to enunciate a theoretically sophisticated corpus of work. On experience as a form of knowledge, see, for example, Lisa Disch, *Toward a Feminist Conception of Politics*, 24 PS: POL. SCI. & POL. 501 (1991). Moreover, Mohanty has further alienated other feminists in her insistence on authenticity: whose experience ultimately produces the Authentic Third World Female Experience? On this critique, see Okin, *supra* note 22, in which she contends that the reception of Mohanty’s seminal work “*Under Western Eyes*” led to First World scholars’ temerity in articulating global, or cross-cultural feminist knowledge, and merely resulted in localized studies. There are of course other reasons for the more modest, localized attempts at “writing culture/oppression/liberation”—viz the demise of grand theory and a politically correct hesitancy in representing the “other.” In “*Under Western Eyes*” Revisited, Mohanty subsequently denied her intention to quash cross-cultural feminist theory, and her attempt to diminish the possibility for global theorizing; rather, she asserts that positionality—or what she calls the politics of location is more important than a descriptive category of the “Third World woman.” See MOHANTY, FEMINISM WITHOUT BORDERS: DECOLONIZING THEORY, PRACTICING SOLIDARITY 221-52 (2003).
133. See, e.g., Isabelle Gunning, *Global Feminism at the Local Level: The Criminalization of Female Genital Surgeries*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 337 (Francisco Valdes, Jerome McCristal Culp & Angela Harris eds., 2002); Sondra Hale, *A Question of Subjects: The “Female Circumcision” Controversy and the Politics of Knowledge*, 22 UFAHAMU 26-35 (1994); Lewis & Gunning, *supra* note 17; Walley, *supra* note 6.
134. According to Patricia Connell, particular models of agency and understandings of victimization in academic, legal, and policy discourse are often translated into constructions of “deserving” and “undeserving womanhood.” Patricia Connell, *Understanding Victimization and Agency: Considerations of Race, Class, and Gender*, 20 POL. & LEGAL ANTHROPOLOGY REV. 115 (1997).

all of which structure the lives of displaced peoples, economically disadvantaged transmigrants, and asylum seekers.¹³⁵ I believe it is flippant to ignore those structural realities to highlight the types of harms or construct a certain kind of victim with whom the public would sympathize—it is a perverse exercise in seeing the forest while ignoring the trees.

In the following pages, I raise a series of questions: Who is dominating the legal, normative, and political arguments determining the classification of “culture” as it relates to state protection? How does victimization hide behind and reproduce power when it is associated with culture? Are cultural claims activating latent concepts of pathology, repugnance, inferiority, or savagery? Where are these discourses being produced and consumed, and what are the relationships between the colonial past and the post-colonial present? Finally, how do we achieve multi-cultural aspirations, when culture is demonized and used to demarcate difference? In the particular case of female genital cutting, do the respective limitations of universalism, medicalization, and criminalization also demarcate the problems of post-structuralist deference, uncommitted laissez-faire liberalism, and effete relativism?

MANAGING DIFFERENCE AT HOME AND ABROAD:

Maternal Imperialism & Colonial Governance (1888-1950)

The current focus on eradicating female genital cutting through education, grassroots participation, and empowerment echoes an earlier wave of colonial campaigns to ban circumcision in African colonies.¹³⁶ Indeed, the practice and its continued salience in the lives of African women and girls has been an enduring concern for women’s rights advocates, legislators, missionaries, health workers, policy makers, and scholars worldwide for the past hundred years. To explore the historical trajectory of the contemporary global anti-FGM campaign, I rely on Susan Pedersen’s framework of maternal imperialism elaborated earlier as “activism over empire, . . . [of] educated and usually well-to-do women, drawing . . . on a long experience of single-sex philanthropic work, [that] sought to protect those women and children who were presumed to be less fortunate or more vulnerable.”¹³⁷ I pay special attention to the international alliances of maternal imperialists involved in the campaign against female genital cutting in

135. On the effects of famine, banditry and resultant sexual violence among Somali women in refugee camps and the gender implications of humanitarian emergencies, see HYNDMAN, *MANAGING DISPLACEMENT*, *supra* note 63, at ch. 3.

136. The British did not try to ban excision in all the countries they governed. For anti-excision campaigns in colonial Sudan, see BODDY, *supra* note 68. As Boddy points out, the colonial anti-excision campaign in Sudan differed from the Kenyan efforts, principally because Sudan was not a settler colony. *Id.* at 5. Colonial governance (as opposed to settlement) was a more masculine affair, with an emphasis on state-financed exploration into the interior, *Pax Britannica* (ideally executed through trade and alliances with Native Chiefs), and military annexation. See generally, RONALD HYAM, *EMPIRE AND SEXUALITY: THE BRITISH EXPERIENCE* (1990).

137. Pedersen, *supra* note 68, at 165.

Kenya from 1928-1931 and to the kinds of discourses that were available and useful to advance their concerns. Predictably, these discourses were medical hygiene, Christianity, and the moral superiority of the British civilization, but these also alternated with abolitionist outrage, anti-Islamism and Orientalism, liberal internationalism¹³⁸ and New Imperialism (i.e. formal support for a gradualist policy of self-rule for African and Asian colonies under European tutelage), and an incipient transnational suffragism. I situate the period of activist campaigns against female genital cutting studied here (1928-1931) within the trajectory of British settler colonialism in Africa, which began as a largely masculine endeavor and changed after the relatively late appearance of women on the continent after World War I.¹³⁹ I compare this historical period of anti-excision campaigns with contemporary maternalism in the 1980s when international law and a specialized network of UN institutions became more responsive (albeit sluggishly) to feminist concerns about eradicating the practice, which led to the deployment of an indigenized maternalism in the twenty-first century.

After the Berlin Conference,¹⁴⁰ during which the European powers attempted to negotiate an equitable distribution of African territories amongst themselves that degenerated into the notorious "Scramble," British maternal imperialists were determined to ensure the welfare of women and children who fell under their government's protection. The maternal counterpart of British rule was vigorously executed by women like the Duchess of Atholl, Eleanore Rathbone, Lady Nancy Astor, Nina Boyle, and other early public-spirited internationalists who were extremely concerned about the British mandate to safeguard and respect women's welfare. Nancy Astor and Eleanore Rathbone expressly entered politics to improve conditions for women in the Empire.¹⁴¹ Nina Boyle was an indefatigable suffragist committed to the goal of women's equality in Britain and abroad. This maternalist era was heavily influenced by the previous interventions in India with respect to eradicating *suttee* and child marriage,¹⁴² but it differed in important respects from the Indian experience. First, the maternalists described were more embedded within international networks at the League of Nations and could avail themselves of robust

138. By liberal internationalism, I refer to the League of Nation's promise of equality, peace, and justice among states.

139. BODDY, *supra* note 68, at ch. 7.

140. The Berlin conference, which was officially conducted in 1884-85 during which the European powers "scrambled for Africa," launched a new phase of state-led rather than private or corporate imperialism that had held sway in Africa under the auspices of magnates like Cecil Rhodes' British South Africa Company and his De Beers mining and diamond companies. State-led imperialism is understood here as the concentration of ownership of industry and finance capital in the public sector of investor countries to open up "less developed" parts of the world for trade and investment. See ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 90-100 (2005).

141. BODDY, *supra* note 68, at 233-34.

142. For the campaign against child marriage, see CHANDRA, *supra* note 67, and against *suttee*, see Mani, *supra* note 67.

transatlantic alliances with the venerable anti-slavery society that had successfully changed laws and policies surrounding the slave trade.¹⁴³ Second, maternal imperialism at this point was also tied to the suffragist movement, which drew on the moral power of the abolitionist discourse within Britain to argue for women's needs and concerns at home and abroad.¹⁴⁴ Third, imperialism in Africa was a state-led rather than a corporate endeavor, and European governments had to promote a social reformist agenda to their domestic constituencies who concomitantly demanded popular representation, enfranchisement, and participatory citizenship at home.¹⁴⁵ In short, the women who went to Africa either as missionaries or those parliamentarians who petitioned Whitehall to remedy the perceived plight of African women and children under British rule used some of the same discursive tools as their predecessors in India, but there were important differences in the international alliances that they could mobilize and in the liberal tenor of the League's interwar, international humanitarianism.¹⁴⁶ As Stoler and Cooper remind us, this was a period in which imperialism was publicly debated and justified in terms of building capacity for future self-governance in the European mold:

Europe's power elites [took pains to] reassure each other that their coercion and brutality were no longer frank attempts at extraction but reasoned efforts to build structures capable of reproducing themselves: stable government replacing the violent conflictual tyrannies of indigenous polities; orderly commerce and wage labor replacing the chaos of slaving and raiding; a complex structuring of group boundaries, racial identities, and permissible forms of sexual and social interaction replacing the disconcerting fluidities of an earlier age.¹⁴⁷

This Manichean world order (suzerain despotism, primitive chaos, sexual licentiousness) fared terribly in comparison to the order, prosperity, and liberation promised by the various administrative regimes instituted by the

143. See KECK & SIKKINK, *supra* note 68, at ch. 2; WOMEN'S RIGHTS AND TRANSATLANTIC SLAVERY IN THE ERA OF EMANCIPATION (Kathryn Kish Sklar & James Brewer Stewart eds., Yale University Press 2007) [hereinafter Sklar & Stewart].

144. On the divisions between suffragists and maternal imperialists in their feminist politics, see Pedersen, *supra* note 68, at 165.

145. See Ann Laura Stoler & Frederick Cooper, *Between Metropole and Colony: Rethinking a Research Agenda*, in TENSIONS OF EMPIRE *supra* note 68, at 10.

146. Sarah Paddle characterizes the maternalist paradigm of international feminist campaigns of the 1920s and 1930s against child slavery in Hong Kong (the period that corresponds chronologically with the female circumcision controversy in Kenya) as "more internationalist and racially aware," seeking activist solutions within an abolitionist framework. Paddle, *supra* note 70, at 2. Paddle characterizes the League's anti-slavery discourse as humanitarian, liberal, and internationalist, largely concurring with the more favorable assessments of the League's aspirations in the interwar period. See, e.g., Nathaniel Berman, "But The Alternative is Despair": *European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792 (1993).

147. Stoler & Cooper, *supra* note 145, at 31.

Europeans.¹⁴⁸ As Lord Frederick Lugard noted in his definitive work on the Dual Mandate:

The task of the administrative officer is . . . to make apparent alike to the educated native, the conservative Moslem, and the primitive pagan . . . that the policy of the government is not antagonistic but progressive—sympathetic to his aspirations and the guardian of his natural rights.

....

. . . Obviously, the extent to which the native races are capable of controlling their affairs must vary in proportion to their degree of development and progress in social organisation

....

[T]he subject races of Africa are not yet able to stand alone, and that it would not conduce to the happiness of the vast bulk of the people—for whose welfare the controlling Power is trustee—that the attempt should be made.¹⁴⁹

Here, my concern is neither with the sincerity or effectiveness of these policy goals (nor indeed with their crude evolutionism), but rather in the way they interfaced with and provided a discursive space to launch maternalist interventions like the campaign against female circumcision in the 1920s. Although I do not examine the interventions against foot binding, child slavery, and bride price that were embarked on roughly around the same time, I illustrate the common discursive strategies deployed by the maternalists and their allies to mobilize resources for their activities. How do the colonial legacies of women's advocacy around the practice of female genital cutting endure in the present, and what kinds of discursive influences and organizing strategies are most visibly effective for changing policy and practice? How do maternal interventions collude with the imposition of medicalized orders and the control of reproductive sexuality, and how were those sexualized regimes ensconced within the imperialist mission?

Before answering these sets of questions, I want to explore the genealogy of one unique set of ideas—cultural essentialism—and its role in post-colonial campaigns against female genital cutting. Essentialism is used to connote the idea that things, women, culture, races, have fixed, innate, and identifiable

148. The various administrative regimes included settler colonialism, Condominium governments, Trusteeships and Protectorates. After the First World War, colonies of the defeated Axis powers came under the League's Mandate System. See Anthony Anghie, *Nationalism, Development and the Postcolonial State: The Legacies of the League of Nations*, 41 *TEX. INT'L L. J.* 447 (2006).

149. LORD LUGARD, *THE DUAL MANDATE IN BRITISH TROPICAL AFRICA* 194, 197 (5th ed. Archon Books 1965) (1926).

properties, or essences.¹⁵⁰ *Cultural* essentialism offers a scientific, systematizing view of a social group's beliefs, life worlds, material expressions, sensibilities, traditions, and rituals. Its empirical offering is premised on the legitimacy of external "objective" observation. Anthropology, the discipline most closely invested in the study of culture, had been a constant perpetrator of the essentialist view until its wholesale rejection by interpretivist scholars, insider and activist practitioners, post-colonial intellectuals, and feminists.¹⁵¹ In a similar vein, "race" also conveyed a biological, innate, and naturalized essence rather than a social construction to describe human similarity and difference. Racial membership and racial boundaries are actively created and policed through institutional and intellectual practices—of which essentialism is part—but also through scientific racism, evolutionism, phrenology, eugenics, census taking and enumeration, human genome and other genetic research projects, and in legal regimes like Jim Crow and *apartheid*.¹⁵²

As Christine Walley notes, the "tendency to understand female genital [cutting] in 'either/or' terms," that is, "moral opprobrium or relativistic tolerance," reveals that both sides are deeply invested in a "hardened view of 'culture' based on a rigid essentialist notion of difference that can be historically traced to the colonial era."¹⁵³ While not all critics agree upon the methodological tools used to attack the more pernicious forms of essentialism (or the ways that class, sexual orientation, gender, generation, and birthplace complicate essentialism), three dominant signifiers converge in the debate about female genital cutting. Both denouncers and defenders of female genital cutting invoke

150. See generally DIANA FUSS, *ESSENTIALLY SPEAKING: FEMINIST NATURE & DIFFERENCE* (1989).

151. I can hardly do justice to the internal critiques of anthropology here. However, the following are seminal publications representative of interpretivist, post-structuralist, anti-colonial, and feminist rejections of cultural essentialism: ANTHROPOLOGY AND THE COLONIAL ENCOUNTER (Talal Asad ed., 1973) (which, although published chronologically earlier in time, is very much inspired by the rejection of essentialist notions of the "savage Other" as the target of colonial rule); JOHANNES FABIAN, *TIME AND THE OTHER: HOW ANTHROPOLOGY MAKES ITS OBJECT* (1983); CLIFFORD GEERTZ, *WORDS AND LIVES* (1988); *GENDER AT THE CROSSROADS OF KNOWLEDGE: FEMINIST ANTHROPOLOGY IN THE POSTMODERN ERA* (Micaela di Leonardo ed., 1991); *WOMEN WRITING CULTURE* (Ruth Behar & Deborah A. Gordon eds., 1995); *WRITING CULTURE* (James Clifford & George E. Marcus eds., 1986). Racial essentialism has also been encapsulated in oppositional black and culture-based diasporic movements like *negritude* and Rastafari. Similarly, influential cultural feminists like Mary Daly, Kathleen Barry, Adrienne Rich, and Andrea Dworkin have embraced notions of essentialism, unleashing concepts of "woman" as mother/nurturer, pacifist, creative and irrational to construct alternative modes of social practice, politics, and aesthetics. See Linda Alcoff, *Cultural Feminism versus Post Structuralism: The Identity Crisis in Feminist Theory*, in *CULTURE/POWER/HISTORY: A READER IN CONTEMPORARY SOCIAL THEORY* 96 (Nicholas Dirks, Geoff Ely & Sherry Ortner eds., 1994). Despite these notable endorsements, post-structuralist theorists, for whom the naturalization of "women's essence" and the homogenizing female subject are contaminated by socio-biological determinism and necessitarian thinking, largely reject feminist engagement with essentialism. See FUSS, *supra* note 150.

152. See, e.g., MELISSA NOBLES, *SHADES OF CITIZENSHIP passim* (2000).

153. Walley, *supra* note 6, at 406-07.

essentialist, totalizing notions of “woman, culture, and race.”¹⁵⁴ These are not terms that refer to some neutral, transparent reality; rather they are embedded within the context of a history of ideas and of Western institutionalized knowledge that give rise to certain practices that change over time.¹⁵⁵ Today, “savagery” coded as race would appear ethnocentric as a basis for humanitarian intervention, but it was perfectly legitimate as a justification for rescuing vulnerable native women in the expansion of Empire within a period when ideas about the natural ordering of races dominated European and American thought.¹⁵⁶ How did these signifiers historically interact with each other to produce ideologies of colonial rule: *Woman* as wayward, childlike, sexually promiscuous, vulnerable, and remediable? Or *Culture* as empirically observable, and “uplift-able” through exposure, commerce, and religious tutelage? And *Race* as determinative of savagery/enlightenment and hierarchies of difference that naturalized racial orders of subjugation?¹⁵⁷

Inquiries of this nature highlight how gender is implicated in colonial and post-colonial processes and how sexuality and reproduction are often cast as national, public policy concerns.¹⁵⁸ Even the most cursory look at colonial and post-colonial campaigns against female genital cutting demonstrates the inscription of larger political struggles onto the bodies of young women and girls. Female genital cutting was initially framed as a matter of public censure and humanitarian concern and then recast as colonial resistance and tribal cohesion in Kenya during the late 1920s-1950s by the incipient independence movement. Susan Pedersen addresses why the particular significance of *irua*,

154. *Id.*

155. PETER WADE, RACE AND ETHNICITY IN LATIN AMERICA 5 (1997).

156. Lately, we replace “fundamentalist Islam” as a fungible heathen category to justify the humanitarian rescue of Afghan or Iraqi women. *See, e.g.*, Abu-Lughod, *supra* note 46. For commentary by First Ladies Laura Bush and Cherrie Blair about the benefits of humanitarian interventions for Afghani and Iraqi women, see *infra* note 363 and accompanying text.

157. Racial orderings occurred in both positivist and naturalist perspectives, and there was significant borrowing and overlap in both schools of thought. Arguably, the naturalists of the Aquinian persuasion used “reason” and “rationality” as signifiers to determine the moral or natural status of barbarians within Christendom. Centuries later, positivists departed from the universalist strand in the natural law to determine attributes of intellect, beauty, culture, and history, bestowing the natural status of rulers and ruled accordingly. Anthony Pagden suggests that the early period of European expansion into the Americas deepened the divisions within the paradigm of moral universal humanism, and that later periods of imperial expansion into Africa, Asia and the Pacific provided the opportunity for the moral paradigm to be recast scientifically according to positivist science in the imperial laboratories. ANTHONY PAGDEN, THE FALL OF NATURAL MAN (1982); *see also* ANGHIE, *supra* note 140 (grounding the development of international human rights and universalism within stages of imperial expansion); Pagden, *Human Rights, Natural Rights, and Europe’s Imperial Legacy*, 31 POL. THEORY 171 (2003).

158. *See* DOMESTICATING THE EMPIRE: RACE, GENDER, AND FAMILY LIFE IN FRENCH AND DUTCH COLONIALISM (Julia Clancy-Smith & Frances Gouda eds., 1998); GENDER, SEXUALITY AND COLONIAL MODERNITIES, *supra* note 68; ANN STOLER, CARNAL KNOWLEDGE AND IMPERIAL POWER: RACE AND THE INTIMATE IN COLONIAL RULE (2002); TENSIONS OF EMPIRE *passim*, *supra* note 68; Rosemary George, *Homes in the Empire, Empires in the Home*, 26 CULTURAL CRITIQUE 95 (1994).

“the ritual unmaking and reworking of women’s bodies became so central to the construction of national identity.”¹⁵⁹ Pedersen uses the “female circumcision controversy” to look more broadly at sexual politics in African nationalism and British colonial policy and how the female body became a metonym for the “woman question” in incipient nationalist movements.¹⁶⁰ As Lydia Liu has noted, women as a “social category” developed in tandem with anti-colonial, nationalist struggles to become a “state category.”¹⁶¹ Indeed, vanguard nationalist leaders addressed the “woman question” as part of the resistance movement in almost every colonial struggle, despite their marked ambivalence and anti-feminist politics after Independence.¹⁶² There is a wealth of feminist writing analyzing the gender politics of nationalisms (particularly with regard to nationalist civil wars or competing nationalisms outside of the West),¹⁶³ the rising fundamentalist retrenchment of women’s physical mobility,¹⁶⁴ and the reification of the spiritual realm with the domestic, womanly domain.¹⁶⁵ Building on the influential insights of Yuval-Davis and Anthias’s volume *Woman-Nation-State*,¹⁶⁶ we are keenly aware of the inscription of political struggles onto women’s bodies, the feminization of the nation (i.e. the “motherland”), and the re-signification of “woman” in the patriotic process of constructing and imagining political communities in Independence struggles and colonial encounters.¹⁶⁷

With regard to the colonial period, Stoler has ably demonstrated the “tense

159. Susan Pedersen, *National Bodies and Unspeakable Acts: The Sexual Politics of Colonial Policy-Making*, 63 J. MOD. HIST. 647, 648 (1991).

160. *Id.*

161. Lydia Liu, *Female Body and Nationalist Discourse: The Field of Life and Death Revisited*, in SCATTERED HEGEMONIES: POSTMODERNITY AND TRANSNATIONAL FEMINIST PRACTICES 37, 41-2 (Inderpal Grewal & Caren Kaplan eds., 1994).

162. *Id.* at 41; Partha Chatterjee, *Colonialism, Nationalism, and Colonialized Women: The Contest in India*, 16 AM. ETHNOLOGIST 622 (1989). On the “woman question” in Kenya, see TOM MBOYA, *Women’s Role in National Development*, in THE CHALLENGE OF NATIONHOOD (1967). A less laudable interpretation of the inclusion of women’s emancipation in the nationalist agenda has been suggested by Laura Nader, who regards the “woman question” as part of the transfer of the control of women from the kin group to the state. See Laura Nader, *The Subordination of Women in Comparative Perspective*, 15 URB. ANTHROPOLOGY 377 (1986).

163. See, e.g., FEMINIST GENEALOGIES, COLONIAL LEGACIES, DEMOCRATIC FUTURES (Jacqui Alexander & Chandra Talpade Mohanty eds., 1997); SITES OF VIOLENCE: GENDER AND CONFLICT ZONES (Wenona Giles & Jennifer Hyndman eds., 2004); Liu, *supra* note 161.

164. See, e.g., Fatima Mernissi, *Arab Women’s Rights and the Muslim State in the 21st Century: Reflections on Islam as Religion and State*, in FAITH AND FREEDOM: WOMEN’S HUMAN RIGHTS IN THE MUSLIM WORLD (Mahnaz Afkhami ed., 1995); Valentine Moghadam, *Revolution, Islam and Women: Sexual Politics in Iran and Afghanistan*, in NATIONALISMS AND SEXUALITIES 424 (Andrew Parker, Mary Russo, Doris Sommer & Patricia Yaeger eds., 1992).

165. On the reification of the spiritual with the domestic/feminine in the Indian nationalist movement, see Chatterjee, *supra* note 162.

166. NIRA YUVAL-DAVIS & FLOYA ANTHIAS, *WOMAN-NATION-STATE* (1989).

167. See Sondra Hale, *Mothers and Militias: Islamic State Construction of Women Citizens in Sudan*, 3 CITIZENSHIP STUD. 373 (1999).

and tender ties” between the carnal and the public in the control of territorial politics and economies.¹⁶⁸ As Stoler urges, we need to scrutinize the ways in which the organization of the domestic sphere interface with that of state policy, so that the intimate and domestic are seen as charged sites of the micro-politics of rule and power.¹⁶⁹ Imperial administration required feminine trustees of the *domus* who could instill solid moral values into the retinues of houseboys, gardeners, and nursemaids who were incorporated in the colonial household. Rosemary Marangoly George’s wonderful study of the domesticated imperial realm reveals how British writers infused their instructional manuals for potential colonial wives with hierarchical management structures, daily surveillance routines, and disciplinary regimes for the “child-like native staff” that replicated the masculinist civilizing mission.¹⁷⁰ One of the most popular instructional manuals, luminously titled *The Complete Indian Housekeeper and Cook: Giving the Duties of Mistress and Servants, the General Management of the House, and Practical Recipes for Cooking in all its Branches* (1888), in fact referred to the household as the “unit of civilization where father and children, master and servant, employer and employed, can learn their several duties.”¹⁷¹ This benevolent moral tutelage would then have a diffusive effect throughout the broader population, to whom those holding the executive posts of DCs, PCs, magistrates, and field officers had restricted access—thus providing as efficient a method of racial subordination and panoptic governance as the Dual Mandate itself.

Of course, the maternal imperial sphere was not always coterminous with the “domestic” sphere. As pacification, exploration, and the development of effective medicines against tropical diseases created a more favorable climate for women in Africa, we see an increased female presence on the continent—especially among settlers, administrator’s wives, and professional women.¹⁷² Upper-class wives, particularly those who were brought over to relieve their husbands’ sexual profligacy with local women,¹⁷³ were quickly charged with their own disciplinary mandate: to teach African women the finer points of childrearing, lactation, cleanliness, and hygiene.¹⁷⁴ Maternalism, which hitherto had been a sphere of charitable activism for genteel married women, became more inclusive of professional spinsters entering politics and the fields of

168. Ann Stoler, *Tense and Tender Ties: The Politics of Comparison in North American History and (Post) Colonial Studies*, 88 J. AMER. HIST. 829 (2001).

169. STOLER, *supra* note 158, *passim*.

170. George, *supra* note 158.

171. FLORA ANN STEEL & GRACE GARDINER, *THE COMPLETE INDIAN HOUSEKEEPER AND COOK* 7 (1888), as reprinted in George, *supra* note 158, at 106-07. The imperial household was dominant in popular theater as well; one remembers Mr. Banks remonstrating his suffragist wife and rebellious children that “a British home is run with great precision” prior to Mary Poppins parachuting in to administer his empire.

172. BODDY, *supra* note 68.

173. Ann Stoler, *Making Empire Respectable: The Politics of Race and Sexual Morality in 20th Century Colonial Cultures*, 16 AM. ETHNOLOGIST 634 (1989).

174. Davin, *supra* note 68; Hunt, *supra* note 70.

pediatrics, public health, sanitation, and nursing.¹⁷⁵ After the First World War, intrepid unmarried women of modest class origins who were “matured by the war and less fearful, left more voluntarily for the colony.”¹⁷⁶ British women in Africa, intent upon holding the government to its avowed civilizing purpose, turned their reforming efforts to the domestic health and education of “native” women and children. In her review of “welcome packets” for colonial wives, Nancy Hunt recounts the propaganda used to glorify the drudgeries and perceived dangers of female presence in the colonies:

Accompanying their husbands in the course of long, fatiguing and monotonous journeys . . . deprived of comfort, living in the tent or in road-posts . . . they devote themselves benevolently and modestly to a highly humanitarian purpose of which they can be proud.¹⁷⁷

Consonant with the attention paid to the welfare of working-class women and children within England, maternalism provided a complementary space for activism and social reform (and its associated class hierarchies) in the virile management of the colonies.¹⁷⁸ And it was not long before the embodied customs, beliefs, and practices of female excision came within their purview and incited moral outrage.

MATERNAL IMPERIALISM AND THE “FEMALE CIRCUMCISION CONTROVERSY”:

East Africa Protectorate (1928-1931)

Early missionary opposition to *irua* (clitoridectomy) in Kenya dates back to 1906, spearheaded by the Church of Scotland Mission (CSM).¹⁷⁹ The four primary mission groups in Kenya were the CSM, the Africa Inland Mission, the Church Missionary Society of the Church of England, and the United Methodist

175. Lynn Weiner, *Maternalism as a Paradigm: Defining the Issues*, 5 J. WOMEN'S HIST. 96, 97 (1993) (using maternalism to describe activists' attempt to portray lactation, motherhood, and child nurture as a socially beneficial activity, investing the private behavior of motherhood with a public purpose); see also Davin, *supra* note 68, at 87-151.

176. Hunt, *supra* note 70, at 293.

177. *Id.* at 295.

178. *Id.* The presence of white women in the colonies was hotly debated. Opposition to admitting women included the chivalrous “no place for a lady” reluctance to give up the virility of the enterprise, as well as fears of women's sterility in the tropics. By the 1920s, however, these fears had been replaced by the exigencies of taming sexual excess, repairing white male morality, and a policy preference for couples to settle in for the “long haul” and reproduce in Africa.

179. CARL ROSBERG & JOHN NOTTINGHAM, *THE MYTH OF “MAU MAU”: NATIONALISM IN KENYA* 112 (1966); Jocelyn Murray, *The Kikuyu Female Circumcision Controversy*, with Special Reference to the Church Missionary Society's “Sphere of Influence” (1974) (unpublished Ph.D. dissertation, UCLA) (on file with author). Murray's account is the most extensive study of the “female circumcision controversy” and is almost exclusively relied on in subsequent studies of the controversy. The controversy is also examined, albeit briefly, in RONALD HYAM, *EMPIRE AND SEXUALITY*, 189-97 (1990).

Mission.¹⁸⁰ All four missions apparently experimented with a number of strategies to discourage *irua*, although the CSM was by far the most rigid and doctrinally opposed to the practice. The strategies ranged from experimenting with promoting circumcision at earlier ages,¹⁸¹ encouraging partial as opposed to total excision of the *labia minora*, expulsion of circumcised girls from mission schools, and denial of medical attention in mission-run health posts, to an outright ban on the practice within their congregants. These various strategies reflected a number of concerns that included preoccupation with low birth rates, high maternal mortality, and profound distaste for the public circumcision ceremonies during which non-marital sexual promiscuity was encouraged. A latent anti-Islamism pervaded their opposition to circumcision as well, given its distant association with Arab influence.¹⁸² For two decades, the missions tried these various tactics, although it was only later in 1926 and with amplified support for banning circumcision from Whitehall that they became more draconian in their tactics. Under the leadership of Dr. John Arthur, medical missionary and head of the CSM, the government authorized a ban on female, though not male, circumcision. It should be noted that prior to 1926, the British administrators sporadically expressed concern about the adverse health effects of *irua* as well as the way that the practice impeded the progress of Christian conversion and Westernization.¹⁸³ Administrators contemplated regulations that would criminalize the practice under the Repugnancy Clause.¹⁸⁴ However, they

180. ROSBERG & NOTTINGHAM, *supra* note 179, at 106-07.

181. As Lynn Thomas documents, Methodist missionaries in the northeastern province of Meru advocated an earlier age for excision to decrease abortion among Kikuyu uncircumcised girls who could neither give birth nor marry unless circumcised. See THOMAS, *supra* note 68, at 40. In fact, during the height of the “female circumcision controversy” administrators in Meru authorized “surprise excision squads” (known colloquially as *kigwarie*) that were executed through their network of local native councils. *Id.* at 144-46. The relative distance of Meru province (on the northeast corner of Kikuyuland) from the more centrally located missions no doubt afforded the colonial administrators and the UMM missionaries a degree of local autonomy in engineering the age of excision if not the practice itself. But the fact remains, as Thomas argues, that genital excision was prudently promoted if not overtly authorized by the British administrators in Meru precisely at the time of the excision ban among the Kikuyu in the Central valley. Rosberg and Nottingham attribute a more gradualist approach to the Methodists and to the Church of England Missions. ROSBERG & NOTTINGHAM, *supra* note 179, at 106-07.

182. BODDY, *supra* note 68, at 249.

183. ROSBERG & NOTTINGHAM, *supra* note 179, at 113.

184. The Repugnancy Clause was used to outlaw customs that European colonial administrators deemed “repugnant to natural justice and morality.” *Tabitha Chiduku v. Chidano*, 1922 S.R. 55, at 58. For example, in *Tabitha Chiduku* the Rhodesian court elaborated a test for the application of the Repugnancy Clause, when dealing with “customs [that] inherently impress us with some abhorrence or are obviously immoral in their incidence.” *Id.* at 58. African colonies were ruled by plural legal systems—customary law generally being applied to matters of inheritance, marriage, divorce, land use, and some internal criminal matters. European law—either common law in Anglophone colonies or civil law in Francophone countries—was the law of public administration, statute, and contract. Under a plural legal order, customary and European law co-existed but customary law could be invalidated if it was inconsistent with European colonial legislation, or if it violated the Repugnancy Clause. See Antony N. Allott, *What is to be Done with African Customary Law?*, 28 J. AFR. L. 56

seemed resigned to the continuation of the practice, convinced that their network of native chiefs would be ultimately responsible for discouraging *irua* rather than formal legislation.¹⁸⁵ This gradual eradication depended upon education and the acceptance of the Christian faith as pacification, cash dependency, and increased settlement inexorably increased British presence in the Kikuyu territories.¹⁸⁶ However, the CSM and its well-connected internationalist humanitarian supporters denounced the government's rather devolutionary, laissez-faire approach. In 1926, Dr. John Arthur, the CSM's most vehement opponent of *irua*, was nominated to the government's Executive Council to represent "native interests."¹⁸⁷ Facing increasing pressure from London, the government enacted the ban against *irua*, which although in theory was illegal under the Repugnancy clause, was given "teeth" by the CSM-maternal imperialist alliance.

As Rosberg and Nottingham describe, in addition to enforcing the ban on *irua*, the CSM insisted that all its congregants renounce any association with the Kikuyu Central Authority (KCA), the proto-nationalist organization that would eventually assume a critical role in the Independence struggle. The CSM lost 90% of their Kikuyu converts in 1929, shortly after the mission imposed this

(1984); Gerald Caplan, *The Making of "Natural Justice" in British Africa: An Exercise in Comparative Law*, 13 J. PUB. L. 120 (1964); William T. McClain, *Recent Changes in African Local Courts and Customary Law*, 10 HOWARD L.J. 187 (1964). While the language of the Repugnancy Clause certainly gave courts jurisdiction over *irua*, judges in Kenya could only penalize *irua* if a perpetrator was brought to their court in violation of the ban.

185. As a colonial official reported, "Legislation against the operation would require the full support of the natives concerned . . . which cannot be expected until the natives have arrived at a much higher level of general development . . . [T]he only means . . . to discourage the practice are education in its widest sense and propaganda." BODDY, *supra* note 68, at 254 (internal quotations omitted). Boddy reports that British reformers in Sudan were not convinced by the value of propaganda, and wanted to push for criminalization. *Id.* at 257. The eradication strategy they proposed was instructive both in terms of its methods and the high level of bureaucratic attention paid to the eradication mission itself, and is worth quoting at length:

I've been discussing this morning with the Governor [Baily, Kassala Province] the possibility of making it a criminal offence & he thinks the way to do it is in 2 steps—1st step get the Govs. and DCs to wake up to your value, and get you and your sister buzzed around the Provinces & put you in contact with the big sheikhs as much as possible, 2nd step when everybody has been made to sit up and to want to stop it, we can tell the Native Courts to start treating it as an offence. . . . [I]t seems to me simply a question of how far the Medical Services will help. Without continual investigation and supervision by the M.I.s [medical inspectors] British and Sudanese, we should get no convictions, & we might really only succeed in alienating the nas [people] from the licensed midwives.

Letter from Douglas Newbold, Governor of Kordofan, Sudan, to Mabel E. Wolff, First Matron of the Midwives Training School in Sudan, SAD 582/6/15-16 (May 3, 1932), as reprinted in BODDY, *supra* note 68, at 257 (emphasis in original). The sister to whom Newbold refers is Gertrude Wolff, who joined Mabel in Sudan in 1930 to run the school. The indomitable Wolff sisters were known as the "Wolves" by colonial officials, given their zealous attempts to eradicate Pharaonic circumcision in Sudan. BODDY, *supra* note 68, at 185.

186. ROSBERG & NOTTINGHAM, *supra* note 179.

187. KECK & SIKKINK, *supra* note 68, at 67-68.

restriction on political affiliation.¹⁸⁸ Chiefs who had been recruited as native interlocutors to denounce the brutality and associated health risks of *irua* were reluctant to enforce the ban because popular resentment among their communities eroded their local base of authority. Later, the council of chiefs had their own sets of problems retaining control over the “young hotheads” of the KCA. Kikuyu youth began singing satirical songs called *Muthirigu* that portrayed the ban on *irua* as a plot by missionaries and colonial administrators to steal their land and seduce uncircumcised girls. The songs were regarded as obscene and intolerably disrespectful to British authority and were immediately banned as seditious. Punishment for defying the ban and singing *Muthirigu* included public floggings, expulsion from school, fines, and prison detentions.¹⁸⁹ The situation came to a head in 1929 when the British government, fearing widespread civil unrest, decided to distance itself from the campaign. Dr. Arthur was asked by Gov. Sir Edward Grigg to resign his position on the Executive Council that year.¹⁹⁰ In tendering his resignation letter, Dr. Arthur presciently warned Grigg that the KCA would ultimately use the ban on *irua* as a nationalist tool to further its ambitions for self-rule.

In January 1930, the situation continued to deteriorate with the murder of a female missionary who had been associated with the CSM ban.¹⁹¹ According to the coroner’s report, Ms. Harriet Stumpf appeared to have been choked and “mutilated” with a knife according to local custom, which caused her death.¹⁹² The coroner attributed this gruesome act to the “stand that certain missions had been taking against [*irua*] with the result that there have been conflicts with natives, most of whom are hostile, while agitators have been attempting to make political capital out of the situation.”¹⁹³ Restless hostile natives circumcising and killing innocent white women¹⁹⁴—clearly things were getting out of hand on the Dark Continent. In his communiqué with the Home Office, Gov. Grigg concluded grimly, “It is clear that this circumcision song and dance is being used to work those participating into a state of dangerous fanaticism.”¹⁹⁵

188. Murray, *supra* note 179.

189. ROSBERG & NOTTINGHAM, *supra* note 179; *see also* Murray, *supra* note 179.

190. KECK & SIKKINK, *supra* note 68, at 71.

191. BODDY, *supra* note 68, at 241.

192. *Id.*

193. *Id.*

194. Harriet Stumpf belonged to the American Inland Mission (AIM), a British-American interdenominational venture that was aligned with the CSM. The murder or sexual assault of any white woman sparked punitive administrative responses that were far disproportionate to the actual crime—no matter how gruesome. *See* STOLER, *supra* note 158, at 59. Missionary deaths were especially worrisome, since they were evidence that the kinder, gentler side of imperial enlightenment was not going according to plan. Missionary deaths exposed the insecurities of colonial administrators that theirs was indeed a fragile, messy, extemporaneous, ad-hoc business—not the smoothly executed exercise of domination and compliance that it was purported to be. *See* John L. Comaroff, *Colonialism, Culture, and the Law: A Foreword*, 26 LAW & SOC. INQUIRY 305 (2001).

195. Letter from Edward Grigg to Colonial Office, CO 533/394/30/78 (Jan. 10, 1930), *quoted in* BODDY, *supra* note 68, at 241.

For nearly three years, opposition to the CSM ban on female circumcision became the *sine qua non* of nationalist opposition. Despite the existence of laws “on the books” that criminalized *irua*, anti-excision bans were quietly disregarded by most Kikuyu converts who no doubt tolerated the missionaries’ remonstrations as part of the benefits they accrued through their association with the Church.¹⁹⁶ It was only in 1929 when the CSM insisted upon a total repudiation of KCA membership that the mission lost its congregation and the above-mentioned events escalated into the infamously labeled “female circumcision controversy.” What led the colonial government to enact this ban? And what alliances brought it about?

John Comaroff reminds us that British missionaries were the “least potent whites in colonial theater: subject to authority of the . . . government . . . they lacked social and material resources. . . . [T]heir only weapons in the political arena were their rhetorical potency and their moral sanction.”¹⁹⁷ Given their precarious (or at best indeterminate) class position within settler society, CSM missionaries in Eastern Africa gradually recruited London-based humanitarian and suffragist groups to strengthen their campaign to outlaw circumcision, most notably among Kikuyu communities in Kenya’s Central Province.¹⁹⁸ While the Kikuyu communities were not the only practitioners of genital circumcision, they were targeted most aggressively by missionaries’ anti-excision efforts.¹⁹⁹ Perhaps not surprisingly, the campaigns among the Kikuyu also coincided with the British settlers’ intensified land expropriation in the Central Province,²⁰⁰ increasingly encroaching on Kikuyu lands, imposing heavy taxation on lands and households, known as poll and hut taxes, and engaging in coercive labor

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196. For an excellent analysis of the motivations and activities that pulled rural Kikuyu to the missions (including unmediated spiritual connection with God, protection from powerful chiefs, colonial land grabs/land alienation, medical attention, and education), see David P. Sandgren, *Twentieth Century Religious and Political Divisions among the Kikuyu of Kenya*, 25 AFR. STUD. REV. 195 (1982).
197. John L. Comaroff, *Images of Empire, Contests of Conscience: Models of Colonial Domination in South Africa*, in TENSIONS OF EMPIRE, *supra* note 68, at 163, 184.
198. Keck and Sikkink label the strategy of recruiting external allies to strengthen the position of less powerful local actors “a boomerang effect.” See KECK & SIKKINK, *supra* note 68, at 12-14.
199. Murray attributes the CSM focus on the Kikuyu to their greater acceptance of Christian conversion. While Murray acknowledges that the CSM overestimated the number of converts who supported the campaign, she does not make the correlation between British appropriation of Kikuyu lands and the missionaries’ choice of Kikuyu communities to implement the ban. Murray, *supra* note 179, at 4. This raises a set of interesting questions, not only because missions are complex entities with diverse motivations, but also because of the alliances they formed and their contradictory actions. See Comaroff, *supra* note 197, at 169 (discussing the three ideals the missionaries sought: the rational, capitalist age; an idyllic countryside; and a “sovereign ‘Empire of God’”). Missionaries were often among the most vocal allies for African land rights and “interests.” Dr. Arthur’s nomination to the Governor’s Executive Council as the representative of “native interests” was initially due to his strong criticism of the forced recruitment of Kikuyu labor in the 1920s. See ROSBERG & NOTTINGHAM, *supra* note 179, at 110-11.
200. See ROSBERG & NOTTINGHAM, *supra* note 179, at 73, for a delimitation of the administrative boundaries of Kikuyu traditional lands in the Central Province.

recruitment through the creation of “Native reserves.” The combined result of land shortage, heavy taxation, and concomitant cash dependency led to widespread resentment and civil unrest. The Kenyan situation was carefully monitored in Whitehall—itsself anxious to limit the autonomy of British settlers by creating political pressures at home²⁰¹—a task in which they were assiduously aided by native rights agitators among the British left.²⁰²

Instrumentally, the CSM-led female circumcision ban satisfied the need for propaganda that promoted British rule as a benign, uplifting, and civilizing enterprise. Missionaries provided moral commentary on the status of colonial affairs that was often critical of the government while garnering political and financial support for their work among upper class Conservatives and devout working class congregations in Whitehall, Exeter Hall, and British church halls.²⁰³ The Duchess of Atholl founded the “Committee for the Protection of Coloured Women in the Crown Colonies” after attending one of the CSM’s meetings at which the customary initiation rite of *irua* was described.²⁰⁴ The Duchess was reportedly outraged and revolted by the missionary’s presentation, wondering how “the British Government could countenance such brutal assaults on innocent victims in its colonies in the twentieth century.”²⁰⁵ Missionaries, elite maternal imperialists, and colonial administrators could leverage their respective connections, political capital, and on-the-ground proselytizing labors

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201. The anxiety of the British government to curtail the authority of settlers in Kenya was related to their devastating losses in the protracted Boer Wars and repeated confrontations with settlers over governance and local autonomy in South Africa and Rhodesia. See Davin, *supra* note 68, at 90.
202. See Diana Wylie, *Confrontation over Kenya: The Colonial Office and its Critics 1918-1940*, 18 J. AFR. HIST. 427 (1977). Historians of the period have unanimously identified Dr. Norman Leys and William McGregor Ross as the principal champions for native rights. Wylie refers to them as “disgruntled” colonial servants—men with extensive experience in Kenya who were intent on exposing the errors and iniquities of British settler occupation. They tirelessly authored reports that were highly regarded by left-leaning and progressive groups who were troubled that British imperialism was not actually bringing progress and civilization to its natives. *Id.* at 427-28. Their contacts and experience imbued their reports with great credibility. Humanitarian groups like the Aborigines’ Protection Society, Labour party reformist organizations, and church groups then used these reports to promote their principles. *Id.* at 429.
203. See Comaroff, *supra* note 197, at 164. Exeter Hall was the habitual meeting place of the Anti-Slavery Society in London.
204. BODDY, *supra* note 68, at 234.
205. *Id.* Boddy also describes the popular discourse of the international women’s movement that studiously held the colonial enterprise to its avowed civilizing purpose. This was best summarized by Eleanore Rathbone, president of the National Union of Societies for Equal Citizenship, who wrote in 1928:

At international women’s conferences in Berlin, Paris, and Rome, I have witnessed the active and sometimes skilful propaganda carried on by Indian women for the purpose of simultaneously shewing up the weak points of British administration in these respects and glossing over Indian responsibility. . . . [These criticisms] are not entirely unjust, and from patriotic as well as humane reasons, one shrinks from the prospect of the British Government relaxing its hold on the reins, without introducing stimuli and safeguards respecting women’s welfare.

Id.

toward a common purpose that simultaneously fulfilled multiple functions under the capacious banner of Christianity, civilization, and commerce.²⁰⁶

The reformist views of early women internationalists of the Atholl-Rathbone vintage, intent on using British rule as an instrument of civilization for African and Asian women, and missionaries who provided the manpower for enacting their enlightened campaigns, varied considerably with those of nascent African nationalists, who had a degree of support in London from Labour party officials and anti-colonialist “native rights” agitators reinvigorated by their commitment to “native paramountcy” in the late 1920s.²⁰⁷ The newly-elected Labour government had campaigned on the platform of “Trusteeship,” which articulated three principal objectives. The first was to preserve indigenous governing structures through indirect rule²⁰⁸ while gradually devolving governance to those powers as they demonstrated suitable self-governing capacities.²⁰⁹ The second goal was to develop local economies while promoting their benefits for native populations (necessary for creating a class of proletarian consumers for depressed interwar European economies, as well as to ensure cheap sources of raw materials to satisfy European tastes and demands).²¹⁰ And

206. I am not evaluating either the sincerity of the early internationalist women’s advocates or their dedication to improving the plight of their less fortunate sisters. I merely want to point out the continuities in proclaiming humanitarian purposes to justify military occupation and consolidate strategic economic alliances. See Weissman, *supra* note 69. As historians of the suffragist and abolitionist movements have shown, the vanguard of these movements clearly possessed an unshakeable devotion to their causes. See KECK & SIKKINK, *supra* note 68, at 46-54; Sklar & Stewart, *supra* note 143. Moreover, both the suffragist and abolitionist movements were profoundly influenced by religious mores of the Christian faith, and frequently formed coalitions with missionaries based in the colonies. My larger intention is to scrutinize the timing of the CSM ban and the way in which *irua* was depicted as a violation in the context of struggles over land, oppressive poll taxes, and aggressive labor recruitment policies in the Central Province.

207. The Duke of Devonshire in a modest white paper initially suggested the policy of “native paramountcy” in 1923. In his capacity as colonial secretary, the Duke recommended that “the interests of the African natives must be paramount, and that if, and when, those interests and the interests of the immigrant races should conflict, the former should prevail.” ROBERT GREGORY, SIDNEY WEBB AND EAST AFRICA: LABOUR’S EXPERIMENT WITH THE DOCTRINE OF NATIVE PARAMOUNTCY 5 (1962) (quoting the White Paper of the Duke of Devonshire). Since British settlers were immigrants, in theory the Duke intended that their interests be subordinated to African interests, together with Asian immigrants. However, as Gregory notes, it is unlikely that the Duke contemplated the subordination of British interests. *Id.* at 41-45. Rather he was more concerned with checking Indian interests, as Indians clamored for the right to unrestricted immigration to the African colonies on par with British immigration. *Id.* The doctrine was later revived by Sidney Webb, colonial secretary of the Labour party from 1929-1931, precisely during Kenyatta’s visit to London and during the “female circumcision controversy.” *Id.* at 109-10. Kenyatta’s London visit fit this mold of presenting Kikuyu grievances over land as a “native interest” which would then be debated against the British settler (immigrant) interest—a situation no doubt abhorred by the settlers. See Wylie, *supra* note 202 (discussing the Duke’s White Paper).

208. See LUGARD, *supra* note 149.

209. *Id.* On the Mandate System of the League of Nations, see Anghie, *supra* note 148, at 451-54. The Mandate system provided international protection for the “backward” colonial populations of the Axis states with the goal of supervision and tutelage for their eventual self-rule, conforming neatly to Lugard’s gradualist vision of African self-rule. *Id.*

210. *Id.* See also, e.g., SIDNEY W. MINTZ, SWEETNESS AND POWER: THE PLACE OF SUGAR IN

the third was to suppress all indigenous forms of abuses catalogued on the continent: cannibalism, child marriage, bride price, widow remarriage (or the levirate), female circumcision, and, meriting utmost opprobrium, indigenous slavery.²¹¹ The quest to eradicate African and Asian forms of slavery and forced labor was extremely compelling, both for Labour and for its international humanitarian allies. Abolitionism was pivotal for mobilizing moral support for the imperial effort—as it was for suffragism, international socialism, evangelism, and continental populism. As Gyan Prakesh has noted, the portrayal of indigenous labor arrangements as iniquitous slavery was expedient in elevating the labor recruitment practices of British imperialism as modern *waged* labor, even when those labor practices were more oppressive than the ones they purportedly replaced.²¹² Indeed, the rhetorical appeal of Emancipation was powerful, and it provided a semantically loaded discourse for both progressive and conservative groups at the time.²¹³ Abolitionism resonated with the working classes, elites, and middle class advocates who perceived Emancipation in largely religious terms.²¹⁴ The working classes interpreted imperial labor recruitment practices within the prism of their own bleak Dickensian experience: as an advanced stage of wage labor from pre-capitalist vassalage or feudal slavery, positing waged earnings and the establishment of private property as a universal right. Religious supporters saw the conversion of pagan enslaved Africans into a free, industrious yeoman peasantry within their evangelical, non-conformist mandate.²¹⁵ In short, as Stoler and Cooper note, “The morality of a form of labor practiced exclusively in the colonies became a way to discuss the morality of the labor market in Europe at a time when capitalist consolidation was the focus of urban agitation and rural revolt.”²¹⁶

While the competing theories of morality and economic feasibility have been exhaustively debated in the literature on the demise of slavery,²¹⁷ my

MODERN HISTORY (1985) (discussing this phenomenon in the context of Caribbean sugar production).

211. See Pedersen, *supra* note 68, at 184 (indicating trusteeship objective to denounce indigenous slavery); see also Patrick Bratlinger, *Victorians and Africans: The Genealogy of the Myth of the Dark Continent*, in “RACE,” WRITING, AND DIFFERENCE 185 (Henry Louis Gates Jr. ed., 1985) (showing the connection made by the abolitionist movement between the revelation of African atrocities in the anti-slavery literature and the move to eradicate all “savage customs” on African ground).
212. Gyan Prakesh, *Terms of Servitude: The Colonial Discourse on Slavery and Bondage in India*, in BREAKING THE CHAINS: SLAVERY, BONDAGE AND EMANCIPATION IN MODERN AFRICA AND ASIA 131 (Martin Klein ed., 1992) (describing this occurrence in India); see also Paddle, *supra* note 70, at 3 (describing this occurrence in China).
213. See generally KECK & SIKKINK, *supra* note 68 (identifying the universal resonance of slavery for transnational human rights and humanitarian social movements).
214. Stoler & Cooper, *supra* note 145, at 30.
215. Comaroff, *supra* note 197, at 182.
216. Stoler & Cooper, *supra* note 145, at 30.
217. See, e.g., BUYING FREEDOM: THE ETHICS AND ECONOMICS OF SLAVE REDEMPTION (Kwame Appiah & Martin Bunz eds., 2007); DAVID DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770-1823 (1975); ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY (1982).

interest here is in the rhetorical pull of abolitionism as a platform for colonial reform. Conservative parliamentarians who were committed to the uplift of vulnerable populations within the Empire also adopted anti-slavery rhetoric. Reminding the House of its commitment to abolition, Atholl, Boyle, and Rathbone used the anti-slavery platform to galvanize interest in their concern over eradicating *irua*.²¹⁸ As Susan Pedersen points out, the Atholl-Rathbone alliance astutely used Labour's avowed commitment to native paramountcy to argue that the concern for equality should extend to equality *between* and among the races: that it should also "'protect[]' [Black] women from 'barbaric' practices."²¹⁹ Indeed, similar to the uproar over *suttee* in the previous century, this "repugnant" native practice became a pressing political priority for the colonial administration, humanitarian agencies, and internationalist societies as the British expanded their presence in Africa.²²⁰ In his path-breaking ethnography, *Facing Mount Kenya*, Jomo Kenyatta described a conference on African Children held in 1931 during which,

[S]everal European delegates urged that the time was ripe when this "barbarous custom" should be abolished, and that, like all other "heathen custom" should be abolished at once by law. That it was the duty of the Conference, *for the sake of African children*, to call upon the Governments under which the customs of this nature were practised to pass laws making it a criminal offence for anyone who should be found guilty of practising the custom of clitoridectomy.²²¹

The missionaries' anti-excision campaigns were particularly focused in their schools. They refused to admit "heathen" girls who had been excised, and would not hire teachers who were from families whose female members were excised.²²² Prior to her death, Ms. Stumpf had apparently orchestrated the expulsion of those students from her school who supported or had undergone *irua*.²²³ Jomo Kenyatta denounced the CSM's eradication strategy of excluding

218. Pedersen, *supra* note 159, at 658-59.

219. *Id.* at 656.

220. KECK & SIKKINK, *supra* note 68, at 70; Pedersen, *supra* note 159, at 675-76 (indicating that once the colonial government realized that a legislative ban would result in "stamping out the custom itself," it decided to pursue a campaign of education and propaganda, which ended up being "meaningless" and consisted of a "single circular send out to local administrative officers in May of 1931").

221. JOMO KENYATTA, *FACING MOUNT KENYA: THE TRIBAL LIFE OF THE GIKUYU* 131-32 (1938) (emphasis added).

222. Missionaries in China also adopted the same strategy in their anti-foot binding campaign, reflecting a common pool of modification behaviors deemed effective at stamping out harmful practices. See KECK & SIKKINK, *supra* note 68, at 62. "Missionary schools promoted 'natural feet' first by offering scholarships only to girls with unbound feet; later they refused entry to girls with bound feet and would not employ teachers with bound feet." *Id.*

223. BODDY, *supra* note 68, at 244 (noting that the ban on children who had undergone circumcision was later lifted, though "native teachers were obliged to condemn *irua* in order to be hired").

Kikuyu students from school because this denied them formal educational opportunities. For Africans (elites and non-elites), Christian education was a critical means of ensuring upward mobility, particularly in the transition to a waged economy in urban and industrial centers and increased urban migration. Kenyatta's biography perhaps needs no retelling, but it is important to note that he attended a CSM primary school as a child.²²⁴ Mission schools were of course pivotal to the conjoined task of Christian conversion and colonial governance (as they were throughout all colonial administrative experiences). Within this context of heightened diversification between rural and urban Kikuyu communities, inter-ethnic alliances and hostilities,²²⁵ Christian conversion accelerated the internal political split between more militant young Kikuyu members of the KCA and their elders, whose Chief Councils were regarded as collaborators with the British administration. The KCA's politicization of *irua* came at a time when younger Kikuyu men needed to secure the acceptance of their more traditionalist elders, who had been resentful of the demands placed on their Christian faith. As Hyam points out, "female circumcision suited their [KCA leaders] purpose well, because it would restore their reputation with the older and more conservative elements in the traditionalist masses, who had been looking rather askance at the doings of these young 'hotheads.'"²²⁶ Indeed, as Lynn Thomas documents, the KCA received its greatest membership boost during the "female circumcision controversy," precisely as the CSM lost the majority of its congregation.²²⁷

Mission-educated intellectual writers and nationalist politicians like Kenyatta were classically portrayed as caught up in a conflict between modernization and their tribal traditions—that is, between cultural resistance and Western hegemony. Not surprisingly, cultural practices like *irua* targeted by colonial administrators and missionaries became symbolic of cultural pride, anti-imperial resistance, and revindication in independence struggles.²²⁸ As a "native anthropologist" Kenyatta was a strenuous supporter of *irua* as an initiation rite of passage for girls.²²⁹ He wrote that *irua* expressed the "very essence of an institution which has enormous educational, social, moral, and religious implications"²³⁰ Putting aside Kenyatta's use of functionalist descriptors, the ceremonies accompanying *irua* were public displays of communal solidarity, age-grade bonds, and cultural rejuvenation (the latter no doubt more urgent in

224. KENYATTA, *supra* 221, at xvi. Kenyatta served as Secretary of the Kikuyu Central Association, the nationalist organization for the Kikuyu, and subsequently became Kenya's president in 1963. *Id.* at xix. He served in that capacity until his death in 1978.

225. See Sandgren, *supra* note 196, at 196, for a more detailed study of the complex motivations behind Kikuyu conversion to Christianity.

226. HYAM, *supra* note 179, at 195.

227. Thomas, *supra* note 70, at 130.

228. ROSBERG & NOTTINGHAM, *supra* note 179; Pedersen, *supra* note 159.

229. See KENYATTA, *supra* note 221, at 134-35. To be fair, Kenyatta dedicates equal amount of ethnographic recording to male initiation rites. See *id.* at chs. 6, 7.

230. *Id.* at 133.

the context of colonial upheaval, rising landlessness, and displacement). Janice Boddy suggests that the very public nature of Kikuyu *irua* ceremonies differed from the private circumcisions in the Muslim North, which strengthened the social affirmation of the participants' initiation into adulthood and solidified the status of the girls as an age-grade (similar to a "class of" in collegiate parlance) that graduated together.²³¹ Kenyatta's dire prediction was that "the abolition of *irua* will destroy the tribal symbol which identifies the age-groups, and prevent the Gikuyu [sic] from perpetuating that spirit of collectivism and national solidarity which they have been able to maintain from time immemorial."²³²

Kenyatta aimed to convince his supporters in London of the importance of *irua* for "native rights" and to defuse some of the combustible association of the KCA with sedition and *irua* in the minds of potential allies in the Labour party and among the British left. Note that Kenyatta's visit coincided with the Atholl committee's²³³ assiduous fact-finding into the medical harms and associated risks of *irua* that was underway in the winter of 1929.²³⁴ Kenyatta in fact testified about the cultural importance of *irua* to Atholl's committee. As an anthropologist trained at the London School of Economics, Kenyatta was able to mediate between those British audiences genuinely concerned about "native rights" and those who felt ambivalent about the CSM ban. *Facing Mount Kenya* was promoted as an empirically rigorous, native account of Kikuyu culture by an educated, intelligent Kikuyu,²³⁵ who did not need either a missionary or an anthropologist interlocutor to speak for his people. Kenyatta reasoned that "educated intelligent Gikuyu [sic]" (like himself) still practiced *irua* because "the whole moral code of the tribe is bound up with this custom and that it symbolizes the unification of the whole tribal organization."²³⁶ In an ironic twist, given the charges of human rights evangelism that would emerge in the 1980s, Kenyatta wrote that the Kikuyu regarded the abolitionists as "religious fanatics" who sought to hasten their Europeanization and disintegrate their social order.²³⁷ Kenyatta claimed that the religious fanatics relied on native informants who converted to Christianity and were taught to regard *irua* as something "savage

231. BODDY, *supra* note 68, at 243. See also Claire Robertson, *Grassroots in Kenya: Women, Genital Mutilation, and Collective Action: 1920-1990*, 21 SIGNS 615 (1996) (giving an excellent analysis of the contemporary metamorphosis of Kikuyu women's age-grades into grassroots associations of micro-credit, labor organization, and environmental activism).

232. KENYATTA, *supra* note 221, at 135.

233. Although Lady Atholl founded the Committee for the Protection of Coloured Women in the Crown Colonies, the Committee was chaired by Josiah Wedgewood, distinguished Labour politician and former magistrate in South Africa. Atholl served as vice chairman and Dr. Ethel Bentham as Secretary. Pedersen, *supra* note 159, at 657.

234. *Id.*

235. See Bronislaw Malinowski, *Introduction to KENYATTA, supra* note 221, at vii. The ethnography was not without its critics, especially among anthropologists who were heavily invested in the objectivist credibility of external observation. See Stephan Feuchtwang, *The Colonial Formation of British Social Anthropology, in ANTHROPOLOGY AND THE COLONIAL ENCOUNTER, supra* note 151, at 71.

236. KENYATTA, *supra* note 221, at 134.

237. *Id.* at 135.

and barbaric, worthy only of heathens who live in perpetual sin under the influence of the Devil.”²³⁸ Kenyatta’s insistence on native rights and cultural nationalism was well received by men on the British left and those who were nominally committed to the Trusteeship platform, though Kenyatta’s testimony was roundly rejected by Lady Atholl and her committee.²³⁹

Kenyatta was not the only writer and intellectual to depict female excision as a clash between the modern and traditional values. Ngugi wa Thiong’o, the renowned Kikuyu writer,²⁴⁰ dramatized the “female circumcision controversy” in his 1965 novel *The River Between*, using equally deterministic metaphors steeped in the functionalism of the period:

Waiyaki reflects that circumcision was an important ritual to the tribe. It kept people together, bound the tribe. It was at the core of the social structure, and a something that gave meaning to man’s life. End the custom and the spiritual basis of the tribe’s cohesion would be no more.²⁴¹

Ngugi highlights the choices faced by his protagonist Waiyaki, the mission-educated son of a traditional and powerful chief. Waiyaki eventually must choose between his love for Nyambura, the uncircumcised daughter of an influential Christian convert, and his Kikuyu traditions. Not a subtle novel, *The River Between* starkly depicted Waiyaki’s dilemma as a choice between expressing political support for an independent country and marrying an uncircumcised woman.²⁴² For her part, Nyambura’s rejection of *irua* was a sign of her father’s complete European capitulation and brainwashing, never a sign of her own agency.²⁴³

Although this is not the place for an extensive treatment on syncretism and cultural hybridity, it should be clear that the putative conflict between modernization and tradition and nationalist agitation was *projected* onto circumcision. Though both are fictional and ethnographic accounts, both *The River Between* and *Facing Mount Kenya* portray the catalytic role that the circumcision ban played in intensifying the conflicts of the late colonial period writ large on the bodies of young girls and women. The cultural essentialism of both Ngugi and Kenyatta highlights the romanticism of and nostalgia for gender relations in a pristine revisionist past, uncorrupted by European settler colonialism.²⁴⁴ Neither aperture (the founding father vis-à-vis the maternal

238. *Id.* at 153.

239. Pedersen, *supra* note 159, at 661.

240. NGUGI WA THIONG’O, *THE RIVER BETWEEN* (1965). In his youth, Ngugi attended Alliance High School, one of the premier CSM secondary schools in Kenya.

241. *Id.* at 68.

242. EMMANUEL NGARA, *ART AND IDEOLOGY IN THE AFRICAN NOVEL: A STUDY OF THE INFLUENCE OF MARXISM ON AFRICAN WRITING* 59 (1985).

243. NGUGI, *supra* note 240.

244. As many literary critics of Ngugi’s writings have suggested, *The River Between* is a transitional novel that marks the author’s trajectory from cultural nationalist to outspoken critic of post-Independence tribalism and corrupt neo-colonial elites. *See, e.g.*, NGARA, *supra*

imperialist) created a particularly favorable (let alone *emancipatory*) space for women. One depicts pre-colonial gender relations as the ideal, presuming a return to those relationships in an independent Kenya. The other regards culture as culprit that must be extirpated and replaced by feminine Christian conventions. The controversy itself illuminates myriad ideas about the place of women in national life: what that “nation” would be and what role women should play within it.

The “female circumcision controversy” of the late 1920s predated the armed resistance associated with the Mau Mau rebellion (1952-1956)²⁴⁵ and the ensuing state of Emergency, but it also provided a historical context of gendered opposition to external reforms of the practices associated with *irua*. As such, the practice of *irua* was one way that nationalist sentiment could be expressed as part and parcel of African emancipation from colonial rule as the struggle for independence intensified in the 1950s. The dances and ceremonies accompanying *irua*, formerly denounced as pagan, atavistic, and orgiastic, were later feared as seditious public meetings.

In her study of the second-wave of anti-excision bans in Meru province, Lynn Thomas draws our attention to the political context of the 1950s, as well as to inter-ethnic resentment of Kikuyu dominance in nationalist politics that was shrewdly exploited by the British. The anti-excision ban was passed in Meru province in 1956, when a local council of male elders agreed to outlaw clitoridectomy.²⁴⁶ In attempting to distance themselves from the Kikuyu-led Mau Mau movement, the Meru local council expressed its alliance with the colonial administration to defeat Mau Mau.²⁴⁷ Despite the decree—or perhaps because of it—more than 2,400 girls, men, and women were charged with practicing circumcision in northeastern Meru province.²⁴⁸ Thomas’s oral historical and archival research suggests that thousands more paid exorbitant fines to council headmen rather than desist from the practice.²⁴⁹ Additionally, a number of girls of the age-grade affected by the ban circumcised themselves.²⁵⁰

The coincidence of self-circumcision (known colloquially as *ngaitana*) with the Mau Mau rebellion and the British imposition of a state of Emergency (1952-1960) to quash the Mau Mau insurgency demonstrates the salience of cultural practices used as oppositional tools vis-à-vis external imposition of

note 242, at ch. 8; Peter Nazareth, *The Second Homecoming: Multiple Ngugis in Petals of Blood*, in *MARXISM AND AFRICAN LITERATURE* 118 (Georg Gugelberger ed. 1985).

245. ROSBERG & NOTTINGHAM, *supra* note 179, at 105.

246. For the Emergency ban on *irua* in Meru province, see Thomas, *Ngaitana*, *supra*, note 69.

247. *Id.* at 86 (documenting that the Meru council opposed Mau Mau as a Kikuyu movement that threatened Meru land interests, promoted violence amongst Africans, and wrongly involved women in political group activities).

248. *Id.* at 129.

249. *Id.* at 143 (commenting on the local headmen’s investment in enforcing the ban, since they received payments in the form of cattle rather than the hefty fines—which hardly anyone could afford—for their own enrichment).

250. *Id.* at 130.

humane reforms. I would not argue that the political exigencies of the 1950s and the cultural nationalism of the late 1920s were the same. Compare, for example, Kenyatta's trial and conviction as a Mau Mau sympathizer with his considerably more gracious treatment in the 1920s in his first trip to London.²⁵¹

During the Emergency, the government placed over 80,000 people in detention camps and forced over one million people to live in garrisoned villages to prevent them from assisting the rebels with material support.²⁵² The state of Emergency was synonymous with massive displacement, detention, and extra-judicial killing. Indeed, it was the pretext of Mau Mau, branded as a "barbarous, atavistic and anti-European tribal cult whose leaders planned to turn Kenya into a land of 'darkness and death'"²⁵³ that gave the British settlers the "emergency" powers they needed to wrest control over local politics from liberal London dogooders. Mau Mau allowed them to conflate "militant" leaders of the pro-independence movement, like Kenyatta, with the inscrutable dreadlocked rebels of the bush who reportedly drank blood and raped young girls, de-legitimizing the former's credibility as capable leaders of an independent Kenya.²⁵⁴ And London retreated from its stated commitment to the Dual Mandate under the guise that Mau Mau was a guerrilla/terrorist movement (not at all a legitimate system of Paramount Chiefs exerting control over the appropriate Native Affairs). It was the time the British settlers were also at their most tyrannical, precisely because they knew that independence was inevitable. Thus, given this context, it is telling that one of the myriad ways that political unrest was expressed was in this defiant wave of self-circumcision.

While Thomas is careful to avoid a direct attribution of self-circumcision to Mau Mau and the upheaval of the Emergency, she does situate adolescent girls as central actors in the process of performing these cuttings on themselves or on each other.²⁵⁵ As Thomas notes, while circumcision is always depicted as something happening to young girls, both the "female circumcision controversy" and the actions of the *ngaitana* demonstrated the girls' active participation and support for the practice. Thomas rejects the conventionally held view that *ngaitana* and the "female circumcision controversy" were women's resistance strategies to colonial policies. Indeed, this type of causal analysis elides the fact

251. Kenyatta was tried and convicted by the British for instigating Mau Mau, a secret society dedicated to ending white rule and forcing settlers out of the East Africa protectorate. See John Lonsdale, *Kenyatta's Trials: Breaking and Making an African Nationalist*, in *THE MORAL WORLD OF THE LAW* 196 (Peter Coss ed., 2000).

252. THOMAS, *supra* note 68, at 80. For Kikuyu women's activism in the rebellion, and their provision of material support to the Mau Mau rebels, see also Cora Ann Presley, *The Mau Mau Rebellion, Kikuyu Women, and Social Change*, 22 *CANADIAN J. AFR. STUD.* 502 (1988).

253. ROSBERG & NOTTINGHAM, *supra* note 179, at xvi.

254. As Kenyatta testified during his trial, "[The government] wanted . . . not to eliminate Mau Mau, Sir, but what they wanted to eliminate is the only political organization—that is KAU [Kenyan African Union]—which fights constitutionally for the rights of the African people." ROSBERG & NOTTINGHAM, *supra* note 179, at 284.

255. Thomas, *Ngaitana*, *supra* note 69, at 131.

that any attempt to impose sexual Occidentalized orders generally faltered; that it was as precarious an undertaking as colonial administration itself. As Antoinette Burton argues, although the colonial state had limited capacity to control or contain the sexual domain, “it was often through reference to sexuality and with an eye to maintaining a certain heterosexual order that the experiments of colonial modernity were attempted.”²⁵⁶ One reasonably wonders what subversive strategies would have been adopted to resist the meticulous genital inspections of squadrons of missionary personnel, had Dr. Arnold’s plan come to fruition.²⁵⁷ Would young girls have compliantly spread their legs for these regimented inspections? Would the missionaries have indulged in one of their classic innovations of creating the “indigenous vaginal inspector” by training “local” women (converted Kikuyu townswomen to be sure—who would then train their rural compatriots) to ensure compliance with prescriptive gynecological health dictates? However risible these scenarios may seem, it is the arrogant self-confidence with which they were conceived (and the earnest reformism that gave rise to them) that speaks volumes about the fate of these types of campaigns.

Because we are justifiably suspicious of causal explanations, the relationship between *irua* and resistance suggests that there are more complex motivations at work. Without lapsing into essentialist apologia or anthropological piety, *irua* was indelibly marked by a different set of imperatives that resisted definition (despite Kenyatta’s efforts at ethnographic representation) let alone modification. Ethnographers have pointed out repeatedly that the *irua* ceremonies formed part of a ritual complex that publicly proclaimed the eligibility of young girls to function as adult women (with the expectation and benefit of mutual assistance among their cohorts and age-grade bonds), to assume community leadership positions, or to simply become legitimate members of their communities in a gerontocratic social order.²⁵⁸ Moreover, since uncircumcised girls were prevented from having children (i.e. girls could be sexually active but not procreative), this created tremendous pressure among women and girls to resist the ban on *irua*. Thomas pointed to factors such as peer pressure and generational pressure between circumcised and uncircumcised women in her study of gender politics in Meru communities in the 1950s.²⁵⁹ These are totally unacknowledged factors in Kenyatta and Ngugi’s essentialist renditions of the “tribal” solidarism of *irua*—indeed, both fictional and ethnographic accounts were completely void of a gendered dimension. In a contemporary overview of the practice, Rogaia Abusharaf also reiterates that part of its continued strength and allure is that following the ritual girls become

256. Antoinette Burton, *Introduction: The Unfinished Business of Colonial Modernities*, in *GENDER, SEXUALITY AND COLONIAL MODERNITIES*, *supra* note 68, at 1.

257. For instance, see correspondence between Governor Newbold and Sister Mabel Wolff debating criminalization and medical surveillance strategies. BODDY, *supra* note 68, at 257.

258. Sandgren, *supra* note 196, at 200; Robertson, *supra* note 231, at 620-26.

259. THOMAS, *supra* note 68.

adults, while those who are uncircumcised may not be vested with this rank, whatever their age.²⁶⁰ By far the explanatory factor with the most convincing logic is one that posits the gateway between initiation and childbearing. Almost every human community endorses a fundamental connection between fertility and reproductive sexuality, conferring a higher and distinct status on its reproductive members. None of these insights suggest, of course, that cultural practices are unchanging, but they should highlight the embeddedness of reproductive sexuality and fertility within a domain that is critical to women's power and resists even the most benign social re-engineering and enlightened legal policy-making of concerned global sisterhood. Perhaps the most striking feature of the "female circumcision controversy" is the extent to which it completely ignored women's investment and power over the reproductive domain within which *irua* played a critical symbolic role. Indeed, the concerted orchestration between anti-excision campaigners in London and Nairobi was almost exclusively reliant on male interventions on the ground, eclipsing the fact that *irua* was an affair controlled by women.

The colonial campaigns in Kenya to eradicate *irua* highlight two continuing features of the contemporary anti-FGM campaign. The first is that the campaigns were caught up in broader cultural conflicts over the terms and scale of "modernity" and "Westernization" (via "missionization" in the past and "globalization" in the present).²⁶¹ The second is the medicalization of the eradication discourse, which continues to be a powerful framing for the contemporary campaign. I suggest that this medicalized framing exploits the same putatively benign discursive spaces of maternal imperialism, which are then used instrumentally to smuggle in totalizing ideas about motherhood, womanhood, and modernity (what Fuambai Ahmadu refers to as the imposition of global homogeneity upon the diverse ways of being a woman in the world).²⁶² According to Elizabeth Heger Boyle, medicalization or "the right to health" provides a more neutral discourse for implementing international interventions than does a human rights framework that is at least rhetorically challenging to the powerful institutional framework of national sovereignty.²⁶³ It was under a right to health platform that the contemporary anti-FGM campaign was re-launched in the 1980s, conforming as it did to the developmentalist policies of the WHO and other specialized organizations within the UN, as well as a consortium of non-profits and religious groups that had ongoing maternal health, nutrition, and family planning programs in Africa. Boyle contends that the right to health had limited traction with feminists, who insisted on viewing female genital *mutilation* as a violation of universal human rights, expressing in the denunciation process some of the same sentiments of the imperial maternalists in

260. Rogaia Mustafa Abusharaf, *Introduction: The Custom in Question*, in FEMALE CIRCUMCISION: MULTICULTURAL PERSPECTIVES, *supra* note 5, at 1, 9.

261. See MERRY, *supra* note 131; Sandgren, *supra* note 196.

262. Ahmadu, *supra* note 6.

263. BOYLE, *supra* note 38, at 43.

terms of moral outrage, disgust, patriarchal bondage, and female oppression. Indeed, I remember as a law student in the early 1990s feeling that the consensual adoption of a right to health and rights of the child framework was a “consolation prize” in the hierarchy of civil and political rights and that radical feminist action *demand*ed a rejection of the diplomatic pandering to state sovereignty. Boyle recounts that the more muted, neutral right to health became untenable to the anti-FGM campaign because it merely medicalized the practice—unwittingly endorsing it instead of eradicating it.²⁶⁴ However, as Richard Shweder pointedly asks: isn’t the concern over female genital cutting largely based on its insalubrious side effects?²⁶⁵ If we remove the medical risk to childbirth, neonatal mortality, fistula, hemorrhage, painful intercourse, and the myriad ills that are associated with genital cutting—acknowledging, in the process, that many of these dire health indicators result from structural adjustment programs *imposed by our financial institutions* that severely limit the access of poorer Africans to health services²⁶⁶—are we only left with our moral squeamishness about a cultural practice that other women engage in?²⁶⁷ Can we look at the global anti-FGM campaign as distinct from, or as an integral part of, a larger set of neo-liberal financial arrangements that have had devastating effects on publicly funded health, education, social security, pension, and sanitation programs in debt-strapped and often war-weary African countries?

Shweder raises interesting points about whether the focus on health is pretextual for continued cultural imperialism. Shweder asks whether it is justifiable to spend so much on eradication programs when the global community could dedicate a portion of those funds to health programs designed to make the practice safer. The latter would make sense if our real concern were, in fact, safety.²⁶⁸ Carla Obermeyer posits that the data do not support the dire health outcomes of non-circumcised versus circumcised women once factors of socio-economic status are controlled for in the statistics.²⁶⁹ When wealthy

264. *Id.* at 55. The dilemma for the contemporary anti-FGM campaign continues to be the medicalization of genital cutting by professional nurses and health workers rather than its abandonment. See Diop & Askew, *supra* note 130, at 128-29.

265. Shweder, *supra* note 123, at 186-89.

266. Given the logic of neo-liberal economics and the agile nature of capital mobility, “significant and specific aspects of state policy . . . for many African countries are directly formulated in places like New York, London, Brussels, and Washington.” Ferguson & Gupta, *supra* note 63, at 992. These policies in banks and international financial institutions correspond directly to corporate investment incentives, not to the will of the people.

267. Shweder, *supra* note 123, at 181-99. With regard to the move to reduce maternal and neonatal health risks by symbolic vaginal pricking, see Obiora, *supra* note 85. Also see Doriane Lambelet Coleman, *The Seattle Compromise: Multicultural Sensitivity and Americanization*, 47 DUKE L. J. 717 (1998), for an analysis of a domestic confrontation between the right to health and a rigid insistence on prohibiting a publicly funded hospital’s engagement in symbolic (i.e., minimally invasive) circumcision on newborn girls. “Culture” and rights to culture are highly contested within multicultural societies and raise questions about immigrants’ rights to resist assimilation in a new country. See sources cited *supra* note 14.

268. Shweder, *supra* note 123, at 186.

269. Obermeyer, *supra* note 59.

women, whose husbands and families are extremely invested in both tradition and their safety, give birth under sterile conditions or with skilled caregivers, the maternal health outcomes are apparently no different between circumcised and non-circumcised women.²⁷⁰ Moreover, the data also do not substantiate more harmful neonatal conditions caused by pelvic obstruction once age at first parturition is taken into account.²⁷¹ This raises questions about whether the real culprit is poverty or culture. Thus, to reiterate: can these cultural claims be separated from the neo-liberal policies and structural adjustment programs of which they form part? As illustrated by the integral approach of the contemporary *irua*-abandonment programs, organizations are pursuing their programs within the rubric of development initiatives either as an opportunistic source of funding for “development” or because the negative health outcomes cannot be isolated from other poverty-related determinants of health.

The drama over female genital cutting appears to work with a pre-ordained script. The script uses new voices and actors to perform stock roles in a series of melodramatic acts that culminate in flurries of consciousness raising activity, histrionic transatlantic insults, proselytizing, and clinical campaigns that, in Janice Boddy’s apposite phrase, “train minds and colonize bodies.”²⁷² The eradication programs are largely undertaken with ineffective administrative measures that are more responsive to the pressures exerted by global institutional networks than to the socially endorsed practices of local populations. To what end?

REPUGNANT PRACTICES AND CIVILIZING MISSIONS:

Imposing the Rule of Law through Health

Michel Foucault repeatedly called our attention to the various ways in which the development of the modern clinic facilitated the growth of administrative regimes that could regulate, contain, and discipline the “diseased” (however their pathologies were defined). In colonial medical missions, these “hygienic compounds” obviously enhanced the disciplinary power of the mission’s horticultural objective to cultivate a pure Christian mind, body, and spirit. The tenor of the missionaries’ denunciations moved from the “barbaric” to the “unhealthy” over the course of their campaign. Tactically, the CSM and its allies raised the specter of health concerns over barbarism in the 1920s, which imbued their efforts with the credibility and, most importantly, the neutrality of medical science. And yet the lurid depictions of genital cuttings were a compelling subtext for the campaigns, especially when combined with the spectral consumption of African genitalia by prurient Victorian audiences.²⁷³ In

270. Interview with Dr. Audrey Garrett, M.D., M.P.H., in Eugene, Or. (June 24, 2008).

271. BODDY, *supra* note 68, at 314-16.

272. *Id.* at ch. 7.

273. On the display of black bodies for white consumption, consider the experience of Saarijite Baartman, also known as the “Hottentot Venus,” a Khosian woman brought to Europe in

the commissioned reports and Lady Atholl's fact finding sessions, we see the almost pornographic display of modified African genitalia to "sickened" British audiences who at one point condemned the effects of excision on maternal and infant mortality as "racial suicide."²⁷⁴

The missionaries' move to medicalize the practice and the subsequent emphasis on health was causally related to the dual function of mission health post—itsself less an altruistic enterprise of providing maternal health care to the native population and more an insurance policy of ensuring the healthy reproduction and increased survival of the native workforce.²⁷⁵ Dr. Arthur was an experienced medical missionary, and the CSM adopted a settlement model that had major medical facilities within its compounds.²⁷⁶ This no doubt gave Dr. Arthur and his staff greater access to circumcised women who faced increased health risks of parturition, impaired menstruation, and urination. Medical testimonies resonated with an audience already convinced about the low health standards of Africans (and obsessed with African genitalia) that were directly repugnant to European ideals of hygiene and medicine. Moreover, the medical tone was more effective at incorporating those "Africa hands," parodied by Orwell who populated the upper echelons of the colonial administration and balked at the sermonizing tenor of missionaries. However, Lady Atholl's

1814 to display her buttocks and enlarged genitalia to spectators. Upon her death, respected pathologist Georges Curvier, who argued that her over-sized genitalia offered physical proof of the African woman's animalized sexuality, further dissected Baartman's body. Baartman's brain and sexual organs were displayed in the Musée de l'Homme until 1985. See Sander Gilman, *Black Bodies, White Bodies: Toward an Iconography of Female Sexuality in Late Nineteenth-Century Art, Medicine, and Literature*, in "RACE," WRITING, AND DIFFERENCE, *supra* note 211, at 203; THE LIFE AND TIMES OF SARA BAARTMAN (Icarus Films 1999).

274. BODDY, *supra* note 68, at 235. This eradication strategy, rooted in what Richard Shweder has called the "yuck response," defines the hallmark features of genital cutting campaigns, persisting into the current anti-FGM campaign. See Richard Shweder, *What about Female Genital Mutilation? And Why Understanding Culture Matters in the First Place*, in ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES 222, 222-26 (Richard Shweder, Martha Minow & Hazel Rose Markus, eds., 2002). For the now-dated "yuck factor," see, for example, FRAN HOSKEN, THE HOSKEN REPORT: GENITAL AND SEXUAL MUTILATION OF FEMALES (4th ed. 1994); LIGHTFOOT-KLEIN, *supra* note 85 (providing a more nuanced view than Hosken, but is acclaimed as a travelogue/personal odyssey of a Western woman's encounter with African patriarchy).
275. Randall Packard has traced the development of research institutes of tropical medicine and hygiene to the colonists' need for disease control of malaria, yellow fever, and parasitic infections that would facilitate white settlement and improve health conditions for imperial expansion rather than for the native population. Randall Packard, *Visions of Postwar Health and Development and their Impact on Public Health Interventions in the Developing World*, in INTERNATIONAL DEVELOPMENT & THE SOCIAL SCIENCES: ESSAYS ON THE HISTORY AND POLITICS OF KNOWLEDGE 93 (Frederick Cooper & Randall Packard eds., 1997). Rates of European settlement and exploration increased exponentially with the development of quinine as an anti-malarial, breakthroughs in bacteriology, and other medicines to combat tropical diseases. For American public health interventions, see E. Richard Brown, *Public Health in Imperialism: Early Rockefeller Programs at Home and Abroad*, 66 AM. J. PUB. HEALTH 897, 897-903 (1976).
276. The CSM had adopted the medical missionary model in its settlements in South Africa and replicated it when given the go-ahead to establish its stations in Kenya. See ROSBERG & NOTTINGHAM, *supra* note 179, at 106.

committee was not always successful in its attempt to gather medical evidence that supported the maternal health risks of *irua*. On at least two occasions, two physicians testified about the negligible effects of *irua* on maternal mortality and refused to acknowledge any correlation between Islam and circumcision.²⁷⁷ As Dr. Lloyd, a medical missionary with experience in Sudan, reportedly attested to the Committee, “Islam is no more responsible for circumcision than Christianity is for tight lacing.”²⁷⁸

The exposure of British audiences to the health risks involved with *irua* also functioned in a parallel manner to the contemporary “yuck-how-could-they-do-that factor” that Richard Shweder describes.²⁷⁹ Undoubtedly, the clinical voice had greater probative appeal when coupled with scientific racism and eugenics that were the *au courant* epistemological paradigms of the period.²⁸⁰ And as Pedersen points out, the early campaigners relied heavily on medical missionaries like John Arthur because the “maternalist” voice could not legitimately express concern for sexuality. Their presentations were focused exclusively on maternal and child health, domestic sanitation, and hygiene. Ultimately, Pedersen concludes that the maternal imperialist crusade to end circumcision was stymied by Victorian constraints on female sexuality: neither Atholl nor Rathbone had a language outside of medical hygiene to marshal sustained support for the ban among their parliamentary colleagues. Male colonial administrators who may have been loath to assimilate the technicalities of African women’s genitalia decided on a compromise that criminalized excision beyond the clitoris that would be enforced by their cohort of Paramount chiefs. This was anathema to both the CSM and Atholl, given their staunch opposition to the entire practice. But, as Pedersen points out, Atholl was caught in a maternalist paradigm that could only be mobilized to improve reproductive health outcomes.²⁸¹ Given his rigid evangelism and tendentious positions on native land rights, Dr. Arthur was not popular among either colonial administrators or settlers.²⁸² The latter were the least committed to expending any resources on eradicating *irua*, staunchly convinced that it was dangerous and futile for meddling London do-gooders to interfere with the “deeply held customs of a ‘savagely black race.’”²⁸³ When the political situation deteriorated, it was clear that Atholl would have to withdraw her proposal, and her Parliamentary colleagues prudently suggested that she move onto a less controversial topic in her crusade for colonial rescue.²⁸⁴

277. Pedersen, *supra* note 159, at 667.

278. BODDY, *supra* note 68, at 237

279. Shweder, *supra* note 274.

280. NANCY LEYS STEPAN, *THE HOUR OF EUGENICS: RACE, GENDER AND NATION IN LATIN AMERICA* 70 (1996).

281. Pedersen, *supra* note 159, at 673.

282. ROSBERG & NOTTINGHAM, *supra* note 179, at 88, 119.

283. Pedersen, *supra* note 159, at 661.

284. *Id.* Apparently, in the debacle of the circumcision controversy, Lady Atholl, Eleanor Rathbone, and Nina Boyle dedicated themselves assiduously to the reviled practice of bride

Decades later, with the rise of clitoral signification and female embodiment, we see a shift in the discourse not completely away from health, but with a newly invigorated focus on clitoral/sexual deprivation. Thus Fran Hosken, a tireless crusader in the anti-FGM campaign, attributed the *real* purpose of female genital cutting as an “attempt to reduce or extinguish sexual pleasure and keep women under male sexual control.”²⁸⁵ The deprivation of sexual stimulation via clitoral excision was a persuasive vehicle for promoting the eradication of female genital cutting on a gyno-centric human rights basis.²⁸⁶ However, the sexual fulfillment and liberation argument was not as compelling to ears beyond Western audiences. The campaign, lacking the “buy-in” of African women and participation of the protean “grassroots/local” sector to credibly rebut charges of human rights imperialism and ethnocentrism, fared no better than Lady Atholl’s cultivated proselytizing efforts. Indeed, in adopting the view that female genital cutting was symbolic of women’s subordination and sexual deprivation, Western women implicitly assumed that no one (in her right mind) would voluntarily choose to undergo the practice.²⁸⁷ When presented with evidence that older girls often actively embraced and requested the practice and that mature women often re-infibulated or re-modified their genitalia in post-partum procedures, and, more importantly, when presented with gynecological data that clitoral excision was not *a priori* constitutive of diminished sexual pleasure,²⁸⁸ the argument switched awkwardly but unsurprisingly from the clitoral into one of informed consent and children’s diminished capacity—a more legalistic, policy-oriented and maternalist human rights framework that worked expeditiously with the medicalized “right to health.” My sense is that we are currently between the biomedical (neutral but powerful and immune to contestation) and the clitoral/castration (strategically retaining the yuck factor and the protective groin-clutching reflex to drive home the mutilation effect) paradigms. But today’s maternal framing has a deferential cultural overtone, undoubtedly a result of the partnerships of institutional actors and African professionals and activists in the campaign. Take, for instance, a policy statement issued in 1995 by key institutional players in the anti-FGM campaign (WHO, UNFPA, UNICEF, and UNDP):

We must work from the assumption that human behaviours and cultural values, *however senseless they may look to us from our particular personal and cultural standpoints*, have meaning and fulfill a function for those who practice

price and widow inheritance in Africa. *See also* BODDY, *supra* note 68, at 256.

285. Continuing in this vein of sexual conspiracy, Hosken wrote, “Men in Africa, whether illiterates or intellectuals, know very well that they derive powers from castrations of women’s sexuality. It is a matter of political control. The fear of female sexuality is after all shared by men around the world.” HOSKEN, *supra* note 274, at 4.

286. *See* MARY DALY, *GYN/ECOLOGY* (1978). Here, gyno-centric refers to the reorientation of western canons of knowledge to reflect a feminized critique of androcentrism.

287. BOYLE, *supra* note 38, at 46.

288. LIGHTFOOT-KLEIN, *supra* note 85, at 25-26; Obermeyer, *supra* note 59, at 400.

them. People will change their behavior only when they themselves understand the hazards and indignity of the harmful practices and perceive the new practices proposed as meaningful, functional, and at least as effective as the old ones. Therefore, what we must aim for is to convince people, including women, that they can give up a specific practice without giving up meaningful aspects of their own cultures.²⁸⁹

What follows is my attempt to show how these three discourses—the maternalist, the medical, and the universalist—fit together, and how an indigenized maternalism has emerged as “the” dominant respected voice within the contemporary anti-FGM campaign. In doing so, my aim is not to recount in detail the well-documented strategies or politics of the contemporary anti-FGM campaign, but rather to identify the campaign as constitutive of certain types of g-feminist interventions that are profoundly influenced by their colonial past. In short, my aim is not to take sides with a frankly tiresome moralizing debate, but rather to show how it animates arguments and attitudes about culture that shape Western understandings of the practice long before the asylum cases brought by African women reach a U.S. court.²⁹⁰ These cases become part of the arsenal of geopolitical and ideological tools for perpetuating Western hegemony (and its attendant anxieties) in a polarized yet interdependent world. As mentioned earlier, asylum cases alleging persecution on the basis of future and past female genital cutting are essential to the credibility of the U.S.’s condemnatory position within the global anti-FGM campaign. However, the present case law and the critiques that give rise to it build on erstwhile notions of culture and ideas of Africans as automatons ruled by an oppressive culture and/or religion.²⁹¹ Indeed, as Wendy Brown writes, “‘culture’ is what nonliberal peoples are imagined to be ruled and ordered by . . . [W]e *have* culture while they *are* a culture. Or, we are a democracy while they are a culture.”²⁹² When we refer to ourselves as cultural subjects, we mean for the most part our autonomous ability to indulge in artistic creation, express a preference for a type of cuisine or taste in music—not the “submission to a harrowing practice that has existed for millennia.”²⁹³ “Family values” and “the American people” are phrases that are often bandied about by populists and fundamentalists, especially at election times, but adherence to

289. WORLD HEALTH ORGANIZATION ET AL., JOINT STATEMENT ON FEMALE GENITAL MUTILATION (1995) (emphasis added). The final statement issued two years later, with a host of other UN agencies, including *inter alia*: UNESCO, UNAIDS, UNIFEM, UNECA, and UNHCR, has no mention of “senseless values.” These kinds of emendations are telling for organizations extremely anxious to portray themselves as harmonious global beehives.

290. Kratz, *supra* note 17, at 310.

291. On the Amina Lawal and Soraya M. death by stoning sentences for adultery, see, for example, Shannon Barrow, *Nigerian Justice: Death by Stoning Reveals Empty Promises to the State and the International Community*, 17 EMORY INT’L L. REV. 1203 (2003). Cf. *Saving Amina Lawal*, *supra* note 47.

292. BROWN, *supra* note 88, at 150.

293. Celia Dugger, *A Refugee’s Body is Intact but her Family is Torn*, N.Y. TIMES, Sept. 11, 1996, at A1.

these values is imbued with a certain degree of volition. The phrase “American people” may be gently caricatured or archly derided given its impossible descriptive scale. Contemporary “othering” is strikingly similar to the colonial discursive strategies that positioned Kikuyu women under the yoke of a barbaric, repulsive practice from which they could only be liberated by the agents of Western civilization. As Nyamu points out, the international community continues to regard African customs as something static and culturally complicit that must be abolished as a precondition for the full realization of women’s rights and empowerment.²⁹⁴

By way of summary and transition, I focused in detail on the colonial campaign rather than the current one because even the best contemporary compilations devote little attention to the antecedents of current actions—reflecting, it seems, a reluctance to confront the repetitive patterns of the past and present.²⁹⁵ Disciplinary boundaries undoubtedly account for the degree of attention to past campaigns. Ethnographic studies often focus on the historical antecedents of local cultural practices²⁹⁶ while socio-legal scholars devote their energies to the interface of state behavior in institutional settings and the generation of human rights norms in assuring compliance with global anti-FGM policies.²⁹⁷ Both approaches are valuable, but the divergence in disciplinary optics may partially explain why we continually act in ways that we suspect are ineffective but nonetheless perceive as preferable to inaction in the face of violation. In her perceptive critique of Western women’s advocacy in the anti-FGM campaign, Sondra Hale asks:

[H]ave some or all of us been invited to action? In general, is it problematic to act on behalf of another group/region/society without invitation? In some cases (as in cases of genocide, for example), is it problematic to wait for an invitation? How do we determine who is the “legitimate” inviter? What role does silence play?²⁹⁸

This is an excellent set of questions to be posed by advocacy groups who are engaged in serious transnational dialogue. When I worked as a (lowercase) g-feminist, my instinct was to defer to community leaders to articulate their priorities and desires while being constantly attentive to internal community divisions, alliances, and tensions and the way that outsiders with funding, connections, promises of employment and higher status, donations of

294. Nyamu, *supra* note 63, at 392-93.

295. *Cf.* Lewis, *supra* note 85 (focusing more on Kenyatta’s anti-feminist cultural nationalism rather than the overall context of the colonial campaign); Sussman, *supra* note 4 (examining foot binding, the Kenyan female circumcision controversy, and *sutte* as historical precursors to the 1996 Female Genital Mutilation Act).

296. *See, e.g.,* BODDY, *supra* note 68; THOMAS, *supra* note 68; Melissa Parker, *Rethinking Female Circumcision*, 65 AFR. 506 (1995); Walley, *supra* note 6.

297. BOYLE, *supra* note 38, at 7.

298. Hale, *supra* note 133, at 26.

technological gadgetry whose sojourns in the “target” communities of comparatively short durée contributed to these dynamics.²⁹⁹ Ultimately, my approach may merely reflect nothing better than an effete relativism, but it is nonetheless aware that activism and advocacy are fraught with Machiavellian intrigue, and no one’s actions aimed at imposing behavioral change and representing others should be exempted from external scrutiny, internal reflection, and accountability.

COLONIAL LEGACIES AND POST-COLONIAL REALITIES:

Contemporary Feminist Campaigns

Under the 1980 Refugee Act,³⁰⁰ individuals seeking to enter or remain in the United States who claim persecution on the grounds of race, nationality, political opinion, religion, or social group membership in their home countries are statutorily entitled to asylum protection pending a favorable review of their application. While recognizing the importance of extra-territorial protection for persecution that was motivated by political opinion, nationality, ethnic origin, or religion, feminist scholars and advocates have repeatedly objected to the androcentric, Eurocentric, and heterocentric bias of the 1951 Refugee Convention.³⁰¹ These objections formed part of a larger feminist critique on the lack of women’s representation and interests within formal international legal institutions, jurisprudence, and policy-making, and the unresponsiveness of the paradigms of global security, trade, and human rights to account for women’s needs within a simplistic geographic terrain that precluded intervention in the designated private sphere.³⁰² This division into public and private occluded a

299. See McKinley, *supra* note 54.

300. 8 U.S.C. §1101(a)(42)(A) (2006); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.). The Refugee Act incorporated the 1951 Refugee Convention into domestic law, removing geographical and time restrictions inherent in the Convention, and reads virtually the same as its progenitor.

[A]ny 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.

Id.

301. See Anderson, *supra* note 77; Andrea Binder, *Gender and the Membership in a Particular Social Group Category of the 1951 Refugee Convention*, 10 COLUM. J. GENDER & L. 167 (2000-2001); Joan Fitzpatrick, *Gender Dimensions of US Immigration Policy*, 9 YALE J.L. & FEMINISM 23 (1997); Pamela Goldberg, *Anyplace But Home: Asylum in the US for Women Fleeing Intimate Violence*, 26 CORNELL INT’L L.J. 565 (1993); Jennifer Greatbach, *The Gender Difference: Feminist Critiques of Refugee Discourse*, 1 INT’L J. REFUGEE L. 518 (1989); Diane Otto, *Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law*, 18 AUSTL. YEAR BOOK INT’L L. 1 (1997); Randall, *supra* note 77; Amy Stern, *Female Genital Mutilation: United States Asylum Laws are in Need of Reform*, 6 AM. U. J. GENDER & L. 89 (1997-1998).

302. Critical feminist scholarship in international law literature is profuse, and many capable writers have both critiqued and celebrated its contributions within the field. The following is

series of hierarchies nested in class, ethnic origin, national belonging, sexual orientation, and cultural capital even while ostensibly paying attention to “women’s basic needs.” As Hilary Charlesworth expressed fifteen years ago:

How do we change the conceptual foundations of international law? How do we make gender a fundamental category of analysis? . . . We are still seeking to understand the pervasiveness of the gendered aspects of our world. We are still developing new ways of theorizing. *We have no historical experience of power on which to draw in our reconstruction.*³⁰³

Charlesworth’s concerns about power and representation have been redressed by the efflorescence of state feminism in Women’s Ministries throughout the globe and gender mainstreaming in international governance.³⁰⁴ Moreover, the theoretical lacuna in international law to which she alluded is now a vibrant area of critical feminist intellectual activity.³⁰⁵ It is now (thankfully) a truism that the apparently neutral principles of security and stability have differential gendered applications, even within the doctrinal approaches to international law. Although these shifts allude to changes within international law alone, human rights, humanitarian, and refugee and asylum law have also responded favorably to the challenge to take women as serious human rights claimants. In fact, a tremendous amount of creative energy has been devoted to rethinking the concept of human rights on both gendered and cultural/geographical grounds.

Before moving inexorably towards the chronological endpoint of our story in 1996, (the year that *Kasinga* was decided and the Female Genital Mutilation Act was passed), we must pause for a moment to assess the constellation of factors that contributed to the shift in the doctrines and practice of public international law. As many feminist scholars have noted, the unassailable nature of the sovereign state and the first-order principle of non-intervention came under severe attack with the revelation of genocidal rape as a military strategy, leading ineluctably to an open acknowledgment of the sexualized landscape of

intended as a representative rather than comprehensive list of influential publications: HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* (2000); GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER (Adrien Wing ed., 2000); HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES (Rebecca Cook ed., 1994); WOMEN’S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES, *supra* note 117; SHELLEY WRIGHT, *INTERNATIONAL HUMAN RIGHTS, DECOLONISATION, GLOBALISATION: BECOMING HUMAN* (2001).

303. Charlesworth, *supra* note 56, at 4 (emphasis added).

304. Charlesworth, *supra* note 62; Halley et al., *supra* note 15. Within the disciplines of political science and international relations, considerable analytical attention has been devoted to “State Feminism.” Per their commitments to CEDAW, governments have adopted the policy of state feminism, which incorporates prominent feminist actors within the apparatus of government. Previously, the relationship between feminists and governments was confrontational and often hostile. For state feminism on the African continent, see HANNAH BRITTON, *WOMEN IN THE SOUTH AFRICAN PARLIAMENT: FROM RESISTANCE TO GOVERNANCE* (2005).

305. See sources cited *supra* note 302.

military conflicts in the former Yugoslavia and Rwanda.³⁰⁶ Forensic evidence and testimonies of survivors of sexual violence established rape as a tactical element of ethnic cleansing in the former Yugoslavia³⁰⁷ and in the Rwandan genocide in 1994.³⁰⁸ This disclosure created the opportunities for determined feminist incursions into one of the most sacrosanct areas of international law: the *post-hoc* investigation of military conflict.³⁰⁹ High-profile feminists called attention to these atrocities—Catharine MacKinnon infamously equated the documented rapes and forced impregnation of Muslim and Croatian women with genocidal pornography.³¹⁰ This evidence unfolded simultaneously within an international institutional apparatus that was acutely embarrassed by its appalling behavior during the Rwandan genocide. It is important to note that sexual violence and forcible reproduction were widely known wartime atrocities,³¹¹ but the scale of the Rwandan genocide spurred even an apathetic, sovereignty-beholden bureaucratic apparatus into belated action.³¹² Concurrently with these tragedies, we can point to a series of fortuitous events that created a receptive environment for feminist concerns in international law—building on the momentum of the 1980s with the UN Decade for Women that had steadily raised consciousness about violence against women in the private sphere and erected a parallel institutional and non-governmental network of organizations dedicated to a number of women’s issues. International human rights and women’s conferences served as a key networking and consciousness-raising tool for inserting feminist human rights concerns in the international arena of governance

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306. See, e.g., Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, in MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA 197 (Alexandra Stiglmyer ed., 1994).
307. M. CHERIF BASSIOUNI & MARCIA MCCORMICK, SEXUAL VIOLENCE: AN INVISIBLE WEAPON OF WAR IN THE FORMER YUGOSLAVIA 33 (Int’l Hum. Rts. Inst. Occasional Paper No. 1, 1996).
308. See Ntahobali & Nyiramasuhuko v. Prosecutor, Case No. ICTR 97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the “Decision On Defence Urgent Motion To Declare Parts Of The Evidence Of Witnesses RV And QBZ Inadmissible” (July 2, 2004); Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998).
309. See, e.g., Engle, *supra* note 47; Linda Malone, *Beyond Bosnia and In re Kasinga: A Feminist Perspective on Recent Developments in Protecting Women From Sexual Violence*, 14 B.U. INT’L L.J. 319 (1996) (noting that the International Criminal Tribunal for the Former Yugoslavia listed rape among the crimes against humanity, punishable under international law).
310. Kelly Askin, *The Quest for Post Conflict Gender Justice*, 41 COLUM. J. TRANSNAT’L L. 509 (2003); Kesic, *supra* note 50; Catharine MacKinnon, *Rape, Genocide & Women’s Rights*, 17 HARV. WOMEN’S L.J. 5 (1994).
311. Malone, *supra* note 309, at 320 (observing that while rape was not recognized at the Nuremberg Trials, rape was prosecuted as a war crime in Tokyo for the notorious “Rape of Nanking”).
312. On the root causes and effects of “popular participation” in the Rwandan genocide, see MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS (2001). On the gendered and sexualized nature of military and peacekeeping occupations, see CYNTHIA ENLOE, BANANAS, BEACHES AND BASES: MAKING FEMINIST SENSE OF INTERNATIONAL POLITICS (1989) and CYNTHIA ENLOE, GLOBALIZATION AND MILITARISM: FEMINISTS MAKE THE LINK (2007).

and policy making, leading to the near-unanimous adoption of CEDAW, an explicitly gender-focused declaration aimed at promoting women's human rights among numerous UN member states. With the insertion of sexual war crimes in the international criminal tribunals as crimes against humanity,³¹³ activists and scholars pressed the case for increased attention to private sector violence—of which female genital mutilation was a key component.

It is within this unfortunately abbreviated rendition of a complex process of negotiation, dialogue, and dedicated effort that we should locate the asylum cases alleging female genital mutilation. In summary, the institutional terrain is global, with actors drawn from an alliance of state Women's Ministries, NGOs, and IGOs—a powerful consortium with state-like powers that James Ferguson and Akil Gupta have referred to as the African BONGO, GONGO and QUANGO.³¹⁴ Most importantly, the discourse is one of universal human rights. During the 1980s, human rights increasingly emerged as the only legitimately normative way to discuss injustices of various kinds inside and outside of the west.³¹⁵ Indeed, as the humanitarian hawk Michael Ignatieff emphatically asserted, “Human rights is the only universally available moral vernacular that validates the claims of women and children against the oppression they experience in patriarchal . . . societies . . . [and enables them] to act against practices—arranged marriages, purdah, . . . genital mutilation, domestic slavery, and so on—that are ratified by the weight and authority of their cultures.”³¹⁶ This is a monumental claim. On one hand, Ignatieff admirably celebrates the capaciousness of human rights discourse in incorporating “Third World voices” to resist patriarchal and post-colonial violence. On the other hand, Ignatieff overlooks the fact that NGOs and social movements originating in the global south are obliged to articulate their grievances in human rights language if they are to successfully participate in the networks of funding and policy making that emanate from the West.³¹⁷ Saudi charities, for instance, would embrace a theocratic discourse in favorably reviewing requests for support; Christian faith-based groups also respond favorably to proposals that sustain their profuse network of local Christian development NGOs in Africa. This is not the secular discourse of human rights, as any good grant-writer knows, even though many of the organizations theoretically share similar goals. The point is that while human

313. See, e.g., *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998).

314. Ferguson & Gupta, *supra* note 63. Ferguson and Gupta refer to transnational governmentality or modes of government that are being implemented on a global scale as the state fragments, shrinks, and privatizes. They question the “NGO-ness” of non-profit organizations, e.g. BONGOs (Bank Organized Non-Governmental Organizations), GONGOs (Government Organized Non-Governmental Organizations) and QUANGOs (Quasi Autonomous Non-Governmental Organizations) that have proliferated with the outsourcing of state functions to the private, globalized sector. *Id.* at 993; see also Sheila Carapico, *NGOs, INGOs, GO-NGOs and DO-NGOs: Making Sense of Non-Governmental Organizations*, MIDDLE EAST REPORT, Spring 2000, at 12, 12-15 (2000).

315. See GREWAL, *supra* note 46, at 128.

316. MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 68 (2003).

317. GREWAL, *supra* note 46, at 144.

rights discourse provides a “universally available moral vernacular,” *pace* Ignatieff, it is not *the* only vernacular that addresses concerns for human dignity.³¹⁸ Moreover, its emphasis on universality and individual rights pose serious challenges for its uncontested status as “the” hegemonic global discourse given its discomfort with group rights—an issue that comes starkly into play in multicultural societies.

In her review of the *Kasinga* and *Abankwah* cases, Jennifer Coffman notes that the anti-FGM campaigners, emboldened by the successful inclusion of intimate violence as a human rights agenda, adopted the universalist stance to strengthen their argument about the externally inflicted, violent, and torturous nature of genital cutting.³¹⁹ That the torturer/mutilator was a family member did not pose a problem within the intimate violence framework. That the torturer seemingly acted without malicious intentions was a more difficult proposition.³²⁰ Here we have the “awkward” relationship between anthropology and feminism to which Margaret Strathern alluded years ago.³²¹ At the same time that the preference was expressed for universalism, relativism was demoted as a credible discourse for defending human rights as the language of superannuated anthropological apologists.³²² But despite quite often vociferous claims to the contrary, both relativists and universalists are deeply invested in a deterministic view of culture.³²³ As Jeremy Waldron argues, proponents of universalism and relativism generally rely upon the paradigmatic case of female genital cutting to elicit support for their respective positions. Waldron writes:

Unlike torture, female genital mutilation is not usually cited as a practice that is universally abhorred, but rather as a practice that is part of the cultural tradition of some societies . . . but which is . . . rightly abhorred by people viewing those cultures and societies from the outside. . . . [This] particular

318. For other traditions of human duties and dignity that are not purely derivative of Enlightenment philosophy, see ABDULLAHI AHMED AN-NA’IM, HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES (1995); Makau Mutua, *The Banjul Charter: The Case for an African Cultural Fingerprint*, in CULTURAL TRANSFORMATION AND HUMAN RIGHTS IN AFRICA 68 (Abdullahi An-Na’im ed., 2002); Onuma Yasuaki, *Toward an Intercivilizational Approach to Human Rights*, in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS 103 (Joanne Bauer & Daniel Bell eds., 1999).

319. Coffman, *supra* note 17, at 60.

320. Counsel for *Kasinga* rejected a “punitive intent” test on the part of the family member to establish the persecutory effect of the genital cutting. See Karen Musalo, *Ruminations on In re Kasinga: The Decision’s Legacy*, 7 S. CAL. REV. L. & WOMEN’S STUD. 357, 362-63 (1998). The subjective intent of the persecutor versus the objective impact is a longstanding debate in refugee and asylum law. See, e.g., *I.N.S. v. Pitcherskaia*, 118 F.3d 641 (9th Cir. 1997).

321. Marilyn Strathern, *An Awkward Relationship: The Case of Feminism and Anthropology*, 12 SIGNS 276 (1987).

322. See Karen Engle, *From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947-1999*, 23 HUM. RTS. Q. 536, 537-38 (2001); Sally Engle Merry, *Human Rights Law and the Demonization of Culture (and Anthropology Along the Way)*, 26 POL. & LEGAL ANTHROPOLOGY REV. 55, 56-58 (2003).

323. See Walley, *supra* note 6, at 406-07.

cultural practice so excites our sympathies (for those who suffer it) and so offends our sensibilities, that the example invites us to condemn the practice notwithstanding its establishment in a culture. This example therefore helps to stiffen the confidence of people like us in our ability to criticize foreign practices, and in the legitimacy of our own human rights ideals, even in the face of relativist objections. It invites us to trust our intuition that certain practices are vile, even when we know that there are people or whole societies who regard those practices as morally acceptable.³²⁴

Thus it is within the tension between universalism and multiculturalism that the FGM campaign is thrown into sharp relief. An effete cultural relativism characterized the FGM/C/S debate between multicultural feminists and universalists prior to the 1980s, but the simultaneous passage of the Federal Female Genital Mutilation Act³²⁵ and the approval of Fauziya Kasinga's asylum application seemed to settle the matter in favor of universalists.³²⁶ Post-1996, the practice of female circumcision was firmly established within the pantheon of human rights violations: it was targeted for eradication through criminalization, economic sanctions, aid restrictions, and behavioral modification campaigns. As mentioned earlier, this was a testament to the tireless efforts of feminist international lawyers and human rights, asylum and refugee advocates to sponsor legislation that recognized the particular harms faced by young women within the private sphere and to reorient the masculinist concepts of state-sponsored violations of civil and political rights, compliance, consent, and international security when assessing women's human rights. In this regard, asylum law made corresponding adjustments to the changes in humanitarian and human rights law in adjudicating the claims of young women.³²⁷ Fearing push back in the wake of Fauziya Kasinga's approved asylum claim, Hope Lewis and Isabelle Gunning urged American feminists to "clean our own house" of "exotic" and familiar human rights violations:

Cleaning house means following our own immigration laws by giving asylum to refugees who face persecution based on gender. The first step is to continue and expand the legacy of the Kassindja case. . . . In a country . . . whose government often focuses on human rights in its political and foreign policy rhetoric, it would be the height of hypocrisy and cynicism not to grant asylum to those who fear the same practices that we condemn as human rights violation. . . .

[R]ecognizing such claims, and treating claimants with human dignity in

324. Waldron, *supra* note 83, at 306.

325. 18 U.S.C. § 116 (2006); 22 U.S.C. § 262K-2.

326. Sussman, *supra* note 4, at 207-08 (arguing that while universalists have largely prevailed in the battle to criminalize FGM, eradication of the practice relies heavily on the insights and concerns raised by cultural relativists).

327. See, e.g., American Immigration Lawyers Association, *supra* note 7.

this country, is the least that we can do.³²⁸

Although the Immigration and Nationality Act is a deeply patriarchal and racialized statute with respect to family reunification, deportation and expedited removal, criminal surveillance and mandatory detention, and “superstar” employment and investment visas, statistics reveal that in a number of resettling countries women are granted asylum and refugee status at higher rates than men despite the far lower percentage of women applicants.³²⁹ Indeed, in the current frenzy of workplace raids, local criminal ordinances, and anti-immigrant violence, asylum seekers fare comparatively better with USCIS than many other groups of non-citizens.³³⁰ Asylum, however, is not immune to anti-immigrant hostility and the politicized rhetoric of illegal immigration and national security, and the precariousness of the process is underscored by the fact that asylum is an administrative act of sovereign grace, not a right.³³¹ Thus, notwithstanding these advances, the long-term political stakes that underpin these successes are costly. As Jacqueline Bhaba reflects:

[A]dvocates, governments and courts often operate with crude, inaccurate, and simplistic stereotypes about complex and evolving social and political situations By trying to secure watertight affidavits . . . asylum advocates are driven to simplify, distort and even falsify the complex societies from which their clients originate in order to persuade decision makers that their clients qualify for protection.³³²

As Bhaba points out, the goal of lawyers in the courtroom is *to win*, by

328. Lewis & Gunning, *supra* note 17, at 135-36.

329. UN High Comm’r for Refugees, *2005 Global Refugee Trends: Statistical Overview of Populations of Refugees, Asylum-Seekers, Internally Displaced Persons, Stateless Persons, and Other Persons of Concern to UNHCR* (June 9, 2006), available at <http://www.unhcr.org/4486ceb12.pdf>. The report states that “[t]he proportion of female refugees varies greatly, depending on the nature of the refugee situation, the region of asylum, age, etc. For instance, in countries with mass refugee situations, the proportion of female refugees tends to be around 50 per cent. The percentage of females among asylum-seekers, however, is significantly lower both in developing as well as developed countries.” *Id.* at ¶ 30. This disparity is due to mobility restrictions that preclude women’s access to resettlement and asylum filing in the first place.

330. This does not diminish the fact that asylum seekers receive appalling treatment at the hands of ICE. Both Kasinga and Danson spent extended time in detention for attempted entry into the U.S. with fraudulent documents—Danson was detained for twenty-seven months, and Kasinga for sixteen months. See Piot, *supra* note 17, at 226.

331. In North America and Europe, for example, immigration officials presume the frivolity of asylum applications, and asylum is increasingly equated with illegal immigration and “queue jumping.” Moreover, resettling states take drastic measures to avoid their Convention obligations for the sole purpose of deterring would-be asylum seekers. In North America and Europe, for example, immigration officials presume the frivolity of asylum applications, and asylum is increasingly equated with illegal immigration and “queue jumping.” Moreover, resettling states take drastic measures to avoid their Convention obligations for the sole purpose of deterring would-be asylum seekers. See Michael Head, *Refugees, Global Inequality, and a New Concept of Global Citizenship*, 2002 AUSTL. INT’L L.J. 57, 60.

332. Bhaba, *supra* note 46, at 22-23.

proffering up arguments that resonate with social stereotypes for individual victories, plea bargains, or sentence mitigation. The goal of advocates and scholars is to *persuade*, even if they traffic in similar discourses. However, the traffic in cultural essentialism presents far more problems than it solves for individual defendants, who do often achieve their goal of asylum.

CULTURE ON TRIAL:

Exhibiting and Evaluating Culture

In this section, I focus on the affidavit of Fauziya Kasinga, and the press coverage of her trial, detention, and appeal.³³³ Kasinga's case was widely heralded as the first victory for female genital mutilation cases, and the precedent-setting opinion issued by the Board of Immigration Appeals changed the guidelines in all subsequent asylum cases alleging opposition to female genital cutting for immigration judges.³³⁴ Kasinga filed a twelve-page affidavit wherein she set out the details and cultural context for her personal story.

Fauziya Kasinga was the youngest daughter of a well-to-do businessman who owned a large residential property in Northern Togo built with the proceeds from a profitable transportation company. Along with her four sisters and two brothers, Fauziya was educated in neighboring Ghana and returned home for summer holidays. Her family was a large, geographically encompassing one—not atypical of well-to-do West African families. Fauziya's fortunes changed when her father died, leaving his surviving sister in charge of two-thirds of his property. Fauziya's aunt banished her mother from the family home after the forty-day customary bereavement period and assumed ownership of the property and control over the fate of her unmarried niece, Fauziya. Fauziya's aunt, ostensibly aggrieved by her nieces' unconventional upbringing, embarked on "traditional re-education" by preventing Fauziya from continuing with her high school studies, deeming the expenditure a waste of resources she now managed, and arranging her marriage to a forty-five-year old prestigious District Assemblyman, who already had three wives.³³⁵ Despite Fauziya's continued resistance to the marriage, her aunt went ahead with the wedding plans, accepted

333. Karen Musalo, *United States Department of Justice Executive Office of Immigration Review Board of Immigration Appeals Falls Church, Virginia*, 7 S. CAL. REV. L. & WOMEN'S STUD. 373, 406 (1998) (reprinting the affidavit of Fauziya Kasinga). Kasinga also tells her life story in her autobiography, *DO THEY HEAR YOU WHEN YOU CRY?*. KASSINDJA & BASHIR, *supra* note 8. This book apparently presented a verisimilitude of Kasinga's trial and life story, and went through a series of ghost-writers who skewed the facts of Kasinga's case, leading to threatened legal action. Moreover, the \$600,000 advance that Kasinga received from her publisher was the subject of contention between Kasinga and her co-author, Layli Miller Bashir. See Musalo, *supra* note 320, at 358 n.8.

334. Martin, *supra* note 120, at 255.

335. There is some dispute about Ibrahim Isaka's true age. In Kasinga's affidavit, he is said to be forty-five years old, but in later interviews with Celia Dugger, Isaka claimed that he was twenty-eight years old. See Piot, *supra*, note 17, at 250 n.2; Dugger, *supra* note 293.

an undisclosed amount of *mahr*³³⁶ from Isaka, and made arrangements for Fauziya's genital cutting on the night of her escape from Kpalime. Sensing that the marriage was irrevocable and that its consummation was imminent, Fauziya astutely mobilized the support of her exiled mother and sisters. Fauziya's sister smuggled her out of Togo by car into Ghana, where they purchased a plane ticket on a flight that departed from Ghana for Germany, using \$3000 that her mother gave to her, raised from the proceeds of her widow's settlement. Upon landing in the Düsseldorf airport, Fauziya met and befriended a German woman who gave her a place to stay for two months. In December, Fauziya met a Nigerian man named Charlie to whom she confided her situation. She did not want to remain in Germany because of language difficulties and because she had no family members there. She did have family members living in the northeastern United States. Charlie provided Fauziya with his sister's British passport and helped her purchase a ticket to the United States, where she would seek asylum based on her fear of genital mutilation.³³⁷ Upon arrival in Newark, Fauziya immediately told the immigration authorities that she was applying for asylum, and was promptly put in detention pending the determination of her claim. The conditions of Fauziya's sixteen-month detention in a total of four facilities were appalling and inhumane. Fauziya's imprisonment in the (subsequently closed) Esmor facility included a prison riot and tear-gassing of the inmates, a refusal of sanitary napkins, and punishment for performing her ablutions before her morning prayers.³³⁸

Kasinga's asylum claim was initially denied by an immigration judge, who found her sworn testimony "irrational" and "inconsistent."³³⁹ However, Kasinga's appeal was taken over by Professor Karen Musalo, Director of the

336. *Mahr* is typically translated as dowry or brideprice. The *mahr* reportedly paid by Isaka was modest: "four bolts of brilliantly patterned cloth, six veils, two pairs of shoes, four headscarves, a large washbasin, and about \$20." Dugger, *supra* note 293.

337. Piot reports that in informal conversations with U.S. Embassy personnel in Lomé, the staff speculated that "Charlie" had less noble intentions for Kasinga. See Piot, *supra* note 17, at 250 n.3. Apparently, African girls on the route between Togo, Germany, and the United States are destined for sexwork, and the traffickers tell their clients to immediately request asylum based on their opposition to FGM if apprehended by immigration authorities. *Id.* There was no mention in Kasinga's affidavit about Charlie's motives. The \$600 that Kasinga paid to Charlie for his sister's passport was disclosed by Celia Dugger in one of the series of four articles she wrote on Kasinga's case. See Celia Dugger, *Woman's Plea for Asylum Puts Tribal Ritual on Trial*, Apr. 15, 1996, N.Y. TIMES, at A1.

338. Piot, *supra* note 17, at 226.

339. Apparently, Judge Ferlise was concerned about the inconsistencies in Kasinga's oral examination (Kasinga did not submit a written affidavit) as to whether Kasinga was already married to Isaka, what her intentions and actions were in Germany, and the inevitability of her mutilation. See Martin, *supra* note 120, at 257; Piot, *supra* note 17, at 227. Dugger reported Ferlise's holding: "The judge said it did not make sense that Ms. Kasinga claimed she would be forced to undergo mutilation since her sisters had avoided it, and Ms. Kasinga herself had delayed it. . . . 'The court wonders how absolute can this tribal law be with so many exceptions being allowed for that rule'" Dugger, *supra* note 337. Obviously, this perfunctory consideration of Kasinga's testimony was the kind of treatment that had enraged feminist human rights and asylum advocates and that they sought to overturn with a favorable ruling in Kasinga's precedent-setting case on appeal.

International Human Rights Clinic at American University.³⁴⁰ In the interim, Kasinga's quest for asylum received a great deal of press attention,³⁴¹ in which both her story and the lamentable conditions of her sixteen-month detention were highlighted. Kasinga's appeal was heard by an *en banc* panel of the Board of Immigration Appeals, and she was unanimously granted asylum in 1996. David Martin, then INS Counsel, has written that the Service was convinced by Kasinga's affidavit, and argued for a broader formulation of political asylum based on FGM than Musalo,³⁴² but sought to frame her social group claim in ways that would prevent the agency from being inundated with numerous similarly-situated claims for asylum.³⁴³ The INS was undoubtedly chagrined by the treatment that Kasinga had experienced while in detention. Even after she was moved from the Esmor facility, Kasinga was repeatedly strip-searched and shackled along with the rest of the prison inmates in other detention centers, which underscored the indignities she endured as a young African woman in the U.S. criminal detention system.³⁴⁴ Human rights advocates argued that Kasinga's detention highlighted the unjust detention of asylum seekers who were and continue to be held in inaccessible prisons, administered by private contractors with little respect for the plight of immigration detainees, and granted limited access to legal representation.³⁴⁵

Kasinga's affidavit was not unduly steeped in culturally deterministic metaphors of barbarism or exoticism. What she described was a story of family intrigue, resentment, and tension between a well-to-do father and his less fortunate relatives, whose progressive beliefs and indulgence of his daughters were seen as evidence of a certain social distance between himself and his extended family.³⁴⁶ Kasinga did not proffer her Muslim faith as evidence of Tchamba barbarism or sexism. There is some attribution of her evil aunt's

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340. Martin, *supra* note 120, at 258; Kasinga's story is also documented on the website of the Center for Refugee and Gender Studies. See <http://cgrs.uchastings.edu/about/kasinga.php>.
341. In addition to Dugger's front page coverage in the New York Times, the Washington Post and the L.A. Times also featured Kasinga's story. See, e.g., Pamela Constable, *INS Says Mutilation Claim May be Basis for Asylum*, WASH. POST, Apr. 24, 1996, at A3; Robert L. Jackson, *Board to Hear Togo Woman's Asylum Appeal*, L.A. TIMES, Apr. 30, 1996, at A15; Cindy Stiner, *Persecution by Circumcision: Woman Who Fleed Togo Convinced U.S. Court but not Mutilators*, WASH. POST, July 3, 1996, at A1. Kasinga was also a *cause célèbre* on television and the radio: she appeared on Nightline on May 2, 1996; and CNN on that same day; and was interviewed on NPR's "All Things Considered" on May 1, 1996. See Musalo, *supra* note 320, at 357.
342. Linda Malone & Gillian Wood, *International Decision: In re Kasinga*, 91 AM. J. INT'L L. 140, 141 (1997).
343. Martin, *supra* note 120, at 259.
344. See Linda Burstyn, *Asylum in America: Does Fear of Female Mutilation Qualify?*, WASH. POST, Mar. 17, 1996, at C5 ("[W]omen who might become victims of what has been called the most harmful custom routinely practiced on earth—should be protected, not further brutalized, by the United States."); Pamela Constable, *Togolese Teen Criticizes Detainment; Female Circumcision Focus of Asylum Fight*, WASH. POST, Apr. 30, 1996, at A3.
345. Celia Dugger, *U.S. Frees African Fleeing Ritual Mutilation*, N.Y. TIMES, Apr. 25, 1996, at A1.
346. Piot, *supra* note 17, at 232.

beliefs to culture and the gender bias of Islamic law, but, by and large, Kasinga did not seem very familiar with the practices of genital cutting among the Tchamba, nor did she discuss genital cutting as an integral part of Tchamba womanhood—only as a precondition to marriage. So it is not surprising that reliable Togolese sources would later document that Togo had a low (5%) rate of female genital cutting.³⁴⁷ There is no mention in her affidavit or in the supporting materials of how Tchamba-Kusuntu girls who resist genital cutting are treated (a curious omission since her four sisters were also uncircumcised women who married men of their own choosing). The social opprobrium directed at her family for their alternative lifestyle was deflected by their elevated social position and the fact that Kasinga came to Kpalime only during the summer holidays. Her flight seemed motivated primarily by her opposition to the marriage to Isaka, her resentment at her changed circumstances after her father's death, and the need to escape her aunt. However, political asylum would not have been granted for the grievances she genuinely suffered. I am certainly not implying that Kasinga contrived her opposition to female genital cutting or her resistance to being cut in preparation for an unwanted marriage. However, she complied with the dominant narrative that portrayed her as a member of a thoroughly oppressive patriarchal tribe “with ‘immutable cultural norms’ that practices ‘forced polygamy’ and ‘mutilates’ its women. Women of the tribe, it was suggested ‘are brainwashed into believing that mutilation is good for them.’”³⁴⁸ This essentialist narrative is one that ushers in any asylum claim for FGM, not just Kasinga's, and is fully supported by media attention to the practice. To secure asylum for their clients, zealous advocates astutely take advantage of the heightened awareness and of the way that opposition to the practice is discursively portrayed by adopting reductive conflation of African-Islamic barbarism (really the Absolute Other as Mbembe puts it) and by invoking primitive health standards and flagrant violations of human rights by either weak, patriarchal, or genocidal states.

The dangers of cultural essentialism are decried principally in the anthropological literature, and I have alluded to many of the debates throughout this article. My point is that we are not dealing with a nuanced, critical debate between liberal feminists and multiculturalists; rather, we are dealing with crude essentialisms in the courts adjudicating cultural citizenship, which then translate into ways of ordering the world into enemies and allies. This presents tremendous difficulties for respectful cross-cultural dialogue among advocates, practitioners and scholars when African women are perpetually cast as victims, and urged “to revolt against the social . . . insanities that allow the mutilation of half their population.”³⁴⁹

The sequel to Kasinga's rescue is replete with the orientalist timelessness

347. *Id.* at 229-30.

348. *Id.* at 230.

349. A.M. Rosenthal, *On My Mind: Female Genital Torture*, N.Y. TIMES, Dec. 29, 1992, at A15.

of Africa that characterized Waris Dirie's biography, and merits quoting at length. In the aftermath of the decision, Celia Dugger traveled to Kpalime to interview Fauziya's uncle, Mouhamadou Kassindja, who rather mysteriously surfaced as the officially recognized family patriarch. Mouhamadou Kassindja was never mentioned in Fauziya's affidavit despite his subsequently acclaimed eminent status. In a subheading entitled, "The Patriarch: The Constraints of Tradition," Dugger wrote:

The patriarch had arranged almost two years earlier for Fauziya to undergo the harrowing rite. For millennia, girls across Africa have done the same. . . . The wives stood in the doorways of their bedrooms, peering out into the courtyard, the slow rhythm of their days determined by their chores: pounding cassava in large wooden mortars, knitting caps for sale, drawing water from a well beneath a coconut tree, scrubbing clothes in washbasins, tending to their children. For Mouhamadou Kassindja's two Kpalime wives, Adidjatou, 25 and Salamatou, 35, this small, dirt courtyard defines the borders of their existence. He does not allow them to leave, even to go to market. It is he who buys the food.³⁵⁰

As an aside, one wonders if Mouhamadou sells the knitted caps that his wives make on their behalf on his innumerable trips to the market to procure the family's food, or if they have an online business that they manage while in seclusion. Dugger's description of the patriarchal compound is a far cry from the relative luxury that Kasinga described in her father's home—which raises a reasonable suspicion that Kasinga was caught in an internal family struggle for control over her father's property that was ultimately won by her aunt. Her mother, described by Dugger as "an unlettered mother of seven who wandered from Togo to Benin to Nigeria and back to Togo dependent on the charity of friends and relatives," returned to Kpalime to seek the patriarch's forgiveness, which he magnanimously extended under international spotlight.³⁵¹

Counsel for Khalid Adem tried some of these tactics in trying to present Adem as a modern, urbane, and educated Ethiopian who believed that FGM was a venial, primitive rural practice. His attempt to introduce evidence of high school certificates and glowing reports of his meritorious school performance, presumably to substantiate his claim to educated status over that of a lowly African gas-station attendant who had formerly overstayed his visa, was promptly quashed by the court as irrelevant and unverifiable. Adem presented letters from his uncircumcised sisters as evidence of his belonging to a progressive family who would not mutilate girls. This was to no avail. As mentioned earlier, the subtext for Adem's trial was that Africa was a place of confusing last names, barbaric cultural practices, and unconventional residential arrangements of immigrant African families. Adem performed poorly on the

350. Dugger, *supra* note 293.

351. *Id.*

witness stand, crying profusely and presenting confused testimony about the alleged timing of the genital cutting.³⁵² His professed love for Amirah rang hollow, or was at least inconsistent, with his lack of involvement in her care, pediatric appointments, diapering—which is understandable in a context where older women assume all child care responsibilities but incongruent when the desired performance is that of the concerned, Westernized Dad.

Adem's lawyer pursued a defense strategy in which he attempted to blame the circumcision on Fortunate Adem (Khalid's wife) and Joyce Dube (Fortunate's mother) as an elaborate plot to deprive Khalid of visitation rights, even though the child had resided with her maternal grandmother since birth and Adem had never contested custody of the child. Adem's defense lawyer questioned Fortunate about her apparent obsession with the discovery of the practice of female genital mutilation soon after the couple's baby was born. As a "Sulu" brought to the United States as a young child, Fortunate claimed no familiarity with the practice. According to the defendant, Fortunate allegedly dedicated a class project to designing a website with their child's picture to protest the practice.³⁵³ The seven-year-old child Amirah gave detailed and unwavering testimony about her father and an unidentified male cutting off her "lun-lun" (private parts) on a kitchen table despite the fact that it was determined that the cutting took place when Amirah was about two years old.

Given its importance as the first domestic conviction for a vilified practice, the case against Adem carried heightened media awareness and was instrumental in spurring Georgia's legislators to pass the state's own version of the Female Genital Mutilation Act.³⁵⁴ Yet there were many inconsistencies in the case that raised suspicions: most notably that female genital cutting is overwhelmingly described as a practice controlled by women, and here the primary suspects were male. Adem's parenting style and the family's residential arrangement simply presented no opportunity for him to be alone with Amirah, to care for her, diaper

352. Over the course of the ten-day trial, Adem's attorneys tried to introduce evidence that he had not ever been alone with Amirah, and that he could not have circumcised her because he was constantly working. Transcript of Record at 679-82, *State v. Adem*, No. 04-B-1291-4 (Gwinnett County Super. Ct. Oct. 23, 2006). Their attempt to introduce his supervisor's testimony about his time sheets into evidence was also rejected for lack of verification.

353. Fortunate Adem has subsequently founded a non-profit called "Amirah's Voice" to end female genital mutilation. According to the organization's mission statement, Amirah's Voice was "founded by the Executive Director and Human Rights Activist Fortunate Adem after discovering her daughter's rights as a defenseless child, as a woman, and as a human being were violated. . . . In 2004, Fortunate Adem pioneered the very first Female Genital Mutilation case in the history of the United States of America. Her ex-husband Khalid Adem became the first person in the history of the United States to be convicted of female genital mutilation on November 01, 2006. . . . This conviction runs as the longest time given in the World for someone who has performed female genital mutilation on a little girl. Amirah's Voice was the only human rights organization that attended the trial for the entire 10 days." See Amirah's Voice, About Us, www.amirahsvoice.org/index-2.html (follow "About Us") (last visited July 29, 2008).

354. Naomi Mendelsohn, *At the Crossroads: The Case for and against a Cultural Defense to Female Genital Mutilation*, 56 RUTGERS L. REV. 1011 (2004).

her, and bathe her during the time it would have taken for her wound to heal with no interception from her mother or grandmother. Indeed, the allegation surfaced right at the time that Fortunate filed for divorce, years after the cutting had been performed on Amirah. The case against Adem was doomed from the start, in large part because of the detailed and steadfast testimony of the child involved. Children in cases like this are a priori defenseless. Moreover, the defense's claim that Fortunate had deliberately circumcised her child and coached her testimony just so she could launch her career as a Human Rights Activist seemed too horrific for the jury to contemplate; it was too far off script for the Mutilating African Parent. Because female genital cutting of a child represents the absolute limit of multicultural tolerance, the case was decided on the grounds of child abuse with only selective consideration of Adem's ethnic background as a subtext for a vilified custom that would be penalized to the maximum extent of the law. Indeed, observers lamented the fact that Adem would only receive a ten year sentence under the state aggravated battery law rather than the twenty year sentence he would have received had Georgia passed a state female genital mutilation criminal statute prior to Adem's alleged commission of the crime.

CONCLUSION

The current aperture in U.S. asylum jurisprudence, building as it does on the global anti-FGM campaign and the institutionalization of women's human rights, offers an attractive set of arguments for African women—elite and non-elite—to use in social protest. The campaign is well funded and offers those who join its ranks alternative opportunities to attract funds for their employment, upward mobility, and economic survival. On the African continent, this is no small feat. The campaign also imbues a sense of modernity and autonomy to women who are attracted to the West, not least because “the West” invokes images of cosmopolitan freedom, technological progress, and economic advancement. To governing elites, the campaign's powerful sponsors, notably WHO, the UN agencies, international financial institutions, and G-8 donor agencies, promise necessary aid dollars for maternal-child health programs contingent on legal measures to eradicate genital cutting. It is true that the adoption of these reforms is in response to direct international pressures with less regard for local sentiments, but the money promised as a condition of these reforms is critical to the government's tenure since the millions of dollars cannot be generated in-country. In sum, the anti-FGM campaign brings together a powerful and appealing set of arguments for social change. As a transnational social movement, it is strikingly similar to the anti-slavery movement of the early 19th century, which provided normative politics for freedom and social justice to a variety of other groups such as suffragists, prohibitionists, Christians, and internationalists. As Eric Foner describes, “[I]f anti-slavery promoted the hegemony of middle-class values, it also provided a language of politics, a

training in organization, for critics of the emerging order.”³⁵⁵ Today’s maternalist voice largely accepts the demise of female genital cutting—hence the emphasis on abandonment—but insists that this is as a result of African initiatives rather than the Western anti-FGM campaign.³⁵⁶ This insistence on African agency is seen in many feminist battles fought over the bodies of African women³⁵⁷ and it seems reasonable for those who support “African voices and choices” to abide by those terms. As I have described, the primary interlocutors in this particular struggle have been well-meaning British matrons, cultural nationalists with suspect gender politics, and G-feminist reformers. We have ample evidence that female genital cutting is being debated and that milder, safer, and symbolic forms are being adopted when other incentives are offered as compensation and as changes (along with the Internet, Bollywood, and *banlieu* hip hop) weave their way in and out of Africa. Now, eradication initiatives are offered in conjunction with a broad gamut of community health and income generation projects and are subject to other indicia of human development. As we know, “development” also ushers in related dynamics of social stratification and modernities. The caveats always remain as laid out by Sondra Hale: when is it time to intervene and when is intervention used as a subterfuge for other battles?

In sum, there are reasons to be both critical and supportive of the anti-FGM campaign. There are other reasons to be hesitant about humanitarian hawks using feminist concerns to justify military occupation.³⁵⁸ During a radio broadcast to the nation on November 17, 2001, U.S. First Lady Laura Bush claimed, “Because of our recent military gains in much of Afghanistan, women are no longer imprisoned in their homes. They can listen to music and teach their daughters without fear of punishment. . . . The fight against terrorism is also a fight for the rights and dignity of women.”³⁵⁹ Cherrie Blair, wife of British Prime Minister Tony Blair, also portrayed the Afghan invasion in glowing, though extremely flippant, terms in her own public comments: “In Afghanistan if you wear nail polish, you could have your nails torn out. . . . The women in Afghanistan are entitled . . . to have the same hopes and aspirations as ourselves and our daughters: for good education, a career outside the home, if they want one; the right to health care, and, of course, most importantly, the right for their

355. ERIC FONER, *POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR* 76 (1980).

356. See Obiora, *supra* note 44, at 238.

357. I am thinking here of Amina Lawal’s defense team at BAOBAB, pleading with Western feminists to respect Nigerian efforts to use liberal interpretations of Shari’a law in the State and Federal Court of Appeals to secure her release. See Email from Ayesha Iman, Board Member, BOABAB for Women’s Human Rights, Please Stop the Amina Lawal Protest Letter Campaigns (May 1, 2003) (on file with author).

358. See, e.g., Weissman, *supra* note 69, at 270.

359. *Radio Address by Laura Bush to the Nation: The Taliban’s War Against Women and Children* (CNN Nov. 17, 2001) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/011117/smn.23.html>).

voices to be heard.”³⁶⁰ Certainly these are noble sentiments, but they do not truly express the objectives of the invasion and the installation of the Karzai government.³⁶¹ As Lila Abu-Lughod has commented on the First Ladies’ interviews:

Most pressing to me was why the Muslim woman in general, and the Afghan woman in particular were so crucial [for mobilization] in this “War against Terrorism” Laura Bush’s radio address . . . [conflated] the Taliban and the terrorists, so that they became . . . a kind of hyphenated monster identity [T]here was the blurring of the very separate causes in Afghanistan of women’s continuing malnutrition, poverty, and ill-health, and their more recent exclusion under the Taliban from employment, schooling and the joys of wearing nail polish.³⁶²

In closing, I urge those concerned with the long term implications of raising the culture flag to consider the rejuvenation of Kant’s call for cosmopolitan “hospitality”:³⁶³ an unconditional extension of safe haven with possibilities for respectful dialogue about contested notions of culture without requiring acceptance or conversion to any particular side.³⁶⁴ This would not require a retreat from impassioned advocacy. It would nonetheless acknowledge that the humanitarian imperative to provide asylum is cheapened through realist deals that demand cultural condemnation, and in the long run, exacerbate geopolitical tensions that drive refugee flows. Although lawyers, anthropologists, feminist critics, and post-colonial critics disagree on the more insidious effects of essentialism and the persecutory nature of genital cutting, we converge on the rights of all to safe haven and hospitality, in the Kantian sense

360. Comments of Cherrie Blair, Nov. 13, 2001, *quoted in* Linda Heard, *Apathy of Afghan Women After Taliban*, GULF NEWS, Sept. 23, 2003, available at <http://www.womenforafghanwomen.org/press/GulfNews92303.html>.

361. In response to those broadcasts, Linda Heard wrote:

Perhaps Laura and Cherie are under the impression that the average Afghan woman under the ‘kindly’ auspices of the US-dominated Karzai government are shopping in climate-controlled malls, sporting freshly coiffed hair and fuchsia talons after depositing their daughters at the local kindergarten.

Could it be that these privileged members of the First Wives’ Club believe that the offices of Afghan lawyers, accountants and architects are bursting with new female recruits, sophisticated health care is readily available to all and that Hamid Karzai himself is surrounded by a coterie of female advisors? Hardly! The reality is very different as those two highflying wives and mothers are no doubt only too aware.

Heard, *supra* note 360.

362. Abu-Lughod, *supra* note 46, at 784.

363. Immanuel Kant, *Perpetual Peace*, in PERPETUAL PEACE AND OTHER ESSAYS 118 (Ted Humphrey trans., 1983).

364. Jacques Derrida, *On Cosmopolitanism*, in ON COSMOPOLITANISM AND FORGIVENESS (Mark Dooley & Michael Hughes trans., Routledge 2001); *see also* K. ANTHONY APPIAH, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS (2006); SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS (2004); COSTAS DOUZINAS, HUMAN RIGHTS AND EMPIRE: THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM (2007).

of the word. Hopefully, we can use our points of convergence to work toward consensus on the greater harms of cultural condemnation.