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CASENOTES

OLOWO V. ASHCROFT: GRANTING PARENTAL ASYLUM BASED ON A CHILD'S REFUGEE STATUS

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I. INTRODUCTION

On May 11, 2004, the Seventh Circuit declared that Esther Olowo should be removed from the United States and sent back to her native country of Nigeria. The court ordered the deportation of Mrs. Olowo because of her attempts to smuggle an undocumented Nigerian child into the country in direct violation of the Immigration and Nationality Act (INA) § 212(a)(6)(E)(i).[1] On appeal Mrs. Olowo argued she should be granted asylum in the United States based on the fear that if she was forced to return to Nigeria, her twin daughters would also be "constructively deported" and forced to undergo female genital mutilation (FGM).[2] The issue facing the court was whether a valid asylum claim should be extended to a mother who feared her children would be subjected to persecution, against her will, if forced to return to Nigeria.[3] Significantly, both daughters were legal permanent residents of the United States, and it was uncontested that it was in their best interests to remain in the United States. In making its decision, the court weighed the consequences of the girls going back to Nigeria with Mrs. Olowo, against the consequences of allowing Mrs. Olowo to remain in the United States despite her illegal activity.[4]

Olowo v. Ashcroft is one of several recent cases to address the "parent-child FGM issue."[5] The circuits are split over this issue because of the varying statutory interpretation and differing applications of the term "persecution."[6] *Olowo*, a Seventh Circuit case, is within the group of cases holding that a mother (the most common family member trying to make this claim) cannot "bootstrap" her asylum claim to the threat facing her children.[7] Under § 208(b)(3) of the INA, asylum granted to parents can be extended to spouses and children under the concept

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[1] *See* Olowo v. Ashcroft, 368 F.3d 692, 695 (7th Cir. 2004).

[2] *Id.* at 695; *see also* Marcelle Rice, *Protecting Parents: Why Mothers and Fathers Who Oppose Female Genital Cutting Qualify for Asylum*, 04-11 IMMIGR. BRIEFINGS 1, 18 (2004) ("constructive deportation refers to the de facto removal of a citizen or resident child that typically occurs when the minor's care-taking parent is removed from the country").

[3] *Olowo*, 368 F.3d at 701.

[4] *See id.* at 701-02.

[5] *See* Rice, *supra* note 2, at 1.

[6] *Id.*

[7] *Id.* at 5.

of "derivative asylum."[8] However, the statute does not mention the extension from children to parents. Thus, some courts, such as those in the Seventh Circuit, prevent parents from seeking asylum through their children's potential persecution.[9]

The opposing viewpoint, led by the Sixth Circuit, holds that a mother's asylum claim is independently valid because she fears her own persecution - the persecution of seeing her child suffer from FGM.[10] A mother, in such jurisdictions, may claim asylum under a broadened interpretation of the term "persecution," which includes emotional pain.[11] This article argues that courts across the country should administer the broader interpretation of a mother's independent persecution and that the best way to accomplish this consistency is to develop this area of asylum law in order to remove the problem of statutory misinterpretation.

Consistency when dealing with the issue of child-parent FGM can only be achieved through legislative improvements by Congress, not through inconsistent judicial interpretation. Congress needs to adopt specific requirements to ensure a balance between competing policies; controlling the number of asylum claims based on the fear of harm to another family member, as well as ensuring family unity in the best interests of a child.[12] Immigration law cannot continue to ignore this increasingly prevalent problem. It is against both American and international values to remove a family to a country where physical and emotional persecution awaits their return. During the process of developing new legislation, Congress should research the asylum laws of Canada, the United Kingdom, Australia, and other international bodies to gain insight into different humanitarian policies.[13]

Every year approximately two million girls across the globe are subjected to the horrors of female genital mutilation.[14] To-

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8 Immigration and Nationality Act 208(b)(3), 8 U.S.C. § 1158(b)(3)(A) (2006).

9 *See id.*; Rice, *supra* note 2, at 18.

10 *See* Abay v. Ashcroft, 368 F.3d 634, 642 (6th Cir. 2004).

11 Rice, *supra* note 2, at 8.

12 *See* Rice, *supra* note 2, at 14.

13 *See id.* at 10.

14 United Nations Organization, *"What is Female Genital Mutilation? What Actions are Being Taken to Prevent it?," available at* http://www.un.org/geninfo/faq/factsheets/FS3.HTM.

day, there are over eighty-four million living women who have been persecuted by some form of this inhumane treatment.[15] Moreover, due to increased rates of immigration, instances of FGM occur in the adopted homelands of immigrants such as the United States, Canada, and Italy.[16] These countries are commonly referred to as "receiving countries"[17] because of the large number of immigrants from Africa.

The practice of female genital mutilation is referred to by many names: "female genital cutting," "female genital circumcision," "female genital surgery," "ritual genital surgery" and "sexual mutilation."[18] According to many scholars, the phrase "female genital circumcision" is less accurate and should not be used because, in comparing male and female circumcision, male circumcision is a less dangerous and severe procedure.[19] In 1999 the USAID Intra-Agency Working Group sponsored a symposium entitled, "Female Genital Cutting: The Facts and the Myths," where the term "female genital mutilation" was defined as:

> [A] harmful traditional cultural practice that involves any alteration or cutting of the female genitalia. Procedures range from snipping or removal of the clitoris and the labia minora to excision of all the external genitalia, with tight closure of the resulting wound. This practice is rooted in closely held traditions governing women's status, identity, and marriageability.[20]

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[15] The majority of women who suffer from FGM live in Africa and the Middle East. Fran P. Hosken, *Female Genital Mutilation Strategies for Eradication*, Presented at The First International Symposium on Circumcision (Mar. 1-2, 1989), *available at* http://www.nocirc.org/symposia/first/hosken.html.

[16] *Id.*; *see also* Julia M. Masterson & Julie Hanson Swanson, *Female Genital Cutting: Breaking the Silence, Enabling Change*, International Center for Research on Women and the Centre for Development and Population Activities (2000), http://www.icrw.org/docs/FGCfinalpdf.pdf.

[17] FEMALE GENITAL MUTILATION: A GUIDE TO LAWS AND POLICIES WORLDWIDE 57 (Anika Rahman & Nahid Toubia eds., 2000) [hereinafter Rahman].

[18] *Id.* at 4.

[19] Marianne Sarkis, *Female Genital Cutting (FGC): An Introduction*, Female Genital Cutting Education and Networking Project, *available at* http://www.fgmnetwork.org/intro/fgmintro.html.

[20] Masterson & Swanson, *supra* note 16, at 10; *see also* HUMAN RIGHTS OF WOMEN: INTERNATIONAL INSTRUMENTS AND AFRICAN EXPERIENCES 269 (Wolfgang Benedek et al. eds., 2002) [hereinafter Benedek] (another definition endorsed by WHO, UNICEF, and UNFPA in 1997 described FGM, "as all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs whether for cultural or other non-therapeutic reasons.").

Despite the combined efforts of the international legal community and the United States to denounce this form of brutalization, FGM remains a widespread problem.[21] Proponents of FGM are avid supporters of the procedure's symbolism and tradition. Consequently several countries, such as Nigeria, refuse to endorse national laws prohibiting the practice.[22] Today, international activists and nongovernmental organizations are trying to gain momentum in a grassroots approach at state and local levels.[23] Activists in Nigeria and other countries stress the importance of establishing a strong educational movement to teach people about the health hazards and severe persecution caused by FGM.[24]

This article reviews the United States Court of Appeals decision in *Olowo v. Ashcroft*[25] and examines the case's significance in the evolution of asylum law and female genital mutilation. Section II outlines the historical background of female genital mutilation and the background of the *Olowo* case. Section III reviews the case law concerning asylum law and FGM prior to the *Olowo* decision. Section IV analyzes the Seventh Circuit's decision and compares it to the Sixth Circuit's holding in *Abay v. Ashcroft*,[26] which was decided the same week as *Olowo* but came to an irreconcilable conclusion. These two cases highlight the inconsistency in judicial interpretation of INA § 208(b)(3)(A), 8 U.S.C. § 1158(b)(3)(A). This article argues that the Sixth Circuit's holding exposes the flaws of the Seventh Circuit's decision. Section V discusses *Olowo* in the context of past important cases and legislation on the international, national, and state levels. The discussion also explores the threat *Olowo* presents to the current laws and policies of the United States that promote family unity. Section VI suggests the need for future legislation. Section VII concludes that FGM remains an important developing aspect of asylum law because the horrors of FGM will continue until the world recognizes the sever-

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[21] Masterson & Swanson, *supra* note 16, at 10.

[22] *See* Masterson & Swanson, *supra* note 16.

[23] *See id.*

[24] U.S. Department of State, *Nigeria: Report on Female Genital Mutilation or Female Genital Cutting*, *available at* http://www.asylumlaw.org/docs/showDocument.cfm?documentID=1206.

[25] Olowo v. Ashcroft, 368 F.3d 692, 695 (7th Cir. 2004).

[26] *See generally* Abay v. Ashcroft, 368 F.3d 634.

ity of the problem and begins to educate communities worldwide. Thus, in the meantime, the United States must pass legislation that provides protection to both the girls at risk of female genital mutilation and their parents who face severe emotional persecution, because as this article suggests, the two are inevitably linked.

II. Historical Background of Female Genital Mutilation

A. *Types of Female Genital Mutilation*

The harm of FGM threatens women of all ages, religions, and races. Mutilation is performed on infants, brides on their wedding night, and even new mothers shortly after giving birth.[27] There are three main types of genital operations to which a woman may be subjected.[28] Typically, the form of FGM practiced is determined by geographic location and local tradition.[29] The first type of mutilation is called "Sunna Circumcision," which is defined by the World Health Organization as the "[e]xcision of the prepuce with or without excision of part or all of the clitoris."[30] Sunna is mainly practiced in Nigeria and other African countries, but it reportedly occurs in some Middle Eastern countries, such as Oman and Saudi Arabia.[31] The second procedure, "Clitoridectomy,"[32] includes, "[e]xcision of the clitoris together with partial or total excision of the labia minora."[33] Approximately eighty-five percent of women subjected to FGM undergo this procedure.[34] Sudan midwives began this form of FGM when the most extreme form of infibulation was prohibited by Great Britain in 1946.[35] Infibulation is the third

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[27] *See* Layli Miller Bashir, *Female Genital Mutilation In the United States: An Examination of Criminal and Asylum Law*, 4 Am. U. J. Gender Soc. Pol'y & L. 415, 420 (1996).

[28] *See* Karen Hughes, *The Criminalization of Female Genital Mutilation in the United States*, 4 J. L. & Pol'y 321, 327-28 (1995) [hereinafter Hughes].

[29] *See id.* at 332; *see also* Bashir, *supra* note 27.

[30] 1995 World Health Organization (WHO) Classification of FGM, *available at* http://www.who.int/mediacentre/factsheets/fs241/en/ [hereinafter WHO Organization].

[31] *See* Sarkis, *supra* note 19.

[32] *Id.*

[33] WHO Classification, *supra* note 30.

[34] *See* Benedek, *supra* note 20, at 270.

[35] *See* Sarkis, *supra* note 19.

and most severe type of FGM: "[E]xcision of part or all of the external genitalia and stitching/narrowing of the vaginal opening."[36] Once the woman is sewn together only a small hole is left open for her to urinate and menstruate. During the recovery process, the girl's legs are tied together for weeks to ensure the hole is closed as much as possible.[37] She must be cut open later to engage in intercourse with her husband, and then closed up again to ensure she remains faithful.[38] This form of FGM is most often seen in Sudan, Somalia, and Djibouti, where eighty to ninety percent of women experience the most severe form of mutilation by having their clitoris completely removed.[39]

B. *The Debate Over the Practice of Female Genital Mutilation*

Proponents of female genital mutilation argue there are several reasons why traditions of genital cutting should prevail. Traditional family values, religion, group identity, and cleanliness are among the most common arguments for perpetuating genital mutilation.[40] Some followers of Islam and Christianity support FGM; however, their argument that the tradition is founded in religious doctrine is mistaken because the practice began in ancient Egypt in the fifth century B.C., long before the existence of either religion.[41] The sustained practice of FGM is not only based on religious and cultural traditions, it also exists to ensure men's power and control over women.[42] The so-called "tradition" is often presented with elaborate ritual ceremonies viewed as a rite of passage necessary for a girl or woman to fulfill her role in becoming part of the community.[43] Many poor families believe the procedure can bring a sense of pride, value, and honor to the family when they otherwise are viewed as inferiors within their community.[44] Many believe that respect for

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[36] WHO Classification, *supra* note 30.
[37] *See* Benedek, *supra* note 20, at 270.
[38] *See* Sarkis, *supra* note 19.
[39] *See* Benedek, *supra* note 20, at 270.
[40] *See* Bashir, *supra* note 27, at 424-25.
[41] Hughes, *supra* note 28, at 331.
[42] *See id.*
[43] *Id.* at 334.
[44] *See* Benedek, *supra* note 20, at 271.

the family will put them in a better position to arrange a proper marriage for their daughter.[45]

Okumephuna Chinwe Celestine from southern Nigeria described the barbarism of the female cutting "ritual." She said, "I heard a voice of a young girl shouting desperately for help inside a closed door. I peeped through the key hole . . . . Inside that conclave were four hefty women; three of them stretching apart the young girl's legs while the fourth was poking a sharp object in her clitoris."[46] The operation required surgical instruments and anesthesia, however, neither were used, instead "screaming children [were] held down by force on the ground in dark huts, with crude knives or any other cutting tools."[47]

Celestine grew up to understand that the main purpose of continuing the practice of FGM was to ensure women would not enjoy sexual activities, thereby preventing women from becoming promiscuous.[48] Sex is considered in many cultures to be an act done for a man's enjoyment and something a woman does out of duty to her husband.[49] Proponents of FGM believe that the narrower opening to the vagina left after mutilation is more pleasing to a woman's husband but, "this view ignore[s] the excruciating pain a mutilated woman endures during sex in order to facilitate this heightened pleasure . . . ."[50] In certain regions of Nigeria, for example, it is a precondition that a woman be circumcised before she can be married.[51] The fear of not accomplishing marriage and dishonoring the family is so great that women allow the continuation of FGM.[52] Older women in the family or community aid in the tradition by performing the cutting and holding down the young child. Consequently, their actions support the continuation of male domination. For example, in The Gambia, the older women who perform the pro-

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[45] *See id.* at 271; *see also* FEMALE "CIRCUMCISION" IN AFRICA: CULTURE, CONTROVERSY, AND CHANGE 254 (Bettina Shell-Duncan & Ylva Hernlund eds., 2000) [hereinafter Shell-Duncan].

[46] Okumephuna Chinwe Celestine, *FGM: An Insult On The Dignity Of Women*, *available at* http://fgmnetwork.org/countries/nigeria.htm [hereinafter Celestine].

[47] Hosken, *supra* note 15.

[48] *See* Celestine, *supra* note 46.

[49] *See id.*

[50] Bashir, *supra* note 27, at 427.

[51] *See* Celestine, *supra* note 46.

[52] *See* Benedek, *supra* note 20, at 273.

cedure are thought to have "supernatural powers" and are revered, and in Sierra Leone they are known as "priestesses."[53] Many women superstitiously fear that if they do not undergo the procedure they will not be able to have children, which is viewed as a central goal and purpose in their life.[54] Activists correctly argue that it is only through the promotion of education that the dangers of this practice will be understood in order to persuade people to abandon the painful tradition.[55]

AIDS, child birth complications, severe hemorrhaging, infections, ulcers, and tetanus, are a few examples of the serious repercussions that result from the unsanitary and painful procedure.[56] Many girls suffer from the inability to urinate and have repetitive urinary tract infections. Some girls even die due to the severe shock and pain of the procedure.[57] Moreover, the psychological trauma that comes from the invasion of a delicate and private area of the body is simply unbearable for many women.[58]

C. *Female Genital Mutilation in Nigeria*

In order for the courts in the United States to correctly understand the fear and sense of persecution facing women returning to countries where FGM is practiced, the judiciary must be aware of the customs and social pressures that exist. Esther Olowo came from Nigeria, the most highly populated African country.[59] According to the Hosken Report in 1993, sixty percent of women were subjected to FGM in Nigeria, totaling 36,750,000 - the highest number reported in all of Africa.[60] Even in the twenty-first century, Nigeria remains a patriarchal society, "in which authority [is] held by the extended family."[61] Women lack most decision making power and, in many areas, are denied the rights to inheritance, the right to own land, and

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[53] *Id.* at 271.

[54] *See id.* at 272.

[55] *See* Sarkis, *supra* note 19.

[56] *See* Bashir, *supra* note 27, at 423.

[57] *See id.* at 422-23.

[58] *See* Hughes, *supra* note 28, at 331.

[59] *See* Shell-Duncan, *supra* note 45, at 96.

[60] NAHID TOUBIA, FEMALE GENITAL MUTILATION: A CALL FOR GLOBAL ACTION 24-25 (2d ed. 1995).

[61] Shell-Duncan, *supra* note 45, at 97.

the right to proper medical treatment.[62] There is no law in Nigeria that protects women from FGM.[63] The government has refused to prohibit the procedure or make it a crime.[64] Thus, women are left to face the pressures without legal protection.

Another problem currently emerging in Nigeria that is associated with FGM is the increased number of medical doctors, nurses, and midwives, who perform the procedure to supplement their salaries. The ethical dilemma presented to physicians is whether to provide a safer and more sanitized procedure or to denounce the procedure completely and allow it to be performed by nonprofessionals causing increased side effects.[65] Understanding the situation in Nigeria and other countries with FGM problems will aid both legislators and judges in their law making decisions.

III. Preceding Case Law and Legislation Before *Olowo v. Ashcroft*

During the early 1990's, concern over female genital mutilation began to gain momentum in the social and political arenas of the United States. In 1995, Congress passed the Federal Prohibition of Female Genital Mutilation Act as a Title 18 Amendment.[66] The Act criminalized the practice of FGM as a

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[62] Shell-Duncan, *supra* note 45, at 97.

[63] Rahman, *supra* note 17, at 200.

[64] *Id.*

[65] *See id.* at 102-03; *see generally* Benedek, *supra* note 20, at 272.

[66] Federal Prohibition of Female Genital Mutilation Act of 1995, July 13 (legislative day, July 10) 1995, *available at* http://www.fgmnetwork.org/index.php (follow "Legislation" hyperlink; then follow "Federal: HR 3019" hyperlink) [hereinafter Federal Prohibition].

116. FEMALE GENITAL MUTILATION

"(a) Except as provided in subsection (b), whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both.

(b) A surgical operation is not a violation of this section if the operation is –

(1) necessary to the health of the person on whom it is performed, and is performed by a person licensed in the place of its performance as a medical practitioners; or

(2) performed on a person in labor or who has just given birth and is performed for medical purposes connected with that labor or birth by a person licensed in the place it is performed as a medical practi-

way to protect minors from the invasive procedure. Both the person performing the operation and the person who requested the genital cutting would be subjected to criminal punishment under the law.[67] Congress' legislation prohibited FGM within the borders of the United States; however, the related problem of aliens seeking asylum from the harms of FGM abroad were not covered by the 1995 Act. This area of the law was left to be developed by the judiciary.

The first case to address the issue of female genital mutilation as a form of persecution was *Matter of Oluloro*.[68] In that case, the United States suspended the deportation of Lydia Oluloro, a Nigerian citizen, in order to protect her daughters from "the extreme hardship" of FGM in which they would be subjected to if forced to returned to Nigeria.[69] The immigration judge's favorable decision, however, had "no precedential value" because 1) the INS chose not to appeal to the Board of Immigration Appeals (BIA) and 2) Lydia Oluloro independently satisfied the criteria of, "good moral character, seven years of continuous presence in the United States, and demonstrated 'extreme hardship' if forced to return."[70] Thus, the issue remained dormant for three years before a BIA judge would decide whether

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tioner, midwife, or person in training to become such a practitioner of midwife.

(c) In applying subsection (b)(1), no account shall be taken of the effect on the person on whom the operation is to be performed of any belief on the part of that or any other person that the operation is required as a matter of custom or ritual.

(d) Whoever knowingly denies to any person medical care or services or otherwise discriminates against any person in the provision of medical care or services, because —

(1) that person has undergone female circumcision, excision, or infibulation;

or

(2) That person has requested that female circumcision, excision, or infibulation be performed on any person;

Shall be fined under this title or imprisoned not more than one year, or both."

[67] *See id.*

[68] *See* Abay v. Ashcroft, 368 F.3d 634, 642 (6th Cir. 2004) (quoted in *In re* Oluloro, No. A72 147 491 (Dep't Justice Mar. 23, 1994) (oral decision)).

[69] *Id.*

[70] These are the criteria to suspend deportation under 8 U.S.C. 1254(a)(1) (2006); *see also* Barret Breitung, *Interpretation and Eradication: National and International Responses to Female Circumcision*, 10 EMORY INT'L L. REV. 657, 674-75 (1996).

FGM was a form of "persecution" appropriate to support a refugee claim.[71]

Finally in 1997, the BIA made the first binding precedent, in *In re Kasinga*.[72] Kasinga was a seventeen-year-old girl who belonged to an organization that opposed the local practice of FGM. Determined to avoid circumcision, she escaped from her tribe and sought refuge in the United States.[73] The Board applied the Federal Prohibition of Female Genital Mutilation Act and held that in order to gain refugee status a person must satisfy the statutory requirements of section 208 of the Immigration and Nationality Act (INA), which defines a refugee as,

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person has habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . . The term "refugee" does not include any person who 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.[74]

Kasinga had to overcome several obstacles before the courts could grant her asylum: 1) she had to fit within the above definition of "refugee," 2) she had to show she belonged to a specific persecuted group and 3) she had to prove herself to be a credible witness.[75] The first two criteria were deemed satisfied by the court because of her affiliation with a particular social group in Togo which objected to FGM, and she had a "well founded fear of persecution" as a member of this particular social group.[76] Kasinga satisfied the third criteria of being a credible witness by providing the court with "plausible, detailed, and internally

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[71] *See* Amy Stern, *Female Genital Mutilation: United States Asylum Laws Are in Need of Reform*, 6 AM. U.J. GENDER & L. 89, 99-100 (1997).

[72] *In re* Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996).

[73] *Id.*; *see also* Stern, *supra* note 71, at 99-100.

[74] Connie M. Ericson, Note: In Re *Kasinga: An Expansion of The Grounds for Asylum for Women*, 20 HOUS. J. INT'L L 671, 673 (1998).

[75] *Id.* at 676-77.

[76] *Id.* at 681-82.

consistent" testimony about the situation in Togo concerning FGM.[77] This case established the precedent for the BIA to classify FGM as an independent form of "persecution" and, thus, "expanded the reach of asylum law for women."[78]

After the *Kasinga* decision, two questions emerged concerning the scope of the court's decision. First, whether the ruling included the right to grant asylum to a parent who seeks to stay in the United States in order to prevent her daughters from undergoing FGM and secondly, whether a woman who was subjected to FGM in the past can seek asylum in the present.[79] The unanswered questions of *Kasinga* have resurfaced in appellate decisions over the last several years—one decision being *Olowo v. Ashcroft*.[80]

IV. Circuit Court Cases in 2004

A. *Background of Olowo v. Ashcroft*

In 2002, Esther Olowo, a permanent U.S. resident, agreed to go to the Bahamas to help her friend, Mr. Ali, illegally bring his daughter into the country.[81] Mr. Ali requested Mrs. Olowo's assistance because he did not trust his ex-wife to bring their daughter, Grace, to Chicago upon entering the United States as they had agreed.[82] Mr. Ali purchased Mrs. Olowo a round-trip plane ticket and provided her with all of the necessary fraudulent documents.[83] The plan proceeded smoothly until officials at the Nassau airport in the Bahamas became suspicious of the group, which consisted of Mrs. Olowo, the young child, Mrs. Ali and her friend. One witness, Officer Haas, later testified that he saw Mrs. Olowo give the women instructions and hand documents over to them.[84] Mrs. Ali and her friend were exposed as frauds after they separated from Mrs. Olowo and Grace.[85] The inspection officers allowed Mrs. Olowo and Grace to board the

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[77] *Id.* at 678-79.
[78] *Id.* at 693.
[79] Ericson, *supra* note 74, at 693-94.
[80] Olowo v. Ashcroft, 368 F.3d 692, 695 (7th Cir. 2004).
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Olowo*, 368 F.3d at 696.
[85] *Id.*

plane out of compassion and decided to continue their investigation in Chicago.[86]

A few months later, the INS questioned Mrs. Olowo about the incident and she admitted in a sworn statement that she presented officials with a false birth certificate that was purchased by Mr. Ali.[87] The statement led to a formal criminal charge of knowingly aiding an alien in violation of INA § 212(a)(6)(E)(i). The statute states, "smugglers who knowingly aid any other alien to enter United States is in violation of the law and generally inadmissible."[88]

At the removal hearing the immigration judge found Mrs. Olowo removable and required her return to Nigeria.[89] According to the court, INS presented "sufficient circumstantial evidence to show by clear and convincing evidence that Mrs. Olowo had knowingly aided Grace to enter the U.S."[90] Moreover, the court held that, "Mrs. Olowo's testimony was not credible because it was inconsistent, self-serving, vague, and implausible" and that she tried to misinform the Court with her untruthful testimony.[91] The court determined she was an integral part of the scheme rather than an ignorant helper.[92]

At the initial hearing, the immigration judge denied both of Mrs. Olowo's applications for "asylum and withholding of removal on the grounds that her daughters are members of a social group that is subjected to female genital mutilation in Nigeria."[93] Three factors influenced the lower court's denial of asylum: 1) the daughters could remain in the United States with their father because all three were legal permanent residents, 2) in Nigeria the father could reject the custom of FGM, because evidence was shown that in traditional Nigerian society the father has the right to refuse FGM of his daughters, and 3) Mrs. Olowo had already been subjected to FGM so there was no

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[86] *Olowo*, 368 F.3d at 696.

[87] *Id.*

[88] Immigration and Nationality Act § 212(a)(6)(E)(i), 8 U.S.C. 1182 (2006) (under this provision, legal permanent residents may be removed); *see also Olowo*, 368 F.3d at 696.

[89] *See Olowo*, 368 F.3d at 697.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

fear of further persecution upon return.[94] The BIA decision was an oral affirmation of the immigration judge's holding. Thus, the Court of Appeals directly applied the decision of the immigration judge ignoring the true cultural and societal problems that the Olowo family would face in Nigeria.

On May 11, 2004, Esther Olowo appealed to the Seventh Circuit Court of Appeals, which affirmed that she should be removed due to her involvement with the smuggling of an illegal alien into the United States.[95]

Assuming Mrs. Olowo was guilty and her involvement justified a removal, the first issue to consider is whether the court erred in denying a grant of asylum in the United States because of her daughters' fear of FGM persecution in Nigeria. The Appellate Court rejected this argument saying, "derivative asylum" is not permitted under these circumstances.[96] The Appellate Court cited *Oforji v. Ashcroft*,[97] for the principle that "a court may not weigh potential hardship to a family member with LPR [legal permanent status] or citizenship in the adjudication of an asylum claim."[98] However, this principle is debatable.

The Seventh Circuit supported a narrow view of Immigration Law, INA 208(b)(3), when it interpreted the statute's silence on the child to parent form of derivative asylum to mean the legislative intent was to prohibit automatic asylum under such circumstances.[99] Under INA 208(b)(3) a court's granting of asylum to a parent will result in automatic asylum for their children and spouse. However, instances where a child is granted asylum does not automatically result in a parent being granted derivative asylum.[100]

Significantly, within a period of one week, the Sixth Circuit faced the same set of issues and came to a different conclusion,

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[94] *See Olowo*, 368 F.3d at 698.

[95] *See id.* However, the merit of this part of the decision is not the main issue of this article.

[96] *Id.* at 701.

[97] Oforji v. Ashcroft, 354 F.3d 609 (7th Cir. 2003).

[98] Rice, *supra* note 2, at 6.

[99] Rice, *supra* note 2, at 14; *see also* INA 208(b)(3), 8 U.S.C. § 1158(b)(3)(A) (2006).

[100] *See* Abay v. Ashcroft, 368 F.3d 634 (6th Cir. 2004); *see also* INA 208(b)(3), 8 U.S.C. § 1158(b)(3)(A) (2006).

in *Abay v. Ashcroft*.[101] In *Abay*, the court held that a mother could seek asylum due to her individual fear that FGM would be forced upon her children.[102] The Sixth Circuit's decision allowed parents to seek asylum based on the torment that they would suffer for fear of their children's well-being. This holding was coined "the common sense compassionate decision."[103] The momentum arising from the *Abay* decision should motivate Congress to pass complementary legislation that protects family unity and human rights. Otherwise mothers will continue to suffer the emotional dilemma and persecution of either having to watch their daughters endure FGM or leave them behind to grow-up on the other side of the world.

A comparison of *Olowo v. Ashcroft* and *Abay v. Ashcroft* illustrates the dangers of using different statutory interpretations and judicial constructions to determine whether a mother meets the criteria for asylum. In *Olowo*, the court relied on the concept of "derivative asylum" or "bootstrapping," however in *Abay*, the mother's persecution was viewed as her own emotional persecution, separate from her daughter's physical persecution from FGM.[104]

B. Abay v. Ashcroft

The petitioner in *Abay v. Ashcroft*, argued that as a mother she "was eligible for asylum in her own right based on her fear that her daughters will be subjected to the torture of female genital mutilation, rather than arguing 'derivative asylum.'"[105] The court agreed with Ms. Abay, holding that it was not uncommon for immediate family members to be themselves "persecuted" as loved ones experience suffering.[106]

The facts of *Abay* are as follows. Abay and her daughter, Amare, came to the United States as visitors on May 18, 1993.[107] After a failed attempt to gain asylum, both were or-

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[101] *See Abay*, 368 F.3d 634.

[102] *Id.*

[103] Female Genital Cutting Education and Networking Project, http://www.fgmnetwork.org/html/modules.php?name=news&file=article&sid=38 (last visited Jan. 17, 2005).

[104] Rice, *supra* note 2, at 5.

[105] *Abay*, 368 F.3d at 641.

[106] *Id.*

[107] *Id.* at 636.

dered to be deported until they filed a new request for asylum with a supplemental brief arguing that Amare would be subjected to female genital mutilation if sent back to Ethiopia.[108] On appeal, the Sixth Circuit denounced the lower court's inability to consider the cultural pressures that exist in Ethiopia and the ninety percent practice rate of FGM.[109] For example, threats from a future husband and his family to perform FGM on Abay's daughter were to be considered because at some point Abay would not have the ability to protect her daughter in the community.[110] In addition, the court also spoke of "social ostracism" as support for Amare's fears to meet the criteria of "refugee" under the Immigration and Naturalization Act.[111]

Abay's own persecution admittedly did not arise from a "derivative asylum" claim, but rather her own fear that came from personal experience of FGM and her understanding of how the community and its traditions function in Ethiopia.[112] According to the court, Abay's satisfactory description of her fear for her daughter's safety was well founded and "there [was] overwhelming objective evidence that a female child in Ethiopia [would] likely undergo female genital mutilation at some point," thus, the mother should also be granted asylum.[113]

V. Discussion and Analysis of Child-Parent Asylum

A. *"Persecution"*

The adoption of a broad definition of "persecution" is critical to the acceptance of asylum claims made by parents who request child-parent asylum in FGM cases. Traditionally, "persecution" may include psychological harm in addition to physical harm.[114] Moreover, "an individual's personal experience of the infliction of severe harm on an immediate family member can provide him or her with grounds for refugee protection."[115] Congress removed the word "physical," thereby al-

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108 *Id.*
109 *Abay*, 368 F.3d at 639.
110 *See id.*
111 *Id.* at 640. *See* 8 U.S.C. § 1101 (2005).
112 *Abay*, 368 F.3d, at 641.
113 *Id.*
114 Rice, *supra* note 2, at 8.
115 *Id.*

lowing persecution to encompass economic and emotional damage.[116] "The psychological harm inflicted on a parent who is forced to stand by as his or her child's genitals are cut can hardly be regarded as less offensive than the economic harm . . . recognized as persecution more than thirty years ago."[117] The broader definition is appropriate given the impossible choice between raising a child and consenting to torture.

The *Abay* decision uses the broader definition of persecution and is supported by the case, *In Matter of Dibba*.[118] In *Abay*, the court used the Board's decision in *Dibba*, along with a few others, to "suggest a governing principle in favor of refugee status in cases where a parent as protector is faced with exposing her child to the clear risk of being subjected against her will to practice that is a form of physical torture causing grave and permanent harm."[119] According to the court, there is a strong basis to argue in favor of family unity because it is wrong to expect a parent to leave behind her child in the United States.[120]

B. *Comparison of* Olowo *and* Abay

The *Olowo* court based its ruling on the assumption that if the whole family returned to Nigeria, Mr. Olowo would be capable of protecting his daughters from FGM by rejecting the tradition and shielding Mrs. Olowo from having to watch her daughters undergo the procedure.[121] The Sixth Circuit in *Abay*, dismissed such reasoning. The court's decision was based on

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[116] *Id.*

[117] *Id.*

[118] Where an alien mother applied for asylum based on her fear that her daughters would be forced to undergo FGM, the Board of Immigration Appeals (BIA) stated, "[n]ormally a mother would not be expected to leave her child in the United States to avoid persecution." *Abay*, 368 F.3d at 641 (quoting *Matter of Dibba*, No. A73 541 857 (B.I.A. Nov. 23, 2001)).

[119] *Abay*, 368 F.3d at 642. For example, the *Abay* court cited Matter of Adeniji, No. A41 542 131 (oral decision) (U.S. Dept. of Justice, Immigration Court, York, Penn., Mar. 10, 1998) where a father was granted asylum because if forced to go back to Nigeria his daughters would be forced to be subjected to FGM. The court also cited Matter of Oluloro, No. A72 147 491 (oral decision) (U.S. Dept. of Justice, Immigration Court, Seattle, Wash., Mar. 23, 1994), where an alien mother was granted asylum in the U.S. because her daughters who were U.S. citizens would be sent back to Nigeria and "posed an extreme hardship" of FGM.

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

[121] *See* Olowo v. Ashcroft, 368 F.3d 692, 698 (7th Cir. 2004).

research which indicated that, in addition to young girls under the control of their parents, adult women are also subjected to FGM for several reasons. An adult woman may be subjected to this painful procedure in order to become suitable for marriage, or her husband may have her vagina sewn shut to keep her from having an affair. Last, a woman's vagina may be sewn up after giving birth to a child.[122] Thus, it is an over simplification of the court to declare Mr. Olowo the ultimate decision-maker and protector of his daughters from FGM. The court neglected to consider important cultural factors in its analysis and by applying the cultural norms of the United States, rather than those of Nigeria, it failed to fully comprehend the fear of Mrs. Olowo and her daughters.

Today in Nigeria the notion of being clean and sexually pure remains prominent.[123] Consideration of a native country's traditions and culture should be an important factor in helping the court to weigh an applicant's credibility.[124] The *Olowo* court recognized the concept of "extreme hardship" on the children, however it refused to expand that notion of compassion to the present facts, when one parent was able to remain in the United States with the children.[125] What is considered an unthinkable act by parents in the United States is respected in other cultures. Thus, "parents who resist FGC [FGM] also frequently face ostracism and can be subjected to bodily harm for their opposition."[126]

The court's decision was also based on the rationale that Mrs. Olowo would not be subject to future persecution because she already underwent FGM and, therefore, could not fit within the statutory definition of "refugee."[127] Again, this factor is inconsistent with the determination of the *Abay* court, which stated that the mother was persecuted "in her own right" when subjected to the reasonable fear that her daughter would be subject to female genital mutilation.[128] The *Abay* court found emotional stress to be the source of persecution, not the actual

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122 *Abay*, 368 F.3d at 638-39; *see also* TOUBIA, *supra* note 60, at 11-13.
123 *See* TOUBIA, *supra* note 60, at 37.
124 *See Olowo*, 368 F.3d at 698-99.
125 *Id.* at 699-702.
126 Rice, *supra* note 2, at 2.
127 *Olowo*, 368 F.3d at 700.
128 *Abay*, 368 F.3d at 641.

cutting of the mother's genitalia. Although this rationale has not been supported in the Seventh Circuit, the *Abay* decision may break new ground for activists of female genital mutilation refugees.

C. *United States Policy of Family Unity*

The judges in *Olowo* largely relied on the fact that Mr. Olowo, the appellant's husband, was capable of staying in the United States with his two daughters because they were all legal permanent U.S. residents.[129] The court noted that if the Department of Homeland Security wanted to charge the husband, and tried to remove him in connection with the smuggling of aliens, then the court would have to consider the potential hardships affecting the daughters.[130] Following this rationale, it is clear that the court did not consider the division of a family and the separation of two young girls from their mother as sufficient to foster "potential hardships."[131]

During the hearing, Mrs. Olowo told the court that if she was sent back to Nigeria she would have to take her daughters with her, exposing them to the threats of her extended family who would force the girls to undergo FGM.[132] The court misinterpreted this statement as a threat by Olowo that she would subject her daughters to FGM unless the court granted her asylum, but the statement was made to inform the court of what she viewed as her only reasonable alternative. Mrs. Olowo's situation was not viewed from a perspective that respected and understood her background, tradition, or the Nigerian family structure. The court ignored the fact that female genital mutilation is a topic of great debate and is based in the "traditional values" of certain cultures and traditional "gender roles."[133] The complexity of the situation is driven by the demands of the native culture regardless of whether the family is located in United States or Nigeria.[134] Thus, from Mrs. Olowo's subjective point of view, it is reasonable to believe that her husband would

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[129] *See Olowo*, 368 F.3d at 698.

[130] *Olowo*, 368 F.3d at 701 (citing Cerrillo-Perez v. INS, 809 F.2d 1425-26 (9th Cir. 1987)).

[131] *Olowo*, 368 F.3d at 701.

[132] *See id.* at 701-02.

[133] *See* TOUBIA, *supra* note 60, at 35-37.

[134] *See generally Olowo*, 368 F.3d at 692.

not be able to care for her two children alone. Assuming Mrs. Olowo returned to Nigeria alone, she would certainly be "persecuted" from the social ostracism and the separation from her children, despite this language not being included in the statutory construction of Immigration & Nationality Act § 212(a)(6)(E)(i).[135] Putting a family in such an impossible situation is undoubtedly a form of persecution.

D. *Best Interests of the Child*

The *Olowo* court also discussed, in the second half of its opinion, the role of the government to secure the safety of the children and the need to have the rights of children protected when their best interests do not parallel their parents' interests.[136] Under U.S. federal law, 18 U.S.C. § 116, "(a) whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned for not more than 5 years or both."[137] Mrs. Olowo raised red flags, declaring to the court that she would bring her children back to Nigeria if removed from the United States. The court believed this comment implied that she would consent to the genital cutting of her daughters in order to keep them with her.[138] The consequences of the court's decision therefore conflicted with the best interests of the children to grow up with their mother present and to avoid FGM.

The criminalization of FGM is supported by national, state, and international law.[139] On the national level, Congresswoman Schroeder, a supporter of the 1995 legislation, "argues that the state's interest in child welfare trumps any concern of parental rights, religious liberty, or multiculturalism . . . ."[140] Congresswoman Schroeder is very determined to ban female genital cutting because it violates the American sentiment "to-

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[135] *See* Immigration and Nationality Act § 212 (a)(6)(E)(i), 8 U.S.C. § 1182 (2005).

[136] *Olowo*, 368 F.3d at 703-04.

[137] 18 U.S.C. § 116 (2004).

[138] *See Olowo*, 368 F.3d at 703.

[139] *See* Rahman, *supra* note 17, at 236-37.

[140] Breitung, *supra* note 70, at 672-73.

ward women's equality and women's place in society."[141] The State of Illinois also prohibits female genital mutilation under 720 Ill. Comp. Stat. 5/12-34. It is one of fifteen states with such a law.[142] On an international scale, both individual countries and international governing bodies have produced laws barring FGM. For example, Great Britain has specifically responded to the threat of FGM abroad proclaiming that "[p]arents who take their daughters abroad to undergo genital circumcision will be sentenced to up to 14 years in prison under a new law."[143]

Overall, the United States must implement laws to stop non refugee parents from taking their children back to a native country where they face persecution. The best way to accomplish this goal is to support the classic U.S. policy of "family unity."[144] Neither a single parent home nor the Illinois foster care system is an ideal environment for the Olowo twins. They both want and need the compassion of their mother, which is critical to child development. It is a violation of American policy to separate a family who has no choice in light of the impossible alternative of subjecting the children to FGM. Mrs. Olowo would be a criminal if she took her children back with her and, yet, would be a bad mother and social outcast in Nigeria if she left her children behind in the United States. No mother should have to make this choice; it is against human nature to make a parent do such a thing.[145] Family unity is a primary goal of immigration law, "so no less protection should be given to refugees than other immigrants."[146] The Seventh Circuit court, in *Polovchak v. Messe*, authorized the termination of the parent's custody rights in order to prevent the parents from removing their child to the Soviet Union when it was in the child's best interests to remain in the United States.[147] This case highlights the court's capacity to split apart a family when it is not

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[141] *Id.* at 672-73.

[142] *Olowo*, 368 F.3d at 702; Rahman, *supra* note 17, at 237; 720 Ill. Comp. Stat. 5/12-34.

[143] *UK: New Female Circumcision Bill Closes Loophole*, ANSA-ENG. MEDIA SERV., Mar. 3, 2004, at 1, *available at* 2004 WL 64006952. *See also* Breitung, *supra* note 70.

[144] Rice, *supra* note 2, at 15.

[145] *See id.*

[146] *Id.*

[147] *See* Polovchak v. Messe, 774 F.2d 731 (7th Cir. 1985).

in the child's best interests given the facts and circumstances of the individual case.

Congress must consider the impossible dilemma facing these families when proposing future legislation. Legislators should be particularly concerned with expanding "derivative persecution" to parents or guardians of children who face the threat of female genital mutilation in their native country.[148]

E. *International Support*

Since the child-parent issue has split in the circuit courts, legislators must gather information on an international level to see how effective the *Abay* decision could be as an overall asylum policy.

Overall, sixteen countries have criminalized female genital mutilation, including nine African countries.[149] However, France is the only country known to regularly prosecute and imprison for the crime of FGM.[150] Both French and American law provides different periods of imprisonment for parents than performing parties, mainly because the separation from a lengthy prison term typically causes "undo hardship on the child."[151] This rationale is a bit ironic considering the court's intention to permanently separate the Olowo twins from their mother. Interestingly, the United States varies from the other countries where FGM is a crime, because the statute only refers to minors.[152] The notion of FGM being a threat to women of varying ages has been addressed in this article and, thus, an additional statutory correction should be made on this issue.

In Canada, the Canadian Immigration and Refugee Board first addressed the FGM asylum problem in a case involving Kandra Hassan Farah of Somalia.[153] Farah, under new guidelines which liberalized the determination of refugee status, was granted asylum after she provided evidence and testified to the conditions in Somalia and the threats from her ex-in-laws of

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148 Rice, *supra* note 2, at 15.

149 Rahman, *supra* note 17, at 57.

150 *Id.* at 57, 65.

151 *Id.* at 64-5.

152 *Id.* at 66.

153 Breitung, *supra* note 70, at 671-72.

FGM if she returned to her native country.[154] The case highlights the social emphasis on female purity, its inevitable link to FGM, and the importance of broadening the scope of permissible refugees in order to cover this persecuted group. In another Canadian case, a mother was granted a stay of execution because ". . .irreparable harm [would] occur in the interim should the child be removed to Nigeria with her mother."[155] The court continued by stating that although it is "normally concerned with irreparable harm to the applicant, in the circumstances of this case, the interests of the infant child are inseparably linked with those of the applicant."[156] Thus, the court found the applicant and her daughter "de facto inseparable."[157] This example addresses the second part of the *Olowo* case where the Seventh Circuit discusses its concerns about ensuring the best interests of the child.[158] A policy similar to the Canadian example would be an appropriate model for American courts to follow when determining whether or not to separate a young child from her mother. Mrs. Olowo posed no threat to the children in the role of their mother; she was a credible witness with parenting skills which the court did not question.

In addition to supporting Canadian case law, legislators must look closely at the United Nations Commission on Human Rights Resolution 1989/57, which created the Convention for Rights of Children.[159] The March 8, 1989 resolution resulted in a binding document on all member countries, which expanded the notions of the Declaration of the Rights of the Child by addressing the treatment of children and the prohibition of their exploitation and inhumane treatment.[160] The threat posed to children touches upon the larger problem with FGM, which is that the practice itself violates fundamental international human rights law.[161] Advocates argue that the victimization that results from FGM stems from more than physical and emo-

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154 *See id.*

155 Rice, *supra* note 2, at 11; Obasohan v. Canada (Minister of Citizenship and Immigration), 2001 CarswellNat 325, 2001 FCT 92, 13 IMM. L.R. (3d) 82.

156 *Id.*

157 *Id.*

158 *See* Olowo v. Ashcroft, 368 F.3d 692, 704 (7th Cir. 2004).

159 *See* Convention on the Rights of the Child, G.A. Res., U.N. Doc. A/RES/44/25 (Dec. 12, 1989), *available at* http://www.hrweb.org/legal/child.html.

160 *See id.*

161 *See* Rahman, *supra* note 17, at 3.

tional suffering because "[FGM] is at its essence a basic violation of girls' and women's rights to physical integrity."[162] The United States needs to respect international laws that are designed to protect children worldwide.

VI. The Need for Future Legislation

Critics of expanding immigration laws to include derivative persecution, argue that it will be impossible to draw a line between which family members should be able to claim the defense. The answer to that critique is simply that American policy, tradition, and the Constitution expect the government to make an effort to support family unity and, thus, in this situation it must do everything it can to properly grant this defense to aliens who fit the criteria. The new legislation must expand the scope of statutory interpretation to include granting a family member asylum in the United States if the evidence establishes that 1) the witness is credible, 2) the threat of FGM is credible to the other family member, and 3) the relationship is between parent and child (or guardian and child). This article does not, for example, suggest a distant cousin or aunt should be able to base her removal defense on the fear that her niece will be subjected to FGM, unless, of course, she is the child's legal guardian.

Also, courts under the new statute should retain their power of discretion in a fact based analysis. If Congress clarifies the child-parent derivative asylum as recommended, then when instances arise, courts across the country will base their decisions on a similar statutory interpretation and analysis. In the spring of 2004, the circuit courts made it clear that this area of immigration law needed clarification. In the future, the law must be improved so that in the course of one week, one family will not be torn apart while another remains united, simply because they lived in a different judicial circuit.

VII. Conclusion

Under current asylum law, there are no clear guidelines of how courts should deal with parents who seek asylum due to the fear of their children being subjected to female genital muti-

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[162] *Id.*

lation. Criticism of this statutory problem is essential to motivating legislators to act and promote consistency in dealing with refugees. The unfortunate reality is that FGM is deeply rooted within many cultures and will take much time and energy to reverse the old customs. Thus, the United States, as a "receiving country" of immigrants,[163] has a responsibility to protect both the children and women who face the physical and emotional persecution of FGM at home and abroad. Undoubtedly, federal legislation is the best way to uphold the United States' obligation to international human rights law and fundamental American policies of family unity and equal protection.

[163] Rahman, *supra* note 17, at 57.