

BEARING WITNESS: LOOKING FOR REMEDIES FOR FORCED STERILIZATION OF INDIGENOUS WOMEN

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I. Introduction

The struggles of indigenous people to survive and thrive within a colonial structure are numerous and varied. Historically, one of the most difficult elements has been simply to maintain (or restore) a population base devastated by disease, colonial encroachment, assimilation, violence, and poverty. In a number of international cases, the dominant society's actions that focused on stemming indigenous population growth have also played a part in this devastation, including the practice of forced or coerced sterilization. While we may think of forced sterilization as a thing of the past in an American context, cases have been discovered relatively recently in many parts of the world, and some programs may be ongoing. As West Virginia College of Law Professor Judith A.M. Scully points out, "Historically, sterilization has been abused in low income and politically powerless communities. Consequently, when sterilization is promoted as a means of preventing pregnancy, suspicion and scrutiny are warranted."²

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 - 2 Judith A.M. Scully, *Maternal Mortality, Population Control, and the War in Women's Wombs: A Bioethical Analysis of Quinacrine Sterilizations*, 19 Wis. Int'l L.J. 103, 149 (2001). The racist element to the sterilization of women is not simply imagined; relative sterilization rates reflect this reality. See Beverly Horsburgh, *Schrdregreesodinger's Cat, Eugenics, and the Compulsory Sterilization of Welfare Mothers: Deconstruction and Old/New Rhetoric and Constructing the Reproductive Right to Natality for Low Income Women of Color*, 17 Cardozo L. Rev. 531,556 (1996) ("As of 1982, fifteen percent of white women had been sterilized, compared with twenty-four percent of African-American women, thirty-five percent of Puerto Rican women, and forty-two percent of Native American women").

Because a growing and sustainable population is imperative for indigenous peoples to continue their culture and preserve their rights and sovereignty, forced or coerced sterilization needs to be discovered and condemned wherever it exists. The freedom of indigenous women to control their fertility is imperative to challenging the dominant culture. As one scholar wrote, "Native women threaten colonial structures through their ability to reproduce the next generation of colonial resistance."³

To that end, I plan to examine the history of forced sterilization of indigenous women and possible international remedies available to victims of such acts. I will look at historical uses of sterilization and forced abortion on indigenous populations, including American Indians, Tibetans, and indigenous Peruvians, and discuss some of the investigations and legal action that resulted from those cases. I will then examine possible international law remedies through agreements such as the Convention to Eliminate Discrimination Against Women and the Convention on the Prevention and Punishment of the Crime of Genocide.

It is important to first distinguish voluntary family planning services, which often strengthen societies by increasing child and maternal health and elevating the status of women, from coercive or forced sterilization practices, which interfere with individuals' ability to determine their own reproductive destiny and end child-bearing altogether. A government family planning program aimed at indigenous people, which may include the option of sterilization, should not automatically be interpreted as a threat to indigenous cultures. For my purposes, coercive or forced sterilization will refer to sterilization that is not consented to, or where consent is obtained through threats of force or other retaliation (such as loss of benefits), through fraud,

³ Myla Vicenti Carpio, *The Lost Generation: American Indian Women and Sterilization Abuse*, *Social Justice* Vol. 31, No. 4, 41 (2004).

or where consent is not fully informed.⁴ Also, although men can be victims of coerced or forced sterilization, because such cases are not as common and the procedures used are less permanent, I will limit my focus to the sterilization of indigenous women.⁵

A. Implicated Rights and Other Considerations

Before one attempts to suggest that there may be remedies for the violation of a certain right, it must be established that such a right exists in the first place. The right, at the very least, to continue the species can be found in U.S. constitutional law, international law, and Lockean concepts of natural law.⁶ In *Skinner v. Oklahoma*, the Supreme Court struck down a state statute that allowed the forced sterilization of certain classes of criminals, finding that "Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race-the right to have offspring."⁷ Rights to privacy and autonomy are also implicated by policies of forced and coerced sterilization. Just as self-determination of peoples is recognized in many international documents, an individual's self-determination is also a protected liberty interest.⁸ The Supreme Court has applied these concepts specifically to the realm of family and childbearing. "If the right of privacy means anything, it is the right of the individual, married or single, to be free

4 See also Brief Amici Curiae of The Association of Legal Aid Attorneys of the City of New York-District 65-U.A.W. et al. Supporting Appellees, *Harris v. McRae*, 100 S.Ct. 2671 (1980) (No. 79-1268), 1980 WL 339659 at 15 (Defining sterilization abuse as "the involuntary termination of reproductive capacity. Sterilization is involuntary when a woman is not informed that the procedure is being performed, or is misinformed, or is overtly coerced into consent (e.g., by the threat of denial of other medical services)").

5 Forced removal of children has also been an extremely important issue in the context of indigenous populations, most notably in the United States, Canada, and Australia, but is not within the scope of this particular paper.

6 See generally Carter J. Dillard, *Rethinking the Procreative Right*, 10 Yale Hum. Rts. & Dev. L.J. 1 (2007).

7 *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942).

8 See Scully, *supra* note 2 at 142 ("The principle of autonomy primarily focuses on the need to respect an individual's capacity for self-determination. Thus, individuals who are capable of deliberating about their personal goals must be treated with respect").

from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁹

It is inherently difficult to discuss issues of reproductive health and freedom, eugenics, and population policies, with their inevitable intersection with issues of feminism, racism, and conflicting interests.¹⁰ Many advocates who fight for abortion rights for poor and minority women also fight against abusive sterilization policies (indeed, it has been argued that a lack of available abortion services makes marginalized women especially susceptible to coercive sterilization programs).¹¹ At the same time, pro-sterilization beliefs might create uncomfortable links between those who struggle for environmental or women's rights and those with racist or eugenic motives.¹²

And as with any intersection of rights and corresponding authority, there are spheres of sovereignty at work in this issue and sometime ambiguous borders between the rights of the individual and the authority of the state. It is imperative, however, that advocates for reproductive justice push those boundaries and work to find protection and recourse for victims of coercive or forced sterilization. It is also important to recognize the delicate balance between

9 Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

10 For a fairly complete (although not completely unbiased) look at the history of population control philosophies, see Diane L. Slifer, *Growing Environmental Concerns: Is Population Control the Answer?*, 11 Vill. Envtl. L.J. 111 (2000).

11 See eg. Brief Amici Curaei, *supra* note 4, at 15 ("The Hyde Amendment restrictions on Medicaid abortion funding, coupled with the availability of public funding for sterilization, compel many Medicaid recipients to resort to irreversible sterilization to avoid unwanted or medically injurious pregnancies. This coerced sterilization invidiously discriminates against poor and minority women and deprives them of their constitutional rights to privacy, liberty and equal protection"); Charles R. England, *A Look at the Indian Health Service Policy of Sterilization, 1972-1976*, Red Ink, Vol. 3, No. 1 (Spring 1994) ("In 1967 the American Public Health Association and the American College of Obstetricians and Gynecologists conducted a study and found that 54 percent of the teaching hospitals nation-wide '...made sterilization a requirement for winning approval for an abortion'").

12 See, for example, alliances between early birth control advocates like Margaret Sanger and "the racist nativist establishment" or billionaire philanthropist Warren Buffett's support of both the Gates Foundation's global AIDS initiatives and, allegedly, questionable chemical sterilization experimentation. See Horsburgh, *supra* note 2, at 554; Associated Press, *Gates: Buffett gift may help cure worst diseases*, June 26, 2006, <http://www.msnbc.msn.com/id/13541144/>; Scully, *supra* note 1, at 114.

preventing coercive family planning practices and limiting access to wanted family planning resources, and especially being cognizant of the tendency to patronizingly limit free choice in the name of 'protecting' marginalized groups.

I believe the key to this balance lies in complete informed consent, which recognizes a true freedom to choose. Because of their historical oppression and population diminishment, indigenous women are specially situated to demand the recognition of this liberty by the international community.

II. Historical Examples of Forced Sterilization of Indigenous Women

A. American Indian Women in the United States

There was a time in the United States when forced sterilization programs were widespread, with 33 states having compulsory sterilization statutes at some point.¹³ Tens of thousands of Americans had their reproductive capacity ended, rarely finding any remedy or justice in the U.S. legal system.¹⁴ Interwoven in this shameful history are the seemingly apocryphal stories of large numbers of American Indian women who were sterilized by the federal government through the Indian Health Service (IHS), primarily in the 1970s. Some have even claimed that IHS created a covert and genocidal policy mandating the sterilization of Indian women.¹⁵ Verifying the truth to these rumors is not unproblematic, but there is, at the very least,

¹³ Paul Lombardo, *Eugenic Sterilization Laws*, Image Archive on the American Eugenics Movement <http://www.eugenicsarchive.org/html/eugenics/essay8text.html> (last visited February 1, 2009).

¹⁴ *Id.* See also *Madrigal v. Quilligan*, 639 F.2d 789 (9th Cir. 1981) (holding physicians were not liable for the unwanted sterilizations of Mexican women in the early 1970s); *Buck v. Bell*, 274 U.S. 200, 47 S.Ct. 584 (1927) (upholding the constitutionality of a statute allowing for the sterilization of the 'feeble-minded'; this case has never been explicitly overruled). For an extensive archive of cases of and information about forced sterilization, see Serena Sebring, *Mississippi Appendectomy*, <http://mississippiappendectomy.wordpress.com> (last visited January 3, 2009).

¹⁵ Lindsay Glauner, *The Need for Accountability and Reparation: 1830-1976 The United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 *DePaul L. Rev.* 911 (2002). Glauner makes a number of bold assertions in her article, including the the U.S.

substantial evidence that sub-standard informed consent procedures were used in sterilizing many women who turned to IHS for their health care.

The rumors and anecdotal stories circulating in the mid-1970s caught the attention of then U.S. Senator James Abourezk of South Dakota, who commissioned a General Accounting Office (GAO) investigation of the issue in 1975.¹⁶ The report, issued in November of 1976, examined sterilizations done at IHS or IHS contract facilities from 1973 to 1976 in the Aberdeen, Albuquerque, Oklahoma City, and Phoenix areas.¹⁷ Of the 3,406 total sterilizations reportedly performed, thirteen were done on women under the age of 21-years-old, in violation of U.S. Department of Health, Education and Welfare (HEW) regulations.¹⁸ A number of deficiencies were discovered in the consent forms used in these procedures, including that many failed to indicate that health care workers orally explained the elements of informed consent to patients or contain court-ordered language explaining that federal benefits could not be withdrawn if the patient refused to be sterilized. Many other forms were not filled out correctly.¹⁹ The 72-hour waiting period between informed the consent process and the sterilization procedure required by HEW was also not observed in many cases.²⁰ In the course of its investigation, the GAO did not interview any individual patients on the basis that “such an effort would not be productive because recently published research noted a high level of inaccuracy in the recollection of

government "created the Indian Health Services specifically to promote and implement the sterilization of all Native American women," none of which are actually supported by the authority she cites.

16 General Accounting Office, Letter Report to Sen. James Abourezk, B-164031(5) (Nov. 4, 1975). The report also looked at medical research involving American Indian subjects and research on the control of trachoma.

17 *Id.* at 3.

18 *Id.* at 19. The accuracy of these numbers is questionable. The GAO report admits that "IHS was unable to supply us with complete and statistically reliable data on (1) whether the sterilizations were voluntary or therapeutic and (2) the ages of the patients." HEW is now known as the Department of Health and Human Services (DHHS).

19 *Id.* at 4-5.

20 *Id.* at 24.

patients 4 to 6 months after giving informed consent.”²¹ Despite the obvious non-compliance with HEW informed consent procedures and a lack of reliable data overall, the GAO concluded that there was no evidence of IHS sterilizations with absolutely no consent and the problem was primarily caused by inconsistent forms and doctors who did not fully understand HEW regulations.²²

A number of informal, non-governmental investigations following the GAO study suggested a more widespread problem than indicated by the GAO report. Alarmed by sterilized patients who had clearly not been given complete information about their procedures, American Indian physician Dr. Connie Pinkerton-Uri embarked on an independent investigation into the situation.²³ Her findings estimated that an alarmingly high percentage of American Indian women of child bearing age – at least 25% – had been sterilized by IHS. Based on interviews of fifty Cheyenne women, tribal judge Marie Sanchez came to believe the number was even higher than that. A small survey conducted on the Northern Cheyenne Reservation and Labre Mission grounds found a sterilization rate of about 34% within three year period.²⁴ In 1979, the National Council of Churches urged Congress to fully investigate the issue, but such a complete investigation has never taken place.²⁵ Due to the time that has passed and the insufficiency of the

21 *Id.* at 4.

22 *Id.* at 19, 22. A year after HEW had promulgated its original guidelines regulating sterilization in 1974, a study found that only 60% of those bound by the regulations were aware of them and only 30% of HEW regulated hospitals were even attempting to comply. Nancy Ehrenreich, *The Colonization of the Womb*, 43 Duke L.J. 492, n. 73 (1993).

23 Jane Lawrence, *The Indian Health Service and the Sterilization of Native American Women*, 24 Am. Indian Q. 400, 410 (2000).

24 *Id.* It's important to note that the last survey focused primarily on women over thirty, when sterilization as a birth control method becomes much more common.

25 See England, *supra* note 11.

data from that period, it is likely we will never know the full extent of the forced or coerced sterilization problem within IHS.^{26 27}

While not traditionally thought of as American Indian, women in Puerto Rico, a U.S. territory with a population that is over 61% of indigenous descent, also experienced questionable sterilization practices in the mid-twentieth century.²⁸ A number of studies showed that nearly a third of Puerto Rican women had been sterilized since 1950, although hard evidence of actual coercion is difficult to substantiate.²⁹ Substantiation is especially difficult when many of the reports "that 'North American imperialists' were embarked on a 'plan of genocide' in Puerto Rico that had led to the sterilization of two hundred thousand women," were coming from pro-natalist groups like the Catholic church and nationalist political parties.³⁰

However, we do know that public funding for sterilization did begin in 1963 and there is evidence that many in the medical and political community felt that it was the best choice for many poor women.³¹

26 While at least one case was brought by an American Indian woman for forced sterilization (*Serena v. Leezer*, No. 74-313 (W.D. Pa.), it appears that no one sterilized by IHS ever found justice through the U.S. legal system. Brief Amici Curiae, *supra* note 4, at n. 19.

27 More recently, IHS has been accused of prescribing long term birth control options like Norplant and Depo-Provera to Native women despite common counter-indications and without exploring the full range of possible side effects with patients. While not as devastating as complete sterilization, the allegations portray a medical community that is still willing to put controlling reproduction ahead of individual women's health. *See eg. The Impact of Norplant in the Native American Community* (1992), *A Study of the Use of Depo-Provera and Norplant by the Indian Health Service*, and *A Review of the Use and Effects of Depo-Provera on Native American Women* (1993), all reports of the Native American Women's Health Education Resource Center.

28 Juan C. Martínez Cruzado, *The Use of Mitochondrial DNA to Discover Pre-Columbian Migrations to the Caribbean: Results for Puerto Rico and Expectations for the Dominican Republic*, KACIKE: Journal of Caribbean Amerindian History and Anthropology, 3 (2002). *See also* Scully, *supra* note 2, at 114 ("In the early stages of developing the oral contraceptive pill . . . women in Puerto Rico were used as subjects to determine the pill's safety and effectiveness. Many of the 132 women in Puerto Rico who were part of the early experiment died as a direct result of using the pill").

29 Laura Briggs, *Discourses of "Forced Sterilization" in Puerto Rico: The Problem with the Speaking Subaltern*, 10.2 Differences: A Journal of Feminist Cultural Studies, 32 (1998).

30 *Id.* at 36.

31 *Id.* at 46.

For example, John Bierley, director of Presbyterian Hospital in San Juan, insisted that the hypersexuality of Puerto Ricans made birth control impossible. ... In private hospitals, sterilization was a very lucrative procedure, with some hospitals opening simply to provide the operation. Many had policies urging maternity patients to have tubal ligations after delivery. The most extreme of these was at Presbyterian Hospital in San Juan, where in 1947 it was the unofficial policy of the hospital to refuse to admit women for their fourth delivery unless they agreed to sterilization.³²

Not surprisingly, poor Puerto Rican women had sterilization rates well above the rest of the population.³³ The rate of sterilization climbed in the years after public funding began, the procedure becoming so common place that 'la operacion' (the operation) became a common euphemism for sterilization.³⁴ Reports showed over 36% of those sterilized experienced "post-operative dissatisfaction,"³⁵ and while this alone is not conclusive evidence of coercive sterilization, such a high rate does deserve closer scrutiny.

High rates of sterilization were also reported throughout Central America during the mid-1960s. It has been suggested that "[b]etween 1963 and 1965 more than 400,000 Colombian women were sterilized in a program funded by the Rockefeller Foundation. In Bolivia, a U.S.-imposed population control program administered by the Peace Corps sterilized Quechua Indian women without their knowledge or consent."³⁶ Once again, due to the lack of investigation undertaken at the time of these incidences, it is difficult to gauge the full extent of the practices and who was actually behind them.

32 *Id.* at 53.

33 Brief Amici Curiae, *supra* note 4, at 32-33 ("In 1965, 34 percent of women between the ages of 20 and 49 had been sterilized. In 1968, the figure for sterilized women in the same age grouping had risen to 35.3 percent. The sterilization rate among Puerto Rican women with incomes below \$5,000. was 43.8 percent").

34 Florita Z. Louis de Malave, *Sterilization of Puerto Rican Women: A Selected, Partially Annotated Bibliography*, University of Wisconsin System Women's Studies Librarian's Office (May 1999).

35 Brief Amici Curiae, *supra* note 4, at 34. The brief also points out the the inaccessibility of abortion (which was illegal at the time these studies were done) and birth control may also have contributed to Puerto Rican women's regret, as they were unable to control their fertility in less permanent ways.

36 England, *supra* note 11. *See also* the discussion of sterilization of Quechua Indian women in Peru, Section II(B), *infra*.

B. Indigenous Women in Peru

The experience of indigenous Peruvian women with forced and coerced sterilization practices is much more recent. Nearly half of Peru's 25 million person population is Quechua Indian.³⁷ Despite the size of this ethnic group, indigenous Peruvians still tend to be marginalized and experience higher levels of poverty, similar to other indigenous groups throughout the world.³⁸

When former President Alberto Fujimori came to power in 1990, he implemented a number of 'reform' programs throughout the country. The performance of permanent sterilization procedures was first authorized by the Peruvian Congress in 1995, through an amendment to the National Population Law.³⁹ Soon after, the Fujimori administration implemented the Voluntary Surgical Contraception (VSC) program, which "dispatched [medical VSC brigades] to every corner of the country."⁴⁰ The program created quotas and annual target numbers of tubal ligations that health care workers were expected to meet to keep their jobs or get promoted, and primarily targeted poor, rural, and indigenous women.⁴¹ During the course of the program, which ended in 2000, over 200,000 Peruvian women were sterilized.⁴² Later investigations by the Peruvian Congress, the Human Rights Ombudsman, and other non-governmental organizations revealed that the VSC program was rife with coercion and unethical practices.⁴³

37 *IWRAP Report: Peru*, WIN News. 24: 4, 72 (1998).

38 Japan Bank for International Cooperation, *Poverty Profile: Republic of Peru (Executive Summary)*, 2 (2001).

39 Jocelyn E. Getgen, *Untold Truths: The Exclusion of Enforced Sterilizations from the Peruvian Truth Commission's Final Report*, 11 (2008).

40 Angel Pez, *Peru: Charges Possible in Fujimori-Era Forced Sterilization*, Global Information Network 1 (July 11, 2006).

41 Getjen, *supra* note 39, at 11-12.

42 Abraham Lama, *Rights-Peru: Sterilization Outcry Stirs Family Planning Debate*, Global Information Network 1 (July 25, 2002).

43 Getjen, *supra* note 39, at 14; Pez, *supra* note 36.

Later investigations revealed that health care provider practices included compensating women and subjecting them to aggression, intimidation, and humiliation. ... Some providers offered women surgical sterilization as the only free method of contraception available. Other health workers did not provide women with information regarding other available birth control methods and many times deliberately gave inaccurate information about the risks and consequences of surgical sterilization procedures. Some women even reported that professionals in clinics and hospitals intimidated them as they sought medical attention for abortion complications.⁴⁴

There was further evidence that food and other benefits were also used to coerce women,⁴⁵ and that consent forms were printed in Spanish, which most indigenous Peruvians are able to neither read nor speak.⁴⁶ The results of these mass, medically unnecessary sterilizations were not confined to simply leaving women unable to bear children. In a number of cases, women died as a result of complications from the surgical procedure.⁴⁷

C. Tibetan women

Tibet presents an interesting case in that although Tibetans are a colonized people governed by the dominant Chinese society, policies limiting childbearing apply to all citizens of the People's Republic of China, not just indigenous Tibetans. While this generally applicable policy distinguishes the situation from that of many other indigenous peoples, issues of uniform application across ethnic groups and family size regulations in combination with other colonial policies such as encouraging Chinese settlement in the Tibetan Autonomous Region (TAR) complicate the issue. The Dalai Lama, exiled spiritual and political leader of Tibet, has

44 Getjen, *supra* note 39, at 12.

45 In March 1998, the U.S. House of Representatives began investigation of forced sterilizations in Peru because of evidence that food subsidized by USAID was used to coerce women to undergo sterilizations. *IWRAP Report*, *supra* note 37. It is interesting to note that Congress was willing to investigate such human rights violations in another country, but not in its own (*see supra* page 7).

46 Pez, *supra* note 40.

47 *Id.* *See also* María Mamérita Mestanza Chávez v. Peru, *infra* note 74, a case arising from such a death.

challenged that that China's "strict family planning rules" are intended to make Tibetans a "minority in our own land."⁴⁸

A two-child limit⁴⁹ has been in place in Tibet since 1984, but some NGOs suggest that in recent years, a policy of two children in rural areas and one in urban areas, the same that applies to ethnically Chinese citizens, is being enforced.⁵⁰ Human rights groups have reported that penalties for non-compliance with the policy range from oppressive fines (sometimes equal to more than a month's wages), loss of benefits for children born after a family has met the limit, and loss of employment or housing, to threats of violence and imprisonment.⁵¹

The full extent of coerced sterilization in Tibet is difficult to determine with certainty. Estimates range from between four and twenty percent of women of child bearing age, and surveys of some villages have found sterilization rates of up to ninety percent.⁵² China has not been forthcoming with information. Despite "grave" concerns from Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and other international bodies, China failed to provide information on reproductive rights in their CEDAW report. Chinese officials continue to maintain that "the government of the Tibet Autonomous Region has never interfered in or restrained Tibetan women's rights to give birth. The government has no policy that sets a quota for the number of children Tibetan women may have, nor does it force women to have abortions or undergo sterilization procedures." However, cases of forced

48 Barry Sautman, "*Cultural Genocide" and Tibet*, 38 *Tex. Int'l L.J.* 173, 203 (2003).

49 Tibetans receive preferential treatment along with 54 other minority ethnic groups, in marriage and family planning policies. Julia V. Taft, Prepared Statement Before the House Int'l Rel. Comm., 105th Cong. (1999).

50 Tibetan Women's Association, A report submitted to The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (2006).

51 *Id.*

52 *Id.* This percentage is among married women

abortion and sterilization are well documented throughout China,⁵³ and surgical sterilization and abortion remain primary methods of birth control nationwide.⁵⁴

D. Romani women

The Roma, an ethnic minority present throughout the world (although primarily in eastern European countries like Romania, Bulgaria, the Czech Republic, Hungary, Slovakia, and the former Yugoslavia⁵⁵) share many characteristics with indigenous peoples, including being the target of forced sterilization and other genocidal policies.

Scholar Edo Banach describes both the Roma and American Indians as "encapsulated nations within a larger constitutional regime," defined as "a private, distinct group that has maintained its own traditions, its own laws, and exists as a distinct cultural and legal entity from the host society that geographically surrounds it."⁵⁶ Romani people retain their own internal sovereignty and live by their own distinctive laws and customs, regardless of the country they reside in.⁵⁷ Like the historical experiences of many indigenous groups, the Roma have endured terrible hardship and oppression at the hands of the dominant societies in which they live. They were enslaved for over 500 years in Moldavia and Wallachia, and over 500,000 Roma were murdered by Nazis during the Holocaust.⁵⁸ Even before the Roma were sent to concentration

53 Sautman, *supra* note 48 at 204. The Chinese government has admitted such abuses have taken place, but generally blame corrupt provincial officials. See Alexa Olesen, *China's family planning agency admits abuses, urges officials to obey law*, Associated Press Worldstream (September 20, 2005).

54 Tibetan Women's Association, *supra* note 50.

55 Edo Banach, *The Roma and the Native Americans: Encapsulated Communities Within Larger Constitutional Regimes*, 14 Fla. J. Int'l L. 353, 368 (2002).

56 *Id.* at 356.

57 *Id.* at 366. And while there are few cultures in the world that do not hold having children sacred, "having children is said to be a central element of the value system of Roma families under tradition customs." *Szjijarto v. Hungary*, CEDAW/C/36/D/4/2004 (29 August 2006).

58 Banach, *supra* note 55, at 367. "The Roma prefer the term 'Porajmos' for the Holocaust. Five hundred thousand is the most commonly cited number of Roma killed in the Holocaust, but this figure is probably a low estimate and some scholars put the number at over a million." *Id.* at n. 92.

camps, the Nazi government instituted genocidal policies toward them. "The Third Reich's initial goal with regard to the Roma was to prevent their propagation. This was done by categorizing them as having 'innate feeble-mindedness' under the Gesetz zur Verhütung erbkranken Nachwuchs (Law for the Prevention of Genetically Impaired Offspring) of July 14, 1933, and permitting their forced sterilization."⁵⁹ Sterilization of Romani women was also common in the Soviet Union, both officially and unofficially.⁶⁰ Although the existence of any official sterilization policies ended with the fall of the communism in Eastern Europe, the practice has continued in a number of countries. In 2005, the Czech Ombudsman for human rights initiated an investigation that found that "[t]he problem of sexual sterilization carried out in the Czech Republic, either with improper motivation or illegally, exists."⁶¹

Slovakia has also been accused of allowing coercive sterilization practices aimed at Romani women to go on within their health care system.⁶² In 2006, the Commission on Security and Cooperation in Europe (a U.S. government agency created in 1976 to monitor and encourage compliance by the participating states with their OSCE commitments, with a particular emphasis on human rights, also known as the Helsinki Commission⁶³), issued a report examining the reactions of the Czech and Slovak governments to the accusations of widespread sterilization abuse.⁶⁴ Whereas, as stated above, the issue was investigated by the Public Defender of Rights in

59 Barry A. Fisher, *No Roads Lead to Rom: The Fate of the Romani People under the Nazis and in Post-War Restitution*, 20 Whittier L. Rev. 513, 521 (1999).

60 Banach, *supra* note 55, at 373. In 1972, the Czechoslovak government passed a Public Decree on Sterilization, which effectively encouraged Romani women to be sterilized. As late as 1988, the Czech Republic passed a regulation rewarding women who underwent sterilization by offering monetary and coupon grants.

61 Marina Denysenko, *Sterilized Roma Accuse Czechs*, BBC News (March 12, 2007). Public Defender of Rights Otakar Motejl also recommended state compensation for women affected between 1973 and 1991.

62 U.N. Human Rights Committee, Concluding observations of the Human Rights Committee, Slovakia, CCPR/CO/78/SVK (Aug. 22, 2003).

63 Commission on Security and Cooperation in Europe, <http://www.osce.gov/> (last visited April 23, 2008).

64 Commission on Security and Cooperation in Europe, *Accountability and Impunity: Investigations Into Sterilization Without Informed Consent in the Czech Republic and Slovakia* (2006).

the Czech Republic, Slovakia denied the charges, claiming their investigations showed no proof of any coercion of Romani women, and threatened anyone who came forward with prosecution for not reporting the crime earlier.⁶⁵ At the same time, high ranking officials of the Slovak government made no attempt to tone down their anti-Roma rhetoric. The Prime minister was quoted as saying, “[I]f we do not deal with [the Roma] now, in time they will deal with us. It's necessary to understand them as a problematic group which rises in numbers.” The Health Minister even promised that “the government will do everything to ensure that more white children than Romani children are born.”⁶⁶ It is not hard to imagine how an investigation by this government would fail to turn up any evidence of wrongdoing.

III. International Remedies

An indigenous individual or group looking for a remedy for forced or coerced sterilization programs would first need to examine the forums available to them. As the domestic investigations such as those carried out by the GAO in the United States and by the government in Slovakia prove, the dominant society that is often the perpetrator of these human rights violations (or at the very least, complicit in them) is generally reluctant to take appropriate action to remedy them. Also, because of the marginalization of indigenous people, popular sentiment might not support pursuing a case domestically the way that popular opinion of the international community would. Seeking justice by way of an international body might appear to be the only viable recourse for some victims.

⁶⁵ *Id.* at 7.

⁶⁶ *Id.* at 5.

When discussing international agreements, it is important to remember that a nation-state must have ratified an agreement to be bound by it, and often must have ratified the Optional Protocol in order to fall within the jurisdiction of the corresponding committee. Thus, available remedies vary from country to country. Whereas the United States often insists that even agreements it does ratify are not self-executing and do not create enforceable causes of action within the domestic legal system, the constitution of the Czech Republic contains an article which incorporates the country's international obligations into domestic law (making them, in fact, superior to domestic law) in much the same way that the Fourteenth Amendment makes parts of the U.S. Constitution apply to states.⁶⁷

While international remedies rarely have the authority to change policies or guarantee restitution, as some of the cases below demonstrate, that can be the result. Outside of tangible result from complaints, each case that is decided in favor of the rights of indigenous people and against those who are responsible for coercive or forced sterilization policies builds up the canon of customary international law, strengthening the basis for subsequent cases and raising the awareness necessary to create real and lasting social change.

A number of international treaties, protocols, and conventions address rights that would be violated through programs of forced or coerced sterilization, especially those aimed at an ethnic or racial minority. Cases pertaining to forced sterilization have already been brought in front of a number of these treaty bodies.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), recognizes the right of women "to decide freely and responsibly on the number and

⁶⁷ Banach, *supra* note 55, at 374 (referring to Article 10 of the Czech Constitution). *See e.g.*, *Gitlow v. New York*, 268 U.S. 652 (1925) (holding that the 14th amendment applied certain 1st amendment provisions to state governments).

spacing of their children and to have access to the information, education and means to enable them to exercise these rights" in Article 16(e).⁶⁸ Protections are "further articulated in General Recommendations 19, 21 and 24." For example, in General Recommendation 19, the CEDAW Committee asks states to take measures to "prevent coercion in regard to fertility and reproduction."⁶⁹

In 2006, the CEDAW Committee heard *Szijjarto v. Hungary*, a case involving forced sterilization of a Romani woman who had sought medical attention for pregnancy-related complications.⁷⁰ The Committee found that the author's rights had been violated, including her rights to equal access to health care and "rights to decide freely and responsibly on the number and spacing of [her] children," and that proper informed consent for the procedure had not been given.⁷¹ In its decision, the Committee recommended that the state party "provide appropriate compensation ... commensurate with the gravity of the violations of her rights." It also recommended that the state party make policy changes to ensure such a violation would not happen again, such as emphasizing the pertinent portions of the Convention to the Hungarian medical community, bringing domestic informed consent laws into conformity with international standards, and monitoring health centers more closely for compliance with informed consent requirements.⁷²

68 Convention on the Elimination of All Forms of Discrimination Against Women, GA res. 47/94, UN Doc. A/47/49 (1992). Article 4(2) also states that measures "aimed at protecting maternity shall not be considered discriminatory."

69 Getgen, *supra* note 39, at 31.

70 *Szijjarto v. Hungary*, CEDAW/C/36/D/4/2004 (29 August 2006).

71 *Id.* CEDAW, *supra* note 68.

72 *Id.* As of 2008, it did not appear that Hungary had implemented any of the Committee's recommendations. See Attorney-General's Department: Submission No. 23, Parliament of Australia, Joint Standing Committee on Treaties (26 August 2008).

The American Convention on Human Rights, which articulates a right to be free from "abusive interference with his private life, his family, his home," is another source of authority that has been used as the basis for a claim involving forced sterilization.⁷³ In *María Mamérita Mestanza Chávez v. Peru*, the family of a 33 year-old indigenous Peruvian woman brought a complaint in front of the Inter-American Commission on Human Rights after the mother of seven died from complications arising from her surgical sterilization.⁷⁴ The family claimed that Ms. Mestanza and her husband had been subject to years of harassment by state medical personnel who insisted that she be sterilized.⁷⁵ After the case was argued to the Commission, but before it issued an opinion, a settlement was reached between the family and the Peruvian government. In it, the government agreed to acknowledge international legal responsibility, investigate and punish those responsible, to compensate Ms. Mestanza's husband and children, including free education, and to implement the recommendations of Peru's Human Rights Ombudsman that resulted from his investigation of the government's family planning program.⁷⁶ Despite the fact that international law is difficult to enforce, settlements such as that in the *Mestanza* case prove that the threat of international admonishment can be an effective motivator to getting a grievance redressed.

The U.N. Human Rights Committee has also used the International Covenant for Civil and Political Rights to pressure countries that use forced sterilization as a tool against ethnic minorities to end such practices.⁷⁷ In its observations on Slovakia, the Committee noted that it

73 Article 11, American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (Nov. 22, 1969).

74 *María Mamérita Mestanza Chávez v. Peru*, Petition 12.191, Inter-Am. C.H.R. Report No. 71/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003).

75 *Id.* The harassment purportedly began in 1996, soon after the Fujimori VSC program had begun.

76 *María Mamérita Mestanza Chávez v. Peru*, Petition 12.191, Inter-Am. C.H.R. Report No. 71/03[1], Friendly Settlement (October 22, 2003).

77 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 999 U.N.T.S. 171 (March 23,

remain[ed] concerned at reports of forced or coerced sterilization of Roma women. In particular, the Committee regrets that in its written answers submitted after the oral consideration of the report, the State party does not clearly deny or admit breaches of the principle of full and informed consent but asserts that an investigation related to maternity wards and gynecology departments of 12 hospitals did not result in findings or infringements of “medical indication” of sterilization.⁷⁸

The Committee went on to recommend that Slovakia "adopt all necessary measures to investigate all alleged cases of coerced or forced sterilization, publicize the findings, provide effective remedies to victims and prevent any instances of sterilization without full and informed consent."⁷⁹ While there is no way to force Slovakia to implement these suggestions, there is hope that increasing international pressure could make a difference. The recommendation could also assist a victim who wishes to bring a complaint in front of the Committee in the future.

Other international agreements also provide articles under which a forced sterilization case might be brought. Article 12 of the Universal Declaration of Human Rights states, "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation." Article 16(1) protects the right "to marry and to found a family."⁸⁰ The Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: ... [i]mposing measures intended to prevent births within the group" in Article 2.⁸¹ The United Nations Declaration on the Rights of

1976). Article 7 provides, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment," while Article 17 states, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

78 U.N. Human Rights Committee, Concluding observations of the Human Rights Committee, Slovakia, CCPR/CO/78/SVK (Aug. 22, 2003).

79 *Id.*

80 Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 (1948).

81 Convention on the Prevention and Punishment of the Crime of Genocide, A Res. 260A (III), UN Doc. A/810 (1948). It is also important to note that in Article 4, the Convention explains that anyone who commits what has been defined as genocide, "shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." This is an important additional protection that indigenous people could look to

Indigenous Peoples recognizes in Article 7, "Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person," and "[i]ndigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group."⁸² While the article specifically mentions the removal of children as a genocidal act (no doubt because of the frequency it has been used against indigenous groups), forced sterilization would also constitute an "act of genocide" as defined in other international documents.⁸³ The International Convention on the Elimination of All Forms of Racial Discrimination bars any kind of discrimination based on race and also recognizes, "[t]he right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution,"⁸⁴ while the International Covenant on Economic, Social and Cultural Rights requires the state parties to the Covenant to recognize that "[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment."⁸⁵ Although it does not hold the same force as a treaty, the 189 governments who participated in adopting the Beijing Declaration and Platform for Action at the Fourth World Conference on Women agreed through consensus that the language of the declaration would recognize that "[a]cts of violence against women ... include forced sterilization and forced

in situations where no official policy of targeted sterilization exists, which is more likely to be the case in the modern era.

82 Article 2, United Nations Declaration on the Rights of Indigenous Peoples, G.A. res. 10612, U.N. Doc. A/61/PV.107, (September 13, 2007).

83 See Convention on Genocide, *supra* note 81.

84 Article 5(a), International Convention for the Elimination of Racial Discrimination, G.A. res. 2106 (XX), U.N. Doc. A/6014 (1966).

85 Article 10, International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), U.N. Doc. A/6316 (1966).

abortion, coercive/forced use of contraceptives, prenatal sex selection and female infanticide," and that "[s]ome groups of women, such as women belonging to minority groups, indigenous women ... are also particularly vulnerable to violence."⁸⁶

In contrast to many of the covenants discussed above which lack real force, The Rome Statute of the International Criminal Court (ICC), the Court's governing document, provides criminal jurisdiction over citizens of the countries who have ratified it.⁸⁷ Subject matter jurisdiction includes genocide and crimes against humanity. The Rome statute defines "genocide" as including imposing measures intended to prevent births within the group, committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, and enforced sterilization, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, is a crime against humanity.⁸⁸

IV. Other Available Remedies

In extreme cases, *ad hoc* criminal tribunals could be set up to prosecute those responsible for atrocities such as forced sterilization (likely in combination with other genocidal policies). Past tribunals such as the International Criminal Tribunal for the Former Yugoslavia and the Special Court for Sierra Leone have been set up to address specific cases, and do not have the permanency of the ICC. Although they do not lead to prosecution, truth commissions are another option for nations attempting to deal with atrocities in their past. After the end of the Fujimori regime, the Peruvian Truth and Reconciliation Commission (CVR) was created to investigate

⁸⁶ Beijing Declaration and Platform for Action Fourth World Conference on Women at 45 (15 September 1995).

⁸⁷ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 1, 2002).

⁸⁸ *Id.* No statute of limitations exists for the crime of genocide, so even groups whose victimization is fairly historic might be able to seek remedy under one of the treaties barring genocide. Glauner, *supra* note 15, at 927.

and reveal the extent of human rights violations by the administration, although the Commission failed to address the forced sterilization program.⁸⁹

Criminal jurisdiction might also be obtained through universal jurisdiction -- a concept where certain especially heinous crimes (such as terrorism, war crimes, or piracy) can be tried in any court able to bring the perpetrators to justice.⁹⁰ Genocide is recognized as *jus cogens*, or "compelling law," a body of peremptory international norms.⁹¹ If forced sterilization rising to the level of genocide could be prosecuted under universal jurisdiction, it would not matter whether a country signed a specific treaty or not, as "customary international law that has achieved the status of *jus cogens* ... is binding on all states."⁹² A crime that has been defined as *jus cogens* might also give rise to *obligation erga omnes*⁹³, which would not only allow, but require, a state to prosecute perpetrators found within its territory. Although the United States has been slow to embrace applying international law in domestic courts, some courts are becoming more open to recognizing that, "[i]t is an ancient and a salutary feature of the Anglo-American legal tradition that the Law of Nations is a part of the law of the land to be ascertained and administered, like any other, in the appropriate case."⁹⁴

Immigration to another country as a refugee might also be an option for indigenous women who have experienced forced sterilization or fear they might in the future. To obtain refugee status in the United States, for example, individuals must "show that they cannot return

89 Jocelyn E. Getgen's recent article *Untold Truths: The Exclusion of Enforced Sterilizations from the Peruvian Truth Commission's Final Report* (available at http://lsrj.org/images/uploads/Peru_Sterilizations.pdf) provides a great critical look at the CVR's failure to address the VSC program. The recent trial of Fujimori for human rights violation committed during his administration does not appear to have included the sterilization program, either. Associated Press, *Peru: Defense says no proof against former president Fujimori* (Feb. 17, 2009).

90 Prof. Jo Pasqualucci, Lecture, Public International Law (Fall 2007).

91 Getgen, *supra* note 39, at 23.

92 Christopher P. Cline, *Pursuing Native American Rights in International Law Venues: A Jus Cogens Strategy After Lyng v. Northwest Indian Cemetery Protective Association*, 42 *Hastings L.J.* 591, 599 (1991).

93 Glauner, *supra* note 15, at 914.

94 *Filartiga v. Pena-Irala*, 630 F.2d 876, 886 (C.A.N.Y. 1980).

home and cannot avail themselves of the protection of their country because of 'persecution or a well-founded fear of persecution on account of ... membership in a particular social group.'"⁹⁵

While women have not generally been able to establish asylum based on gender discrimination,⁹⁶ asylum claims based on abuses unique to women, such as forced abortion, rape, and genital mutilation, have been successful.⁹⁷ Some women have also been able to convince the Bureau of Immigration Appeals (BIA) that they belong to a specific targeted social group by virtue of being a woman in conjunction with other elements (such as a woman of a certain religion or a woman who is the victim of persecution for failing to conform with social mores).⁹⁸

In 1996, Congress eased immigration restrictions for women fleeing coercive sterilization policies through an amendment to the Illegal Immigration and Immigrant Responsibility Act (IIRIRA), which states, "a person 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 procedure . . . shall be deemed to have been persecuted on account of political opinion."⁹⁹ Under this new language, to prove she is persecuted and meet the standard required to obtain refugee status, a woman just has to prove she is a victim of one of these policies and can forgo trying to convince an immigration judge that she belongs to a specific social group. The first case to test the new law, *In re X--P--T--*, was the asylum claim of a Chinese woman who had been forcibly sterilized after her third child.¹⁰⁰ In its opinion, the BIA stated, "The applicant has shown that she was forcibly sterilized for violating the coercive population control policies of China. We

95 Phyllis Coven, U.S. Dep't of Justice, Considerations for Asylum Officers Adjudicating Asylum Claims from Women, Immigration and Naturalization Service, 8 (May 26, 1995).

96 Susannah Smiley, *Taking the "Force" Out of Enforcement: Giving Effect to International Human Rights Law Using Domestic Immigration Law*, 29 Cal. W. Int'l L.J. 339, 344 (1999).

97 Coven, *supra* note 95, at 9.

98 *Id.* at 12-14.

99 Illegal Immigration Reform and Immigrant Responsibility Act, 8 U.S.C. § 1101(a)(42) sec. 601(a)(1).

100 *In re X-P-T*, 21 I. & N. Dec. 634 (BIA 1996).

conclude, as a result of the amendments made by section 601 of the IIRIRA, that forcible sterilization is a basis for grants of asylum and withholding of deportation to China."¹⁰¹ Outside of the United States, women might have an easier time establishing their claims, as countries such as Canada, Australia and New Zealand have enacted looser guidelines for gender-based asylum claims.¹⁰²

V. Conclusion

Issues of population and reproduction are some of the most hotly debated in the world. While the question has often revolved around a woman's right not to have children, reproductive justice advocates have been bringing increased attention to the question of a woman's right to have children, an issue which disproportionately effects women of color and, as we have seen, indigenous populations. Such cases need to be brought to light both domestically and internationally, so that women everywhere can be guaranteed their fundamental rights to family and bodily autonomy.

Due to its use in the U.S. Abortion debate, informed consent has taken on an almost sinister connotation in some women's rights circles, but at their core, almost all issues in reproductive justice can be boiled down to giving people the knowledge they need to make an informed choice and the resources to carry it out. The movement to end sterilization abuse is no different.

The risk to the future survival of indigenous peoples is great. As the United States Supreme Court noted in *Skinner v. Oklahoma*, "The power to sterilize, if exercised, may have

¹⁰¹ *Id.*

¹⁰² Smiley, *supra* note 96, at 347.

subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear."¹⁰³ And while eugenics may not hold the same appeal among power brokers and policy makers that it once did, the combination of a rapidly populating planet coupled with advancing reproductive technology provides fertile ground for the atrocities of the past to repeat themselves:

The temptation to use medical knowledge and skills to manipulate or coerce entire classes of people or whole societies in the name of improved health, social well-being, or cost control is likely to become increasingly potent, and enormously seductive, in the years ahead. With the terrible example of the eugenics movement of the late nineteenth and early twentieth centuries in mind, it is a development to be watched carefully and generally resisted. . . . The coercion of people by medical means represents a potential threat that is already in many places clear and present: a threat to the institution of medicine and to human liberty and dignity.¹⁰⁴

International bodies provide sympathetic forums for oppressed groups across the globe to bring their demands for justice. The increasing body of international human rights law concerning forced and coerced sterilization of indigenous people is sending a powerful message to nation-states who might perpetrate or condone such acts: no more.

103 *Skinner v. Oklahoma*, 316 U.S. at 541.

104 THE GOALS OF MEDICINE: THE FORGOTTEN ISSUE IN HEALTH CARE REFORM 33-34 (Mark J. Hanson & Daniel Callahan eds., 1999), quoted in Michael J. Malinowski, *Choosing the Genetic Makeup of Children: Our Eugenics Past-Present, and Future?*, 36 Conn. L. Rev. 125, 212 (2003).