INTERNATIONAL APPROACH TO SOLVING THE PARENTAL ASYLUM CONUNDRUM

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I. INTRODUCTION

Imagine you are eight years old, playing at home, when you hear the voice of a young girl desperately shouting for help. Your curiosity and conscience compel you to dash out of the house and find the source of the save-my-soul cry. You find the cry emanating from behind a closed door and with trepidation, you peep through the keyhole. Shocked and surprised, you see four hefty women; three of them stretch apart the legs of a young girl, around twelve years old, while the fourth pokes a sharp object in her clitoris.[1] Now, ask yourself why would anyone do something like that to an innocent girl? The eight-year-old who actually witnessed these events determined that the women must be vampires sucking human blood.[2]

Adults recognize this practice as female genital mutilation ("FGM"), a practice adopted by many communities in Africa and Southeast Asia.[3] Amnesty International estimates that two million girls a year are at risk for undergoing the harmful procedure which generally happens[4] at any time "from a few days after birth to a few days after death."[5] FGM may cause infections, HIV, childbirth

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1. Okumephuna Chinwe Celestine, *FGM: An Insult on the Dignity of Women*, FGC EDUCATION AND NETWORKING PROJECT, http://fgmnetwork.org/countries/nigeria.htm (last visited Feb. 11, 2008).

2. *Id.*

3. For a list of current statistics on the prevalence of FGM by country, *see* H. L. Dietrich, *FGC Around the World*, FGC EDUCATION AND NETWORKING PROJECT, http://www.fgmnetwork.org/intro/world.php (last visited Feb. 11, 2008). The nomenclature associated with female genital surgeries has varied including "female genital mutilation", "female circumcision", and "female genital cutting". For the purposes of this paper, I have selected "female genital mutilation." Other authors have provided a more in depth analysis to the proper terminology. *E.g.* ELLEN GRUENBAUM, THE FEMALE CIRCUMCISION CONTROVERSY 3 (2001) ("The term 'female genital mutilation' has become more widely accepted since the 1990s."). *See also* L. Amede Obiora, *Bridging Society, Culture, and Law: The Issue of Female Circumcision: Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. 275 (1997) ("Pontificating that any irreversible removal of a healthy organ or tissue is inherently mutilative, many of [its] critics maintain that 'female genital mutilation' is the only appropriate characterization.").

4. AMNESTY INTERNATIONAL, WHAT IS FEMALE GENITAL MUTILATION? 2 (Oct. 1, 1997), http://web.amnesty.org/library/index/ENGACT770061997 ("an estimated 135 million of the world's girls and women have undergone genital mutilation, and two million girls a year are at risk of mutilation – approximately 6,000 per day.").

5. *Id.; See also* OFFICE OF THE SENIOR COORDINATOR FOR INTERNATIONAL WOMEN'S ISSUES, U.S. DEPARTMENT OF STATE NIGERIA: REPORT ON FEMALE GENITAL MUTILATION (FGM) OR FEMALE GENITAL CUTTING (FGC) (June 1, 2001), *available at*

complications, psychological trauma, or even death.[6] As a result, a majority of developed countries have specifically outlawed FGM.[7] The United States has criminalized this procedure[8] and, in 1996, established that a reasonable fear of FGM is a basis for granting asylum.[9] Unfortunately, despite efforts to protect girls vulnerable to this procedure, the United States has failed to take the next crucial step: granting asylum to parents of at-risk girls.[10] Without this step, parents are forced to choose to either to put their daughters up for adoption in the United States or risk exposing them to FGM upon return to their home country.

U.S. courts have struggled to find judicial precedent that would allow the parents to stay in the United States with their child. Although to date U.S. courts have failed to find such authority, international law provides support. The United States has signed and ratified treaties, most notably the Refugee Convention, that

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http://www.asylumlaw.org/docs/nigeria/usdos01_fgm_Nigeria.pdf. ("In [the] Edo State [of Nigeria], for example, the procedure is performed within a few days after birth. In some very traditional communities, if a deceased woman is discovered to have never had the procedure, it may be performed on her before burial. In some communities it is performed on pregnant women during the birthing process and accounts for much of the high morbidity and mortality rates.")

6. Meredith Aherne, *Olowo v. Ashcroft: Granting Parental Asylum Based on a Child's Refugee Status*, 18 PACE INT'L L. REV. 317, 325 (2006) (listing AIDS, child birth complications, severe hemorrhaging, infections, ulcers, tetanus, inability to urinate, repetitive urinary tract infections, psychological trauma, severe shock, and death as possible side effects); *See also* Marianne Sarkis, *Female Genital Cutting (FGC): An Introduction*, FGC Education and Networking Project, http://www.fgmnetwork.org/intro/fgmintro.php (last visited Feb. 11, 2008) (including HIV transmission; death from shock, hemorrhage, or septicemia; sexual frigidity; genital malformation; delayed menarche; chronic pelvic complications; recurrent urinary retention and infection; obstetric complications which expose a fetus to a range of infectious diseases and damage from a malformed birth canal as potential risks).

7. *See* Canada's Criminal Code §273.3; Article 312 of France's Penal Code (providing 10-20 years of imprisonment for FGM); UK's Prohibition of Female Circumcision Act of 1985 (prohibiting FGM); New Zealand's Crimes Act 1961 (enacted 1/1/1996). Sweden has banned FGM since 1982. The Female Genital Cutting Education And Networking Project, Notes On Some Overseas Countries' Laws at http://fgmnetwork.org/legisl/interntl/overseas.php#europe (last visited Apr. 22, 2009). Australian laws are state-by-state. The Female Genital Cutting Education And Networking Project, Australian and Other Laws, http://www.fgmnetwork.org/legisl/interntl/austral.php (last visited Apr. 22, 2009).

8. 18 U.S.C. § 116(a) (1996) (stating "[W]hoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned for not more than 5 years, or both.").

9. *In re Kasinga*, 21 I & N Dec. 357, 367 (BIA 1996) (finding the FGM may be a persecution of a particular social group as limited by gender and tribe or village, among other things); *see also* Mohammed v. Gonzales, 400 F.3d 785, 795-96 (9th Cir. 2005) (holding that FGM is a continuing act of persecution, potentially entitling the applicant to withholding of removal). More discussion on FGM as a potentially continuing act of persecution, *see infra* notes 55-66 and accompanying text.

10. Currently the U.S. courts are split on whether to grant asylum, with only the U.S. Court of Appeals for the Sixth Circuit granting asylum and federal circuits 5, 7, 8 and 11 refusing. Kimberly Sowders Blizzard, *Note, A Parent's Predicament: Theories of Relief for Deportable Parents of Children who Face Female Genital Mutilation*, 91 CORNELL L. REV. 899, 900-01 (2006). No other theories of relief have been successful for parents either. *See generally id.*

mandate member states to grant asylum to parents in these cases.[11] A decision following international law would not only be compassionate, but would ensure that these children acquire the development, well-being, and education necessary to become American citizens.[12]

This Comment posits that decisions reached by foreign courts provide enlightenment to solving the parental predicament under U.S. asylum law. Part II provides an overview of the current state of U.S. asylum law and examines the flurry of conflicting decisions arising out of the federal circuits. Part III surveys decisions from foreign courts and considers the weight of international treaties. Part IV provides an analytic solution to allow asylum for parents of at-risk children, discussing both the benefits and disadvantages of such an approach. This comment concludes that the United States should uphold its international obligations and follow its precedent by granting asylum to parents of at-risk girls.

II. CURRENT STATE OF ASYLUM LAW

A. Overview

U.S. circuit courts have encountered significant difficulty in finding grounds to grant asylum to parents of at-risk girls. In fact, of the five federal circuits to consider the issue, the U.S. Court of Appeals for the Sixth Circuit is the only one to grant parental asylum.[13] The others have denied relief on a variety of grounds.[14] As a result, it is necessary to provide an overview of asylum law to fully understand the issues that are embedded in this problem.

Asylum is granted when an alien proves that he is entitled to refugee status. Under U.S. statutory law, a refugee is:

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11. *See* discussion *infra* Part 1, subsection entitled "Refugee Status" and Part 2, subsection entitled "Why Foreign Cases are Relevant."

12. David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L. J. 1165, 1213-14 (2006) (concluding that "[f]amily law and immigration law play vital yet distinct roles in sorting out the rights and realities that determine where children live.").

13. Niang v. Gonzales, 492 F.3d 505, 511 (4th Cir. 2007) (reasoning psychological harm is insufficient for asylum);Osigwe v. Aschroft, 77 F. App'x 235 (5th Cir. 2003) (finding at-risk daughter was a U.S. citizen and would not be deported with her parent); Abay v. Ashcroft, 368 F.3d 634, 641 (6th Cir. 2004) (holding parents of children who may be subjected to FGM are persecuted themselves because they must "witness or experience the persecution of family members"); Obazee v. Ashcroft, 79 F. App'x 914, 916 (7th Cir. 2000) (establishing at-risk daughter could stay in the U.S. on other grounds and thus would not be deported with her parent); Oforji v. Ashcroft, 354 F.3d 609, 617-18 (7th Cir. 2003) (same); Olowo v. Ashcroft, 368 F.3d 692, 702-05 (7th Cir. 2004) (same); *But see* Jalloh v. Gonzales, 423 F.3d 894, 899 (8th Cir. 2005) (reasoning family members unlikely to leave U.S. with applicant do not affect the applicant's status)..

14. These grounds include the alternative options for the child to remain in the United States; the insufficiency of psychological harm as persecution; and the unlikelihood that the family would leave with the applicant. For more details see *id.* and *infra* Part 1, subsection entitled "The Circuit Split."

> [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.[15]

This definition is primarily taken from the Refugee Convention and later Protocol.[16] The Refugee Convention was adopted in 1951 by the United Nations in an effort to "assure refugees the widest possible exercise of . . . fundamental rights and freedoms."[17] Although the United States was not a signatory to the Refugee Convention, it agreed to enforce its provisions when President Lyndon B. Johnson signed the 1967 Protocol in November 1968.[18] The Protocol was ratified by Congress and implemented in the Refugee Act.[19] The Refugee Act also requires the asylum applicant to demonstrate that (1) the alien does not have a 'safe third country' to return to legally; (2) the application for asylum was filed within a year of arrival in the United States; and (3) the alien has not previously been denied asylum.[20] If the alien is unable to establish eligibility under this definition, she may be granted asylum under theories of withholding of removal, derivative asylum, humanitarian asylum, cancellation of removal, or under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT").[21]

Given these conditions and categories, only three narrow groups of parents whose children risk FGM are protected under the current state of U.S. asylum law: first, mothers who have previously been subject to FGM and can convince a court to grant humanitarian asylum; second, parents with U.S.-citizen children who satisfy the exceptional hardship and the ten-year residency requirement; and

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15. 8 U.S.C. § 1101(a)(42) (2000).

16. 8 U.S.C. § 1158(b)(1)(A) (2000). *See also* Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 37, *available at* http://www.unhchr.ch/html/menu3/b/o_c_ref.htm; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 *available at* http://www.unhchr.ch/html/menu3/b/o_p_ref.htm [hereinafter Refugee Convention].

17. *Id.* at pmbl.

18. Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 19 U.S.T. 6223; Weekly Compilation of Presidential Documents, vol. 4, 1494.

19. 8 U.S.C. § 1158 (2005).

20. 8 U.S.C. § 1158 (a)(2). In practice, the one-year deadline is the only real issue for applicants.

21. *See* Olowo v. Ashcroft, 268 F.3d 692 (7th Cir.2004) (Refugee Convention); Abay v. Ashcroft, 368 F.3d 634 (6th Cir. 2004) (Refugee Convention); Osigwe v Ashcroft, 77 F. App'x 235 (5th Cir. 2003) (humanitarian grant of asylum); Abebe v. Gonzales, 432 F.3d 1037 (9th Cir. 2005) (en banc) (Ferguson dissenting) (derivative asylum); Salameda v. I.N.S. (withholding of removal) *as summarized in* Oforji v. Ashcroft, 354 F.3d 609 (7th Cir. 2003); Nwaokolo, 314 F.3d 303 (7th Cir. 2002) (withholding of removal and CAT). Oforji v. Ashcroft, 354 F.3d 609 (7th Cir. 2003) (CAT).

finally, mothers who have not yet undergone FGM.[22] It remains to be seen whether a fourth category of asylum seekers —those who claim psychological damage from fearing harm to another — will be accepted by any federal circuits other than the U.S. Court of Appeals for the Sixth Circuit.[23]

1. Refugee Status

In the United States, refugee status is defined to correspond to the Refugee Convention. Specifically, under the aforementioned definition, the applicant must prove (1) an inability or unwillingness to return to her home country (2) due to a well-founded fear (3) of persecution (4) because of one of the enumerated grounds.[24] The first two elements of this rule do not present significant barriers for asylum-seekers. Unwillingness to return is proven through credible evidence.[25] A well-founded fear must be 'subjectively genuine' and 'objectively reasonable', usually using Country Reports and Asylum Profiles authored by the U.S. Department of State.[26] Since FGM itself has already been recognized as a basis for asylum, these documents tend to have sufficient information about the practice.[27] Persecution and classification under an enumerated ground, however, provide a significant barrier to asylum seekers in this arena.

The Board of Immigration Appeals ("BIA"), the administrative agency responsible for reviewing asylum claims, has defined persecution in the seminal FGM agency decision *Matter of Acosta*.[28] There, the BIA determined that "harm or suffering had to be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor sought to overcome"[29] and the government of a country, or an organization that the government was "unable or unwilling" to control, must inflict that harm or suffering.[30] Subsequent court decisions have upheld and elaborated on the definition, and hold that persecution

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22. Blizzard, *supra* note 10, at 926.

23. Alida Yvonne Lasker, *Solomon's Choice: The Case for Granting Derivative Asylum to Parents*, 32 BROOKLYN J. INT'L L. 231, 250-51 (2006).

24. 8 U.S.C. § 1101(a)(42)(A) (2000). *See also* In re Sanchez, 19 I & N Dec. 276, 283 (BIA 1985). Furthermore, it is worth noting that one of the barriers for any asylum seeker is proving his/her testimony to be credible, but this problem is ubiquitous among all asylum seekers, and does not appear to be particularly concentrated within this subset of group. *See* Audrey Macklin, International Association of Refugee Law Judges, *Truth and Consequences: Credibility Determination in the Refugee Context*, *in* THE REALITIES OF REFUGEE DETERMINATION ON THE EVE OF A NEW MILLENNIUM 134 (1998).

25. Sangha v. I.N.S., 103 F.3d 1482, 1487 (1997).

26. Balasubramanrim v. I.N.S., 143 F.3d 157, 165 (3d Cir. 1998) ("The alien must show that 'he has a subjective fear of persecution that is supported by objective evidence that persecution is a reasonable possibility.'") (citing Chang v. I. N. S., 119 F.3d 1055, 1066 (3d Cir. 1997)).

27. *See* U.S. Department of State, Country Reports on Human Rights Practices 2006, http://www.state.gov/g/drl/rls/hrrpt/2006/ (last visited Feb. 11, 2008) (discussing the human rights records of states such as Nigeria, Mali, Senegal, and Sierra Leone).

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

29. *Id.* at 222.

30. *Id.*

"encompasses more than threats to life or freedom, but less than mere harassment or annoyance"[31] and does not include all treatment that Americans find offensive.[32] It requires a "real chance" of persecution, although as little as a 10% chance may be sufficient as long as an objective situation is established by the evidence.[33] Ultimately, the BIA held in *Matter of Kasinga*, that FGM itself is a form of persecution.[34]

Yet persecution still presents a problem for parents who wish to have asylum based on their daughter's risk. Parents, not personally subject to FGM, are not specifically viewed as persecuted.[35] Technically, "acts of violence against the applicant's friends and family may establish a well-founded fear where those acts create a pattern of persecution closely tied to the petitioner."[36] Unfortunately, the courts have not found this standard to be met when a parent provides evidence of a daughter's risk of FGM. The U.S. Court of Appeals for the Sixth Circuit, however, found that the persecution requirement was satisfied because allowing and witnessing the harm to a child is itself a form of torture.[37] The U.S. Court of Appeals for the Ninth Circuit has also found protection for parents of a child who may be subject to persecution in the statute. Specifically, the court held that "children and their parents constitute a statutorily protected group and that a parent who provides care for a disabled child may seek asylum and withholding of removal on the basis of the persecution the child has suffered . . . ."[38] However, other federal circuits have adopted a narrow interpretation of persecution, and find that the threat of FGM does not constitute a threat to the parent's life or freedom.[39]

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31. Aguilar-Solis v. I.N.S., 168 F.3d 565, 570 (1st Cir. 1999) (citations omitted).

32. Fatin v. I.N.S., 12 F.3d 1233, 1240 (3rd Cir.1993) (determining that persecution does not include "all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional.").

33. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987) ("There is simply no room in the United Nations' [Protocol] definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening.") (citing GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 181 (1966) (also stating "If there is a real chance that [an applicant] will suffer persecution, that is reason good enough , and [the applicant's] 'fear' is 'well-founded').

34. *In re* Fauziya Kasinga, 21 I. & N. Dec. 357, 358 (BIA 1996).

35. Blizzard, *supra* note 10, at 908 ("[T]he problem with granting asylum to a parent based on a daughter's risk of FGM is that the parent is not the one personally subject to the persecution of FGM."); *See also* Olowo v. Ashcroft, 368 F.3d 692, 701 (7th Cir. 2004) ("[A]n applicant [must] demonstrate that she herself will be subject to persecution if removed, and [does] not encompass any consideration of persecution that may be suffered by others - even family members – who may be obligated to return with her to Nigeria.").

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

37. *Abay*, 368 F.3d at 642 ("[A] rational factfinder would be compelled to find that Abay's fear of taking her daughter into the lion's den of female genital mutilation in Ethiopia and being forced to witness the pain and suffering of her daughter is well-founded.").

38. Tchoukhrova v. Gonzales, 404 F.3d 1181, 1184 (9th Cir. 2005) (overturned on alternate grounds).

39. Blizzard, *supra* note 10, at 909 (citing Olowo v. Ashcroft, 268 F.3d 692, 701 (7th Cir. 2004)).

The last element, under both the Refugee Convention and the implementing legislation, states that a refugee must be persecuted "on account of race, religion, nationality, membership in a particular social group, or political opinion."[40] The BIA has interpreted the particular social group to mean "a group of persons all of whom share a common, immutable characteristic … that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."[41] This standard allows room for manipulation because it is difficult to define.[42] Yet the trend in the courts is to define the group very narrowly, such as "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice."[43]

This element of refugee status has also proven to be a high hurdle for asylum-seekers. In *Abay v. Ashcroft*, the first case granting asylum to parents of at-risk girls, the U.S. Court of Appeals for the Sixth Circuit failed to define the social group or other enumerated ground on which asylum was granted.[44] A 'family' could be a social group, but the Supreme Court has previously indicated that all of the family members must be persecuted in order to satisfy the particular social group requirement.[45] Therefore, while asylum could be granted based on social group if defined this way, in *Abay* one of the required conditions was ignored, removing the precedential power this case would have had.

Alternatively, parents could argue that they should be protected from persecution based on an anti-FGM political opinion. In order to show persecution based on political opinion, the applicant must prove that she expressed a political opinion explicitly or that the persecutor imputed an opinion to the applicant; that the opinion or activities are known or likely will be known to the persecutor; and the persecution, which remains uncontrolled by the government, results from the applicant's political opinion.[46] This may be a difficult argument for the parent of an at-risk child to make because, in this sensitive arena where the persecution itself is private, most parents do not verbally express their opinion, but do so tacitly by protecting their child from the procedure. However, it is arguable that these elements can be satisfied because the opinion is expressed through the child and

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40. 8 U.S.C. § 1101(a)(42)(A) (2006).

41. Fatin, 12 F.3d at 1239-40 (quoting Matter of Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985) (overruled in part on other grounds by Matter of Moharrabi, 19 I. & N. Dec. 439 (BIA 1987))).

42. *See* Blizzard, *supra* note 10, at 909-10 (providing a synopsis of the interpretation of 'particular social group').

43. In re Kasinga, 21 I. & N. Dec. 357, 265 (BIA 1996).

44. Blizzard, *supra* note 10, at 911.

45. *See, e.g.* Vumi v. Gonzales, 502 F.3d 150, 154-56 (2d Cir. 2007) (holding that membership in a family of a person suspected of participating in the assassination of a president constituted a particular social group). *See also* Toma v. Gonzales, 179 Fed. Appx. 320, 323-24 (6th Cir. 2006) (holding that membership in a family whose members were politically active in Iraqi resistance constituted a particular social group).

46. Garcia-Ramos v. I.N.S., 775 F.2d 1370, 1373 (9th Cir. 1985).

that this refusal must be known to the persecutor by the parents' response before the persecutor subjects the child to the harmful procedure. To date, this argument has not been tested in the agency or U.S. courts.

2. Withholding of Removal

Withholding of removal is an alternative form of relief for asylum seekers, and is usually sought at the same time as asylum.[47] The requirements are generally the same, but there is a slightly higher burden of proof, because withholding of removal is mandatory whereas asylum is discretionary.[48] This type of protection extends to applicants barred from asylum under the one-year filing deadline or one of the other asylum restrictions.[49] Even the few parents who do find protection under withholding of removal will not get the same protections that are available to them by refugee status. Specifically, if an applicant is granted withholding of removal, he is not entitled to apply for permanent residence in the United States.[50]

3. Derivative Asylum

Keeping families together is a 'prime goal' of the U.S. immigration system.[51] As a result, a spouse or child joining an alien who is granted asylum may automatically be granted asylum as well, a process called "derivative asylum."[52] Moreover, adult children who are U.S. citizens can petition the government for permanent resident status for their parents.[53] However, statutory provisions granting derivative asylum indicate that Congress has chosen to limit 'families' to a spouse and minor child. This interpretation of the statute limiting derivative asylum to parents whose minor child is the asylum seeker.[54] Many judges base their rulings against parents of at-risk girls based on this interpretation of the provision without deciding whether this was the Congress' intent when drafting the statute. Such a position lacks clear authority.

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47. 8 U.S.C. § 1231(b)(3)(A) (2000).

48. I.N.S. v. Cardozo-Fonseca, 480 U.S. 421, 423 (1987) (holding that withholding of removal is subject to a "more likely than not" standard, whereas asylum is subject to a "well-founded fear" standard).

49. 8 U.S.C. § 1231(b)(3)(B) (2000).

50. SEBASTIAN AMAR ET. AL., SEEKING ASYLUM FROM GANG-BASED VIOLENCE IN CENTRAL AMERICA: A RESOURCE MANUAL (Aug. 2007), *available at* http://www.ailf.org/lac/GangResourceManual.pdf. However, applicants given withholding status are permitted to remain in the United States and are eligible for employment. *Id.*

51. Blizzard, *supra* note 10, at 905 (quoting 148 CONG. REC. H4989, 4991 (daily ed. July 22, 2002)).

52. 8 U.S.C. § 1158(b)(3)(A) (2005).

53. *See* U.S. Citizenship and Immigration Services, Immigration Through a Family Member, http://www.uscic.gov/ (last visited 3/30/09) (follow "Services & Benefits" hyperlink; then follow "Permanent Resident (Green Card); and finally, "Immigration through a Family Member").

54. 8 U.S.C. § 1158(b)(3)(A) (2005). *See also* Abay, 368 F.3d at 644 (Sutton, concurring) ("By its terms, the statute does not include parents as individuals who may obtain a derivative grant of asylum.").

4. Humanitarian Asylum

If an asylum-seeker is unable to prove that she is eligible for refugee status because she lacks a well-founded fear of persecution, then the alien can apply for humanitarian asylum.[55] This form of asylum, which provides an alternative route for asylum seekers, is grounded in the Refugee Protocol.[56] Specifically, the Refugee Protocol declares that "a person who – or whose family – has suffered under atrocious forms of persecution should not be expected to repatriate." Humanitarian asylum gives the judge discretion in reviewing an application to grant asylum when there are "compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution."[57] The rationale for extending asylum in these situations is the recognition that the trauma of past persecution may be so atrocious and severe that repatriation is inhumane.[58]

This high standard for a humanitarian grant of asylum was lowered in 2001 to require that the applicant prove past persecution and future serious harm that is "so serious that it equals the severity of persecution"[59], but not necessarily inflicted based on one of the enumerated categories (race, religion, nationality, membership in a particular social group, or political opinion), However, the courts have been reluctant to rely on this regulation and to date no court has taken advantage of this new standard, which was primarily enacted for population control cases in China.[60]

While humanitarian asylum is only granted in cases of 'extraordinary suffering',[61] it remains possible to establish humanitarian asylum if an alien "has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country."[62] The Immigration and Naturalization Service ("INS"), which is now replaced by the Department of Homeland Security ("DHS"), has interpreted "other serious harm" to include serious harms that are not protected by refugee status.[63] However, "mere economic disadvantage or the inability to practice one's chosen profession" is not considered to be "other serious harm."[64]

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55. 8 C.F.R. § 208.13(b)(1)(iii)(A) (2003).

56. Matter of Chen, 20 I. & N. Dec. 16, 19 (1989) ("[T]here may be cases when the favorable exercise of discretion is warranted for humanitarian reasons even if there is little likelihood of future persecution.").

57. 8 C.F.R. § 208.13(b)(1)(iii)(A) (2003).

58. Matter of Chen, 20 I. & N. Dec. 16, 19 (1989); *see also* Baka v. I.N.S., 963 F.2d 1376, 1379 (10th Cir. 1992).

59. Asylum Procedures, 65 Fed. Reg. 76121, 76127 (Dec. 6, 2000); *see* 8 C.F.R. § 208.13(b)(1)(iii)(A) (2000).

60. Blizzard, *supra* note 10, at 915.

61. Waweru v. Gonzales, 437 F.3d 199, 205 (1st Cir. 2006).

62. 8 C.F.R. § 208.13(b)(1)(iii)(A)

63. Asylum Procedures, 65 Fed. Reg. 76121, 76127 (Dec. 6, 2000). Specifically, other serious harm includes "harm that is not inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion, but is so serious that it equals the severity of persecution. 8 C.F.R. § 208.13(b)(1)(iii)(B) (2000).

64. *Id.*

This standard can be a useful tool for mothers who have previously suffered FGM and are seeking asylum in the United States, but who cannot establish membership in a particular social group under the Refugee Act.[65] These mothers can argue that their prior torture is a continuing harm that still affects their physical and mental health. Yet this argument has limitations. It does not extend to fathers,[66] or help mothers who have not been subjected to FGM. However, these women should be protected by asylum regardless of whether they are able to prove the likelihood that they will be subjected to FGM upon returning to their home country, they will likely be granted asylum on that basis.[67] This may be a successful avenue for a small subset of parents who are not eligible for asylum, but will not adequately protect them all.

5. Cancellation of Removal

The parent of an at-risk daughter may be eligible for a cancellation of removal.[68] This requires that "removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."[69] The child will suffer exceptional hardship because she will either grow up without parents or will be subjected to FGM.[70] Unfortunately, the child's right to remain in the United States, free from torture, prevents her from suffering hardship when her parents are deported despite the argument that the child will be separated from her parents.[71]

In 1995, the U.S. Court of Appeals for the Seventh Circuit expanded the coverage of cancellation of removal to include considerations of constructive deportation. In *Salameda v. INS*,[72] the court held that a non-resident alien child would be constructively deported if his parents were deported, since the child had no legal right of his own to remain in the United States.[73] However, the doctrine of constructive deportation is quite limited. While the INS must consider the potential harm to an alien child when granting or denying a stay of removal,[74] this doctrine does not apply to children who have been granted citizenship rights[75] or to

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65. Blizzard, *supra* note 10, at 913-14.

66. Men in general will not be protected by this argument since by definition, men are not subject to female genital mutilation. However, those fathers who have suffered another form of torture that is severe enough to qualify as continuing harm will have stronger claims to asylum, but that is outside of the FGM context.

67. Blizzard, *supra* note 10, at 913.

68. 8 U.S.C. § 1229b(b)(1)(D) (2006).

69. *Id.*

70. Blizzard, *supra* note 10, at 916.

71. Oforji 354 F.3d at 618 (7th Cir. 2003) (holding that the applicant was not protected by cancellation of removal because her citizen child's separation from a parent is not exceptional hardship).

72. Salameda, 70 F.3d at 451.

73. *Id.*

74. Nwaokolo v. I.N.S., 314 F.3d 303 (7th Cir. 2002).

75. Oforji , 354 F.3d at 618 (stating that Congress gave immigrants the choice of whether to

those who have another parent with a legal right to remain in the United States.[76] In those cases the child is able to stay in this country despite the removal of one parent. This is especially relevant in the FGM context since the children will be granted asylum and given a legal right to remain in the United States. While this doctrine had the potential to open doors for parents whose children fear FGM, it has been shut for most in the jurisdiction of the U.S. Court of Appeals for the Seventh Circuit.[77] Only those parents whose alien children do not have an option to stay in the United States may be protected by constructive deportation, but this is a rare situation since most children who fear FGM qualify for asylum even though their parents do not.[78]

6. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

The Convention Against Torture ("CAT") prohibits extraditing an alien to another country when "there are substantial grounds for believing that he would be in danger of being subjected to torture."[79] The CAT provides a non-traditional route to prevent deportation. The applicant must prove that it is more likely than not that she will be subject to torture[80] given evidence of past torture, the lack of possibility of relocation to another part of the country where she would not be tortured, other evidence of that country's "flagrant" violations of human rights, and other relevant information of the conditions in that country.[81] This torture must be inflicted with the consent[82] or willful blindness of a public official.[83]

The problem with using this form of relief for parents of children who fear FGM is that there is no direct application to the parents.[84] First it is the children, rather than the parents, who suffer from this form of torture.[85] Secondly, the mental anguish caused by the stigma of having a child who has not undergone FGM may not be sufficient to qualify, although the point is worth arguing in court since it has not explicitly been rejected to date.[86] Finally, this is not a practical form of relief because in most African countries FGM is not practiced with

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leave their children behind or take them with them when they were deported, and the court could not intervene).

76. Obazee v. Ashcroft, 79 F App'x 914, 917 (7th Cir. 2003) (nonprecedential decision).

77. The progression of Seventh Circuit cases from Salneida to Oforji has consistently narrowed the ability of illegal immigrants parents to remain in the United States with their children. *Supra* part II.A.5.

78. Blizzard, *supra* note 10, at 918.

79. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art 3, (July 18,2005) 1465 U.N.T.S. 8. [hereinafter Convention Against Torture].

80. 8 C.F.R. § 208.16(c)(2) (2003); Hamoui v. Ashcroft, 3898 F.3d 821, 827 (9th Cir. 2004)..

81. 8 C.F.R. § 208.16(c)(3) (2003).

82. 8 C.F.R. § 208.18(a)(1), (7) (2003).

83. *In re* S-V-, 22 I & N Dec. 1306, 1311 (B.I.A. 2000).

84. Blizzard, *supra* note 10, at 919-20.

85. *Id.* at 919.

86. *Id.*

government consent.[87] In fact, "at least sixteen African countries have explicitly banned the practice, and the Maputo Protocol, an African regional document that prohibits and condemns FGM, came into force in November 2005."[88] Although judges can consider the government's willful blindness, it is hard to overcome the burden set by the existence of statutes banning FGM in these countries.[89] The series of events required to qualify for this form of relief make this a very uncommon alternative for parents of children fearing FGM.

B. The Federal Circuit Split

As described in the previous section, there are many variables that may affect the availability of asylum to parents of girls at risk for undergoing FGM. The following cases, analyzed in chronological order, provide more depth to the issues involved, and apply the asylum framework to FGM cases.

1. Nwaokolo v. I.N.S.[90]

Philomena Nwaokolo entered the United States legally on an F-2 visa for spouses or children of academic students but violated her visa by accepting employment.[91] While in the country, Nwakolo became a mother of three children – two sons and one daughter.[92] Then, during the extensive asylum proceedings, Nwaokolo gave birth to a second daughter.[93] After many proceedings with the INS, including four motions to reopen, Nwaokolo sought relief under the CAT on the theory that she and her daughters would likely be forced to undergo FGM if they returned to Nigeria.[94] The BIA denied the fourth motion to reopen because Nwaokolo failed to establish changed circumstances that could exempt her from the one-motion limit.[95]

However, the United States Court of Appeals for the Seventh Circuit held that "Nwaokolo has a better than negligible chance of meeting her burden on appeal" because the minor children will be constructively deported along with their parents.[96] The court concluded that the record from the BIA does not suggest they considered the potential harms to Nwaokolo's second daughter when reviewing the application, even though the BIA's analysis stated that the reasoning would be

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87. *Id.* at 920.

88. IRIN Africa, *ERITREA: Government Outlaws Female Genital Mutilation*, Apr. 5, 2007, *at* http://www.irinnews.org/Report.aspx?ReportId=71199.

89. Lie v. Ashcroft, 396 F.3d 530 (3d Cir. 2005) (holding that violence wrought by fellow citizens was not the result of governmental action or acquiescence).

90. 314 F.3d 303 (7th Cir. 2002) (per curium).

91. *Id.* at 304.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Nwaokolo*, 314 F.3d at 304.

96. *Id.* at 307.

exactly the same as that of the older daughter.[97] Rather, the court concluded that the analysis may vary as a result of the difference between the daughters' ages.[98]

Nwaokolo mandates a consideration of how the harm suffered by the daughters impacted the applicant. Subsequent cases, however, limit the court's rationale in *Nwaokolo* is to motions to reopen and to a small subset of parental asylum cases. As seen in a later case, *Oforgi v. Ashcroft*,[99] broader applications of *Nwaokolo* were expressly dismissed. In *Oforgi*, the court limited *Nkwaokolo* stating, "unlike Nwaokolo, Oforgi did not first enter the United States legally, nor has she resided in the United States for the required continuous seven-year period. Thus she does not qualify for the 'exceptional hardship' claim" available to Nwaokolo.[100] This language severely abrogated future use of *Nwaokolo* by parents, unless they are well within the coverage created under the cancellation of removal provisions.

2. Obazee v. Ashcroft[101]

From 1976 to 1981, Ruth Obazee was a member of the Reform Ogboni Fraternity ("ROF").[102] As part of a five-year initiation ritual, Obazee was required, among other things, to eat human body parts.[103] After she left the organization, she was kidnapped and threatened with harm if she returned to Nigeria.[104] Obazee had been subjected to FGM, and feared that her three minor daughters, all of whom are U.S. citizens, would be forced to undergo the same procedure if they returned to Nigeria.[105]

The INS initiated an order to show cause[106] upon discovering Obazee's presence in the U.S.[107] In a hearing before an immigration judge ("IJ"), Obazee argued that she would be persecuted by the ROF and that one of her daughters would be tortured if Obazee brought her back to Nigeria.[108] The IJ found that these arguments were unfounded because academic literature suggested that the ROF did not participate in cannibalism and intolerance.[109] The BIA affirmed the

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97. *Id.* at 308.

98. *Id.* at 310.

99. 354 F.3d 609.

100. *Id.* at 617 (7th Cir. 2003).

101. 79 F. App'x 914 (7th Cir. 2003).

102. *Id.* at 915.

103. *Id.*

104. *Id.*

105. *Id.* However, the official record only reflects that Obazee had one daughter; the fact that she had three was brought out by her attorney on oral examination. *Id.* at n. 1

106. An order to show cause is an directive from a judge to the alien, giving the alien an opportunity to come to court and convince the judge why she should not be deported. BLACK'S LAW DICTIONARY 1131 (8th edition 2004).

107. Obazee, v. Ashcroft, 79 F. App'x 914, 915. (7th Cir. 2003)

108. *Id.* (only one of the three daughters is discussed in the opinion because she is the only daughter included in the record).

109. *Id.* at 916.

IJ's decision.[110] After affirming the decision that Obazee's testimony regarding the ROF was not credible, the U.S. Court of Appeals for the Seventh Circuit turned to the issue of whether Obazee's daughter would be tortured.[111] The court explained that "in such circumstances, the INS should in its discretion, consider the impact and alternatives facing the minor child who is a United States citizen."[112] In this case, because the daughter's father was a U.S. citizen, she could remain in the United States with him, providing support for the court to affirm the IJ's decision.[113]

However, the Court failed to adequately address the potential harm that would be inflicted upon a mother by separation from her daughter. Obazee would certainly suffer serious harm since she would be forced to leave her daughter on the other side of the world. Obazee would be forced to allow her daughter's father to decide what values and beliefs to instill in the girls without her input. Specifically, the Court did not delve into the possibility that the father might approve of the practice of FGM. If he supported the ritual, it is possible that he would allow the daughters to return to Nigeria, under the guise of visiting relatives or the like, knowing that the girls would likely be subjected to FGM while overseas. This would render the protection of the daughters under the Refugee Act meaningless. It is important to note that this decision is non-precedential. Although it provides some insight as to how the court may interpret a similar claim in the future, judges are not bound by the decision in the future.

3. Oforji v. Ashcroft[114]

Doris C. Oforji has two minor daughters who are U.S. citizens.[115] Unlike Obazee, the daughters did not have a place to stay in the United States and would be subjected to FGM if they returned to Nigeria.[116] Oforji herself had previously undergone FGM.[117] When Oforji first arrived in the United States, the INS denied her entry and accused her of trying to fraudulently enter the country without immigration documents.[118] *Inter alia*, Oforji argued that she should be allowed to stay in the U.S. because her two daughters would be forced to undergo FGM if they returned to Nigeria with her.[119] She applied for asylum, withholding of removal, and protection under CAT.[120] The IJ initially held that Oforji did not

110. *Id.*
111. *Id.* at 917.
112. *Obazee*, 79 F. App'x at 917.
113. *Id.*
114. 354 F.3d 609.
115. *Id.* at 612.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Oforji*, 354 F.3d at 612.
120. *Id.*

willfully misrepresent herself to gain entry to the United States.[121] However, he also found inconsistencies in Oforji's testimony and denied her refugee status.[122]

On review, the U.S. Court of Appeals for the Seventh Circuit affirmed the decision of the IJ, relying on *Salameda v. I.N.S.*[123] In *Salameda*, the court held that the IJ, considering the application of a parent, must determine whether a non-U.S. citizen child would be constructively deported with the parent.[124] The *Oforji* court distinguished the instant case from *Salameda* because Oforji's children were U.S. citizens and would not be deported without a hearing along with their parents.[125] The court found that although Oforji is "faced with the unpleasant dilemma of permitting her citizen children to remain in this country under the supervision of the state… or an otherwise suitable guardian, or taking her children back to Nigeria to face the potential threat of FGM," Congress has left that dilemma to the immigrant.[126] As a result, the Court held that someone who will not undergo torture upon returning to their native country cannot establish a prima facie case under the CAT based on the rights of their U.S. citizen children.

The requirement that the Court laid out in *Oforji* has caused quite a stir among academics.[127] It is generally regarded as 'Solomon's Choice'[128] to require immigrants to choose between their political beliefs and separation from the daughters. Further, by stating that the immigrant is responsible for making the decision, the court assumes that Congress actually considered the plight of the parent of an at-risk girl when drafting the statute. Aside from the fact that this assumption is contrary to the domestic immigration policy of keeping families together, it seems unlikely that Congress considered it carefully. Specifically in the category of 'particular social group', Congress may have implicitly assumed that adults would either have the same immutable characteristic as their children, as is the case with tribe membership or skin color, or that children were not capable of singularly including themselves in the social group, such as with former military leadership or land ownership.[129] Nonetheless, the U.S. Court of Appeals

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121. *Id.*.

122. *Id.*

123. *Id.* at 615-16 (citing *Salameda* v. I.N.S 70 F.3d 447 (7th Cir. 1995)).

124. *Oforji*, 354 F.3d at 612*; see supra* notes 71-72 and accompanying text.

125. Oforji, 354 F.3d at 616.

126. *Id.* at 618.

127. *See e.g.* Meredith Aherne, *supra* note 6 (focusing on the dangers that result from using statutory interpretations to decide claims for asylum); Blizzard, *supra* note 10 (finding that the court 'condemns' parents to a difficult decision); Dree K. Collopy, *Incorporating a Hardship Factor in Asylum Claims Based on Female Genital Mutilation: A Legislative Solution to Protect the Best Interests of Children*, 21 GEO. IMMIGR. L.J. 469 (2007) (reasoning that the decision results in a 'legal anomaly' that provides noncitizen children with more protection than U.S. citizen children).

128. Lasker, *supra* note 23, at 231.

129. These examples are taken directly from the BIA's interpretation of what constitutes a "particular social group." *See* In re C-A-, 23 I & N Dec. 951 (BIA 2006)(citing Matter of Acosta, 19 I & N Dec. 211 (BIA 2005))("[P]ersecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The

for the Seventh Circuit does make this assumption and many courts have relied on this as precedent.[130]

4. Osigwe v. Ashcroft[131]

The facts of this case parallel those of *Oforji*. Ngozi Victoria Osigwe and her husband, Chibundu Cajetan Osigwe, applied for asylum, withholding of removal, and for protection under CAT because their minor, citizen daughter would be at risk for FGM if she returned to Nigeria.[132] The IJ denied refugee status to the Osigwes based on the risk of their daughter being forced to undergo FGM if she returned to Nigeria.[133]

However, the Unied States Court of Appeals for the Fifth Circuit determined that the Osigwes might be eligible for a humanitarian grant of asylum.[134] The court did not provide significant analysis before remanding to the IJ for an evaluation of the humanitarian grant of asylum, only stating that "although the Osigwe's citizen child would be subject to risk of torture if she was returned to Nigeria, the Osigwes do not fall within the parameters of the Convention Against Torture Act based on their knowledge that their daughter faced a risk of being tortured."[135] In this brief opinion, the U.S. Court of Appeals for the Fifth Circuit both opened the door for humanitarian grants of asylum and closed the door to refugee status under the Refugee Convention in that federal circuit. Fortunately, the case is not binding precedent, even in the Fifth Circuit.

5. Abay v. Ashcroft[136]

Yayeshwork Abay fled to the United States with her youngest daughter Burban Amare, a minor, in 1993, leaving three older daughters with her husband in Ethiopia.[137] Subsequently, Abay's husband also fled from Ethiopia, leaving the daughters with Abay's mother.[138] Previously, Abay's mother had attempted to subject the older daughters to FGM, but Abay and her husband, who oppose the practice, had thwarted her attempts.[139] Abay was mutilated by her mother when she was nine years old and felt as though she would not be able to prevent future

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shared characteristic might be an innate on such as sex, color, or kinship ties . . . ."); In re Fauziya Kasinga, 21 I & N Dec. 257 (BIA 1996)("[T]he applicant is a member of a social group consisting of young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose that practice.").

130. In re A-K-, 24 I & N Dec. 275 (BIA 2007). *But see* Niang v. Gonzales, 492 F.3d 505 (4th Cir. 2007) (refusing to follow Oforji for statutory interpretation reasons).

131. 77 F. App'x 235 (5th Cir. 2003) (per curium) (unpublished decision).

132. *Id.* at 235.

133. *Id.*

134. *Id.* at 235-36.

135. Osigwe v. Ashcroft, 77 F. App'x 235 (5th Cir. 2003)(per curium)(unpublished decision).

136. 368 F.3d 634 (6th Cir. 2004).

137. *Id.* at 639

138. *Id.*

139. *Id.*

husbands or in-laws from subjecting the daughters to FGM.[140] In addition, Amare feared that she would be forced by her relatives or a future husband to undergo FGM if she returned to Ethiopia.[141] This fear was corroborated by a U.S. State Department report, which estimated 90% of all Ethiopian females are subjected to FGM.[142]

The court granted refugee status to both Amare and her mother.[143] Abay argued that she was eligible for a grant of asylum based entirely on her own fears that her daughters would be tortured.[144] She based her argument on the *Matter of C-Y-Z-*,[145] where an alien was granted asylum based on the argument that forced sterilization of his wife established persecution based on political opinion.[146] The court concluded that "[i]t not only constitutes persecution for the asylum applicant to witness or experience the persecution of family members, but it serves to corroborate his or her own fear of persecution."[147] In addition the court relied on several cases where the INS granted relief other than refugee status to parents of female children who reasonably fear FGM.[148]

Academics have both commended and critiqued this opinion.[149] One critique of the opinion was the lack of authority for finding that a parent would suffer a mental injury that was sufficient to rise to the level of persecution since there was no associated physical harm to the parent.[150] However, providing asylum applicants the right to immigrate with their parents furthers the policy goal of keeping families together.[151] This especially holds true for minor children who are more vulnerable than adults.[152] U.S. case law recognizes that persecution of a family member can constitute persecution of the applicant and that persecution encompasses psychological harm.[153] A majority of the critiques of *Abay* are about technical deficiencies, such as failing to explicitly describe the enumerated ground

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140. *Id.* at 639.

141. *Id.*

142. Abay v. Ashcroft, 368 F.3d at 639-40.

143. *Id.* at 639.

144. *Id.* at 642-43.

145. Matter of C-Y-Z-, 21 I & N Dec. 915 (BIA 1997).

146. Abay v. Ashcroft, 368 F.3d at 641.

147. *Id.* (quoting *In re* C-Y-Z-, 21 I & N Dec. at 915 (citations omitted)).

148. *Id.* at 641 (citing Matter of Adeniji, No A41 542 131; Matter of Oluloro, No. A72 147 491; and Matter of Dibba, No. A73 541 857).

149. *E.g.,* Wes Henricksen, *Abay v. Ashcroft: The Sixth Circuit's Baseless Expansion of INA § 101(A)(42)(A) Revealed a Gap in Asylum Law*, 80 WASH. L. REV. 477 (2005). *See also* Lasker, *supra* note 23, at 233-34; Blizzard, *supra* note 10, at 911-13.

150. Henricksen, *supra* note 149.

151. *Id.*

152. *Id.*

153. Marcelle Rice, *Protecting Parents: Why Mothers and Fathers Who Oppose Female Genital Cutting Qualify for Asylum*, IMM. BRIEFINGS (Nov. 2004).

under which Abay was protected.[154] The commendations, however, of the opinion focus on the compassion shown by the court.[155]

6. Azanor v. Ashcroft[156]

In Nigeria, Eunice Oritsegbeyiwa Azanor was a member of a minority tribe and the Christian church, during a period when Muslims were treated preferentially to Christians.[157] Specifically, "her position of leadership in an evangelical Christian church led to frequent harassment and prevented her from pursuing educational and professional opportunities reserved for Muslims and members of other tribes."[158] Azanor fled to the United States, leaving her daughter with relatives in Nigeria.[159] During her stay in the United States, Azanor received information that the persecution against Christians had escalated, and so she decided to remain in the country.[160] While in the United States, Azanor gave birth to a son and a daughter.[161] During the INS hearings, Azanor argued that she would be subjected to "religious, ethnic, and political persecution" if she returned to Nigeria.[162] She did not mention FGM in either her original application for asylum and withholding of removal or during questioning by the IJ.[163]

After the IJ denied her application, Azanor retained new counsel who raised the issue of FGM as a ground for asylum in a motion to reopen.[164] This issue included statements about Azanor's fear that her youngest daughter will likely be forced to undergo FGM if she returned to Nigeria[165] The BIA denied Azanor's motion to reopen because she failed to prove that she would suffer mental distress with public officials' consent or acquiescence under the CAT.[166]

On appeal, the United States Court of Appeals for the Ninth Circuit held that the BIA abused its discretion by requiring that the government officials have "custody or physical control" over the distress, not merely consent or acquiescence, to show government approval.[167] Under an abuse of discretion standard, the court reversed the BIA's conclusion because the opinion did not

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154. *See, e.g.,* Blizzard, *supra* note 10 ("In *Abay*, the Sixth Circuit did not explain how a parent's persecution resulting from her child's FGM is on account of an enumerated ground.").

155. Rice, *supra* note 153, at 10-11 (focusing on the torture including family member harm and psychological harm).

156. 364 F.3d 1013 (9th Cir. 2004).

157. *Id.* at 1016.

158. *Id.*

159. *Id.*

160. *Id.* at 1017.

161. *Azanor,* 364 F.3d at,1017. It is unclear from the facts why Azanor is unable to remain in the United States with her citizen husband.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 1018.

166. *Azanor,* 364 F.3d at, 1018.

167. *Id.* at 1019.

reveal whether the BIA relied on its custody or control requirement.[168] This case benefits parents of at-risk daughters by lessening the governmental control requirement. One problem that parents encounter is the existence of laws banning FGM which are supposed to encourage parents to voice anti-FGM political opinions, but when parents take the risk to engage in such behavior, the government ignores the persecution that results. By lessening the harsh standards to show governmental control, the Ninth Circuit also created a more realistic rule of law for parents to prove.

7. Olowo v. Ashcroft[169]

Esther Olowo won an immigration visa lottery[170] in 1995 and was granted U.S. permanent resident status.[171] Several years later, Olowo agreed to help a family friend smuggle an alien child into the United States.[172] She was caught trying to reenter the United States from the Bahamas with the child, and the INS issued a motion of removability for knowingly aiding the illegal entry of an alien.[173] Olowo applied for asylum and withholding of removal, arguing that her two daughters would be subjected to FGM if the family were to relocate back to Nigeria.[174] Even though Olowo opposed the practice, her husband's family would force the children to undergo the procedure.[175] Olowo was herself subjected to FGM when she was twelve years old.[176] Further, she argued that even though her husband and children were also legal permanent residents, they would accompany her return because her husband cannot take care of the family alone.[177] The IJ denied the petition, stating that Olowo could not "bootstrap a claim for asylum based upon fear of harm to her children" since they could stay in the United States and, if they chose to return to Nigeria, the husband could protect the daughters from torture.[178] The BIA affirmed the IJ's decision.[179]

The United States Court of Appeals for the Seventh Circuit reiterated the ruling in *Oforji*, that persecution must be suffered by the applicant herself, and does "not encompass any consideration of persecution that may be suffered by

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168. *Id.* at 1021.

169. Olowo v. Ashcroft, 368 F.3d 692 (7th Cir. 2004).

170. "The Congressionally mandated Diversity Immigrant Visa Program makes available 50,000 diversity t[sic] visas (DV) annually, drawn from random selection among all entries to persons who meet strict eligibility requirements from countries with low rates of immigration to the United States." Diversity Visa Program, http://travel.state.gov/visa/immigrants/types/types_1322.html (last visited March 27, 2009).

171. *Id.* at 697.

172. *Id.* at 695.

173. *Id.*

174. *Id.* at 697.

175. Olowo v. Ashcroft, 368 F.3d 692, 698 (7th Cir. 2004).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 695.

others – even family members – who may be obliged to return with her to Nigeria."[180] Despite its reliance on *Oforji*, the Seventh Circuit contradicts its prior precedent. *Oforji* focused on the fact that the children did not need to return to her country of origin because they had an independent legal right to remain in the United States. However, *Olowo* took that holding much further by declaring that the impact on the children should not even be considered. This expansion of *Oforji* is untenable since U.S. immigration law prioritizes family reunification and *Oforji*, *Salameda*, and *Nwaokolo* all considered the impact on the child in deciding the asylum claim of the parent.

8. Niang v. Gonzales[181]

In 2000, Mame Fatou Niang arrived in the United States on a visitor's visa.[182] Soon after arrival in the country, she met a Senegalese man and within a year they had their first child.[183] After the birth of her second child two years later, Niang filed for asylum.[184] In 2003, DHS initiated removal proceedings because Niang had outstayed her visa.[185] During her DHS hearings, Niang argued that she should have relief from removal because if she were to return to Senegal with her daughter, the three-year-old would be at risk for undergoing FGM.[186] Niang herself had been subjected to FGM as a child, causing her continuing health and psychological problems.[187] While Niang opposes the practice, the father of her children tacitly approves of the procedure and the child's paternal grandparents have strongly requested it.[188] The IJ denied asylum under all forms of relief.[189]

Upon review, the U.S. Court of Appeals for the Fourth Circuit stated that "it is worth noting that a humanitarian grant of asylum may be warranted in circumstances where the mother, who has been subjected to FGM, fears her daughter will be subjected to FGM if she accompanies her mother to the country of removal."[190] Unfortunately, Niang did not petition for a review of the IJ's decision on this point.[191] Ultimately, the court determined that these facts did not give rise to a finding of asylum because Niang solely asserted a psychological harm, which does not rise to the level of "life or freedom" as required by statute;[192] Niang's daughter is an American citizen, distinguishing the case from *Abay*; and other

180. *Olowo*, 368 F.3d at 701.
181. Niang v. Gonzales, 492 F.3d 505 (4th Cir. 2007).
182. *Id.* at 507.
183. *Id.*
184. *Id.*.
185. *Id.*
186. *Id.*
187. *Niang,* 492 F.3d at 508.
188. *Id.*
189. *Id.* at 509.
190. *Id*. at 509 n.4.
191. *Id.*
192. *Niang,* 492 F.3d at 513. (citing 8 U.S.C. § 1231(b)(3)).

federal circuits have failed to recognize a derivative claim for asylum when considering the hardship to American citizen children, citing *Oforji* and *Olowo*.[193]

9. In re A-K-[194]

A-K- is a Senegalese citizen with two minor U.S. citizen daughters.[195] He filed a motion seeking withholding of removal under the CAT.[196] A-K- argued that his two daughters would be at risk of FGM if they returned to Senegal.[197] Since the U.S. Court of Appeals for the Fifth Circuit, the jurisdiction that would potentially oversee the agency decision, has not published any case law addressing the issue, the BIA considered how the Fifth Circuit would interpret sister circuits' precedent.[198] The BIA considered *Oforji*, *Abay*, and *Niang* in its decision. Unlike the situation in *Abay* where the children had no legal right to remain in the United States,[199] the BIA held that A-K- had no claim to asylum because both children had a legal right to remain in the United States.[200] The BIA further held that the type of harm being addressed was not harm that derivatively provides asylum to the parent, but rather directly causes persecution to the parent as "the target of the emotional persecution that arises from physical harm to a loved one."[201] As a result, the BIA held that this kind of psychological harm to the parent was not sufficient to qualify as persecution, to satisfy the requirements for asylum or withholding of removal.[202] This ruling allowed the BIA to prevent cases of parental asylum without addressing the real issue presented in *Abay*: the possibility that physical harm to a family member could be a direct psychological harm to the applicant when the persecutor takes advantage of the applicant's close relationship with the child who was physically harmed.

10. In re A-T-[203]

A-T- is a Malian citizen who was subjected to FGM as a young child, but does not remember the procedure.[204] She was legally admitted into the United States as a visitor in 2000. In 2004, she applied for asylum.[205] This case took the law to the next level, arguing that "if she were to have a daughter in the future,

193. *Id.* at 514.
194. *In re* A-K-, 24 I & N Dec. 275 (BIA 2007).
195. *Id.* at 275.
196. *Id.*
197. *Id.*
198. *Id.* at 276.
199. *In re* A-K-, 24 I & N Dec. 275, 276 (BIA 2007).
200. *Id.*
201. *Id.* at 278.
202. *Id.* at 275.
203. *In re* A-T-, 24 I & N Dec. 296 (BIA 2007), *vacated by* 24 I.&N. Dec. 617 (USDOJ Off. Att. Gen. 2008).
204. *Id.* at 296.
205. *Id.*

[she] would actively oppose having the procedure performed on her child."[206] The IJ found that A-T- failed to show that she would be tortured upon return to Mali.[207] The BIA considered the possibility of asylum based on past persecution, as in *Abay,* but found that FGM does not rise to the level of past harm necessary to invoke a discretionary grant of asylum.[208] The BIA further established that the possibility of giving birth to a daughter who will be subjected to FGM is insufficient to show a future risk of persecution.[209] The BIA declined to follow *Mohammed v. Gonzales*,[210] where the U.S. Court of Appeals for the Ninth Circuit had held that FGM constitutes a continuing harm for asylum purposes, but the BIA conceded that involuntary sterilization is considered a continuing harm.[211] *In re A-T-* also implicitly held that the BIA does not recognize claims of future persecution based on children that have not yet been born.[212]

C. Summary

The federal circuit courts have muddied the case law considerably. On one hand the U.S. Court of Appeals for the Seventh Circuit has progressively tightened its requirements for parents of at-risk children, and now require that the parent independently show harm regardless of the effect on the child.[213] On the other, asylum applicants in the U.S. Court of Appeals for the Sixth Circuit discover that the effect on the child is not only relevant, but can provide a basis for a parental asylum claim.[214]

Although the Refugee Act includes five different avenues for relief (refugee status, derivative asylum, humanitarian asylum, withholding of removal, and CAT), there are only two categories of asylum seekers who can successfully claim protection under these categories: mothers who were previously subjected to FGM, suffering particularly damaging torture, and parents of U.S. citizen children who satisfy the requirement of exceptional hardship. Technically, mothers of daughters without a legal right to remain in the United States are protected, but this group is nearly non-existent because at-risk daughters are given asylum status, which is a legal right to remain in the United States. The BIA reduced these opportunities

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206. *Id.* at 297.

207. *Id.*

208. In re A-T-, 24 I & N Dec. 296, 299 (BIA 2007).

209. *Id.*

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

211. *In re A-T-*, 24 I.& N. Dec. at 300.

212. *Id*. at 302 (stating that the respondent's claim that her future child or children may be subjected to FGM is too speculative to warrant consideration).

213. *See* Oforji v. Ashcroft, 354 F.3d 609 (7th Cir. 2003) (limiting *Salameda* and *Nwaokolo* to cases where the child has no legal right to remain in the United States); Obazee v. Ashcroft, 79 F. App'x 914 (7th Cir. 2003) (finding that the INS has the discretion to decide when to consider the impact on United States citizen children when a parent is deported); Nwaokolo v. INS, 314 F.3d 303 (7th Cir. 2002) (holding that the BIA should consider potential harms to a child with a legal right to remain in the United States); Salameda v. INS, 70 F.3d 447 (7th Cir. 1995) (holding that the determination of a parent's application requires consideration of whether his child will be constructively deported with the parent).

214. Abay v. Ashcroft, 368 F.3d 634 (6th Cir. 2004).

even further by limiting the option of continued persecution. Additionally, the BIA has construed the existing precedent set by the federal circuit courts to eliminate the right to asylum for parents of a U.S. citizen, effectively creating a benefit for non-citizen children. Unfortunately, the rationale behind the BIA decisions is based on existing case law and applied in a legitimate manner, which makes it unlikely to be overturned on appeal. An evaluation of positions taken in foreign courts, however, shows that the BIA has not addressed several potential arguments. The lack of discussion on these points allows the U.S. circuit courts to overturn and remand the BIA decisions with more direct orders to grant asylum.

III. TACTICS TAKEN IN FOREIGN COURTS

A. Why Foreign Cases are Relevant

Foreign cases are relevant for two reasons. First, arguments under foreign law may be applicable to corresponding U.S. law; second, many of the foreign decisions rely on law based on international treaties that the United States has also signed and ratified. Therefore, this paper will not delve into cases that rely on treaties that the United States is not associated with, such as the European Convention on Human Rights ("ECHR"). Decisions based on the ECHR and similar treaties have very little persuasive value in the United States and are not likely to support a decision for asylum or to overcome the burden of pre-existing U.S. law.[215] Instead, the focus in this section will be on cases decided under the Refugee Convention,[216] CAT,[217] the United Nations Convention on the Rights of the Child ("UNCRC"),[218] and the International Convention on Civil and Political Rights ("ICCPR").[219]

B. Interpretive Arguments Presented in Foreign Courts

The first and most basic argument that is accepted by several foreign courts is that the daughter's fear of FGM is relevant to the parents' asylum application, but her citizenship status is not.[220] Specifically, Canadian case law requires

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215. Lori A Nessel, *Forced to Choose: Torture, Family Reunification, and United States Immigration Policy*, 78 TEMP. L. REV. 897, 921 (2005) ("[T]he United States takes the position that such international treaties are not self-executing and that it is therefore not bound by them unless it enacts implementing legislation.").

216. Refugee Convention, *supra* note 16.

217. Convention Against Torture, *supra* note 77.

218. Convention on the Rights of the Child, G.A. Res. 44/25, Annex, U.N. Doc. A/Res/44/25 (Nov. 20, 1989), *available at* http://www.unhchr.ch/html/menu3/b/k2crc.htm [hereinafter UNCRC].

219. International Convention on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. Doc. A/6316 (Dec. 16, 1966), *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm [hereinafter ICCPR].

220. *In re* Khandra Hassan Farah, et al., T93-12197, T93-12198 and T93-12199 Immigrant and Refugee Board of Canada (May 10, 1994) *available at* http://www.unhcr.org/refworld/docid/3ae6b70618.html.

consideration of evidence of the impact of deportation on a child because a mother and daughter are "de facto inseparable"[221] and the "interests of an infant child are inseparably linked with those of [her parent]."[222] The Canadian courts therefore consider evidence of the impact that deportation has on a child as a factor in their analysis. This analysis, based on the importance of family, is already reflected in the analysis by the U.S. Court of Appeals for the Seventh Circuit, which requires IJs to review whether a non-citizen child will be deported alongside the parent.[223] However, the Canadian courts have not found citizenship to be a relevant consideration in this determination.

Australian courts have echoed this sentiment. Australian Refugee Review Tribunal decision N97/19046 considered an applicant who fled her country when her in-laws tried to force her and her daughter to submit to FGM after her sister had died from complications resulting from the procedure.[224] The court considered the mother's own fear of FGM to be "double" because of the risk of harm to her daughter.[225] This opinion demonstrates Australia's willingness to use a daughter's risk of FGM as independent grounds for protecting the parent herself.

Under current U.S. law, the BIA will not consider this as independent grounds for the parent because the child herself would be entitled to asylum status and allowed to remain in the United States.[226] However, the Australian approach is not a big leap from current U.S. case law, which requires some consideration of the impact to the child of separation from the parent (which is one explanation for the court's decision in *Abay v. Ashcroft*). The biggest difference is that the BIA evaluates the child's citizenship status. This change would further the U.S. immigration policy, which is developed to advance family reunification,[227] by focusing more on the impact to the applicant of separation from her child, and by allowing for less discrimination on the basis of citizenship in the U.S. legal system.

Second, foreign jurisdictions have granted asylum on the recognition that the parent is persecuted when the daughter is harmed.[228] Specifically, the argument focuses on how the parent has endured emotional and psychological harm by

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221. Obasohan v. Canada [2001] 3 F.C. D-5, 2001 FCT 92.

222. *Id.*

223. *See* Nwaokolo v. INS, 314 F.3d 303, 304 (7th Cir. 2002).

224. Australia Refugee Review Tribunal, RRT N97/19046 (Oct. 16, 1997).

225. *Id.*

226. *See In re* A-T-, 24 I.& N. Dec. 296 (BIA 2007) (holding that the applicant-parent's claim for asylum cannot be based on removal from children with a legal right to remain in the United States).

227. For a detailed discussion on U.S. immigration policy toward family reunification, *see generally* Enid Trucios-Haynes, *"Family Values" 1990's Style: U.S. Immigration Reform Proposals and the Abandonment of the Family*, 36 BRANDEIS J. FAM. L. 241 (1997-1998).

228. *See, e.g., In re* Khandra Hassan Farah, et al., T93-12197, T93-12198 and T93-12199 Immigrant and Refugee Board of Canada (May 10, 1994) *available at* http://www.unhcr.org/refworld/docid/3ae6b70618.html*; see also* Obasohan v. Canada [2001] 3 F.C. D-5, 2001 FCT 92.

witnessing and experiencing her daughter's torture.[229] This argument has varied based on the type of harm that the mother has arguably suffered.[230]

The leading Canadian case applying this argument, *In the Matter of Khadra Hassan Farah*, focused on the fact that the mother was not getting equal access to custody of her Canadian citizen daughter.[231] In *Farah*, a Somali woman left her husband, after her husband forbade contact between her and her first child as retribution for her interest in divorce and independence.[232] She raised their two remaining children alone in Canada without any contact from her husband who remained in Somalia.[233] However, if she were deported back to Somalia, custody of the children would have been given to their father, a proponent of FGM, without an equitable hearing on the issues.[234] If the mother were granted custody in Somalia, she would be able to prevent her daughter from submission to FGM by her father.[235] The Immigration and Refugee Board of Canada ("IRB") reasoned that the mother's inability to protect her daughters from FGM in her home country despite her deeply held beliefs is sufficient persecution to establish her right to asylum.[236] "An individual may suffer harm from the knowledge that another individual is being harmed, particularly if that other individual is a family member. The harm may manifest itself as emotional pain from knowing that a loved-one has been harmed."[237]

C. Arguments Based on Treaties Signed and Ratified by the U.S.

1. Refugee Convention and the United Nations High Commissioner for Refugees

UNHC, the governing body of the 1951 Refugee Convention and the 1967 Protocol, has made it explicitly clear that the Refugee Convention applies to

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229. *See, e.g., In re* Khandra Hassan Farah, et al., T93-12197, T93-12198 and T93-12199 Immigrant and Refugee Board of Canada (May 10, 1994) *available at* http://www.unhcr.org/refworld/docid/3ae6b70618.html; *see also* Australia Refugee Review Tribunal, RRT N97/19046 (Oct. 16, 1997).

230. *See, e.g., In re* Khandra Hassan Farah, et al., T93-12197, T93-12198 and T93-12199 Immigrant and Refugee Board of Canada (May 10, 1994) *available at* http://www.unhcr.org/refworld/docid/3ae6b70618.html (loss of equal treatment in custody dispute).

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *See, e.g., In re* Khandra Hassan Farah, et al., T93-12197, T93-12198 and T93-12199 Immigrant and Refugee Board of Canada (May 10, 1994) *available at* http://www.unhcr.org/refworld/docid/3ae6b70618.html

236. *See, e.g., In re* Khandra Hassan Farah, et al., T93-12197, T93-12198 and T93-12199 Immigrant and Refugee Board of Canada (May 10, 1994) *available at* http://www.unhcr.org/refworld/docid/3ae6b70618.html.

237. Rice, *supra* note 153, at 7 (quoting Persecution of Family Members, Memorandum, from the Office of International Affairs, Asylum Division 1 (June 30, 1997)).

parents of minors who reasonably fear being forced to suffer FGM and makes them eligible for refugee status.[238] Specifically, the UNHCR declared, "a woman can be considered a refugee if she or her daughter/daughters fear being compelled to undergo FGM against their will; or, she fears persecution for refusing to undergo or allow her daughters to undergo the practice."[239] Further, the UNHCR has released several other statements that support these interpretations of the Refugee Convention.[240] The UNHCR has even interpreted the Refugee Convention to include the parents of refugee minors as eligible for derivative refugee status more generally.[241] In addition to merely stating that parents have these expansive rights to protect their children from FGM, the UNHCR has enforced these rights as well. In 1996, the UNHCR was presented with a case from Hong Kong where a mother wanted to protect her daughters from being subjected to FGM in their home country.[242] The UNHCR granted refugee status to the family and found them a safe country in which to remain until conditions improved.[243] Although the UNHCR does not provide a written opinion for these types of cases, no facts were presented to offer alternative grounds on which to grant asylum.

The United States has signed and ratified the 1967 Protocol Relating to the Status of Refugees, which also includes provisions of the Refugee Convention.[244] Congress then implemented the terms of these agreements with the 1980 Refugee Act.[245] However, when the Congress codified the Refugee Convention, it selected which parts of the Refugee Convention that would be binding, and modified some of the language found in the original provisions.

This Comment argues, first and foremost, that the United States should uphold its binding obligations as set out by ratifying these international agreements, including finding that the statements provided by the UNHCR as to the status of women whose daughters may be subjected to FGM are binding. However, assuming that the U.S. courts will not accept this plea, there are still numerous provisions adopted by the United States that the UNHCR has interpreted to cover parents of children at risk for FGM.

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238. Memorandum from united Nations High Commisioner for Refugees on Female Genital Mutilatoin, at para. 5, SUS/HCR/011 (May 10, 1994).

239. Rice, *supra* note 153, at 9 (quoting HEAVEN CRAWLEY, WOMEN AS ASYLUM SEEKERS—A LEGAL HANDBOOK 71 (Immigration Law Practitioners' Association and Refugee Action 1997).

240. *See, e.g.*, Office of the United Nations High Commissioner for Refugees, Guidelines on the Protection of Refugee Women ¶56.

241. U.N. High Comm'r for Refugees, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate* § 5.1.2, *available at* www.unhcr.org/publ/PUBL/4317223c9.pdf.

242. James Rice, *A Successful Case is Made for Granting Refugee Status to a Woman Fleeing Her Own Country to Protect her Daughter from Female Genital Mutilation*, 4 GONZ. J. INT'L L. (2000-01), *available at* http://www.gonzagajil.org/pdf/volume4/Rice/Rice.pdf.

243. *Id.*

244. Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 19.5 U.S.T. 6223.

245. 8 U.S.C.A. § 1231(b)(3) (2000).

The best example of these provisions includes the interpretation of the "particular social group" ("PSG"). The UNHCR has stated that a PSG is not limited by group size and does not require that everyone in the group be at risk for persecution.[246] Furthermore, when determining what constitutes a PSG, the decisionmaker should look at potential PSGs that are wider or narrower as a means of determining whether the applicant is within the targeted group.[247] For example, defining a PSG for a girl who would be subjected to FGM could be as narrow as "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose that practice"[248] or as broad as "women in countries where FGM is practiced." However, as previously discussed in Part 1, there is a trend in the U.S. courts to define PSG very narrowly resulting in the exclusion of non-persecuted members.[249] By relying on its own interpretation of the Refugee Convention, the United States has significantly impaired the breadth that the provisions were intended to have on the signatory countries. The United States has clearly turned a blind eye to the interpretations issued by the UNHCR and other member countries.[250]

2. Other Treaties

Many international treaties pressure member states to consider family unity when evaluating an application for refugee status or asylum.[251] As with the Refugee Convention, the Convention of Rights of the Child ("UNCRC") provides a clear directive to member states to protect parents of refugee children. Specifically, the UNCRC requires that member states "ensure that a child shall not be separated from his or her parents against their will, except when … such separation is necessary for the best interests of the child."[252] The UNCRC also

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246. U.N. High Comm'r of Refugees, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, ¶¶ 29, 31, U.N. Doc. HCR/GIP/02/01 (May 7, 2002), *available at* http://www.unhcr.org/publ/PUBL/3d58ddef4.pdf [hereinafter *Guidelines on International Protection.*]

247. *See id.* ¶31; *Case for the Intervener in* Zainab Esther Fornah (Appellant) v. Secretary of State for the Home Department (Respondent) and UNHCR (Intervener) *(House of Lords)*, 19 INT'L J. REFUGEE L. 339 (2007).

248. *See, e.g.*, *In re* Kasinga, 21 I. & N. Dec. 357, 358 (BIA 1996).

249. *See, e.g.*, *id.* at 358 (defining the PSG as "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose that practice.").

250. *See e.g.*, Canada v. Ward, [1993] 2 S.C.R. 689 (Can.) (adopting a broad interpretation of PSG, which would include gender or parents); *Guidelines on International Protection, supra* note 246.

251. *See, e.g.*, International Convention on the protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (Dec. 18, 1990); African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 4; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222; Universal Declaration of Human Rights, ,G.A. Res. 217A (III), art. 4, U.N. Doc. A/810 (1948).

252. UNCRC, *supra* note 218, at art. 9.

provides that Member States shall respect the rights and duties of parents, which an Australian Court has interpreted to mean that the child's fear of circumcision and the mother's right to prohibit her child from being circumcised were relevant factors when considering the parent's asylum application.[253]

U.S. courts reviewing asylum claims have taken the position that separation is in the best interests of the child where requiring the child to return to that child's home country with her parents puts the child at risk for the infliction of torture.[254] This current interpretation has allowed the United States to choose which treaty it wants to follow – the Refugee Convention or the UNCRC – by making them appear mutually exclusive. However, U.S. courts fail to address the alternative that the child may be free from torture while remaining with her parents. This option allows the United States to satisfy its obligations under both treaties, and align U.S. case law with the general international trend.[255] Ultimately though, the UNCRC is the least persuasive body of law presented here. Although the United States has signed this treaty, it remains one of two countries who have yet to ratify it; the other remaining country is Somalia, which does not have a recognized government.[256]

The International Convention on Civil and Political Rights ("ICCPR"), which the United States has both adopted and ratified,[257] also includes provisions for protecting the sanctity of the family. The Human Rights Committee, which is responsible for monitoring implementation of the ICCPR,[258] considers the "length of stay in the host country, age, … the family's financial and emotional interdependence; and … the state's interest in promoting public safety and in enforcing its immigration laws" when evaluating claims that sever a family unit.[259] The Human Rights Committee found that Australia's decision to remove a thirteen-year-old boy's parents would violate the provisions of the ICCPR.[260]

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253. V95/03664 (1996) RRTA 1449, at para. 47 (Austl.). This claim, based on a parent's decision not to circumcise her son, was ultimately denied because she did not have a legitimate fear of harm to her child. *Id.*

254. *See, e.g.*, Olowo v. Ashcroft, 368 F.3d 692 (7th Cir. 2004) (finding that children with a legal right to remain in the United States will not return to the applicant-mother's country of origin along with their mother). *See also* Oforji v. Ashcroft, 354 F.3d 609 (7th Cir. 2003) (finding that it is up to the immigrant to decide whether to submit their children to torture or allow them to remain with an appointed guardian in the United States).

255. *See e.g. In re* Khandra Hassan Farah, et al., T93-12197, T93-12198 and T93-12199 Immigrant and Refugee Board of Canada (May 10, 1994) *available at* http://www.unhcr.org/refworld/docid/3ae6b70618.html (loss of equal treatment in custody dispute). *See also* V95/03664 (1996) RRTA 1449 (Austl.)

256. Blizzard, *supra* note 10, at 926.

257. ICCPR, *supra* note 213.

258. Office of the United Nations High Commissioner for Human Rights, Human Rights Committee Monitoring Civil and Political Rights, http://www2.ohchr.org/english/bodies/hrc/index.htm (last visited Mar. 29, 2009).

259. Canepa v. Canada, Human Rights Committee, U.N. Doc. CCPR/C/59/D/558/1993 (1997) *available at* http://www1.umn.edu/humanrts/undocs/558-1993.html.

260. Winata v. Australia, Human Rights Committee, at para. 7.3 U.N. Doc. CCPR/C/72/D/930/2000 (2001) *available at* http://www1.umn.edu/humanrts/undocs/930-2000.html.

Specifically, "forcing the parents to choose between uprooting their son and abandoning him would amount to arbitrary interference with family life."[261] However, the State could "demonstrate additional factors … beyond a simple enforcement of its immigration law in order to avoid a characterization of arbitrariness" and thus to comply with the ICCPR.[262] The court did not suggest what these factors might be, but could include evidence as to the purpose of the immigration law.

In the context of the U.S. asylum law, this would be easy to implement through the existing framework of the Refugee Act. The focus on family in the Refugee Act provides enough basis for the courts to consider other factors that would affect the family. Further, the courts could use the acceptance of the ICCPR as evidence to counter the argument outlined above that Congress intentionally omitted protection for parents of minor children in the Refugee Act.[263] Alternatively, the ICCPR could be used as a basis to show that Congress must have unintentionally left out a provision protecting parents, since intentionally omitting such a provision in the Refugee Act would conflict with Congress's adoption of the ICCPR.

IV. LESSONS LEARNED – APPROACHES TO TAKE FROM U.S. AND FOREIGN CASES

A. Follow Abay v. Ashcroft

Many important reasons for following *Abay v. Ashcroft* have already been discussed in this paper and others. Specifically, past U.S. precedent supports the result in *Abay*: persecution encompasses both psychological harm and family member harm.[264] The U.S. Court of Appeals for the Sixth Circuit relied on cases relating to forced sterilization as continuing persecution under the Refugee Act.[265]

In re A-T- presented the BIA with the issue of whether FGM was a continuing harm like other forms of sterilization. The BIA determined that FGM was a once-occurring harm and refused to extend refugee protection under a "continuing harm" theory.[266] Sterilization as it is performed in China is grounds for granting asylum in the United States even after the persecution has been completed because

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261. Nessel, *supra* note 215, at 913.

262. Winata v. Australia, Human Rights Committee, at para. 7.3 U.N. Doc. CCPR/C/72/D/930/2000 (2001) *available at* http://www1.umn.edu/humanrts/undocs/930-2000.html.

263. *See supra* notes 52-54 and accompanying text.

264. *See* Rice, *supra* note 153, at 7 (noting cases that have interpreted Congress's intent with regards to persecution in favor of encompassing both psychological harm and family member harm).

265. Abay v. Ashcroft, 368 F.3d 634, 641 (6th Cir. 2004) (following the reasoning in *In re* C-Y-Z-, 21 I. & N. Dec. 915 (BIA 1997)).

266. *In re* A-T-, 24 I.& N. Dec. 296, 300-01 (BIA 2007).

the procedure has "lasting physical and emotional effects."[267] Yet there are many similarities between the type of harm that results from FGM and those of forced sterilization procedures, especially since FGM may adversely affect a woman's ability to bear children.[268] Further, following this line of jurisprudence provides protection to families that are at risk of being broken up due to U.S. asylum laws: many mothers of these young girls would be granted asylum because of their continuing persecution from FGM. Granting these mothers asylum protection can also grant derivative asylum to the mother's dependents, including fathers and other siblings.

Given the existing case law, appellate courts will have to overcome deference to the BIA if presented with this opportunity. Specifically, an appellate court must "uphold the Board's decision if it is supported by reasonable, substantial, and probative evidence on the record as a whole… [or if] the Board of Immigration Appeals affirms the decision of an immigration judge without opinion, [the appellate court reviews] the decision of the immigration judge directly."[269] This standard can be achieved by focusing on the extensive body of case law where applicants were granted asylum based on harm experienced to family members.[270] This type of persecution is established by showing that the applicant was forced to witness or otherwise experience the persecution of a family member. This type of persecution is also exemplified in the sterilization cases.[271] As mentioned, this approach has been used abroad to grant asylum to parents whose daughters are at risk of FGM.[272]

B. Uphold Obligations Created by International Treaties

There is sufficient evidence to show that the UNHCR intends to protect parents of at-risk children under its interpretation of the statute. Moreover, the U.S. courts are receptive to considering the UNHCR guidelines as indicators of Congressional intent, even though they are not precedential.[273]

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267. *Id.* at 300.

268. *See* WORLD HEALTH ORGANIZATION, FEMALE GENITAL MUTILATION, at http://www.who.int/mediacentre/factsheets/fs241/en/ (last visited Mar. 29, 2009).

269. *Abay,* 368 F.3d at 637-38.

270. *E.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 424 (1987) ([R]espondent's brother . . . had been tortured and imprisoned because of his political activities in Nicaragua."); INS v. Stevic, 467 U.S. 407, 410 (1984) ("[H]is father-in-law had been imprisoned."); *In re* A-S-, 21 I. & N. Dec. 1106, 1107 (BIA 1998) ("Although the respondent was not home at the time, the intruders threatened his parents.").

271. *See, e.g.*, *In re* C-Y-Z-, 21 I. & N. Dec. 915 (BIA 1997).

272. *See supra* notes 143-45 and accompanying text.

273. *See, e.g.*, *In re* C-A-, 23 I. & N. Dec. 951, 960 (BIA 2006) (using the UNHCR guidelines to define PSG); *In re* Kasinga, 21 I. & N. Dec. 357, 377 (BIA 1996) ("[T]he Service itself recognizes that gender-based asylum claims are 'developments in refugee protection' and that its guidelines are a natural and multifaceted outgrowth of a set of gender guidelines issued by the UNHCR in 1991, and 1993 Canadian gender guidelines and other sources of expertise including the Women's Refugee Project of the Harvard Immigration and Refugee Program.").

Although the BIA and reviewing courts have frequently referred to the UNHCR guidelines in interpreting unclear language in the past,[274] the United States does not officially hold itself bound by the UNHCR interpretations of the Refugee Convention, even though it was ratified by Congress.[275] However, it is in the best interest of the United States' foreign relations to follow through on obligations set by these treaties. Professor Jaya Ramji-Nogales has provided several persuasive arguments as to why U.S. domestic law should parallel the goals set forth in international human rights treaties. First and foremost, the United States signed and ratified these treaties and adopted them as part of U.S. domestic law.[276] Second, upon signing and ratifying the treaties, the United States has committed itself to an obligation of good faith in interpreting the treaties.[277] However, "[t]he 'non-self-executing' fiction permits the President to sign a treaty that may not be implemented for years, if at all. … This system of making binding international obligations without guarantees of domestic enforcement is contrary to international law and the doctrine of good faith interpretation."[278]

It is also important to consider the opinions of the UNHCR as reflecting global norms.[279] The United States has been an active party in forcing less-developed nations to accept these global standards and acts as a role-model in implementing them. As a global leader, it is not only important to help set global norms by negotiating and promoting human rights treaties, but it is crucial to do so to show skeptical nations that it can and should be done. As a result of this leadership role, along with indications that the treaties were codifying existing domestic law, other countries keep a watchful eye on the United States to better understand how to interpret the terms of a treaty. When U.S. domestic law diverges from the interpretations of the UNHCR, it provides an opportunity for less protective countries to pick a preferable interpretation that possibly would lead to loop holes in other human rights treaties. As a result, the United States has an

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274. *See, e.g.*, *In re* C-A-, 23 I. & N. Dec. 951, 960 (BIA 2006) (using the UNHCR guidelines to define PSG); *In re* Kasinga, 21 I. & N. Dec. 357, 377 (BIA 1996) ("[T]he Service itself recognizes that gender-based asylum claims are 'developments in refugee protection' and that its guidelines are a natural and multifaceted outgrowth of a set of gender guidelines issued by the UNHCR in 1991, and 1993 Canadian gender guidelines and other sources of expertise including the Women's Refugee Project of the Harvard Immigration and Refugee Program.").

275. *See* Ndom v. Ashcroft, 384 F.3d 743, 753 n.4 (9th Cir. 2004) ("The UNHCR Handbook is considered persuasive authority in interpreting the scope of refugee status under domestic asylum law."). *See also* INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987) ("[T]he Handbook provides significant guidance in construing the Protocol, to which Congress has sought to conform."). *But see* INS v. Aguirre-Aguirre, 526 U.S. 415, 427 (1999) ("The U.N. Handbook . . . is not binding on the Attorney General, the BIA, or United States courts.").

276. Jaya Ramji-Nogales, *A Global Approach to Secret Evidence: How Human Rights Law Can Reform Our Immigration System*, 39 COLUM. HUM. RTS. L. REV. 287, 327-28 (2008) [hereinafter *Global Approach to Secret Evidence*].

277. Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 STAN. J. INT'L L. 117, 149 (2001).

278. *Id.* at 150.

279. *Global Approch to Secret Evidence*, *supra* note 276.

international obligation to follow through on its human rights obligations that are set by international treaties.

Ultimately though, given the United States' historical approach to international treaties, the best tool for applicants is the Refugee Convention. It is under interpretations of the Refugee Convention that asylum applicants are most likely to have success because the existing domestic framework closely mimics the treaty itself. Additionally, the frequency with which U.S. courts already use the UNHCR guidelines to interpret ambiguous language provides some precedent for relying on the interpretations that the UNHCR offers in other contexts.

C. Use Interpretive Arguments Presented in Foreign Cases in U.S. Courts

The argument taken from *Farah*, the leading Canadian case, could readily be applied in U.S. cases. As discussed, the IRB relied on the fact that the mother was persecuted by prohibiting her fair access to the custody of her daughter.[280] The harm to the parent was focused more on how the government stripped her of her parenting rights, instead of the torture that would be inflicted on the daughter.[281] This approach provides an alternative form of protection without forcing courts to go against existing precedent within their jurisdiction. This argument relies in part on the U.S. Constitution protecting the parenting rights of its citizens, which it has in many cases.[282] It should be noted that not all harms that are constitutionally protected will constitute persecution under the Refugee Act.[283] However, a parent's complete loss of rights to express a political opinion such as opposition to an archaic ritual constitutes a severe abrogation of this right. Such anti-FGM political opinion approach could find some success in the U.S. federal circuits.

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280. *In re* Khandra Hassan Farah, et al., T93-12197, T93-12198 and T93-12199 Immigrant and Refugee Board of Canada (May 10, 1994) *available at* http://www.unhcr.org/refworld/docid/3ae6b70618.html

281. *Id.*

282. *E.g.*, Quilloin v. Walcott, 434 U.S. 246, 254-255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected . . . . We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought ot be in the children's best interest.'"); Moore v. East Cleveland, 431 U.S. 494, 503-504 (1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

283. *See* Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993) ("[T]he concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional. If persecution were defined that expansively, a significant percentage of the world's population would qualify for asylum in this country-and it seems most unlikely that Congress intended such a result.").

Further, every parent's obligation to protect the health and well-being of a child is abrogated each time a parent is to choose between family unity and subjecting a child to a dangerous tradition like FGM. This undermines the parent's rights to provide education and protect the health of the child, and reinforces the power of the persecutors who force the child to undergo FGM by requiring the parent to make such a choice.

The argument that physical harm is not required is neither novel nor unsupported under U.S. asylum law. To the contrary, the BIA itself has even recognized this fact.[284] As stated by the U.S. Court of Appeals for the Third Circuit, "[a]n example of such [persecution] might be requiring a person to renounce his or her religious beliefs or to desecrate an object of religious importance. Such conduct might be regarded as a form of 'torture' and thus as falling within the Board's description of persecution in Acosta."[285] Focusing on non-traditional harms is especially important in the context of gender-based persecution since this area is particularly fraught with injustice and bias against women. Further, oppressors often use unique methods in addition to force, such as psychological and occupational persecution.

One of the main policy issues that arise in these cases is how to balance the right to family unity and deterring immigration.[286] Generally speaking, the United States restricts family reunification rights in order to deter immigration.[287] That said, the United States considers issues relating to a family member to be a relevant factor in an asylum case.[288] The extent to which that factor matters seems more applicable in other non-FGM types of asylum cases. For example, in political asylum cases, demonstrating that family members are harassed and threatened is a common basis for showing a threat to the applicant.[289] However, as the U.S. asylum law expands, the family is not considered by the courts as implicated in the threats to a U.S. citizen daughter and her choices are to be put up for adoption in the United States or be subjected to this possible FGM.[290] This implies that the United States is a player in the abrogation of parental rights to instill a political opinion in a child; it empowers the players in the applicant's home country who subject unwilling girls to FGM by increasing the stakes for a parent who opposes torture. Even if the parent strongly believes that her political rights are of sufficient importance to take a risk of losing her daughter to foster parents, the United States requires that the decision be made in exchange for a complete

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284. In re Acosta, 19 I. & N. Dec. 211 (BIA 1985).

285. Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993).

286. Nessel, *supra* note 215, at 901.

287. *Id.* at 901-02.

288. *See, e.g.*, Gonzales v. Thomas, 547 U.S. 183 (2006).

289. *See, e.g.*, Barraza Rivera v. INS, 913 F.2d 1443 (9th Cir. 1990).

290. *See, e.g.*, Olowo v. Ashcroft, 368 F.3d 692 (7th Cir. 2004) (finding that children with a legal right to remain in the United States will not return to the applicant-mother's country of origin along with their mother). *See also* Oforji v. Ashcroft, 354 F.3d 609 (7th Cir. 2003) (finding that it is up to the immigrant to decide whether to submit their children to torture or allow them to remain with an appointed guardian in the United States).

abrogation of all parenting rights. In essence, this adds to the persecution done to the parents by their political anti-FGM stance.

V. CONCLUSION

FGM is a widespread practice that deserves strong condemnation, especially from powerful and developed countries like the United States. The United States has recognized its responsibility, and has provided asylum to girls at risk for undergoing FGM. However, the United States has not taken the next, and arguably most important, step in protecting these young girls – protecting the parents who try to safeguard the girls from their aappalling fate. U.S. appellate courts, including the U.S. Court of Appeals for the Sixth Circuit, have tried to remove barriers that applicants face in their fight for asylum. Additionally, domestic statutory law provides several options for these parents. Yet, despite the many avenues for relief for asylum-seekers, the immigration courts seem to have limited nearly all of them by negatively construing cases and statutory law. Although the BIA enjoys strong deference to its interpretations, there is hope for these parents. These asylum-seekers should focus on the valid arguments presented in *Abay v. Ashcroft* as well as alternative forms of harm, such as emotional and psychological damage, and family reunification, which are founded in past precedent. Furthermore, there is a need for continued pressure on the American government, as a powerful global player and role model, to recognize and uphold international obligations when treaties are signed and ratified. These recommendations can lead U.S. courts toward fair and equitable results, and encourage enforcement of anti-FGM laws abroad and sets a precedent that all parties must uphold international obligations.