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# Refusing to Expand Asylum Law: An Appropriate Response by the Fourth Circuit in Niang v. Gonzalez

Daniel F.E. Smith

# Refusing to Expand Asylum Law: An Appropriate Response by the Fourth Circuit in *Niang v. Gonzales*

## INTRODUCTION

Mame Fatou Niang's denial of relief from removal, in *Niang v. Gonzales*,[1] illustrates the difficulties that arise at the intersection of U.S. asylum law[2] and the controversial practice of female genital mutilation ("FGM"). FGM is the term given to a set of surgical and quasi-surgical operations that remove all or part of the external female genitalia and are performed on girls and women mainly in Africa and Asia.[3] U.S. asylum law, as it relates to the practice of FGM, functions properly to meet only the needs of those aliens who may actually face persecution in their home countries. In *Niang v. Gonzales*, Niang based her claim for withholding of removal on the possible threat of FGM to her daughter, a U.S. citizen.[4] Because Niang herself would not face FGM and her daughter, as a citizen, was permitted to remain in the United States, Niang's claim of persecution lacked a firm legal foundation, and she was thus denied relief.[5] The decision of the *Niang* court placed Mame Fatou Niang in the difficult position of choosing between leaving her daughter behind in the United States with a father who might take her to

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1. 492 F.3d 505 (4th Cir. 2007).

2. In the interest of clarity, this Recent Development uses the term "asylum law" to collectively refer to all claims made by aliens seeking relief from deportation, including asylum, withholding of removal, and protection under the Convention Against Torture.

3. *See* Bah v. Mukasey, 529 F.3d 99, 101 (2d Cir. 2008) (quoting Abankwah v. INS, 185 F.3d 18, 23 (2d Cir. 1999)).

4. *Niang*, 492 F.3d at 507–08. If Niang herself faced FGM, "it is well-settled" that it would qualify as persecution strong enough to support a grant of asylum. Abebe v. Gonzales, 432 F.3d 1037, 1042 (9th Cir. 2005). But because Niang's claim was based on the threat of FGM to her U.S. citizen daughter, the court was faced with a different question altogether.

5. *Niang*, 492 F.3d at 509 (noting that the Board of Immigration Appeals ("BIA") affirmed the immigration judge's denial of relief to Niang); *id.* at 514 ("[T]he *state of the law* and the contents of this record require that we affirm the BIA.") (emphasis added). The circuit courts review BIA findings of fact under a "substantial evidence" standard. *Id.* at 510. Questions of law are reviewed de novo, with deference given to BIA interpretations of the Immigration and Nationality Act and its associated regulations. *Id.* at 515 (Williams, J., dissenting in part). Judge Williams dissented in part because she believed the majority did not afford enough deference to previous BIA interpretations of the term "persecution" that might have justified Niang's asylum claims. *Id.* at 516.

Senegal and have FGM performed on her,[6] or taking her daughter to Senegal where FGM might still be performed.[7] Despite the heart-wrenching nature of this individual case, the Fourth Circuit's decision was a proper application of asylum law. Asylum law, as it currently stands in the United States, appropriately reserves asylum and withholding of removal for those aliens who truly need protection from inevitable and actual persecution in their native countries.

Although this Recent Development focuses on Niang's claim for withholding, the general argument that claims for relief from removal should remain limited under applicable law applies equally to claims for asylum. Withholding of removal does not provide as broad a protection for the applicant as asylum and only protects against removal to the specific country or countries to which withholding is granted.[8] This piece argues, however, that Niang's arguments—if made in the context of an asylum claim—should also be rejected.

This Recent Development specifically addresses why Niang's argument to expand the definition of "persecution" to include fear of pure psychological harm was inappropriate as a matter of law. Next, it responds to the *Niang* dissent's argument that pure psychological harm can rise to the level of torture necessary to support a persecution claim. Reflecting on the growth of derivative asylum in response to China's harsh population control measures, this Recent Development then explains why Niang's argument to apply derivative asylum to FGM cases was properly rejected by the Fourth Circuit. This Recent Development concludes that current asylum law appropriately limits relief to aliens threatened with actual harm and, as a result, may ultimately best serve the humanitarian goal of reducing FGM worldwide.

## I. *NIANG V. GONZALES*

Mame Fatou Niang, a native and citizen of Senegal, entered the United States on a non-immigrant visa in August 2000.[9] She remained in the United States after her visa expired on November 8, 2000.[10] Eight months later, Niang gave birth to her daughter.[11] Two

6. *Id.* at 508.

7. *Id.* at 507.

8. Anwen Hughes, *Asylum and Withholding of Removal—A Brief Overview of the Substantive Law*, 1659 PLI/CORP 305, 331 (2008). For example, if Niang had been granted withholding of removal, she could not be deported to Senegal, but may have been deported to another nation.

9. *Niang*, 492 F.3d at 507.

10. *Id.*

years later, in October 2003, the Department of Homeland Security initiated proceedings for removal.[12] Niang conceded removability but argued multiple grounds for relief, including withholding of removal.[13] The Fourth Circuit reviewed Niang's case and resolved two arguments Niang made to support her claim for withholding of removal. Niang argued that: (i) she should be granted withholding because she would suffer persecution based on the psychological harm resulting from her daughter being subjected to FGM in Senegal, and (ii) she should be granted withholding on a "derivative" claim based on the persecution her daughter would face in Senegal if subjected to FGM.[14] Both of these arguments were based on the presumption that Niang's citizen daughter would accompany Niang to Senegal if Niang was deported. The Fourth Circuit concluded that psychological harm alone did not establish a sufficient basis to support Niang's first claim of persecution.[15] Regarding the derivative claim, the Fourth Circuit concluded that statutes and regulations did not authorize Niang's claim for withholding based on the threat of FGM to her U.S. citizen daughter.[16]

Denied relief by the Fourth Circuit, Niang faced the unenviable decision of either leaving her daughter with the child's father in the United States or taking her daughter to Senegal where FGM might be performed. Asylum law requires this decision because "the statutory language [of the Immigration and Nationality Act] does not provide a derivative claim to parents of U.S. citizens"[17] and because, at least in the Fourth Circuit, claims of fear of psychological harm do not meet

11. *Id.*

12. *Id.* at 508.

13. *Id.* Niang's case made its way from an immigration judge to the Board of Immigration Appeals, both of whom rejected Niang's claims and ordered her removed. *Id.* at 509. "Withholding of removal" is the descriptor given to the U.S. implementation of the 1951 United Nations Convention Related to the Status of Refugees under 8 U.S.C. § 1251(b)(3) and requires an applicant to establish that she is a refugee by showing a "clear probability of persecution" (i.e., that persecution is "more likely than not"). Hughes, *supra* note 8, at 330–31.

14. *Niang*, 492 F.3d at 509–10. Niang also made a claim for relief from removal based on protection under the Convention Against Torture ("CAT") but did not appeal the BIA's rejection of this claim to the Fourth Circuit, and thus waived it. *Id.* at 508, 510 n.5.

15. *Id.* at 512.

16. *Id.* at 513.

17. *Id.* at 512 n.11. The Fourth Circuit further notes that "[t]his omission may be intended to 'prevent wholesale circumvention of the immigration laws by persons who enter the country illegally and promptly have children to avoid deportation.' " *Id.* (quoting Hernandez-Rivera v. INS, 630 F.2d 1352, 1356 (9th Cir. 1980)).

the standard for statutory persecution necessary for a withholding claim to succeed.[18]

Niang, however, is not the first alien parent faced with such a heart-wrenching decision under current asylum law. Between 2002 and 2005, fourteen cases dealing with the issue of parents claiming relief based on the threat of FGM to their daughters were heard by seven circuits,[19] with only the Sixth Circuit granting asylum in the case of *Abay v. Ashcroft*.[20] *Abay* seems to be in a class by itself in recognizing parental asylum claims based on the threat of FGM to daughters.[21] For example, in the representative case of *Oforji v. Ashcroft*,[22] the Seventh Circuit held that the mother of two U.S. citizen daughters could not successfully claim derivative asylum or withholding of removal based on a threat of FGM to her daughters.[23] The Seventh Circuit specifically noted that Congress had foreseen the "difficult choices" the current law places before illegal aliens, but upheld the law as Congress intended.[24] Although one might look to this state of the law and try to construe statutes to allow these families to stay in the United States[25] or argue for legislative action to make families claiming FGM threats able to stay,[26] a closer look at the law

18. *Id.* at 512.

19. Kimberly S. Blizzard, Note, *A Parent's Predicament: Theories of Relief for Deportable Parents of Children Who Face Female Genital Mutilation*, 91 CORNELL L. REV. 899, 900 & n.3 (2006).

20. 368 F.3d 634 (6th Cir. 2004). See *infra* text accompanying notes 29–37 for a discussion of *Abay v. Ashcroft*.

21. *Abay*, 368 F.3d at 645–46 (Sutton, J., concurring) (reviewing case law and noting that "[c]ircuit court precedent does not advance [the derivative asylum] claim ... particularly in the absence of testimony that the child effectively would be deported alongside the parent"). Note that while Judge Sutton characterizes the mother's claim as derivative asylum, *id.* at 645, the majority views the "issue ... [as] whether Abay can seek asylum *in her own right* based on a fear that her child will be subjected to female genital mutilation." *Id.* at 641 (majority opinion) (emphasis added). Claims of derivative asylum based on the child's status and claims of parental asylum based on fear of psychological harm can thus overlap. Niang's claim of derivative asylum is discussed more thoroughly in Part IV, *infra*.

22. 354 F.3d 609 (7th Cir. 2003).

23. *Id.* at 619.

24. *Id.* at 618.

25. *See, e.g.*, Niang v. Gonzales, 492 F.3d 505, 515–17 (4th Cir. 2007) (Williams, J., dissenting in part) (arguing that psychological harm alone may satisfy the requirement of "persecution" for a claim of withholding of removal and the case should therefore be remanded to the BIA to resolve the issue); Alida Yvonne Lasker, Note, *Solomon's Choice: The Case for Granting Derivative Asylum to Parents*, 32 BROOK. J. INT'L L. 231, 267 (2006) ("[T]here 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.").

26. Blizzard, *supra* note 19, at 922–23; Lasker, *supra* note 25, at 267.

surrounding FGM and immigration indicates that clear standards denying relief in such cases are appropriate.

## II. FEAR OF PSYCHOLOGICAL HARM DOES NOT CONSTITUTE PERSECUTION

An applicant asserting a claim for withholding of removal must demonstrate "a 'clear probability' that she will face persecution in the country of removal" in order to succeed.[27] Niang first argued that the psychological harm of having her daughter subjected to FGM should be the type of persecution able to support a withholding claim.[28] But, as noted earlier, *Abay v. Ashcroft* is the only case that has granted a parent's claim for asylum based on the fear that a daughter would be subjected to FGM in the parent's native country.[29] In *Abay*, the Sixth Circuit held that an alien mother could successfully claim asylum—demonstrating a well-founded fear of future persecution—based on the fear that her daughter would be forced to suffer FGM.[30] The Sixth Circuit, based on three administrative adjudications that granted asylum or withholding to parents of citizen daughters facing FGM, found 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."[31]

Although most cases based on psychological harm alone cannot support a claim for persecution,[32] *Abay* and the dissenting judge's

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27. *Niang*, 492 F.3d at 510 (quoting Rusu v. INS, 296 F.3d 316, 324 n.13 (4th Cir. 2002)); *see* 8 U.S.C. § 1231(b)(3)(A) (2006) ("[T]he Attorney General may not remove an alien to a country if ... the alien's life or freedom would be threatened in that country because of [his] ... membership in a particular social group ...."); 8 C.F.R. § 1208.16 (2007) (implementing regulations for 8 U.S.C. § 1231).

28. *Niang*, 492 F.3d at 511. Niang's claim was limited to withholding of removal because her asylum claim was "untimely." *Id.* at 509. The standard for withholding of removal is higher than the standard for an asylum claim. *Id.* (citing Camara v. Ashcroft, 378 F.3d 361, 367 (4th Cir. 2004)).

29. *See supra* note 21 and accompanying text.

30. Abay v. Ashcroft, 368 F.3d 634, 642 (6th Cir. 2004). Note that *Abay* involved an asylum claim where the standard is a "well-founded fear of future persecution," *id.* at 636–37, while the *Niang* case, as noted, involved a withholding of removal claim where the standard is a "clear probability" of persecution. *Niang*, 492 F.3d at 510. This means that Niang faced a tougher standard than the immigrant in *Abay*.

31. *Abay*, 368 F.3d at 642.

32. *See, e.g.*, *Niang*, 492 F.3d at 512 (rejecting Niang's psychological harm argument); Shoaira v. Ashcroft, 377 F.3d 837, 844 (8th Cir. 2004) (finding that psychological damage suffered by daughter who witnessed her father's four arrests and was pushed to the ground by a police officer did not rise to the level of persecution necessary to support an asylum claim).

opinion in *Niang*[33] suggest that there is some small amount of legal traction for such an argument; however, even among some who argue for an expansion of asylum law to support alien families facing FGM in their home countries, the holding of *Abay* is controversial.[34] The *Niang* majority decision exemplifies this critique by distinguishing *Abay* as the "only federal decision permitting a parent to seek relief . . . based solely on the psychological suffering she will endure if her daughter will be subjected to FGM upon removal."[35] The Fourth Circuit went on to strongly assert that psychological harm alone simply cannot qualify as "persecution."[36] The *Niang* court viewed the *Abay* holding that psychological harm could constitute persecution as gratuitously extending the statutory definition of persecution.[37] In short, the Fourth Circuit in *Niang* accused the Sixth Circuit in *Abay* of legislating from the bench.

In addition to its tenuous treatment before the courts in cases involving parents of potential FGM victims, the classification of psychological harm as "persecution" runs contrary to the Board of Immigration Appeals' ("BIA") construction of the term as "harm or suffering . . . inflicted upon an individual *in order to punish him for possessing a belief* or characteristic a persecutor sought to

33. *Niang*, 492 F.3d at 517 (Williams, J., dissenting in part) (arguing that the BIA's failure to address the argument that the psychological harm to Niang was "persecution" required a remand). Judge Williams cited the BIA case of *In re C-Y-Z-*, 21 I. & N. Dec. 915 (B.I.A. 1997) (en banc), to support the argument that psychological harm might constitute persecution. *Niang*, 492 F.3d at 516. *In re C-Y-Z-* involved a husband's successful claim of persecution based on the forced sterilization of his wife. 21 I. & N. Dec. at 915. Despite Judge Williams' argument to the contrary, this case is best handled as a claim of derivative asylum. *See infra* text accompanying notes 82–92.

34. Blizzard, *supra* note 19, at 911–12; Wes Henricksen, Note, Abay v. Ashcroft: *The Sixth Circuit's Baseless Expansion of INA Section 101(a)(42)(A) Revealed a Gap in Asylum Law*, 80 WASH. L. REV. 477, 502–03 (2005) ("[D]ecisions such as *Abay v. Ashcroft* . . . purport to expand the law but provide no solid basis on which to do so. A more desirable alternative would be for Congress to amend INA § 208(b)(3)(A) to include parents of asylees.").

35. *Niang*, 492 F.3d at 512. The Fourth Circuit also distinguished *Abay* on the grounds that the daughter in that case was not a U.S. citizen and thus, unlike Niang's citizen daughter, could not stay in the United States. *Id.* This mode of distinguishing *Abay* is arguably flawed, as it seems the Fourth Circuit, faced with the *Abay* facts, would grant asylum to the alien daughter who faced the actual physical threat of FGM and deny it to the mother who only faced a fear of psychological harm. *See infra* notes 54–57 and accompanying text. *But see Niang*, 492 F.3d at 514 n.13 (noting that, in some circumstances, an asylum claim of parents fearing an FGM threat to a daughter might succeed).

36. *Niang*, 492 F.3d at 512.

37. *Id.*

overcome."[38] Such harm or suffering must be inflicted by a government or individuals or groups that a government is not able or willing to control.[39] However, social groups, not governments, tend to be the perpetrators of FGM.[40] For example, in Senegal the government has criminalized FGM and has established educational programs,[41] which suggests that the government is working against FGM persecution by the social groups that perform it.[42] Because FGM is a cultural practice,[43] it strains logic to argue that the community women performing the act[44] are somehow punishing and persecuting the parents for a belief that FGM is wrong for their children. Rather, it seems that FGM is performed to satisfy cultural superstitions about possible harms that the female genitalia pose to children or male sexual partners[45] and for reasons relating to chastity or purity.[46] FGM is not about persecuting parents.

Outside of the FGM context, the treatment of psychological harm as a source of the persecution necessary to support an asylum or withholding claim indicates that claims based solely on psychological harm are likely to fail. For example, in *Mashiri v. Ashcroft*,[47] an entire family of Afghanis living in Germany was threatened and harassed by individuals and groups strongly opposed to foreigners, with violence perpetrated against the father and the two sons.[48] In *Mashiri*, the mother, Zakia Mashiri, was granted asylum based on strong proof of past persecution which gave rise to a legal "presumption of a well-founded fear of future persecution" necessary

38. *In re* Acosta, 19 I. & N. Dec. 211, 222 (B.I.A. 1985) (emphasis added). This matter dealt with an adult citizen of El Salvador who alleged death threats and assaults from El Salvadoran guerrillas. *Id.* at 218. He was not granted asylum or withholding of removal. *Id.* at 237.

39. *Id.* at 222.

40. *See, e.g.*, *Niang*, 492 F.3d at 508–09 (discussing the practice of FGM in Senegal and noting that the Senegalese government has made FGM a crime).

41. *Id.* (citing 2003 U.S. DEPT. OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR SENEGAL (Feb. 25, 2004)).

42. This author does not have clear data that the law criminalizing FGM is enforced by the Senagalese government, but is assuming that this law is enforced to an adequate extent.

43. Blizzard, *supra* note 19, at 901.

44. *Id.*

45. *See* Adam Liptak, *Drawing a Line Between Enduring Harm and Legitimate Fear*, N.Y. TIMES, Nov. 5, 2007, at A18 (referencing a 2001 State Department report detailing tribal beliefs in Mali that contact between a baby and the clitoris during birth could kill the baby and that poison secreted from the clitoris could kill a man if it touched his penis).

46. *See* World Health Org., *Female Genital Mutilation*, May 2008, http://www.who.int/mediacentre/factsheets/fs241/en/index.html.

47. 383 F.3d 1112 (9th Cir. 2004).

48. *Id.* at 1115–17.

to satisfy the requirements for asylum.[49] The Ninth Circuit opinion in *Mashiri* noted that, "[p]ersecution may be emotional or psychological, as well as physical."[50] But the facts of *Mashiri* indicate that Mashiri not only suffered the psychological harm of witnessing her husband and sons' abuse, but was also herself almost caught and beaten by an anti-foreigner mob and threatened with death.[51] In other words, the *Mashiri* court stated in dicta that persecution may be purely emotional or psychological,[52] but actually held that the *cumulative* harm to Mashiri, emotional, psychological, *and* physical, rose to the level of persecution.[53]

Niang attempted to base her claim of persecution on the psychological harm she would suffer if her daughter was subjected to FGM in Senegal.[54] Although a non-United States citizen girl or woman in the position of Niang's daughter could successfully claim persecution based on the actual physical threat of FGM and be granted withholding of removal,[55] Niang herself could not base a claim solely on the psychological harm resulting from FGM being performed on her daughter,[56] despite *Abay*'s indication otherwise. As

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49. *Id.* at 1119; *see also* 8 U.S.C. § 1101(a)(42)(A) (2006) (defining "refugee"). Niang herself may have been able to make a claim for asylum based on past persecution for the FGM she was subjected to as a child. *See* Niang v. Gonzales, 492 F.3d 505, 509 n.4 (4th Cir. 2007). However, such a claim was not made by Niang in her appeal before the Fourth Circuit, *id.*, and is beyond the scope of this Recent Development.

50. *Mashiri*, 383 F.3d at 1120.

51. *Id.* at 1116–17.

52. *Id.* at 1120.

53. *Id.* at 1121. Several courts have noted the need to consider harms cumulatively. *See, e.g.*, Poradisova v. Gonzales, 420 F.3d 70, 79–80 (2d Cir. 2005) (noting that persecution is determined based on a cumulative view of events); Chand v. INS, 222 F.3d 1066, 1074 (9th Cir. 2000) ("When considering an asylum claim, we consider cumulatively the harm an applicant has suffered."). Notably, neither of these courts included psychological harm in the analysis of cumulative harms suffered.

54. *Niang*, 492 F.3d at 511. Under current asylum law, parents can neither claim derivative asylum based on the asylee status of their children, *see* Abay v. Ashcroft, 368 F.3d 634, 641 (6th Cir. 2004), nor, as previously noted, claim derivative asylum if their children are U.S. citizens. *Niang*, 492 F.3d at 512 n.11; *see also supra* note 17 and accompanying text. Niang likely claimed her potential psychological harm qualified as persecution in order to circumvent this statutory bar. Niang also argued that she should be granted derivative withholding of removal. *See* discussion *infra* Part IV. The "psychological harm" claim was arguably more likely to succeed because it only required the court to interpret the statutory term "persecution" in Niang's favor, while the derivative withholding claim would have required the court to judicially amend the statute.

55. *Niang*, 492 F.3d at 510 ("FGM constitutes 'persecution' within the meaning of the Immigration and Nationality Act . . . ."). Niang's daughter, as a U.S. citizen, would not need to make such a claim.

56. *Id.* at 512. Niang could have made a strong asylum or withholding claim based on the possibility that FGM would be performed on her again. *See* Bah v. Mukasey, 529 F.3d

the Fourth Circuit held, " 'persecution' cannot be based on a fear of psychological harm alone."[57] This decision appropriately limits relief from removal to aliens facing more than pure psychological harm in their home countries.

The *Niang* majority's holding that the psychological harm of having a daughter subjected to FGM cannot itself constitute persecution is consistent with most other circuits that have decided cases involving parents of potential FGM victims.[58] *Mashiri*, a case in which the entire family was persecuted, and where the mother herself was threatened with death and beatings, simply indicates that psychological harm in combination with actual or threatened physical harm can rise to the level of persecution.[59] Psychological harm alone, especially in the FGM context, does not rise to the level of persecution necessary to support a withholding or asylum claim.

## III. THE CONVENTION AGAINST TORTURE AND NIANG'S CLAIM OF PSYCHOLOGICAL PERSECUTION

Judge Williams' partial dissent in *Niang*[60] argued that the definition of torture in the United Nations Convention Against Torture ("CAT"),[61] as well as dictionary definitions of torture,

99, 114–15 (2d Cir. 2008). But such a claim would only succeed if FGM, as practiced in Senegal, involves multiple incidents of mutilation. Alternatively, at least in the Eighth Circuit, Niang could have claimed general persecution as a woman based on the past FGM harm she suffered. *See* Hassan v. Gonzales, 484 F.3d 513, 518 (8th Cir. 2007) ("We have never held that a petitioner must fear the repetition of the exact harm that she has suffered in the past. Our definition of persecution is not that narrow.").

57. *Niang*, 492 F.3d at 512.

58. *See, e.g.*, Gumaneh v. Mukasey, 535 F.3d 785, 789 (8th Cir. 2008) ("We conclude that an applicant may not establish a derivative claim for withholding of removal based upon the applicant's child's fear of persecution."); Oforji v. Ashcroft, 354 F.3d 609, 617 (7th Cir. 2003) ("[T]here is no statutory or regulatory authority for Oforji to have her own deportation suspended because she fears for her children if they return to Nigeria with her [and face FGM]."). The *Abay* holding, as previously discussed, conflicts with *Niang*, but it is the only case that granted asylum to the parent based on the fear that FGM would be performed on the daughter. *See supra* notes 20–21 and accompanying text.

59. *See supra* notes 47–53 and accompanying text.

60. Judge Williams concurred with the majority's denial of Niang's derivative withholding of removal claim. *Niang*, 492 F.3d at 514 (Williams, J., dissenting in part). But she dissented from the majority's denial of Niang's withholding claim based on the psychological harm Niang would suffer if her daughter was subjected to FGM and would have remanded to the BIA for a determination of the issue. *Id.* at 514–15, 520.

61. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, art. 1 (1988), 1465 U.N.T.S. 85, 113 [hereinafter Convention Against Torture].

indicate torture may be solely psychological.[62] Judge Williams used a broad interpretation of the definitions of torture to argue that the majority construed "persecution" too narrowly compared to BIA interpretations and would have remanded to the BIA for a determination of that issue.[63] But a more complete look at the CAT definition of torture belies Judge Williams' claim that a parent's awareness of the persecution of a daughter could qualify as torture under CAT. As the majority held, it was simply unnecessary to remand the case to the BIA to determine if the psychological harm of having a daughter subjected to FGM qualified as torture.[64]

The CAT defines torture as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[65]

Judge Williams used just a small portion of this definition—defining torture as an "act by which severe pain or suffering, *whether physical or mental*, is intentionally inflicted on a person"—to support her argument that psychological harm could qualify as persecution.[66] Put simply, Judge Williams argued that because torture may qualify as statutory persecution and because torture includes psychological pain and suffering, a logical conclusion could be drawn that psychological harm may constitute persecution.[67] Although Judge Williams argued

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62. *Niang*, 492 F.3d at 516. This discussion of the Convention Against Torture to support a claim of psychological persecution should be distinguished from Niang's claim for asylum under CAT, which Niang waived when she did not appeal it to the Fourth Circuit. *Id.* at 514 n.1. Judge Williams became Chief Judge Williams in July 2007, less than a month after the *Niang* case was decided. *See* Jerry Markon & Michael D. Shear, *Conservatives' Grip on Key Virginia Court Is at Risk*, WASH. POST, Dec. 18, 2006, at A1. Since Judge Williams is listed as a Judge in the *Niang* opinion, this piece will refer to her as Judge Williams.

63. *See Niang*, 492 F.3d at 516–17. Fears of torture can make an immigrant eligible for withholding of removal under CAT. Hughes, *supra* note 8, at 307.

64. *Niang*, 492 F.3d at 514.

65. Convention Against Torture, *supra* note 61, at art. 1 (emphasis added).

66. *Niang*, 492 F.3d at 516 (Williams, J., dissenting in part).

67. *Id.*

that the majority views "persecution" too narrowly, under the definition provided by the CAT, it seems that Judge Williams viewed the term too broadly. All legal terms, including "torture," find some portion of their meaning from context. It is undisputed that FGM itself constitutes torture because of the physical and mental suffering it inflicts.[68] But as the conflicts between the circuit courts regarding parents of potential FGM victims,[69] and between Judge Williams and the majority in *Niang* indicate, it is unsettled whether being a parent of an FGM victim constitutes torture at all, much less torture to the point of persecution.

The full definition of torture in the CAT supports a narrower view than Judge Williams propounds, especially in the context of Niang's claim. After defining "acts" that *might* constitute torture, the CAT then describes "purposes" for which the acts *will* constitute torture, including forcing confessions, punishment, and interrogation,[70] none of which support the premise that parents of potential FGM victims suffer torture. Thus, it appears that Judge Williams' broad view of torture is based on the fourth general purpose for which acts constitute torture—the broad, vague provision that acts constitute torture if they are committed "for any reason based on discrimination of any kind" when imposed directly or indirectly by a public official or someone acting in official capacity.[71] But fitting parents of potential FGM victims into this definition requires "the consent or acquiescence" of some public official[72] or, at a minimum, "willful blindness" of government officials.[73] Including such parents stretches the definition of torture beyond the breaking point in cases such as *Niang*, where the government of Senegal has criminalized FGM and has established educational programs and individual villages have prohibited FGM.[74]

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68. *See* Abebe v. Gonzales, 432 F.3d 1037, 1042 (9th Cir. 2005).

69. *Compare Niang*, 492 F.3d at 513, *and* Oforji v. Ashcroft, 354 F.3d 609, 617 (7th Cir. 2003) (rejecting, in both cases, mothers' claims of derivative asylum or derivative withholding of removal based on the threat of FGM to their U.S. citizen daughters), *with* Abay v. Ashcroft, 368 F.3d 634, 642 (6th Cir. 2004) (finding mother had well-founded fear of persecution to qualify as refugee based on the FGM threat to her daughter). The conflict here tends to blend parents' claims of psychological persecution to support their own asylum claims with claims of derivative asylum based on the threat to their children. For a discussion relating to claims of derivative asylum, see *infra* Part IV.

70. Convention Against Torture, *supra* note 61, at art. 1.

71. *Id.*

72. *Id.*

73. *See* Reyes-Reyes v. Ashcroft, 384 F.3d 782, 787 (9th Cir. 2004).

74. *Niang*, 492 F.3d at 508–09 (citing 2003 U.S. DEPT. OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR SENEGAL (Feb. 25, 2004)).

Maintaining the integrity of the asylum process supports the exclusion of parents of potential FGM victims from the "torture" category and the rejection of claims that psychological harm qualifies as persecution necessary for asylum or withholding of removal. Determining that parents like Niang would suffer actual psychological harm to the extent of torture in witnessing or being aware of FGM being performed on their daughters requires a difficult journey into the mind of the parent. The father of Niang's daughter, for example, apparently supports (or at least does not oppose) the practice of FGM.[75] If he were faced with removal proceedings, it is not clear whether he would testify to this fact, and he would certainly have a strong incentive to maintain otherwise. If parents of potential FGM victims were deemed to suffer persecution through an expansive view of torture, parents who simply stated opposition to FGM and their fear of it being performed upon their daughters would be able to strongly anchor their claims for asylum and withholding of removal. This could result in the realization of the Fourth Circuit's fear of "wholesale circumvention of the immigration laws by persons who enter the country illegally and promptly have children to avoid deportation."[76] The best policy is to reject the argument that the possible psychological harm of having a daughter subjected to FGM qualifies as torture sufficient to support a claim of persecution.

## IV. REJECTING NIANG'S DERIVATIVE CLAIM FOR WITHHOLDING OF REMOVAL

Niang's second argument on appeal was that the Fourth Circuit should recognize a derivative claim for withholding of removal based on the "barbaric nature of FGM."[77] Such a claim had no clear statutory basis and did not fit within the recognized exception for hardship to U.S. citizen children and spouses, an exception that requires a ten-year physical presence in the United States by the asylum applicant.[78] The Fourth Circuit majority held that the statute

75. *Id.* at 508.

76. *Id.* at 512 n.11 (quoting Hernandez-Rivera v. INS, 630 F.2d 1352, 1356 (9th Cir. 1980)).

77. *Id.* at 513. Note that this claim can easily be confused with Niang's claim of psychological harm. While Niang's claim of psychological harm is based on the threat of FGM to her daughter, it is directly based on the *psychological harm* she would suffer *as a parent.* The derivative claim, on the other hand, is based directly on the harm *that Niang's daughter might suffer* if she accompanied Niang to Senegal. For further discussion, see *infra* text accompanying notes 90–92.

78. *Niang*, 492 F.3d at 513 (citing 8 U.S.C. § 1229b(b)(1)(A) (2000)); *see also In re* A-K-, 24 I. & N. Dec. 275, 279 (B.I.A. 2007) ("[W]hile section 208(b)(3)(A) of the Act

did not provide a derivative withholding claim like Niang's and refused to create one.[79] The Fourth Circuit's decision was followed by the BIA when it decided *In re A-K-*,[80] which reaffirmed the lack of statutory authority to grant derivative asylum to a parent based on a child's successful asylum claim.[81]

The BIA, like the Fourth Circuit and other circuits, seems reluctant to establish derivative asylum or withholding claims for parents of daughters facing FGM.[82] This reluctance seems mainly based on the lack of a statutory basis on which to ground such claims,[83] but could also be related to the experience of handling derivative claims in the context of asylum for victims of China's harsh population control measures. Currently, the legal definition of a "refugee" in 8 U.S.C. § 1101(a)(42) includes special language that presumes persecution on account of political opinion for an asylum applicant "who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program . . . ."[84] This special language is a result of amendments to the law that were included in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,[85] which addressed asylum claims that resulted from "coercive family

provides for derivative asylum in certain circumstances, the Act does not permit derivative withholding of removal under any circumstances.").

79. *Niang*, 492 F.3d at 513.

80. 24 I. & N. Dec. 275, 279 (B.I.A. 2007).

81. *Id.* Although *In re A-K-* focused on asylum status, the BIA also noted that applicants for withholding of removal could not base their claims solely on the fear of FGM being forced upon their daughters in the native country. *Id.* at 275. This decision has been interpreted as "foreclosing" derivative claims and claims of psychological harm made by parents based on the potential persecution of their children. *See* Kechichian v. Mukasey, 535 F.3d 15, 22 & n.4 (1st Cir. 2008). Again, the claim of *the parent's own* psychological harm as persecution is blending with the parent's derivative claim based on *harm to the child*. *See id.*; *see also infra* text accompanying notes 90–92.

82. *See, e.g.*, Gumaneh v. Mukasey, 535 F.3d 785, 789–90 (8th Cir. 2008) (agreeing with the reasoning in *Niang*); *Niang*, 492 F.3d at 513; Oforji v. Ashcroft, 354 F.3d 609, 615 (7th Cir. 2003) ("It is important to understand that claims of constructive deportation [(i.e., derivative asylum)] are cognizable only if such a claim falls squarely within the narrow holdings of the cases creating the doctrine."). In *Abay*, the majority did not reach the derivative asylum claim, focusing instead of the mother's fear that her daughter would be subjected to FGM. Abay v. Ashcroft, 368 F.3d 634, 641 (6th Cir. 2004). Judge Sutton's concurrence indicated that there was no statutory basis for such a derivative claim. *Id.* at 645 (Sutton, J., concurring).

83. *See In re A-K-*, 24 I. & N. Dec. at 279.

84. 8 U.S.C. § 1101(a)(42)(B) (2006).

85. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

planning practices" in the native country.[86] When the BIA decided *In re C-Y-Z-*[87] and interpreted this special language for the first time, it held not only that an alien could claim asylum and withholding of removal based on her forced abortion or sterilization, but also that her husband could successfully make such claims based upon his wife's suffering.[88] Thus, this decision effectively found that an alien was persecuted based on physical acts that were performed on his spouse.[89]

In the *Niang* case, Judge Williams, in her dissent, raised the precedent of *C-Y-Z-* to support the proposition that psychological harm to the alien applicant based on the forced sterilization of his wife could support a claim of persecution.[90] The claim of psychological harm to support persecution and the claim for derivative asylum or withholding begin to overlap in this area, as an asylum applicant like Niang strives to find a way to remain in the country. Although a legal difference exists between a claim for derivative asylum and a claim of psychological harm,[91] there does not seem to be much substantive difference. In the derivative claim, the applicant is claiming that the harm *her daughter* will suffer should support a grant of asylum or withholding to her derivatively, while in the psychological harm claim, the applicant is claiming that the harm to her daughter causes *her* psychological harm, which is persecution that qualifies her for asylum or withholding in her own right. Ultimately, the Fourth Circuit rejected the view that harm to another supported a claim of persecution by the asylum applicant, narrowly reading *C-Y-Z-* to permit a derivative claim for asylum or withholding only in cases of forced sterilization.[92] As discussed in Part VI below,

86. *In re* C-Y-Z-, 21 I. & N. Dec. 915, 917 (B.I.A. 1997) (en banc).

87. *Id.* at 915.

88. *Id.* at 919–20.

89. Even at the time it was made, this decision was controversial, drawing two dissents that argued that the husband did not suffer persecution because of the sterilization of his wife. *Id.* at 933 (Vacca, Board Member, dissenting); *id.* at 935 (Villageliu, Board Member, dissenting).

90. Niang v. Gonzales, 492 F.3d 505, 516 (4th Cir. 2007) (Williams, J., dissenting in part).

91. *See id.* at 509–10 (treating the psychological harm and "derivative" claims separately).

92. *Id.* at 511 n.9. The statute prevented the Fourth Circuit from establishing a derivative claim for withholding of removal. *See In re* A-K-, 24 I. & N. Dec. 275, 279 (B.I.A. 2007) ("[W]hile section 208(b)(3)(A) of the Act provides for derivative asylum in certain circumstances, the Act *does not* permit derivative withholding of removal under any circumstances.") (emphasis added).

limiting derivative claims in this manner helps support the integrity of the asylum system as a whole.

Even within the sterilization context, derivative claims have only been allowed in the narrow situation of sterilization threats to spouses. In the case of *In re S-L-L-*,[93] a boyfriend attempted to claim asylum, withholding, and CAT protection based on allegations that the Chinese government had compelled the abortion of his child by his girlfriend.[94] Importantly, the BIA resolved the case by limiting the holding of *C-Y-Z-*, permitting only spouses to establish past persecution under the special language of 8 U.S.C. § 1101(a)(42) and requiring unmarried applicants to prove any claims based on other language in the provision.[95] As the majority stated, "[t]he interpretive lines, no matter where drawn, will be vulnerable to criticism that they are overinclusive, under-inclusive, inadequately tied to statutory language, or unmanageable in practice."[96]

The *S-L-L-* decision helps to show the difficulties in application that arose from the *C-Y-Z-* decision. The expansion of statutory language by Congress and the subsequent interpretation of that language by the BIA in *C-Y-Z-* required the courts and immigration agencies to determine which applicants qualified for the derivative claim permitted by the statutory amendment. The statutory amendment itself has recently been reinterpreted, with the Second Circuit holding that the provisions of 8 U.S.C. § 1101(a)(42) do not automatically apply to spouses,[97] effectively reversing *C-Y-Z-* and *S-L-L-*. These cases show the difficulties that could arise if a statutory amendment was made to permit derivative claims for those related or romantically involved with girls and women threatened by FGM.

Professor Karen Musalo has argued that there should be similar treatment for FGM cases and forced sterilization cases.[98] Musalo argues that the only reason there is any distinction is that the judiciary is dominated by men who value "procreation and motherhood," which are threatened by sterilization.[99] FGM, on the other hand, is not valued by the predominantly male judiciary because it only affects

93. 24 I. & N. Dec. 1 (B.I.A. 2006).

94. *Id.* at 2.

95. *Id.* at 8. The other language in 8 U.S.C. § 1101(a)(42) includes in the definition of a "refugee" a person who has been persecuted "for other resistance to a coercive population control program." 8 U.S.C. § 1101(a)(42)(B) (2006).

96. *In re S-L-L-*, 24 I. & N. Dec. at 4.

97. *See* Shi Liang Lin v. U.S. Dep't of Justice, 494 F.3d 296, 311–12 (2d Cir. 2007).

98. Liptak, *supra* note 45 (quoting Professor Karen Musalo from a newspaper interview).

99. *Id.*

"women's sexual pleasure and autonomy."[100] Despite Musalo's interesting viewpoint, the law can be explained more simply: targeting victims of coercive population measures for asylum involves, for the most part, the pool of applicants facing forced sterilizations and forced abortions in China.[101] Targeting victims of FGM for asylum involves a much larger pool of applicants distributed throughout Africa and parts of Asia.[102] Limiting asylum claims to those actually threatened with FGM helps the law avoid problematic loopholes that might encourage alien mothers from a wide array of nations to come to the United States to have children at least partly for the purpose of avoiding removal.[103] Thus, the experience with special provisions for those suffering from coercive population control measures indicates that the lack of expansion of derivative claims to parents of potential FGM victims is a welcome stability in the law.

## V. *NIANG V. GONZALES* AS A STABILIZING INFLUENCE IN ASYLUM LAW

As previously discussed in Parts II through IV of this Recent Development, the Fourth Circuit correctly decided *Niang v. Gonzales* as a matter of law. As a matter of policy, the *Niang* decision is also appropriate. The precedential effect of the Fourth Circuit's decision helps to stabilize a somewhat turbulent area of asylum law. Moreover, as discussed below, the opinion best serves the ultimate goals of asylum law.

Stability in the law surrounding grants of asylum and withholding of removal for parents of potential FGM victims provides potential

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100. *Id.*

101. *See* Carrie Acus Love, Note, *Unrepeatable Harms: Female Genital Mutilation and Involuntary Sterilization in U.S. Asylum Law*, 40 COLUM. HUM. RTS. L. REV. 173, 215 & n.213 (2008) (noting that the Congressional amendments to the definition of a "refugee" in 8 U.S.C. § 1101(a)(42) were aimed at Chinese immigrants). Victims of forced sterilization or abortion in other nations also seem eligible to apply for asylum under the provision in 8 U.S.C. § 1101(a)(42). For example, reports indicate that Romani women living in Slovakia have been forcibly sterilized, and thus the language of § 1101(a)(42) appears to apply to them as well. *See* CTR. FOR REPROD. RTS., BODY AND SOUL: FORCED STERILIZATION AND OTHER ASSAULTS ON ROMA REPRODUCTIVE FREEDOM IN SLOVAKIA 31 (2003), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/bo_slov_part1_0.pdf.

102. *See* Blizzard, *supra* note 19, at 901.

103. *See* Oforji v. Ashcroft, 354 F.3d 609, 618 (7th Cir. 2003) ("Under the present law a woman who is otherwise a deportable alien does not have any incentive to bear a child (who automatically becomes a citizen) whose rights to stay are separate from the mother's obligation to depart.").

asylees with a clear expectation about their ability to stay in the United States. This is especially important in the immigration courts, where clear precedent is lacking.[104] Under administrative law precedent, the circuit courts defer to the BIA's interpretations of the Immigration and Nationality Act and related regulations.[105] But with a limited number of reported decisions from the BIA,[106] every case decided by the circuit courts on appeal becomes much more valuable for its ability to clarify the law for potential asylees and asylum law practitioners.

Denying alien parents' claims for relief from removal when their daughters are threatened with FGM also serves the ultimate goals of asylum law. David Martin describes the two competing goals of asylum law as a desire to "provide haven for the persecuted" and a desire to have "reasonable control over the entry of aliens."[107] The easier it is for aliens to successfully claim asylum or withholding of removal in a nation, the more aliens will come to that nation, leading to a political "backlash" because the desire for reasonable control has not been satisfied.[108] In the case of FGM, expanding the legal definition of persecution to include pure psychological harm or permitting some form of derivative claim would undoubtedly expand the possibilities for asylum. Because doing so would threaten the scarce resource of asylum,[109] "courts and agencies must resist the

104. Robert C. Leitner, Comment, *A Flawed System Exposed: The Immigration Adjudicatory System and Asylum for Sexual Minorities*, 58 U. MIAMI L. REV. 679, 681 (2004) ("[There is a] marked lack of precedent ... generated by the immigration courts. While the hallmark of the common law system is the respect for precedent and stare decisis, few, if any, of the decisions that emerge from the immigration courts are published, and these decisions therefore carry minimal precedential value."). Leitner also notes that the courts of appeals have split on several immigration issues, which the Supreme Court has been slow to resolve. *Id.*

105. Niang v. Gonzales, 492 F.3d 505, 515 (4th Cir. 2007) (Williams, J., dissenting in part) (citing Christensen v. Harris County, 529 U.S. 576, 586–88 (2000) and Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

106. *See* Leitner, *supra* note 104, at 681.

107. David A. Martin, *The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource*, *in* REFUGEE POLICY: CANADA AND THE UNITED STATES 30, 34 (Howard Adelman ed., 1991).

108. *Id.* at 35.

109. Asylum is a scarce resource because there is, in practice, an upper limit to the number of refugees the United States accepts each year. While the Citizenship and Immigration Service of the Department of Homeland Security states on its webpage that "[t]here are no quotas on the number of individuals who may be granted asylum each year," U.S. Citizenship and Immigration Serv., Dep't of Homeland Sec., *Asylum*, www.uscis.gov/asylum (last visited Apr. 13, 2009), there is a statutory requirement for the President to provide a limit on the number of refugees for each fiscal year after consultation with Congress. *See* Immigration and Nationality Act §§ 207(a)(2), (d), 8

temptation to expand the legal standards governing asylum"[110] as they pertain to parents whose daughters are threatened with FGM.

Legal scholars have identified this argument as the "floodgates" or "slippery slope" argument—that a precedential grant of asylum in one case will result in massive amounts of immigration and asylum claims based on that precedent.[111] Professor Musalo notes that this argument is used to urge denial of asylum to women that suffer, among other abuses, FGM.[112] It is important to distinguish the grant of asylum or withholding for those women and girls that face FGM themselves, who can currently make successful asylum claims, from the parents or spouses of these potential FGM victims.[113]

Legally permitting claims by parents of potential FGM victims, whether based on pure psychological harm, the CAT, or some form of derivative claim, would increase the risk that parents from areas where FGM is prevalent would come to the United States and have children to avoid removal.[114] It is certainly possible that the increase

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U.S.C. §§ 1157(a)(2), (d) (2006). For fiscal year 2008, the proposed limit was 80,000 refugees. U.S. DEP'T OF STATE ET AL., PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2008: REPORT TO THE CONGRESS 18 (2007), *available at* http://www.state.gov/documents/organization/91978.pdf.

110. Martin, *supra* note 107, at 37.

111. *See* Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 120 (2007) (discussing the "floodgates" argument and noting that granting asylum will result in a "deluge of claims"); Amy B. Kretkowski, Note, *Continuing Persecution: An Argument for Doctrinal Codification in Light of* In re A-T- *and* Brand X, 94 IOWA L. REV. 331, 366 (2008) (discussing the "slippery slope" argument and noting fear of "mass immigration" held by the government and the BIA).

112. Musalo, *supra* note 111, at 119–20. Musalo argues that the floodgates argument as it relates to gender-related harms does not have an empirical basis. *See id.* at 132–33. This Recent Development does not dispute that claim, as it focuses on the claims of parents of potential FGM victims, not those of women and girls actually threatened with FGM.

113. See *supra* note 4, for example.

114. Recent statistics describing the United States' unauthorized immigrant population in general (i.e., not specifically describing the population of parents of potential FGM victims) support the view that immigrants come to the United States and have children. *See* THE URBAN INST., CHILDREN OF IMMIGRANTS: FACTS AND FIGURES 1 (May 2006), http://www.urban.org/UploadedPDF/900955_Children_of_Immigrants.pdf (noting that in 2003, sixty-one percent of children of immigrants lived in a family with at least one noncitizen parent). Children born in the United States are U.S. citizens. *Id.* When immigrating, the soon-to-be parents of these citizen children disregard the possibility that they will eventually be deported and separated from their children. *See* Nina Bernstein, *A Mother Deported, and a Child Left Behind*, N.Y. TIMES, Nov. 24, 2004, at A1 (noting that immigration experts estimate that tens of thousands of U.S. citizen children annually lose unauthorized immigrant parents to deportation). Thus, even without the possibility of being granted asylum or withholding of removal and with the danger of being separated from their citizen children, parents come to the United States and have children. This author asserts that the granting of asylum claims to parents of potential FGM victims

in successful claims would not directly result in a drastic increase in the overall number of grants of asylum and withholding of removal. Nevertheless, granting such claims would increase the risk that parents from areas where FGM is prevalent would come to the United States and have children partly to avoid deportation.[115] The concern is not about the increased "flow" of immigrants, but rather about the type of immigrant who is coming (i.e., the immigrant who comes to the United States and has a child to avoid deportation). Grants of asylum and withholding of removal should be reserved for those who truly face persecution—not uncertain psychological harm—in their home countries.

Additionally, denying alien parents' claims for asylum or withholding of removal may ultimately reduce the occurrence of FGM worldwide. If more parents are granted asylum or withholding based on threats of FGM, perhaps fewer people will protest the practice of FGM in nations where it is prevalent. Once granted asylum or withholding, parents who might have protested FGM seem to have little personal incentive to do so because they and their children are safely in the United States. Even if these parents were to protest from the United States, it seems likely that their protests would be ineffective because communities that practice FGM generally seem to ignore attempts by "outsiders" to educate them.[116] A lack of significant protest and community conflict over FGM in foreign nations will reinforce its practice. It may seem more humane to allow alien parents to stay with their daughters in the United States and avoid social ostracization for refusing to have FGM performed on their daughters or, alternatively, avoid the psychological harm caused by the actual practice. However, from a broader viewpoint, the more humane approach is to not allow alien parents to flee social conflict in their home nations, in effect, "turning their backs on continuing the struggle for a communal answer"[117] to the practice of FGM.

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would only increase the incentive for these parents to come to the United States and have children. It should be noted, however, that the total number of parents making claims, if anything like the total number of FGM victims claiming asylum or withholding of removal, is likely to be small. *See* Zainab Zakari, *FGM Asylum Cases Forge New Legal Standing*, WOMEN'S E-NEWS, Nov. 25, 2008, http://www.womensenews.org/article.cfm?aid=3833 (noting that although it is difficult to reliably estimate FGM-related asylum grants, the overall number of girls and women seeking FGM-related asylum has typically been small).

115. *See supra* note 17 and text accompanying note 103.

116. *See* Patricia A. Broussard, *Female Genital Mutilation: Exploring Strategies for Ending Ritualized Torture; Shaming, Blaming, and Utilizing the Convention Against Torture*, 15 DUKE J. GENDER L. & POL'Y 19, 37 (2008).

117. Martin, *supra* note 107, at 44 (speaking generally about the conflict between grants of asylum and global human rights efforts).

Some implicitly reject this argument when advocating for changes to U.S. immigration law that would grant parents asylum or withholding and thus prevent those parents from having to choose between abandoning their citizen children or exposing their daughters to the threat of FGM in the native country.[118] This focus on preserving the family recognizes the fact that parents of potential FGM victims may not initially possess the power to effectuate change in their home countries or to fully protect their children.[119] But this argument fails to recognize that the most successful programs to reduce FGM involve education of the community by its members—not by outsiders or foreigners.[120] Depriving a community of the parents that resist FGM will only serve to perpetuate the practice. If parents truly oppose FGM, they should use their resources and fight to change its practice in their native countries, rather than wasting their resources traveling to the United States and attempting to abandon the communal struggle.

## CONCLUSION

The Fourth Circuit's response to the difficult case of *Niang v. Gonzales* was appropriate based on current asylum law. As it is currently implemented by courts and immigration agencies, asylum law functions properly to meet the needs of those aliens truly in need of the protection of the United States. Pure psychological harm that a parent experiences when her daughter undergoes FGM is too tenuous to support an asylum or withholding of removal claim based on persecution or the United Nations Convention Against Torture. Derivative claims of asylum or withholding are appropriately limited to claims made by victims of China's coercive population control methods, and, as the difficulties experienced in that setting indicate, should not be expanded to include claims made by parents of

118. *See* Blizzard, *supra* note 19, at 925–26; Dree K. Collopy, Note, *Incorporating a Hardship Factor in Asylum Claims Based on Female Genital Mutilation: A Legislative Solution to Protect the Best Interests of Children*, 21 GEO. IMMIGR. L.J. 469, 503 (2007).

119. *See* Abebe v. Gonzales, 432 F.3d 1037, 1042–43 (9th Cir. 2005) (observing that parents may sometimes be unable to prevent FGM from being forcibly performed on their daughter by other relatives); Tiffany Ballenger, *Female Genital Mutilation: Legal and Non-Legal Approaches to Eradication*, 9 J.L. & SOC. CHALLENGES 84, 88 (2008) (noting that families who oppose FGM may be shunned by their community and that daughters who have not undergone FGM may be unable to marry); Musalo, *supra* note 111, at 133 (noting that female asylum seekers may have few financial assets).

120. *See* Ballenger, *supra* note 119, at 92–93; *see also* Broussard, *supra* note 116, at 37–39 (arguing that support for native educators and the resulting self-actualization will reduce the practice of FGM).

potential FGM victims. Because it ultimately encourages those who oppose FGM to stand up for their beliefs and catalyze community change, the current denial of asylum or withholding to parents of daughters facing FGM is appropriate as a matter of humanitarian policy. FGM threats to daughters should not be a basis for parents to be granted asylum or any other form of relief from removal.

DANIEL F. E. SMITH**

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