

# A Parent's Predicament: Theories of Relief for Deportable Parents of Children Who Face Female Genital Mutilation

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## NOTE

### A PARENT'S PREDICAMENT: THEORIES OF RELIEF FOR DEPORTABLE PARENTS OF CHILDREN WHO FACE FEMALE GENITAL MUTILATION

*Kimberly Sowders Blizzard*†

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#### INTRODUCTION

Doris Oforji has a difficult choice. Awaiting deportation, she must decide whether to leave her two daughters behind in the United States or take them with her to Nigeria, where they will face female genital mutilation (FGM).<sup>1</sup> Should she desert her children, leaving them half a world away under state supervision? Or should she risk subjecting them to a painful, antiquated ritual, condemned by human rights advocates around the world? Ms. Oforji appealed to the U.S.

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<sup>1</sup> *Oforji v. Ashcroft*, 354 F.3d 609, 617–18 (7th Cir. 2003).

justice system to allow her to remain in the country with her U.S. citizen daughters, but to no avail. A Seventh Circuit court told her that the choice stands and is hers to make.<sup>2</sup>

Many parents face the same dilemma as Ms. Oforji—whether to leave their children alone in the United States or risk their exposure to FGM in the parents' home country—because our courts either refuse to or cannot find legal authority to allow the parents to remain in the United States. From 2002 to 2005, seven circuits decided fourteen cases in which alien parents sought relief based on the fear that their daughters would face FGM if the parents were deported.<sup>3</sup> The court addressed the merits of the claim in nine of these cases, relying on a variety of legal theories and reaching divergent conclusions.<sup>4</sup> The decisions have resulted in a circuit split on the issue of granting asylum to these parents: Only the Sixth Circuit has granted asylum, whereas the Fifth, Seventh, Eighth, and Eleventh Circuits have refused to grant

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<sup>2</sup> *Id.* at 618 (“Oforji will be faced with the unpleasant dilemma of permitting her citizen children to remain in this country under the supervision of the state of Illinois . . . or taking her children back to Nigeria to face the potential threat of FGM. Congress has foreseen such difficult choices, but has opted to leave the choice with the illegal immigrant, not the courts.”).

<sup>3</sup> See *Abebe v. Gonzales*, 432 F.3d 1037 (9th Cir. 2005) (en banc); *Axmed v. U.S. Att’y Gen.*, 145 F. App’x 669 (11th Cir. 2005) (unpublished opinion); *Jalloh v. Gonzales*, 423 F.3d 894 (8th Cir. 2005); *Kawu v. Ashcroft*, 113 F. App’x 732 (8th Cir. 2004) (per curiam) (unpublished opinion); *Olowo v. Ashcroft*, 368 F.3d 692 (7th Cir. 2004); *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004); *Swiri v. Ashcroft*, 95 F. App’x 708 (5th Cir. 2004) (per curiam) (unpublished decision); *Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004); *Oforji*, 354 F.3d 609; *Obazee v. Ashcroft*, 79 F. App’x 914 (7th Cir. 2003) (unpublished order); *Osigwe v. Ashcroft*, 77 F. App’x 235 (5th Cir. 2003) (per curiam) (unpublished decision); *Alade v. Ashcroft*, 69 F. App’x 771 (7th Cir. 2003) (unpublished order); *Key v. INS*, 64 F. App’x 891 (4th Cir. 2003) (per curiam) (unpublished decision); *Nwaokolo v. INS*, 314 F.3d 303 (7th Cir. 2002) (per curiam). A fifteenth case was filed in district court, but was dismissed for lack of jurisdiction. See *Ayinde v. Ashcroft*, No. 03 Civ. 358(GWG), 2003 WL 22087473 (S.D.N.Y. Sept. 10, 2003).

<sup>4</sup> In all of the cases except *Abebe*, *Kawu*, *Swiri*, *Alade*, and *Key*, the court at the very least commented on the validity of a claim that the parents should be allowed to stay in the United States based on the child’s fear of FGM. See *Abebe*, 432 F.3d at 1043 (remanding to the BIA to consider the probability that the daughter will face FGM, but not reaching the question of whether the parents qualify for relief); *Kawu*, 113 F. App’x at 733 (denying without comment parent’s motion to supplement based on fear of child’s FGM); *Swiri*, 95 F. App’x at 709 (denying motion to reopen in part because the fear of FGM claim was available at the initial hearing); *Alade*, 69 F. App’x at 774–75 (denying asylum because aliens failed to properly raise their FGM claim); *Key*, 64 F. App’x at 892–93 (denying motion to reopen because the FGM claim was available at the initial proceedings); cases cited *supra* note 3. In *Abebe*, however, prior to rehearing, the Ninth Circuit had addressed the parents’ claim and denied it. *Abebe v. Ashcroft*, 379 F.3d 755 (9th Cir. 2004), *vacated en banc*, 432 F.3d 1037.

asylum.<sup>5</sup> No circuit has allowed a parent to remain in the United States under any other theory of relief.<sup>6</sup>

The courts are not only condemning parents to a difficult decision, but also exposing young children to the possibility of an unnecessary medical procedure that is illegal in the United States.<sup>7</sup> FGM, also known as female circumcision, is the ritual cutting of female genitalia practiced in many African and Asian countries, most often on girls aged four to twelve.<sup>8</sup> The mildest form, performed on a very small percentage of girls subject to FGM, involves simply cutting the hood of the clitoris.<sup>9</sup> More extreme forms entail complete removal of the clitoris and labia followed by stitching together the two sides of the vulva.<sup>10</sup> FGM, usually performed without anesthesia, is extremely painful, and can have serious, even fatal, consequences.<sup>11</sup>

Many women defend FGM as a traditional rite of passage and an empowering female custom. The ritual, performed by another woman, bonds women together and links them to their cultural roles.<sup>12</sup> The accompanying ceremony is a joyous celebration, a time of gift-giving and festivity.<sup>13</sup> Some also claim that FGM is an Islamic religious practice, although FGM predates Islam and is practiced by non-Muslim groups.<sup>14</sup> Critics, on the other hand, condemn FGM as a barbaric ritual that endangers women's health and perpetuates male dominance.<sup>15</sup> FGM violates multiple human rights, including the rights to life and physical integrity.<sup>16</sup> In addition, the UN considers

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<sup>5</sup> See *Axmed*, 145 F. App'x at 675-76; *Jalloh*, 423 F.3d at 899; *Abebe*, 379 F.3d at 759-60; *Olowo*, 368 F.3d at 701; *Abay*, 368 F.3d at 642-43; *Osigwe*, 77 F. App'x at 235-36 (remanding to the BIA to determine humanitarian asylum claim).

<sup>6</sup> See cases cited *supra* note 3.

<sup>7</sup> 18 U.S.C. § 116 (2000).

<sup>8</sup> See JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 454 (2002). Two million girls experience FGM every year. See *id.* at 455. According to the U.S. Department of State, FGM is so prevalent that in Nigeria 60% to 90% of women experience it "anytime from a few days after birth to a few days after death." OFFICE OF THE SENIOR COORDINATOR FOR INT'L WOMEN'S ISSUES, U.S. DEP'T OF STATE, NIGERIA: REPORT ON FEMALE GENITAL MUTILATION (FGM) OR FEMALE GENITAL CUTTING (FGC) (2001), available at <http://www.state.gov/g/wi/tls/rep/crfgm/10106.htm> [hereinafter NIGERIA REPORT]. See generally FEMALE GENITAL MUTILATION 3-9 (Anika Rahman & Nahid Toubia eds., 2000) (describing the history, practice, and consequences of FGM around the world).

<sup>9</sup> See INS RESOURCE INFORMATION CENTER, ALERT SERIES: WOMEN: FEMALE GENITAL MUTILATION 2 (1994), available at <http://uscis.gov/graphics/services/asylum/ric/documentation/alnga94-001%28fgm%29.pdf> [hereinafter FGM ALERT].

<sup>10</sup> See *id.* The victim's legs are bound from hip to ankle to keep her immobile during the forty-day healing period. See NIGERIA REPORT, *supra* note 8.

<sup>11</sup> See *Nwaokolo v. INS*, 314 F.3d 303, 308-09 (7th Cir. 2002) (*per curiam*); DUNOFF ET AL., *supra* note 8, at 455; FGM ALERT, *supra* note 9, at 3.

<sup>12</sup> See DUNOFF ET AL., *supra* note 8, at 455.

<sup>13</sup> See *id.*

<sup>14</sup> See FEMALE GENITAL MUTILATION, *supra* note 8, at 6; FGM ALERT, *supra* note 9, at 5.

<sup>15</sup> See DUNOFF ET AL., *supra* note 8, at 455.

<sup>16</sup> See FEMALE GENITAL MUTILATION, *supra* note 8, at 20-39.

FGM violence against women and urges states to prevent and punish the practice.<sup>17</sup>

This Note discusses the possible grounds of relief for deportable parents of children who face FGM. Part I provides a brief overview of refugee law and procedure. Part II explains and evaluates the following five theories on which the circuit courts have relied to grant or deny relief: refugee status, humanitarian asylum, derivative asylum, withholding of removal, and relief under the Convention Against Torture. Part III encourages reliance on a relatively new regulation for grants of humanitarian asylum to some mothers whose children face FGM and advocates two simple and legally well-supported statutory changes that would allow more parents to remain in the United States with their minor children. No parent should have to choose between abandoning a child and placing her in danger of FGM.

## I

### OVERVIEW OF REFUGEE LAW

The international community developed asylum law to provide a safe haven for persecuted individuals. In response to the many refugees resulting from World War II, the UN adopted the Convention Relating to the Status of Refugees.<sup>18</sup> The UN later strengthened the Convention by eliminating its geographical and temporal limitations in the Protocol Relating to the Status of Refugees.<sup>19</sup>

In order to gain asylum in the United States, an alien must demonstrate refugee status.<sup>20</sup> U.S. refugee law derives principally from the Refugee Convention and the later Protocol, to which the United States acceded in 1968.<sup>21</sup> The Refugee Act of 1980, part of the Immigration and Naturalization Act (INA), implemented the Protocol and codified previously informal procedures to resettle refugees.<sup>22</sup>

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<sup>17</sup> See G.A. Res. 58/156, ¶¶ 9–10, U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/156 (Feb. 26, 2004); U.N. Comm'n on Human Rights, *Violence Against Women in the Family*, ¶¶ 20, 22–23, U.N. Doc. E/CN.4/1999/68 (Mar. 10, 1999).

<sup>18</sup> See Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]; David A. Martin, *Large-Scale Migrations of Asylum Seekers*, 76 AM. J. INT'L L. 598, 598 (1982). The United States did not join the Refugee Convention. See CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 33.01(1) (2003).

<sup>19</sup> See Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. 1, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol]; Tara Magner, *A Less than "Pacific" Solution for Asylum Seekers in Australia*, 16 INT'L J. REFUGEE L. 53, 63 (2004).

<sup>20</sup> See 8 U.S.C. 1158(b)(1)(A); see also *infra* Part II.A.

<sup>21</sup> Refugee Protocol, *supra* note 19, 19 U.S.T. at 6223, 606 U.N.T.S. at 267; accord GORDON ET AL., *supra* note 18, § 33.05(2); Anwen Hughes, *Basics of U.S. Asylum Law*, in BASIC IMMIGRATION LAW 2004, at 313, 315 (PLI Corp. Law & Practice, Course Handbook Series No. F.139 (2004)).

<sup>22</sup> Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.); Immigration and Nationality Act, Pub. L. No. 82-414, 66

Generally, an alien applies to the Attorney General for asylum either by affirmative application through the U.S. Citizenship & Immigration Services (USCIS) or by defensive application in response to removal proceedings.<sup>23</sup> Applications for asylum automatically include requests for withholding of removal if asylum is denied.<sup>24</sup> Asylum officers interview affirmative applicants and make initial determinations regarding refugee status, humanitarian asylum, and withholding of removal.<sup>25</sup> Immigration judges (IJs) review denials of affirmative applications and make initial decisions on defensive applications.<sup>26</sup> The Board of Immigration Appeals (BIA) then makes the final determination regarding asylum, which is subject to judicial review.<sup>27</sup>

Applicants must meet strict substantive and procedural requirements to be considered for asylum.<sup>28</sup> The alien must be physically present in the United States<sup>29</sup> and must satisfy the following criteria: (1) the alien cannot safely and legally relocate to another country, (2) the alien has applied for asylum within one year of arrival in the United States, and (3) the alien has not previously been denied asylum.<sup>30</sup> The alien must then establish refugee status under the INA, either directly<sup>31</sup> or derivatively.<sup>32</sup> In rare cases, the alien may alternatively qualify for a humanitarian grant of asylum.<sup>33</sup> But even if the applicant otherwise qualifies, final discretion to grant or deny asylum rests with the Attorney General, who considers such factors as the alien's background and possible risks to national security.<sup>34</sup>

Aliens who wish to remain in the United States because they fear torture in their home countries have an alternate avenue of relief.

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Stat. 163 (1952) (codified as amended in 8 U.S.C. §§ 1101–1557 (2000)); GORDON ET AL., *supra* note 18, §§ 33.01(3), 33.05(2).

<sup>23</sup> See U.S. Citizenship & Immigration Servs., Dep't of Homeland Sec., Obtaining Asylum in the United States: Two Paths to Asylum, <http://uscis.gov/graphics/services/asylum/paths.htm> (last modified Jan. 21, 2006) [hereinafter *Paths to Asylum*]. In 2004, the Department of Homeland Security absorbed the U.S. Immigration and Naturalization Service (INS), which was then renamed the USCIS. See U.S. Citizenship & Immigration Servs., Dep't of Homeland Sec., About Us, <http://uscis.gov/graphics/aboutus/index.htm> (last modified Jan. 20, 2006).

<sup>24</sup> 8 C.F.R. § 208.3(b) (2004).

<sup>25</sup> See *Paths to Asylum*, *supra* note 23; U.S. Citizenship & Immigr. Servs., Dep't of Homeland Sec., What Is the Affirmative Asylum Process?, <http://uscis.gov/graphics/services/asylum/asylumprocess.htm> (last modified Jan. 21, 2006).

<sup>26</sup> See GORDON ET AL., *supra* note 18, § 34.02(3)(e).

<sup>27</sup> See *id.* § 34.01(12)(g).

<sup>28</sup> See *id.* § 33.05(1).

<sup>29</sup> 8 U.S.C. § 1158(a)(1) (2000).

<sup>30</sup> See *id.* § 1158(a)(2).

<sup>31</sup> See *infra* Part II.A.

<sup>32</sup> See *infra* Part II.C.

<sup>33</sup> See *infra* Part II.B.

<sup>34</sup> See 8 U.S.C. § 1158(b); 8 C.F.R. § 208.14 (2004); GORDON ET AL., *supra* note 18, § 33.05(3)(b)(iii).

The UN adopted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to prevent and punish torture, which is defined as the infliction of

severe pain or suffering, whether physical or mental, . . . for such purposes as obtaining from [a person] . . . information or a confession, punishing him . . . , or intimidating or coercing him . . . , or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>35</sup>

Article 3 of the CAT prohibits the return of a person to a state when “there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>36</sup> The United States became a party to the CAT in 1994, but aliens could not obtain relief under the CAT until Congress passed implementing legislation in 1998.<sup>37</sup> Aliens may now seek relief in the form of withholding of removal.<sup>38</sup>

## II

### THEORIES OF RELIEF FOR PARENTS WHOSE CHILDREN FACE FGM

Only one circuit court has allowed a parent to remain in the United States because her daughter would face FGM if the parent were deported.<sup>39</sup> Although other theories of relief are arguably available, all other circuits directly deciding the issue have denied relief.<sup>40</sup> This result is puzzling given the value placed on family in the United States and the emphasis on family unity in refugee law around the world. The Supreme Court has long maintained “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.”<sup>41</sup> The right to raise one’s children is essential to liberty—a right “far more precious . . . than property rights.”<sup>42</sup> The integrity of the family

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<sup>35</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), *opened for signature* Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 [hereinafter CAT]. For a detailed history, see Andrea Montavon-McKillip, Note, *CAT Among Pigeons: The Convention Against Torture, a Precarious Intersection Between International Human Rights Law and U.S. Immigration Law*, 44 ARIZ. L. REV. 247, 248–51 (2002).

<sup>36</sup> CAT, *supra* note 35, art. 3.

<sup>37</sup> See Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-761, 2681-822; Dawn J. Miller, *Holding States to Their Convention Obligations: The United Nations Convention Against Torture and the Need for a Broad Interpretation of State Action*, 17 GEO. IMMIGR. L.J. 299, 301 (2003).

<sup>38</sup> 8 C.F.R. § 208.16(c) (2004).

<sup>39</sup> *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004).

<sup>40</sup> See *supra* note 5 and accompanying text.

<sup>41</sup> *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion).

<sup>42</sup> *May v. Anderson*, 345 U.S. 528, 533 (1953); accord *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

unit is of cardinal importance.<sup>43</sup> Consequently, the “prime goal” of U.S. immigration law is to keep families together.<sup>44</sup> Because family reunification is a dominant feature of the U.S. immigration system, there are special preferences for family members of U.S. citizens.<sup>45</sup> Moreover, the principle of family unity was central to the very development of international refugee law, from which U.S. immigration law derived.<sup>46</sup> Although the principle was not formally included in the 1951 Convention on refugee status, the majority of states observe it.<sup>47</sup>

Unfortunately, the “minimum requirement” of international refugee law “is the inclusion of the spouse and minor children,” not of the parents.<sup>48</sup> Other international law, however, expands the idea of family unity by focusing beyond the head of the household. For example, the Convention on the Rights of the Child, the most widely ratified human rights treaty in history, requires states to “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.”<sup>49</sup> Furthermore, the United Nations High Commissioner for Refugees (UNHCR) explicitly recognized that a mother could successfully claim asylum if her daughters feared FGM.<sup>50</sup>

Given the important role family unity plays in human values in the United States and abroad, why is the United States forcing parents to choose between leaving their children behind or taking them to a foreign country where they could face FGM? Legally, the answer lies in the fact that courts are having a difficult time finding statutory or common law authority to help these parents. Courts have examined at least five theories of relief, none of which adequately protects parents and their children who face FGM.

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<sup>43</sup> See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

<sup>44</sup> 148 CONG. REC. H4989, 4991 (daily ed. July 22, 2002) (statement of Rep. Sensenbrenner); see also STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 147 (3d ed. 2002) (“[O]ne central value that United States immigration laws have long promoted, albeit to varying degrees, is family unity.”).

<sup>45</sup> See THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP 302 (5th ed. 2003).

<sup>46</sup> See OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 43 (1992).

<sup>47</sup> See *id.*

<sup>48</sup> *Id.*

<sup>49</sup> Convention on the Rights of the Child, art. 9, Nov. 20, 1989, 28 I.L.M. 1448, 1460. The United States is one of only two countries that has not ratified this convention. See *Abebe v. Ashcroft*, 379 F.3d 755, 764 n.1 (9th Cir. 2004) (Ferguson, J., dissenting) (noting that the other country that has not ratified the convention, Somalia, does not have a recognized government), *vacated en banc*, 432 F.3d 1037 (9th Cir. 2005).

<sup>50</sup> See HEAVEN CRAWLEY, REFUGEES AND GENDER 181 (2001). The UNHCR opinion is relevant here because U.S. refugee law derives from the 1951 UN Convention. See *supra* note 21 and accompanying text.

### A. Refugee Status

In the landmark case of *In re Kasinga*, the BIA recognized FGM as a legitimate ground for asylum.<sup>51</sup> But only the Sixth Circuit has granted asylum to a parent based on her fear that her daughter would be subjected to FGM.<sup>52</sup> Before a court can grant asylum, the alien must demonstrate refugee status.<sup>53</sup> The INA adopts the definition of refugee found in the Refugee Convention: “any person . . . who is unable or unwilling to return to . . . [that person’s home] 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.”<sup>54</sup> An applicant must therefore prove four elements to be eligible for asylum: (1) inability or unwillingness to return to one’s home country due to (2) a well-founded fear of (3) persecution (4) on account of an enumerated ground.<sup>55</sup>

The first element, inability or unwillingness to return to one’s home country, is generally subject to a finding of credible evidence.<sup>56</sup> The second element, a well-founded fear, has both subjective and objective components.<sup>57</sup> Credible testimony satisfies the subjective component, whereas the objective component requires specific evidence of a reasonable possibility of persecution, often met by State Department country reports and asylum profiles.<sup>58</sup> The remaining two elements—persecution on account of an enumerated ground—present significant difficulties for parents attempting to establish refugee status based on their child’s risk of FGM.

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<sup>51</sup> 21 I. & N. Dec. 357, 358 (B.I.A. 1996); *see also* Arthur C. Helton & Alison Nicoll, *Female Genital Mutilation as Ground for Asylum in the United States: The Recent Case of In re Fauziya Kasinga and Prospects for More Gender Sensitive Approaches*, 28 COLUM. HUM. RTS. L. REV. 375, 375–76 (1997).

<sup>52</sup> *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004).

<sup>53</sup> *See* 8 U.S.C. § 1158(b)(1)(A) (2000).

<sup>54</sup> *Id.* § 1101(a)(42); Refugee Convention, *supra* note 18, art. I(A)(2). The Refugee Act added the Convention’s definition to the INA to bring the INA in conformance with the Convention. *See In re Acosta*, 19 I. & N. Dec. 211, 219–20 (B.I.A. 1985), *overruled in part on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

<sup>55</sup> *In re Sanchez*, 19 I. & N. Dec. 276, 283 (B.I.A. 1985).

<sup>56</sup> *See* 8 C.F.R. § 208.13(a), (b)(2)(i). For example, asylum has been denied when the applicant has in fact returned to his home country after he initially left. *See, e.g., Atoui v. Ashcroft*, 107 F. App’x 591, 593 (6th Cir. 2004).

<sup>57</sup> 8 U.S.C. § 1101(a)(42); *Nagoulko v. INS*, 333 F.3d 1012, 1016 (9th Cir. 2003); *In re Sanchez*, 19 I. & N. Dec. at 283.

<sup>58</sup> *See Ambartsoumian v. Ashcroft*, 388 F.3d 85, 89 (3d Cir. 2004); *Nagoulko*, 333 F.3d at 1016; *Hartooni v. INS*, 21 F.3d 336, 341 (9th Cir. 1994). The Seventh Circuit has harshly criticized overreliance on these reports and profiles because the State Department is often biased, and because asylum applicants cannot adequately challenge the conclusions. *See Diallo v. Ashcroft*, 381 F.3d 687, 700 (7th Cir. 2004); *Niam v. Ashcroft*, 354 F.3d 652, 658–59 (7th Cir. 2004).

### 1. *Persecution*

Although the term “persecution” is not statutorily defined, the BIA has construed it as “harm or suffering . . . inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor [seeks] to overcome . . . [and] inflicted either by the government of a country or by persons or an organization that the government [is] unable or unwilling to control.”<sup>59</sup> In particular, persecution comprises torture, confinement, and severe economic deprivation that constitutes a threat to life or freedom.<sup>60</sup> Persecution also includes harm inflicted for “political, religious, or other reasons that this country does not recognize as legitimate.”<sup>61</sup> The Third Circuit warns, however, “that ‘persecution’ is an extreme concept that does not include every sort of treatment our society regards as offensive.”<sup>62</sup> An asylum applicant “need not prove that it is more likely than not that he or she will be persecuted in his or her home country.”<sup>63</sup> Although there must be a “real chance” that persecution will occur, even a ten percent chance of actual persecution may be sufficient.<sup>64</sup>

While the Refugee Act generally contemplated persecution at the hands of the government, courts have expanded the concept to include harm inflicted by individuals or organizations that a government cannot or will not control.<sup>65</sup> Hence, mob action that the government cannot restrain may be grounds for asylum,<sup>66</sup> but spousal abuse is not—unless the wife can show that she has sought governmental protection or that the government is unwilling to protect her.<sup>67</sup> Thus, there must be some nexus between the harm and the government.<sup>68</sup>

FGM itself constitutes persecution, as a brutal mutilation from which most women can expect little state protection.<sup>69</sup> Parents, how-

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<sup>59</sup> *In re Acosta*, 19 I. & N. Dec. at 222 (citations omitted).

<sup>60</sup> *See id.* But general travel restrictions in the home country or harsh conditions do not amount to persecution. *See id.*

<sup>61</sup> *De Souza v. INS*, 999 F.2d 1156, 1158 (7th Cir. 1993).

<sup>62</sup> *Fatin v. INS*, 12 F.3d 1233, 1243 (3d Cir. 1993).

<sup>63</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Prior to 1987, the INS applied a “clear probability” standard, under which an applicant had to provide objective evidence that the alien would “more likely than not” be subjected to persecution. *See INS v. Stevic*, 467 U.S. 407, 413, 429–30 (1984).

<sup>64</sup> *See Cardoza-Fonseca*, 480 U.S. at 440 & n.24; *Cordon-Garcia v. INS*, 204 F.3d 985, 990 (9th Cir. 2000).

<sup>65</sup> *See In re McMullen*, 17 I. & N. Dec. 542, 544–45 (B.I.A. 1980).

<sup>66</sup> *See Rosa v. INS*, 440 F.2d 100, 102 (1st Cir. 1971).

<sup>67</sup> *See Rusovan v. INS*, 139 F.3d 902, 1998 WL 78999, at \*2 (7th Cir. 1998) (unpublished table decision).

<sup>68</sup> *See id.* at \*1.

<sup>69</sup> *See Mohammed v. Gonzales*, 400 F.3d 785, 795–96, 798 (9th Cir. 2005); *In re Kasinga*, 21 I. & N. Dec. 357, 365, 367 (B.I.A. 1996).

ever, do not fear the infliction of FGM on themselves, but instead fear its infliction on their daughters. Thus, the 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. Accordingly, the Seventh Circuit has refused to grant refugee status to parents based on the fear that their daughters will face FGM, maintaining that the standards for refugee status "require an applicant to demonstrate that she herself will be subject to persecution if removed, and do not encompass any consideration of persecution that may be suffered by others—even family members—who may be obliged to return with her" to her home country.<sup>70</sup> When Esther Olowo, a Nigerian citizen, applied for asylum on the ground that her twin daughters would be subjected to FGM if she were deported, the court found that "Ms. Olowo did not demonstrate that, if removed to Nigeria, she herself would face persecution on account of her membership in a social group."<sup>71</sup> The court not only denied Ms. Olowo refugee status, but also went so far as suggesting that the state remove her U.S. citizen daughters from her custody because she intended to take them with her to Nigeria, where they would be forced to undergo FGM.<sup>72</sup>

The Sixth Circuit, however, reached a different conclusion in a case with similar facts. Yayeshwork Abay and her nine-year-old daughter, Burhan Amare, both citizens of Ethiopia, sought asylum based on the fear that Amare would be forced to undergo FGM in Ethiopia if deported.<sup>73</sup> The Sixth Circuit granted Amare asylum based on her own fear of FGM and then turned to the question of whether her mother was also eligible for asylum.<sup>74</sup> In support of Abay's claim, the court noted that the BIA had previously granted asylum to an alien based on harm to a family member: An alien whose wife was forcibly sterilized in China was considered a refugee under the INA.<sup>75</sup> In addition, the court observed that the USCIS had previously withheld removal of parents whose daughters would face FGM upon the parents'

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<sup>70</sup> *Olowo v. Ashcroft*, 368 F.3d 692, 701 (7th Cir. 2004); *accord Oforji v. Ashcroft*, 354 F.3d 609, 617 (7th Cir. 2003); *Obazee v. Ashcroft*, 79 F. App'x 914, 917 (7th Cir. 2003) (unpublished order).

<sup>71</sup> *Olowo*, 368 F.3d at 701.

<sup>72</sup> *See id.* at 702–03.

<sup>73</sup> *See Abay v. Ashcroft*, 368 F.3d 634, 635–36 (6th Cir. 2004).

<sup>74</sup> *See id.* at 640–41.

<sup>75</sup> *See id.* at 641 (citing *In re C-Y-Z*, 21 I. & N. Dec. 915, 918–919 (B.I.A. 1997)).

deportation<sup>76</sup> and that the BIA had reopened a case to allow a mother to argue that her child would face FGM if she were deported.<sup>77</sup>

The *Abay* court found in this precedent “a governing principle in favor of refugee status in cases where a parent and protector is faced with exposing her child to the clear risk of being subjected against her will to a practice that is a form of physical torture causing grave and permanent harm.”<sup>78</sup> The mother’s suffering as a consequence of being forced to allow the mutilation of her daughter in itself amounts to persecution: “[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.”<sup>79</sup> Thus, the court granted Abay herself refugee status.<sup>80</sup>

Although the Sixth Circuit’s reasoning may be more appealing, the Seventh Circuit’s view is legally sound.<sup>81</sup> Clearly, a parent who must witness her child’s physical pain suffers herself. The question in asylum cases, however, is whether that suffering rises to the level of persecution. Under the established legal standard, not every unpleasant act—and “unpleasant” in this case is admittedly an understatement—qualifies as persecution. A child’s pain is something that no parent wants to witness, but the act of witnessing that pain does not constitute a threat to the parent’s life or freedom.<sup>82</sup> Our society may find FGM barbaric and offensive, but the parent’s suffering in response to the child’s FGM may not be so extreme as to reach the level of persecution.

## 2. *On Account of Membership in a Particular Social Group*

Even if a court accepts that the parent’s suffering amounts to persecution, the parent must also prove that the suffering is inflicted “on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>83</sup> Of these, “membership in a particular social group” has been the most difficult category to define, and

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<sup>76</sup> See *Abay*, 368 F.3d at 641–42 (citing *In re Adeniji*, No. A41 542 131 (oral decision) (U.S. Dep’t of Justice, Immigration Court, York, Pa., Mar. 10, 1998); *In re Oluloro*, No. A72 147 491 (oral decision) (U.S. Dep’t of Justice, Immigration Court, Seattle, Wash., Mar. 23, 1994)). But see *infra* Part II.A.3.

<sup>77</sup> See *id.* at 642 (citing *In re Dibba*, No. A73 541 857 (B.I.A. Nov. 23, 2001)). But see *infra* text accompanying note 104.

<sup>78</sup> *Abay*, 368 F.3d at 642.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> But see Marcelle Rice, *Protecting Parents: Why Mothers and Fathers Who Oppose Female Genital Cutting Qualify for Asylum*, IMMIGRATION BRIEFINGS, Nov. 2004, at 1-5, 8-9.

<sup>82</sup> See *Olowo v. Ashcroft*, 368 F.3d 692, 701 (7th Cir. 2004).

<sup>83</sup> 8 U.S.C. § 1101(a)(42) (2000).

thus the easiest to manipulate.<sup>84</sup> The BIA, to which courts generally defer, interprets “social group” as “a group of persons all of whom share a common, immutable characteristic.”<sup>85</sup> This characteristic may be innate, such as gender or kinship ties, or it may be some shared past experience, depending on the circumstances of the particular case.<sup>86</sup> Regardless, it “must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”<sup>87</sup>

A social group may be as small as one family, or it may be as large as the groups mentioned in the other four grounds, such as an entire race or nationality.<sup>88</sup> Nevertheless, “[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.”<sup>89</sup> Gender is often a defining characteristic of a social group, but no court has granted asylum based solely on gender persecution.<sup>90</sup>

In FGM cases, courts define the social group very narrowly. For example, in *In re Kasinga*, the BIA defined Kasinga’s social group as “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”<sup>91</sup> The BIA then remarked:

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<sup>84</sup> See *Fatin v. INS*, 12 F.3d 1233, 1238–39 (3d Cir. 1993).

<sup>85</sup> *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled in part on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987); see also *Fatin*, 12 F.3d at 1239 (noting that the BIA’s interpretation is entitled to deference and citing *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)).

<sup>86</sup> See *Fatin*, 12 F.3d at 1239–40.

<sup>87</sup> *Id.* at 1240.

<sup>88</sup> See *Aguirre-Cervantes v. INS*, 242 F.3d 1169, 1175 (9th Cir.), *vacated*, 270 F.3d 794 (9th Cir. 2001); *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993). Family membership in a clan is also a legitimate social group. See *In re H-*, 21 I. & N. Dec. 337, 343 (B.I.A. 1996).

<sup>89</sup> *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991); accord *Vides-Vides v. INS*, 783 F.2d 1463, 1467 (9th Cir. 1986) (noting that being “young urban male” is not specific enough to constitute membership in a particular social group). But see *Fatin*, 12 F.3d at 1240 (“[T]o the extent that the petitioner in this case suggests that she would be persecuted . . . in Iran simply because she is a woman, she has satisfied [membership in a particular social group].”).

<sup>90</sup> See, e.g., *Seifu v. Ashcroft*, 80 F. App’x 323, 323–24 (5th Cir. 2003) (per curiam) (unpublished decision); *Fatin*, 12 F.3d at 1240; see also Memorandum from Phyllis Coven, Office of Int’l Affairs, Dep’t of Justice, to All INS Asylum Office/rs [sic], HQASM Coordinators (May 26, 1995) (also known as INS Gender Guidelines), available at <http://www.asylumlaw.org/docs/showDocument.cfm?documentID=454> (last visited Mar. 25, 2006) (“[W]hile some courts have concluded as a legal matter that gender can define a particular social group, no court has concluded as a factual matter that an applicant has demonstrated that the government . . . would seek to harm her solely on account of gender.”). See generally Stephen M. Knight, *Seeking Asylum from Gender Persecution: Progress amid Uncertainty*, 79 INTERPRETER RELEASES 689 (2002) (discussing the status of gender-based asylum claims).

<sup>91</sup> 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

[T]he particular social group is defined by common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities. The characteristics of being a “young woman” and a “member of the Tchamba-Kunsuntu Tribe” cannot be changed. The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.<sup>92</sup>

Furthermore, and critical to the establishment of refugee status, the BIA concluded that the persecution occurs because of the victim's membership in this social group, relying heavily on the fact that there is no other, legitimate reason for FGM.<sup>93</sup>

When a child faces FGM, her parents are arguably members of a social group encompassing parents of “young women of [Tribe A] who have not had FGM, as practiced by that tribe, and who oppose the practice.”<sup>94</sup> Nevertheless, the suffering, or “persecution,” necessary for refugee status is not intentionally inflicted on the parents “on account of” their membership in this group. Rather, the harm is inflicted upon the child because of the child's membership in a particular social group. The Sixth Circuit did not address this problem when it granted asylum to Abay.

### 3. Abay v. Ashcroft: *Inapplicable Reasoning*

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. The decision is further flawed because the court relied on support not directly applicable to the issue at hand. First, the court suggested that a finding of persecution based on harm to a family member is not unusual, relying primarily on *In re C-Y-Z*, in which a man was granted asylum based on the forced sterilization of his wife under Chinese coercive population control measures.<sup>95</sup> The U.S. position in population control cases is that the husband himself has undergone past persecution: “The husband of a sterilized wife can essentially stand in her shoes and make a bona fide and non-frivolous application for asylum based on problems impacting more intimately on her than on him.”<sup>96</sup> The sterilization in essence affects both the husband and the wife equally, since the two can no longer have children together. In the case of a parent whose child faces FGM, however, the impact on the parent is not equivalent to the impact on the

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<sup>92</sup> *Id.* at 366.

<sup>93</sup> *See id.* at 366–67.

<sup>94</sup> *Id.* at 365.

<sup>95</sup> *See supra* note 75 and accompanying text.

<sup>96</sup> *In re C-Y-Z*, 21 I. & N. Dec. 915, 918 (B.I.A. 1997) (quoting the INS brief on appeal in the case).

child, and therefore the situation is not analogous to that of coercive population control. Furthermore, coercive population control has a special significance in U.S. asylum law that FGM does not: In 1996, as a show of opposition to China's population control measures, Congress specifically amended the INA definition of refugee to address coercive population control.<sup>97</sup>

Second, the *Abay* court noted that the USCIS has granted relief to parents of children facing FGM under the "more stringent" standard for withholding of removal.<sup>98</sup> The cases cited by the court, however, fell under the exceptional hardship provision of the INA<sup>99</sup>—a very different avenue of relief than asylum. The provision grants withholding of removal to qualifying aliens whose deportation would prove an "exceptional and extremely unusual hardship" to a U.S. citizen or permanent resident spouse, parent, or child.<sup>100</sup> The focus of the court's inquiry in exceptional hardship cases is whether the child will experience exceptional hardship upon a parent's deportation, whereas in asylum cases, the focus is the persecution of the alien parent. Thus, the exceptional hardship cases cited are not precedent for cases on refugee status; a parent may easily qualify for relief under the exceptional hardship provision but still fail to satisfy the less stringent—but very different—standard for asylum.

Finally, the court cited *In re Dibba*, in which the BIA reopened an asylum case based on a mother's fear that her daughter would be subject to FGM in the mother's home country.<sup>101</sup> In that case, the BIA found merely that the mother had presented sufficient evidence to reopen the case, expressly stating that the alien had not fully demonstrated refugee status.<sup>102</sup> The standard for reopening an asylum case is much less stringent than for granting asylum.<sup>103</sup> Although the BIA appeared receptive to granting asylum to the mother in *In re Dibba*, it has not affirmatively established a principle in favor of refugee status for parents in this situation.<sup>104</sup>

In summary, although granting refugee status to parents of children who face FGM is appealing, the legal standard is simply not met,

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<sup>97</sup> See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 601(a), 110 Stat. 3009-546, 3009-689 (codified at 8 U.S.C. § 1101(a)(42) (2000)); *In re X-P-T*, 21 I. & N. Dec. 634, 635-36 (B.I.A. 1996). See generally Kimberly Sicard, Note, *Section 601 of IIRIRA: A Long Road to a Resolution of United States Asylum Policy Regarding Coercive Methods of Population Control*, 14 GEO. IMMIGR. L.J. 927, 932-36 (2000) (describing the events leading to the amendment of the definition of refugee).

<sup>98</sup> See *supra* note 76.

<sup>99</sup> 8 U.S.C. § 1229b(b)(1)(D) (2000).

<sup>100</sup> See *infra* Part II.D.

<sup>101</sup> See *supra* note 77 and accompanying text.

<sup>102</sup> See *In re Dibba*, No. A73 541 857 (B.I.A. Nov. 23, 2001).

<sup>103</sup> See *Abay v. Ashcroft*, 368 F.3d 634, 642 (6th Cir. 2004).

<sup>104</sup> See, e.g., *Olowo v. Ashcroft*, 368 F.3d 692, 698 (7th Cir. 2004).

primarily because parents do not suffer persecution on account of their own membership in a particular social group or other enumerated category. Nevertheless, there are other ways to keep families together without changing—or distorting—the legal standard for refugee status.

### B. Humanitarian Grants of Asylum

An alien who fails to establish a well-founded fear of persecution may nonetheless receive asylum by demonstrating “compelling reasons for being unwilling or unable to return to the [home] country arising out of the severity of the past persecution.”<sup>105</sup> The principle derives from the Refugee Protocol, which states: “It is frequently recognized that a person who—or whose family—has suffered under atrocious forms of persecution should not be expected to repatriate.”<sup>106</sup> This “humanitarian” grant of asylum is thus available when there is no danger of future persecution but the applicant establishes past persecution “so severe that repatriation would be inhumane.”<sup>107</sup>

Humanitarian grants of asylum are rare, reserved for victims of particularly heinous abuse.<sup>108</sup> The paradigmatic case involved a Chinese man who suffered years of horrific physical and psychological abuse during the Cultural Revolution.<sup>109</sup> Applicants who suffer anything less are unlikely to receive humanitarian grants of asylum.<sup>110</sup>

In 2001, however, Congress made a humanitarian grant of asylum available to an alien who establishes both past persecution in his or her home country and “a reasonable possibility that he or she may suffer other serious harm upon removal to that country.”<sup>111</sup> “Other serious harm” is defined as “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.”<sup>112</sup> No court has yet utilized this new regulation to grant asylum.<sup>113</sup> A recent Fifth Circuit case suggests, however, that some

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<sup>105</sup> 8 C.F.R. § 208.13(b)(1)(iii)(A) (2004); *accord* *Krastev v. INS*, 292 F.3d 1268, 1271 (10th Cir. 2002).

<sup>106</sup> OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 136 (1979); *accord* *In re Chen*, 20 I. & N. Dec. 16, 19 (B.I.A. 1989).

<sup>107</sup> *Baka v. INS*, 963 F.2d 1376, 1379 (10th Cir. 1992).

<sup>108</sup> *See* *Bucur v. INS*, 109 F.3d 399, 404–05 (7th Cir. 1997).

<sup>109</sup> *See In re Chen*, 20 I. & N. Dec. at 19–21.

<sup>110</sup> *See* *Mullai v. Ashcroft*, 385 F.3d 635, 637 (6th Cir. 2004).

<sup>111</sup> 8 C.F.R. § 208.13(b)(1)(iii)(B) (2004); *accord* *Belishta v. Ashcroft*, 378 F.3d 1078, 1080 (9th Cir. 2004); *Krastev v. INS*, 292 F.3d 1268, 1271 (10th Cir. 2002).

<sup>112</sup> *Asylum Procedures*, 65 Fed. Reg. 76121, 76127 (Dec. 6, 2000).

<sup>113</sup> Two recent cases have been remanded to consider the “other serious harm” prong of the regulation. *See* *Arboleda v. U.S. Att’y Gen.*, 434 F.3d 1220, 1226 (11th Cir. 2006)

mothers whose children face FGM may be eligible for humanitarian grants of asylum. Ngozi Victoria Osigwe and her husband sought asylum on the ground that their daughter risks FGM if the family is forced to return to Nigeria.<sup>114</sup> On review, the Fifth Circuit remanded the case to the BIA to decide whether these circumstances warrant a discretionary grant of humanitarian asylum.<sup>115</sup>

Under the traditional standard for humanitarian asylum, it is unlikely that the Osigwes would receive asylum. The BIA would assess the severity of Ms. Osigwe's past persecution and compare it with the harm suffered by the victims of the Chinese Cultural Revolution and the Cambodian genocide.<sup>116</sup> Some women might be able to meet this standard given the severity of some forms of FGM,<sup>117</sup> but for many women, the ritual would not reach the required severity.

The 2001 amendment, however, may provide another avenue to humanitarian grants of asylum for mothers who have undergone FGM and whose children will face FGM if returned to the home country. Under the new regulation, the severity of the past abuse is not the dominant factor. A mother will be eligible for a humanitarian grant of asylum if she can prove (1) past persecution and (2) the possibility that she will suffer other serious harm if deported.<sup>118</sup> FGM qualifies as persecution.<sup>119</sup> Thus, if the mother previously suffered FGM, she can likely establish the first element of the claim. The second element, other serious harm, is harm that rises to the level of persecution yet is not inflicted on an enumerated ground under the asylum provision.<sup>120</sup> As discussed above, the primary problem with a mother's establishing her own refugee status on the basis of her child's risk of FGM is that the mother's suffering—the consequence of witnessing her daughter's torture—is not inflicted on account of the mother's membership in a particular social group. Accordingly, the mother's suffering seems to be the perfect case of other serious harm—harm that does not qualify the alien for refugee status because it is not inflicted on account of an enumerated ground, but is serious enough to make it inhumane to send her back to her home country. The only question is whether other courts will join the Sixth Circuit in holding that the mother's suffering rises to the level of persecution.<sup>121</sup>

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(per curiam); *Shala v. Gonzales*, No. 04-1039-AG NAC, 2006 WL 93002, at \*2 (2d Cir. Jan. 9, 2006) (unpublished order).

<sup>114</sup> See *Osigwe v. Ashcroft*, 77 F. App'x 235, 235 (5th Cir. 2003) (unpublished decision).

<sup>115</sup> See *id.* at 235–36.

<sup>116</sup> See *Bucur v. INS*, 109 F.3d 399, 405 (7th Cir. 1997).

<sup>117</sup> See *supra* notes 9–11 and accompanying text.

<sup>118</sup> See *supra* note 111 and accompanying text.

<sup>119</sup> See *supra* note 69 and accompanying text.

<sup>120</sup> See *supra* note 112 and accompanying text.

<sup>121</sup> See *supra* note 79 and accompanying text.

The humanitarian grant of asylum under the 2001 amendment is a promising possibility for those mothers who underwent FGM in their home countries. It would not, however, help mothers who managed to escape FGM, or fathers who cannot append their own asylum claims to the mothers' claims. Therefore, the provision would be of limited use in many cases.

### C. Derivative Asylum: Spouses and Children

An alien's spouse or child who does not otherwise qualify for asylum may "be granted the same status as the alien if accompanying, or following to join, such alien,"<sup>122</sup> subject to similar discretionary standards.<sup>123</sup> Although derivative asylum has received little academic attention, one can understand the principal reason for granting asylum to spouses and children of asylees: keeping families together.<sup>124</sup> Strangely, however, there is no general statutory authority for granting derivative asylum to a parent on the basis of a child's asylee status.<sup>125</sup> This fact leads to an absurd result. If a woman receives asylum for fear of FGM, then her husband and children will receive derivative asylum. But if a minor child receives asylum for fear of FGM, her parents will not receive derivative asylum; the child must remain in the United States alone. It is difficult to explain Congress's failing to grant derivative asylum to a minor child's parent, while specifically protecting an adult's spouse and children.<sup>126</sup>

Thus, even if an alien child receives asylum based on her fear of FGM, her parents may still face deportation. The parents will then face the choice of deserting their daughter in the United States or taking her with them to their home country to risk FGM. Many judges probably agree with Judge Ferguson of the Ninth Circuit:

I do not believe that Congress intended any parent to face that choice. If Congress failed to clarify, in so many words, that a parent

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<sup>122</sup> 8 U.S.C. § 1158(b)(3)(A) (2000); accord *GORDON ET AL.*, *supra* note 18, § 33.05(5). Some courts have added confusion to this area by using the term "derivative asylum" interchangeably with "constructive deportation," discussed later, or to mean the establishment of refugee status in the parent's own right on the grounds of harm to the child, as in *Abay*, discussed previously. See, e.g., *Olowo v. Ashcroft*, 368 F.3d 692, 701 (7th Cir. 2004) ("[C]laims for 'derivative asylum' based on potential harm to an applicant's children are cognizable only when the applicant's children are subject to 'constructive deportation' . . ."); *Oforji v. Ashcroft*, 354 F.3d 609, 614 (7th Cir. 2003). Such usage is inappropriate, however, given the specific statutory meaning of derivative asylum. See 8 C.F.R. 208.21(a) (2004).

<sup>123</sup> See 8 C.F.R. § 208.21(a). There is no appeal from discretionary denial. *Id.* § 208.21(e).

<sup>124</sup> See *supra* notes 41–47 (discussing family unity as a primary goal of immigration law).

<sup>125</sup> See *Abay v. Ashcroft*, 368 F.3d 634, 641 (6th Cir. 2004).

<sup>126</sup> See *Abebe v. Ashcroft*, 379 F.3d 755, 763–64 (9th Cir. 2004) (Ferguson, J., dissenting), *vacated en banc*, 432 F.3d 1037 (9th Cir. 2005).

may claim asylum on the basis of a threat to her child, that omission is attributable only to a failure to imagine that so many young children would be independently targeted for persecution. . . . Surely, Congress did not intend parents to choose between exposing their children to such threats and abandoning them halfway around the world.<sup>127</sup>

Unfortunately, in this case, judges are bound by the text of the statute, and derivative asylum provides no relief for parents of children who face FGM.

#### D. Withholding of Removal: Exceptional Hardship and Constructive Deportation

An alien who does not qualify for asylum may still qualify for withholding of removal under the exceptional hardship provision of the INA if “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.”<sup>128</sup> For a child whose parents are being deported, the prospect of facing FGM in a foreign country is undoubtedly an exceptional hardship. Likewise, if a child remains alone in the United States, her separation from her parents is an equal hardship.<sup>129</sup> Therefore, parents of American citizens or permanent resident aliens who would face FGM if they accompanied their parents into exile may receive withholding of removal, but only if the parent has lived in the United States for at least ten years and meets the provision’s other stringent requirements.<sup>130</sup>

A significant problem arises, however, if only the primary caregiver is deported, but the other parent has the right to remain in the United States. In that case, a court may find that there is no hardship to the child—even if the child has had no contact with the remaining parent—because the child can stay in the country with that parent.<sup>131</sup> To receive withholding of removal, the departing parent would then have to convince a court that handing the child over to the remaining parent would constitute a hardship to the child.

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<sup>127</sup> *Id.* at 763.

<sup>128</sup> 8 U.S.C. § 1229b(b)(1)(D) (2000).

<sup>129</sup> *See Oforji v. Ashcroft*, 354 F.3d 609, 617 (7th Cir. 2003).

<sup>130</sup> *See* 8 U.S.C. 1229b(b)(1) (“The Attorney General may cancel removal of, and adjust to the status of an alien . . . if the alien . . . (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application; (B) has been a person of good moral character during such period; (C) has not been convicted of an offense . . . ; and (D) establishes 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.”).

<sup>131</sup> *See Obazee v. Ashcroft*, 79 F. App’x 914, 917 (7th Cir. 2003) (unpublished order).

In *Salameda v. INS*, the Seventh Circuit extended the exceptional hardship provision through the constructive deportation doctrine.<sup>132</sup> In 1991, the Salamedas applied for suspension of deportation under the predecessor to the current exceptional hardship provision of the INA, which required a seven- rather than ten-year residency in the United States, claiming that their deportation would be a hardship to their son.<sup>133</sup> The child, however, was neither a U.S. citizen nor a permanent resident, and therefore the provision did not apply.<sup>134</sup> The court nevertheless concluded that the parents' deportation would result in the son's constructive deportation, as he had no legal right of his own to remain in the country, and therefore that the son's hardship should be considered in the parents' application for withholding of deportation.<sup>135</sup>

Unfortunately for most parents, the constructive deportation doctrine has since been limited to the narrow ambit of the case that created it: The doctrine applies only to alien children when both parents face deportation.<sup>136</sup> The Seventh Circuit once suggested that the constructive deportation doctrine might allow consideration of a child's hardship in determining whether to grant asylum or CAT relief to deportable parents.<sup>137</sup> In *Nwaokolo v. INS*, the court granted a stay of deportation and remanded a petition to reopen a deportation case because the BIA denied the petition without considering the hardship to the applicant's four-year-old American citizen daughter, who would face FGM if she accompanied her mother to Nigeria.<sup>138</sup> This extension of the constructive deportation doctrine would have greatly aided parents whose children faced FGM upon the parents' deportation; the parents could receive direct relief based on the child's fear of FGM.<sup>139</sup> The Seventh Circuit, however, later halted this line of reasoning in *Oforji v. Ashcroft*: "[W]e now hold that an alien parent who has no legal standing to remain in the United States may not establish a derivative

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<sup>132</sup> 70 F.3d 447 (7th Cir. 1995).

<sup>133</sup> *Id.* at 448 (citing 8 U.S.C. § 1254(a)(1) (1994) (repealed 1996)).

<sup>134</sup> *See id.* at 449, 451.

<sup>135</sup> *See id.* at 451; *accord Oforji v. Ashcroft*, 354 F.3d 609, 615–16 (7th Cir. 2003) (summarizing *Salameda*).

<sup>136</sup> *See Oforji*, 354 F.3d at 616.

<sup>137</sup> *See Olowo*, 368 F.3d at 701; *Oforji*, 354 F.3d at 614–16; *Obazee v. Ashcroft*, 79 F. App'x 914, 917 (7th Cir. 2003) (unpublished order); *Nwaokolo v. INS*, 314 F.3d 303, 307–08 (7th Cir. 2002) (per curiam); *see also supra* Part II.A (discussing asylum); *infra* Part II.E (discussing relief under the CAT).

<sup>138</sup> 314 F.3d at 307–08.

<sup>139</sup> *Cf. supra* Part II.A (describing the refusal of most courts to grant asylum based on the persecution of a family member).

claim for asylum by pointing to potential hardship to the alien's United States citizen child in the event of the alien's deportation."<sup>140</sup>

The constructive deportation doctrine thus offers very narrow protection to parents of alien children, applying only if the alien child does not have the option to stay in the United States. But because an alien child facing FGM if her parents are deported would most likely qualify for asylum herself, it would be a rare case in which the constructive deportation doctrine would save a parent from the predicament of deserting the child or exposing her to the risk of FGM.

### E. Relief Under the CAT

Although the CAT offers an alternative for aliens whose claims fall outside the traditional framework of asylum,<sup>141</sup> the standard for relief is somewhat narrower.<sup>142</sup> The applicant must prove that she will more likely than not suffer torture in her home country, as opposed to the more lenient burden of showing a "real chance" of persecution for asylum.<sup>143</sup> Evidence of past torture is relevant but not sufficient; the applicant must show a probability of future torture.<sup>144</sup> Furthermore, to meet this burden, the harm must be inflicted with the consent or acquiescence of a public official, meaning that the official must be aware of the activity before it occurs.<sup>145</sup> Actual knowledge is not required; willful blindness suffices to meet the burden.<sup>146</sup> However, if a government is powerless to stop the activity, the alien is not protected under the CAT as he would be under refugee law.<sup>147</sup>

In addition, unlike the regulations governing asylum based on refugee status, those regulating relief under the CAT do not expressly

<sup>140</sup> 354 F.3d at 618. Again, the Seventh Circuit has borrowed the term "derivative asylum" to describe its consideration of hardship to a third party, the child. *See id.* at 614; *supra* note 122.

<sup>141</sup> *See supra* notes 35–38 and accompanying text.

<sup>142</sup> There is no discretion to refuse removal because of the alien's background or potential threat, as there is in grants of asylum based on refugee status. *See In re H-M-V-*, 22 I. & N. Dec. 256, 269 (B.I.A. 1998) (Rosenberg, Board Member, dissenting); Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8480–81 (Feb. 19, 1999). This prohibition on "refoulement" was a significant obstacle to the ratification of the treaty in the United States, *see Miller, supra* note 37, at 301, and met further resistance from the INS, *see Montavon-McKillip, supra* note 35, at 251. But under existing legislation, an alien who does not qualify for withholding of removal will obtain deferral of removal. *See* 8 C.F.R. § 208.16(c)(4) (2004).

<sup>143</sup> *See Ambartsoumian v. Ashcroft*, 388 F.3d 85, 88–89 (3d Cir. 2004); 8 C.F.R. § 208.16(c)(2); *supra* notes 63–64 and accompanying text.

<sup>144</sup> *See Hamoui v. Ashcroft*, 389 F.3d 821, 827 (9th Cir. 2004).

<sup>145</sup> *See* 8 C.F.R. § 208.18(a)(1), (7).

<sup>146</sup> *See In re S-V-*, 22 I. & N. Dec. 1306, 1311–12 (B.I.A. 2000).

<sup>147</sup> *Compare id.* at 1312 ("[A] government's inability to control a group ought not lead to the conclusion that the government acquiesced to the group's activities."), *with supra* notes 65–66 and accompanying text (noting that under asylum law, persecution includes harm inflicted by groups that governments cannot control).

include a derivative asylum provision.<sup>148</sup> Whether derivative relief is available under the CAT is an open question; the Ninth Circuit recently remanded a case so that the BIA could “bring its considerable experience and expertise to bear on the issue.”<sup>149</sup> The Seventh Circuit, however, denied the availability of derivative relief, relying on the express wording of the CAT itself: The applicant must “‘establish that it is more likely than not that *he or she would be tortured* if removed to the proposed country of removal.’”<sup>150</sup>

In two separate cases, parents with children facing FGM in their home countries have sought CAT relief in the Seventh Circuit. The court first granted one mother a stay of deportation pending review of her petition to reopen deportation hearings, suggesting that the BIA should consider the threat to the daughter created by the mother’s deportation.<sup>151</sup> The following year, however, the court foreclosed any claim of “derivative asylum” under the CAT based on the torture of any person other than the alien requesting relief.<sup>152</sup> The regulations specifically require that “‘*the alien* is more likely than not to be tortured in the country of removal.’”<sup>153</sup>

The logic underlying that view is very similar to that of denying refugee status to these parents: It is not the parents themselves who face persecution or torture. As with refugee status, however, the parents have some argument that they experience severe mental anguish that rises to the level of torture when they must watch their daughters undergo FGM. Furthermore, as required by the definition of torture, the reason for the parents’ suffering is arguably based on discrimination.<sup>154</sup> Many critics claim that FGM is a discriminatory practice, socially subjugating women and girls to male dominance.<sup>155</sup> But no court has granted CAT relief to a parent whose daughter risks FGM if the parent is deported.

One problem these parents face is that the standard for relief under the CAT is generally narrower than that for asylum, requiring a showing of a higher probability of harm upon deportation.<sup>156</sup> Perhaps applicants generally assume that if they cannot qualify for asy-

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<sup>148</sup> See *Azanor v. Ashcroft*, 364 F.3d 1013, 1020 (9th Cir. 2004); 8 C.F.R. § 208.16(c).

<sup>149</sup> *Azanor*, 364 F.3d at 1021.

<sup>150</sup> *Oforji v. Ashcroft*, 354 F.3d 609, 615 (7th Cir. 2003) (quoting 8 C.F.R. § 208.16(c)(2)).

<sup>151</sup> See *Nwaokolo v. INS*, 314 F.3d 303, 308 (7th Cir. 2002) (per curiam); see also *supra* notes 137–40 and accompanying text (describing the Seventh Circuit’s discussion, and ultimate dismissal, of the theory that the constructive deportation doctrine allows consideration of the hardship to a child in the parent’s deportation hearing).

<sup>152</sup> See *Oforji*, 354 F.3d at 615–18.

<sup>153</sup> *Id.* at 615 (quoting 8 C.F.R. § 208.16(c)(4)).

<sup>154</sup> See CAT, *supra* note 35, art. 1(1).

<sup>155</sup> See DUNOFF ET AL., *supra* note 8, at 455.

<sup>156</sup> See *Ambartsoumian v. Ashcroft*, 388 F.3d 85, 88–89 (3d Cir. 2004).

lum, they probably will not qualify under the more stringent standard for CAT relief. Or perhaps applicants do not believe they can adequately prove that their suffering is “torture” or that the torture is based on discrimination. Furthermore, a court might require a showing that the parents, rather than the children, suffer the required discrimination, and find that there is no direct discrimination against the parent.

A further problem is that the parent must also prove that his suffering is inflicted by the government or with its consent.<sup>157</sup> Many countries where FGM is prevalent are working to eradicate the practice—at least formally.<sup>158</sup> Parents from these countries may thus find it difficult to show that the government acquiesces in the practice.<sup>159</sup>

Given the few forms of relief available, the argument that a parent merits relief under the CAT when a child faces FGM upon the parent’s removal is plausible and could succeed if properly stated before a sympathetic court.<sup>160</sup> As previously discussed, the Ninth Circuit recently remanded a case to the BIA to determine in the first instance whether a mother could establish a claim under the CAT based on the fact that her daughter would be subject to FGM if the mother were deported.<sup>161</sup> Although the reviewing court refused to speculate on the likelihood of the alien’s success, the remand implies that the court is open to the claim.<sup>162</sup>

### III

#### PREVENTING A PARENT’S PREDICAMENT: THE CASE FOR CHANGE

Regardless of individual views on whether FGM is a form of torture or a celebrated rite of passage, FGM is a crime in the United States,<sup>163</sup> and many women and girls come to this country to escape the violent practice. Even a cultural relativist would be hard-pressed to agree that a girl who does not wish to undergo FGM should be

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<sup>157</sup> See *supra* notes 145–47 and accompanying text; see also Lori A. Nessel, “Willful Blindness” to Gender-Based Violence Abroad: United States’ Implementation of Article Three of the United Nations Convention Against Torture, 89 MINN. L. REV. 71, 119–23 (2004) (describing various interpretations of government “acquiescence” required to grant CAT relief).

<sup>158</sup> See FEMALE GENITAL MUTILATION, *supra* note 8, at 101.

<sup>159</sup> See *supra* notes 145–47 and accompanying text.

<sup>160</sup> Compare *Oforji v. Ashcroft*, 354 F.3d 609, 615–18 (7th Cir. 2003) (granting a stay of deportation in essence to consider granting CAT relief), with *Nwaokolo v. INS*, 314 F.3d 303, 307–08 (7th Cir. 2002) (per curiam) (denying derivative CAT relief). In both cases, the applicants applied for relief based on their children’s suffering—not their own.

<sup>161</sup> See *supra* note 149 and accompanying text.

<sup>162</sup> The BIA, however, cited *Oforji* when it denied relief the first time, suggesting that its position is similar to that of the Seventh Circuit, which foreclosed derivative claims under the CAT. See *supra* note 152 and accompanying text.

<sup>163</sup> See *supra* note 7 and accompanying text.

subjected to the painful and debilitating procedure against her will. Indeed, FGM is a ground for asylum for those who face it in their home countries.<sup>164</sup>

But the situation is different for a parent whose daughter faces FGM if she accompanies the parent upon removal from the United States. Although the daughter may be able to remain in the United States through asylum or based on her own citizenship, the parent has very limited options under current law. The parent then faces a difficult decision: whether to abandon the child in the United States, often in the custody of strangers, or to take the child to a foreign country where she faces FGM. Given the value placed on family unity both in American society in general and in immigration law in particular,<sup>165</sup> a parent should not have to face this choice. Rather, the parent deserves some form of legal relief.

Under current law, parents can request asylum or relief under the CAT, although significant problems arise from certain elements of both claims. Ultimately, there is only a slim chance that the parent will qualify for relief, and even then, most courts would agree that the claims stretch the boundaries of the law. Similarly, parents of American citizens and permanent resident aliens may qualify for withholding of removal under the exceptional hardship provision of the INA, but only if, *inter alia*, they have already resided in the United States for ten years. Given that there is always the possibility of turning custody of the child over to the state, insensitive courts can bypass this provision even for the few parents who might otherwise qualify for relief.

Thus, the humanitarian grant of asylum is the only promising avenue of relief under current law—and it is only available to mothers who have undergone FGM themselves.<sup>166</sup> Since the mother can establish past persecution, she need only show other serious harm if she is deported—that is, harm that rises to the level of persecution but is not inflicted on account of, *inter alia*, membership in a particular social group, which seems to ideally cover the suffering of a parent on account of her child's subjection to FGM. Even the Seventh Circuit would have difficulty denying that a mother would suffer serious harm if she witnessed the persecution of her child. But the mother's harm itself must amount to persecution, and some courts may not consider the mother's mental anguish a threat sufficient for asylum.

With two sensible statutory changes to derivative asylum and withholding of removal, almost all parents whose children face FGM in

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<sup>164</sup> See *supra* note 51 and accompanying text.

<sup>165</sup> See *supra* notes 41–47 and accompanying text.

<sup>166</sup> A father would presumably receive derivative asylum if his wife, the mother, were granted humanitarian asylum, thus keeping the family together. See *supra* Part II.C.

their home countries would qualify for relief. First, under current law, only spouses and children of asylees generally qualify for derivative asylum. Thus, the spouse and children of an adult who receives asylum for fear of FGM may remain in the United States, but the parents of a minor child who similarly receives asylum for fear of FGM have no option to remain with their child. The most obvious—and reasonable—solution to this predicament is to change the statute. The value placed on the family in American society, and specifically in immigration law, supports the amendment of the derivative asylum provision to include parents of minor children in order to keep the families of persecuted children together.<sup>167</sup> Why protect a child from persecution in her home country and then subject her to another form of suffering by separating her from her parents?

Furthermore, current immigration law lends support to this statutory change, even beyond the primary policy of maintaining family unity. In the specific instance of a person who receives asylum for turning over a living American POW/MIA from the Korean, Vietnam, or Persian Gulf Wars, the asylee's spouse and children, as well as the asylee's parents, receive derivative asylum.<sup>168</sup> Amending the general derivative asylum provision to match the POW/MIA asylum provision would provide reliable relief for parents of alien children who face FGM. As Judge Ferguson pointed out, surely Congress did not intend to force parents to choose between deserting their children or exposing them to horrific threats.<sup>169</sup> We now know that many children are the direct targets of persecution, such as when they face FGM in their home countries. Immigration law serves to protect these children from threats of persecution, but they deserve the further protection of allowing their parents to remain in the United States with them.

The primary argument against amending the derivative asylum provision is that it would increase the number of immigrants admitted into the country, an unpopular prospect with many Americans.<sup>170</sup> This concern, however, is misplaced. The President sets a ceiling on

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<sup>167</sup> The law provides that the spouse and children of an asylee may receive the same status as the asylee. See *supra* notes 122–23 and accompanying text. Thus, if the statute were changed to include parents of minor children, the parents could receive asylum themselves. The child's siblings could then append their asylum claims to the parents' derivative claims, allowing the child-asylee's entire immediate family to remain in the United States.

<sup>168</sup> See Persian Gulf War POW/MIA Accountability Act of 2002, Pub. L. No. 107-258, 116 Stat. 1738 (amending Bring Them Home Alive Act of 2000, Pub. L. No. 106-484, 114 Stat. 2195).

<sup>169</sup> See *supra* note 127 and accompanying text.

<sup>170</sup> As this Note went to press, thousands of demonstrators across the United States were protesting tougher immigration laws contemplated by Congress. See, e.g., *Immigrant Protests Hit New York*, CNN.COM, Apr. 1, 2006, <http://www.cnn.com/2006/US/04/01/immigration.rallies.ap/index.html>; Elliot Spagat, *Students Stage New Immigration Protests*, CHRON.COM, Mar. 31, 2006, <http://chron.com/disp/story.mpl/ap/nation/3763124.btml>.

the total number of refugees admitted each year,<sup>171</sup> and granting derivative asylum to parents of minor asylees would in no way affect the President's control of refugee admissions. Although the absolute number of refugees might rise slightly, the ceiling is rarely if ever met,<sup>172</sup> and it can always be reduced. Therefore, rather than taking the unpopular measure of increasing the immigrant population, Congress would be justly protecting innocent children. With this statutory change, children would no longer be effectively orphaned by American courts purporting to protect them from foreign dangers.

A second feasible statutory change that would keep parents and children together while avoiding FGM is the elimination of the exceptional hardship provision's ten-year residency requirement, which currently prevents most parents from receiving relief under the INA.<sup>173</sup> The residency requirement has little bearing on the hardship to the child whose parent faces deportation. The parent may have arrived only shortly before the child's birth, and the child may be less than ten years old. Neither of these circumstantial details changes the fact that an American citizen might be subjected to a form of torture or ripped from the custody of her parents unless removal proceedings are cancelled. Granted, the longer a child lives in the United States, the greater the hardship in assimilating to the parent's native country, but as Judge Posner observed in his *Oforji* concurrence: "The . . . ten-year[ ] rule is irrational viewed as a device for identifying those cases in which the hardship to an alien's children should weigh against forcing her to leave the country."<sup>174</sup> The same reasoning holds true for all Americans who would be adversely affected by the deportation of an alien spouse, parent, or child. The residency period of the alien is not necessarily related to the degree of hardship.

Despite the residency requirement's irrationality, however, Congress is highly unlikely to repeal the provision, given the overwhelming political support for limited immigration.<sup>175</sup> Indeed, the residency requirement was recently increased from seven to ten

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<sup>171</sup> See NANCY F. RYTINA, U.S. DEP'T OF HOMELAND SEC., REFUGEE APPLICANTS AND ADMISSIONS TO THE UNITED STATES: 2004, at 1 (2005), available at <http://uscis.gov/graphics/shared/statistics/publications/refugeeflowreport2004.pdf>.

<sup>172</sup> See *id.* (noting that only 52,835 refugees were admitted in 2004 even though the President set the ceiling at 70,000); INT'L RESCUE COMM., THE U.S. REFUGEE ADMISSIONS PROGRAM CRISIS CONTINUES IN 2003, [http://www.theirc.org/what/the\\_us\\_refugee\\_admissions\\_program\\_crisis\\_continues\\_in\\_2003.html](http://www.theirc.org/what/the_us_refugee_admissions_program_crisis_continues_in_2003.html) (last visited Mar. 3, 2006) (tracking recent years' actual refugee admittances).

<sup>173</sup> See *Oforji v. Ashcroft* 354 F.3d 609, 620 (7th Cir. 2003) (Posner, J., concurring).

<sup>174</sup> *Id.*

<sup>175</sup> See PollingReport.com, Immigration, <http://pollingreport.com/immigration.htm> (last visited Mar. 28, 2006) (compiling polls by various agencies from 2005 and 2006).

years.<sup>176</sup> Although the rational solution is to remove the residency requirement and focus instead on the severity of the hardship to the citizen, it is difficult to imagine strengthening the hardship requirement enough to stem the tide of immigrants to the satisfaction of the voting public. The provision already requires an “exceptional and extremely unusual hardship” for withholding of removal, a robust statement of the degree of the citizen’s adversity. Yet the perception—if not the reality—is that so many immigrants were being admitted under the provision that the residency requirement had to be tightened. Thus, in order to gain support for the elimination of the residency requirement, Congress would have to ensure that greater numbers of aliens would not be admitted under the revised provision. However, any additional restriction on relief, beyond the severity of the hardship, would likely be as random as the residency requirement.

Even if the statute were amended to remove the residency requirement, the definition of hardship would also need to evolve in the context of parents whose children face FGM in a foreign country. To maximize the benefit to these parents, courts would need to view the separation from the departing parent as a hardship, even if the child has the option of remaining in the United States with another parent or guardian. At the very least, the court would have to inquire into whether the child would in fact accompany the departing parent rather than stay in the United States with the remaining parent or guardian. Furthermore, courts would have to abandon the idea that a parent who would choose to depart with her child and risk subjecting the child to FGM in another country—rather than abandoning the child in the United States—does not deserve custody of her child.<sup>177</sup> The assumptions in considering hardship to a child should be that “any separation of a child from its mother is a hardship”<sup>178</sup> and that “‘a mother would not be expected to leave her child in the United States in order to avoid persecution.’”<sup>179</sup> These principles should extend to fathers as well, thus placing the utmost value on keeping families together. Only then will the exceptional hardship provision and constructive deportation doctrine adequately assist parents and their children who face FGM if the parents are deported.

Unfortunately, some courts currently consider separation of the child from the parent a desirable alternative to withholding of removal.<sup>180</sup> But this position eschews one of the central values of immi-

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<sup>176</sup> See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 308, 110 Stat. 3009-546, 3009-615 (repealing 8 U.S.C. § 1254(a)(1) (1994)).

<sup>177</sup> See *supra* note 72 and accompanying text.

<sup>178</sup> *Oforji*, 354 F.3d at 617.

<sup>179</sup> *Abay v. Ashcroft*, 368 F.3d 634, 642 (6th Cir. 2004) (quoting *In re Dihba*, No. A73 541 857, at 2 (B.I.A. Nov. 23, 2001)).

<sup>180</sup> See *supra* note 72 and accompanying text.

gration law: the integrity of the family. It also drastically increases the hardship to the child, as separation from the parent is itself a hardship. If the courts do not interpret the provision rationally, but instead interpret it in such a way as to actually increase the hardship to an American-citizen child, perhaps Congress should take a more dramatic step and define "exceptional hardship" more explicitly.

Ironically, if the derivative asylum provision is amended to encompass parents of minor children—and there are few reasons to suggest that it should not be—but the current exceptional hardship provision is retained, American-citizen children will be worse off than alien children. If the derivative asylum provision is amended, parents of minor asylees would automatically qualify for asylum.<sup>181</sup> But without an amendment to the exceptional hardship provision, parents of citizen children would not qualify for withholding of removal unless they met stringent—and irrelevant—residency requirement. Thus, parents of American-citizen children would be less likely to remain in the United States with their children than similarly situated parents of minor asylees.<sup>182</sup> Even as it is now, "although they are citizens, [American-citizen children] are treated as badly as aliens."<sup>183</sup>

#### CONCLUSION

Most parents with children who face FGM upon departure from the United States are forced to choose between leaving their children alone in the United States and risking their children's exposure to FGM in their home country. Our law should never place a parent in this predicament. Many parents have appealed to the courts for help, seeking relief under five legal theories. Unfortunately, under current law, only two groups of parents have a chance at relief: mothers who have undergone FGM themselves and can convince a court to grant discretionary humanitarian asylum, and parents of American-citizen children who meet the stringent requirements of the exceptional hardship provision, including the ten-year residency requirement. However, with two statutory changes, almost all of these parents would qualify for relief, and the children would not lose their parents or face FGM. Immigration law cannot right the wrongs of the world,<sup>184</sup> but it can serve important social values by protecting the sanctity of the fam-

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<sup>181</sup> *But see supra* notes 122–23 and accompanying text (noting that derivative asylum applicants are subject to the same discretionary standards as the principal asylee).

<sup>182</sup> Some would argue that such discrepancies reveal significant deficiencies in the current citizenship regime. *See, e.g., Oforji*, 354 F.3d at 620–21 (Posner, J., concurring) (arguing that Congress should rethink granting citizenship based on birth). That argument, however, is beyond the scope of this Note.

<sup>183</sup> *Id.* at 620.

<sup>184</sup> *See In re H-*, 21 I. & N. Dec. 337, 350 (B.I.A. 1996) (Heilman, Board Member, dissenting).

ily, while ensuring that no parent is forced to choose between abandoning a child and exposing her to the physical and psychological threat of FGM.