

UNREPEATABLE HARMS:  
FEMALE GENITAL MUTILATION AND  
INVOLUNTARY STERILIZATION IN U.S.  
ASYLUM LAW

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INTRODUCTION

As a citizen of the People's Republic of China, Ms. X chose to have three children with her husband.<sup>1</sup> In doing so she violated China's "one couple, one child" family planning policy. Although she allowed another family to raise her second child and went into hiding herself, the government authorities eventually found her, arrested her, and forcibly sterilized her against her will. Ms. X fled to the United States and, upon arrival, applied for asylum based on the past persecution she had suffered under the coercive population control policies in China. The Board of Immigration Appeals (BIA)<sup>2</sup>

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1. The facts in this paragraph describing Ms. X's persecution are taken from the I-589 Application for Asylum and for Withholding of Removal filed in the case of *In re X-P-T*. I-589 Application for Asylum and for Withholding of Removal, *In re X-P-T*, 21 I. & N. Dec. 634 (B.I.A. 1996) (on file with author).

2. The BIA provides review of Immigration Court decisions. The BIA's decisions are reviewable by the federal circuit courts. Circuit court decisions are binding on the BIA and on the Immigration Courts for cases arising out of their respective jurisdictions. See Thomas A. Aleinikoff et al., *Immigration and Citizenship: Process and Policy* 281–84 (6th ed. 2008).

granted Ms. X's application for asylum, and she was allowed to remain in the United States.<sup>3</sup>

Like Ms. X, Ms. T also sought refuge in the United States from persecution she suffered in her home country.<sup>4</sup> As a young girl in Mali, Ms. T was forced to undergo female genital mutilation (FGM), a procedure in which she was forcibly held down and her external genitalia were cut off without anesthesia by a woman in her village, causing her on-going physical, psychological, and sexual trauma.<sup>5</sup> But in contrast to its decision in Ms. X's case, the BIA held that Ms. T's past persecution did not make her eligible to remain in the country. She was ordered removed.<sup>6</sup>

What accounts for these different outcomes under U.S. asylum law? The Immigration and Nationality Act (INA) provides that an individual may be granted asylum if she is unable to return to her 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."<sup>7</sup> Under this statutory framework, political asylum has been typically viewed as a "forward-looking form of relief" for individuals who fear *future* persecution if returned to their countries of origin.<sup>8</sup> Although *past* persecution also creates a basis for asylum relief, it can be rebutted if the government can show that conditions have changed such that the applicant no longer has a fear of being persecuted<sup>9</sup> or that the applicant could safely relocate to another region of her country.<sup>10</sup> In this way, even

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3. *In re X-P-T*, 21 I. & N. Dec. 634, 635 (B.I.A. 1996).

4. The facts in this paragraph describing Ms. T's persecution are taken from the I-589 Application for Asylum and for Withholding of Removal filed in the case of *In re A-T*. I-589 Application for Asylum and for Withholding of Removal, *In re A-T*, 24 I. & N. Dec. 296 (B.I.A. 2007) (on file with author).

5. Ms. T suffered a complete excision of her clitoris and vulva. Brief for American College of Obstetricians and Gynecologists et al. as Amici Curiae Supporting Petitioner, *In re A-T*, 24 I. & N. Dec. 296 (B.I.A. 2007) (No. 07-2008) [hereinafter Amici Curiae Brief].

6. *In re A-T*, 24 I. & N. Dec. 296 (B.I.A. 2007). The applicant was denied asylum on procedural grounds, but the BIA also denied her withholding of removal claim on substantive grounds, situating her case within asylum law jurisprudence more generally. *See also infra*, note 155.

7. Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2006).

8. *In re A-T*, 24 I. & N. Dec. at 298.

9. 8 C.F.R. § 1208.13(b)(1)(i)(A) (2008).

10. 8 C.F.R. § 1208.13(b)(1)(i)(B) (2008).

the past persecution basis for asylum maintains a forward-looking perspective.

Involuntary sterilization cases, however, represent a significant departure from the statutory focus on future persecution. Although individuals who have been forcibly sterilized cannot undergo the procedure again, Congress has amended the definition of a “refugee” to include victims of involuntary sterilization.<sup>11</sup> Accordingly, the BIA has granted asylum to victims of involuntary sterilization,<sup>12</sup> as well as to their spouses.<sup>13</sup>

Like involuntary sterilization, FGM is an example of an “unrepeatable harm,”<sup>14</sup> in that it cannot be inflicted on a victim more than once.<sup>15</sup> But in contrast to involuntary sterilization, FGM has not been singled out for statutory inclusion by Congress, and the circuit courts and BIA have failed to reach a consensus on how to treat past victims of the practice. For example, the Eighth Circuit has held that past subjection to FGM merits asylum when the applicant also fears other types of gender-based violence and discrimination in her home country.<sup>16</sup> Taking a different approach, the Ninth Circuit has held that FGM represents “continuing persecution,” and therefore, past subjection to the practice makes an individual eligible for asylum without further evidence of future persecution.<sup>17</sup> The BIA, however, has rejected the Ninth Circuit’s “continuing persecution” theory and has held that past subjection to FGM does not merit relief.<sup>18</sup> The

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11. Immigration and Nationality Act § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B) (2006).

12. *In re X-P-T-*, 21 I. & N. Dec. 634 (B.I.A. 1996).

13. *In re C-Y-Z-*, 21 I. & N. Dec. 915 (B.I.A. 1997). *But see In re S-L-L-*, 24 I. & N. Dec. 1 (B.I.A. 2006) (limiting the holding in *Matter of C-Y-Z-* to married spouses who were opposed to their spouse’s forced sterilization).

14. This note uses the term “unrepeatable harms” to refer to cases of past persecution that cannot occur more than once. It adopts this term from Susannah C. Vance, Note, *An Enduring Fear: Recent Limitations on the Past Persecution Ground for Asylum*, 91 Ky. L.J. 957 (2003).

15. *But see Bah v. Mukasey*, 529 F.3d 99, 114 (2d Cir. 2008) (pointing out that many victims of Type III FGM are cut open and resewn shut multiple times throughout their lives, thus making the categorical assumption that FGM is a “one-time act” erroneous); *In re A-T-*, Respondent, 24 I. & N. Dec. 617, 621–22 (A.G. 2008) (rejecting the presumption that FGM “is a ‘one-time’ act that cannot be repeated on the same woman”).

16. *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007).

17. *Mohammed v. Gonzales*, 400 F.3d 785, 802 (9th Cir. 2005).

18. *In re A-T-*, 24 I. & N. Dec. 296, 299 (B.I.A. 2007). On September 22, 2008, one year after the BIA issued this opinion, the Attorney General vacated

Second Circuit, in turn, has criticized the BIA's application of the regulatory framework and has declined to follow its approach.<sup>19</sup> Finally, the BIA itself has made discretionary grants of asylum to particular victims of FGM based on the concept of a humanitarian exception.<sup>20</sup> Thus, while FGM and involuntary sterilization are both unrepeatable harms, only involuntary sterilization has been accorded consistent relief by Congress and the courts.

This note explores the divergent treatment that involuntary sterilization and FGM have received under U.S. asylum law. Part I describes the practices of involuntary sterilization and female genital mutilation and their statuses as human rights violations. Part II discusses U.S. asylum relief and compares the legal interpretation the two practices have received under this body of law. Part III explores several possible reasons for the disparity in treatment. Finally, Part IV argues that all cases of unrepeatable harms should be handled consistently and offers an integrated theoretical framework based on international human rights norms for harmonizing the legal standard.

## I. BACKGROUND: INVOLUNTARY STERILIZATION AND FEMALE GENITAL MUTILATION

### A. Involuntary Sterilization

The practice of forcibly sterilizing individuals against their will in the People's Republic of China is the product of increasingly strict national population control measures over a number of decades.<sup>21</sup> The central government's influence on childbirth decisions is at least as old as Mao Tse-tung's family planning policies of the 1950s; the modern policy was inaugurated in a 1979 speech by President Deng Xiaoping calling for stricter childbirth limitations.<sup>22</sup>

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the BIA's decision and remanded it for further consideration. *In re A-T*, Respondent, 24 I. & N. Dec. 617, 617 (A.G. 2008). See *infra* note 159 for a discussion of the Attorney General's order.

19. *Bah*, 529 F.3d at 117.

20. *In re S-A-K- and H-A-H-*, 24 I. & N. Dec. 464, 465 (B.I.A. 2008).

21. Although involuntary sterilization also occurs in other countries, this Note focuses on cases arising out of China because U.S. asylum policy has been formulated in response to the large number of individuals fleeing China's coercive population control policies.

22. Thomas L. Hunker, Note, *Generational Genocide: Coercive Population*

During the early 1980s, China had a population of approximately one billion people, half under the age of twenty-one. Rapid population growth was inevitable, and the government launched its “longer, later, fewer” campaign promoting “later marriage, longer intervals between births, and smaller families.”<sup>23</sup> Throughout the 1980s and 1990s, Chinese officials quickly realized, however, that voluntary compliance with these goals would not achieve the targeted population and growth rates.<sup>24</sup> As a result, forced abortions, sterilizations, and intrauterine device (IUD) insertions became widespread throughout China during the 1980s and 1990s.<sup>25</sup> The “one-child policy” came into effect in 2002 with the enactment of the “Law on Population and Family Planning.”<sup>26</sup>

The “longer, later, fewer” campaign and the “one-child policy” were premised on the idea that the sacrifice of a second or third child today would benefit future generations tomorrow.<sup>27</sup> Although regulations vary across provinces, the general framework allows married couples to have only one child and requires that they apply for permission to the local family planning authorities if they wish to have a second child.<sup>28</sup> The policies are implemented by provincial and

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*Control as a Basis for Asylum in the United States*, 15 Fla. St. J. Transnat'l L. & Pol'y 131, 134 (2005), available at [http://www.law.fsu.edu/journals/transnational/vol15\\_1/Hunker.pdf](http://www.law.fsu.edu/journals/transnational/vol15_1/Hunker.pdf).

23. Penny Kane & Ching Y. Choi, *China's One Child Family Policy*, 319 Brit. Med. J. 992, 994 (1991), available at <http://www.pubmedcentral.nih.gov/picrender.fcgi?artid=1116810&blobtype=pdf>.

24. *Id.*

25. Hunker, *supra* note 22, at 134. Forced abortions and sterilizations are officially prohibited by the central government, but “local cadres, under pressure to meet strict quotas and targets, administer forcible abortions and sterilizations with near impunity.” *Id.*

26. Laura Matherne, *Family Planning in Post-Mao China*, 12 B. U. Brownstone J., May 2005, at 85, 85.

27. Kane & Choi, *supra* note 23, at 192.

28. Hunker, *supra* note 22, at 134. Normally, couples must wait at least four years to be given authorization for a second child, and permission is often granted only to couples in rural areas whose first child was either a girl or disabled. U.S. Dep't. of State, 1999 Country Reports on Human Rights Practices: China (2000), available at <http://www.state.gov/g/drl/rls/hrrpt/> [hereinafter China 1999]. These exceptions to the one-child per couple goal “take[] into account both the demands of farm labor and the traditional preference for boys.” Also, “[e]thnic minorities, such as Muslim Uighurs and Tibetans, are subject to less stringent population controls,” and in “remote areas, such as rural Tibet, there are no effective limits.” In response to the May 12, 2008 earthquake, which killed approximately 10,000 schoolchildren, the Chengdu Population and Family