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Toward a Compassionate Solution: The UNHCR Guidance Note and Asylum for Parents of Female Genital Mutilation Vulnerable Children

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TOWARD A COMPASSIONATE SOLUTION:
THE UNHCR GUIDANCE NOTE
AND ASYLUM FOR PARENTS OF
FEMALE GENITAL MUTILATION
VULNERABLE CHILDREN

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ABSTRACT

On August 26, 2009, the United States Court of Appeals for the Fifth Circuit handed down its decision in Kane v. Holder\(^1\) denying a father’s petition for withholding of removal despite the threat of FGM to his minor daughter. As one ground of relief, the father, Kane, advanced a principal claim because he would be subject to persecution: “(1) as a member of a social group of ‘parents of minor daughters of the Fulani Tribe who have not had FGM, and who oppose the practice,’ (2) as a result of his political and religious opposition to FGM, and (3) by having to endure his daughters’ FGM.”\(^2\) At the eleventh hour before judgment, Kane submitted a letter pursuant to Federal Rule of Appellate Procedure 28(j)\(^3\) informing the court that the United Nations High Commissioner for Refugees (“UNCHR”) had recently issued a UNCHR Guidance Note\(^4\) addressing a parent’s claim of persecution by virtue of the likely genital mutilation of his or her daughter. Kane argued that the UNCHR Guidance Note

\(^1\) No. 07-60757, 2009 WL 2620288 (5th Cir. Aug. 26, 2009).
\(^2\) Id. at *2.
\(^3\) FED. R. APP. P. 28(j) provides: “If pertinent and significant authorities come to a party’s attention after the party’s brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.”

\(^4\) United Nations High Commissioner for Refugees, Guidance Note on Refugee Claims relating to Female Genital Mutilation (May 2009), http://www.unhcr.org/refworld/docid/4a0c28492.html [hereinafter UNCHR Guidance Note].
provided new persuasive, though non-binding, authority in favor of his claim. The Court dismissed the UNHCR Guidance Note stating, “it is doubtful whether this particular guidance note offers persuasive authority, as it appears to contradict the express terms of the [Immigration and Nationality Act].”

This Article will argue that the Fifth Circuit’s characterization of the UNHCR Guidance Note is overbroad. The UNHCR Guidance Note addresses two types of asylum claims for parents of possible FGM victims: derivative claims and principal-applicant claims. A derivative claim allows the parent to piggy-back on his or her child’s asylum claim, whereas the parent in a principal-applicant claim petition for asylum status in his or her own right due to the persecution the parent would suffer by opposing the practice or FGM or witnessing his or her child’s mutilation. The UNHCR Guidance Note does not conflict with current immigration law with regard to parental-principal applicant asylum claims. Instead, it should, as Kane argued, serve as highly persuasive authority in interpreting the meaning of “persecution” under the immigration statute. Currently, the circuits are split and the Board of Immigration Appeals’ (“BIA”) precedent is unclear on whether parents can validly assert principal-applicant claims that are inextricably based on the threat of FGM to their female children. In this Article, I will argue that the circuit split and ambiguity in BIA jurisprudence should resolve in favor of a broad construction of the term “persecution” to allow parents of potential FGM victims to succeed in principal-applicant claims.

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5 Kane, 2009 WL 2620288, at *6. The opinion does not indicate the “express terms” with which the UNHCR Guidance Note conflicts. However, presumably, the court is selectively reading the UNHCR Guidance Note to advocate for derivative asylum claim for parents of FGM victim, a claim that is not allowed under current immigration law. See discussion of derivative asylum claim infra Part II (A).
6 8 C.F.R. § 208.13 (2009).
7 See discussion infra Part III.
INTRODUCTION

One month ahead my mother told me about a coming event in the family. At a great festivity I should be initiated together with all the other girls of my age, and we should receive a lot of beautiful gifts. I was eagerly looking forward to that day. The evening before the initiation my mother took me to a large compound and we sat there all night with all the other girls and their mums. . . . Early in the morning, just before six o’clock, my aunt took hold of my arms and held me tight. She said: “Don’t cry. If you honour your family I shall cover you with gifts.” With such encouragement she took me to a courtyard behind the house. Two women held me, one of them locking my legs and the other my arms. I was terrified. In the next moment I felt an intense pain. I saw blood running from between my legs and I lost consciousness.

Later, when I woke up again, the pain was still there and I kept bleeding. My parents were afraid and did not know what to do. The women were running to and fro and finally brought some black powder that they put on the wound. But I kept bleeding the whole day. From time to time they put more powder on the wound. I was afraid to pee because it hurt so much. I was sick for more than 40 days. I’ll never forget the shock I had when they made that operation on me. . . .

One day a friend told me that I had been promised to a man, in other words I was engaged. One year later I left school and got married. My grandmother told me that school was not important for a young girl.

On the wedding night, when the marriage was to be consummated, there was a lot of trouble because I had been sewn up (infibulated) like all other Fulani girls. Two elderly women came in the evening and took the stitches away without any anesthesia, before handing me to my husband for him to accomplish his duty. That night I felt again the same pain and the trauma from when I was mutilated. For a week I could not stand or walk upright, and I could not sit down because of the pain. I hated my husband after that night. Furthermore, I became pregnant after my first sexual experience. I went through another pain, trauma and torment during child birth. Due to the complications the baby died at birth. . . .

[I] now have a daughter. I am prepared to fight for her right so that she will not victim of mutilation like I have been.8

Mariam, a 16-year-old girl of the Fulani tribe, was subjected to Female Genital Mutilation9 (“FGM”) when she was 10 years old. Unfortunately, her story is not unique. The

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Population Review Bureau reports that between 100 and 140 million women and girls worldwide have been subjected to various forms of FGM. Many parents echo Mariam’s desire to fight for their children’s right not to be victimized by FGM. While courts have taken important strides in granting asylum status to FGM-vulnerable girls, neither the courts nor Congress have protected these girls’ parents or families by allowing parents to remain in the United States with their daughters. This Note will discuss possible asylum remedies for parents of potential FGM victims and argue that the best remedy for the greatest number of parents under current immigration law is for courts to construe “persecution” broadly to allow parents to succeed on principal-applicant asylum claims.

On August 26, 2009, the United States Court of Appeals for the Fifth Circuit handed down its decision in *Kane v. Holder*\(^\text{11}\) denying a father’s petition for withholding of removal despite the threat of FGM to his minor daughter, who, like Mariam, is a member of the Fulani tribe in Senegal. As one ground of relief, the father, Kane, advanced a principal claim because he would be subject to persecution: “(1) as a member of a social group of ‘parents of minor daughters of the Fulani Tribe who have not had FGM, and who oppose the practice,’ (2) as a result of his political and religious opposition to FGM, and (3) by having to endure his daughters' FGM.”\(^\text{12}\) At the eleventh hour before judgment, Kane submitted a letter pursuant to Federal Rule

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9 Female Genital Mutilation is also known by the terms “Female Genital Cutting” or “Female Genital Circumcision.” The use of the term “Female Genital Mutilation” in this Article is adopted to conform to the majority of United Nations documents that refer to the practice. As a result, I have adopted the use of the term Female Genital Mutilation in this Article.


12 *Id.* at *2.
of Appellate Procedure 28(j) informing the court that the United Nations High Commissioner for Refugees ("UNHCR") had recently issued a UNHCR Guidance Note addressing a parent’s claim of persecution by virtue of the likely genital mutilation of his or her daughter. Kane argued that the UNCHR Guidance Notice provided new persuasive, though non-binding, authority in favor of his claim. The Court dismissed the UNHCR Guidance Note stating, “it is doubtful whether this particular guidance note offers persuasive authority, as it appears to contradict the express terms of the [Immigration and Nationality Act].”

This Article will argue that the Fifth Circuit’s characterization of the UNHCR Guidance Note is overbroad. The UNHCR Guidance Note addresses two types of asylum claims for parents of possible FGM victims: derivative claims and principal-applicant claims. A derivative claim allows the parent to piggy-back on his or her child’s asylum claim, whereas the parent in a principal-applicant claim petition for asylum status in his or her own right due to the persecution the parent would suffer by opposing the practice or FGM or witnessing his or her child’s mutilation. The UNHCR Guidance Note does not conflict with current immigration law with regard to parental-principal applicant asylum claims. Instead, it should, as Kane argued, serve as highly persuasive authority in interpreting the meaning of “persecution” under the immigration statute. Currently, the circuits are split and the Board of Immigration Appeals’ (“BIA”) precedent is unclear on whether parents can validly assert principal-applicant claims that are

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13 FED. R. APP. P. 28(j) provides: “If pertinent and significant authorities come to a party’s attention after the party’s brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.”

14 United Nations High Commissioner for Refugees, Guidance Note on Refugee Claims relating to Female Genital Mutilation (May 2009), http://www.unhcr.org/refworld/docid/4a0c28492.html [hereinafter UNHCR Guidance Note].

15 Kane, 2009 WL 2620288, at *6. The opinion does not indicate the “express terms” with which the UNHCR Guidance Note conflicts. However, presumably, the court is selectively reading the UNHCR Guidance Note to advocate for derivative asylum claim for parents of FGM victim, a claim that is not allowed under current immigration law. See discussion of derivative asylum claim infra Part II (A).

inextricably based on the threat of FGM to their female children.\textsuperscript{17} This Article will argue that the circuit split and ambiguity in BIA jurisprudence should resolve in favor of a broad construction of the term “persecution” to allow parents of potential FGM victims to succeed in principal-applicant claims.

Part I will outline the current practice of FGM, addressing the types of FGM and its prevalence in specific geographical locations, as well as the reaction of the United States and the international community to the practice. Part II will provide background on the theories of relief for parents of potential FGM victims in U.S. immigration law. Part III will discuss the federal appellate courts and BIA’s treatment of parental asylum claims under various forms of relief, highlighting the current circuit split regarding parental-principal applicant claims. Part IV will argue that the UNHCR Guidance Note should bolster parental-principal applicant claims by analyzing the role of the UNHCR in the United States legislation and interpretation of United States’ obligations under relevant international treaties. In addition, Part IV will identify the various policy rationales and legal precedents that support the allowance of these claims. Lastly, Part V will identify and rebut criticisms for granting asylum to parents of potential FGM victims.

I. BACKGROUND ON THE PRACTICE OF FGM

The practice of FGM transcends any particular cultural, ethnic, or religious group.\textsuperscript{18} According to the Population Reference Bureau, FGM is practiced in at least 28 African countries and parts of Asia, the Middle East and Latin America. Currently, two to three million girls, typically between the ages of four and twelve, are at risk for FGM each year in Africa, and an

\textsuperscript{17} See discussion \textit{infra} Part III.

\textsuperscript{18} Different social groups use a wide variety of FGM methods. For a more thorough analysis of the cultural justifications and varying practices of FGM, see generally: UNICEF, \textit{FEMALE GENITAL MUTILATION/CUTTING: A STATISTICAL EXPLORATION} (2005), \textit{available at} http://www.unicef.org/publications/index_29994.html.
estimated 100 to 140 million girls and women have undergone FGM. The rate of FGM ranges significantly from country to country, with the Department of State reporting a range from only 4.5% in Niger to 98.6% in Guinea.

The term “female genital mutilation” or “FGM” refers to a variety of methods that involve partial or total removal of female external genitalia. The World Health Organization has classified the practice in four types:

Type I: Partial or total removal of the clitoris and/or the prepuce (clitoridectomy).
Type II: Partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (excision).
Type III: Narrowing of the vaginal orifice with creation of a covering seal by cutting and appositioning the labia minora and/or the labia majora, with or without excision of the clitoris (infibulation).
Type IV: Unclassified: All other harmful procedure to the female genitalia for non-medical purposes, for example, pricking, piercing, incising, scraping and cauterization.

The short-term health consequences of FGM include: extreme pain, bleeding, shock, psychological trauma, infections, urine retention, damage to the urethra and anus, and even death. The long-term complications include: increased risks during childbirth, chronic infections, tumors, abscesses, cysts, infertility, excessive growth of scar tissue, increased risk of HIV/AIDS infection, hepatitis, and other blood-borne diseases, damage to the urethra resulting in

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21 See Tina Rosenberg, Mutilating Africa's Daughters: Laws Unenforced, Practices Unchanged, N.Y. TIMES, July 5, 2004 (reporting an account of Ms. Bagyoko, a circumciser who used to perform infibulations among the Somali community in northern Kenya. “She would cut off the clitoris and all the labia of 7-year-old girls. She would sew up the girls to be totally smooth, with a pencil eraser-sized opening for menses and urine. Each girl’s legs were bound together for weeks so scars could form. Ms. Shuriye used no anesthetic.”).
urinary incontinence, fistula, painful menstruation, painful sexual intercourse, and other sexual dysfunctions.

Many international and regional organizations and treaties have acknowledged the dangers of FGM and support efforts to eradicate the practice, recognizing the practice of FGM as a violation of women's and female children's rights. The United States has followed suit by criminalizing the practice of FGM as part of the Illegal Immigration Reform and Immigrant

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23 State Department Report, supra note 13, at 6; UNHCR Guidance Note, supra note 7, at 4-5. See WHO Annex 5, supra note 12, at 33-35 for a more in-depth discussion of complications and side effects of FGM by type.

Responsibility Act [IIRAIRA] in September 1996.\textsuperscript{25} Further, in the landmark case \textit{Matter of Kasinga},\textsuperscript{26} the BIA granted asylum to a female applicant based on a threat that she would be subjected to FGM if returned to her national country. In this decision, the BIA held that FGM qualified as “persecution.” In addition, the BIA recognized that the applicant was a member of a “particular social group”: young women who are members of a particular tribe that practices FGM, and who have not been subjected to FGM and oppose the practice.\textsuperscript{27} As a result, because FGM constituted persecution and the applicant was persecuted as a result of her membership in a particular social group, she fell within the definition of a refugee\textsuperscript{28} and qualified for asylum relief pursuant to 8 U.S.C. § 1158 (1994).

\section*{I. Theories of Relief}

Aliens seeking to remain in the United States as asylees can pursue six possible avenues for relief.\textsuperscript{29} The first three are affirmative avenues of relief: principal asylum claims,\textsuperscript{30} derivative asylum claims,\textsuperscript{31} and humanitarian grants of asylum.\textsuperscript{32} The second three— withholding of removal,\textsuperscript{33} Convention Against Torture (\textquotedblleft CAT\textquotedblright) claims,\textsuperscript{34} and cancellation of removal pursuant to the exceptional hardship exception\textsuperscript{35}—are defensive claims only available to applicants who are in removal proceedings. This section will explain each of these opportunities for relief and discuss which options are available for parents of potential FGM victims.

\textsuperscript{25} See IIRIRA, Pub. L. No. 104-208, § 645(b)(1), 110 Stat. 2009-709 (codified at 18 U.S.C. § 116 (2006)) (penalizing anyone who “knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained 18 years” with a fine or imprisonment).


\textsuperscript{27} Id. at 365-66.


\textsuperscript{29} Humanitarian parole may also be a possible avenue for temporary relief for parents of potential FGM victims. See. 8 U.S.C. 1182(5)(A)(2009) (giving the Attorney General discretionary authority to grant parole into the United States temporary for urgent humanitarian reasons or significant public benefit).

\textsuperscript{30} 8 C.F.R. § 208.13.

\textsuperscript{31} 8 C.F.R. § 208.21 (2009).

\textsuperscript{32} 8 C.F.R. § 208.13(2)(iii).

\textsuperscript{33} 8 C.F.R. § 208.16(b) (2009).

\textsuperscript{34} 8 C.F.R. § 208.16(c) (2009).

A. AFFIRMATIVE CLAIMS

The first of the affirmative claims, principal asylum, is a ground of discretionary relief, available when the applicant can establish the following elements: (1) an inability or unwillingness to return to one’s home country due to (2) a well-founded fear of (3) persecution (4) on account of membership in a particular social group.\(^{36}\) The persecution element may be fulfilled by past persecution or future persecution\(^{37}\) on account of one of five factors: (1) race; (2) religion; (3) nationality; (4) membership in a particular social group; or (5) political opinion.\(^{38}\) An applicant does not have a well-founded fear if the applicant could “internally relocate” to another part of his or her country of nationality to avoid the persecution.\(^{39}\) The burden of proof for establishing each element rests on the applicant.\(^{40}\) In addition, the trier of fact may make a credibility determination considering the totality of the circumstances including:

- the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.\(^{41}\)

An applicant is excluded from eligibility for asylum status if

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion; (ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States; (iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the

\(^{36}\) 8 C.F.R. § 208.13.
\(^{37}\) 8 C.F.R. § 208.13(b).
\(^{38}\) 8 C.F.R. § 208.13(b)(2)(i)(a).
\(^{39}\) 8 C.F.R. § 208.13(b)(2)(ii).
\(^{40}\) 8 C.F.R. § 208.13(a).
arrival of the alien in the United States; (iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States . . .

The use of principal-applicant claims for parents of potential FGM victims raises several potential problems in fulfilling the statutory elements. First, the statute does not define persecution. As a result, it is unclear whether parents’ possible claims of persecution rise to the level of persecution in the statute. For example, a parent could claim that his or her experience of witnessing his or her child be subjected FGM rises to the level of persecution. In addition, because a possible complication of FGM is death, a parent could claim that his or her fear of losing his or her daughter, initially or later during childbirth rises to the level of persecution. Finally, a parent could claim that the high likelihood that he or she would be subjected to social shunning or violence as a result of his or her opposition to FGM within a social group that widely practices FGM rises to the level of persecution. Because persecution is not statutorily defined, courts are left to interpret the scope of the term. As such, courts may interpret persecution broadly to include, or narrowly to exclude, the parental claims enumerated above.

The second potential difficulty arises in determining whether parents are part of a particular social group who suffer persecution “on account of” their membership in that particular social group as required under the statute. Parents will claim that “parents of young women of [tribe A] who have not undergone FGM, as practiced by that tribe, and who oppose the practice” is a valid social group. But it is unclear whether the parent’s suffering of having to watch his or her child be subjected to FGM is intentionally inflicted on the parent because of

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43 The B.I.A. has defined persecution as “harm or suffering that is inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome.” Matter of Acosta, 19 I. & N. 211, 211-12 (Mar. 1, 1985).
his or her membership in the social group. 45 Some critics suggest that while the harm is inflicted upon the child because of the child’s membership in a particular social group, the harm if not inflicted on the parent as a result of the parent’s social group. 46 However, the BIA and the federal courts have both recognized that if the persecutor acts “at least in part” because of a protected characteristic, the “on account of” requirement is satisfied. 47 If persecution is construed broadly to include parents’ possible claims, courts could find the persecutor acted “at least in part” on account of the protected characteristic because the persecutor could be intentionally punishing the parent for his or her opposition or using the parent as an example to deter other parents with similar views from opposing the practice of FGM.

The second of the affirmative claims, derivative asylum, allows spouses and children of the principal applicant, not otherwise eligible for asylum, to be granted the same status as the principal applicant. This status is currently only available to spouses and children, not parents, of the principal asylee. 48 As such, this avenue of relief is not available to parents of potential FGM victims under current immigration law. Accordingly, the Fifth Circuit was correct that the UNHCR Guidance Note conflicts with U.S. immigration law 49 in this regard because the UNHCR Guidance Note advocates parental-derivative claims in the asylum and withholding of removal context. 50 The conflict between the UNHCR Guidance Note and current immigration

46 Id.
47 See, e.g., Borja v. INS, 175 F.3d 732 (9th Cir. 1999) (en banc); Matter of T-M-B-, 21 I. & N. Dec. 775 (B.I.A. 1997), rev’d on other grounds sub nom.
48 8 C.F.R. § 208.21.
49 Kane, 2009 WL 2620288, at *6.
50 UNHCR Guidance Note, supra note 7, at 8. (“Where a family seeks asylum based on a fear that a female child of the family will be subjected to FGM, the child will normally be the principal applicant, even when accompanied by her parents. In such cases, just as a child can derive refugee status from the recognition of a parent as a refugee, a parent can, mutatis mutandis, be granted derivative status based on his or her child’s refugee status.”)
law regarding parental-derivative claims may signal to Congress the wisdom of amending the current immigration statute to allow for parental-derivative claims in the FGM context.\textsuperscript{51}

The third affirmative claim arises when the applicant is unable to establish a well-founded fear of persecution but nonetheless may receive a humanitarian grant of asylum. A humanitarian grant of asylum may be granted when the applicant can demonstrate compelling reasons for being unwilling or unable to return to his or her country arising out of the severity of the past persecution.\textsuperscript{52} Because FGM constitutes persecution,\textsuperscript{53} if a FGM-vulnerable child’s mother was subjected to FGM in her national country, the mother could be eligible for a humanitarian grant of asylum based on this past persecution. This theory of relief is limited to a small class of applicants but is a viable option of relief for mothers who have been subjected to FGM in the past or to other parents who have suffered other types of past persecution that rise to the statutory requirement.

\textsuperscript{51} Immigration reform is outside of the scope of this Note, however, such derivative claims are not without precedent and have been allowed in both the U (available to victims of certain crimes who are willing to assist government officials in the investigation of the criminal activity) and T (available to victims of severe forms of human trafficking) non-immigrant visa classifications. See Wes Henricksen, Note, 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, 502 (2005). In addition, various policy considerations, such as family unity and the best interests of the child, support immigration reform to allow parents to apply as derivative applicants to their daughters’ valid asylum claims. See Bridgette A. Carr, Incorporating a “Best Interests of the Child” Approach Into Immigration Law and Procedure, 12 YALE HUM. RTS. & DEV. L.J. 120 (2009); Alida Yvonne Lasker, Note, Solomon’s Choice: The Case for Granting Derivative Asylum to Parents, 32 BROOK. J. INT’L L. 231, 261-62 (2006). While specific reform proposals are outside of the scope of this note, numerous scholars have articulated insightful proposals. See e.g., Blizzard, supra note 38 at 921-22 (advocating an amendment to general derivative asylum provision to match POW/MIA asylum provision as well as removal ten-year residency requirement in the exceptional hardship provision); Dree K. Collopy, Note, Incorporating a Hardship Factor in Asylum Claims Based on Female Genital Mutilation: A Legislative Solution to Protect the Best Interests of Children, 21 GEO. IMMIGR. L.J. 469 (2007) (proposing that the best solution to protect citizen children from FGM and separation from family is to extend the “hardship factor” currently considered in cancellation of removal claims to asylum and withholding of removal); Andy Rottman, Comment, The Rocky Path from Section 601 of the IIRIRA to Issue-Specific Asylum Legislation Protecting the Parents of FGM-Vulnerable Children, 80 U. COLO. L. REV. 533 (2009) (arguing that issue specific legislation, similar to the IIRIRA is needed but must be carefully researched and drafted to avoid problems similar to those encountered as a result of the IIRIRA).

\textsuperscript{52} 8 C.F.R. § 208.13(2)(iii).

\textsuperscript{53} Matter of Kasinga, 21 I. & N. Dec. at 365.
B. DEFENSIVE CLAIMS IN REMOVAL PROCEEDINGS

The first of the defensive claims, withholding of removal, is available if the applicant is excluded from asylum eligibility.\(^5^4\) The applicant retains the burden to establish the same elements as are required in a principal applicant claim.\(^5^5\) The main difference is the remedy: withholding provides no option for adjusting the applicant’s status to a legal permanent resident, whereas asylees will likely have the opportunity to apply for legal permanent residence after one year.\(^5^6\) Because the elements are identical, parents seeking withholding from removal face the same challenges as parents seeking principal asylum relief.\(^5^7\)

The second possible defensive option for relief is a Convention Against Torture claim (“CAT claim”).\(^5^8\) To succeed in a CAT claim, the applicant must prove that he or she will, more likely than not, suffer torture in his or her home country.\(^5^9\) Torture includes:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind . . . \(^6^0\)

In addition, the harm must be inflicted by or with the consent or acquiescence of a public official.\(^6^1\) As such, this category raises several potential difficulties for parents seeking to use CAT as a basis for relief. First, the parents themselves must face the likelihood of persecution or torture. Because FGM is inflicted on the parent’s daughter, not the parent, the parent may have difficulty qualifying for relief under this category. The parent can argue that the severe mental

\(^5^4\) 8 C.F.R. § 208.16(a).
\(^5^5\) 8 C.F.R. § 208.16(b).
\(^5^6\) 8 C.F.R. 209.2(a)(2009).
\(^5^7\) See discussion infra Part II.A.
\(^5^8\) 8 C.F.R. § 208.16(c).
\(^5^9\) 8 C.F.R. § 208.16(c)(3).
\(^6^0\) 8 C.F.R. § 208.18(a)(1) (2009) (emphasis added).
\(^6^1\) 8 C.F.R. § 208.18(a)(1) (“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”).
anguish suffered upon seeing his or her daughter tortured rises to the level of torture. This seems to correspond with the definition of torture under the Torture Convention, but courts have not yet granted a claim on this ground. Parents may also have difficulty satisfying the requirement of government involvement because family members or tribal leaders, not government officials, most often perform FGM. In countries with legislation criminalizing the practice of FGM, however, government omission in the form of failure to prosecute crimes or enforce legislation may provide a well-established basis for CAT relief.\footnote{C.f. Ornelas-Chavez v. Gonzales, 458 F.3d 1052, 1060 (9th Cir. 2006) (Under the CAT “[i]t is enough that public officials could have inferred the alleged torture was taking place, remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it.”) (internal citations omitted); Silva-Rengifo v. Atty. Gen. of U.S., 473 F.3d 58 (3rd Cir. 2007); Zheng v. Ashcroft, 332 F.3d 1186, 1194 (9th Cir. 2003).} As a result, this avenue may provide meaningful relief for some parents of potential FGM victims; however, it may be difficult for many parents to satisfy the requirement of government involvement depending on the circumstances of the case and the legislation, conditions, and enforcement of the parent’s national country.\footnote{See Blizzard, supra note 38, at 918-20 for additional analysis of this theory of relief.}

The third potential avenue for defensive relief is cancellation of removal pursuant to the exceptional hardship exception. Under the exceptional hardship exception, the applicant must demonstrate that he or she 1) has been physically present in the United States for ten years; 2) he or she is a person of good moral character; and 3) has not been convicted a serious offense. Additionally, the applicant must establish a fourth element: 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.\footnote{Pub. L. 104-208, § 304(a)(3), 110 Stat. 3009-594 (codified as 8 U.S.C. § 1229b(b)(1)(2006)).} Parents of potential FGM victims could claim that the possibility of separation from their child amounts to hardship under the statute. The Ninth Circuit held that such a separation was “simply one of the
common results of deportation or exclusion that are insufficient to prove extreme hardship.”

However, the Seventh Circuit held the constructive deportation fulfilled the exceptional hardship requirement. Nonetheless, even if the court adopts the constructive deportation holding of the Seventh Circuit, this theory of relief is limited to applicants with alien children when both parents face deportation. If either parent can legally remain in the United States, or the applicant’s child is not a United States citizen, the applicant will not be able to remain in the United States with his or her child. As a result, this option provides a remedy for some applicants but is not adequate remedy for many parents of potential FGM victims.

Based on the foregoing, while current immigration law provides some possible opportunities of relief for parents of potential FGM victims, many are limited to only a small subset of potential applicants. In lieu of immigration reform to establish derivative-applicant claims, the most promising remedy for the majority of parents seems to be a principal-applicant asylum claim. Nonetheless, as discussed in Part III, granting principal-applicant asylum claim to parents of potential FGM victims requires several interpretative leaps that most courts are unwilling to take.

III. CIRCUIT COURT AND BIA’S TREATMENT OF PARENTAL ASYLUM CLAIMS

Since 2002, numerous FGM-related parental cases have appeared before nine circuit courts. Many of these cases were dismissed on procedural grounds without ruling on the substantive issue of whether parents have any valid claim for relief based on a threat of FGM to their daughters. The remaining cases consider the validity of various affirmative and defensive

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65 Jimenez v. INS, No. 96-70169, 1997 WL 349051, at *1 (9th Cir. June 25, 1997).
66 Salameda v. INS, 70 F.3d 447 (7th Cir. 1995).
67 See Oforji v. Ashcroft, 354 F.3d 609, 616 (7th Cir. 2003).
68 See Blizzard, supra note 12 at 916-18 for a more in-depth consideration of this theory of relief.
69 See infra notes 63-101 and accompanying text.
70 See Jallow v. U.S. Att’y Gen., 330 F. App’x. 193, 195 (11th Cir. 2009) (affirming B.I.A.’s denial of Jallow’s application for withholding of removal due to its adverse credibility finding without addressing the validity
grants of asylum, particularly derivative and principal-applicant asylum claims. The next two subsections will discuss these cases in detail to determine the courts’ current stance on the availability of each type of claim for parents of potential FGM victims.

A. DERIVATIVE ASYLUM CLAIMS

Courts agree that parents do not have a valid claim for derivative asylum due to the lack of statutory authority, although the Eighth and Ninth Circuits remanded several cases to the BIA for a determination on whether parents may derivatively qualify for asylum.71 Despite these anomalies, it is well established that parents cannot succeed in derivative claims except in limited cases of constructive deportation.72 For example, in Bah v. Gonzales,73 the United States

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71 See Benyamin v. Holder, 579 F.3d 970, 977 (9th Cir. 2009) (remanding to determine whether alien’s father could derivatively qualify for asylum based on that threat of FGM to his daughter); Hassan v. Gonzales, 484 F.3d 513, 519 (8th Cir. 2007) (remanding for consideration on Hassan’s derivative asylum claim, due to immigration judge’s false assumption that the children could remain in the United States with their faith); Abebe v. Gonzales, 432 F.3d 1037, 1043 (9th Cir. 2005) (remanding for consideration of whether parents of a U.S. citizen children likely to face persecution in their parents’ native country, may derivatively qualify for asylum).

72 Constructive deportation recognizes that non-citizen children will have to accompany their parents to their native country despite their valid asylum claim, and allows such children and their parents to remain in the United States together. See 8 U.S.C. § 1158(b)(3) (2006) (“A spouse or child (as defined in section 1101(b)(1) (A), (B),
Court of Appeals for the Sixth Circuit found that the mother, Bah, could not succeed on a derivative asylum claim because her daughters were not in the United States and were currently exposed to the risk of FGM in Guinea.\textsuperscript{74}

Similarly, in \textit{Oforji v. Ashcroft},\textsuperscript{75} the United States Court of Appeals for the Seventh Circuit held that the mother, Oforji, could not establish a derivative asylum claim because of the potential hardship to her children. Oforji testified that she had undergone FGM and that her tribe required that all women be circumcised, with refusal punishable by death. She also testified that she had no one in the United States to leave her children with should she be deported.\textsuperscript{76} Yet, the court denied Oforji’s derivative claim because her children, as United States citizens, would not be constructively deported if their mother were removed to her native country. As United States citizens, her daughters had the right to remain in the country regardless of their mother’s deportation.\textsuperscript{77} Nonetheless, the court showed much reluctance in its ruling, noting:

\textit{[A]s United States citizens [the children] have the right to stay here without [their mother], but that would likely require some form of guardianship – not a Hobson's choice, but a choice no mother wants to make. Given the undesirable consequences of the choice she has to make, Oforji is in effect requesting that we amend the law to allow deportable aliens who have not resided here continuously for seven or ten years to attach derivatively to the right of their citizen children to remain in the United States. Any such amendment is for Congress, not the courts, to consider. . . . Congress has foreseen such difficult choices, but has opted to leave the choice with the illegal immigrant, not the courts. The law is clear that citizen family members of illegal aliens have no cognizable interest in preventing an alien's exclusion and deportation.\textsuperscript{78}}

\textsuperscript{73} 462 F.3d 637 (6th Cir. 2006).
\textsuperscript{74} \textit{Id.} at 642-43.
\textsuperscript{75} 354 F.3d 609 (7th Cir. 2003).
\textsuperscript{76} \textit{Id.} at 613.
\textsuperscript{77} \textit{Id.} at 618.
\textsuperscript{78} \textit{Id.} at 617-18.
In *Olowo v. Ashcroft*, the Seventh Circuit again ruled against a mother’s derivative asylum and withholding of removal applications, agreeing with the immigration judge that the mother, Olowo, could not “bootstrap a claim for asylum based upon fear of harm to her children.” The court confirmed that “[b]oth of these [asylum and withholding of removal] standards 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.”

Likewise, in *Gumaneh v. Mukasey*, the United States Court of Appeals for the Eighth Circuit held that the withholding of removal statutory provisions did not allow an applicant to assert a claim derived from a child’s fear of future persecution. Yet, as in *Oforji*, the court recognized:

> Gumaneh is faced with an extremely difficult decision: leave her U.S. citizen minor daughters in the United States to reside with friends or relatives, or take her daughters to The Gambia and risk the possibility that they will be subjected to FGM . . . . Despite this difficult choice, under the statutes as presently enacted, Gumaneh is not eligible for withholding of removal based upon a derivative claim that her daughters will be subjected to FGM.

The BIA has also held that a parent applicant could not establish eligibility for asylum based on the incidental psychological suffering of the parent occasioned by harm to her child. To grant relief would require the court to exceed the statutory asylum scheme established by Congress.

In addition, the Third and Fourth Circuits have confirmed the unavailability of derivative claims for parents of potential FGM victims. The Fifth Circuit in *Kane* also ruled that parental-

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79 368 F.3d 692 (7th Cir. 2004).
80 *Id.* at 698; see also Obazee v. Ashcroft, 79 F. App’x 914, 916-18 (7th Cir. 2003) (disallowing derivative asylum because the children could stay in U.S. with father and avoid risk of FGM).
81 368 F.3d at 701.
82 535 F.3d 785 (8th Cir. 2009).
83 *Id.* at 790.
85 *Id.* at 278-79.
derivative claims were not cognizable under current immigration law. While the courts agree that the current immigration laws do not allow for derivative-applicant claims, some judges are clearly troubled by the impossible choices created by this deficiency in the statute.

**B. PRINCIPAL-APPLICANT ASYLUM CLAIMS**

The circuit courts do not agree, however, on whether parents can succeed on principal-applicant claims based on fear that their minor child would be subjected to FGM, the harm of being forced to witness their child’s pain and suffering, and/or persecution for opposing the practice in social group that supports the practice of FGM.

The Fourth, Fifth, and Seventh Circuits have ruled against such principal-applicant claims. For example, in *Kane*, the Fifth Circuit found that Kane did not have a valid principal applicant claim because he himself would not be a target for persecution and had no fear of persecution. Similarly, the Fourth Circuit held in *Niang v. Gonzales*, that the mother, as a matter of law, could not establish a claim for withholding of removal based on the psychological harm she would suffer if her United States citizen daughter accompanied her to Senegal and was subjected to FGM because the mother was not the target of the persecution. The court made its decision despite the fact that the mother was a member of a tribe that practiced FGM at an “alarming[ly] high rate” and had been subjected to the practice herself, which resulted long-

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86. See Misoka v. U.S. Att’y Gen., 283 F. App’x. 927, 929-30 (3rd Cir. 2008) (holding allegation that alien’s daughter would be subjected to FGM if he were removed did not warrant a grant of derivative withholding of removal); *Niang v. Gonzales*, 492 F.3d 505 (4th Cir. 2007) (alien could not establish entitlement to withholding of removal based on the alleged persecution her U.S. citizen daughter would face if she accompanied alien to Senegal because the statute does not allow for derivative claims).


88. See e.g. *Ofori*, 462 F.3d at 617-18; *Gumaneh*, 535 F.3d at 790.

89. See *Kane*, 2009 WL 2620288 at *4; *Niang*, 492 F.3d at 505; Obazee v. Ashcroft, 79 F. App’x 914, 916-18 (7th Cir. 2003) (agreeing with the Immigration Judge that Obazee “cannot claim the possible mistreatment of a family member as the basis of her claim for asylum”); *Osigwe v. Ashcroft*, 77 F. App’x 235, 235 (5th Cir. 2003) (holding applicant does not qualify for asylum based on knowledge that daughter faced a risk of FGM).


91. 492 F.3d 505, 507 (4th Cir. 2007).

92. Id. at 511.
lasting health and psychological problems.\textsuperscript{93} In addition, her daughter’s paternal grandparents had been sending intimidating letters requesting that their granddaughter undergo FGM.\textsuperscript{94}

The Sixth Circuit, however, granted a parental-principal-applicant asylum claim in its landmark decision, \textit{Abay v. Ashcroft}.\textsuperscript{95} In \textit{Abay}, the court specifically stated that it was granting a principal-applicant claim – not a derivative claim – based on persecution the parent would endure upon seeing his or her child mutilated. The mother, Abay was a citizen and native of Ethiopia who had been subjected to FGM when she was nine years old. Abay’s mother previously attempted to circumcise Abay’s older daughters and was only prevented by Abay’s intervention. Despite her ability to prevent FGM in these cases, Abay would be unable to prevent forced circumcision by her daughters’ future husbands or in-laws.

Abay cited three previous decisions in which the BIA granted relief to an applicant based on a threat of FGM to the applicant’s daughter.\textsuperscript{96} Specifically, in \textit{Matter of Adeniji},\textsuperscript{97} the BIA granted withholding of removal for a father because his citizen daughters would be forced to return to Nigeria with him, where they would likely be subjected to FGM by relatives despite their father’s wishes. Similarly, in \textit{Matter of Oluloro},\textsuperscript{98} the BIA suspended deportation of an alien mother because the risk that her U.S.-born daughters would be subjected to female genital mutilation in Nigeria “posed an extreme hardship” to the daughters. Lastly, in \textit{Matter of Dibba},\textsuperscript{99} an alien mother filed a motion to reopen her asylum case, arguing that “she would be forced to allow the mutilation of her daughter and that the event and its consequences would

\begin{itemize}
\item \textsuperscript{93} Id.
\item \textsuperscript{94} Id.
\item \textsuperscript{95} 368 F.3d 634 (6th Cir. 2004).
\item \textsuperscript{96} Abay, 368 F.3d at 641-42.
\item \textsuperscript{97} No. A41 542 131 (oral decision) (U.S. Dept. of Justice, Immigration Court, York, Pa., Mar. 10, 1998) (cited in \textit{Abay}, 368 F.3d at 641-42).
\item \textsuperscript{98} No. A72 147 491 (oral decision) (U.S. Dept. of Justice, Immigration Court, Seattle, Wash., Mar. 23, 1994) (cited in \textit{Abay}, 368 F.3d at 641-42).
\item \textsuperscript{99} No. A73 541 857 (B.I.A. Nov. 23, 2001) (cited in \textit{Abay}, 368 F.3d at 641-42).
\end{itemize}
cause her mental suffering sufficient to constitute persecution.‘’ Noting that the practice of FGM was not illegal in the alien’s native country, the alien had been subjected to FGM at a young age, the grandmother’s demand that the daughter be subjected to FGM, and the prevalence of female genital mutilation in The Gambia, the BIA found that she had presented a sufficient basis to reopen her case.\footnote{101} In addition, the BIA stated “normally a mother would not be expected to leave her child in the United States in order to avoid persecution.”\footnote{102}

Further, the Abay court noted the BIA’s willingness to expand the definition of persecution in \textit{Matter of C-Y-Z},\footnote{103} where the Board granted asylum status to an alien because of his spouse’s forced sterilization. The Sixth Circuit found a “governing principle” on the basis of the BIA decisions discussed above “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.”\footnote{104}

Likewise, the Eighth Circuit indicated a willingness to consider principal-applicant claims. In \textit{Gumaneh}, the court noted the Sixth Circuit’s decision in Abay but did not address the specific issue of whether the applicant could succeed on a principal-applicant claim because the applicant did not argue that she was eligible for withholding based upon any psychological harm to herself.\footnote{105} Additionally, in \textit{Diop v. Holder},\footnote{106} the Eighth Circuit denied a parent’s principal asylum claim only because the parent did not establish the requisite fear of persecution and objective risk that the child would be subjected to FGM against the parent’s will.\footnote{107} Moreover, at least one judge in the Fourth Circuit opined that parental-principal asylum claims in the FGM

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\footnote{100} Id. \\
\footnote{101} Id. \\
\footnote{102} Id. \textit{Contra Ofori}, 462 F.3d at 617-18. \\
\footnote{103} 21 I. & N. Dec. 915 (June 4, 1997). \\
\footnote{104} \textit{Abay}, 368 F.3d at 642. \\
\footnote{105} 535 F.3d at 790. \\
\footnote{106} 586 F.3d 587 (8th Cir. 2009). \\
\footnote{107} Id. at 591.
context should be remanded to the BIA for clarification on the interpretation of “persecution” because neither the statute nor the implementing regulations define persecution\(^{108}\) and the BIA has indicated its willingness to adopt an expansive definition through its decision in *Matter of C-Y-Z.*\(^{109}\) and adoption of the Torture Convention.\(^{110}\)

The BIA’s position on parental-principal applicant claims is unclear. In *Matter of A-K*., the BIA took note of the circuit courts’ decisions in *Niang, Oforji* and *Abay* and denied the applicant’s claim for withholding of removal based on his claim that his two minor United States citizen daughters would be subjected to FGM in his home country.\(^{111}\) However, the BIA factually distinguishes *Abay* instead of criticizing its reasoning.\(^{112}\) In addition, the BIA recognizes:

> there may also be cases where a person persecutes someone close to an applicant, such as a spouse, parent, child or other relative, with the intended purpose of causing emotional harm to the applicant, but does not directly harm the applicant himself. However, in such a case, the persecution would not be ‘derivative,’ as the applicant himself would be the target of the emotional persecution that arises from physical harm to a loved one.\(^{113}\)

Further, the BIA fails to find that a particular social group – fathers of daughters who have not been subject to FGM, but who nonetheless oppose the practice – only in this particular case because the applicant stated that he had no fear of persecution to himself if he were to return to Senegal.\(^{114}\) As a result, *Matter of A-K* does not appear to foreclose the availability of parental-

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\(^{108}\) *Niang*, 492 F.3d at 515 (Williams, J., concurring in part and dissenting in part).

\(^{109}\) *Id.* at 515-16 (In *Matter of C-Y-Z.*, the B.I.A. held that while the applicant did not experience the harm of forced sterilization himself, it constituted persecution for the asylum applicant to “witness or experience the persecution of family members.”).

\(^{110}\) *Id.* (noting that the *Torture Convention*, as ratified by the United States, defines torture as both anguish of the mind and body).


\(^{112}\) *Id.* at 276-77.

\(^{113}\) *Id.* at 278.

\(^{114}\) *Id.* at 280.
principal applicant asylum claims. In addition, the BIA cases cited by the court in Abay suggest that applicants can succeed on a principal-applicant claim.

**C. HUMANITARIAN OR CAT CLAIMS**

Several courts have indicated a willingness to consider alternate claims of relief in the form of humanitarian grants of asylum, cancellation of removal pursuant to the exceptional hardship exception, and CAT claims. Specifically, the Fourth Circuit in Niang noted that a humanitarian grant of asylum “may be warranted in circumstances where a mother, who has been subjected to FGM, fears her daughter will be subjected to FGM if she accompanies her mother to the country of removal.”115 In *Matter of S-A-K- and H-A-H-*,116 the BIA has also recognized that humanitarian asylum may be appropriate in certain cases of female genital mutilation, holding:

> [w]hether or not the respondents have established a fear of further harm based on their membership in a particular social group . . . they have suffered an atrocious form of persecution that results in continuing physical pain and discomfort, and we conclude that they should not be expected to return to Somalia."117

The Fourth Circuit articulated a willingness to grant a hardship exception to cancellation of removal but was unable to grant relief to the applicant because she was unable to satisfy the ten-year physical presence requirement.118 Further, the Seventh Circuit granted a motion to reopen a CAT claim based on INS’s failure to consider that the applicant’s United States citizen daughter would be subjected to FGM if required to accompany her mother back to their native country.119

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115 Niang, 492 F.3d at 509, n.4. See also Osigwe, 77 F. App’x at 234 (remanding to B.I.A. to determine whether alien is eligible for humanitarian asylum based on the risk that daughter would be subjected to FGM if the family was returned to their native country).
117 *Id.* at 465-66 (noting that the B.I.A.’s decision in *Matter of A-T* does not preclude the ruling in this case).
118 Niang, 492 F.3d at 513. See also Oforji, 354 F.3d at 617 (applicant was unable to qualify for the exceptional hardship exception for removal because she could not fulfill the physical presence requirement).
119 Nwaokolo v. INS, 314 F.3d 303 (7th Cir. 2002) (granting motion to reopen but failing to rule on the merits).
IV. ARGUMENT FOR BOLSTERING PARENTAL-PRINCIPAL APPLICANT ASYLUM CLAIMS

International guidance, particularly from the UNHCR, while not binding, holds a prominent role in the United States’ drafting of immigration statutes and has assisted courts in interpreting United States immigration law to comply with international protocols. The same should be true in parental-principal applicant asylum claims where the applicant’s daughter will likely be subjected to FGM if removed to her native country. The UNHCR Guidance Note bolsters such claims by advocating a broad interpretation of “persecution” to include parents who would be forced to witness the pain and suffering of their child, or risk persecution because of their opposition to the practice. In addition, the courts’ own decisions and one of major policy

120 For example, the foundational statute for United States immigration law and policy, Refugee Act of 1980, adopts the Protocol’s definition of “refugee” and Court uses the UNHCR’s Handbook to guide its analysis of the interpretation of the definition. See INS v. Cardoza-Fonseca, 480 U.S. 421, 436-39 (1987) (“If one thing is clear from the legislative history of the new definition of “refugee,” and indeed the entire 1980 Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . Indeed, the definition of “refugee” that Congress adopted, is virtually identical to the one prescribed by Article 1(2) of the Convention. . . 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. The Conference Committee Report, for example, stated that the definition was accepted “with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol. . . In interpreting the Protocol's definition of “refugee” we are further guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979).”). See also Matter of Acosta, 19 I. & N. Dec. 211, 221, 225, 232-33 (B.I.A. 1985) (noting that Congress added the elements in the definition of a refugee to our law by means of the Refugee Act of 1980. . . In so doing Congress intended to conform the Immigration and Nationality Act to the United Nations Protocol Relating to the Status of Refugees . . . Since Congress intended the definition of a refugee in section 101(a)(42)(A) of the Act to conform to the Protocol, it is appropriate for us to consider various international interpretations of that agreement.” and adopting interpretations of “well-founded fear of persecution” and “particular social group” because they were consistent with the U.N. Convention, Protocol, and/or the UNHCR Handbook). The USCIS also relies heavily on UNHCR guidance when establishing its guidelines. See e.g. Memorandum from Phyllis Coven, U.S. Dept of Justice, Considerations for Asylum Officers Adjudicating Asylum Claims From Women (1995), available at https://www.uchastings.edu/cgiislaw/guidelines/guidelines_us.pdf.

121 UNHCR Guidance Note, supra note 7, at 8.
interests that underpin United States immigration law – family unity\textsuperscript{122} – support an expansive interpretation of “persecution.”\textsuperscript{123}

A. ROLE OF THE UNHCR’S GUIDANCE ON UNITED STATES IMMIGRATION LAW

The United States has repeatedly affirmed the importance of the UNHCR’s guidance in development and interpretation its immigration law and guidelines.\textsuperscript{124} The U.S. Multilateral Protocol to the Status of Refugees affirms that States Parties, including the United States “undertake to co-operate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.”\textsuperscript{125} Additionally, United States refugee and asylum law largely follows the treaties that created both the UNHCR and refugee law: the 1951 Refugee Convention and its 1967 Protocol.\textsuperscript{126} Moreover, courts have repeatedly recognized the UNHCR as useful guidance in interpreting its obligations under the Protocol.\textsuperscript{127} For example, in \textit{Matter of Acosta},\textsuperscript{128} the BIA confirmed that “the various international interpretations of the Protocol, including the Handbook published by the United Nations High Commissioner for Refugees, are useful tools in construing our obligations under the Protocol.”\textsuperscript{129} Further, in \textit{INS v. Cardoza-Fonseca},\textsuperscript{130} the Supreme Court used the UNHCR Handbook to interpret the Protocol’s definition of “refugee,” noting that “the Handbook provides significant guidance in construing

\textsuperscript{123} See infra notes 129-31 and accompanying text.
\textsuperscript{124} See supra note 112.
\textsuperscript{125} Article II, Co-Operation of the National Authorities with the Authorities with the United Nations, T.I.A.S. No. 6577, 19 U.S.T. 6223 (January 31, 1967).
\textsuperscript{126} See supra note 112.
\textsuperscript{127} See infra note 120-23.
\textsuperscript{128} 19 I. & N. Dec. 211 (1985).
\textsuperscript{129} Id. at 211.
the Protocol, to which Congress sought to conform. It has been widely considered useful in
giving content to the obligations that the Protocol establishes.”\textsuperscript{131}

The prominent role of the UNHCR’s guidance in United States immigration
jurisprudence suggests that the UNHCR Guidance Note should bolster principal-applicant claims
for parents of potential FGM victims. The UNCHR Guidance Notes states, in pertinent part:

The parent could nevertheless be considered the principal applicant where he or
she is found to have a claim in his or her own right. This includes cases where the
parent would be forced to witness the pain and suffering of the child, or risk of
persecution for being opposed to the practice.\textsuperscript{132}

The UNHCR Guidance Note supports the Sixth Circuit’s broad interpretation of prosecution,
which can encompass the potential persecution that parents may suffer because of the threat of
FGM to their female children. As a result, the UNHCR Guidance Note is instructive in resolving
the current circuit split and ambiguity in BIA precedent in favor of allowing parental-principal
applicant asylum claims in the context of FGM.

**B. POLICY SUPPORTING A BROAD DEFINITION OF “PERSECUTION”**

The foundational policy consideration underpinning United States immigration and
constitution law – family unity\textsuperscript{133} – also supports this conclusion. First, forcing a parent to
choose between leaving his or her child or taking his or her child back to a native country where
the child will likely be subjected to FGM contradicts the principle of family unity supported by
the Convention on the Rights of the Child,\textsuperscript{134} as well as the United States Constitution and
immigration laws.

\textsuperscript{131} \textit{Id.} at 439 n.22; see also Zavala-Bonilla v. INS, 730 F.2d 562, 567 n.7 (9th Cir. 1984) (“The \textit{Handbook} has
been treated by the B.I.A. as a significant source of guidance with respect to the United Nations Protocol, to which
the United States acceded in 1968. In 1980, the United States also conformed the wording of the asylum statute to
the wording of the Protocol.”).

\textsuperscript{132} \textit{UNHCR Guidance Note, supra} note 7, at 8.

\textsuperscript{133} See \textit{supra} note 115.

\textsuperscript{134} See \textit{infra} notes 111-13.
A core conviction of the Convention on the Rights of the Child is that the family is a “fundamental group of society and the natural environment for the growth and well being of all its members and particularly children” and should be “afforded the necessary protection and assistance so that [the family] can fully assume its responsibilities within the community.” In addition, Article 7 of the Convention affirms that children shall have the right to be “cared for by his or her parents.” Article 9 further provides, “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.” These convictions are inconsistent with requiring a parent to separate from his or her child or put the child in a situation where she would likely be subjected to FGM, which is not in the child’s best interests.

Moreover, as recognized in *Abebe v. Ashcroft*, the Supreme Court has repeatedly affirmed the Constitution’s protection of the sanctity of the family and United States immigration law goal of family reunification. In *Abebe*, Judge Ferguson specifically observed, “[f]amily reunification is the ‘dominant feature of current arrangements for permanent immigration to the United States,’ with special preferences for the immediate relatives of U.S.

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136 *Id.* at art. 7.
137 *Id.* at art. 9. While not yet a State Party, the United States has signaled its intention to ratify the Convention and is one of only two countries who have not yet ratified the Convention.
138 379 F.3d at 763-64 (Ferguson, J. dissenting).
139 See, e.g., 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.”). See also *Abebe*, 379 F.3d at 763-64 (Ferguson, J. dissenting) (“The Supreme Court has long protected, under substantive due process principles, the integrity of the family unit and the right of parents to raise their children.”); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (The rights to conceive and to raise one's children have been deemed ‘essential,’ ‘basic civil rights of man,’ and ‘rights far more precious ... than property rights’); Wisconsin v. Yoder, 406 U.S. 205 (1972); Ginsberg v. New York, 390 U.S. 629 (1968).
140 *Id.* (quoting Thomas A. Aleinikoff et al., Immigration and Citizenship: Process and Policy 319 (4th ed.1998)).
citizens.”

Further, Congress has displayed its commitment to family unity by authorizing a waiver of inadmissibility for “humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.” Accordingly, necessitating parents to choose between fracturing their families and risking exposing their young daughters to the risk of FGM, a traumatizing procedure that is illegal in the United States, thwarts one of this country’s most fundamental principles and protections.

Based on the importance of the UNHCR’s guidance in interpreting United States immigration law, combined with the policy considerations that support providing a remedy for parents of potential FGM victims that will keep the family unit intact, the UNHCR Guidance Note should be used to bolster parental-principal-applicant asylum claims. As advocated by the UNHCR, parental-principal-applicant claims should be bolstered by interpreting “persecution” broadly to encompass cases where either parent would be forced to witness the pain and sufferings of their child being subjected to FGM or would suffer persecution for being opposed to the practice. A broad interpretation of “persecution” need not be solely grounded in the UNHCR Guidance Note because both United States immigration law and precedent also support such a definition.

C. SUPPORT FOR A BROAD DEFINITION OF “PERSECUTION” IN UNITED STATES STATUTES AND JURISPRUDENCE

The United States, through statute and case law, has evidenced a willingness to construe persecution broadly to encompass not only physical persecution but also psychological persecution. In 1965, Congress amended Section 243(h) of the Immigration and Nationality Act

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141 Id. (quoting Thomas A. Aleinikoff et al., Immigration and Citizenship: Process and Policy 319 (4th ed.1998)).
142 See Marcelle Rice, Protecting Parents: Why Mothers and Fathers Who Oppose Female Genital Cutting Qualify for Asylum, 04-11 Immigr. Briefing 1 (2004) (citing 8 U.S.C. § 1255(h)(2)(B)).
143 UNHCR Guidance Note, supra note 7, at 8.
by removing “physical” persecution from the statutory asylum requirements because the physicality requirement was construed as too narrow. Before 1965, Section 243(h) limited withholding of deportation to only cases where the applicant could show a probability of “physical persecution.” The removal of the physicality requirement shows Congress’s desire to open the door for the possibility of asylum for those who experience mental, emotional, or economic persecution.

Further, multiple courts have expanded the definition of persecution to include the experience of an applicant who witnesses harm inflicted on his or her family members. For example, in Xuncax v. Gramajo, the court recognized that witnessing an immediate relative being tortured or severely mistreated itself constituted “cruel, inhuman or degrading treatment” in violation of international law. Similarly, in Matter of C-Y-Z-, the BIA held that forced sterilization of one spouse was an act of persecution against the other spouse that qualified the spouse for asylum and withholding of deportation. Further, the BIA also found past persecution based on a respondent’s detailed description of what his family endured during the Cultural Revolution due to their religious convictions. Moreover, in Matter of Dibba, the BIA reopened a case and allowed the applicant mother to apply for asylum based on a well-founded

144 Kovac v. INS, 408 F.2d 102, 106 (9th Cir. 1969).
145 Rice, supra note 82; see also Blazina v. Bouchard, 286 F.2d 508, 511 (3rd Cir. 1961) (“before the Attorney General may grant relief under section 243(h), it must be shown to his satisfaction that, if deported, the alien would be subject not only to persecution, but to physical persecution.”).
148 Id. at 187; see also Tachiona v. Mugabe, 234 F. Supp. 2d 401 (D. N.Y. 2002) (awarding ACTA damages to relatives because of their severe emotional pain and indignity in witnessing attacks on their family members); Mushikiwabo v. Barayagwiza, No. 94 CIV. 3627, 1996 WL 164496 (S.D. N.Y. Apr. 9, 1996) (awarding damages based on the pain and suffering experienced by relatives of those massacred in the Rwandan genocide).
149 21 I. & N. Dec. at 920.
fear of persecution because the mother “would be forced to allow the mutilation of her daughter and that the event and its consequences would cause her mental suffering sufficient to constitute persecution.”¹⁵¹

Federal appellate courts have also found persecution based on harm inflicted on an applicant’s family members. Specifically, the Ninth Circuit held that death threats combined with the harm to members of his family and the murders of his political counterparts compelled a finding of past persecution.¹⁵² The Seventh Circuit also stated “certainly having one’s children forcibly taken, killed, or kidnapped might rise to the level of persecution.”¹⁵³

Moreover, the Immigration Service itself has affirmed that “[h]arm to an applicant's family member may constitute persecution to the applicant” in a memorandum to asylum officers regarding family harm. The Immigration Service clarifies its position, stating:

An individual may suffer harm from the knowledge that another individual is harmed, particularly if that other individual is a family member. The harm may manifest itself as emotional pain from knowing that a loved-one has been harmed. The harm may be intensified if the applicant feels that his or her status or actions led the persecutor to harm the family member and/or if the applicant witnessed the harm to the family member. Finally, the death or prolonged incarceration of a family member, which essentially deprives the applicant of the internationally recognized fundamental right to family, also constitutes an example of harm to the applicant resulting from harm to a family member.¹⁵⁴

¹⁵¹ No. A41 542 131 (cited by Abay, 368 F.3d at 641-42); see also Matter of Adeniji, No. A41 542 131 (cited by Abay, 368 F.3d at 641-42) (granting application for withholding of removal to an alien father otherwise ineligible for asylum because his citizen daughters would be forced to return to Nigeria with him, where they would likely be subject to female genital mutilation by relatives despite their father's wishes); Matter of Oluloro, No. A72 147 491 (cited by Abay, 368 F.3d at 641-42) (granting suspension of deportation, directly resulting in permanent resident status, to an alien mother because the risk that her U.S.-born daughters would be subjected to female genital mutilation in Nigeria “posed an extreme hardship” to the daughters). See supra notes 90-95 and accompanying text.

¹⁵² Salazar-Paucar v. INS, 281 F.3d 1069, 1075 (9th Cir. 2002).

¹⁵³ Tamas-Merceu v. Reno, 222 F.3d 417, 425 (7th Cir. 2000).

¹⁵⁴ Memorandum from Joseph L’Anglois, Office of International Affairs, Asylum Division, Persecution of Family Members, at 1 (June 30, 1997) (on file with author).
In addition, Congress adopted the Torture Convention into its domestic penal and immigration law.\(^{155}\) In doing so, Congress accepted a definition of torture that includes “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.”\(^{157}\) The U.S. statute that incorporates the Torture Convention into domestic penal law specifically includes in its definition severe pain or suffering, “the threat that another person will imminently be subjected to . . . severe physical pain or suffering.”\(^{158}\) Because FGM is universally considered severe physical pain or suffering, it logically follows that, the threat of FGM to a parent’s daughter if returned to their national country, would rise to the level of torture. By analogy, if such a threat rises to the level, it should also rise to the level of persecution as required by the other asylum claims.\(^{159}\) At least one judge noted this correlation, recognizing that the definition of torture in the CAT, coupled with lack of statutory or regulatory definition of “persecution” and BIA cases such as in *Matter of C-Y-Z-*, suggest that BIA may advocate for a broad interpretation of “persecution.”\(^{160}\) A definition that may include the psychological harm that parents would suffer if removed to their national country where the parents would be forced to subject their daughter(s) to FGM.\(^{161}\)

The statutory language, BIA cases, and circuit court case precedent, in addition to the adoption of the Convention Against Torture into United States domestic penal and immigration law, provide the courts with ample authority to adopt a broad interpretation of persecution. This history combined with the UNHCR Guidance Note’s position reinforce the prudence of resolving

\(^{156}\) See supra note 27.
\(^{157}\) *Torture Convention*, Art. 1, ¶ 1 (emphasis added).
\(^{159}\) Rice, *supra* note 134.
\(^{160}\) *Id.*
\(^{161}\) *Niang*, 492 F.3d at 514-17 (Williams, J., concurring in part and dissenting in part) (holding that the Court is required to remand Niang’s claim to the B.I.A. for the agency to address the issue in first instance).
the current circuit split and ambiguity in BIA jurisprudence in favor of interpreting persecution broadly to allow parental-principal applicant claims in cases of FGM.

V. REBUTTAL OF CRITICISMS AGAINST GRANTING ASYLUM TO PARENTS OF POTENTIAL FGM VICTIMS

Critics of parental asylum claims argue that granting such claims will open the “floodgates,” causing a large influx of asylum applicants that will overwhelm the United States immigration system.162 Given the statistic that two to three million girls are at risk of FGM in Africa alone, the pool of potential victims is certainly significant. If all of the parents of those potential victims also sought asylum relief, the number of potential applicants would be staggering.163 Additionally, critics warn that parents could potentially have children solely to qualify for asylum benefits, which may result in the realization of the fear of “wholesale circumvention of the immigration laws by person who enter the country illegally and promptly have children to avoid deportation.”164 Further, critics claim that by denying alien parents’ claims for asylum, the United States may ultimately reduce the occurrence of FGM worldwide by refusing to allow “alien parents to flee social conflict in their nations, in effect, ‘turning their backs on continuing the struggle for a communal answer’ to the practice of FGM.”165

The concern of opening the floodgates to an overwhelming number of asylum applicants began in Sanchez-Trujillo v. INS,166 when the court refused to expand the definition of a particular social group because “[t]o hold otherwise would be tantamount to extending refugee status to every alien displaced by general conditions of unrest or violence in his or her home

163 Id.
164 Id. at 1290.
165 Id. at 1297 (quoting David A. Martin, THE REFUGEE CONCEPT: ON DEFINITIONS, POLITICS, AND THE CAREFUL USE OF A SCARE RESOURCE, IN REFUGEE POLICY: CANADA AND THE UNITED STATES 30, 34 (Howard Adelman ed., 1991)).
166 801 F.2d 1571 (9th Cir. 1986).
country.” The Immigration and Naturalization Service also advanced this concern when arguing against the allowance of FGM as a ground for asylum in Matter of Kasinga. The BIA highlights the INS’s argument in its opinion:

The Service points out that it is “estimated that over eighty million females have been subjected to FGM.” It further notes that there is “no indication” that “Congress considered application of [the asylum laws] to broad cultural practices of the type involved here.” The Service proceeds to argue that “the underlying purposes of the asylum system ... are unavoidably in tension” in both providing protection for those seriously in jeopardy and in maintaining broad overall governmental control over immigration. The Service further argues that “the Board's interpretation in this case must assure protection for those most at risk of the harms covered by the statute, but it cannot simply grant asylum to all who might be subjected to a practice deemed objectionable or a violation of a person's human rights.” It is from these underpinnings that the Service argues that the class of FGM victims who may be eligible for asylum “does not consist of all women who come from the parts of the world where FGM is practiced, nor of all who have been subjected to it in the past.”

Deborah Anker, Clinical Professor of Law at Harvard Law, stated that the fear of opening the floodgates to an overwhelming number of asylum applicants has “always underlined every concern about asylum.”

Yet, despite these concerns, asylum applications did not increase after the courts recognized FGM as a valid ground for asylum. The United States Citizenship and Immigration Service itself reported that the floodgates did not open in the wake of Matter of Kasinga, stating: “In the 1996 precedent decision Matter of Kasinga, the BIA recognized FGM

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167 Id. at 1577.
168 Matter of Kasinga, 21 I & N Dec. at 370-71 (internal citations omitted) (emphasis added).
169 Alex Kotlowitz, Asylum for the World’s Battered Women, N.Y. TIMES MAGAZINE, Feb. 11, 2007, available at http://www.nytimes.com/2007/02/11/magazine/11wwnidealab.html (quoting Deborah Anker); see also Stephanie K. Pell, Comment, Adjudication of Gender Persecution Cases Under the Canada Guidelines: The United States Has No Reason to Fear an Onslaught of Asylum Claims, 20 N.C. J. INT’L L. & COM. REG. 655, 663 (1995) (“This fear of ‘opening the floodgates’ underlies the United States restrictive asylum policies. In limiting the scope of who can apply for asylum by narrowly interpreting the elements of the refugee definition, courts ensure that the United States is not faced with accepting vast demographic groups of people from oppressed countries throughout the world.”)
170 See Danielle L.C. Beach, Battlefield of Gendercide: Forced Marriages and Gender-Based Grounds for Asylum and Related Relief, 09-12 Immigrbrief 1 (Dec. 2009) (noting that empirical evidence does not support the floodgates argument); Musalo, supra note 153, at 132-33.
as a basis for asylum. Although genital mutilation is practiced on many women around the world, INS has not seen an appreciable increase in the number of claims based on FGM.\textsuperscript{171} In addition, the USCIS notes, “the Canadian experience with gender-related asylum claims is instructive. . . . Rather than receiving a flood of applications, the Immigration and Refugee Board of Canada reports that gender-related claims have actually dropped steadily since a peak of 315 claims in 1995.”\textsuperscript{172} Both France and Canada have recognized FGM as a basis for granting refugee status, yet a flood of refugees has not overwhelmed either country.\textsuperscript{173} If the number of asylum applications did not appreciably increase with introduction of principal-applicant claims by potential FGM victims, it is unlikely that corollary parental-principal applicant claims will result in an overwhelming amount of asylum applications. Further, no evidence has been proffered to substantiate that the floodgates will open if parents are allowed to seek principal-applicant asylum claims.

In addition to being logically and statistically unlikely, the floodgates will not likely open as a result expanding the definition of persecution to include parents of potential FGM victims because they must still meet the rigorous qualification for asylum. All applicants must establish an inability or unwillingness to return to one’s home country due to a well-founded fear of persecution on account of membership in a particular social group.\textsuperscript{174} Even if parents are able to establish that they would be persecuted on account of membership in a particular social group\textsuperscript{175} and that they are unable or unwilling to return to their home country, parents must also prove that


\textsuperscript{172} Id.

\textsuperscript{173} Layli Miller Bashir, \textit{Female Genital Mutilation in the United States: An Examination of Criminal and Asylum Law}, 4 AM. U. J. GENDER & L. 415, 453 (1996) (arguing as a result that critics should not assume that the United States would experience an influx of refugee claims based on FGM).

\textsuperscript{174} 8 C.F.R. § 208.13.

\textsuperscript{175} For example, “parents of young women of [tribe A] who have not had FGM, as practiced by that tribe, and who oppose the practice.”
they have a well-founded fear of persecution. An applicant cannot have a well-founded fear if he or she could internally relocate to another part of their national country to avoid the persecution.\textsuperscript{176} This can be a significant hurdle because in many FGM-practicing countries, the practice is isolated to specific ethnic groups or specific geographic rural areas.\textsuperscript{177} As a result, some applicants may be unable to establish that they could not internally relocate to another part of their national country to avoid the risk of FGM-related persecution.

Moreover, an immigration officer has discretion to deny an applicant’s asylum claim if the officer finds that the applicant is not credible.\textsuperscript{178} The credibility determination serves as another check to restrain the bursting of the floodgates.\textsuperscript{179} The credibility determination and the general discretionary nature of asylum status, also provide an adequate mechanism to eliminate parents who may be exploiting their children to obtain asylum status.

Lastly, the argument that the United States may ultimately reduce the occurrence of FGM worldwide by refusing to allow “alien parents to flee social conflict in their nations, in effect,  

\textsuperscript{176} 8 C.F.R. § 208.13(b)(2)(ii) (1999).

\textsuperscript{177} See Amnesty International, FEMALE GENITAL MUTILATION IN AFRICA: INFORMATION BY COUNTRY, AI Index: ACT 77/007/1997 (Oct. 1, 1997), available at http://asiapacific.amnesty.org/library/Index/ENGACT770071997?openCof=ENG-2AF (reporting the prevalence of FGM in specific regional areas of countries). For example, FGM is mainly practiced in the north of Benin, only in some areas of the far north and south-west of Cameroon, in approximately 10 of Central African Republic’s 48 ethnic groups, among the rural populations in the north, north-east and west of Côte d’Ivoire, and in the northern equatorial part of the Democratic Republic of Congo. In addition, FGM is most prevalent in the regions of the Upper East, Upper West and North of Ghana. In Guinea-Bissau, FGM is widespread among the Fula and Mandinka but is practiced much less often in urban areas. In Kenya, FGM is prevalent among various ethnic groups and in far eastern areas bordering Somalia and in some refugee camps housing Somalis. Thirteen ethnic groups reportedly practice FGM in Liberia and in Mauritania, FGM is practiced among 95% of the Soninke and Halpulaar ethnic group and 30% of Moor women. FGM is prevalent among the Muslim population of Senegal and is practiced most widely in the eastern region of the country, where it also affects the non-Muslim population. FGM is widely practiced in northern Sudan, and to a much lesser extent in the south. FGM is only practiced in five regions of Tanzania, in the north of Togo, and in Kapchorwa district of Uganda. By contrast, in Burkina Faso, Chad, Djibouti, Eritrea, Ethiopia, Gambia, Guinea, Mali, Nigeria, Sierra Leone, Somalia FGM is carried out by most or all ethnic groups.

\textsuperscript{178} INA § 208, 8 U.S.C. § 1158(b)(1)(B)(iii) (considering factors such as the demeanor and responsiveness of the applicant, the plausibility of the applicant’s account, the consistency between the applicant’s statements, the internal consistency of each such statement, and the consistency of such statements with other evidence of record).

\textsuperscript{179} If all of these checks available under the current statutory structure are still not enough to contain the floodgates, Congress may consider adding a numerical cap to limit the number of FGM-related parental asylum claim granted on an annual basis. See Andy Rottman, Comment, The Rocky Path from Section 601 of the IIRIRA to Issue-Specific Asylum Legislation Protection the Parents of FGM-Vulnerable Children, 80 U. COLO. L. REV. 533, 566 (2009).
‘turning their backs on continuing the struggle for a communal answer’ to the practice of FGM,”
confuses the issue. The purpose of asylum is to provide relief to refugees from various forms of persecution. If one were to accept the argument that refugees should be denied asylum status if they could engage in the social conflict to struggle for a communal answer, asylum status would be obliterated. Asylum does not focus on solving the problem that underlies the refugee’s persecution. Instead, asylum provides an immediate remedy to stop the refugee’s persecution. It may be advisable for refugees to remain in their national countries to solve their political or societal conflicts, but that is not a requirement or consideration under current United States immigration law. As a result, this criticism misses the purpose of asylum all together and cannot defeat the argument for the grant of asylum status to parents of potential FGM victims.

CONCLUSION

Every year millions of young girls are at risk of female genital mutilation. To add to the horror of such potential trauma, if granted asylum in the United States, these girls also face the real possibility living a life separated from their parents or having to face the risk of mutilation to keep their family units intact. For a country and immigration system that is committed to providing relief to refugees and promoting family unity, this cannot be an acceptable paradigm. Without reform of the current immigration laws, parental-principal-applicant asylum claims are the best possible remedy to ensure that family can remain intact and girls can be protected from the threat of FGM in their national countries.

Fortunately, allowing parental-principal-applicant asylum claims is not without precedent. As a result, the recent publication of the UNHCR Guidance Note that advocates for a broad construction of “persecution” to justify parental-principal applicant claims should be

180 See supra note 106.
181 See discussion infra Part III(B).
highly persuasive authority to resolve the debate in favor of such claims.\textsuperscript{182} The Fifth Circuit’s dismissal of the UNHCR Guidance Note in \textit{Kane v. Holder}\textsuperscript{183} should be re-evaluated due to its mischaracterization of the UNCHR Guidance Note as contradictory to current immigration law. Instead, the UNHCR should be used to further support existing case law, statutes, and policy justifications that support a more expansive interpretation of “persecution.”\textsuperscript{184} Defining persecution more broadly would allow courts to recognize the threat of persecution due to a parent’s opposition to the practice of FGM or the persecution that a parent would face in having to watch his or her daughter be subjected to FGM against the parent’s wishes as valid claims of persecution. This would resolve the current circuit split and ambiguity in BIA’s jurisprudence in favor of granting asylum relief to parents of potential victims of FGM as principal applicants.

Parents, such as Mariam, Kane, and many others, seek to fight for their daughters’ right not to be victims of female genital mutilation. However, while courts have taken important strides in granting asylum status potential FGM victims, neither the courts nor Congress have protected parents’ right to raise their children without the fear of FGM and to keep their family units intact. Recognizing the validity of parental-principal applicant claims provides the courts with a compassionate means to remedy this oversight and injustice.

\begin{footnotesize}
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\item \textsuperscript{182} See discussion \textit{infra} Part IV(A).
\item \textsuperscript{183} \textit{Kane}, 2009 WL 2620288, at *6.
\item \textsuperscript{184} See discussion \textit{infra} Part IV(B)-(C).
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