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Miriam R. Cahan
Washington University School of Law

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AN IMPOSSIBLE CHOICE: DENIAL OF PARENTS’ DERIVATIVE ASYLUM CLAIMS BASED ON THEIR CITIZEN DAUGHTER’S RISK OF FEMALE GENITAL MUTILATION

I. INTRODUCTION

Imagine leaving your home to pursue a life free from political and social persecution. You and your spouse risk everything to improve your lives by coming to the United States illegally. You live here for many years without a problem. You have two daughters who are American citizens by virtue of their birth in this country. At some point your illegal status catches up to you and the U.S. government institutes deportation proceedings against you and your spouse. You argue to the immigration judge that if removed to your country of origin, your daughters will be constructively deported and subjected to female genital mutilation (“FGM”). You tell the judge that upon your return, there is nothing you or your spouse can do to oppose the practice. FGM is ingrained in the culture and viewed as a rite of passage for all young girls. The judge deports you and your spouse, believing that there is no real risk of FGM because your daughters are legally allowed to stay in the United States. As a parent you have a choice: leave your daughters in America (to be cared for perhaps by distant relatives or the state), or bring them with you to face certain persecution.

The United States was established in the hope of attaining freedom from an oppressive government and creating a society based on the ideals of freedom and liberty.¹ As a result, United States immigration laws allow

1. *See generally* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

WE, therefore, the Representatives of the UNITED STATES OF AMERICA, in GENERAL CONGRESS, Assembled, appealing to the Supreme Judge of the World for the Rectitude of our Intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly Publish and Declare, That these United Colonies are, and of Right ought to be, FREE AND INDEPENDENT STATES; that they are absolved from all Allegiance to the British Crown, and that all political Connection between them and the State of Great-Britain, is and ought to be totally dissolved; and that as FREE AND INDEPENDENT STATES, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which INDEPENDENT STATES may of right do. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.

Id. para. 32.

people refuge in this country upon a showing of past persecution or fear of persecution.²

Recently, many illegal alien parents have brought asylum claims because they fear that if they (and their children) are deported, their daughters will undergo FGM. A more serious issue arises when the daughter is a citizen of the United States and thus able to remain in the country independently of her parents. In many cases, courts have been reluctant to allow derivative asylum claims absent a showing that the parent personally fears persecution or that the child will be constructively deported.³ As a result, refugees' parental rights are altered without regard to the principles and procedures of family law and the substantive due process right to raise one's family.

This Note argues that the manner in which courts make asylum determinations impermissibly conflicts with family law principles and the constitutional interest in raising one's family.

Part II of this Note will give an overview of refugee laws and the types of claims applicants make. Part III then summarizes FGM practices and trends, including descriptions of the types of procedures and possible complications. Part IV offers a history of judicial treatment, followed in Part V by a discussion of the importance of the family in immigration law. The process through which family issues are typically resolved in the family law and constitutional contexts is discussed in Part VI. Finally, Part VII discusses the many problems that arise when immigration law ignores the principles of family and constitutional law.

II. ASYLUM CLAIMS

Three basic claims exist for refugees who wish to gain entry to the United States: asylum, withholding of removal, and claims under the Convention Against Torture ("CAT").⁴ Asylum-seekers request the ability

2. See *infra* text accompanying notes 4–8.

3. Parents are left with an impossible choice: leave their child in the United States to be raised by someone else or bring the child with them and face serious risk of bodily injury. See *generally* In re A-K-, 24 I. & N. Dec. 275 (BIA 2007); Abebe v. Ashcroft, 379 F.3d 755, 760 (9th Cir. 2003) (holding that the parents did not have a "well-founded fear of persecution"); Oforji v. Ashcroft, 354 F.3d 609, 616 (7th Cir. 2003) ("Oforji's two female children potentially subject to FGM are both United States citizens, and thus . . . have the legal right to remain in the United States."); Olowo v. Ashcroft, 368 F.3d 692, 701 (7th Cir. 2004) ("Such claims for 'derivative asylum' based on potential harm to an applicant's children are cognizable only when the applicant's children are subject to 'constructive deportation' along with the applicant. . . . Accordingly, the facts presented here do not support a claim for derivative asylum.").

4. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 938 (4th ed. 2005).

to remain in the United States.⁵ The Immigration and Nationality Act (“INA”) dictates that asylum is available to a refugee if he or she can “establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.”⁶ Withholding of removal⁷ is “a narrower

5. *Id.*

6. Immigration and Nationality Act § 208, 8 U.S.C. § 1158(b)(1)(B)(i) (2006).

The testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant’s testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. . . . [T]he trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

Id. § 1158(b)(1)(B)(ii). “There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.” *Id.* § 1158(b)(1)(B)(iii). An applicant is not eligible for asylum

if the Attorney General determines that—

(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 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; . . .

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

Id. § 1158(b)(2)(A). Moreover, asylum may be terminated if the Attorney General determines that—

(A) the alien no longer meets the conditions described in subsection (b)(1) of this section owing to a fundamental change in circumstances;

(B) the alien meets a condition described in subsection (b)(2) of this section;

(C) the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien’s nationality or, in the case of an alien having no nationality, the country of the alien’s last habitual residence) in which the alien’s life or freedom would not be threatened . . . and where the alien is eligible to receive asylum or equivalent temporary protection;

(D) the alien has voluntarily availed himself or herself of the protection of the alien’s country of nationality . . . by returning to such country with permanent resident status or the reasonable possibility of obtaining such status with the same rights and obligations pertaining to other permanent residents of that country; or

(E) the alien has acquired a new nationality and enjoys the protection of the country of his or her new nationality.

Id. § 1158(c)(2).

7. “[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.” *Id.* § 1231(b)(3)(A). An applicant is not entitled to withholding of removal for reasons similar to those in the asylum statute. *See supra* note 6.

remedy that prohibits forcible return to the country of persecution but not to third countries.”⁸ The standard for withholding of removal is similar to that for asylum, and an application under one provision is treated automatically as an application under both.⁹ Finally, a refugee may bring a claim under the CAT.¹⁰ To succeed with this claim, an applicant must “establish that it is more likely than not that he or she would be tortured.”¹¹ Applicants can apply for all three options at the same time.¹²

8. LEGOMSKY, *supra* note 4, at 938. “The Justice Department regulations expressly use the word ‘asylum’ in a generic sense to encompass [asylum and withholding of removal] (as well as a third remedy under the Convention Against Torture . . .).” *Id.* “[A]n application for asylum under section 208 is automatically treated as an application for withholding of removal under section 241(b)(3) in the event relief under section 208 is denied.” *Id.*

9. *Id.* The applicant must “establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 C.F.R. § 1208.16(b) (2004). Additionally, “[i]f the applicant is determined to have suffered past persecution . . . it shall be presumed that the applicant’s life or freedom would be threatened in the future . . .” *Id.* § 1208.16(b)(1)(i).

This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant’s life or freedom would not be threatened . . . ; or

(B) The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

Id. § 1208.16(b)(1)(i)(A)–(B).

“If the applicant’s fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm.” *Id.* § 1208.16(b)(1)(B)(iii).

An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than not that he or she would be persecuted Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. In evaluating whether it is more likely than not that the applicant’s life or freedom would be threatened in a particular country . . . the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

(i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant . . . ; and

(ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country.

Id. § 1208.16(b)(2)(i)–(ii).

10. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; 8 C.F.R. § 208.18.

11. 8 C.F.R. § 1208.16(c)(2).

Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third

III. FEMALE GENITAL MUTILATION

Many cultures around the world perform FGM; however, it is most common in Africa, Asia, and the Middle East.¹³ It is typically practiced on girls under the age of fifteen, and between 100 and 140 million women alive today have endured the procedure.¹⁴

There are four types of FGM. The first involves “excision of the prepuce, with or without excision of part or the entire clitoris.”¹⁵ Type two is the “excision of the clitoris with partial or total excision of the labia minora.”¹⁶ Type three is called infibulation and involves the “excision of part or all of the external genitalia and stitching/narrowing of the vaginal opening.”¹⁷ The final type involves:

person information or a confession, 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, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Id. § 1208.18(a)(1).

In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:

- (i) The intentional infliction or threatened infliction of severe physical pain or suffering;
- (ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- (iii) The threat of imminent death; or
- (iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

Id. § 1208.18(a)(4).

12. LEGOMSKY, *supra* note 4, at 1158 n.13. For the purposes of this note, the term asylum will refer to all three types generally.

13. *Female Genital Mutilation-New Knowledge Spurs Optimism*, PROGRESS IN SEXUAL & REPROD. HEALTH RES. No. 72 (World Health Org., Switz.) 2006, at 1, available at <http://www.who.int/reproductive-health/hrp/progress/72.pdf> [hereinafter PROGRESS No. 72].

14. *Id.* at 2. Every year, three million young women are affected by FGM. *Id.*

Recent surveys have found that in Egypt 90% of girls who had undergone FGM were between five and 14 years of age when subjected to the procedure, 50% of those in Ethiopia, Mali and Mauritania were under five years of age, and 76% of those in the [sic] Yemen were not more than two weeks old. In some communities, women who are about to be married or are pregnant with their first child or who have just given birth also undergo the practice.

Id.

15. *Id.* at 3. The prepuce is a fold of skin covering the clitoris that is equivalent to the foreskin on the penis. See THE OXFORD ENGLISH DICTIONARY 382 (2d ed., vol. XII 1991).

16. PROGRESS No. 72, *supra* note 13, at 3.

17. *Id.*

pricking, piercing or incising of the clitoris and/or labia; stretching of the clitoris and/or labia; cauterization by burning of the clitoris and surrounding tissue; scraping of tissue surrounding the vaginal orifice (angurya cuts) or cutting of the vagina (gishiri cuts); introduction of corrosive substances or herbs into the vagina to cause bleeding or for the purpose of tightening or narrowing it¹⁸

Often, FGM is conducted with rudimentary tools or in unsanitary conditions.¹⁹ The process can lead to infection, urinary complications, severe pain, and long term consequences such as abscesses and problems with childbirth.²⁰ A few countries have criminalized FGM; however, enforcement of these laws is rare.²¹ The procedure is often viewed as an essential part of a young woman's growth and sometimes a prerequisite for marriage.²²

18. *Id.*

19. *Id.* at 3–4.

Severe pain and bleeding are the most common immediate consequences of all forms of FGM. Since in most cases the procedure is carried out without anaesthesia, the resulting pain and trauma can produce a state of clinical shock. In some cases, bleeding can be protracted and result in long-term anaemia.

Id. at 3.

20. *Id.* at 4.

Long-term adverse effects include abscesses, painful cysts and thick, raised scars called keloids, which can, in turn, cause problems during subsequent pregnancy and childbirth. Deinfibulation, for the purpose of reopening the vaginal orifice after it has been stitched or narrowed, and reinfibutaion, to reduce the vaginal opening after deinfibulation, are sometimes performed at each birth, with potentially dire health consequences. Other long-term complications include infertility and haematocolpos (the accumulation of menstrual fluid in the vagina)."

. . . .

. . . A wide range of psychological and psychosomatic disorders have been attributed to the practice, among them disordered eating and sleeping habits, changes in mood and symptoms of impaired cognition that include sleeplessness, recurring nightmares, loss of appetite, weight loss or excessive weight gain, as well as panic attacks, and difficulties in concentrating and learning.

Id. (citing UNICEF Global Consultation on Indicators, *Child Protection Indicators Framework, Female Genital Mutilation and Cutting* (Nov. 11–13, 2004); Alice Behrendt & Steffen Moritz, *Posttraumatic Stress Disorder and Memory Problems After Female Genital Mutilation*, 162 AM. J. PSYCHIATRY 1000–02 (2005)).

21. PROGRESS No. 72, *supra* note 13, at 4–5.

[A] study published in 2000 found that prosecutions had been brought in only four of the 28 countries of Africa and the Middle East where FGM is practised. Laws prohibiting FGM have also been introduced in several countries with immigrant communities continuing the practice: these countries include Australia, Canada, New Zealand, USA and at least 13 countries in Western Europe. Again, the annual rate of prosecutions varies widely.

Id. at 5.

22. PROGRESS No. 72, *supra* note 13, at 5.

The direct risk of FGM on an asylum applicant can be the basis for a claim.²³ Such a claim falls under the INA requirements for membership within a particular social group.²⁴ Additionally, some circuits have held that a woman who has been a victim of FGM qualifies for the presumption of past persecution.²⁵ Once past persecution is shown, there is a

Social scientists say FGM persists for the following reasons.

- It endows a girl with cultural identity as a woman: in many ethnic groups the clitoris is associated with masculinity and is excised to maintain differentiation between males and females.
- It imparts to a girl a sense of pride, a coming of age and admission to the community: in many communities, girls are rewarded with gifts, celebrations and public recognition after the operation.
- Not undergoing the operation brands a girl as a social outcast and reduces her prospects of finding a husband.
- It is part of a mother's duties in raising a girl 'properly' and preparing her for adulthood and marriage.
- It is believed to preserve a girl's virginity, widely regarded as a prerequisite for marriage, and helps to preserve her morality and fidelity: in some ethnic groups, virginity is associated with an infibulated vulva, not with an intact hymen.
- It is believed to enhance a husband's pleasure during the sex act.
- It is believed to confer bodily cleanliness and beauty on a girl: in some communities, the female genitalia are considered unclean.
- It is believed to be prescribed by religion and thus to make a girl spiritually pure.

Id.

23. *In re Kasinga*, 21 I. & N. Dec. 357, 368 (BIA 1996). The Board of Immigration Appeals ("BIA") "noted its 'extreme nature' which amounts to more than a 'minor form of genital ritual,' and 'clearly inflicts harm or suffering on the girl or woman who undergoes it,' exposing her to 'potentially life threatening complications.'" Arthur C. Helton & Alison Nicoll, *Female Genital Mutilation As Ground for Asylum in the United States: The Recent Case of In Re Fauziya Kasinga and Prospects for More Gender Sensitive Approaches*, 28 COLUM. HUM. RTS. L. REV. 375, 376 (1997) (quoting *In re Kasinga*, 21 I. & N. Dec. at 361). "Because the source of persecution was non-governmental, Kasinga was required to establish a country-wide fear of persecution." *Id.* at 377. The BIA concluded there was such a country-wide fear by looking at police tolerance, governmental protection for FGM, and the prevalence of the practice. *Id.* The BIA also "recognized that even though that harm was not subjectively imposed with punitive or malignant intent, it could still amount to persecution." *Id.*

24. *In re Kasinga*, 21 I. & N. Dec. at 368. The *In re Kasinga* court defined the social group narrowly as "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice." *Id.*

In later years, the definition of social groups in relation to crimes against women has expanded. "We have held 'that a "particular social group" is one united by a voluntary association . . . or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.'" *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005) (quoting *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000)). "Few would argue that sex or gender, combined with clan membership or nationality, is not an 'innate characteristic,' 'fundamental to individual identit[y].' . . . [G]ender is an immutable trait that can qualify under the rubric of 'particular social group.'" *Id.* at 797. Additionally, members of the same group can persecute one another. *Id.* at 798 n.19 (quoting *Maini v. INS*, 212 F.3d 1167, 1174 (9th Cir. 2000)).

25. *Id.* at 794.

presumption of a well-founded fear of future persecution that the government may rebut with evidence of changed circumstances.²⁶

Although the applicant may not be subjected to FGM again, courts have compared FGM to past persecution presumptions in the context of forced sterilization.²⁷ “Like forced sterilization, genital mutilation permanently disfigures a woman, causes long term health problems, and deprives her of a normal and fulfilling sexual life.”²⁸ It is clear that courts take FGM claims seriously. Applicants who have had FGM or fear it in the future have a good chance of receiving some form of asylum.²⁹

To establish eligibility for asylum on the basis of past persecution, Mohamed “must show: (1) an incident . . . that rise[s] to the level of persecution; (2) that [wa]s ‘on account of’ one of the statutorily-protected grounds; and (3) [wa]s committed by the government or forces the government is either ‘unable or unwilling to control.’”

Id. at 794–95 (quoting *Navas v. INS*, 217 F.3d 646, 655–56 (9th Cir. 2000)). “[T]he extremely painful, physically invasive, psychologically damaging and permanently disfiguring process of genital mutilation undoubtedly rises to the level of persecution.” *Id.* at 796.

26. *Id.* at 798. “Once a petitioner demonstrates past persecution within the definition of the Act, she is entitled to a presumption of a well-founded fear of future persecution. The government must then rebut that presumption by demonstrating by a preponderance of evidence that circumstances have fundamentally changed or that relocation is possible . . .” *Id.* at 798–99 (citation omitted) (citing 8 C.F.R. § 1208.13(b)(1)(i) (2000)). *See also supra* note 9.

27. *Id.* “Such a permanent and continuing form of persecution requires a special result under the asylum regulations, namely that applicants who have suffered forced or involuntary sterilization necessarily have an inherent well-founded fear of future persecution because such persons will be persecuted for the remainder of their lives.” *Id.* (quoting *Qu v. Gonzales*, 399 F.3d 1195, 1202 (9th Cir. 2005)). The court went on to state that because FGM is a “permanent and continuing” act of persecution, like forced sterilization, “the presumption of a well-founded fear . . . cannot be rebutted.” *Id.* at 801.

28. *Mohammed*, 400 F.3d at 799. The court acknowledged that forced sterilization, unlike female genital mutilation, is expressly recognized as past persecution by the INA. . . . However, [the statute] does *not* in its text provide for automatic asylum upon a showing of *past* sterilization. Rather, the principle that the fact of sterilization cannot be used by the government to rebut the fear of future harm was developed by the BIA and the courts after legislation was enacted as a recognition of the special, continuing, and permanent nature of coercive population control. Thus, assuming that Mohamed’s experience constitutes past persecution on account of a protected ground—a subject that, unlike sterilization, is not expressly addressed by statute—the reasoning in the forced sterilization cases would appear to apply equally to the case of genital mutilation.

Id. at 799–800 n.22.

Additionally, female genital mutilation, unlike forced sterilization, can be performed multiple times in a woman’s life. However, this varies among communities. For example, in some cultures women are deinfibulated and reinfibulated before and after child birth. *See supra* note 20.

29. *See Mohammed*, 400 F.3d at 798–801. An applicant must also show that FGM is practiced frequently enough to satisfy the court that the risk is real. *See id.* at 798.

IV. JUDICIAL TREATMENT OF DERIVATIVE ASYLUM CLAIMS BASED ON A DAUGHTER'S RISK OF FGM

In the case *In re A-K*,³⁰ the Board of Immigration Appeals (“BIA”)³¹ held that a father from Senegal could not base his claim for asylum solely on his citizen daughters’ fear of FGM.³² The BIA focused on prior cases that distinguished between non-citizen and citizen children,³³ and

30. 24 I. & N. Dec. 275 (BIA 2007).

31. Removal hearings are first presented to an Immigration Judge (“IJ”) who is “subject to the general supervision of the Chief Immigration Judge, who in turn is part of the Executive Office for Immigration Review (EOIR).” LEGOMSKY, *supra* note 4, at 639. The IJs are not Article III judges, but “they clearly perform judicial functions.” *Id.*

Each of the opposing parties (the noncitizen and the ICE [Immigration and Customs Enforcement]) has the right to appeal the decision of the IJ to the Board of Immigration Appeals (BIA). The BIA, like the IJs, is part of EOIR. Unlike the IJ’s [sic], who are scattered in various cities throughout the United States and ride circuit to other cities, the BIA sits in a fixed location

. . . [T]he Board now decides most of its cases by single-member ‘affirmances without opinion’ (AWOs). The remaining cases are usually decided by three-member panels and are typically accompanied by reasoned opinions

. . . .

. . . Ordinarily, the exclusive procedure for obtaining judicial review of a removal order is to file a petition for review in the United States Court of Appeals for the circuit in which the removal hearing was held.

Id. at 641–42 (citation omitted).

32. *In re A-K*, 24 I. & N. Dec. at 278. The court noted that in the context of asylum, the Act contemplates that a spouse or child of an alien who is granted asylum based on persecution may, if not otherwise eligible for asylum himself, be granted the same status as the alien if accompanying, or following to join, the alien who has been granted asylum. However, the converse is not true; there is no statutory basis for a grant of derivative asylum status to a parent based on the grant of asylum to his child. Furthermore, in situations contemplated by section 208(b)(3)(A) of the Act, the principal applicant must first establish entitlement to asylum in his own right, following which the spouse or child of the principal applicant may then be afforded asylum status through him.

Id. at 278–79 (citations omitted).

The applicant believed “that he should be found to be a member of a particular social group, which includes fathers of daughters who have not been subjected to FGM, but who nonetheless oppose the practice. We decline to find such a particular social group in this case.” *Id.* at 280.

33. *Id.* at 276. “In the matter at hand, the children who are alleged to face persecution, and through whom the respondent in this matter seeks to derive relief, are not applicants for asylum, as they are United States citizens with a legal right to remain in this country.” *Id.* at 279. The court evaluated other circuits’ decisions granting asylum based on the fear of FGM against the applicant’s non-citizen child. *Id.* at 276. The court also evaluated the risk of FGM in Senegal and determined it was not more likely than not that FGM would occur. *See id.* at 277–78, 280. The court compared this case to *Abay v. Ashcroft* and stated, “the Sixth Circuit determined that the practice of FGM in Ethiopia was ‘nearly universal,’ and thus that there was little doubt that the respondent’s daughters would undergo the procedure if they accompanied their mother to that country.” *Id.* at 277 (quoting *Abay v. Ashcroft*, 368 F.3d 634, 636, 642 (6th Cir. 2004)).

“By contrast, the State Department’s 2005 country report on human rights practices in Senegal indicates that FGM is common only in certain areas of the country.” *Id.* (citing BUREAU OF

determined that the girls “could avoid this risk altogether by remaining in the United States, which they are legally entitled to do.”³⁴

The BIA suggested that the daughters could stay with a parent who is not subject to removal, or with a court-appointed guardian.³⁵ However, the BIA did not make a factual inquiry into whether the children would actually return to Senegal with their father, much less who would care for them if the court deported him.³⁶

Appellate courts have agreed with the BIA’s decision in *In re A-K*. For example, the Ninth Circuit, in *Abebe v. Ashcroft*,³⁷ rejected an Ethiopian couple’s derivative asylum claim founded on their daughter’s risk of FGM because the court felt the practice could be controlled by the parents.³⁸ In

DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP’T OF STATE, SENEGAL COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2005 (2006), available at <http://www.state.gov/g/drl/rls/hmpt/2005/61589.htm>).

Further, the court identified a “governing principle in favor of refugee status in cases where a parent and protector is faced with exposing her child to the clear risk of being subjected against her will to a practice that is a form of physical torture causing grave and permanent harm.” *Id.* at 276 (quoting *Abay*, 368 F.3d at 642).

34. *Id.* at 277. The court found that the father did not show that it was “more likely than not that his life or freedom would be threatened on account of his opposition to this practice.” *Id.* at 280.

The court also declined to address the respondent’s claim under the CAT:

There is no legal basis for a derivative grant of such protection where, as here, the respondent has not alleged any past torture, or fear of future torture, to himself. Accordingly, the respondent has not met his burden of establishing that it is more likely than not that he will be subjected in Senegal to torture that 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.’

Id. (citations omitted) (quoting 8 C.F.R. § 1208.18(a)(1) (2007)).

35. *Id.* at 277. The lower court had granted withholding of removal on humanitarian grounds because of the risk to his daughters. *Id.* at 279. On appeal, the BIA noted that “the Act does not contain a discretionary component and does not allow an Immigration Judge to award ‘relief’ for humanitarian reasons if a probability of qualifying persecution to the applicant is not shown.” *Id.* The lower court also held that the respondent was likely to face persecution because he opposed FGM. Additionally, members of the respondent’s family and tribesmen in Senegal would “take whatever steps were necessary to insure that respondent’s two young U.S. citizen daughters were subjected to the FGM procedures if returned to Senegal.” *Id.*

36. The court noted that

the statement of the Immigration Judge . . . is highly speculative and assumes that the respondent’s two United States citizen children would return with the respondent to Senegal, which is factually questionable if the respondent truly believes that they would definitely be tortured there, and which is in no way legally required of the children.

Id. at 280.

37. 379 F.3d 755 (9th Cir. 2004).

38. *Id.* at 759–60. The parents “indicated in their testimony that they would be able to protect their daughter from forced FMG, even though they might face ostracism.” *Id.* at 759. The court acknowledged that the standard of review constrained its decision. “Although a reasonable factfinder could have found a fear of persecution, . . . a finding is not *compelled* by the facts of this case.” *Id.* at 759–60.

The dissenting judge, however, believed that the Immigration Judge “transformed the couple’s expressions of disapproval of FGM, and their *desire* to protect their daughter from it, into affirmations

Oforji v. Ashcroft,³⁹ the Seventh Circuit also denied a mother's claim based on hardship to her citizen children. The court noted that "Oforji's two female children potentially subject to FGM are both United States citizens, and thus . . . have the legal right to remain in the United States."⁴⁰ The *Oforji* court also recognized that "depending on the father's whereabouts, or the appointment of a guardian, they may have an opportunity to not follow their mother to Nigeria."⁴¹ Again, the court made no factual determination regarding the children's actual placement options.

In another case, *Olowo v. Ashcroft*,⁴² the Seventh Circuit, after determining that a mother could not meet the standards for asylum based on her daughter's risk of FGM,⁴³ ordered an investigation with the Department of Children and Family Services.⁴⁴ The respondent in this case

of their *ability* to prevent it." *Id.* at 760 (Ferguson, J., dissenting) (emphasis in original). The father stated, "practically all females have to undergo through [sic] that [FGM] and I will try to do whatever I can to stop that but if I . . . get imprisoned or I am unable to protect her she would have to go through that." *Id.* at 761. "When the IJ suggested that the parents controlled the FGM decision, Mengistu [the father] responded, 'It's not as easy as that. I mean there will be pressure from the society, from the grandparents. . . . [I]f I'm for some reason incarcerated and I'm not there She wouldn't be able to stop them, I'm afraid.'" *Id.*

39. 354 F.3d 609, 611 (7th Cir. 2003).

40. *Id.* at 616. The court distinguished the facts in this case from the situation in *Salameda v. INS*, 70 F.3d 447 (7th Cir. 1995), because "*Salameda* involved both parents of the child being deported." *Oforji*, 354 F.3d at 616. Furthermore:

[U]nlike Oforji's children, the minor child in *Salameda* was not a United States citizen. Yet he was subject to deportation because his parents were being deported. The question raised was whether he was "entitled to ask for relief on his own account." Since he was not the target of deportation, the order in that case "had the effect of depriving him of the right to request suspension of deportation."

Id.

41. *Id.* Note that the court does not evaluate what will be done with the child once this ruling is issued. Rather, it speculates as to potential placements without regard to the child's best interest or the capabilities of the father or guardian.

42. 368 F.3d 692 (7th Cir. 2004).

43. *Id.* at 695. The Court held that "[s]uch claims for 'derivative asylum' based on potential harm to an applicant's children are cognizable only when the applicant's children are subject to 'constructive deportation' along with the applicant." *Id.* at 701. "A spouse or child of an alien who is granted asylum . . . may, if not otherwise eligible for asylum . . . be granted the same status as the alien if accompanying, or following to join, such alien." *Id.* (quoting Immigration and Nationality Act § 208, 8 U.S.C. § 1158(b)(3) (2006)).

44. *Id.* at 703–04. Ms. Olowo stated that the

Yoruba tribe still practices FGM, and that she had been subjected to the procedure herself when she was twelve years old. Ms. Olowo further stated that, if she returns with her daughters to Nigeria, her husband's family will force her daughters to undergo FGM and that she and her husband will be unable to protect the children because FGM is a tribal tradition and a "cultural requirement." Ms. Olowo also claimed that she could not relocate to another part of Nigeria to protect her daughters because her husband's family would eventually find them and subject her daughters to FGM.

Id. at 697–98.

testified that she would be forced to bring her family to Nigeria if she were removed.⁴⁵ The court denied her petition, holding that the asylum standards do not allow for consideration of other family members.⁴⁶ The court noted that “allowing Ms. Olowo to make this decision unilaterally disregards the legal rights of the children.”⁴⁷ The court recommended “proceedings under the Juvenile Court Act, [so that] Ms. Olowo’s daughters will be afforded the opportunity that immigration proceedings do not provide—representation of their best interests.”⁴⁸

When an applicant is attempting to base a claim on his or her child’s fear of FGM, it is imperative for the applicant to inform the court of any intention to bring the child with him or her. The *Olowo* decision makes pursuing derivative claims virtually impossible if applicants would have to face custody proceedings. The *Olowo* case thus points out a major flaw in immigration proceedings generally: “[C]hildren of removable aliens do not have a right to representation in immigration proceedings unless they themselves are charged with removability.”⁴⁹ The limited scope of asylum proceedings creates problems for families when not all family members are subject to deportation.

Conversely, some courts have allowed parents’ derivative claims to succeed. In *Matter of Oluloro*,⁵⁰ the immigration judge granted asylum based on a citizen daughter’s risk of FGM. The court in *Matter of Adeniji* granted a claim 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

45. “[E]ven though her daughters and her husband are legal permanent residents and could remain in the United States, the whole family will have to return to Nigeria if she is removed because her husband would not be able to care for the children on his own.” *Id.* at 698.

46. The “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 to Nigeria.” *Id.* at 701. *See also supra* note 41 and accompanying text.

47. *Id.* at 703.

We are concerned deeply by the representations that Ms. Olowo made at her administrative hearing that, if removed, she would take her daughters back to Nigeria and allow them to be subjected to FGM. Ms. Olowo may have made these statements in an attempt to strengthen her asylum claim and to encourage the IJ to grant her application, but we cannot overlook the fact that Ms. Olowo has announced in an official proceeding her intention to allow her daughters to face FGM in Nigeria rather than arrange for them to remain in the United States.

Id. at 701–02.

48. *Id.* at 704.

49. *Id.* at 704 n.9.

50. No. A72-147-491 (Wash. EOIR Immigr. Ct. Mar. 23, 1994) (oral decision) (cited in *Abay v. Ashcroft*, 368 F.3d 634, 642 (6th Cir. 2004)).

genital mutilation by relatives despite their father's wishes."⁵¹ Similarly, in *Matter of Dibba*,⁵² a mother attempted to reopen her asylum case based on a derivative claim.⁵³ The BIA believed the fear that her daughter would be persecuted was sufficient to reopen the case:⁵⁴

[T]he Board made clear that the alien *need not* "prove that she would take the child with her as part of her burden to demonstrate eligibility for relief, if she has custody of the child [N]ormally a mother would not be expected to leave her child in the United States in order to avoid persecution."⁵⁵

In these cases, courts understood and considered the difficult choice confronted by families facing deportation.

Courts have taken a similar approach when the daughters are also aliens. For example, after evaluating prior BIA decisions, the Sixth Circuit in *Abay v. Ashcroft* allowed a mother's derivative asylum claim based on her daughter's risk of FGM.⁵⁶ This case is unique because both the daughter and the mother were aliens. However, the *Abay* court declared the mother a refugee and "conclude[ed] that a rational factfinder would be compelled to find that Abay's fear of taking her daughter into the lion's den of female genital mutilation in Ethiopia and being forced to witness the pain and suffering of her daughter is well founded."⁵⁷ This logic can be applied over to cases in which a citizen child is at risk of FGM, since the fear is no less real when the daughter is an alien rather than an American citizen. The important question should be whether the daughter will return to the FGM-practicing country.

V. IMMIGRATION AND FAMILY

Immigration courts allow derivative asylum claims by family members in other contexts. The spouse of a victim of forced abortion or sterilization

51. *Abay*, 368 F.3d at 641–42 (citing *Matter of Adeniji*, No. A41-542-131 (Pa. EOIR Immigr. Ct. Mar. 10, 1998) (oral decision)).

52. No. A73-541-857 (BIA 2001) (cited in *Abay*, 368 F.3d at 642).

53. "She argued that 'she 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.'" *Abay*, 368 F.3d at 642 (citing *Matter of Dibba*, No. A73-541-857 (BIA 2001)). The mother also presented evidence of her own experience of FGM and claimed that "her mother would demand that her daughter be similarly mutilated if she returned to The Gambia." *Id.*

54. *Id.*

55. *Id.* (quoting *Matter of Dibba*, No. A73-541-857 (BIA 2001)) (emphasis added).

56. *Id.*

57. *Id.*

may pursue a claim of past or future persecution.⁵⁸ In *Matter of C-Y-Z-*, the BIA allowed a husband to claim past persecution based on his wife's forced sterilization in China.⁵⁹ The court believed he could "essentially stand in [his wife's] shoes and make a bona fide and non-frivolous application for asylum based on problems impacting more intimately on her than him."⁶⁰

Furthermore, the INA allows U.S. citizens to sponsor family members for immigration into the United States.⁶¹ Immigration law consistently recognizes important family relationships and should continue to acknowledge them for alien parents of citizen children.

VI. FUNDAMENTAL RIGHT TO FAMILY

The Supreme Court has long recognized a parent's right to raise children without government interference.⁶² In *Troxel v. Granville*,⁶³ the

58. *Matter of C-Y-Z-*, 21 I. & N. Dec. 915, 917 (BIA 1997). "The position of the Immigration and Naturalization Service is that past persecution of one spouse can be established by coerced abortion or sterilization of the other spouse."

59. The applicant claimed that "after the birth of his first child, his wife was forced to obtain an intrauterine device . . . and that when he protested he was arrested and detained for 1 day." *Id.* at 916. The device was removed and they became pregnant again. "[H]is wife was ordered to undergo an abortion . . . but avoided doing so by hiding with relatives." *Id.* After the birth, "he paid the fine [of 2000 yuan] to avoid having his house destroyed by birth control cadres." *Id.* The couple later had a third child and "the applicant's wife was forced to be sterilized against her will . . ." *Id.* The applicant left for the United States shortly thereafter. *See id.*

60. *Matter of C-Y-Z-*, 21 I. & N. at 918. The BIA later held in *In re S-L-L-* that this right does not extend to non-married couples. 24 I. & N. Dec. 1, 7 (2006). "When the government intervenes in the private affairs of a married couple to force an abortion or sterilization, it persecutes the married couple as an entity." *Id.* at 13. "We do not find convincing reasons to extend the nexus and level of harm attributed to a husband who was opposed to his wife's forced abortion to a boyfriend or fiancé. . . . [A] husband shares significantly more responsibility in determining, with his wife, whether to bear a child in the face of societal pressure and government incentives than does a boyfriend or fiancé for the resolution of a pregnancy of a girlfriend or fiancée." *Id.* at 19.

61. Immigration and Nationality Act § 201, 8 U.S.C. § 1151(b)(2)(A)(i) (2006) states that "the term 'immediate relatives' means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age." The INA § 203 describes the preferences family members are given for family-sponsored immigrants. It states: "Aliens subject to the worldwide level . . . for family-sponsored immigrants shall be allotted visas as follows:

- (1) Unmarried sons and daughters of citizens
- (2) Spouses and unmarried sons and unmarried daughters of permanent resident aliens
- (3) Married sons and married daughters of citizens
- (4) Brothers and sisters of citizens.

Id. § 203.

62. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("[Liberty] denotes not merely freedom from bodily restraint but also the right . . . [to] establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) ("The child is not

Supreme Court reinforced the idea “that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”⁶⁴ The state may not interfere with this right without suspicion of parental unfitness.⁶⁵

The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.⁶⁶

Familial autonomy is thus a deeply rooted American tradition.

The Supreme Court has also recognized that illegal aliens cannot be denied equal protection of the laws.⁶⁷ “Aliens, even aliens whose presence

the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (describing the “fundamental liberty interest of natural parents in the care, custody, and management of their child”); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”).

63. 530 U.S. 57 (2000).

64. *Id.* at 66. This case involved the application of a Washington statute allowing any person to petition for visitation with a child at any time. The statute was held invalid, as applied to a dispute between a widow and paternal grandparents over the amount of visitation the grandparents should receive. *Id.* at 57. See also *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”) The Supreme Court recognized that the Washington statute was problematic because it “places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent’s estimation of the child’s best interests, the judge’s view necessarily prevails.” *Troxel v. Granville*, 530 U.S. 57, 67 (2000).

65. The court noted:

[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.

Id. at 68–69.

66. *Id.* at 68 (citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979)). Justice O’Connor noted that under the statute, “in practical effect, . . . a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge’s determination of the child’s best interests.” *Id.* at 67.

67. *Plyler v. Doe*, 457 U.S. 202, 210 (1982). The issue in *Plyler v. Doe* was whether a Texas statute denying free public education to undocumented children violated the Fourteenth Amendment. *Id.* at 205.

in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”⁶⁸ The Supreme Court recognized that although aliens are not a suspect class,⁶⁹ the children of illegal aliens should not be faulted for the actions of their parents.⁷⁰

Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants.⁷¹

The Supreme Court therefore held that a Texas statute denying free public education to undocumented children “impose[d] a lifetime hardship on a discrete class of children not accountable for their disabling status.”⁷² A child should not be punished for the actions of his or her parents or the circumstances of his or her birth.⁷³

68. *Id.* at 210. *See also* *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

69. *Plyler*, 457 U.S. at 219 n.19.

We reject the claim that “illegal aliens” are a “suspect class.” . . . Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime. In addition, it could hardly be suggested that undocumented status is a “constitutional irrelevancy.”

Id.

70. “[T]he children who are plaintiffs in these cases ‘can affect neither their parents’ conduct nor their own status.’” *Id.* at 220 (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)). This argument is even stronger for citizen children whose parents face deportation, as they are not a party to the proceedings.

71. *Id.* at 219–20.

72. *Id.* at 223. In reaching its holding, the Supreme Court recognized that education is a greater societal good because it allows people to participate in civic duties and the political system. *Id.* at 221. Our early history has shown that “some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.” *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)). “Such an opportunity, when the state has undertaken to provide it, is a right which must be made available to all on equal terms.” *Id.* at 223.

73. “Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent.” *Id.* at 220 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

VII. THE DENIAL OF DERIVATIVE CLAIMS CONTRADICTS FAMILY LAW PRINCIPLES AND THE FUNDAMENTAL RIGHT TO FAMILY

When courts deny derivative asylum claims for parents of citizens at risk for FGM, they directly contradict well-rooted traditions and principles of family and constitutional law. Judicial denial intrudes on the fundamental right of fit parents to raise their children.⁷⁴

This jurisprudential contradiction becomes a real world problem when courts reject parents' derivative asylum claims and do not inquire into the applicant's actual plans for his or her children upon deportation.⁷⁵ In such cases, courts fail to examine the child's best interest, the applicant's parenting skills, or where the child will go if the parent is deported. The law presumes that being raised by one's fit, biological parent is in the child's best interest.⁷⁶ Yet courts, in cases like *In re A-K-*, coldly treat the child's situation as irrelevant since she has a right to remain in the United States.⁷⁷ Without properly evaluating these factors, courts deprive parents and children of due process and equal protection of the laws.

Certainly, the standard applied to these cases should not focus on the child's ability to remain in this country. Deportation of a parent deeply affects a child for the remainder of his or her life. In such instances, the child will be raised by another relative, enter the state's care, or be forced to relocate to a country that practices FGM. Each situation raises pressing concerns not sufficiently considered by the courts.

Sometimes when deported parents choose to bring the child with them, FGM is an inevitable result.⁷⁸ As in the *Olowo* case, a parent who makes this choice known to the court may face investigation by state authorities and perhaps lose custody.⁷⁹ This consequence is quite problematic. Claiming their child will return with them is necessary for parents to show a reasonable fear of their daughter's persecution. Yet, by stripping them of custody, courts are essentially punishing parents for attempting to do whatever possible to avoid subjecting their daughter to FGM.

74. See *supra* note 65 and accompanying text.

75. See *In re A-K-*, 24 I. & N. Dec. 275 (BIA 2007); *supra* notes 30–36 and accompanying text; see also *Oforji v. Ashcroft*, 354 F.3d 609 (7th Cir. 2003); *supra* notes 39–41 and accompanying text. These courts merely speak in terms of possibilities rather than the actualities of the situation. The courts ignore the child's relationship with the parent and the child's preference for whom he or she wants to live with; the courts wholly disregard the child's best interest.

76. See *supra* note 66 and accompanying text.

77. See *supra* notes 30–36 and accompanying text.

78. In many communities, it is naïve to believe that parents have the ability to control the practice. See *supra* note 22 and accompanying text.

79. See *supra* notes 43–48 and accompanying text.

If the law presumes a child's best interest is met by being raised by natural parents, then, arguably, citizen children have an interest in being raised by their parents.⁸⁰ Furthermore, "the Convention on the Rights of the Child, the most widely ratified human rights treaty in history, requires states to 'ensure that a child shall not be separated from his or her parents against their will, except when . . . such separation is necessary for the best interests of the child.'"⁸¹ In sum, children have a right to be raised by their parents, and the best interest of the child should determine the result of asylum claims whenever the parent/child relationship is at issue.

From a practical perspective, if courts continue to instigate custody proceedings, parents will effectively be barred from presenting their case for derivative asylum. Parents will no longer face an impossible choice; courts will have made it for them. Applicants will leave their daughters behind to be raised by someone else. The courts' refusal to inquire into parental fitness thus infringes on the applicants' fundamental right to raise their children.

Additionally, state custody is an insufficient alternative because of the cost to the government. In 2002, the total cost to local, state, and federal government for out-of-home care of children was nearly ten billion dollars.⁸² Furthermore, foster care⁸³ is not meant to be a permanent placement.⁸⁴ Generally, the goal is reunification with a parent (which

80. See *supra* note 66 and accompanying text. A parent has a liberty interest in raising his or her child, and being raised by one's parents is presumed to be in the child's best interest. The law aims to protect the best interest of the child by creating this presumption and only inquiring into family relationships when the child's best interest is at risk. Thus, since the laws protect the child/parent relationship, a child has a liberty interest in being raised by his or her parents.

81. *Abebe v. Ashcroft*, 379 F.3d 755, 764 (9th Cir. 2004) (Ferguson, J., dissenting) (citing United Nations Convention on the Rights of the Child art 9, Nov. 20, 1989, 1577 U.N.T.S. 3).

82. CYNTHIA A. SCARCELLA ET AL., *THE COST OF PROTECTING VULNERABLE CHILDREN IV*, at 10 tbl.2 (2004). "According to estimates from the U.S. House of Representatives Committee on Ways and Means, more than 50 percent of the children in foster care in 1999 were given federal foster care assistance, which is tied to eligibility for welfare benefits." *Frontline, Failure to Protect: Foster Care Statistics*, <http://www.pbs.org/wgbh/pages/frontline/shows/fostercare/inside/stats.html> (last visited Feb. 4, 2009).

83. The Code of Federal Regulations defines foster care as

"24-hour substitute care for children outside of their own homes." Foster care settings include, but are not limited to, nonrelative foster family homes, relative foster homes (whether payments are being made or not), group homes, emergency shelters, residential facilities, and pre-adoptive homes.

CHILD WELFARE INFORMATION GATEWAY, *NUMBERS AND TRENDS: FOSTER CARE STATISTICS 2* (2007), available at <http://www.childwelfare.gov/pubs/factsheets/foster.cfm> (follow "Printable Version PDF" hyperlink) (citation omitted).

84. Child foster care statistics reveal:

Of the estimated 513,000 children in foster care as of September 30, 2005:

- 51 percent had a goal of reunification with parent(s) or primary caregiver(s)

would be impossible in derivative asylum cases), or adoption (which would also be impossible, since the parents' rights have not been officially terminated). As a result, if a child does enter the foster system, the cost to the state increases because the child will be in the system until he or she reaches the age of majority.

Foster care can cause emotional harm as well. Siblings may be separated from each other if a foster home is unable to take more than one child. Separation from parents and siblings is not easy on a child. Also, the children may live in several homes over an extended period of time. Moving frequently and adjusting to new homes and people can be difficult for children and may negatively impact their lives.

Stability and consistency are key elements in determining a child's best interest.⁸⁵ Placements in the foster system are not very successful. "According to a survey of foster care alumni conducted by Casey Family Programs, 13 percent reported being homeless at least once since being discharged. Further, fully 15 percent of the alumni reported being arrested since leaving foster care."⁸⁶ The law generally tries to keep parents and children together because this arrangement benefits children and affects their emotional stability and future societal contributions.

Immigration laws have always valued important family relationships.⁸⁷ There is no reason to disregard familial considerations in the asylum context. Citizens are allowed to sponsor their children, parents, and other family members' entry into the United States.⁸⁸ Nevertheless, the

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- 20 percent had a goal of adoption
 - 7 percent had a goal of living with a relative or guardian
 - 7 percent had a goal of long-term foster care
 - 6 percent had a goal of emancipation
 - 8 percent had not yet had a permanency goal established.

Id. at 4–5.

85. In custody proceedings courts look to parents' past behavior to determine the nature of the parent/child relationship. *See* *Elisa B. v. Superior Court*, 117 P.3d 660, 662 (Cal. 2005) (determining that after the separation of a lesbian couple, the partner who was not the biological mother of twins conceived through sperm donation could not deny motherhood and evade legal responsibility because she openly held out the children as her own). This test embodies the idea that it is best for a child to continue to have contact with parental figures for consistency and stability. "By recognizing the value of determining paternity, the Legislature implicitly recognized the value of having two parents, rather than one, as a source of both emotional and financial support, especially when the obligation to support the child would otherwise fall to the public." *Id.* at 669.

86. *Frontline*, *supra* note 82.

87. *See* Immigration and Nationality Act § 201, 8 U.S.C. § 1151 (b)(2)(A)(i) (2006); *id.* § 203.

88. "Family 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. citizens." *Abebe v. Ashcroft*, 379 F.3d 755, 764 (9th Cir. 2004) (citing THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 319 (4th ed. 1998)).

principles currently applied in the asylum context are contrary to the goal of reunification and importance of families in American immigration law.

In *Plyler v. Doe*,⁸⁹ the Supreme Court recognized that children should not be punished for the illegal behavior of their parents.⁹⁰ This rule must be considered in derivative asylum cases as well. Otherwise, the child will, in many instances, be constructively deported with the parent. American girls will be punished for their parents' illegal status by undergoing FGM, a form of torture. Girls left in the United States will be punished by being deprived of their right to be raised by their natural parents.

Even when one natural parent remains, the separation is still traumatic and may be contrary to the child's best interest.⁹¹ The children themselves may be aware of these effects. For example, a child whose mother was deported and who now lives with her father said, "I'm not happy; I'm sad Because it's not fair that everybody else has their mom except me."⁹² Courts that evaluate only the parent's actions have a narrow perspective and thus fail to acknowledge the detrimental and punishing effect deportation has on children.

Additionally, significant societal costs are incurred when children are left without a parent.⁹³ If only one parent is supporting the child, that parent may need federal and state assistance. Moreover, costs associated with the foster care system are significant.⁹⁴ It is unquestionably better for the emotional health of the child to have access to her parents. Immigration courts do not account for the costs of social services for children left without one or both parents. Unlike parents whose children are removed from a home because of neglect, these parents will never be able to return to the United States and reclaim their children. Depending on the age of the child, this could mean up to eighteen years of social services and assistance. Courts must consider these factors when making deportation decisions.

89. 457 U.S. 202 (1982).

90. *Id.*; see *supra* notes 67–73 and accompanying text.

91. See *Adoption of Kelsey S.*, 823 P.2d 1216, 1236 (Cal. 1992) ("Absent such a showing [of unfitness], the child's well-being is presumptively best served by continuation of the father's parental relationship."); see also *supra* note 66 and accompanying text.

92. Nina Bernstein, *A Mother Deported, and a Child Left Behind*, N.Y. TIMES, Nov. 24, 2004, at A1.

93. *Id.* ("[I]mmigration experts say there are tens of thousands of children every year who lose a parent to deportation. As the debate over immigration policy heats up, such broken families are troubling people on all sides, and challenging schools and mental health clinics in immigrant neighborhoods.")

94. See *supra* note 82 and accompanying text.

The fundamental right of parents to raise their children can be denied when it conflicts with a substantial government interest. While some may claim that allowing derivative claims to go forward would encourage illegal aliens to have children in the United States, claims based on a daughter's risk of FGM should only be allowed if that risk is sufficient to satisfy the asylum standards.⁹⁵ It is unlikely that an influx of sustainable asylum claims will erupt if these claims are allowed. The United States has always been seen as a safe haven because American law respects the autonomy of the individual and family. Keeping families together is an important American principle. An unrealistic fear of increased asylum claims does not justify denying such a deeply rooted national tradition and important constitutional right.

VIII. CONCLUSION

Immigrants founded the United States, thus this nation's doors have always been open to people seeking refuge. The Constitution and laws of the United States respect familial relationships and allow parents to raise their children without excessive intrusion by the government. The judicial denial of parents' derivative asylum claims based on their citizen daughter's risk of FGM intrudes on both the parents' and child's constitutional rights. Presently, however, in such cases courts simply deny asylum and order removal, without inquiring into what would happen to the children. By overlooking this important issue, courts protect neither the best interest of the child nor the constitutional rights of the child and parents. Immigration courts must begin to adjudicate these derivative asylum claims with family law and constitutional principles in mind.

*Miriam R. Cahan**

95. See *supra* notes 6–12 and accompanying text.

* B.S. (2005), University of Illinois at Urbana-Champaign; J.D. (2009), Washington University School of Law. I would like to thank Professor Stephen Legomsky for providing the initial idea for this Note, Professors Susan Appleton and Christopher Bracey for their advice and guidance, and my friends and family for their love and support.