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When Children Suffer: The Failure of U.S. Immigration Law to Provide Practical Protection For Persecuted Children

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COMMENT

WHEN CHILDREN SUFFER: THE FAILURE OF U.S. IMMIGRATION LAW TO PROVIDE PRACTICAL PROTECTION FOR PERSECUTED CHILDREN

INTRODUCTION

Every year, mothers around the world face a devastating choice. They can either stay in their home countries, where their daughters are at risk of being subjected to female genital mutilation (FGM), or they can flee to the United States, where their children would potentially be eligible for asylum relief. However, under existing U.S. immigration law, even if a child is granted asylum, the immigration court will likely not recognize an independent asylum claim for the mother. The mother will then be ordered removed from the United States and must face yet another devastating choice: either leave her child behind in the U.S. or take her child back to her home country, where persecution and permanent physical disfigurement may await her.

Parents of minor children eligible for asylum face this devastating situation, particularly in FGM cases.[1] The United

[1] Although this Comment focuses on cases dealing with FGM, the purpose of this work is not to argue for legislative change solely in the context of FGM cases but rather for change as to derivative eligibility of parents of both asylee children and U.S. citizen children who fear persecution if relocated to their parents' home countries. "Female genital mutilation, or FGM, is the collective name given to a series of surgical operations, involving the removal of some or all of the external genitalia, performed on girls and women primarily in Africa and Asia. Often performed under unsanitary

States Department of Justice recognizes that human-rights violations against children can take a number of forms, including abusive child labor practices, human-trafficking, rape, forced prostitution, and forcible military recruitment.[2] In such cases, the parents may be ineligible for relief because they cannot independently establish a well-founded fear of persecution.[3] Parents are faced with this extremely difficult decision because U.S. immigration law does not allow for derivative asylum claims for parents of minor children.[4]

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conditions with highly rudimentary instruments, female genital mutilation is 'extremely painful,' 'permanently disfigures the female genitalia, [and] exposes the girl or woman to the risk of serious, potentially life-threatening complications,' including 'bleeding, infection, urine retention, stress, shock, psychological trauma, and damage to the urethra and anus.'" Abay v. Ashcroft, 368 F.3d 634, 638 (6th Cir. 2004) (citing *In re* Kasinga, 21 I. & N. Dec. 357, 361 (BIA 1996)).

[2] U.S. Department of Justice Immigration and Naturalization Service, *Guidelines for Children's Asylum Claims* (Dec. 10, 1998), *available at* http://www.asylumlaw.org/docs/united_states/guidelines/children.pdf.

[3] Under U.S. immigration law, asylum may be granted to a non-citizen who meets the statutory definition of a refugee and is physically within the United States. 8 U.S.C.A. § 1101(a)(42) (West 2009). The definition of "refugee" provided by the Immigration and Nationality Act is:

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

Id.

> The only difference between a refugee and an asylee is that a refugee is in another country seeking refuge and an asylum seeker has already arrived in the United States. 8 U.S.C.A. § 1158(a)(1) (West 2009). An alien can also apply for withholding of removal. 8 U.S.C.A. § 1231(b)(2) (West 2009). Withholding of removal is a narrower remedy that prohibits forcible return of the alien to the country of persecution but not to third countries. An application for asylum under § 1158 is automatically treated as an application for withholding of removal under § 1231(b)(2) in the event relief under § 1158 is denied. 8 C.F.R. § 208.3(b) (West 2009).

[4] 8 U.S.C.A. § 1158(b)(3)(A) (West 2009) ("In general . . . [a] spouse or child . . . of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien."); *see also* Kimberly Sowders Blizzard, *A Parent's Predicament: Theories of Relief for Deportable Parents of Children Who Face Female Genital Mutilation,* 91 CORNELL L. REV. 899, 900 (2006) (noting the difficult choice a parent faces when his/her daughter would be exposed to FGM in the parents' home country because United States courts either refuse to or cannot find legal authority to allow the parents to remain in the United States); Alida Yvonne Lasker, *Solomon's Choice: The Case for Granting Derivative Asylum to Parents,* 32 BROOK. J. INT'L. L.

Children frequently face de facto deportation when their parents do not have a legal right to remain in the United States.[5] De facto deportation occurs when a child is not legally deemed deportable but, realistically, the child has no choice but to leave the United States along with her parent.[6] The child is likely to return to the parent's home country because of a lack of family ties and support in the United States.[7] De facto deportation often arises in two situations. The first situation is the case of an asylee child[8] for whom a grant of asylum may represent an empty promise of protection if the family would have to, or likely choose to, take the child to the home country in order to keep the family intact.[9] The second situation is the case of a U.S. citizen or legal permanent resident (LPR) child who, despite having a legal right to remain in the United States, would nevertheless be subject to de facto deportation to a country where the child would likely suffer persecution.[10]

Current asylum law fails to put proper emphasis on protecting the child. The "best interest of the child" principle was specifically addressed in a memorandum from the legacy INS (Immigration and Naturalization Service), now known as

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231 (2006).

[5] The term "de facto" refers to something that is actual and existing in fact. De facto deportation of a child would occur should a parent not be granted asylum relief as the child would certainly return with her parent to their home country as the parent would be unable to legally remain in the United States. Although the child is not formally or legally being deported, the reality of the situation is that she too would leave the country with her parent.

[6] The reference to "her" in this sentence should be understood to mean both his and her. Throughout this Comment, references to individuals will be in the feminine form in order to maintain readability and uniformity. In no way does a reference in the feminine form mean to exclude its applicability to males as well.

[7] *See In re* Dibba, No. A73 541 857 (BIA Nov. 23, 2001) ("[N]ormally a mother would not be expected to leave her child in the United States in order to avoid persecution.").

[8] This Comment refers to both "refugees" and "asylees." Although the terms are used interchangeably to mean children who suffered past persecution or have a well-founded fear of future persecution, it is important to understand the distinction. An "asylee" is an individual who is *inside* the U.S. and claiming asylum relief. A "refugee" is a person who is *outside* the U.S. and requesting asylum in the U.S. *See* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 4 (Paul T. Lufkin ed., Refugee Law Center 1999).

[9] *See* Abay v. Ashcroft, 368 F.3d 634 (6th Cir. 2004) (dealing with alien children).

[10] *See* Abebe v. Gonzales, 432 F.3d 1037 (9th Cir. 2005) (dealing with U.S. citizen children); Olowo v. Ashcroft, 368 F.3d 692 (7th Cir. 2004) (dealing with U.S. citizen children).

the Department of Homeland Security, which recognized the increasing attention from the international community toward children asylum seekers.[11] Given the legacy INS's stance on protecting the best interest of the child, the current practice in the United States runs counter to national and international concerns about providing relief for parents of asylee children. In addition, while the child would be subject to potential persecution should she return to her home country with a parent, should she remain in the United States she would instead be torn from her family. Such separation of parent and child runs contrary to the "time-honored policy of family unity in U.S. law."[12]

This Comment focuses on the need for statutory change in order to address the policy concerns of family unity and to protect asylee children. Part I looks at how the current state of immigration law stands in relation to derivative asylum claims. Part II examines how courts have interpreted current asylum law and the inconsistency and shortcomings of such judicial interpretations. Part III examines policy concerns associated with the child-parent derivative asylum issue, specifically family unity and practical child protection. Finally, Part IV makes two recommendations: 1) legislative change to current asylum law to allow derivative relief for parents of asylee children, and 2) a request for affirmative guidance from the Board of Immigration Appeals (BIA) on asylum eligibility standards for parents of U.S. citizen and LPR children who fear persecution in their parents' home country.

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[11] U.S. Department of Justice Immigration and Naturalization Service, *Guidelines for Children's Asylum Claims* (Dec. 10, 1998), *available at* http://www.asylumlaw.org/docs/united_states/guidelines/children.pdf (stating that the internationally recognized "best interests of the child" principle is a useful measure for determining appropriate procedures when dealing with children, even though it does not play a role in determining substantive eligibility under the U.S. refugee definition. The principle rests on the idea that children's rights are human rights and universal rights and focuses on the vulnerability of children and the need for refugee policies to protect and assist them).

[12] Marcelle Rice, *Protecting Parents: Why Mothers and Fathers Who Oppose Female Genital Cutting Qualify for Asylum,* Immigration Briefings (Nov. 2004).

I. DERIVATIVE ASYLUM: ELIGIBILITY UNDER EXISTING U.S. IMMIGRATION LAW

Section 208 of the Immigration Nationality Act (INA)[13] provides that, once an individual is granted asylum,[14] derivative claims can be asserted by the primary applicant's spouse and/or minor child, whether or not the spouse or child independently meets the requirements for asylum.[15] However, the statute is silent in regard to parents.[16] This poses an exceptional problem for asylum seekers when the principal asylum applicant is a child.

Since parents of children granted asylum are not granted derivative eligibility under the INA,[17] they must look to other avenues of relief in order to remain legally in the United States. However, there are few alternatives available. In order to establish an independent claim for asylum relief, a parent must show that she meets the definition of refugee pursuant to § 1101(a)(42).[18] The parent must prove either actual persecution or a "well-founded fear of persecution" by the government of the home country or a group the government

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[13] The INA, the governing statute for United States immigration law, was enacted in 1952. Before the INA, a variety of statutes governed immigration law; however, they lacked effective organization. The refugee and asylum provisions were added by the Refugee Act of 1980. The INA is currently codified at 8 U.S.C. §1101 et seq.

[14] The INA states that any alien who is physically present in the United States or who arrives in the United States may apply for asylum in accordance with INA § 208. 8 U.S.C.A. § 1158 (West 2009). A person seeking asylum must have a "well-founded fear" that he or she will suffer persecution on account of "race, religion, nationality, membership in a particular social group, or political opinion." *In re* Acosta, 19 I. & N. Dec. 211, 213 (1985) (citing 8 U.S.C. § 1101(a)(42)(A)).

[15] "A spouse or child (as defined in [INA] § 101(b)(1)(A), (B), (C), (D), or (E)) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien." 8 U.S.C.A. § 1158(b)(3) (West 2009).

[16] For immigration purposes, "child" is defined as an unmarried person under twenty-one years of age who is a child born in wedlock, a stepchild, legitimized, born out of wedlock, adopted, or classified as an immediate relative under 8 U.S.C.A. § 1151(b). 8 U.S.C.A. § 1101(b)(1) (West 2009).

[17] The statute specifically provides derivative claims for spouses and children of the principal applicant, but it makes no mention of parents of principal applicants, even when the principal applicant is a minor child. *See* 8 U.S.C.A. § 1158(b)(3) (West 2009).

[18] 8 U.S.C.A. § 1101(a)(42) (West 2009). Those applying for asylum have to do so within one year of arriving in the United States. 8 U.S.C.A. § 1158(a)(2)(C) (West 2009).

cannot or will not control making the parent unable or unwilling to "avail himself or herself of the persecution."[19] The persecution or well-founded fear of persecution must be based on one of the following five categories: race, religion, nationality, membership in a particular social group, or political opinion.[20]

Although one may be able to establish past persecution, or a well-founded fear of future persecution, it is generally difficult to establish a nexus between the persecution and one of the five protected categories.[21] This is especially true when it is a parent basing an asylum claim on a child's fear of persecution.[22] A few courts of appeals have shaped the definition of membership in a particular social group to provide relief to parents and protection to children.[23] However, these holdings are limited and not consistent among the circuits, thus not providing adequate protection to all children.[24]

Furthermore, outside the asylum context, three categories exist for granting legal immigrant status: family relationship,[25]

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[19] 8 U.S.C.A. § 1101(a)(42) (West 2009).

[20] *Id.*

[21] *See* Center for Gender and Refugees Studies, CGRS Advice – Female Genital Cutting Asylum Cases (Oct. 2007), *available at* http://cgrs.uchastings.edu/documents/cgrs/advisories/FGC_cases_CGRS_overview_advice.pdf.

[22] *Id.*

[23] *See, e.g.*, Abebe v. Gonzales, 432 F.3d 1037 (9th Cir. 2005) (en banc); Abay v. Ashcroft, 368 F.3d 634 (6th Cir. 2004).

[24] *Id.*

[25] 8 U.S.C.A. § 1153 (West 2009). Parents of children who qualify for asylum relief, but who do not themselves independently qualify for asylum relief, are faced with further disappointment as they are unlikely to gain relief under a "family sponsored immigrant" category. There are four preference categories for family sponsored immigrants: unmarried sons and daughters of citizens, spouses and unmarried sons and unmarried sons and unmarried daughters of permanent resident aliens, married sons and married daughters of permanent resident aliens, and brothers and sisters of citizens. 8 U.S.C.A. § 1153(a) (West 2009). In addition, spouses and minor children of U.S. citizens are "immediate relatives" outside the preference system. 8 U.S.C.A. § 1151(b)(E)(2)(A)(i) (West 2009). Parents of a U.S. citizen may also be immediate relatives entitled to be petitioned by their son or daughter, but only after the U.S. citizen child reaches the age of twenty-one. An individual granted asylum whose admission has not been terminated and who has been physically present in the United States for at least one year may apply to adjust his or her status to that of an LPR. 8 U.S.C.A. § 1159(a) (West 2009). Upon maintaining five years of LPR status, the individual is then entitled to apply for naturalization in order to gain U.S. citizenship. 8 U.S.C.A. § 1427(a) (West 2009).

employment-based, and diversity immigrant status.[26] As to family relationship, there are four family preference categories, none of which allows a child, defined as an unmarried person under twenty-one years of age,[27] to petition for a parent.[28] Since it is unrealistic for a minor child to remain unaccompanied in the United States, a child asylee whose parents do not qualify for asylum or other immigration benefits almost certainly ends up leaving the United States with her parents and returning to their home country, where they face persecution.[29]

II. DEALING WITH THE SHORTCOMINGS: CONFLICTING COURT OF APPEALS APPROACHES TO PARENTAL ASYLUM ELIGIBILITY

Since the INA does not expressly provide any relief for parents of asylee children, the BIA and the courts of appeals have developed various interpretations to afford relief [30] and

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[26] Both employment-based and diversity immigrant status categories are complex processes that are often beyond the reach of parents of asylee children and are beyond the scope of this Comment.

[27] 8 U.S.C.A. § 1151(b) (West 2009).

[28] 8 U.S.C.A. § 1153(a) (West 2009). A United States citizen under the age of twenty-one cannot confer legal status on his or her parents, nor can a LPR of any age. In addition, should the child become a U.S. citizen after five years of LPR status, the child would have to wait until they reached the age of twenty-one in order to petition for the parents to be granted the legal right to relocate to the United States as immediate relatives. Thus, even if a child is able to petition for a parent under one of the family-sponsored immigrant preference categories, she would still face being separated from her parent for up to six years, plus the time it takes to reach the age of twenty-one, as the child would need to gain LPR status and subsequently U.S. citizenship in order to petition for a family relative. The more tender-aged and vulnerable the asylee child, the longer she must wait to be joined with her parents. *See generally* Andres v. Holder, 312 F. App'x 905, 2009 WL 430437 (9th Cir. 2009) (addressing the issue of children of tender years but in the context of when a child witnesses a parent's persecution); Hernandez-Andres v. Gonzales, 496 F.3d 1042 (9th Cir. 2007).

[29] Alida Yvonne Lasker, *Solomon's Choice: The Case for Granting Derivative Asylum to Parents,* 32 BROOK. J. INT'L. L. 231, 253 (2006).

[30] Congress's enactment of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (§ 601(a)) provided an addition to the term "refugee" for immigration purposes. The Act added a sentence to the end of 8 U.S.C.A. § 1101(a)(42) that reads as follows:

> For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure *or for other resistance to a coercive population control program,* shall be deemed to have been persecuted on account of political opinion, and a person who has a well

looked to alternative legal strategies[31] in order to protect children. Unfortunately, this piecemeal system has resulted in contradictory approaches among the circuits as to a parent's asylum eligibility in such circumstances.[32] Circuits are in conflict over whether a child's fear of persecution can establish eligibility for a parent's asylum claim. This is particularly true in cases dealing with FGM; as the practice is directed mainly at children, parents are unable to claim direct persecution.[33] Courts of appeals are bound by long-standing U.S. Supreme Court precedent to defer to a reasonable BIA administrative interpretation of the INA statute.[34] But the BIA, as well as immigration courts, fails to provide concrete guidance regarding whether a parent qualifies for asylum relief when her child would be subjected to persecution were they to return to their home country.[35] The BIA has not yet directly addressed the parent-child derivative issue. In fact, in *Benyamin v.*

> founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such *failure, refusal, or resistance shall* be deemed to have a well founded fear of persecution on account of political opinion.

8 U.S.C.A. § 1101(a)(42) (West 2009) (emphasis added).

> The BIA then interpreted this new language to apply to spouses of individuals who have been forced to abort pregnancy or undergo involuntary sterilization or who have been or fear they will be persecuted for failure to undergo abortion or sterilization procedures, if the spouse can show eligibility based on her experience or fears. *See In re* J-S, 24 I. & N. Dec. 520, 542 (BIA 2008) (overruling the decisions in *In re* C-Y-Z, 21 I. & N. Dec. 915 (BIA 1997); *In re* S-L-L, 24 I. & N. Dec. 1 (BIA 2006) (rejecting the per-se joint spousal, eligibility rule, and finding that a spouse of an individual who suffered or will suffer abortion or sterilization can qualify for asylum based on her fears and experiences with coercive family-planning policies).

[31] *See* Tchoukhrova v. Gonzales, 430 F.3d 1222, 1225 (9th Cir. 2005) (holding that the applicant established an asylum claim based on the harm suffered by her disabled child by inventing the doctrine of "persecution renvoi," which establishes that a parent may file as the principal applicant and use the harms suffered by the child to support the parent's claim).

[32] *Compare* Abay v. Ashcroft, 368 F.3d 634, 642 (6th Cir. 2004) (holding mother eligible for asylum), *with In re* A-K-, 24 I. & N. Dec. 275, 277 (BIA 2007) (holding mother ineligible on ground she could choose to leave her U.S. citizen child behind in the United States), *and* Olowo v. Ashcroft, 368 F.3d 701 (7th Cir. 2004) (holding mother ineligible).

[33] *See* Benyamin v. Holder, 579 F.3d 970 (9th Cir. 2009); Abay v. Ashcroft, 368 F.3d 634 (6th Cir. 2004); Olowo v. Ashcroft, 368 F.3d 692 (7th Cir. 2004).

[34] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).

[35] 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, 490-91 (referring to BIA decisions *In re Oluloro, In re Adeniji,* and *In re Dibba*).

Holder,[36] the Ninth Circuit specifically remanded the case to the BIA to consider whether a respondent derivatively qualifies based on the persecution suffered by the child. However, the BIA has yet to address this question.

In their attempt to resolve the parent-child derivative issue, the courts of appeals have provided three methods of relief, none of which is specifically prescribed by statute. These include 1) basing the claim on the psychological harm a parent would suffer from witnessing her child's persecution,[37] 2) establishing relief under the theory of constructive deportation,[38] and 3) granting eligibility based on the persecution a parent would directly face for attempting to protect her child.[39] While demonstrating the courts' valiant efforts, these methods have unfortunately failed to put proper emphasis on protecting the child.[40]

A. ESTABLISHING AN INDEPENDENT ASYLUM CLAIM: IMPUTING A CHILD'S FEAR TO A PARENT

The legal strategy of imputing the child's fear of persecution to her parent does not establish the parent as a derivative asylum applicant. Rather, it provides the parent with an independent ground for asylum eligibility. The Sixth

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[36] *Benyamin*, 579 F.3d 970.

[37] *See Abay*, 368 F.3d at 642.

[38] *See, e.g., Benyamin*, 579 F.3d at 974; *Olowo*, 368 F.3d at 701; Oforji v. Ashcroft, 354 F.3d 609, 616 (7th Cir. 2003).

[39] *See Abebe*, 432 F.3d at 1043. The Ninth Circuit remanded the case back to the BIA and the BIA remanded the case to the Immigration Court of Portland, Oregon. The immigration judge held that the parent would face extreme harassment, threats, possible physical violence, ostracism, discrimination, and severe economic deprivation in preventing daughter's FGM, which provided grounds for parent's asylum claim. *Id. See In re* Anon (A# redacted) (Portland, Or., Immigration Court, Dec. 19, 2007) (on file with the Center for Gender & Refugee Studies, Univ. of Cal., Hastings); *Abay,* 368 F.3d at 640 (holding that ostracism may be type of persecution); *Persecution of Family Members*, Memorandum from the Office of International Affairs, Asylum Division, June 30, 1997, at 1 ("harm to an applicant's family member may constitute persecution to the applicant."); *In re Chen*, 20 I. & N. Dec. 16 (BIA 1989) (where the BIA granted humanitarian asylum based in part on past harm to the applicant's father); *see generally* Kimberly Sowders Blizzard, *A Parent's Predicament: Theories of Relief for Deportable Parents of Children Who Face Female Genital Mutilation,* 91 CORNELL L. REV. 899, 904 (2006) (discussing theories for relief for parents whose children face FGM).

[40] Alida Yvonne Lasker, *Solomon's Choice: The Case for Granting Derivative Asylum to Parents,* 32 BROOK. J. INT'L. L. 231, 253 (2006).

Circuit addressed this issue in *Abay v. Ashcroft*.[41] There, a mother petitioned for asylum relief on the basis of her minor daughter's fear of FGM in their native country of Ethiopia.[42] The issue before the court was whether the mother could "seek asylum in her own right based on a fear that her child" would be subjected to FGM.[43] The mother acknowledged that she did not have an express statutory right to derivative asylum based on her child's asylee status, but instead posited that she was eligible in her own right based on her fear that her daughter would be persecuted.[44] The Sixth Circuit recognized that a parent is independently eligible for asylum if the parent can show a "well-founded fear" of the persecution of a family member.[45] However, the Sixth Circuit declined to address whether parents are eligible for derivative status.[46] Instead, the court found that a parent's fear of being unable to prevent – as well as having to witness – her child's mutilation constituted persecution.[47] The *Abay* court granted the mother asylum relief, holding that the type of psychological persecution she feared was legitimate and made asylum relief appropriate.[48]

It has been argued that *Abay* resolves the child-parent derivative asylum issue and should be adopted by other circuits and the BIA.[49] However, the circuits remain divided on what constitutes persecution. Thus, the *Abay* decision does not guarantee that in every instance of child asylum eligibility, the child's parent will be granted asylum relief.[50]

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[41] *Abay*, 368 F.3d at 642.

[42] *Id.* at 640-41.

[43] *Id.*

[44] *Id.*

[45] *Id.* at 642.

[46] *Id.* at 641.

[47] *Id.* at 642.

[48] *Id.* at 641-42.

[49] *See* Marcelle Rice, *Protecting Parents: Why Mothers and Fathers Who Oppose Female Genital Cutting Qualify for Asylum,* Immigration Briefings (Nov. 2004).

[50] *See* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 171 (Paul T. Lufkin ed., Refugee Law Center 1999) (quoting United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status §51 (1988)). *Compare* Fisher v. INS, 79 F.3d 955, 961 (9th Cir. 1996) (defining persecution as the "infliction of suffering or harm upon those who differ . . . in a way regarded as offensive"), *with* Xie v. INS, 434 F.3d, 136, 143 (2d Cir. 2006). *See also* Alida Yvonne Lasker, *Solomon's Choice: The Case for Granting Derivative Asylum to Parents,* 32 BROOK. J. INT'L. L. 231, 253 (2006) ("*Abay* theory fails to put proper emphasis on the child, and as a result, may fail to protect the child.").

Other circuits are unlikely to follow the reasoning set out in *Abay* because their definitions of persecution do not extend to mental or psychological harm.[51] In addition, the *Abay* analysis fails to properly consider the best interests of the child. Under the *Abay* approach, if a parent cannot show that the mental harm she would suffer amounts to persecution, the parent still must decide whether to abandon her child or take her to a country in which the child would be subject to persecution.[52] Although an asylum application is generally based on the individual applicant, the unique parent-child relationship means that a decision not to provide relief to the parent directly affects the child, who would consequently face de facto deportation. Therefore, it is necessary to provide relief to parents that also takes into account the best interest of the child.

The BIA has also identified two additional considerations in determining whether an individual is a member of a particular social group: particularity and social visibility of the social group.[53] In *Abay*, the particular social group consisted of mothers who are unable to prevent their daughters from being subjected to FGM and who thus fear experiencing their daughters' FGM.[54] Focusing on the psychological harm to the parent, under *Abay,* a parent whose child fears persecution in the parent's home country may automatically meet the well-founded fear of persecution requirement. The court in *Abay* concluded that the mother there met the definition of refugee based on her fear of being unable to prevent her daughter's subjection to FGM and her fear of experiencing the cutting of her daughter's genitalia. Consequently, the *Abay* court reversed the BIA's decision that the mother was ineligible for asylum relief.

The primary problem with asserting an independent asylum claim on behalf of the parent based on future

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[51] *See* Niang v. Gonzales, 492 F.3d 505 (4th Cir. 2007) (holding that psychological harm without accompanying physical harm is not enough to establish persecution).

[52] Alida Yvonne Lasker, *Solomon's Choice: The Case for Granting Derivative Asylum to Parents,* 32 BROOK. J. INT'L. L. 231, 253 (2006).

[53] *See In re* C-A-, 23 I. & N. Dec. 951, 959 (BIA 2006) (explaining that a particular social group needs to be socially visible); *In re* S-E-G-, 24 I. & N. Dec. 579, 584 (BIA 2008) (explaining that a particular social group also needs be sufficiently particular).

[54] Abay v. Ashcroft, 368 F.3d 634, 642 (6th Cir. 2004).

psychological harm is establishing a "nexus" between the psychological harm and a protected group.[55] In a child asylum case, particularly an FGM case, the child is generally claiming persecution due to her membership in a particular social group.[56] The immutable characteristics that define the group must be unchangeable or so fundamental to the individual's identity that she should not be forced to change.[57] However, the group cannot be significantly defined solely by the persecution suffered or feared.[58] A parent claiming asylum based on a child's fear of persecution would have particular difficulty since not all circuits recognize psychological harm as persecution. In addition, even if the court recognizes such a form of persecution, the parent must establish that the psychological harm suffered or feared is the direct result of her membership in a particular social group, something that is exceptionally difficult given the strict restrictions on the definition of a "social group."

The Sixth Circuit has specifically recognized a particular social group, allowing asylum protection to parents based on the psychological fear of the persecution of their children. However, parents of claimants applying for asylum outside the Sixth Circuit may be unable to establish an asylum claim independent of the persecution a child fears if they are unable to prove the persecution is due to one of the five protected categories.[59]

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[55] Under the "nexus" requirement, an individual's fear of persecution needs to be reasonably related to her race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C.A. § 1101(a)(42) (West 2009).

[56] *See In re Kasinga*, 21 I. & N. Dec. 357, 357 (BIA 1996) (defining the particular social group as "[y]oung women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice").

[57] *See In re* C-A-, 23 I. & N. Dec. 951, 958 (BIA 2006); Center for Gender and Refugees Studies, CGRS Advice – Female Genital Cutting Asylum Cases (Oct. 2007) (stating that "victims of female genital cutting" is an improper way to define a social group), *available at* http://cgrs.uchastings.edu/documents/cgrs/advisories/FGC_cases_CGRS_overview_advice.pdf.

[58] Center for Gender and Refugees Studies, CGRS Advice – Female Genital Cutting Asylum Cases (Oct. 2007) (stating that "victims of female genital cutting" is an improper way to define a social group), *available at* http://cgrs.uchastings.edu/documents/cgrs/advisories/FGC_cases_CGRS_overview_advice.pdf.

[59] *Id.*

B. AN ALTERNATIVE AVENUE: THE CONSTRUCTIVE DEPORTATION THEORY

In order to better protect the interests of children, courts of appeals have turned to other means of granting relief to parents of asylee children.[60] In *Benyamin v. Holder*, a father applied for asylum relief on the grounds that his minor daughter had faced past persecution in the form of FGM in Indonesia and that he feared his other daughter would be subjected to FGM should the family return to Indonesia.[61] The Ninth Circuit recognized that the father's application for asylum raised a "unique concern – the effect that the BIA's decision to deny relief to Benyamin [would] have on his alien minor children."[62] The court then held that the father's asylum application raised the issue of constructive deportation of his daughters.[63] Citing the court's earlier decision in *Abebe v. Gonzales*, the court reasoned that, "[b]ecause a minor alien has no legal right to remain in the United States, 'deportation of [her] parents would result in [her] being constructively deported.'"[64] However, the Ninth Circuit remanded the case back to the BIA to consider the daughter's persecution in its own right as a potential ground for granting relief to the father, thus declining to extend the theory of constructive deportation.[65]

Likewise, the Seventh Circuit considered the constructive deportation theory in addressing the problems associated with children returning to a country in which they fear persecution.[66] In *Oforji v. Ashcroft*, the Seventh Circuit held that a claim for parental asylum basing eligibility on the potential harm to the applicant's child is cognizable *only* when the applicant's child is subject to "constructive deportation"

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[60] *See* Benyamin v. Holder, 579 F.3d 970 (9th Cir. 2009) (remanding case to BIA to consider whether respondent derivatively qualifies based on the persecution suffered by the child).

[61] *Id.* at 972.

[62] *Id.* at 974.

[63] *Id.* (quoting Abebe v. Gonzales, 432 F.3d 1037, 1048-49 (9th Cir. 2005) (en banc) (Tallman, J., dissenting in part and concurring in part)).

[64] *Id.* at 974.

[65] *Id.* at 978.

[66] Oforji v. Ashcroft, 354 F.3d 609, 618 (7th Cir. 2003) (finding constructive deportation theory did not support respondent's claim for withholding of removal under the United Nations Convention Against Torture).

along with the applicant.[67] However, under Seventh Circuit precedent, a child is deemed to be "constructively deported" only if she has no other legal right to remain in the United States.[68] In *Oforji*, the mother asserted relief based on the FGM her two U.S. citizen daughters would face should she be forced to relocate her family to Nigeria.[69] The Seventh Circuit, applying the constructive deportation doctrine, reaffirmed the BIA's denial of asylum relief, holding that the mother failed to show that the daughters would be constructively deported, given their legal right to remain in the United States as citizens.

The Seventh Circuit also addressed the theory of constructive deportation in *Olowo v. Ashcroft*.[70] In *Olowo*, both of Ms. Olowo's daughters feared FGM persecution in their mother's home country.[71] The court noted that, not only were both daughters legal permanent residents of the United States, but so was their father. Consequently, the court recognized that more than just the status of the child is relevant in determining whether the constructive deportation theory applies.[72] The court held that, since there was a parent available to care for the daughters in the United States, and since the daughters themselves also had a legal right to remain in the country, they were under no compulsion to leave and would not be constructively deported.[73]

The result of the varied appellate decisions is that "[t]he 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."[74] However, in the FGM context, "because an alien

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[67] *Id.* at 615-16.

[68] *Id.* at 616.

[69] *Id.* at 612.

[70] Olowo v. Ashcroft, 368 F.3d 692, 701 (7th Cir. 2004).

[71] *Id.*

[72] *Id.*

[73] *Id.* The argument could be made that the father could then petition for the spouse as an immediate relative, thus providing relief for the mother who would otherwise not have a legal right to remain in the United States. However, this argument fails to take into account the fact that the mother and father of the children never were married, which entirely eliminates that avenue of relief for the mother.

[74] Kimberly Sowders Blizzard, *A Parent's Predicament: Theories of Relief for Deportable Parents of Children Who Face Female Genital Mutilation,* 91 CORNELL L. REV. 899, 900 (2006).

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."[75] The only way to get around this limitation is to have the parent, rather than the child, apply for asylum relief based on the parent's fear of the child's persecution. By adopting this legal strategy, the child will not have established a legal right to remain in the United States and the parent can thus claim constructive deportation of the child as a means of relief. However, such a complicated legal strategy is likely to be impractical and inaccessible for most of those who flee to the United States in the hope of obtaining asylum relief. Furthermore, since the theory of constructive deportation would not apply to children who can legally remain in the United States, yet would still result in the deportation of the child's parent, the theory of constructive deportation ultimately fails to provide adequate protection to qualifying children.

C. ATTEMPTS TO PROTECT U.S. CITIZEN AND LPR CHILDREN: ESTABLISHING A "WELL-FOUNDED FEAR" BASED ON PERSECUTION FOR PROTECTING A CHILD

Although children who have a legal right to remain in the United States do not fall under the constructive deportation theory, the reality is that such children nevertheless face de facto deportation when their parents are deemed ineligible for asylum relief.[76] Unlike constructive deportation, de facto deportation is not premised on an imputed legal effect, but instead is based on fact and reality. Regardless of whether a child has a legal right to remain in the United States, when a parent is not granted relief and is subsequently ordered removed, the child will most likely accompany the parent to a country in which the child fears persecution. Therefore, it is necessary that U.S. asylum law take into account the threat de facto deportation poses for children, particularly U.S. citizen and LPR children.

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[75] *Id.*

[76] The term "constructive" refers to something that is legally imputed or has an effect in law though not necessarily in fact. BLACK'S LAW DICTIONARY 138 (West 2001). The term "de facto" refers to something that is actual and existing in fact that has effect even though not formally or legally recognized. *Id.* at 187.

The Ninth Circuit in *Abebe v. Gonzales* recognized the need to protect U.S. citizen children who would be forced to leave the country with parents who could not qualify for asylum.[77] In *Abebe*, a mother and father were claiming asylum based on the persecution their U.S. citizen daughter would face if the parents were forced to relocate their family to Ethiopia.[78] The Ninth Circuit found that there was sufficient evidence to show that the threat of FGM of the daughter exceeded the threshold required to establish asylum eligibility.[79] Therefore, the court remanded the case to the BIA to address whether parents of a U.S. citizen child who are likely to face persecution in the parents' home country qualify for asylum relief.[80] The BIA then remanded the case to the immigration judge, who concluded that a parent could establish a well-founded fear of persecution based on the harm she could suffer from attempting to protect her U.S. citizen child from persecution.[81] Although noting that mere discrimination is generally not enough,[82] the immigration judge held that discrimination *in combination with other harms* may be sufficient to establish persecution.[83] The judge found that the child's parents would face extreme harassment, threats, possible physical violence, ostracism, discrimination, and severe economic deprivation

[77] Abebe v. Gonzales, 432 F.3d 1037, 1043 (9th Cir. 2005) (en banc) (Ninth Circuit remanded the case back to the BIA, which remanded to the Immigration Court of Portland, Or.). The facts and holding pertaining to the extent of persecution the parent would face in attempting to protect the child from persecution were provided in the unpublished decision of the immigration judge. *In re* Anon (A# redacted) (Portland, Or., Immigration Court, Dec. 19, 2007) (on file with the Center for Gender & Refugee Studies, Univ. of Cal., Hastings).

[78] *Abebe*, 432 F.3d at 1043.

[79] *Id.*

[80] *Id.*

[81] *In re* Anon (A# redacted) (Portland, Or., Immigration Court, Dec. 19, 2007) (on file with the Center for Gender & Refugee Studies, Univ. of Cal., Hastings) (addressing issue of whether a parent of a U.S. citizen child likely to face persecution in the parent's home country is eligible for asylum that was remanded in *Abebe* to the BIA and then to the IJ).

[82] *Id.* (*citing* Fisher v. INS, 79 F.3d 955, 962 (9th Cir. 1996)).

[83] *In re* Anon (A# redacted) (Portland, Or., Immigration Court, Dec. 19, 2007) (on file with the Center for Gender & Refugee Studies, Univ. of Cal., Hastings) (*citing* Krotova v. Gonzales, 416 F.3d 1080, 1087 (9th Cir. 2004) (finding anti-Semitic harassment, sustained economic and social discrimination, and violence against Russian Jew and her family compelled finding of persecution) and Korablina v. INS, 158 F.3d 1038, 1044-45 (9th Cir. 1998) (holding discrimination, harassment, and violence against Ukranian Jew can constitute persecution)).

should they attempt to prevent their daughter from undergoing FGM.[84] The judge also found that the child's parents had established the existence of a practice of persecution in Ethiopia against families who would not allow their daughters to undergo FGM.[85]

Although the decision in *Abebe* attempts to provide practical protection to U.S. citizen and LPR children who would face persecution in their parents' home country, the analysis is inconsistent with that of other the circuits and thus does not provide *practical* protection to all children. In addition, the decision in *Abebe* highlights the inherent limitation of the remedy, since the court focuses primarily on the parent neglecting to take into account the harms that the child would face, given the unique circumstances of the parent-child relationship. Furthermore, although the decision in *Abebe* provides relief, it is extremely limited because it is binding law only within the Ninth Circuit.

As illustrated by *Abay*, *Benyamin*, and *Abebe*, there are serious pitfalls in a system that attempts to resolve the child-parent asylum issue entirely through adjudicative interpretation of current asylum law. It is unclear whether the Supreme Court will ever intervene to resolve the conflicts associated with the child-parent derivative asylum issue. Moreover, even if the Supreme Court does weigh in, it is not apparent that any resolution under the current statutes could provide comprehensive protection for refugee children. As a result, it is necessary to look to legislative changes in order to provide for the practical protection of children who would suffer persecution should their parents not be granted asylum relief.

III. POLICY CONCERNS FAVORING LEGISLATIVE CHANGE: FAMILY UNITY AND PROVIDING PRACTICAL PROTECTION FOR CHILD REFUGEES

To inform the discussion of legislative change to existing asylum law, it is first necessary to examine the policy concerns that favor a legislative resolution. Current U.S. immigration law regarding the child-parent derivative issue runs contrary

[84] *In re* Anon (A# redacted) (Portland, Or., Immigration Court, Dec. 19, 2007) (on file with the Center for Gender & Refugee Studies, Univ. of Cal., Hastings).

[85] *Id.*

to the principles of family unity and the protection of child refugees. When a child remains in the United States without her parents or accompanies her parents outside the United States, the child is not being protected.

A. FAMILY UNITY

The parent's option of leaving a child behind in the United States unaccompanied runs contrary to the goals of immigration law and conflicts with a body of constitutional and international human-rights laws aimed at protecting family unity.[86] In *Stanley v. Illinois*, the Supreme Court emphasized the importance of family and the significance of keeping families together.[87] Current immigration law regarding the child-parent derivative asylum runs contrary to such principles. A child who is granted asylum or who is a U.S. citizen or LPR is forced to remain separated from her parent if she wishes to stay in the United States and receive the benefits associated with her legal status.[88]

Although the word "family" is not specifically mentioned in the United States Constitution, the Supreme Court has consistently recognized the implicit value of family integrity and extended a variety of powerful protections to the parent-child relationship.[89] In doing so, the Court has stressed

[86] One of immigration law's principal aims is to reunite families. This is clearly illustrated by the availability of waivers of inadmissibility for "humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." 8 U.S.C.A. § 1255(h)(2)(B) (West 2009); *see also* The Universal Declaration of Human Rights Article 16(3) (1948), *available at* http://www.un.org/en/documents/udhr ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.").

[87] Stanley v. Illinois, 405 U.S. 645, 651 (1972).

[88] Should an asylee child leave, going back to the home country with her parent could result in rescission of the child's asylum status because it would provide evidence that the child was not "unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution . . ." 8 U.S.C.A. § 1101(a)(42)(A) (West 2009).

[89] *See* Moore v. City of E. Cleveland, 431 U.S. 494, 503-04 (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."). The Supreme Court has also recognized among the liberties protected by the Due Process Clause of the Constitution is the right of parents to "establish a home and bring up children, [a right] essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

parents' essential role in raising their children.[90] This includes deciding where a child is domiciled, which is generally linked to the domicile of the child's parents.[91] By placing primary responsibility on the parent, the Court has strictly limited the state's role in the family unit.[92] However, when it comes to immigration law, the government plays a much more direct role in deciding where a child and parent should live, making the child's interest in an immigration context "much less prominent."[93]

The direct role taken by the government in immigration cases is illustrated in cases concerning child-parent derivative asylum. By either granting or denying relief to the parent on the basis of her child's fear of persecution, the courts ultimately decide where the child will be domiciled. A parent who is not granted asylum relief predicated on her child's fear of persecution will either leave her child behind in the United States or return her child to a country in which the child fears persecution.

In the event a child who would otherwise face persecution in her parent's home country remains behind in the United States, conflicts with the principle of family integrity arise.[94] A child has no right to confer legal status on her parent for immigration purposes.[95] The parent must either leave the United States or remain an undocumented immigrant, a decision that has harsh ramifications.[96] This is a surprising result, given that two high-priority important policy concerns

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[90] Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (stating that it is "cardinal . . . that the custody, care and nurture of the child reside first in the parents").

[91] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48 (1989) ("Since most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents.").

[92] *See* Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 688 (2001) (speaking to the parameters set up by the United States Constitution to limit the states' ability to define and regulate family rights and obligations).

[93] David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1179 (2006).

[94] *Id.*

[95] In order to confer status an individual must be an LPR or U.S. citizen and must be over the age of twenty-one. *See* 8 U.S.C.A. § 1151(b)(1)(E)(2)(A)(i) (West 2009) (dealing with immediate relatives); *see also* 8 U.S.C.A. § 1153(a) (West 2009) (dealing with the four family-sponsored immigration preference categories).

[96] 8 U.S.C.A. §1182(a) (West 2009) (excludable aliens); 8 U.S.C.A. § 1229a(a) (West 2009) (removal proceedings).

of U.S. immigration law are family unity and the protection of refugees.[97]

B. PRACTICAL PROTECTION FOR CHILDREN

Current immigration law not only raises policy concerns about family unity, it also makes it difficult to provide practical protection to an asylee, LPR, or U.S. citizen child. Policy issues associated with providing meaningful protection to children encompass general concerns about unaccompanied minors living alone in the United States, a child's subjection to persecution in her parents' home country, and the psychological effects on a child of either remaining in the United States or moving to her parents' home country.

Should a parent be denied asylum relief, resulting in a child remaining alone in the United States, obvious policy concerns arise.[98] There is a wealth of scholarship regarding unaccompanied minors that provides insight into the shortfalls of this aspect of our immigration system.[99] Reports of children who remain behind in the United States without their parents have shown that such circumstances lead to severe mental trauma, negative changes in school performance, behavioral problems, and feelings of abandonment and resentment suffered by the children.[100] Children who remain unaccompanied are likely to lack the emotional, financial and psychological support needed to maintain stability and succeed in life.[101]

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[97] *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972); *see also* OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER OF REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 43 (1992).

[98] *See generally* Jacqueline Bhabha & Susan Schmidt, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.*, THE JOURNAL OF THE HISTORY OF CHILDHOOD AND YOUTH, VOL. 1, NO. 1, 126-38 (2008).

[99] *See* Jacqueline Bhabha, *More Than Their Share of Sorrows: International Migration Law and the Rights of Children*, 22 ST. LOUIS U. PUB. L. REV. 253 (2003); Guy S. Goodwin-Gill, *Unaccompanied Refugee Minors: The Role and Place of International Law in the Pursuit of Durable Solutions*, 3 INT'L J. CHILD. RTS. 405, 410 (1995); Jacqueline Bhabha & Wendy A. Young, *Through a Child's Eyes: Protecting the Most Vulnerable Asylum Seekers*, 75 INTERPRETER RELEASES 757, 760 (1998).

[100] *See* Nina Bernstein, *A Mother Deported and a Child Left Behind*, N.Y. TIMES, Nov. 24, 2004, at A1 (describing the accounts of several children who remained in the United States after one or both of their parents were deported).

[101] *See* Jacqueline Hagan, *U.S. Deportation Policy, Family Separation, and Circular Migration*, 42 INT'L MIGRATION REV. 64 (2008) (providing a look into the difficulties faced by families separated by removal).

Furthermore, children who remain in the United States without their parents and without alternative means of support are immediately forced to turn to the government for aid.[102] Separating the child and parent thus shifts the burden of custody to the relevant state's foster-care system and "ultimately onto the shoulders of American taxpayers."[103] This outcome "runs counter to international and domestic child welfare principles regarding best interests of the child."[104]

In addition, studies have shown that children in the foster-care system are susceptible to emotional and behavioral disturbances as well as developmental and mental-health problems.[105] Children separated from their parents when relocating to the United States are more prone to experience difficulty in school and are more likely to be behind other children their age in their educational development.[106] A child's separation from her parents can also lead to negative psychological effects for both the child and parent, with long-term separation commonly leading to severe depression and anxiety.[107]

A parent who decides to remain in the United States with her child but without valid immigration status becomes an undocumented alien.[108] She would not be able to avail herself of

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[102] Center for Gender and Refugees Studies, CGRS Advice – Female Genital Cutting Asylum Cases (Oct. 2007), *available at* http://cgrs.uchastings.edu/documents/cgrs/advisories/FGC_cases_CGRS_overview_advice.pdf.

[103] *Id.*

[104] *Id.*

[105] *See* June M. Clausen, Ph.D., John Landsverk, Ph.D., William Ganger, M.A., David Chadwick, M.D., & Alan Litrownik, Ph.D., *Mental Health Problems of Children in Foster Care*, JOURNAL OF CHILD AND FAMILY STUDIES, VOL. 7, NO. 3, 283-296 (Human Sciences Press 1998); Hewitt B. Clark, Ph.D., Barbara Lee, Ph.D., Mark E. Prange, Ph.D., & Beth A. McDonald, M.A., *Children Lost Within the Foster Care System: Can Wraparound Service Strategies Improve Placement Outcomes?*, JOURNAL OF CHILD AND FAMILY STUDIES, VOL. 5, NO. 1, 39-54 (Human Sciences Press 1996).

[106] T.H. Gindling & Susan Poggio, *Family Separation and the Educational Success of Immigrant Children*, Univ. of Md., Co. of Baltimore Brief No. 7 (Mar. 2009).

[107] *Id.*

[108] If the parent has applied for asylum and been denied, she will automatically be placed in removal proceedings. During removal proceedings she can reassert her asylum claim. The issue of remaining undocumented arises when a parent has not applied independently for asylum relief and been denied because, if she had applied, she would be ordered removed from the United States. There are harsh ramifications for individuals who remain undocumented in the United States, given the negative sentiment toward undocumented aliens. *See* 8 U.S.C.A. § 1158(c)(3) (West 2009).

the benefits associated with residing in the United States legally and she would live in fear of being arrested and forced to leave.[109] Should the parent remain in the United States undocumented for more than one year, the parent would be subject to a ten-year bar from re-entering the country.[110] The parent would run the risk of being apprehended by Immigration Customs Enforcement and ordered removed from the United States.[111] Such risks result in extreme hardships to the child forced either to flee with her parent or to remain alone in the United States.[112]

In the alternative, in order to maintain family integrity, a parent not eligible for asylum relief based on her child's fear of persecution may choose to have the child accompany her back to their home country. Although this would guarantee family unity, it would subject the child to the very persecution that established her as a refugee in the first place. In the case of a country of origin that forces children to be subject to FGM, by taking the child to the parent's home country, the parent would subject the child to the threat of a practice recognized in the United States as a crime, persecution, and torture.[113] Some courts have even gone as far as to say that a parent who takes a child back to such a home country may be putting her legal custody of the child in jeopardy by endangering the child.[114] Yet it is hardly reasonable to expect that a family will voluntarily choose to break up the family unit and leave their asylee, U.S. citizen, or LPR child outside the intimately protected circle of her immediate relatives, even in order to protect the child from possible persecution. Nor is it necessarily desirable from a public policy standpoint to insist that families do so in order to protect their children from persecution, when research shows

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[109] *Id.*

[110] 8 U.S.C.A. § 1182(a)(9)(B)(i)(II) (West 2009). Should the parent remain in the United States with her child for more than 180 days, the parent would be subject to a three-year bar from entering the United States in the event she leaves the country and attempts to return. 8 U.S.C.A. § 1182(a)(9)(B)(i)(I) (West 2009).

[111] 8 U.S.C.A. § 1182(a)(7)(A)(i) (West 2009) (inadmissible and thus removable for not being in possession of a valid entry document).

[112] In removal proceedings the child could attempt to receive relief under Cancellation "B" for non-LPRs ordered removed; however the standard of hardship is exceptional—extremely unusual hardship—which is a very high standard to meet. *See* 8 U.S.C.A. § 1229b(b) (West 2009).

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

[114] *See* Olowo v. Ashcroft, 368 F.3d 692, 702-04 (7th Cir. 2004).

that separation from primary caregivers is not in the best interests of children.[115]

Forcing a U.S. citizen or LPR child to relocate with her parents amounts to a violation of the child's constitutionally protected right to live in the United States.[116] The argument has been made that a child who leaves for her parents' home country can then make the choice to return to the United States once she is older and thus not barred from enforcing a protected right.[117] However, a child who leaves with her parent to live in the parent's home country loses the benefits associated with her legal status for the period of time during which she lives outside the United States.[118] When the child is an LPR, extensive periods outside the United States can eventually lead to the presumption of abandonment of legal resident status.[119]

There are a variety of significant policy concerns directly relevant to the parent-child derivative asylum issue. Children who fear persecution in their home countries should be given the right to confer legal status onto their parents. Such a right would resolve the policy concerns of family unity and child protection. Since both of these concerns are fundamental to the life and future of the child, legislative attention to this issue is both necessary and urgent.

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[115] *See generally* Nina Bernstein, *A Mother Deported and a Child Left Behind*, N.Y. TIMES, Nov. 24, 2004, at A1 (describing the accounts of several children who remained in the United States after one or both of their parents were deported); June M. Clausen, Ph.D., John Landsverk, Ph.D., William Ganger, M.A., David Chadwick, M.D., & Alan Litrownik, Ph.D., *Mental Health Problems of Children in Foster Care*, JOURNAL OF CHILD AND FAMILY STUDIES, VOL. 7, NO. 3, 283-96 (Human Sciences Press 1998); Hewitt B. Clark, Ph.D., Barbara Lee, Ph.D., Mark E. Prange, Ph.D., & Beth A. McDonald, M.A., *Children Lost Within the Foster Care System: Can Wraparound Service Strategies Improve Placement Outcomes?*, JOURNAL OF CHILD AND FAMILY STUDIES, VOL. 5, NO. 1, 39-54 (Human Sciences Press 1996); T.H. Gindling & Susan Poggio, *Family Separation and the Educational Success of Immigrant Children*, Univ. of Md., Co. of Baltimore Brief No. 7 (Mar. 2009).

[116] *See* Acosta v. Gaffney, 558 F.2d 1153 (3d Cir. 1977).

[117] *See* Tischendorf v. Tischendorf, 321 N.W.2d 405 (Minn. 1982), *cert. denied*, 460 U.S. 1037 (1983) (noting that when a child objects to removal, the child's constitutional right to remain in the country does not prevent the child's removal to a foreign country by his custodial parent).

[118] *See generally* Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 41 (1988).

[119] A person might be found to have abandoned her status if she stays outside the United States for more than 365 days without getting a re-entry permit before leaving. *See* U.S. Dept. of State, Returning Resident Alien, http://travel.state.gov/visa/immigrants/info/info_1333.html (last visited Mar. 17, 2010).

IV. NECESSARY CHANGE FOR CHILDREN: PROPOSED LEGISLATION AND BIA ACTION

Given the policy concerns associated with parental derivative asylum and the inconsistency at the adjudicative level in allowing for asylum for parents of children who fear persecution, change is necessary in order to protect children. Change must come from both the legislature and the BIA in order to provide practical protection to asylee, U.S. citizen, and LPR children who fear persecution in their home countries. Otherwise, these children will continue to be subjected to de facto deportation and either separation from their parents or the persecution that awaits them back home.

A. A NARROW SOLUTION: AMENDING THE DERIVATIVE STATUTE

One way to address the policy concerns associated with the parental derivative asylum issue is for Congress to amend 8 U.S.C. § 1158(b)(3) to include parents as derivatives of a child's asylum application.[120] Such an amendment should establish a derivative asylum right for parents of asylee children under the age of twenty-one. The language of § 1158(b)(3)(A) should be amended as follows:

> A spouse, child (as defined in section 1101(b)(1) (A), (B), (C), (D), or (E) of this title), *or parent* of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.

There will likely be criticisms of any such proposal to grant derivative asylum to parents.[121] The fear of allowing a child to confer legal status to her parents arises from worries about increases in frivolous asylum claims.[122] In addition, it may be argued that an unscrupulous parent might take advantage of

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[120] 8 U.S.C.A. §1158(b)(3) (West 2009).

[121] *See generally* The Federation for American Immigration Reform, Anchor Babies: Part of the Immigration-Related American Lexicon, http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters4608 (last visited Mar. 17, 2010).

[122] *Id.*

her child's asylum claim for personal benefit.[123] Concededly, this could be the case when a parent does not have a genuine relationship with her child. Thus the parental derivative asylum statute should be supplemented to include language requiring the existence of a genuine parent-child relationship.[124] The proposed statutory language to supplement § 1158(b)(3) should read as follows:

> A parent must show a bona fide parent-child relationship with the child in order to qualify as a derivative asylee under § 1158(b)(3).[125]

Granting derivative asylum to parents will assure the protection of refugee children. Such a statutory change is feasible in the context of the very narrow slice of cases that would actually fall under the parent-derivative statute. In 2008, of the 12,187 affirmative asylum grants, only 1,505 were made to children under the age of seventeen.[126] This amounts to approximately twelve percent of the total affirmative asylum grants.[127] Of that twelve percent, it is highly unlikely that *all* of the children granted asylum had parents who wanted, but were not eligible for, asylum relief. Therefore, it is doubtful that providing derivative claims for parents will result in abuse or outrageously high numbers of asylum claims on the basis of parent-derivative eligibility.

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[123] *Id.*

[124] In the context of deriving status from a spouse, Congress responded to concerns about whether the relationship was genuine and not merely for immigration benefits by enacting legislation that deters individuals from filing claims based on a fraudulent marriage. 8 U.S.C.A. § 1186a (West 2009).

[125] Current law already defines a "bona fide parent-child relationship" as follows:

> The terms 'parent', 'father', or 'mother' mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection, except that, for purposes of paragraph (1)(F) (other than the second proviso therein) in the case of a child born out of wedlock described in paragraph (1)(D) (and not described in paragraph (1)(C)), the term 'parent' does not include the natural father of the child if the father has disappeared or abandoned or deserted the child or if the father has in writing irrevocably released the child for emigration and adoption.

8 U.S.C.A. § 1101(b)(2) (West 2009).

[126] Daniel C. Martin & Michael Hoefer, Department of Homeland Security, Office of Immigration Statistics, Annual Flow Report, Refugees and Asylees: 2008 (June 2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2008.pdf.

[127] *Id.*

Statutory change of current U.S. immigration law is also supported by expressed international views regarding parent derivative asylum. The United Nations High Commissioner for Refugees (UNHCR), the international authority on matters of refugee law, expressed its position on derivative asylum claims by stating that "family members/dependants of a recognized refugee may apply for derivative refugee status in accordance with their right to family unity."[128] Unlike the United States, the UNHCR considers spouses, unmarried children under the age of eighteen, parents or primary caregivers of a principal applicant who is under the age of eighteen, and minor siblings of a principal applicant who is under the age of eighteen, as all being eligible for derivative status.[129] Since one of the aims of U.S. refugee and asylum law is to comply with international law,[130] it appears contradictory that Congress would not include parents of child applicants as derivatives of their children in matters of asylum since the UNHCR has explicitly recognized such a right under international law. Congress should adopt statutory language providing parents with derivative asylum relief to bring the United States into conformity with international law.

Although providing parents with derivative asylum eligibility is arguably the most politically feasible option due to its very narrow application, such a resolution ultimately fails to provide comprehensive protection to all those vulnerable children who fear persecution in a country abroad. The proposed narrow revision to the current derivative asylum statute would fail to provide protection to U.S. citizen or LPR children who fear persecution in their parents' home countries, as these children are not in asylum proceedings and

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[128] UN High Commissioner for Refugees, Procedural Standards for Refugee Status Determination Under UNHCR's Mandate (Nov. 20, 2003), *available at* http://www.unhcr.org/refworld/docid/42d66dd84.html. Material in the Handbook is not controlling but is nevertheless useful to the extent that it provides one internationally recognized interpretation of the United Nations Protocol Relating to the Status of Refugees. *In re* Acosta, 19 I. & N. Dec. 211, 221 (1985).

[129] UN High Commissioner for Refugees, Procedural Standards for Refugee Status Determination Under UNHCR's Mandate (Nov. 20, 2003), *available at* http://www.unhcr.org/refworld/docid/42d66dd84.html.

[130] *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 437 (1987) ("Not only did Congress adopt the Protocol's standard in the statute, but there were also many statements indicating Congress' intent that the new statutory definition of 'refugee' be interpreted in conformance with the Protocol's definition.").

consequently could not by extension confer legal status upon their parents. Yet these children would still face de facto deportation should their parents not be eligible for independent asylum relief based on the children's fear of persecution in the parents' home countries.

Accordingly, one avenue of relief for U.S. citizen and LPR children is the approach taken by the Ninth Circuit in *Abebe*, which provided relief to a U.S. citizen child's parent by focusing on the parent's fear of the persecution she would face for attempting to protect her child.[131] However, the Ninth Circuit's and immigration judge's decisions in *Abebe* are neither binding on, nor consistent with, the decisions in other circuits or by the BIA. Furthermore, a U.S. citizen child could not rely on the constructive deportation theory to provide asylum relief for her parent.[132] Established legal precedent provides that children face constructive deportation only when they have no legal right to remain in the United States upon their parents' denial of asylum relief.[133] Because a U.S. citizen or LPR child would still retain the legal right to remain in the United States, the family could not obtain asylum relief for the parents under the constructive deportation theory.

B. A COMPREHENSIVE FIX: THE BIA MUST PROTECT U.S. CITIZEN AND LPR CHILDREN

Policy concerns associated with derivative asylum are not fully served merely by adding parents to the list of eligible derivatives under § 1158(b)(3).[134] Whether a child is an asylee, U.S. citizen, or LPR, if the parent is forced to leave the country, the child will almost certainly be forced to leave with her. Therefore, it is essential for the BIA to act to protect *all* minor children from being forced to relocate to countries in which they will live in fear persecution.

In order to prevent the de facto deportation of U.S. citizen and LPR children who fear persecution in their parents' home

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[131] Abebe v. Gonzalez, 432 F.3d 1037 (9th Cir. 2005) (en banc); *In re* Anon (A# redacted) (Portland, Or., Immigration Court, Dec. 19, 2007) (on file with the Center for Gender & Refugee Studies, Univ. of Cal., Hastings).

[132] *See* Olowo v. Ashcroft, 368 F.3d 692, 701 (7th Cir. 2004); Oforji v. Ashcroft, 354 F.3d 609, 615 (7th Cir. 2003).

[133] *Olowo*, 368 F.3d at 701; *Oforji*, 354 F.3d at 615.

[134] 8 U.S.C.A. § 1158(b)(3) (West 2009).

countries, the BIA should issue a memorandum addressing the necessary standards for granting relief to parents of U.S. citizen and LPR children. For guidance in issuing this memorandum, the BIA should turn to the decisions in *Abay* and *Abebe* to develop the criteria outlining what a parent must show to establish an independent asylum claim premised on her child's fear of persecution.[135] The BIA should allow a parent to establish an independent claim for asylum relief based on a child's fear of persecution in either of two ways: (1) if the parent shows she would likely suffer physical harm from attempting to protect her child from persecution, or (2) if the parent shows she would likely suffer psychological harm by being forced to witness the mutilation or persecution of her child.

An individualized assessment based on the proposed revised BIA standards for parents of U.S. citizen and LPR children is consistent with immigration proceedings as they currently operate. By issuing such a memorandum, the BIA would provide clarity to the courts and alleviate the concerns associated with U.S. citizen and LPR children who fear persecution in their parents' home countries.[136] Although *Abebe* already speaks to such relief for U.S. citizen and LPR children, the holding is limited to only one circuit. Furthermore, the circuits remain inconsistent on the issue of asylum relief for parents based on their children's fear of persecution, with some providing various levels of protection, and some providing none at all. Since the BIA has yet to address the impact of de facto deportation on U.S. citizen and LPR children, and in light of the potentially dangerous consequences such children face, it is urgent that the BIA swiftly issue a memorandum covering all immigration cases nationwide.

CONCLUSION

The goal of protecting refugee children is not being served

[135] *See* Abay v. Ashcroft, 368 F.3d 634 (6th Cir. 2004); *see also* Abay v. Gonzales, 432 F.3d 1037 (9th Cir. 2005); *In re* Anon (A# redacted) (Portland, Or., Immigration Court, Dec. 19, 2007) (on file with the Center for Gender & Refugee Studies, Univ. of Cal., Hastings).

[136] The concerns here referred to are those of family unity and protection of the child, which were addressed in Part II of this Comment.

by current U.S. immigration law concerning asylum relief. A child who fears mutilation and other forms of persecution in her home country is currently subject to de facto deportation in the event that her parent cannot establish an independent asylum claim. As a result, parents are being forced to choose between leaving their children behind in the United States and taking their children to places where persecution awaits.

Given this stark reality, changes to current U.S. asylum law are both urgent and necessary. First, in order to ensure practical protection for asylee children, Congress should amend the derivative statute to include parents as derivative asylees. Such a statutory change will immediately provide practical protection to asylee children. Second, the BIA should issue a memorandum that addresses the concerns associated with U.S. citizen and LPR children who fear persecution in their parents' home countries. The memorandum should state that a parent can establish an independent right to asylum based on either the psychological harm she would likely face by witnessing her child's persecution or the physical harm she would likely suffer by attempting to protect her child from persecution.

Enacting each of these proposals would promote long-standing, deeply held, U.S. constitutional and public-policy principles favoring family unity and integrity. Both the language and the practical effect of U.S. asylum law must be fixed in order to prevent any mother from again being forced to make the devastating decision to take her son or daughter back to a place where the family will live in fear of mutilation and persecution.

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