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# SOLOMON'S CHOICE: THE CASE FOR GRANTING DERIVATIVE ASYLUM TO PARENTS\*

## I. INTRODUCTION

How could a parent choose between abandoning her child in a foreign country and taking the child back to her home country to face persecution? Indeed, it is difficult to imagine how a parent might even find herself in such a situation. Yet, this is precisely what can occur when a child confronts the type of persecution that targets children but does not directly affect adults. In those cases, the child would be eligible for asylum<sup>1</sup> in the United States, but the parent would not. As a result, the parent would have no legal status in the United States and must choose between leaving the child here and taking her back to the country in which she was originally threatened with persecution. When the case is reversed—where a parent qualifies for asylum and the child does not—the child is eligible for derivative asylum status.<sup>2</sup> As the name suggests, the status is derived from the person applying for asylum. To qual-

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\* The title of this Note was inspired by Judge Manion of the Seventh Circuit Court of Appeals, who described parents of persecuted children as facing a “distasteful Solomonic choice.” *Oforji v. Ashcroft*, 354 F.3d 609, 616 (7th Cir. 2003).

1. Asylum is an immigration status that is granted to a noncitizen who is within the United States and satisfies the statutory definition of a refugee. The Immigration and Nationality Act (INA) § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006). The INA states, in pertinent part:

The term refugee means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable 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.

INA § 101(a)(42), 8 U.S.C. § 1101(a)(42). The statutory definition of an asylee is almost identical. INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2006). The only difference between the two types of status is that a refugee is in another country seeking refuge in the United States, while an asylum seeker has arrived in the United States. INA § 208(a)(1), 8 U.S.C. § 1158(a)(1). The U.S. refugee definition is based on the definition in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. Convention Relating to the Status of Refugees art. 1(A), *adopted* July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention]; Protocol Relating to the Status of Refugees, art. 1, *adopted* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

2. The INA expressly provides for derivative status for the spouse and children of an asylee. INA § 208(b)(3)(A), 8 U.S.C. § 1158(b)(3).

ify for asylum under the Immigration and Nationality Act (INA), a person must be outside of her country of origin and have been persecuted<sup>3</sup> or have a “well-founded fear<sup>4</sup> of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>5</sup> Because the status of a child is derivative of her parent, the child need not prove that she has a well-founded fear of persecution; she need only prove her relationship to the asylee.<sup>6</sup> In other words, the family connection alone is sufficient to grant the status. Underlying this derivative asylum provision is the policy of family unification that recurs throughout the INA.<sup>7</sup> But, despite the premium the INA places on family unification, the derivative asylum provision only expressly names children and spouses as potential beneficiaries.<sup>8</sup> The provision is silent as to whether a parent can gain derivative asylum status from her child.

Several recent cases have foregrounded this question and forced courts to consider if the INA provides relief for parents who seek asylum because their minor child has a well-founded fear of persecution.<sup>9</sup> The

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3. The INA does not define the term “persecution,” but the dominant case law holds that persecution is “either a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.” *In re Acosta*, 19 I. & N. Dec. 211, 220–22 (1985). In addition, the “harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome.” *Id.* at 222–23. Varying circuit court interpretations of persecution will be considered *infra* Part IV.

4. The term “well-founded fear” is discussed *infra* note 40.

5. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

6. 8 C.F.R. § 1208.21 (2006). This regulation sets out the criteria of the relationship to the asylee and places the burden of proof on the asylum applicant to establish, by preponderance of the evidence, that the potential beneficiary is an eligible spouse or child. *Id.*

7. The policy of family unification and reunification can be seen most distinctly in the provisions of the INA that create the preference system for family-sponsored immigration to the United States. Under this regime, an unlimited number of immediate relatives (spouses, minor children, and parents) of United States citizens over twenty-one are eligible for visas and not subject to numerical quotas. INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2006). The category of immediate relatives is the most privileged class of family-based immigrants, with the visa quotas becoming more narrow as the family relation becomes less immediate. The entire scheme of family-based immigration to this country suggests how high a premium U.S. immigration law places on keeping families united and ensuring that immigrants have a familiar support system when they arrive in the country. For a hierarchy of the numerical quotas of family-sponsored immigrant visas, see INA § 203(a), 8 U.S.C. § 1153(a) (2006).

8. INA § 208(b)(3)(A), 8 U.S.C. § 1158(b)(3)(A) (2006); 8 C.F.R. § 1208.21 (2006).

9. See *Abebe v. Ashcroft (Abebe I)*, 379 F.3d 755 (9th Cir. 2004) *rev'd en banc* by *Abebe v. Gonzales (Abebe II)*, 432 F.3d 1037 (9th Cir. 2005). See also *Tchoukhrova v. Gonzales (Tchoukhrova I)*, 404 F.3d 1181 (9th Cir. 2005), *rehearing denied* by Tchouk-

cases in which this issue most frequently arises involve claims based on threat of female genital mutilation (FGM)<sup>10</sup> to a minor daughter. In these cases, the child, if cognizant, has a well-founded fear of persecution on the grounds of FGM, but the parent does not.<sup>11</sup> The parent, of course, has a well-founded fear of harm to the child, but does not have a fear of persecution in her own right. Thus, the only way to avoid a division of the family is to grant the parent derivative status. However, the courts and the applicants for asylum have generally resisted the argument that the parent can be a beneficiary of derivative asylum.<sup>12</sup> Relying on the interpretation that the silence of the INA on the subject precludes derivative asylum status from flowing from child to parent, the courts have found other ways of granting status to the parent in a situation where the child is the object of persecution. Invariably, if courts are inclined to grant

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hrova v. Gonzales (*Tchoukhrova II*), 430 F.3d 1222 (2005), *vacated by* Gonzales v. Tchoukhrova (*Tchoukhrova III*), 127 S. Ct. 57 (2006).

10. FGM refers to the practice of cutting the genitalia of young girls in certain African countries. It can cause extreme pain and severe medical complications. AMNESTY INT'L, FEMALE GENITAL MUTILATION: A HUMAN RIGHTS INFORMATION PACK (1997), <http://www.amnesty.org/ailib/intcam/femgen/fgm1.htm>. See also IMMIGR. AND NATURALIZATION SERVICE, ALERT SER. AL/NGA/94.001, WOMEN: FEMALE GENITAL MUTILATION 1-5 (1994) [hereinafter INS FGM Alert]. Women and girls who object to the procedure have been granted asylum in the United States. See, e.g., *In re Fauziya Kasinga*, 21 I. & N. Dec. 357 (1996). FGM will be explained and discussed at length *infra* Part II. The nomenclature of this practice is varied: female genital mutilation, female genital cutting, and female circumcision. Critics of the procedure tend to use one of the former two terms, while those who condone it use the latter. The position of the U.S. asylum law and the author of this Note is that the practice is persecution, torture, and a ground for asylum. Therefore, the Note will employ the term that best conveys the severity of the procedure: female genital mutilation. FGM is also the most commonly used and recognized terminology that refers to the procedure. For a discussion of the contentious terminology of this practice, see Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 4-9 (1995). See also Bettina Shell-Duncan & Ylva Hernlund, *Female "Circumcision" in Africa: Dimensions of the Practice and Debates*, in FEMALE "CIRCUMCISION" IN AFRICA: CULTURE, CONTROVERSY, AND CHANGE 6-7 (Bettina Shell-Duncan & Ylva Hernlund eds., 2000) (arguing that female genital cutting is the appropriate term because "female circumcision" is misleading as an analogy to male circumcision, while "female genital mutilation" is too judgmental of African cultures that practice the procedure).

11. The most recent case of this type is *Abebe II*, which will be discussed in detail *infra* Part III. *Abebe I* was originally decided in 2004 by a panel of three judges on the Ninth Circuit Court of Appeals. 379 F.3d 755. It was later reheard en banc and decided as *Abebe v. Gonzales* in 2005. *Abebe II*, 432 F.3d 1037. This case will be discussed in detail *infra* Part III.

12. A notable exception to this approach is Judge Ferguson's dissent in *Abebe I*, which forms a large part of the basis for the argument in this Note. *Infra* Part V. 379 F.3d at 760 (Ferguson, J., dissenting).

these cases, they do so under the theory that the parent herself has a well-founded fear of persecution if she tries to protect her child,<sup>13</sup> or that the parent will be persecuted by virtue of her relationship to the child.<sup>14</sup> In either case, the parent must show that she has a well-founded fear of persecution to her own person. Following this theory, courts have had to “stretch” to find persecution where, in any other type of case, the fate facing the parent would not rise to the level of persecution.<sup>15</sup>

In late 2005, the Ninth Circuit decided two cases that involved the question of derivative asylum for parents. The first was *Abebe v. Ashcroft (Abebe I)*, which centered around an Ethiopian couple and their fear that their U.S. citizen child would be subjected to FGM if the family were deported to Ethiopia.<sup>16</sup> The Ninth Circuit, in a three-member decision, denied the petitioner’s claim,<sup>17</sup> but later a majority of the regular active judges on the Ninth Circuit voted to rehear the case en banc.<sup>18</sup> The case was then decided en banc in late 2005 in *Abebe v. Gonzales (Abebe II)*.<sup>19</sup> In addition, the Ninth Circuit recently voted not to rehear en banc another case that involved the issue of derivative asylum for parents. The case was *Tchoukhrova v. Gonzales*, which concerned a mother who applied for asylum with her son and husband as derivative applicants.<sup>20</sup> In this case, the son was the primary object of persecution because he was a fourteen-year-old boy with cerebral palsy in Russia.<sup>21</sup> In April 2005, the court, in a three-member decision, held that Russian children with disabilities are eligible for asylum and that harm to the child can be imputed to the parents in support of their asylum applications.<sup>22</sup> Unhappy with this ruling, the Department of Justice (DOJ) applied for rehearing, but

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13. See, e.g., *Abay v. Aschroft*, 368 F.3d 634 (6th Cir. 2004).

14. See, e.g., *Tchoukhrova I*, 404 F.3d 1181. This case will be discussed in detail *infra* Part III.

15. For example, in *Abay v. Aschroft*, the Sixth Circuit held that parents’ fear of ostracism resulting from refusing to subject the child to FGM may amount to persecution. *Abay*, 368 F.3d 634. However, most courts find that ostracism does not rise to this level. This question will be discussed in depth *infra* Parts II & IV.

16. *Abebe I*, 379 F.3d at 760.

17. *Id.*

18. *Abebe v. Gonzales*, 400 F.3d 690 (9th Cir. 2005) (vacating panel decision and ordering rehearing en banc).

19. *Abebe II*, 432 F.3d 1037.

20. *Tchoukhrova I*, 404 F.3d 1181, 1187.

21. *Id.* at 1184. The son experienced a litany of harms that will be recounted *infra* Part III.

22. *Id.* at 1184, 1191.

the court decided not to rehear the case on December 5, 2005.<sup>23</sup> In May 2006, the Department of Justice petitioned the Supreme Court for a writ of certiorari. On October 2, 2006, the Supreme Court granted certiorari, vacating and remanding the case.<sup>24</sup>

The asylum seekers and the court in both *Abebe* and *Tchoukhrova* did not maintain that the parents could derive asylum status from their child.<sup>25</sup> Instead, they contended that the parents themselves were subject to persecution of their own because of their relationship to the child. For instance, in their brief on appeal, the parents in *Abebe* argued that they would face ostracism if they tried to protect their daughter from FGM; they did not argue that they were eligible for derivative asylum.<sup>26</sup> Likewise, the courts have not decided these cases using the theory of derivative asylum. In *Abebe I*, for example, the Ninth Circuit held that the parents did not qualify for asylum because ostracism did not rise to the level of persecution.<sup>27</sup> A year later, the court in *Abebe II* again decided the case without resolving the question of derivative asylum for parents.<sup>28</sup> Similarly, in *Tchoukhrova*, the Ninth Circuit held that the child's persecution harmed the family as a unit and therefore the family could claim asylum on the grounds that they made up a particular social group.<sup>29</sup> a

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23. *Tchoukhrova II*, 430 F.3d 1222. The decision not to rehear the case en banc was affirmed very narrowly, with seven judges dissenting. The dissent, written by Judge Kozinski, will be discussed *infra* Part IV and *infra* note 197.

24. *Tchoukhrova III*, 127 S. Ct. 57.

25. *Tchoukhrova I*, 404 F.3d at 1184; *Abebe I*, 379 F.3d at 758–60.

26. In their brief to the Ninth Circuit, the petitioners did not argue that they were eligible for derivative asylum through their daughter; in relation to the FGM claim, they limited the argument to the possibility that they would face ostracism if they refused to subject their daughter to FGM. Brief for Petitioners at 18–19, *Abebe v. INS*, No. 02-72390 (9th Cir. Mar. 18, 2003). Similarly, the petitioner's reply brief did not suggest that the parents were eligible for derivative asylum. Reply Brief for Petitioners, *Abebe v. INS*, No. 02-72390 (9th Cir. May 20, 2003).

27. *Abebe I*, 379 F.3d at 759.

28. *Abebe II*, 432 F.3d at 1043.

29. The INA does not define the term "particular social group." The leading case law on this ground for asylum is the Board of Immigration Appeals' decision in *In re Acosta*:

[W]e interpret the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic . . . . However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

*Acosta*, 19 I. & N. Dec. at 233. However, the Ninth Circuit took a different view of "particular social group" in *Sanchez-Trujillo v. INS*, holding that the defining characteristic of

social group comprised of the family of a disabled child in Russia.<sup>30</sup> Thus, in addressing the claims in both *Abebe* and *Tchoukhrova*, the Ninth Circuit declined to hold that parents could receive derivative asylum.

With these two cases in mind, this Note proposes that courts should grant asylum to the parents of persecuted children on the theory that they qualify for derivative asylum status through their child's claim.<sup>31</sup> Courts should not require that the parent show persecution to his or herself because this approach fails to place proper emphasis on the protection of the child. Moreover, requiring the parent to show persecution in her own right has the potential to affect the asylum laws adversely by diluting the very definition of "persecution." In addition, the alternate theory on which these cases are granted—where the court considers harm to one member of a family as harm to the family unit—also serves to dilute the standards of asylum law by making grants of asylum too broad. As an alternative, this Note will consider the legal bases, policy concerns, and practical implications of granting cases on the theory of derivative asylum for parents. In short, this Note aims to construct a solid rationale by which courts might grant such cases and, in addition, why Congress should amend the INA to specify that parents of persecuted children are eligible for derivative asylum.

Part II of this Note provides a background of circuit court and Board of Immigration Appeals (BIA) cases that considered the question of whether parents may be eligible for derivative asylum through their minor child. Part III focuses on the two recent cases in the Ninth Circuit. Part IV critiques the prevalent approach of requiring the parents to prove that they fear persecution to themselves or considering persecution to the family unit. Offering an alternative, Part V presents the legal and policy arguments in favor of granting derivative asylum status to parents. Part VI concludes that granting derivative asylum to the parents of a minor child is the preferred approach to cases where a minor child is the target of persecution.

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a "particular social group" is a "voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group." *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986). The two approaches of *In re Acosta* and *Sanchez-Trujillo* have been combined in the Department of Justice's proposed rule on the topic that would revise the pertinent regulation of 8 C.F.R. § 208.15. 65 Fed. Reg. 76588, 76593–76595, 76598 (Dec. 7, 2000).

30. *Tchoukhrova I*, 404 F.3d at 1184, 1189–92.

31. In terms of the age limit on what it means to be a child, this Note adopts the INA's definition of a child as "an unmarried person under twenty-one years of age." INA § 101(b)(1), 8 U.S.C. § 1101(b)(1).

## II. BACKGROUND OF DERIVATIVE ASYLUM CASES

The majority of cases that concern persecution of minor children involves the practice of FGM in certain African countries.<sup>32</sup> According to Amnesty International, eighty-five percent of all FGM procedures in Africa are clitoridectomies, where all or part of the clitoris is removed.<sup>33</sup> Amnesty International estimates that two-million girls a year are at risk for undergoing some form of genital mutilation and that it occurs in twenty-eight African countries.<sup>34</sup> FGM can lead to death, hemorrhage, infections, increased risk for contracting HIV, severe pain, psychological problems, and loss of sexual sensation.<sup>35</sup> For these reasons, U.S. law has come to recognize FGM as both a federal crime<sup>36</sup> and a ground for asylum.<sup>37</sup>

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32. Of the FGM cases discussed in this Note, five involve asylum seekers from Nigeria, *Olowo v. Ashcroft*, 368 F.3d 692 (7th Cir. 2004); *Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004); *Oforji v. Ashcroft*, 354 F.3d 609 (7th Cir. 2003); *Nwaokolo v. Ashcroft*, 314 F.3d 303 (7th Cir. 2002); two from Ethiopia, *Abebe I*, 379 F.3d 755 (9th Cir. 2004); *Abay*, 368 F.3d 634 (6th Cir. 2004); and one from Gambia, *In re Dibba*, (unpublished) No. A73 541 857 (BIA Nov. 23, 2001).

33. In addition to this practice, there is the more severe "infibulation" procedure, where all, or part, of the clitoris is removed. Then, all, or part, of the *labia minora* is removed and the *labia majora* are then stitched together in order to cover the vagina. Amnesty International estimates that fifteen percent of all FGM in Africa involves this radical version of the practice. Lastly, the least severe procedure consists of only the removal of the clitoral hood. The timing of the procedure also may vary in different countries, ranging from infancy to the time of the first pregnancy, but the average time is between the ages of four and eight years of age. AMNESTY INT'L, FEMALE GENITAL MUTILATION: A HUMAN RIGHTS INFORMATION PACK, *supra* note 10. See also INS FGM ALERT 1–5, *supra* note 10.

34. AMNESTY INT'L, FEMALE GENITAL MUTILATION: A HUMAN RIGHTS INFORMATION PACK, *supra* note 10.

35. *Id.*

36. 18 U.S.C. § 116 (2005). However, the widespread use of FGM in Africa suggests that many do not consider it to be a crime at all. The most common cultural explanations of the practice are that it ensures virginity, makes the girl marriageable, and ensures fidelity once married. See ELIZABETH HEGER BOYLE, FEMALE GENITAL CUTTING: CONFLICT IN THE GLOBAL COMMUNITY 27–31 (2002). For a multidisciplinary compilation on the tensions between human rights and cultural relativism in the context of FGM, see generally FEMALE "CIRCUMCISION" IN AFRICA: CULTURE, CONTROVERSY, AND CHANGE *supra* note 10. In addition, for a recent study of the incidence of FGM in Africa that considers the cultural, legal, medical, and ethical dimensions of the practice, see generally ROSEMARIE SKAINE, FEMALE GENITAL MUTILATION: LEGAL, CULTURAL AND MEDICAL ISSUES (2005).

37. The first instance was a BIA decision, *In re Fauziya Kasinga*, in 1996. *Kasinga*, 21 I. & N. Dec. 357. *Kasinga*, the asylum-seeker, was a woman from a particular tribe in Togo that practiced FGM. She was threatened with this practice when she was forced to marry at the age of seventeen and escaped before the procedure. *Id.* at 358. The BIA held that FGM, as practiced in *Kasinga's* tribe, constituted persecution and that she was a



Since 2002 there have been at least a half-dozen cases in circuit courts where adult asylum applicants argued that their minor daughter would be subjected to FGM if she were returned to her country of origin.<sup>38</sup> Parents in these cases have argued that the risk of FGM to their daughter formed the basis of a claim to some sort of immigration relief:<sup>39</sup> asylum, withholding of removal,<sup>40</sup> or relief under the Convention Against Torture

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member of a social group “consisting of young women . . . who have not had FGM, as practiced by that tribe, and who oppose the practice.” *Id.* Further, the BIA found that she had a well-founded fear of persecution in the form of FGM on account of her membership in this social group. *Id.* The BIA relied, in large part, upon the then recent INS Alert on FGM. INS FGM ALERT 1–5, *supra* note 10. Although Kasinga was granted asylum on a rather limited fact pattern, the precedent has been expanded to apply to asylum applicants from a variety of countries who fear FGM or have been already subjected to FGM. *See, e.g.*, *Abankwah v. INS*, 185 F.3d 18, 20, 25–26 (2d Cir. 1999) (holding that asylum seeker from Ghana had well-founded fear of persecution on account of her fear of FGM). It should be noted that subsequent to the Second Circuit’s decision in this case, *Abankwah* was found to have fabricated her story of persecution. Still, despite the unfortunate shadow such fraud casts over the facts of the case, the courts have continued to rely on *Abankwah* for its legal holding. *See also* *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005) (holding that FGM constitutes past persecution that creates presumption of future persecution that the government cannot rebut with proof of a change in country conditions). This case solidified the holding in *Kasinga*, showing that the U.S. law recognizes both future fear of FGM and past FGM as persecution.

38. *Abebe I*, 379 F.3d 755 (9th Cir. 2004); *Abay*, 368 F.3d 634 (6th Cir. 2004); *Olowo*, 368 F.3d 692 (7th Cir. 2004); *Azanor*, 364 F.3d 1013 (9th Cir. 2004); *Oforji*, 354 F.3d 609 (7th Cir. 2003); *Nwaokolo*, 314 F.3d 303 (7th Cir. 2002). For a discussion of derivative asylum for parents within the framework of women refugees’ rights, see Marissa Farrone, Note, *Opening the Doors to Women? An Examination of Recent Developments in Asylum and Refugee Law*, 50 ST. LOUIS U. L.J. 661, 684–89 (2006).

39. “Relief” is a term of art in immigration law that means that a citizen who is otherwise deportable is granted relief from deportation and is permitted to remain in the United States. Depending on the form of relief granted, the conditions and durations vary. For a discussion of the theories of relief in these cases and for an argument in favor of statutory revision of the INA to provide for derivative status for parents of girls who face FGM, see Kimberly Sowders Blizzard, Note, *A Parent’s Predicament: Theories of Relief for Deportable Parents of Children Who Face Female Genital Mutilation*, 91 CORNELL L. REV. 899 (2006).

40. “Withholding of removal”—also called “restriction on removal” or “withholding of deportation”—is usually applied for, in the alternative, with an application for asylum. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2006); 8 C.F.R. § 208.16 (2006). The standard for asylum requires that a person have “well-founded fear” of future persecution. The Supreme Court held that a noncitizen need not show that it is “more likely than not” that she will be persecuted. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Instead, fear that persecution is more than ten percent likely to occur is well-founded. *Cordon-Garcia v. INS*, 204 F.3d 985, 990 (9th Cir. 2000). In contrast, withholding of removal involves a higher standard that requires the noncitizen to establish that it is “more likely than not that he or she would be persecuted on account of race, religion, nationality, membership

(CAT).<sup>41</sup> One of the first circuit cases that addressed this issue was *Nwaokolo v. Ashcroft* in the Seventh Circuit in 2002.<sup>42</sup> The asylum petitioner in the case was a Nigerian woman who had been in the U.S. legally, but had violated the employment terms of her visa and was ordered

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in a particular social group, or political opinion” if returned to his or her home country. 8 C.F.R. § 208.16(b)(2) (2006). In other words, the grounds for asylum and withholding are identical, but the standards of proof differ. This difference accounts for the fact that asylum is a discretionary form of relief while withholding is not: when a noncitizen meets the statutory requirements of asylum, a judge *may* grant asylum; however, when a noncitizen meets the statutory requirements of withholding, a judge *cannot* remove that person to her home country. Compare INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) with 8 C.F.R. § 208.16(b)(2).

41. Relief under the Convention Against Torture (CAT) is another form of relief (CAT relief) that is also usually applied for, in the alternative, with an application for asylum. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, 1465 U.N.T.S. 85 (1988) (codified in U.S. law at 8 C.F.R. §§ 208.16(c), 208.18 (2006)) [hereinafter Convention Against Torture or CAT]. Like withholding of removal under INA § 241(b)(3), 8 U.S.C. § 1231(b)(3), the standard for CAT relief is whether the applicant is “more likely than not” to be subjected to torture and, thus, is more strict than the “well-founded fear” standard of asylum status. 8 C.F.R. §§ 208.16(c)(4), 208.18. Also like withholding of removal, this form of relief is not discretionary and a person cannot be removed to a country where it is “more likely than not” that she will be tortured. 8 CFR § 208.16(d). However, CAT relief is more limited than either asylum or withholding under INA § 241(b)(3) because the torture in question must occur with the “consent or acquiescence of a public official or other person acting in an official capacity.” 8 CFR § 208.18(a)(1). The fact that much FGM is performed by private persons and may not be officially sanctioned by the government can lead to problems in making an FGM claim for CAT relief. In contrast, “persecution” in the context of asylum and withholding of removal can be conducted by either a public or private actor that the government is “unwilling or unable to control.” *McMullen v. INS*, 658 F.2d 1312, 1315 (9th Cir. 1981). Both withholding of removal under INA § 241(b)(3) and CAT relief are less generous than asylum because these forms of relief merely prevent the person from being deported and are not accompanied by the privileges of asylum status. For example, after one year of living in the United States, an asylee can “adjust status” to that of a legal permanent resident (“greencard” holder). 8 C.F.R. § 209.2 (2006). However, there is no similar provision for a person who is granted withholding of removal or CAT relief—meaning the person cannot become a legal permanent resident the same way. Clearly, asylum is the preferable status. However, often a noncitizen cannot apply for asylum because she has failed to apply for asylum within the one year provided by statute or because of a certain type of criminal conviction. INA §§ 208(a)(2)(B), 208(b)(2)(A), 8 U.S.C. §§ 1158(a)(2)(B), 1158(b)(2)(A). In such cases, the noncitizen will apply for withholding of removal and CAT relief. As a result, cases of asylum, withholding of removal, and claims under CAT are all quite similar. Although this Note focuses on asylum, other forms of immigration relief are discussed because they are analogous to asylum and because the argument for derivative status for parents relates to all forms of relief.

42. *Nwaokolo*, 314 F.3d 303.

deported.<sup>43</sup> Relying on a case called *Salameda v. INS*,<sup>44</sup> the court reasoned that the petitioner's youngest daughter, who was an American citizen, would be "constructively deported" if the mother were deported because she was too young to remain alone in the United States and would have to accompany her mother.<sup>45</sup> As a result, the *Nwaokolo* court granted a stay of removal<sup>46</sup> because the INS failed to consider that the applicant's U.S. citizen children might be subject to torture<sup>47</sup> if their mother were deported to Nigeria.<sup>48</sup> While this case did not hold that "constructive deportation" could give rise to a derivative asylum claim for a parent of a

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43. *Id.* at 304.

44. *Salameda v. INS*, 70 F.3d 447 (7th Cir. 1995). Although unrelated to FGM, *Salameda* held that where a minor "will have to follow his parents into exile . . . he is constructively deported and should therefore, one might suppose, be entitled to ask—or more realistically his parents' lawyer should be entitled to ask on his behalf—for [relief]." *Id.* at 451.

45. *Nwaokolo*, 314 F.3d at 307–08.

46. A stay is defined as a "postponement or halting of a proceeding, judgment, or the like." BLACK'S LAW DICTIONARY 1425 (17th ed. 1999). In *Nwaokolo*, the petitioner's order of deportation was stayed pending the resolution of her petition for review. *Nwaokolo*, 314 F.3d at 310. The term "removal" encompasses both deportation and exclusion. INA § 240(a)(1), 8 U.S.C. § 1229a(a)(1) (2006).

47. The court suggested that FGM is torture within the meaning of the Convention Against Torture. *Nwaokolo*, 314 F.3d at 310. The position that FGM is torture was later confirmed by a statement by the Seventh Circuit: "It is undisputed that FGM as practiced in Nigeria constitutes 'torture' within the meaning of the CAT." *Oforji*, F.3d 609, 615 n.2. The first article of the Convention Against Torture defines torture as:

[A]ny 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 a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him 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 . . . . This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Convention Against Torture, *supra* note 41, art. 1. In the context of immigration relief, this definition was largely assumed by the corresponding Department of Justice regulation. 8 C.F.R. § 208.18(a) (2006). For an analysis of FGM cases in light of the relationship between torture and family unification, see Lori A. Nessel, *Forced to Choose: Torture, Family Reunification, and United States Immigration Policy*, 78 TEMP. L. REV. 897, 941–42 (2005). In addition, for a general discussion of gender and the U.S. approach to the CAT, see Lori A. Nessel, "Willful Blindness" to Gender-Based Violence Abroad: *United States' Implementation of Article Three of the United Nations Convention Against Torture*, 89 MINN. L. REV. 71 (2004).

48. *Nwaokolo*, 314 F.3d at 308.

child who would be subject to FGM, it did establish that the INS<sup>49</sup> must consider the potential harm to a child when granting or denying immigration relief.<sup>50</sup>

In 2003, the Seventh Circuit considered and rejected a similar case involving derivative asylum in *Oforji v. Ashcroft*.<sup>51</sup> This case concerned an asylum seeker from Nigeria with two U.S. citizen daughters. The mother herself had already undergone FGM and therefore did not fear this form of persecution herself. Instead she feared that her daughters would be subject to the practice if she were deported and they returned to Nigeria with her.<sup>52</sup> The court stated:

Oforji requests this court to “extend derivative asylum” to her based on “new expansions and considerations” reflected in case law such as *Nwaokolo* . . . and *In Re Kasinga* . . . . Oforji bases this request on her claim that “[t]his court has previously recognized that when an alien minor’s parent is deported, the minor will have to accompany the parent into exile and is also effectively deported.”<sup>53</sup>

The court dismissed this argument by distinguishing the case from the “constructive deportation” that was avoided in *Salameda* because the *Nwaokolo* children are citizens who have the legal right to remain in the United States.<sup>54</sup> The court stated that, if the mother can locate the father (or, presumably, another caretaker) in the United States, the children may be able to avoid going to Nigeria with their mother.<sup>55</sup> Essentially, the mother faced what Judge Manion, in his majority opinion, called the “distasteful Solomonic choice” between leaving her children behind or subjecting them to FGM in Nigeria.<sup>56</sup> Still, the court was unable to pro-

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49. The Homeland Security Act of 2002 reclassified the INS and several other immigration agencies under the control of the Department of Homeland Security (DHS) and the Department of Justice (DOJ). Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135. As a result, cases prior to that date refer to the INS, while subsequent cases refer to the DHS or DOJ. For a discussion of this restructuring, see David A. Martin, *Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements*, 80 No. 17 INTERPRETER RELEASES 601 (2003).

50. *Nwaokolo*, 314 F.3d at 308–10.

51. *Oforji*, 354 F.3d 609.

52. *Id.* at 615.

53. *Id.*

54. *Id.*

55. *Id.* at 616.

56. *Id.* This statement is part of the majority opinion although, on the face of it, it sounds critical of the decision to deny relief in this case. Essentially, the court stated that the law is such that the “Solomonic choice” is the only option left to the mother in such a case. Judge Posner, in a concurring opinion, added that derivative asylum is logically impossible in this case since the children are U.S. citizens, and are therefore not eligible

vide relief, holding that parents are not eligible for derivative asylum status.<sup>57</sup>

The Seventh Circuit again considered a case of this kind in *Olowo v. Ashcroft* in 2004.<sup>58</sup> Like many in this line of cases, the petitioner was a national of Nigeria who had already been subjected to FGM and had two daughters. Before the Immigration Judge, and on appeal, Olowo claimed asylum on the basis that her children would have to return to Nigeria if she were deported and would then be forced to undergo FGM.<sup>59</sup> The court, ostensibly relying on *Oforji*, suggested that a parent's claim for derivative asylum is possible, stating that "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."<sup>60</sup> The court then cited the derivative asylum provision of the INA in support of this contention.<sup>61</sup> However, the court found that Olowo did not qualify for derivative status because her children were legal permanent residents and could not be "constructively deported."<sup>62</sup> In short, Olowo's case failed because the court did not find that the children would be "constructively deported," but the court did leave open the possibility that in circumstances where a child faced "constructive deportation," a parent might be granted derivative asylum status.<sup>63</sup>

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for asylum because they have no need for it. *Id.* at 619 (Posner, J., concurring). As Posner pointed out, this distinction fails to have meaning because the children are in the same position as they would be if they were noncitizens granted asylum and their mother was deported: "although they are citizens they are treated as badly as aliens." *Id.* at 620 (Posner, J., concurring). The logical problem of whether parents can derive asylum status from a U.S. citizen child will be addressed *infra* Part V.

57. *Id.* at 618.

58. *Olowo*, 368 F.3d 692. For an analysis of *Olowo* that advocates amending the INA to permit parents to receive derivative asylum, see Meredith Aherne, Comment, *Olowo v. Ashcroft: Granting Parental Asylum on a Child's Refugee Status*, 18 PACE INT'L L. REV. 317 (2006).

59. *Olowo*, 368 F.3d at 697.

60. *Id.* at 701.

61. *Id.*; INA § 208(b)(3)(A), 8 U.S.C. § 1158(b)(3).

62. This decision suggests some disagreement about the difference between actual deportation and "constructive deportation" as elaborated in *Salameda*, 70 F.3d at 451. That case defined "constructive deportation" as a situation where minor children, who were legally free to remain in the United States, would be forced by necessity to follow a parent who was deported. *Id.* In *Olowo*, this outcome is exactly what the children faced because they would be forced to accompany their mother even though they were not themselves being legally deported. To that effect, Olowo argued that if she were deported, her husband would be unable to care for her daughters on his own and they would have to return with her to Nigeria. *Olowo*, 368 F.3d at 698.

63. *Olowo*, 368 F.3d at 701.

In May 2004, only eight days after the Seventh Circuit's decision in *Olowo*, the Sixth Circuit decided the case of *Abay v. Ashcroft*.<sup>64</sup> In this case, the petitioner and her daughter were both citizens of Ethiopia.<sup>65</sup> Unlike *Olowo*, both the mother and the daughter applied for asylum on the grounds that they feared that the daughter would be subjected to FGM.<sup>66</sup> Relying on the State Department Human Rights Country Report for Ethiopia<sup>67</sup> that stated that FGM was "nearly universal" and testimony from the daughter, the Sixth Circuit easily concluded that the daughter had a well-founded fear of persecution vis-à-vis FGM.<sup>68</sup> The case of the mother, Abay, however, was more problematic. The court did not consider the argument of whether derivative asylum might be possible. Instead, it framed the question as follows: "The issue before the Court is really whether Abay can seek asylum in her own right based on a fear that her child will be subjected to female genital mutilation."<sup>69</sup> Specifically, the court noted that Abay "acknowledges that there is no express statutory authority for a parent to claim 'derivative asylum' based on her child's asylee status" and cited the derivative asylum provision of the INA.<sup>70</sup> It is not clear what the court would have held on the derivative asylum question because the court did not formulate the question in that way.<sup>71</sup>

Instead, Abay argued that she was eligible for asylum because the BIA, in *In re C-Y-Z*, had previously held that a family member may be eligible for asylum if she witnessed harm to another family member.<sup>72</sup> In light of the likelihood that the family would face ostracism if they refused to have the daughter subjected to FGM, the court agreed with Abay,<sup>73</sup> citing a series of BIA decisions that granted withholding of removal<sup>74</sup> to parents who feared that their daughters would be forced to undergo FGM. In particular, the court relied upon *In re Dibba*, where the BIA granted re-

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64. *Abay*, 368 F.3d 634.

65. *Id.* at 635.

66. *Id.* at 636.

67. *Id.* at 369.

68. *Id.* at 640.

69. *Id.* at 641.

70. *Id.*

71. *Id.*

72. The *Abay* court cited the following from a concurring opinion in *In re C-Y-Z*: "It not only constitutes persecution for the asylum applicant to witness or experience the persecution of family members, but it serves to corroborate his or her own fear of persecution." *Abay*, 368 F.3d at 641 (quoting *In re C-Y-Z*, 21 I. & N. Dec. 915, 926-27 (BIA 1997) (Rosenberg, Board Member, concurring)).

73. *Abay*, 368 F.3d at 640-42.

74. See *supra* note 40 (discussing withholding of removal).

opening of a case to a petitioner so that she could proceed with an asylum claim based on fear that a daughter would be subject to FGM. The BIA stated that “normally a mother would not be expected to leave her child in the United States in order to avoid persecution.”<sup>75</sup> In concluding that Abay had a valid claim for asylum, the court stated that the precedents “suggest a governing principle in favor of refugee status in cases where a parent and protector is faced with exposing her child to the clear risk of being subjected against her will to a practice that is a form of physical torture causing grave and permanent harm.”<sup>76</sup> The court decided that the mother’s fear of being forced to return her daughter to Ethiopia and to witness her mutilation amounted to a well-founded fear of persecution.<sup>77</sup>

Also in 2004, the Ninth Circuit considered a similar claim in *Azanor v. Ashcroft*.<sup>78</sup> In that case, the court noted that the question of whether a parent can assert a derivative claim on behalf of a child was one of first impression to the circuit and had not been decided.<sup>79</sup> The petitioner was a Nigerian woman with a U.S. citizen daughter.<sup>80</sup> The mother had already been subject to FGM and feared that the same would be forced upon her daughter if she were deported.<sup>81</sup> Because of an untimely filing of her motion to reopen the case, the court denied review of her asylum claim.<sup>82</sup> It did, however, hold that the BIA abused its discretion in not reopening her case to consider CAT relief<sup>83</sup> based on the threat of FGM to her daughter.<sup>84</sup> The court remanded the case to the BIA to decide, among other issues, any claim the mother might have to a derivative claim under CAT.<sup>85</sup> To this affect, Judge Wallace, writing for the majority, stated:

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75. *Id.* at 642 (citing *In re Dibba*, No. A73 541 857 (unpublished) (BIA Nov. 23, 2001)).

76. *Id.*

77. *Id.* In *Abebe I*, the Ninth Circuit suggested that the Sixth Circuit held that Abay was eligible for asylum because she faced ostracism if she did not permit her daughter to be subjected to FGM. *Abebe I*, 379 F.3d at 759. The Ninth Circuit then distinguished the cases by noting that ostracism did not rise to the level of persecution under Ninth Circuit case law and declined to follow the holding in *Abay*. *Id.* Although the Sixth Circuit did briefly discuss potential ostracism, the *Abay* court decided the case on the theory that witnessing harm to a family member amounted to persecution. *Abay*, 368 F.3d at 642. The *Abay* decision will be considered in greater depth *infra* Part IV.

78. *Azanor*, 364 F.3d 1013.

79. *Id.* at 1021.

80. *Id.* at 1016.

81. *Id.*

82. *Id.* at 1018.

83. *See supra* note 41 (discussing CAT relief).

84. *Azanor*, 364 F.3d at 1021.

85. *Id.*

“Moreover, we should not decide whether an alien may assert a derivative torture claim on behalf of her United States citizen children—a question of first impression in this circuit—without first allowing the Board to bring its considerable experience and expertise to bear on the issue.”<sup>86</sup> In essence, the court deferred to the BIA, but allowed for the possibility of a parent’s derivative claim by stating that it was a novel question for the courts and that prohibition of such a status was not a foregone conclusion.

### III. RECENT NINTH CIRCUIT CASES: *ABEBE* AND *TCHOUKHROVA*

Despite *Azanor*’s holding that derivative asylum for parents was still an open question, the Ninth Circuit, in *Abebe I*, chose not to address the issue directly.<sup>87</sup> As aforementioned, this case was decided by a panel of three judges,<sup>88</sup> reheard en banc,<sup>89</sup> and decided in late 2005.<sup>90</sup> The case attracted a great deal of attention from asylee advocates<sup>91</sup> and some degree of attention from the press.<sup>92</sup> *Abebe* involved Ethiopian parents who claimed asylum, in part, under the theory that their daughter would be subjected to FGM if the family were deported.<sup>93</sup> The court suggested that the FGM claim presented a close case, but denied the petition for review of the deportation order on the basis that the parents would be able to protect the daughter from the mutilation.<sup>94</sup> The court based this conclusion on the fact that the parents failed to prove that the daughter’s subjection to FGM was “inevitable or even probable” because the parents stated they would do anything they could to prevent FGM.<sup>95</sup> The court

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86. *Id.*

87. *Abebe I*, 379 F.3d 755.

88. *Id.*

89. *Abebe I*, 400 F.3d 690 (granting rehearing en banc).

90. *Abebe II*, 432 F.3d 1037.

91. See Center for Gender and Refugee Stud., Advisory: *Asylum, Withholding, and CAT Protection for Parents Who Oppose Female Genital Cutting [FGC]*, 2004, [http://cgrs.uchastings.edu/documents/legal/cgrs\\_advisory\\_FGC.doc](http://cgrs.uchastings.edu/documents/legal/cgrs_advisory_FGC.doc); Marcelle Rice, *Protecting Parents: Why Mothers and Fathers Who Oppose Female Genital Cutting Qualify for Asylum*, 04-11 IMMIGR. BRIEFINGS 1, 5–6, Nov. 2004, available at [http://cgrs.uchastings.edu/documents/legal/imm\\_briefings\\_11-04.pdf](http://cgrs.uchastings.edu/documents/legal/imm_briefings_11-04.pdf).

92. See Peter Blumberg, *Judge Wonders When Genital Mutilation Might Be Ok*, SAN FRAN. DAILY J., June 22, 2005, at 1, 5; David Watson, *Couple Claiming Fear of Daughter’s Mutilation Gain En Banc Review of Ruling Denying Asylum Claim*, METRO. NEWS, Mar. 4, 2005, available at: <http://www.metnews.com/articles/2005/saka030405.htm>.

93. *Abebe I*, 379 F.3d at 756–57.

94. *Id.* at 759. The court referred to the FGM claim as a “closer case” in contrast to the father’s claim of political persecution, which the court rejected. *Id.*

95. *Id.* As Judge Ferguson pointed out in his dissent in *Abebe I*, this was an inappropriate standard. *Id.* at 760–61 (Ferguson, J., dissenting). He reasoned that the majority



also based this finding on a ten-year-old State Department document that stated that “women are able to prevent their daughters from being subjected to [FGM] by relatives.”<sup>96</sup> Furthermore, the court reasoned that even if the family faced ostracism for protecting the daughter from FGM, ostracism did not rise to the level of persecution under Ninth Circuit case law and could not be a ground for asylum.<sup>97</sup> To that effect, the court focused on the issue of ostracism in explaining why it need not follow the result in *Abay*.<sup>98</sup> In *Abebe I*, the court stated that *Abay* was not analogous because the Sixth Circuit recognized ostracism as persecution,<sup>99</sup> but the Ninth did not.<sup>100</sup> This point of distinction, however, is somewhat misplaced since *Abay* did not center on ostracism as a basis for the mother’s asylum claim, but instead focused on the fear experience of witnessing harm to one’s family member.<sup>101</sup> In short, *Abebe I* rejected the reasoning of *Abay* and eschewed the derivative asylum argument.<sup>102</sup>

In 2005, the Ninth Circuit decided *Abebe II* and again declined to address the theory of derivative asylum directly.<sup>103</sup> Instead, the court remanded the case to the BIA to address the question of derivative asylum for parents in the first instance.<sup>104</sup> The court decided the case on a much narrower basis, holding that the Immigration Judge had erred in finding that the parents did not have a well-founded fear that their daughter would be subject to persecution.<sup>105</sup> As a result, the Ninth Circuit held that the parents had made a prima facie case for asylum and remanded to the BIA to consider, in the first instance, if parents are eligible for derivative

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was incorrect in suggesting that the parents needed to prove that the FGM was probable or likely to occur. *Id.* Instead, Judge Ferguson, following the Supreme Court in *INS v. Cardozo-Fonseca*, quoted: “one can certainly have a well-founded fear of an even happening when there is less than a 50 percent chance of the occurrence taking place.” *Id.* (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)). With this in mind, Judge Ferguson argued that the majority in *Abebe I* held the parents to an inappropriate standard and, even if it is likely that the parents can protect their daughter, “they may still have a well-founded fear of not being able to do so.” *Abebe I*, 379 F.3d at 761 (Ferguson, J., dissenting).

96. *Abebe I*, 379 F.3d at 759 (citing U.S. DEP’T. OF STATE, ETHIOPIA—PROFILE OF ASYLUM CLAIMS & COUNTRY CONDITIONS 5 (1994)).

97. *Id.*

98. *Id.*

99. *Abebe I*, 379 F.3d at 759; *Abay*, 368 F.3d at 640.

100. *Abebe I*, 379 F. 3d at 759 (citing *Kazlauskas v. INS*, 46 F.3d 902, 907 (9th Cir. 1995) (holding that ostracism does not rise to the level of persecution)).

101. *Abay*, 368 F.3d at 641–42.

102. *Abebe I*, 379 F. 3d at 759–60.

103. *Abebe II*, 432 F.3d at 1043.

104. *Id.*

105. *Id.*

asylum.<sup>106</sup> The case was very close, with only one vote affirming the decision.<sup>107</sup> To date, the BIA has not decided this issue<sup>108</sup>

Shortly after agreeing to rehear *Abebe* en banc, but before announcing its decision, the Ninth Circuit decided *Tchoukhrova v. Gonzales*.<sup>109</sup> Like *Abebe*, *Tchoukhrova* received attention from advocates of asylum seekers<sup>110</sup> and the disabled.<sup>111</sup> In addition, news of the case appeared in the *San Francisco Chronicle*.<sup>112</sup> *Tchoukhrova* differed from most of the

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106. Commentary on this case has interpreted it to mean that the Ninth Circuit held that the parents were eligible for asylum. See, e.g., *CGRS Wins en banc Genital Cutting Case—Abebe*, Newsletter (Center for Gender and Refugee Studies, U.C. Hastings College of the Law, San Francisco, CA), Spring 2006, available at <http://cgrs.uchastings.edu/newsletter/spring06/spring06.htm>. Read literally, *Abebe II* actually remands the case to the BIA. Nevertheless, Judge Tallman, in his dissenting opinion in *Abebe II*, noted that the majority's remand was illusory because the court did not dismiss the derivative claim as being without merit. *Abebe II*, 432 F.3d at 1048 (Tallman, J., dissenting). The decision to remand this issue to the BIA is based on the Supreme Court case of *INS v. Ventura*, which held that if an issue emerged in a circuit court that the executive agency's adjudicatory bodies (the immigration judge and BIA) did not previously hear, the court must remand to allow the agency (here, the INS or DHS) to decide the matter in the first instance. *INS v. Ventura*, 537 U.S. 12, 17 (2002). To this effect, the Supreme Court held: "Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands." *Id.* at 16. Further, the Court noted: "The agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides." *Id.* at 17.

107. *Abebe II*, 432 F.3d 1037.

108. A search for the remand of *Abebe II* on the Westlaw online database yielded no results. Westlaw Research Page, <http://www.westlaw.com> (last visited Sept. 28, 2006). In addition, a search of the BIA's online law library yielded no results. Virtual Law Library, Board of Immigration Appeals, [http://www.usdoj.gov/eoir/vll/intdec/lib\\_indecitnet.html](http://www.usdoj.gov/eoir/vll/intdec/lib_indecitnet.html) (last visited Sept. 28, 2006).

109. *Tchoukhrova I*, 404 F.3d 1181.

110. Deborah Anker, of the Harvard Immigration and Refugee Clinic of Greater Boston Legal Services, circulated a memorandum against the rehearing. Memorandum from Deborah Anker on *Tchoukhrova v. Gonzales*, [http://www.gbls.org/immigration/Tchoukhrova\\_Memorandum\\_to\\_Interested\\_Parties\\_7-27-05.pdf](http://www.gbls.org/immigration/Tchoukhrova_Memorandum_to_Interested_Parties_7-27-05.pdf) [hereinafter Anker Memorandum]. In addition, Anker, along with Nancy Kelly and John Willshire-Carrera, filed an amicus brief in connection with the *Tchoukhrova* case. Brief of Amicus Curiae in Support of Petitioner-Appellants and Opposing Rehearing en banc, *Tchoukhrova v. Gonzales*, No. 03-71129 (9th Cir. Aug. 31, 2005).

111. *Case Law Developments*, 29 MENTAL & PHYSICAL DISABILITY L. REPORTER 520, 525 (2005).

112. Bob Egelko, *Disabled Russian Boy, Family Given Asylum*, SAN FRAN. CHRON., Apr. 22, 2005, at B3, available at <http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/04/22/BAGGGCCHPH1.DTL>.

cases in this Note because it did not involve FGM.<sup>113</sup> However, it did address the question of derivative asylum for parents. After the case was decided in favor of the asylum applicants, the DOJ applied for a rehearing en banc.<sup>114</sup> In early December 2005, the court voted not to rehear the case.<sup>115</sup> However, the government petitioned the Supreme Court for a writ of certiorari in May 2006.<sup>116</sup> In October 2006, the Supreme Court vacated and remanded the case.<sup>117</sup>

In *Tchoukhrova*, Victoria Tchoukhrova, the mother of a severely disabled Russian boy, applied for asylum and named her son and her husband as derivative beneficiaries.<sup>118</sup> However, the person in this case who was the primary object of persecution was the child, Evgueni.<sup>119</sup> His cerebral palsy was caused by the negligence of the Russian state-owned hospital when, in 1991, his mother was giving birth to him.<sup>120</sup> The staff induced labor and then left the mother alone overnight, so that the child was still inside the womb and deprived of oxygen.<sup>121</sup> Then, when the staff returned to deliver the child, they broke his neck in the process of extracting him.<sup>122</sup> Telling his mother that “they didn’t see the reason why he needed to live,” they threw Evgueni into a medical waste container.<sup>123</sup> Evgueni lived and was removed from the medical waste bin.<sup>124</sup> “Despite Victoria and her husband Dmitri’s attachment to their newborn son, government officials tried to intimidate the couple into abandoning him to a state-run orphanage. Notwithstanding his parents’ refusal to give their consent, Evgueni was transferred to an institution for orphaned children with birth defects.”<sup>125</sup> Later, as a child, Evgueni was subject to verbal and physical assaults by strangers.<sup>126</sup> Two attacks against him were so severe that Evgueni required hospitalization, but the police never investigated the incidents.<sup>127</sup>

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113. *Tchoukhrova I*, 404 F.3d 1181.

114. Anker Memorandum, *supra* note 110.

115. *Tchoukhrova II*, 430 F.3d 1222, 1223.

116. Brief for the Petitioner, *Tchoukhrova III*, 127 S. Ct. 57 (No. 05–1401).

117. *Tchoukhrova III*, 127 S. Ct. 57.

118. *Tchoukhrova I*, 404 F.3d at 1187.

119. *Id.* at 1184–87.

120. *Id.* at 1184.

121. *Id.*

122. *Id.*

123. *Tchoukhrova I*, 404 F.3d at 1184.

124. *Id.*

125. *Id.* at 1184–85.

126. *Id.* at 1185.

127. *Id.*

The Ninth Circuit, in deciding *Tchoukhrova*, was faced with a very compelling set of facts and it is not surprising that the court ruled in favor of the family. However, rather than advance the argument of derivative asylum for parents, the court decided the case under a different theory. First, the court held that Evgueni was a member of a particular social group of disabled children who faced persecution on account of their disabilities.<sup>128</sup> Then the court turned to the question of whether a parent could receive derivative asylum through her child.<sup>129</sup> In the first definitive statement by a majority opinion in the Ninth Circuit, the court interpreted the silence of the INA on derivative asylum for parents to mean that such status was not legally permissible.<sup>130</sup> Instead, the court stated: “[I]f the child is the principal applicant and is granted asylum, the child can legally stay in this county, but his parents will be removed.”<sup>131</sup> The court then recognized the dilemma inherent in such a rule: “Facing imminent removal, parents could be forced to make a choice between abandoning their child in the United States or taking him to a country where it is likely that he will be persecuted.”<sup>132</sup>

In resolving the case, the court found a creative way to effectively grant asylum to the parents without literally calling it derivative asylum. The court concluded that parents of disabled children are part of the same particular social group as their children because the parent-child relationship is “immutable.”<sup>133</sup> Then the court held that asylum claims of family members within this particular social group should be considered as a unit and that harm to one member of the family may be imputed to the entire family unit.<sup>134</sup> Therefore, the harm to Evuegni could be imputed to his mother. To this effect, the court stated:

Taken as a whole, the harm to which Evgueni was subjected unquestionably rose to the level of persecution. Because this persecution is properly considered when adjudicating his mother’s claim, we hold that Victoria [the mother] has suffered past persecution, and note that the same would be true whichever parent was the principal applicant.<sup>135</sup>

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128. *Tchoukhrova I*, 404 F.3d at 1188–89.

129. *Id.* at 1190–91.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 1189–90.

134. *Tchoukhrova I*, 404 F.3d at 1192.

135. *Id.* at 1195. The term “principal applicant” refers to the person applying for asylum—in this case, Evgueni’s mother. The finding of past persecution is significant here because past persecution creates a presumption of future persecution. 8 C.F.R. § 208.13(b)(1) (2006). However, this presumption can be rebutted by the Government with

In other words, the court concluded that Evgueni's persecution could be imputed to his mother, making her eligible for asylum. Then, in a strange and circular twist, Evgueni and his father became eligible for derivative asylum status as the son and husband of Victoria. The court achieved the same outcome that would have resulted from holding that parents were eligible for derivative asylum. However, the implications of granting on the *Tchoukhrova* theory are not the same as those that flow from a derivative asylum approach.<sup>136</sup>

#### IV. THE PROBLEMS WITH REQUIRING PERSECUTION OF THE PARENT

The result of not extending derivative asylum to parents is that courts must find that the parent fears persecution in her own right. The Sixth Circuit in *Abay* and the Ninth in *Tchoukhrova* have granted<sup>137</sup> cases of this type, and in both cases, declined to hold that the parents are eligible for derivative status.<sup>138</sup> Both decisions present problematic legal and practical implications.

The Sixth Circuit approach in *Abay* was to find that the mother's fear of being unable to prevent and having to witness her daughter's mutilation constituted persecution.<sup>139</sup> This assertion presumes that persecution can be purely psychological and fear of harm to another or fear of witnessing harm to another constitutes persecution. This issue is complicated by the fact that the INA does not define the term "persecution."

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a showing that changed circumstances make the fear of future persecution unfounded. *Id.* Yet, certain forms of past persecution have been found to be so severe that even an absence of a fear of future persecution cannot bar a grant of relief from deportation. *See In re Chen*, 20 I. & N. Dec. 16, 19 (BIA 1989) (holding that a favorable grant of discretion may be warranted on humanitarian grounds in certain extreme cases even if there is little likelihood of future persecution). *See also* 8 C.F.R. § 1208.13(b)(1)(iii)(A) (2006). In *Mohammed v. Gonzales*, the Ninth Circuit found that the experience of past FGM is an ongoing harm that may entitle the applicant to relief even if she does not fear future FGM. *Mohammed*, 400 F.3d at 802.

136. This point will be discussed *infra* Part IV.

137. *Tchoukhrova I*, 404 F.3d 1181; *Abay*, 368 F.3d 634. Technically, the circuit courts do not grant or deny asylum claims; only executive officials within the Department of Homeland Security and the Department of Justice have the authority to grant asylum. INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (2006). A circuit court reviews the decisions of the executive bodies below (the immigration judge and the BIA) and remands the case to the BIA, which has the authority to grant or deny the claim. *See, e.g., Abay*, 368 F.3d at 642–43 (remanding the case to the BIA "for further consideration in light of our conclusions").

138. *Tchoukhrova I*, 404 F.3d at 1191–92; *Abay*, 368 F.3d at 641.

139. *Abay*, 368 F.3d at 642–43. For a criticism of the reasoning in *Abay*, see Wes Henriksen, Comment, *Abay v. Ashcroft: The Sixth Circuit's Baseless Expansion of INA § 101(a)(42)(A) Revealed a Gap in Asylum Law*, 80 WASH. L. REV. 477 (2005).

There is ample, often contradictory, case law on the meaning of this word in the context of asylum. For example, according to the BIA in *In re Acosta*, prior to the 1980 Refugee Act,<sup>140</sup> the term meant “either a threat to the life or freedom of, or the infliction of suffering or harm upon those who differ in a way regarded as offensive.”<sup>141</sup> *Acosta* concluded:

As was the case prior to the enactment of the [1980] Refugee Act, “persecution” as used in section 101(a)(42)(A) [the refugee/asylee definition] clearly contemplates that harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome.<sup>142</sup>

In general, persecution tends to signify serious threats to life or freedom. For instance, the Ninth Circuit stated: “This circuit has defined persecution as ‘the infliction of suffering or harm’ upon those who differ (in race, religion or political opinion) in a way regarded as offensive.”<sup>143</sup> Furthermore, the Ninth Circuit held that “persecution . . . is an extreme concept that does not include every sort of treatment our society regards as offensive.”<sup>144</sup> Likewise the Seventh Circuit has held that persecution may occur from acts such as “detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings, or torture.”<sup>145</sup> In contrast, the Sixth Circuit has suggested that ostracism may rise to the level of persecution.<sup>146</sup>

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140. The 1980 Refugee Act brought U.S. law into compliance with its obligations under the 1967 Protocol on Refugees. Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102; 1967 Protocol, *supra* note 1.

141. *Acosta*, 19 I. & N. Dec. at 222–23.

142. *Id.* The requirement that the persecution must be intended to punish a person or overcome a certain characteristic she possesses does not fit well in the context of FGM, where the persecutors do not generally view their act as punishment or harm. As a result, FGM cases do not require that the perpetrator have the intent to persecute, harm, or punish. See *Kasinga*, 21 I. & N. Dec. at 365. For a different approach, compare the concurrence of BIA Board Member Rosenberg, where she argued that the requirement of intent does apply to FGM because the procedure is intended to overcome the applicant’s state of being “non-mutilated and accordingly, free from male-dominated tribal control.” *Id.* at 374 (Rosenberg, Board Member, concurring).

143. *Korablina v. INS*, 158 F.3d 1038, 1043 (9th Cir. 1998) (quoting *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995)). Both *Korablina* and *Ghaly* refer to the language used in *In re Acosta*.

144. *Abebe I*, 379 F.3d at 758 (quoting *Fatin v. INS*, 12 F.3d 1233, 1243 (3d Cir. 1993)).

145. *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir. 1995), followed by *Oforji*, 354 F.3d 609.

146. *Abay*, 368 F.3d at 640.

In *Abay*, the court suggested that the mental harm of witnessing her daughter's mutilation rose to the level of persecution.<sup>147</sup> However, given the diversity of opinion among the circuits as to the meaning of persecution, it is doubtful that other circuits will follow the logic of *Abay* and hold that the mental harm is persecution. Those who support the approach in *Abay* and argue that mental harm is persecution cite instances where courts have granted asylum when the persecution was not physical.<sup>148</sup> For instance, Marcelle Rice, in an article in *Immigration Briefings*, cited *Kovac v. INS*, where the Ninth Circuit found that persecution was not limited to physical acts.<sup>149</sup> However, that case is not entirely apropos because it concerned economic harm and did not consider mental or psychological harm.<sup>150</sup> Generally, where the courts have considered the question of mental harm, they have held that it may be a significant aspect of persecution,<sup>151</sup> but only when coupled with physical harm or a threat of physical harm.<sup>152</sup>

The argument in *Abay* that mental harm could constitute persecution relied on *In re C-Y-Z*, where the BIA granted withholding of deportation<sup>153</sup> to a man because his wife had undergone forced sterilization as a part of China's coercive family planning program.<sup>154</sup> The *Abay* decision quoted the following section of *In re C-Y-Z* as an analogy to *Abay's* claim: "It not only constitutes persecution for the asylum applicant to witness or experience the persecution of family members, but it serves to corroborate his or her own fear of persecution."<sup>155</sup> However, this section of the decision is part of a concurring opinion; the majority holding in *In re C-Y-Z* is narrower and does not focus on the element of mental harm

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147. *Id.* at 641–42.

148. *See* Rice, *supra* note 91.

149. *Id.*; *Kovac v. INS*, 407 F.2d 102, 105–07 (9th Cir. 1969).

150. *Id.* at 107.

151. *See, e.g., Shoiria v. Ashcroft*, 377 F.3d 837, 844 (8th Cir. 2004) (holding that the asylum applicant's experience of witnessing her father's forcible arrests on four occasions, which led to post-traumatic stress disorder, did not rise to the level of persecution, but acknowledging that mental harm may be an aspect of persecution).

152. *See, e.g., Duarte de Guinac v. INS*, 179 F.3d 1156, 1163 (9th Cir. 1999) (holding that "the physical and mental abuse he experienced is wholly consistent with the documentary evidence introduced by the INS and compels the conclusion that he was a victim of persecution"). In reviewing the precedent cases, there is no evidence that mental harm alone may rise to the level of persecution. A search of BIA and circuit court cases did not yield any examples, but, since some BIA decisions are not published, the author of this Note is unwilling to state conclusively that no such case exists.

153. This relief is synonymous with withholding of removal or restriction on removal. *See supra* note 40 (discussing the withholding of removal).

154. *In re C-Y-Z*, 21 I. & N. Dec. 915 (BIA 1997).

155. *Id.* at 926–27 (Rosenberg, Board Member, concurring); *Abay*, 368 F.3d at 641.

caused by witnessing harm to a family member. Instead, *In re C-Y-Z* held that “the husband of a sterilized wife can essentially stand in her shoes and make a bona fide and non-frivolous application for asylum based on problems impacting more intimately on her than him.”<sup>156</sup>

Thus, one potential shortcoming of the *Abay* argument that mental harm is persecution is that other circuits will resist following it because its reasoning stretches and dilutes the definition of persecution. The *Abay* decision extrapolated from a concurring opinion in *In re C-Y-Z* and proffered a broad interpretation of persecution that included purely mental harm. Although this holding is within the jurisprudence of the Sixth Circuit, it does not necessarily apply to other circuits that define persecution more narrowly.<sup>157</sup> For instance, as aforementioned, in *Abebe I*, the Ninth Circuit acknowledged the holding in *Abay*, but explicitly declined to follow it, in part, because ostracism did not conform to their circuit’s conception of persecution.<sup>158</sup> To date, no other circuit court has followed the holding of *Abay*.<sup>159</sup>

The practical result of proceeding on the *Abay* theory is that it fails to put proper emphasis on the child and, as a result, may fail to protect the child. The child’s protection is dependent on the parents’ ability to show that they themselves fear persecution. If the parents cannot convince an Immigration Judge or a court that their mental harm amounts to persecution, U.S. asylum law cannot protect the best interest of the child because her parents must choose between abandoning her or returning her to harm. In either case, the best interest of the child is not protected. In addition, requiring parents to make a showing of their own persecution complicates what might otherwise be a simple case: the case for granting asylum to the child may be solid, but the more tenuous claims of the parents must also be advanced and adjudicated. The result is to place an un-

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156. *In re C-Y-Z*, 21 I. & N. Dec. at 918 (majority opinion) (quoting Memorandum from the Office of the General Counsel of the Immigration and Naturalization Service 4 (Oct. 21, 1996)).

157. The Sixth Circuit has tended to take a comparatively broad approach to the definition of persecution. For instance, the court in *Abay* suggested that ostracism might be a form of persecution, but the Ninth Circuit rejected that proposition in *Abebe I*. See *supra* text accompanying note 72 and compare to *supra* text accompanying notes 97–102.

158. *Abebe I*, 379 F.3d at 759.

159. Apart from the Ninth, other circuits have not directly addressed the issue of whether mental harm of this kind may rise to the level of persecution. The Seventh Circuit cited *Abay* in *Liu v. Ashcroft*, but cited in relation to a different issue. *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004).



necessary burden<sup>160</sup> on the court system by adding additional claimants and layers of legal complexity.

In contrast to *Abay*'s focus on mental harm, *Tchoukhrova* maintained that harm to one person could be imputed to the family unit.<sup>161</sup> In *Tchoukhrova*, the Ninth Circuit held that "disabled children and their parents constitute a statutorily protected group and that a parent who provides care for a disabled child may seek asylum and withholding of removal on the basis of the persecution that the child has suffered on account of his disability."<sup>162</sup> The court may have considered the question in this way because, arguably, nothing suffered by the parents of Evgueni constituted persecution per se.<sup>163</sup> In particular, the court held that precedent on derivative asylum has not "formalistically divided the claims between 'principal' and 'derivative' applicants but instead, without discussion, have simply viewed the family as a whole."<sup>164</sup> Therefore, "a parent of a disabled child may file as a principal applicant in order to prevent the child's forced return to the family's home country and may establish her asylum claim on the basis of the persecution inflicted on or feared by the child."<sup>165</sup>

The problem with the argument that persecution of one person is persecution of the family unit is similar to the problem with the *Abay* argument that mental harm is persecution: both decisions take an idiosyncratic approach to the very notion of persecution. In the case of *Tchoukhrova*, the Ninth Circuit suggested that the lack of an express statute making parents eligible for derivative status is a formalistic procedural problem that can be overcome by treating the family as a unit.<sup>166</sup> In support of this position, the *Tchoukhrova* court cited a series of cases where the court treated the family as a whole in the context of an asylum

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160. "Unnecessary" because it could be avoided by following the derivative asylum argument. *See infra* Part V.

161. *Tchoukhrova I*, 404 F.3d at 1190–92.

162. *Id.* at 1184.

163. The parents were not permitted to see their son for two months and, when they were, they found the conditions in the institution "horrifying." *Id.* at 1185. After their son was released, they were denied any public medical support because he was labeled as permanently disabled. *Id.* As a result of their experiences, the parents became advocates for disabled children in Russia. *Id.* at 1186. This activism led to further problems with society: people threw stones at the mother and vandalized their car, the father was fired, and at subsequent job interviews he was told to stop advocating for the rights of disabled children. *Id.* at 1186. Judge Kozinski, in his dissent to the decision not to rehear the case, wrote, "the harms suffered directly by Victoria are clearly not enough to amount to persecution." *Tchoukhrova II*, 430 F.3d at 1225 (Kozinski, J., dissenting).

164. *Tchoukhrova I*, 404 F.3d at 1192.

165. *Id.*

166. *Id.* at 1191–92.

claim.<sup>167</sup> However, none of the cited cases contemplated a situation where the persecution of a child was imputed to a parent, or considered to constitute harm to the entire family unit.<sup>168</sup> In other words, even though the decision cited many cases as bases for its conclusion, the holding in *Tchoukhrova* created a novel conception of persecution to the family unit. To this effect, Judge Kozinski, in his dissenting opinion to the later decision not to rehear *Tchoukhrova* en banc, wrote:

By allowing the harms suffered by a child to be imputed to the parent, the panel in effect creates a reverse derivative asylum claim . . . . This exotic reading of the immigration statute was never discussed by the [Immigration Judge], the BIA or even the parties—rather, it is something the panel comes up with on its own.<sup>169</sup>

Had courts actually taken the approach that *Tchoukhrova* suggests they did and treat families as a unit, the discourse on the question of derivative asylum for parents—spanning from *Nwaokolo* to *Abebe*—would have been unnecessary. If immigration judges and circuit courts had considered harm to one family member as harm to the unit, they could have granted those cases without much discussion.

In addition, the decision not to rehear *Tchoukhrova* succeeded very narrowly; six of his fellow judges joined Judge Kozinski in his dissenting opinion.<sup>170</sup> Judge Kozinski argued that the *Tchoukhrova* decision was flawed because it expanded the notion of family as particular social group. To this effect, Judge Kozinski wrote: “[F]inding that a *group* was persecuted doesn’t mean that every member of the group was persecuted. Rather, once an asylum petitioner has shown that he is a member of a persecuted group, he must still show that he himself has suffered or is likely to suffer persecution.”<sup>171</sup> In contrast, the *Tchoukhrova* court did not consider whether the mother suffered persecution by virtue of being in the particular social group of parents of disabled children in Russia.<sup>172</sup> Judge Kozinski maintained that it is important to consider the harms to

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167. *Id.* at 1192. In particular, the court cited: *Kaiser v. Ashcroft*, 390 F.3d 653, 660 (9th Cir. 2004); *Maini v. INS*, 212 F.3d 1167, 1177 (9th Cir. 2000); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996); *Prasad v. INS*, 47 F.3d 336, 339 (9th Cir. 1995).

168. *Tchoukhrova I*, 404 F.3d at 1191–92.

169. *Tchoukhrova II*, 430 F.3d at 1223 (Kozinski, J., dissenting). “Panel” in his quote refers to the three-member panel that decided *Tchoukhrova*. In addition, Judge Kozinski referred to the “immigration statute” in this way because he concluded that a certain regulation about refugees statutorily precludes the possibility that parents can receive derivative asylum. See *infra* note 197 for a discussion of Judge Kozinski’s argument.

170. *Tchoukhrova II*, 430 F.3d at 1223–27 (Kozinski, J., dissenting).

171. *Id.* at 1124 (emphasis in original).

172. *Tchoukhrova I*, 404 F.3d at 1191–92.

all family members in order to identify the particular social group, but the harms may not be considered cumulatively.<sup>173</sup> The strength of Judge Kozinski's dissent and the amount of support it garnered among his peers indicate that courts might hesitate to follow the *Tchoukhrova* decision because its family unit argument is idiosyncratic and overly broad. To that effect, the Ninth Circuit itself declined to follow its own reasoning in *Tchoukhrova* when it decided *Abebe II* in favor of the asylum applicants.<sup>174</sup> The court could have easily relied upon its reasoning in *Tchoukhrova* and held that the harm to the Abebes' daughter was harm to the entire family unit. They declined to do so.<sup>175</sup> Instead, the court only cited *Tchoukhrova* in relation to the proper standard of review.<sup>176</sup> The court may not have found the reasoning in *Tchoukhrova* to be persuasive.

In addition, as Kozinski noted in his dissent, *Tchoukhrova* bypassed the derivative asylum statute and rendered it ineffectual: the statute has no meaning if harm to one family member can be imputed, cumulatively, to the entire unit and every family member becomes eligible for asylum. In support of this contention, Judge Kozinski stated:

By assessing the harms cumulatively, the panel moots this carefully drawn statutory scheme, and obviates the need for derivative status in the first place. Under the panel's reasoning, section 1158(b)(3) [the derivative asylum provision] becomes mere surplusage, since the spouse and children of the principal applicant will *themselves* file as principal applicants once the familiar harms are assessed "cumulatively." This is all very new law.<sup>177</sup>

Not only does the *Tchoukhrova* decision undermine the statute, as Judge Kozinski argued, it also has the potential to make some sort of

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173. *Tchoukhrova II*, 430 F.3d at 1225–26 (Kozinski, J., dissenting). After deciding *Tchoukhrova I*, the Ninth Circuit held in *Thomas v. Gonzales* that family may constitute a social group. *Thomas v. Gonzales (Thomas I)*, 409 F.3d 1177, 1187 (9th Cir. 2005), vacated by *Gonzales v. Thomas (Thomas II)*, 126 S. Ct. 1613 (2006). See also *infra* text accompanying note 182 (discussing *Thomas I*). Unlike in *Tchoukhrova I*, in *Thomas I*, the court did not "cumulate" the harm, but considered the treatment of the individual. *Thomas I*, 409 F.3d at 1188–89. The Supreme Court vacated the judgment of the Ninth Circuit and remanded, holding that the court of appeals must remand the case to the BIA to decide the issue of whether a family constitutes a particular social group. *Thomas II*, 126 S. Ct. 1613.

174. *Abebe II*, 432 F.3d at 1040–43.

175. *Id.*

176. *Id.* at 1040–42.

177. *Tchoukhrova II*, 430 F.3d at 1225 (Kozinski, J., dissenting) (emphasis in original). Judge Kozinski's reference to the "carefully drawn statutory scheme" again refers to his contention that parents are statutorily excluded from derivative asylum. See *infra* note 197 for a discussion of Judge Kozinski's argument.

quasi-derivative asylum available to anyone who can prove she is a member of a family unit in which at least one member is persecuted. One logical consequence is that courts will now have to grapple with the definition of family unit in order to limit the potential scope of this decision and avoid abuse of the system. In short, by reading the derivative asylum statute literally as to exclude parents, the court stripped the statute of any meaning.

Thus, like the mental harm argument in *Abay*, it is unlikely that other courts will follow the *Tchoukhrova* court's theory concerning persecution of the family unit. The Supreme Court's recent decision to vacate and remand the case<sup>178</sup> only makes the future of *Tchoukhrova* more uncertain. The Court remanded the case to be considered in light of its decision in *Gonzales v. Thomas*.<sup>179</sup> That case also originated in the Ninth Circuit.<sup>180</sup> In June 2005—two months after the panel decision in *Tchoukhrova*—the Ninth Circuit held in *Thomas* that a family may constitute a social group.<sup>181</sup> The case involved individual members of a white family in South Africa who were persecuted by black South Africans because of their family relationship to an allegedly racist boss.<sup>182</sup> In April 2006, the Supreme Court vacated the judgment of the Ninth Circuit and remanded, instructing the Court of Appeals to remand the case to the BIA to decide, in the first instance, whether family may constitute a particular social group.<sup>183</sup> Although the Ninth Circuit did not explicitly rely on this case in denying the rehearing of *Tchoukhrova*, its existence as precedent may have bolstered the petitioners' claim that family could be a social group in that case. As a result, the Supreme Court's decision in *Thomas* destabilized the Ninth Circuit's decision in *Tchoukhrova*, making a remand the likely result in the latter case. In sum, the reasoning in *Tchoukhrova* has not proved to be persuasive and it is unlikely that the BIA will adopt this approach when considering the issue of derivative asylum for parents.

#### V. THE ARGUMENT FOR GRANTING DERIVATIVE ASYLUM TO PARENTS

In contrast to the approaches in *Abay* and *Tchoukhrova*, the argument that parents are eligible for derivative asylum is straightforward, easy to

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178. *Tchoukhrova III*, 127 S. Ct. 57.

179. *Id.*; *Thomas I*, 409 F.3d at 1187.

180. *Thomas I*, 409 F.3d at 1187.

181. *Id.* at 1188–89.

182. *Id.* at 1188.

183. *Thomas II*, 126 S. Ct. at 1615. This decision was also based on the holding in *Ventura*, that the courts cannot decide factual or legal issues in the first instance, but must instead remand the case to the BIA for the agency to first decide the matter. *Ventura*, 537 U.S. at 17. See also *supra* note 106.

administer, and, most importantly, legally coherent. Until *Tchoukhrova* stated that derivative immigration status was not available to parents,<sup>184</sup> it was considered an open question in the Ninth Circuit.<sup>185</sup> Both the BIA or the Circuits could have decided the cases by holding that the derivative asylum statute applied to parents, but declined to do so. However, the dissenting opinions in several of these cases indicate that there is no clear consensus that parents are ineligible for derivative asylum status.

For instance, in *Abebe I*, Judge Ferguson's dissent stridently disagreed with the majority for not reaching the question of derivative asylum.<sup>186</sup> He stated that he would hold that the parents in the *Abebe* case qualify for asylum through their daughter.<sup>187</sup> He argued that failing to grant the case along these lines is a "misreading of the law and an affront to basic human values."<sup>188</sup> The dissent recalled the case of *Azanor*<sup>189</sup> and the fact that the Ninth Circuit remanded it to the BIA because the issue of a derivative torture claim was an issue of first impression that the BIA should decide.<sup>190</sup> Similarly, in another 2004 Ninth Circuit decision, *Mansour v. Ashcroft*,<sup>191</sup> Judge Pregerson's dissent closely followed the reasoning of Judge Ferguson in *Abebe I*.<sup>192</sup> First, he stated: "Whether aliens in removal proceedings may assert a derivative claim for relief from removal on behalf of their U.S. citizen children is an open question in this Circuit."<sup>193</sup> Likewise, Judge Pregerson wrote: "[A]s our colleague, Judge Ferguson, persuasively reasoned . . . this is a question that should be answered in favor of recognition of a derivative claim."<sup>194</sup> Furthermore, in favor of the derivative asylum argument, he wrote: "I share Judge Ferguson's view and would hold that Petitioners may derivatively claim relief

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184. *Tchoukhrova I*, 404 F.3d at 1191–92.

185. *Mansour v. Ashcroft*, 390 F.3d 667, 682 (9th Cir. 2004) (Pregerson, J., dissenting); *Azanor*, 364 F.3d 1013, 1021. Similarly, the Sixth Circuit considered it an open question until holding otherwise in *Oforji*, 354 F.3d at 618.

186. *Abebe I*, 379 F.3d at 762 (Ferguson, J., dissenting).

187. *Id.* at 764.

188. *Id.* at 762.

189. *Azanor*, 364 F.3d 1013.

190. *Abebe I*, 379 F.3d at 762 (Ferguson, J., dissenting) (citing *Azanor*, 364 F.3d at 1021).

191. *Mansour*, 390 F.3d 667. The case involved Coptic Christian parents from Egypt who claimed that they feared that their U.S. citizen children would be persecuted for being Copts if the family were returned to Egypt. The majority rejected the parents' petition for review, stating that the discrimination that the asylum applicant faced did not amount to persecution. *Id.* at 672–74. The majority did not consider the question of derivative status for the parents. *Id.*

192. *Id.* at 682–83. (Pregerson, J., dissenting).

193. *Id.* at 682.

194. *Mansour*, 390 F.3d at 682.

from removal because they have a well-founded fear that their U.S. citizen children will be persecuted if Petitioners and their family are forced to return to Egypt.”<sup>195</sup>

In *Abebe I*, Judge Ferguson based his argument that parents could receive derivative asylum, in part, on an analysis of the derivative asylum statute.<sup>196</sup> He argued that the statutory silence of the INA's derivative asylum provision vis-à-vis parents does not foreclose the possibility of granting such status.<sup>197</sup> This interpretation is supported by other instances where the courts have concluded that silence in the INA does not indicate that a particular interpretation is precluded. For instance, the INA has separate sections on inadmissibility and deportation.<sup>198</sup> Section 212(h) provides for a waiver for certain grounds of inadmissibility.<sup>199</sup> Thus, a person can request a waiver if she is found inadmissible. Section 212(h) does not mention deportation at all. However, courts have interpreted the 212(h) waiver to apply to deportation as well as inadmissibility because the noncitizen in a deportation proceeding is “similarly situated” to one

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195. *Id.*

196. The provision states: “A spouse or child . . . of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.” INA § 208(b)(3)(A), 8 U.S.C. § 1158(b)(3)(2006).

197. *Abebe I*, 379 F.3d at 762–63 (Ferguson, J., dissenting). In contrast, Judge Kozinski, in his dissenting opinion in the decision not to rehear *Tchoukhrova* en banc, maintained that derivative asylum for parents was expressly prohibited by an immigration regulation. *Tchoukhrova II*, 430 F.3d at 1223. The regulation Judge Kozinski cited is titled “Derivatives of refugees.” 8 C.F.R. § 207.7(b) (2006). The regulation expressly names parents as ineligible for receiving derivative refugee status. However, as its name suggests, the regulation is about refugees—not asylees. Accordingly, there is another regulation in the Code of Federal Regulations that addresses the admission of an asylee's spouse and children. 8 C.F.R. § 1208.21 (2006). Like the derivative asylum statute in the INA, this regulation on asylees is silent as to the question of derivative status for parents. *Id.* Had the Department of Justice intended the refugee regulation to apply to both refugees and asylees, it would not have promulgated a separate asylum regulation. Moreover, the regulation that Judge Kozinski cited is not cited by any other case mentioned in this Note as authority that parents are ineligible for derivative asylum status.

198. A person may be found inadmissible on certain enumerated grounds (such as criminal conduct or contagious diseases) when she applies for admission to the United States. INA § 212(a), 8 U.S.C. § 1182(a) (2006). In addition, inadmissibility grounds apply to the case of a noncitizen present in the United States who attempts to adjust her status to that of a legal permanent resident. INA § 245(a), 8 U.S.C. § 1255(a) (2006). However, a person may be found deportable if she is already legally within the United States, but commits some act that is a ground for deportation. INA § 237, 8 U.S.C. § 1227 (2006). As the statute numbers suggest, these two provisions are found in different sections of the code and the grounds of inadmissibility and deportation, despite some overlap, are not the same.

199. INA § 212(h), 8 U.S.C. § 1182(h) (2006).

in an inadmissibility proceeding.<sup>200</sup> In this sense, the courts have shown that silence in the INA does not mean that what is omitted, necessarily, is forbidden. Using the same logic as the courts vis-à-vis the 212(h) waiver, it can be argued that a parent of an asylum seeker is “similarly situated” to a child of an asylum seeker and the derivative asylum statute should apply to both.<sup>201</sup>

Judge Ferguson specifically considered the silence of the INA on the question of derivative asylum for parents and concluded that Congress could not have intended for a parent to choose between leaving a daughter alone in the United States and taking her back to her home country where she might suffer FGM.<sup>202</sup> He was highly critical of the majority’s position that Congress “has opted to leave the choice with the illegal immigrant, not with the courts.”<sup>203</sup> When arguing that the statutory silence does not forbid the possibility of derivative asylum for parents, Judge Ferguson wrote:

I do not believe that Congress intended any parent to face that choice. If Congress failed to clarify, in so many words, that a parent may claim asylum on the basis of a threat to her child, that omission is attributable only to a failure to imagine that so many young children would be independently targeted for persecution. Our consciousness of FGM has now grown, as has our knowledge that hundreds of thousands of children are compelled to serve as child soldiers in deadly conflicts around the world.<sup>204</sup>

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200. *Jankowski-Burczyk v. INS*, 291 F.3d 172, 175 (2d Cir. 2002) (stating that the 212(h) waiver applies to noncitizens in deportation proceedings). The same was the case for a waiver under former section 212(c) of the INA. INA § 212(c), 8 U.S.C. 1182(c) (1995). See *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) (extending applicability of the 212(c) waiver to deportation proceedings). 212(c) relief was repealed with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996., Pub. L. No. 104–208, 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1182(c) (2006)). Although that form of relief was repealed, it was another instance where courts “read into” a silence in the INA.

201. This Note argues that, in a narrow set of circumstances, parents should receive derivative status, but that such grants should be limited by the same age restrictions that govern derivative status for children. A child of an asylee can only receive derivative asylum status as long as she is a child within the meaning of the INA—in other words, an unmarried child under the age of twenty-one. INA § 101(b)(1), 8 U.S.C. § 1101(b)(1) (2006). Reciprocally, a child should only be able to provide derivative status to her parent as long as she is a child within the meaning of the INA. Limiting the grant of the derivative status in this way is still in keeping with the purpose of granting the status to a parent: protecting the child when she may not be able to protect herself.

202. *Abebe I*, 379 F.3d at 763 (Ferguson, J., dissenting).

203. *Id.* at 763 (quoting *Oforji*, 354 F.3d at 618).

204. *Id.* at 763.

In other words, Judge Ferguson concluded that the INA's statutory silence with regard to parents was not the result of a deliberate decision to exclude parents, but an inability to imagine that it would be necessary to do so. Judge Ferguson concluded that it would be inappropriate to deny a grant of derivative asylum to parents simply because Congress could not have envisioned the need to expressly mention parents. Instead, the silence of the statute can be interpreted as leaving room for the interpretation that parents are eligible for derivative asylum in certain circumstances. Judge Ferguson also relied on *Abay*'s holding that earlier cases "suggest a governing principle in favor of refugee status in cases where a parent and protector is faced with exposing her child to the clear risk of being subjected against her will to a practice that is a form of physical torture causing grave and permanent harm."<sup>205</sup> In this way, Judge Ferguson's dissent also has echoes of the notion of "constructive deportation" discussed by the Seventh Circuit.<sup>206</sup>

Furthermore, not granting derivative asylum status to parents in these circumstances conflicts with one of the major underlying policies of U.S. immigration law: family unity.<sup>207</sup> As Judge Ferguson stated in *Abebe I*, "U.S. immigration law prioritizes the value of keeping families together. 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."<sup>208</sup> Another example of the premium that immigration law places on family unity is the fact that several

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205. *Id.* at 762–64 (citing *Abay*, 368 F.3d at 642).

206. *Nwaokolo*, 314 F.3d at 307–08. See also *supra* Part II (discussing "constructive deportation").

207. For example, the goal of keeping families united is furthered by the rather broad definition of "child" that includes step-children and adopted children. INA § 101(b)(1), 8 U.S.C. § 1101(b)(1) (2006). The emphasis on family in the INA can also be seen in temporary, nonimmigrant, visas, such as fiancé visas, and student or worker visas that allow the spouse and minor children of the person to accompany the student or worker for their duration of stay in the United States. INA § 101(a)(15)(K), 8 U.S.C.A. § 1101(a)(K) (2006) (fiancé visa); INA § 101(a)(15)(F), 8 U.S.C.A. § 1101(a)(F) (2006) (student visa); INA § 101(a)(15)(H), 8 U.S.C.A. § 1101(a)(H) (2006) (work visa). For a discussion of family unity and immigration law in relation to torture claims, see generally Nessel, "Willful Blindness" to Gender-Based Violence Abroad: United States' Implementation of Article Three of the United Nations Convention Against Torture, *supra* note 47.

208. *Abebe I*, 379 F.3d at 764. (Ferguson, J., dissenting) (quoting THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 319 (4th ed. 1998)); INA § 201(b), 8 U.S.C. § 1151(b) (2006). Judge Ferguson also cited the U.S. Supreme Court in *Stanley v. Illinois*, where the Court held: "The rights to conceive and to raise one's children have been deemed 'essential, basic civil rights of man' and 'rights far more precious . . . than property rights.'" *Abebe I*, 379 F.3d at 763. (Ferguson, J., dissenting) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).



types of waivers and relief require that the noncitizen prove that there would be hardship to an American citizen child if the family were returned.<sup>209</sup> In other words, the body of immigration law shows a preference for keeping families united. To interpret the provision as not permitting derivative asylum for parents in these extreme circumstances is inconsistent with the overall character of the INA.<sup>210</sup> However, derivative asylum status should not be available to the siblings or other family members of the persecuted child. The focus should be on protecting the principal applicant for asylum and allowing that child to remain in the care of her parents.

In addition to being legally coherent and preferable to interpret the derivative asylum statute to apply to parents, to do so also comports with international law on children and refugees. In particular, Judge Ferguson cited the Convention on the Rights of the Child,<sup>211</sup> which, even though Somalia and the United States have not ratified it, is the most widely ratified treaty in history.<sup>212</sup> Ferguson noted that the Convention requires

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209. One example is the 212(h) waiver described *supra* text accompanying notes 199–201. That waiver requires that a noncitizen make a showing that her spouse, parent, or child, who is a U.S. citizen or legal permanent resident, would suffer extreme hardship if the noncitizen were denied admission or deported. INA § 212(h)(B). In addition, cancellation of removal, a type of relief that literally “cancels” the person’s deportation, also requires a showing of “exceptional and extremely unusual hardship” to a spouse, parent, or child who is a U.S. citizen. INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D) (2006). For an analysis of gender in the context of cancellation of removal, see Jennifer Lindsley, Comment, *All Relevant Factors: Gender in the Analysis of Exceptional and Extremely Unusual Hardship*, 19 WIS. WOMEN’S L.J. 337 (2004).

210. In relation to this point, Judge Ferguson suggested that not granting derivative asylum to parents can lead to ridiculous results. For instance, he noted that the majority in *Abebe I* denied the parent’s claim, in part, because they did not testify that they would definitely be unable to protect their daughter from FGM. Judge Ferguson stated that it was absurd to require that parents testify that they would be powerless to protect their daughter because where a parent stated just that in *Olowo*, the Seventh Circuit chastised the mother for “seeking to take her daughters with her [if she were deported] and ordered notification of state agencies charged with protecting ‘minors from parents who allow acts of torture to be committed on minors.’” *Abebe I*, 379 F.3d at 762 (Ferguson, J., dissenting) (citing *Olowo*, 368 F.3d at 703–04). Thus, Judge Ferguson suggested that, under the majority’s logic, a parent will fail to establish a well-founded fear unless they argue that they are powerless to protect the child, but then face court-ordered removal of their children if their claim fails and they are deported. *Id.* at 761.

211. Convention on the Rights of the Child art. 9, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3.

212. *Abebe I*, 379 F.3d at 764 (Ferguson, J., dissenting). Convention on the Rights of the Child, *supra* note 211, art. 9. The United States signed the treaty February 16, 1995, but has not yet ratified it. Office of the U.N. High Comm’n for Human Rights, Status of Ratification of the Principal Int’l Human Rights Treaties as of 09 June 2004, <http://www.unhchr.ch/pdf/report.pdf>. However, according to the Vienna Convention on

states to “ensure that a child shall not be separated from his or her parents against her will, except when . . . such separation is necessary for the best interests of the child.”<sup>213</sup> Additionally, Judge Ferguson noted that the practice of not granting derivative asylum to parents is inconsistent with statements by the United Nations High Commissioner for Refugees (UNHCR) that state that a “woman could be considered a refugee if her daughters feared being compelled to undergo FGM.”<sup>214</sup> In addition, the UNHCR includes parents of minors in the list of persons eligible for derivative refugee status.<sup>215</sup> The reference to the UNHCR is germane because U.S. refugee and asylum law, to a great extent, tracks the legal in-

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the Law of Treaties, signing a treaty expresses a state's consent to be bound, unless otherwise indicated. Vienna Convention on the Laws of Treaties art. 12, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. While the United States has also not ratified this treaty, it is viewed as a restatement of the customary international law governing treaties. *Auguste v. Ridge*, 395 F.3d 123, 141 n.15 (3d Cir. 2005); *Ehrlich v. American Airlines, Inc.* 360 F.3d 366, 373 n.5 (2d Cir. 2004). Similarly, it can be argued that the Convention on the Rights of the Child has attained the status of customary international law. A treaty is elevated to the status of international law and becomes binding upon all nations—even those states that have not ratified—when its contents become general and consistent practice of states followed out of a sense of legal obligation. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). However, in the recent case of *Roper v. Simmons*, the Supreme Court did not entertain the notion that the Convention on the Rights of the Child was an expression of customary international law. *Roper v. Simmons*, 543 U.S. 551 (2005). Instead, the Court stated that the failure of the United States to ratify the Convention indicates a lack of national consensus on the issue. *Id.* at 621–23 (referring specifically to the juvenile death penalty). For an argument in favor of ratifying the Convention on the Rights of the Child, see Howard Davidson, *Children's Rights and American Law: A Response to "What's Wrong with Children's Rights,"* 20 EMORY INT'L L. REV. 69 (2006).

213. Convention on the Rights of the Child, *supra* note 211, art. 9. Similarly, *Tchoukhrova I* quoted article 23 of the International Covenant on Civil and Political Rights, which states that “family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” *Tchoukhrova I*, 404 F.3d at 1191 (quoting International Covenant on Civil and Political Rights art. 23, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171). The United States ratified this treaty on September 8, 1992. Office of the U.N. High Comm'n for Human Rights, *supra* 212.

214. *Abebe I*, 379 F.3d at 763 (Ferguson, J., dissenting) (citing HEAVEN CRAWLEY, REFUGEES AND GENDER: LAW AND PROCESS 181 (2001)). *See also* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, MEMORANDUM: FEMALE GENITAL MUTILATION, paras. 5, 7, U.N. Doc. SUS/HCR/011 (May 10, 1994).

215. UNHCR, PROCEDURAL STANDARDS FOR REFUGEE STATUS DETERMINATION UNDER UNHCR'S MANDATE § 5.1.2 (2005), *available at* <http://www.unhcr.org/publ/PUBL/4317223c9.pdf>.

struments that created both the UNHCR and refugee law: the 1951 Refugee Convention and its 1967 Protocol.<sup>216</sup>

Not only does granting parents derivative asylum status have a legal basis in the INA, U.S. case law, and international refugee law, this approach is also grounded by other policy rationales, like ease of administration. On a practical level, granting derivative asylum to parents is the most efficient and simplest way to achieve the goal that decisions like *Abay* and *Tchoukhrova* sought to achieve: ensuring that a persecuted child is protected and that a parent need not choose between abandoning their child and exposing her to harm. When courts are compelled to grant such cases they must construct elaborate theories of mental harm and family group that, as noted above,<sup>217</sup> are based on idiosyncratic interpretations of the law that may not be followed by other courts. In contrast, following the derivative asylum approach would allow for a uniform rule that other circuits could follow without regard to their particular definitions of persecution or family as a particular social group. In addition, such a rule would be easy to administer because the family would present only the claim of the minor child and the court would not need to adjudicate additional claims of persecution by the parents. Having a blanket rule that, in cases where a child is the target of persecution, a parent is eligible for asylum would be far easier to administer than the approaches in *Abay* or *Tchoukhrova*. In addition, making parents eligible for derivative asylum in these cases has the administrative and economic benefit of preventing asylee children from becoming dependants of the state if their parents are deported. The U.S. immigration law has a strong policy against allowing potential “public charges” to enter the country and providing derivative status to parents would prevent asylee children from burdening the state’s child protective services administrations.<sup>218</sup>

A potential policy argument against granting derivative asylum to parents is that to do so would open the “floodgates” and lead to abuse of the immigration system. The argument is that if the courts granted derivative asylum to parents, every parent of every girl in sub-Saharan Africa would rush to the United States to claim asylum for their daughter and reap the derivative benefits. A similar argument was made when FGM

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216. For instance, the definition of refugee, found at INA § 101(a)(42), is directly modeled off the first articles of the 1951 Refugee Convention and its 1967 Protocol. 1951 Refugee Convention, *supra* note 1, art. 1; 1967 Protocol, *supra* note 1, art. 1.

217. *See supra* Part IV.

218. For example, potential to become a public charge is a ground of inadmissibility that may bar a noncitizen from entering the U.S. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4) (2006). It would be contrary to this policy to admit asylee children with no means of supporting themselves.

became a ground for asylum—that massive numbers of African women would flee to the United States to claim asylum—and that has not proven to be so.<sup>219</sup> Most likely, there would not be a dramatic increase in asylum petitions from Africa if courts followed the derivative asylum rule.

However, even if there were an increase in applications, arguably, the “floodgates” problem would be less massive than the “floodgates” that *Tchoukhrova* may have opened by rendering the derivative asylum provision meaningless. The derivative asylum approach would just apply the existing statute to parents, while *Tchoukhrova* entirely bypasses the statute and opened up the possibility that everyone who is part of a persecuted family unit might be eligible for asylum—even if the individual is not the victim of persecution. If that were the case, brothers, sisters, grandparents, and cousins could all claim to be members of that family unit and apply for status. Thus, even in a worst-case scenario where the extension of derivative asylum to parents did increase the number of people claiming asylum, the result could not be worse than what might result from the undefined family unit principle in *Tchoukhrova*.

Another argument that is often argued against granting parents derivative asylum status is that in some cases the child is a U.S. citizen and is therefore ineligible for asylum.<sup>220</sup> The argument is that derivative status is logically impossible because the child has a legal right to remain in the U.S. and cannot be deported.<sup>221</sup> However, this formalistic approach fails to consider the realities of children who, although they may have an abstract legal right under U.S. immigration law, have no way to practically enjoy this right.<sup>222</sup> In many cases, the child may not even be old enough to understand her predicament. As Judge Posner wrote in *Oforji* in relation to U.S. citizen children in this situation, “although they are citizens they are treated as badly as aliens.”<sup>223</sup> Thus, denying derivative status to

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219. *Kasinga*, 21 I. & N. at 369 (Filppu, Board Member, concurring). There is no reliable, publicly available source of statistics on the number of people who have applied for asylum on the ground of FGM. A search of federal cases on the Westlaw database yielded forty-two court and BIA cases involving FGM. Westlaw Research Page, <http://www.westlaw.com> (last visited Oct. 7, 2006). However, this is not an accurate number of total cases because it does not include unpublished cases before immigration judges and the BIA.

220. *Abebe II*, 432 F.3d at 1048–50 (Tallman, J., dissenting); *Oforji*, 354 F.3d at 619–20 (Posner, J., concurring).

221. *Abebe II*, 432 F.3d at 1048 (Tallman, J., dissenting).

222. See David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165 (2006) (evaluating the rights of parents and children where immigration law mandates the deportation of a parent).

223. *Oforji*, 354 F.3d at 620 (Posner, J., concurring).

parents on such a formalistic basis would achieve an absurd result if the parent were forced to return to a country where the child would be persecuted. Refugee law was designed to protect against persecution and provide safe haven; it was not intended to remove children from safety and subject them to persecution. Such a result would be contrary to the very basic principles upon which international and U.S. refugee law is based.

In short, granting derivative asylum to parents is the preferable approach to cases where a minor child is the target of persecution. The derivative asylum approach can easily be read into the statutory silence of the INA on this matter and is in keeping with the U.S. immigration policy of family unity. Moreover, following the theory that parents are eligible for derivative asylum is easy for the courts to administer because it is a coherent and uniform rule.

## VI. CONCLUSION

This Note has sought to present a solid rationale for granting derivative asylum to the parents of persecuted minor children. Beginning with an examination of the case law on the subject, it has traced how the courts proceeded from treating derivative asylum for parents as an open question in the early cases, to foreclosing the possibility in cases like *Abay* and *Tchoukhrova*, and now remanding the issue to the BIA to consider. The outcomes in those two cases were, arguably, consistent with existing asylum law, but the reasoning in each case was unnecessarily complicated and each case's holding is overly broad. In other words, *Abay* took an idiosyncratic approach to mental harm as persecution, while *Tchoukhrova* constructed a novel theory for considering harm to the entire family unit. The reasoning in each case was outside the mainstream of asylum law and, in light of the recent Supreme Court decisions in *Thomas* and *Tchoukhrova*, it appears unlikely that the BIA or the courts will follow either case. As a result, meritorious claims will be denied because judges will continue to feel constrained by the silence of the INA on the issue of derivative asylum for parents.

Interpreting the derivative asylum provision of the INA to apply to parents is a better approach for the reasons discussed above. To do so is legally coherent because the silence in the INA does not preclude the extension of derivative immigration status to parents. A derivative asylum rule would be uniform and courts could follow it without the fear of diluting their constructions of the notion of persecution. Its uniformity also would further judicial and administrative efficiency because the rule is easy to apply and administer. Similarly, applying the statutory provision to parents is a way of saving it from the obsolescence to which the *Tchoukhrova* decision relegated it: *Tchoukhrova* stripped the derivative

asylum provision of any real meaning by considering harm cumulatively to the family unit and allowing any family member to make a claim. A rule that allows parents to receive derivative asylum status would preserve the efficacy of the derivative asylum provision and rein in the broad holding of *Tchoukhrova*. Granting derivative asylum to parents is in keeping with the policy of family unity in U.S. immigration law and with the instruments of international law that concern the rights of children and refugees. Finally, the derivative asylum approach avoids the terrible "Solomonic choice"<sup>224</sup> where parents must decide between abandoning their child in the U.S. or taking her back to persecution at home. In sum, there is ample authority in the law to suggest that the silence in the INA can be read to allow for the extension of derivative asylum to parents, or, in the alternative, that Congress should amend the INA in order to expressly bring the statute in line with the realities of today's child asylum seekers.

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224. *Oforji*, 354 F.3d at 616.

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