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INVOLUNTARY STERILIZATION OF NATIVE AMERICAN WOMEN IN THE UNITED STATES: A LEGAL APPROACH

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Comment*

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I. INTRODUCTION

United States law permitted involuntary sterilization of Native American women through federal policies and regulations during the 1970s. Although the federal laws regarding sterilization were facially

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neutral, the administrative acts implemented by the government had disparate impacts on minority and socially disadvantaged communities, particularly Indigenous women.[1] A close analysis of these laws and administrative funding reveals that the government ultimately enabled involuntary sterilization of Indigenous women.[2] As a result, Native American victims and their respective tribes should be entitled to some form of legal remedy by the federal government.

Native Americans, in general, represented a unique class of victims among other disadvantaged minority groups who faced sterilization abuses because of their tribal relationship with the United States federal government.[3] Denominated "domestic dependent nations" by Justice Marshall in *Cherokee Nation v. Georgia*,[4] a complex relationship formed between the United States government and Native Americans over the nineteenth and twentieth centuries, particularly after Congress declared plenary authority over tribal nations and abrogated Native sovereignty.[5] This complicated relationship put Native women at the mercy of federally run agencies, specifically the Indian Health Service (IHS), the Public Health Service (PHS), and ultimately the Department of Health, Education, and Welfare (HEW).[6] As part of the overall growth and expansion of the administrative state, these gov-

1. *See infra* note 116 and accompanying text. Although this Comment primarily focuses on Native women, Native American men were also sterilized—admittedly at lower numbers compared to women, which is why women are the focus.
2. Jane Lawrence, *The Indian Health Service and the Sterilization of Native American Women*, 24 AM. INDIAN Q. 400 (2000) (discussing how the Indian Health Service (IHS) began providing family planning services—including sterilization—for Native Americans in 1965 under the authority of United States Department of Health, Education, and Welfare (HEW), and the Public Health Services (PHS), a division of HEW that formed the Indian Health Services (IHS) in 1958). Congress had transferred total responsibility of Indian health from the Bureau of Indian Affairs (BIA) to the PHS in 1955, stating that "all facilities transferred shall be available to meet the health needs of the Indians and that such health needs shall be given priority over that of the non-Indian population." *Id.* at 401. Lawrence argues that the IHS targeted Native Americans for family planning services because of the high birth rates among tribal women. *Id.* at 402.
3. Sally J. Torpy, *Native American Women and Coerced Sterilization: On the Trail of Tears in the 1970s*, AM. INDIAN CULTURE & RSCH. J., Jan. 2000, at 1, 1.
4. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 14 (1831).
5. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); Lone Wolf v. Hitchcock, 187 U.S. 553, 565–66 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. . . . When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians.").
6. HEW is now called the Department of Health and Human Services (HHS).

ernment-funded agencies on tribal reservations made Native people's reproductive practices the focus of United States policy and administration.[7] Beginning in the 1930s and peaking in the 1970s, many sterilizations—both voluntary and involuntary—occurred within federal IHS government-established hospitals or medical care facilities that contracted with the IHS to provide medical care to Native Americans. The sterilizations were, in part, due to the federal government's promotion of hospital births and its aim to cease traditional indigenous birth-related practices.[8] In addition to the cultural violence perpetrated, the government often inflicted violence on individuals by committing these sterilizations without the patient's full knowledge, understanding, or uncoerced consent.[9]

The remainder of this Comment explores the historical and administrative landscape that made coercive sterilization practice legal. Part II discusses the significance of addressing the sterilization of Native American women and how this Comment contributes to the existing scholarship. Part III summarizes the origins of United States eugenics laws, foundational eugenics cases, and regulations passed during the 1970s as well as the national sterilization cases that challenged them. Part IV turns to the scope and effects of the practice of sterilizing Native American women as evidenced in the few cases brought by Native women, by the activism and resistance against sterilization, and in the investigations that confirmed the practice and governmental involvement. Part V explores the possible legal remedies—recognition and reparation—available to sterilized Native women and their tribes.

II. WHY NATIVE STERILIZATION MATTERS

A. Significance

Research regarding Native American sterilization—including this Comment—is significant because it increases knowledge of and atten-

7. Lawrence, *supra* note 2, at 402.

8. *See* BRIANNA THEOBALD, REPRODUCTION ON THE RESERVATION: PREGNANCY, CHILDBIRTH, AND COLONIALISM IN THE LONG TWENTIETH CENTURY 6–8 (2019) (describing the shift of traditional, native midwifery among Indigenous women to depend upon the BIA, and then the IHS, for their reproductive health needs over the course of the century); *see also* Torpy, *supra* note 3, at 10 ("IHS hospitals were built for Native Americans because most tribes lived in areas where no private medical care or state health services were available. As of 1977, IHS facilities consisted of fifty-one hospitals, eighty-six health centers (including twenty-six in schools), and several hundred other health stations across the nation.").

9. *See* Brint Dillingham, *Indian Women and IHS Sterilization Practices*, 3 AM. INDIAN J. 27 (1977); Gail Marks Jarvis, *The Theft of Life*, AKWESASNE NOTES (N.Y.), Sept. 1977, at 30–32; U.S. GOV'T ACCOUNTABILITY OFF., HRD-77-3, INVESTIGATION OF ALLEGATIONS CONCERNING INDIAN HEALTH SERVICE 1 (1976) [hereinafter GAO REPORT], https://www.gao.gov/assets/hrd-77-3.pdf [https://perma.cc/62L7-5ANA].

tion to a subject that is generally absent or neglected in American history and legal scholarship. Little attention has been given to the dark blemish that is the United States' history of eugenics,[10] let alone Native American sterilization from a legal standpoint. The omission of this critical narrative is partly due to timing. Activist organizations began to expose the massive involuntary sterilization of Indigenous women by the United States government during the 1960s and 1970s, when most American social and political attention was given to the Civil Rights and Women's Rights movements. When attention shifted to Native American issues, the focus was primarily on resisting the public policy discussions of the Termination Era, which did not end until the 1960s.[11] This was followed by the confrontations between Native Americans and the United States over "treaty rights that had been violated by the United States government and private corporations."[12]

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10. Thomas F. Cargill, *Eugenics in High School History: Failure To Confront the Past*, 25 INDEP. REV. 5, 6 (2020) ("One would expect that with the current political focus on discrimination and racism, eugenics would be an important topic in U.S. history and related courses at the high school level. Unfortunately, this is not the case. As I show in this paper, high school history textbooks essentially ignore the topic."). Conceptions of white, western supremacy pre-date the eugenics movement, but as Professor Cargill writes:

> [E]ugenics provided the scientific foundation for these racist views and rationalized them as something more than an emotional dislike of others who differ because of color, religion, culture, country of origin, economic standing, mental and physical disability, and so on. Eugenics essentially elevated racism to a virtue in that breading out the unfit was defined as an expression of concern for improving society.

Id. at 8. Eugenics aims to reduce human suffering by eliminating "bad hereditary" (i.e., genetic diseases and disabilities) and undesirable characteristics (like poverty) within the human population. The Human Betterment Foundation, *Effects of Eugenic Sterilization as Practiced in Cal.* (1937), https://tile.loc.gov/storage-services/service/rbc/rbpe/rbpe00/rbpe002/0020380f/0020380f.pdf [https://perma.cc/TT6G-VTAU]; *see Eugenics*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/eugenics [https://perma.cc/EUP9-7F6L] (last visited March 12, 2022) (defining eugenics as the practice or advocacy of improving the human species by only allowing the reproduction of select people). This Comment focuses on the sterilization of women as a practice of eugenics. *See generally* Myla Vicenti Carpio, *The Lost Generation: American Indian Women and Sterilization Abuse*, 31 SOC. JUST. 40, 46 (2004) (identifying the two types of sterilization practiced upon Native American women, tubal ligation and hysterectomy); Allison C. Carey, *Gender and Compulsory Sterilization Programs in America: 1907–1950*, 11 J. HIST. SOCIO. 74, 81–84 (1998) (explaining that eugenicists focused more on women than men because of women's childbearing capabilities).

11. DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 230 (7th ed. 2017).

12. Torpy, *supra* note 3, at 1 ("Network television periodically broadcast scenes of confrontation ranging from the Alcatraz Occupation in 1969 through the Wounded Knee Occupation of 1973. . . . Little publicity was given to another form of Native American civil rights violations—the abuse of women's reproductive freedom.").

Another reason for the lack of awareness of Native American sterilization is the absence of Native women who came forward to sue or disclose their experiences. Sterilization often had physical and psychological ramifications, especially when conducted by duplicitous medical staff.[13] Many women of color, including Native American women, were so emotionally traumatized following their sterilizations that they refrained from speaking out about what they had undergone.[14] Similarly, many Indigenous women remained silent about their sterilizations because of the United States' colonialist policies. For instance, the government had the power to remove Indigenous children from their families for placement in boarding schools, foster care, or adoption. The U.S. also controlled individuals' treaty entitlements to health care and housing—practices that were still prevalent in the late twentieth century.[15] Greater awareness of Native American involuntary sterilizations was not possible until several brave Native American women, doctors, and scholars found a platform in Indigenous publications such as the *American Indian Journal*, *Akwesasne Notes*, and *Navajo Times*.[16]

Even when the involuntary sterilization of poor women and women of color gained national recognition in the tragic cases of *Relf v. Weinberger*[17] in 1973 and *Madrigal v. Quilligan* in 1978,[18] Native Ameri-

13. *See* REBECCA M. KLUCHIN, FIT TO BE TIED: STERILIZATION AND REPRODUCTIVE RIGHTS IN AMERICA, 1950–1980 74 (2009) ("Many victims believed their coercive sterilization to be isolated incidents, and cultural stigmas attached to infertility shamed other victims—especially Native American and Hispanic women—into secrecy."); *see also* Lawrence, *supra* note 2, at 410–12 ("The sterilization of Indian women affected their families and friends; many marriages ended in divorce, and numerous friendships became estranged or dissolved completely. The women had to deal with higher rates of martial problems, alcoholism, drug abuse, psychological difficulties, shame, and guilt. . . . Indian women generally agreed to sterilization when they were threatened with the loss of their children and/or their welfare benefits . . . most of them gave their consent when they were heavily sedated during a Cesarean section or when they were in a great deal of pain during labor, and . . . the women could not understand consent forms because they were written in English at the twelfth-grade level.").
14. Lawrence, *supra* note 2, at 410.
15. Marks Jarvis, *supra* note 9, at 30.
16. *See* Dillingham, *supra* note 9, at 27; *Native Woman Sues over Illegal Sterilization, Seizure of Children*, AKWESASNE NOTES (N.Y.), Summer 1975, at 8, [*A* Message to the "Establishment Media"] PROQUEST DOCUMENT ID 220276142 [hereinafter *Native Woman Sues*]; Marks Jarvis, *supra* note 9, at 30; Gail Marks Jarvis, *Indian Genocide–A Modern Tragedy*, NAVAJO TIMES (Ariz.), Nov. 10, 1977, at B-6; *U.S. Gov't Report Claims 3,400 Indian Women Were Sterilized*, NAVAJO TIMES (Ariz.), Dec. 1, 1977, at A10 [hereinafter *U.S. Gov't Report*]; AMÁ (Dartmouth Films 2019) (highlighting women now speaking about sterilization abuses they endured during the 1960s and 1970s, with the hope that more Native women come forward with their stories).
17. *See* Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974) (involving a civil rights class action that garnered national attention and resulted in HEW changing its regulations regarding sterilization), *vacated*, 565 F.2d 722 (1977).

can women remained excluded from this narrative because of their unique identity and relationship with the United States government, particularly with respect to healthcare services.[19] To date, neither the federal government nor the IHS has acknowledged or provided reparation for their part in the sterilization of Indigenous women. While some states have passed compensation acts to provide reparation to men and women who were wrongfully sterilized during the same era, very few states have addressed their role in the sterilization of Indigenous women nor have they provided Native women recognition or reparation for their acts.[20] Successful reparation bills have come about

18. *Madrigal v. Quilligan*, No. 75-2057 (C.D. Cal. 1978), *aff'd*, No. 78-3187, 639 F.2d 789 (9th Cir. Jan. 1, 1981), was a civil rights class-action lawsuit filed by twelve Mexican American women against the Los Angeles County-USC Medical Center for involuntary sterilization. *See* Antonia Hernandez, *Chicanas and the Issue of Involuntary Sterilization: Reforms Needed To Protect Informed Consent*, 3 CHICANO L. REV. 3, 4–9 (1976) (Hernandez was the attorney in *Madrigal*). In an unpublished opinion, Judge Jesse W. Curtis ruled in favor of the medical center, stating miscommunication and language barriers between doctors and patients resulted in the "unwanted" sterilizations of the women. *Id.* at 9. Despite an unfavorable ruling, the women influenced California's Department of Health to include bilingual informational material that explained the sterilization procedure and consequences and to require a seventy-two-hour waiting period before the procedure. *Id.* at 12; *see 1978:* Madrigal v. Quilligan, LIBR. OF CONG., https://guides.loc.gov/latinx-civil-rights/madrigal-v-quilligan [https://perma.cc/5TRZ-44Y4] (last visited March 12, 2022). Materials on *Madrigal v. Quilligan* are collected in the Carlos G. Velez-Ibanez Sterilization Research Collection, Series 2: Madrigal v. Quilligan files, 1978–79, UCLA, Chicano Stud. Rsch. Ctr. Libr. & Special Collections.

19. The Constitution cemented tribal sovereignty into United States law and gave Congress the sole power to make laws affecting the tribal nations. *See* U.S. CONST. art. I, § 8, cl. 3. The Supreme Court further defined Indian nations as "domestic dependent nations" whose relationship with the federal government was "that of a ward to his guardian." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 14 (1831). This trust relationship is unique and is also the basis for the government's duty to provide healthcare services to Indigenous people. *See* 25 U.S.C. § 13 (forming the basis of the Native American healthcare system, stating that "[t]he Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes: . . . For relief of distress and conservation of health.").

20. As of March 2022, six states—Virginia, Oregon, North Carolina, South Carolina, California, and Vermont—have apologized for their role in involuntary sterilization, with three of these states, Virginia, North Carolina, and California, enacting compensation acts for their surviving victims. The Eugenics Asexualization and Sterilization Compensation Program of North Carolina and the Forced or Involuntary Sterilization Compensation Act of California are discussed in more detail in Part IV. An estimated forty percent of the victims in North Carolina were African American and Native American. North Carolina's act is restricted to those sterilized in the state by the Eugenics Board of North Carolina. N.C. JUST. FOR STERILIZATION VICTIMS FOUND., QUESTIONS & ANSWERS ON EUGENICS IN N.C. (2014). As a result, sterilization done at IHS hospitals or IHS contract facilities

due to collaborative initiatives from community activists, health providers, legislators, and scholars who exposed the coercive sterilization practices and linked those past practices to current survivors and descendants. Such movement has yet to emerge on behalf of sterilized Indigenous women, although perhaps the time has arrived for such action.

B. Contribution to Scholarship

This Comment offers a critical legal approach to the United States' involvement in the involuntary sterilization of Native American women. In one way or another, academic scholars like Sally J. Torpy, Myla Vicenti Caprio, Jane Lawrence, Rebecca Kluchin, and Brianna Theobald have written on the sterilization abuses of Native American women in the United States during the twentieth century.[21] However, existing scholarly analyses, by and large, take a historical approach and thus provide a perspective on Native American sterilization only from that single disciplinary lens. Although this Comment provides some necessary historical background, its contribution is as an interdisciplinary inquiry with an emphasis on the legal landscape that enabled coercive sterilization of Native American women.

To clarify, it is not my intention to declare a historical approach to this scholarship as inferior or of any less value. On the contrary, the existing scholarship provides the foundation for this Comment, and in

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are not covered by the Act. N.C. GEN. STAT. §§ 143B–426.50 to 143B–426.57 (2015). Virginia's compensation act is purposely excluded from this discussion because it was estimated there were roughly eleven known survivors when the act passed in 2015. Jenna Portnoy, *Va. General Assembly Agrees To Compensate Eugenics Victims*, WASH. POST, (Feb. 27, 2015), https://www.washingtonpost.com/local/virginia-politics/va-general-assembly-agrees-to-compensate-eugenics-victims/2015/02/27/b2b7b0ec-be9e-11e4-bdfa-b8e8f594e6ee_story.html [https://perma.cc/5HHR-6F3F]. With little to no information on the victims, it is difficult to determine whether any of the eleven were Native Americans. In July 2021, California enacted a Forced or Involuntary Sterilization Compensation Program, administered by the California Victim Compensation Board, to provide compensation to "any survivor of state-sponsored sterilization conducted pursuant to eugenics laws that existed in the State of California between 1909 and 1979" or any survivors of coercive sterilization performed in prisons after 1979. CAL. HEALTH & SAFETY CODE §§ 24210–24217 (West 2021); *see also* Adam Beam, *California Poised To Pay Compensation to Victims of Forced Sterilization,* L.A. TIMES (July 7, 2021, 2:53 AM), https://www.latimes.com/california/story/2021-07-07/california-poised-pay-victims-forced-sterilizations [https://perma.cc/7EEG-SJUU] (explaining eligible victims could receive up to $25,000 in reparations for their sterilizations).

21. The authors cited—Sally J. Torpy, Myla Vicenti Caprio, Jane Lawrence, Rebecca Kluchin, and Brianna Theobald—have served as a foundational guide to this Comment for their work in involuntary sterilization of Native American women during the twentieth century. Particularly, these authors' use of oral histories and interviews of sterilized Native women have proved immensely useful.

many ways, contemporary historical analysis allows this legal analysis to occur—as evidenced by citation to these works throughout. Without their scholarship, this Comment could not be possible. Similarly, the focus of this Comment is limited to sterilizations that happened during the Neo-Eugenics Era of the 1970s, in which there was a notable—and documented—spike in involuntary sterilization of Indigenous women and other socially disadvantaged minority groups. Sterilizations of Native women in the 1970s, whether voluntary or involuntary, were not novel; evidence suggests the later sterilizations were merely an extension of early twentieth-century eugenics campaigns.[22] Thus, though this Comment is situated within the historical framework constructed by the existing scholarship, my intent is to contribute a legal perspective that may be usefully deployed in future academic discussions, in both legal and non-legal settings.

III. LEGAL CONTEXT OF NATIVE STERILIZATION

A. Origins of Eugenic Laws in the United States

As with the history of coercive sterilizations, the practice of eugenics in the United States is often not addressed or widely known.[23] In 1907, Indiana enacted the first compulsory eugenics sterilization (CES) law,[24] and other states followed suit. Prior to 1925, all CES laws challenged in court were found unconstitutional.[25] In 1927, how-

22. *See* THEOBALD, *supra* note 8, at 8 (describing how historians have mistakenly taken Native American women outside of the eugenic campaigns, although colonial power dynamics, racialized and class assumptions, and growing favoritism towards assimilation created ideal conditions that made Native American women vulnerable to sterilization abuses by government officials, physicians, and social workers).

23. Teryn Bouche & Laura Rivard, *America's Hidden History: The Eugenics Movement*, SCITABLE (Sept. 18, 2014), https://www.nature.com/scitable/forums/genetics-generation/america-s-hidden-history-the-eugenics-movement-123919444/ [https://perma.cc/8732-FES4] ("[A]sk the average person about the 'eugenics movement' and you are likely to get blank stares.").

24. Edward J. Spriggs, Jr., *Involuntary Sterilization: An Unconstitutional Menace to Minorities and the Poor*, 4 N.Y.U. REV. L. & SOC. CHANGE 127, 128 (1974).

25. *Id.*; *see, e.g.*, Williams v. Smith, 131 N.E. 2 (Ind. 1921); Haynes v. Lapeer Cir. Judge, 166 N.W. 938 (Mich. 1918) (barring superintendent of Michigan Home and Training School from assessing the sanity of an "alleged incompetent" to determine the necessity of an operation to remove one or both of her fallopian tubes); Smith v. Bd. of Exam'rs, 88 A. 963 (N.J. 1913). In 1925, however, the highest courts in Michigan and Virginia upheld CES for the first time in the United States. Smith v. Command, 204 N.W. 140 (Mich. 1925) (upholding 1923 Mich. Pub. Acts 285); Buck v. Bell, 130 S.E. 516 (Va. 1925), *aff'd*, 274 U.S. 200 (1927) (upholding 1924 Va. Acts 569). After the United States Supreme Court upheld *Buck v. Bell*'s CES statute as constitutional, other states enacted similar CES statutes. Since *Buck v. Bell*, only five CES statutes have been declared unconstitutional. *See, e.g.*, Wyatt v. Aderholt, 368 F. Supp. 1382 (M.D. Ala. 1973); Brewer v. Valk, 167 S.E. 638 (N.C. 1933); *In re* Hendrickson, 123 P.2d 322 (Wash. 1942).

ever, the United States Supreme Court upheld Virginia's CES statute in the ground-breaking case of *Buck v. Bell*.[26] This case, above all, affirmed eugenicists' beliefs that undesirable qualities like poverty, immorality, mental disability, and even racial dispositions could be inherited and thus, eradicated through sterilization. It is this case that launched the Era of Negative Eugenics.

B. Infamous Eugenic Cases

Considered the origin of constitutional eugenic laws, *Buck v. Bell* laid the foundation for most CES statutes and practices in the United States on both the state and federal level. In an 8–1 decision, the *Buck v. Bell* Court held that Virginia's state statute permitting compulsory sterilization of those "manifestly unfit from continuing their kind" did not violate the Due Process Clause of the Fourteenth Amendment.[27] This case involved three generations of women of the same family: the petitioner, Carrie Buck, "a feeble-minded white woman who was committed to the State Colony," her mother, Emma Buck, who was also considered feeble-minded, and Carrie's young daughter, Vivian. Carrie Buck and her guardian contended that her sterilization—via salpingectomy, a form of tubal ligation—violated her substantive due process, which guarantees the right to procreate, and conflicted with equal protection.[28] The Court disagreed.[29] In its opinion given by Justice Holmes, the Court placed society's "interest" above that of Carrie Buck, allowing for the launch of the negative eugenics approach of the Virginia legislature across a majority of American states.[30]

At the outset of the twentieth century, "positive" eugenicists focused on encouraging those with what the movement deemed superior genetic qualifications to reproduce—in other words, white and native born.[31] However, the negative eugenics era was ushered within the decade, as eugenic reformers believed positive eugenics must be supplemented with fertility control and the sterilization of "undesirables" to avoid their procreation.[32] Justice Holmes stated:

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26. *See Buck*, 274 U.S. 200.
27. *Id.* at 207.
28. *Id.* at 207 (arguing her sterilization violated her due process of law and equal protection because the CES statute was only for the "feeble-minded" at certain institutions and made no mention of other state institutions or persons who were not institutionalized).
29. *Id.* at 207–08 (stating that involuntary sterilization of those deemed "feeble-minded" did not violate due process under the Fourteenth Amendment, and since the procedure was limited to people housed in state institutions, it did not deny inmates equal protection).
30. *See* Spriggs, *supra* note 24, at 128; Paul A. Lombardo, *Facing Carrie Buck*, 33 HASTINGS CTR. REP. 14, 14–15 (2003).
31. *See* KLUCHIN, *supra* note 13, at 11–14.
32. *Id.* at 14–15.

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for this imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.[33]

Emma, Carrie, and young Vivian were all sterilized after the Supreme Court handed down this decision.[34] Following *Buck v. Bell*, thirty-two states and Puerto Rico passed statutes similar to Virginia's, permitting involuntary sterilization of all genders under the guise of eradicating "manifestly unfit" genetic stock in the best interest of society.[35]

As critical legal scholars and those who experience inequality know, neutral laws with disparate and discriminatory effects on one group, such as those with disabilities or mental illness, also often have disparate effects on racial and ethnic minorities. Although this case centered around the sterilization of an intellectually disabled white woman, the Court's use of the broad term "manifestly unfit" and extremely deferential rational basis standard of review are vital in understanding how the sterilization of other socially disadvantaged groups, particularly Native American women, could occur during the Jim Crow era. Rather than limiting the possible persons sterilized to the intellectually disabled—deplorable enough on its own—the Court left open the possibility that anyone could be sterilized if the government could point to some public welfare benefit.[36] The term "manifestly unfit" is so ambiguous that sterilization proponents could, and did, expand the category to include those who were socially disadvantaged and living on the margins, i.e., minorities and women of color. In essence, states could—and did—enact race-neutral statutes and then implement them in a way that caused disproportionately high rates of coercive sterilization among women of color.

Furthermore, by employing a rational basis standard of review—the most deferential standard—the Supreme Court's ruling meant that proof of a legitimate state interest for the public's welfare was sufficient to justify sterilization statutes.[37] The law of sterilization,

33. *Buck*, 274 U.S. at 207 (citing Jacobson v. Massachusetts, 197 U.S. 11 (1905)).
34. *See* Torpy, *supra* note 3, at 3 (discussing how Vivian was not institutionalized but attended elementary school, where she qualified for honor roll).
35. *See Buck*, 274 U.S. at 207.
36. *See id.* ("We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence.").
37. The standard of review is the test a court applies in reviewing the constitutionality of a law. *See* Richard Duncan, *Standards of Constitutional Review*, DUNCAN'S CON L. COURSE BLOG (Oct. 11, 2020, 8:45 AM), https://professorduncan.blogspot.com/2011/10/standards-of-constitutional-review.html [https://perma.cc/4EXU-EBJ8]. When constitutional questions are involved, there are three standards of constitutional review: minimal scrutiny (rational basis), inter-

however, changed in 1942 when the Supreme Court decided *Skinner v. Oklahoma*.[38] In that case, defendant Jack T. Skinner was incarcerated in Oklahoma following his third theft-related conviction—one for stealing chickens and two for armed robbery.[39] Oklahoma's eugenics statute allowed for sterilization of criminals who habitually committed certain crimes.[40] Skinner argued that Oklahoma's CES law violated the Fourteenth Amendment, and the Court agreed.[41] Rather than use rational basis review as it did in *Buck*, the Court applied strict scrutiny in *Skinner*.[42] Explaining the shift to the most stringent standard of review, the Court seemed to recognize the disparate effects of sterilization,[43] where socially disadvantaged groups bore the brunt of punitive sterilizations:

> Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have 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. There is no redemption for the individual whom the law touches.[44]

Nonetheless, *Skinner* did not overturn *Buck v. Bell*, nor did it declare all involuntary sterilization laws unconstitutional—only those laws that drew an artificial distinction between individuals, subjecting

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mediate scrutiny, and strict scrutiny. *Id.* The rational basis test is the most deferential, with the state only needing to show that the restriction is "rationally or conceivably related [Means] to any legitimate state interest [Ends]." *Id.* Nearly all laws can satisfy this standard. Intermediate scrutiny is more rigorous, and the government must prove that the restriction serves an important state interest and does so by means that are substantially related to that interest. *Id.* Strict scrutiny, the highest and most rigorous standard of review, requires the government to prove the law serves a compelling state interest and also that the restriction is both narrowly tailored and the least restrictive means to achieve that interest. *Id.* Strict scrutiny is often employed in equal protection claims that involve fundamental rights and suspect classifications, including gender, race, national origin, and religion. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942); Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Bd. of Educ., 347 U.S. 483 (1954); Korematsu v. United States, 323 U.S. 214 (1944).

38. *Skinner*, 316 U.S. at 536–43.

39. *Id.* at 537.

40. *Id.* at 536 ("Oklahoma's Habitual Criminal Sterilization Act . . . . defines an 'habitual criminal' as a person who, having been convicted two or more times for crimes 'amounting to felonies involving moral turpitude,' either in an Oklahoma court or in a court of any other State, is thereafter convicted of such a felony in Oklahoma and is sentenced to a term of imprisonment in an Oklahoma penal institution." (citations omitted)).

41. *Id.* at 538–41 (holding Oklahoma's law violated the Equal Protection Clause of the Fourteenth Amendment because other white-collar crimes were excluded from the punitive sterilization act).

42. *Id.* at 541–42.

43. *Id.* at 541.

44. *Id.* at 541–42.

some to sterilization but not others.[45] In fact, *Skinner* upheld *Buck v. Bell*'s central premise that the state's power to regulate for health and safety of its citizens encapsulates the authority to determine which specific individuals have a right to a family or to procreate and which, like Carrie Buck, do not. In short, involuntary sterilizations could legally continue—and they did—despite disproportionate effects on certain socially disadvantaged groups.[46]

Everything changed in 1973, however, when the sterilization of two African American sisters, Marie Alice Relf, age twelve, and Minnie Lee Relf, fourteen, shocked the nation[47] and abruptly ended the influence of *Buck v. Bell*.[48] The Relf sisters were involuntarily sterilized at the Montgomery, Alabama, Community Action Family Planning Clinic, a HEW-funded and -controlled facility.[49] Their mother, who had very little education and was illiterate, signed the medical forms with an X with the belief that she was permitting doctors to give her young daughters shots that would prevent pregnancy.[50] Instead, Marie Alice and Minnie Lee were sterilized.[51] In *Relf v. Weinberger*,

45. *Buck v. Bell* has never been overturned, although each state in the United States and Puerto Rico have repealed their respective eugenics statutes. *See* Lutz Kaelber, *Eugenics: Compulsory Sterilization in 50 American States*, UNIV. VT., http://www.uvm.edu/~lkaelber/eugenics/ [https://perma.cc/CKR9-V3S8] (last visited Dec. 7, 2021); Bonnie Mass, *Puerto Rico: A Case Study of Population Control*, 4 LATIN AM. PERSPS. 66, 68 (1977) ("[A] law regulating 'eugenic sterilization' which was enacted in Puerto Rico (Act number 116 of May 13, 1937), not to be repealed until June 8, 1960." (citation omitted)). West Virginia was the last state to repeal its eugenic sterilization legislation in 2013. *See* Eric Eyre, *W. Va. House Passes Repeal of Forced Sterilization Law*, CHARLESTON GAZETTE-MAIL (Mar. 25, 2013), https://www.wvgazettemail.com/news/politics/w-va-house-passes-repeal-of-forced-sterilization-law/article_21dd1f3c-778c-5c34-828f-781451c44e52.html [https://perma.cc/WAT9-9KC7].

46. *See* Kidi Tafesse, *What the 'Miss. Appendectomy' Says About the Regard of the State Towards the Agency of Black Women's Bodies*, MOVEMENT FOR BLACK WOMEN'S LIVES (May 1, 2019), https://blackwomenintheblackfreedomstruggle.voices.wooster.edu/2019/05/01/what-the-mississippi-appendectomy-says-about-the-regard-of-the-state-towards-the-agency-of-black-womens-bodies/ [https://perma.cc/PN5G-FPLK]. Fannie Lou Hammer coined the term "Mississippi appendectomy" to refer to involuntary sterilization of poor Black women, deemed "unfit to reproduce," in the South between the 1920s and the1980s. *Id.* Of those sterilized in the South, eighty-five percent were women and forty percent were women of color. *Id.*

47. Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974).

48. *See* Spriggs, *supra* note 24, at 129 n.24 (referencing the only five CES statutes that had been declared unconstitutional since the passing of *Buck v. Bell*).

49. KLUCHIN, *supra* note 13, at 98–101.

50. *Id*. Importantly, the girls here were not "feebleminded" or deemed mentally ill—they were "unfit" because clinic personnel believed their race and class inevitably meant unwed motherhood and state dependence. *Id.* at 99. Within the *Relf* case, ten out of the eleven girls were black and five were minors under the age of eighteen. *Id.* at 101.

51. *Id*. at 99–100; *Relf*, 372 F. Supp. at 1200.

the Relf sisters sued the government agencies and individuals responsible for their sterilization, bringing national attention to involuntary sterilization abuses taking place among socially disadvantaged communities.[52] The district court sided with the sisters and required HEW to amend its regulations to prohibit using federal funds for involuntary sterilizations, sterilizing minors and the mentally incompetent, threatening women on welfare with the loss of benefits if not sterilized, and performing sterilization procedures without informed consent.[53] After *Relf*, states began to repeal their eugenic statutes, and the steady decline of the negative eugenics era began.[54]

The exact and total number of involuntary sterilizations that occurred during the negative eugenics era is unknown. However, it is estimated that more than 60,000 women were sterilized in thirty-two states after the passage of *Buck v. Bell* in 1927, with several sterilizations occurring well into the early 1980s.[55] Of that 60,000, a November 4, 1976, Government Accountability Office (GAO) report confirmed that several thousand Native American women were sterilized, both voluntarily and involuntarily, between 1973 and 1976.[56]

C. Passage of Laws that Allowed Native Sterilizations

Laws passed in the wake of judicial endorsements of compulsory eugenics statutes allowed the sterilization of Native American women to occur. During the twentieth century, Congress enacted legislation that changed Native American healthcare.[57] One such legislative measure was the Indian Health Facilities Act of 1954 (Transfer Act), which transferred all healthcare matters from the Bureau of Indian Affairs (BIA) to the PHS.[58] Upon the passage of the Transfer Act, the PHS created the Division of Indian Health, later renamed the Indian Health Service (IHS), to oversee Native American healthcare.[59]

52. KLUCHIN, *supra* note 13, at 98–101.
53. *Relf*, 372 F. Supp. at 1203–04.
54. *See* sources cited *supra* note 45; *1907 Indiana Eugenics Law*, IND. HIST. BUREAU, https://www.in.gov/history/state-historical-markers/find-a-marker/1907-indiana-eugenics-law [https://perma.cc/GA6X-MPRC] (last visited March 12, 2022).
55. Alexandra Minna Stern, *Forced Sterilization Policies in the U.S. Targeted Minorities and Those with Disabilities—and Lasted into the 21st Century*, LEGALNEWS (Sept. 23, 2020), http://legalnews.com/detroit/1491856 [https://perma.cc/J4B4-SQ7N]; Kaelber, *supra* note 45.
56. GAO REPORT, *supra* note 9, at 30.
57. *See supra* note 2 and accompanying text.
58. Pub. L. No. 568, 68 Stat. 674 (1954).
59. *1954: President Eisenhower Establishes the Indian Health Service*, NAT'L LIBR. OF MED., https://www.nlm.nih.gov/nativevoices/timeline/490.html [https://perma.cc/VY6R-7XLV] (last visited on March 12, 2022); Lawrence, *supra* note 2, at 401 (explaining that the BIA was part of the Department of the Interior, while the PHS was a division of HEW); *see supra* notes 6–8 and accompanying text.

The scope of the tribal–federal government relationship grew to encapsulate government-provided health services over the course of many years through treaties, Supreme Court decisions, and legislative and administrative actions.[60] Following the Transfer Act, the government's health services responsibilities increased even more, as federal assimilation efforts promoted the abandonment of traditional Native medicine practices.[61] The IHS built hospitals and contract facilities to specifically target Native Americans, since most tribal citizens lived on reservations where no private medical care or state health care services were available.[62] Starting in 1965, IHS hospitals and facilities offered federally funded family planning services other than abortion and sterilization.[63] However, sterilization was eventually included as the government began promoting and funding population control efforts. The Family Planning Services and Population Research Act of 1970[64] and other legislation, prompted by population control concerns in the 1970s, allowed HEW to allocate more funding to sterilizations.[65] Though the number of Native American women sterilized obviously increased as a result, it is important to emphasize that Native women were being sterilized *before* HEW began providing federally funded family planning services in the 1970s.[66] Some sterilizations

60. *Id.*; *About IHS*, INDIAN HEALTH SERV, https://www.ihs.gov/aboutihs/ [https://perma.cc/YD3J] (last visited March 12, 2022); *see supra* note 2 and accompanying text. Note, federally provided health care is not an entitlement. It is a right guaranteed to Native Americans that was solidified in treaties, laws, and the Constitution. U.S. CONST. art. I, § 8, cl. 3; *supra* note 19 and accompanying text.

61. THEOBALD, *supra* note 8, at 6–8.

62. Torpy, *supra* note 3, at 10.

63. Lawrence, *supra* note 2, at 402; THEOBALD, *supra* note 8, at 148; *see also* THEOBALD, *supra* note 8, at 57–58 (IHS hospitals were viewed as having "potential for both marking and facilitating progress toward assimilation. Indian Service officials and employees almost universally agreed that Native healers—especially the 'medicine man'—hindered assimilation, and one function of the new hospitals was to diminish their influence.").

64. Pub. L. No. 91-572, 84 Stat. 1504 (codified at 42 U.S.C. §§ 300 to 300a-6). The Act amended the Public Health Service Act, adding the Family Planning Program as Title X. ANGELA NAPILI, CONG. RSCH. SERV., RL33644, TITLE X (PUBLIC HEALTH SERVICE ACT) FAMILY PLANNING PROGRAM 1 (2017), https://sgp.fas.org/crs/misc/RL33644.pdf [https://perma.cc/D546-C28J] ("[I]t is the only domestic federal program devoted solely to family planning and related preventive health services.").

65. KLUCHIN, *supra* note 13, at 7 ("On reservations, Native American women became targets of physicians employed by the Indian Health Service (IHS) who believed that restricting these women's reproduction would reduce their poverty and their dependence on government assistance. Between 1970 and 1976, IHS hospitals and their affiliates sterilized between 25 and 42 percent of all Native American women of childbearing age." (footnote omitted)).

66. *See generally* THEOBALD, *supra* note 8 (discussing how women of the Crow tribe experienced involuntary sterilization abuses in the 1930s).

even occurred within the BIA-run health facilities before the Transfer Act.[67]

Passed by Congress with an overwhelming vote of 298 to 32, the Family Planning Services and Population Research Act of 1970 established the Office of Population Affairs within HEW.[68] The Act's purpose was to provide and assist *voluntary* family planning services through public or private entities.[69] This would seemingly include access to contraceptives, which, by 1965, were legalized in all states and territories, courtesy of *Griswold v. Connecticut*.[70] In reality, though the Family Planning Services and Population Research Act was facially neutral, it had disparate impacts on poor women and women of color,[71] making sterilizations much more accessible by providing federal funding.[72] This is evident through the 350% increase in the number of women sterilized between 1970 and 1975, when approximately one million American women were sterilized per year.[73] Native American women were included in this sterilization spike,[74] which coincided with HEW-funded sterilization as part of IHS family planning services. And while the Act required voluntary participation, the disparate effects can also be traced to procedures conducted without informed consent or after coercion by medical staff, prevalent practices in several cases.[75] Overall, the passage of the Family Planning Services and Population Research Act of 1970 meant that sterilization became more readily available. Consequently, the involuntary sterilization of Indigenous women and other minority groups increased.

During the 1970s, HEW funded sterilizations for the poor and people of color. It is estimated that HEW funded ninety percent of the annual sterilization costs for poor people.[76] Ultimately, the reality was that with HEW's funding, physicians and social workers could abuse their authority in dealing with socially disadvantaged groups,

67. *Id.*
68. Pub. L. No. 91-572, 84 Stat. 1504 (1970).
69. *Id.*
70. Griswold v. Connecticut, 381 U.S. 479 (1965).
71. Torpy, *supra* note 3, at 4.
72. *Id.* (stating HEW funded ninety percent of annual sterilization costs for poor people in the 1970s).
73. *Id.*
74. Lawrence, *supra* note 2, at 403 (providing a chart comparing the average number of children per women per select tribe in 1970 and 1980 census records). Lawrence contends that availability of family planning services, including sterilization, contributed to lower birthrates. *Id.*; *see* Torpy, *supra* note 3, at 12 fig.1 (depicting a similar family planning HEW pamphlet utilized by IHS facilities in the 1960s and 1970s to promote sterilization of Native women as a form of birth control).
75. *See* Relf v. Weinberger, 372 F. Supp. 1196 (1974).
76. Torpy, *supra* note 3, at 4.

particularly racial minority women. Bolstered by the lore of eugenics, medical and social-work personnel often utilized their authority to pressure poor women of color into sterilization procedures.[77] This abuse of power primarily came in the form of coercion, blatant or subtle, and the lack of informed consent. It was not until *Relf v. Weinberger* that these abuses became public, and a court order required HEW to amend its regulations regarding sterilization. Although *Relf v. Weinberger* confirmed sterilization abuses and forced HEW to amend its sterilization regulations, not all groups targeted for involuntary sterilization were recognized, and not all involuntary sterilizations ceased. Both caveats were particularly true for Indigenous women.

IV. THE PRACTICE OF STERILIZING NATIVE AMERICAN WOMEN

Involuntary sterilization of Native American women occurred throughout American history; however, the practice spiked dramatically in the 1970s. In many ways, racist ideas about the inferiority of minority groups in the United States fueled these involuntary sterilizations.[78] Racist, classist, and discriminatory ideologies are the root of involuntary sterilization, prompting the federal laws that provide authorization, the agency regulations that allow facilitation, the favorable court decisions that give justification, and the practices of medical personnel that ensure implementation.[79] The following cases, investigations, and activism campaigns confirm extensive involuntary sterilizations of Native women, emphasize the pervasive structural racism at the foundation of the practice, and highlight the resistance efforts undertaken by Native American tribes and tribal members.

A. Cases of Sterilized Native American Women

Perhaps one reason involuntary sterilization of Native women is not well known is because sterilization abuse often silenced Indigenous women through fear and shame.[80] As a result, Native women

77. *Id.*

78. *See Relf*, 372 F. Supp. at 1199; Madrigal v. Quilligan, 639 F.2d 789 (1978); Ankita Rao, *Indigenous Women in Canada Are Still Being Sterilized Without Their Consent*, VICE (Sept. 9, 2019, 6:00 AM), https://www.vice.com/en/article/9keaev/indigenous-women-in-canada-are-still-being-sterilized-without-their-consent [https://perma.cc/HU3X-7V67] ("'What [Hitler] did to the Jews, they were already doing to the Indians here—the forced removal of people,' said Juana Majel Dixon, a California-based Indigenous law scholar and secretary of the National Congress of American Indians, who herself was sterilized by the Indian Health Services when she was 16 years old.").

79. *See supra* note 2 and accompanying text.

80. Carpio, *supra* note 10, at 41 (discussing how sterilization abuse often silenced Native women's voices through fear and shame). "Moreover, governmental bodies

rarely took legal action, but the few brave women, such as Norma Jean Serena, who brought suits against those involved in their involuntary sterilizations confirm involuntary sterilization of Native American women. In Serena's case, her suit prompted further investigation by Dr. Constance Redbird Pinkerton-Uri, a Choctaw-Cherokee physician, which later resulted in an investigation by the General Accounting Office (GAO) in April 1975.[81]

Serena's two-part case highlights the sterilization abuses occurring within Native communities in the 1970s.[82] In August 1970, Serena, a Creek–Shawnee Native American woman, gave birth to her third child after Child Welfare and Board of Assistance authorities in Pittsburgh, Pennsylvania, had removed her other two children.[83] On this basis, Serena was coerced into sterilization by "doctors who told her 'she had enough children[,]' . . . that any subsequent pregnancies might result in the birth of 'deformed or retarded children[,]'" and that sterilization was mandatory.[84] Like her other children, Serena's infant son was placed in foster care after Serena's social workers convinced her that she was too ill and exhausted to take care of an infant.[85] It was not until a child custody hearing two years later that Serena learned "her sterilization was not mandatory, as she had been told, and that the welfare official had lied about the possibility of deformed children."[86]

Serena's experience was far from an anomaly, and coerced consent was not uncommon in Native communities. Unfortunately, abuse of power through coercion was more common than not and also not confined to sterilization. Government-sponsored removal of and mandatory boarding school for Native children dovetailed with involuntary sterilization practices.[87] In Serena's case, three of her children

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commissioned to investigate accusations concerning involuntary sterilizations by the IHS have cut away [Native women's] voices and their stories by refusing to interview the sterilized women." *Id.* (citation omitted).

81. Torpy, *supra* note 3, at 6.
82. *See Native Woman Sues*, *supra* note 16.
83. *Id.*; Torpy, *supra* note 3, at 5 ("[S]ocial workers had come to Serena's home and demanded that she accompany her two-year-old son and her three-year-old daughter to Children's Hospital in Pittsburgh for medical examinations; once there, the caseworkers told the mother that the two children were seriously ill and needed to stay at the hospital. Shortly after, however, they were placed in homes with foster parents who were led to believe they could adopt the children.").
84. *Killing Our Future: Sterilization and Experiments*, AKWESASNE NOTES (N.Y.), Mar. 31, 1977, [hereinafter *Killing Our Future*] PROQUEST DOCUMENT ID 220286146.
85. *Native Woman Sues*, *supra* note 16.
86. *Killing Our Future*, *supra* note 84.
87. *See* KLUCHIN, *supra* note 13, at 108 ("Set in the context of poor health care, which contributed to short life spans, and the decades-old practice of removing children from Native American homes and sending them to white schools to be assimi-

were removed under false pretenses.[88] Nationally, Indigenous children were removed from their communities at a much higher rate than non-Indian children.[89] According to the Association on American Indian Affairs, almost a third of all Indigenous children were separated from their families and placed in foster homes, adoptive homes, or boarding school institutions before the passage of the Indian Child Welfare Act (ICWA) in 1978.[90] Child removal and coercive sterilization were not unique to Norma Jean Serena, they were part of the assimilation policies employed by the United States government in the twentieth century. With the aid of the Council of Three Rivers American Indian Center, Serena eventually filed a civil suit, the first of its kind, seeking the return of her three children and $20,000 in damages from the Department of Public Welfare for her involuntary sterilization.[91] Thankfully, Serena received a favorable ruling in the initial part of her suit in 1973; the jury found the social workers guilty of misrepresentation and of using false pretenses to place Serena's

lated, forced sterilization exacerbated an existing population problem that threatened the health and well-being of Native American tribes and cultures." (footnote omitted)); *see also* Torpy, *supra* note 3, at 14 ("Thousands of Native American women in the 1970s were faced with either the solicitude of losing their children or the fear of losing their ability to have children."); *Id.* at 17 ("In the 1970s, there occurred a heightened awareness about Native American culture and concern over the mass displacement of [Native] children to non-Indian foster and adoptive homes and institutions"); Margaret D. Jacobs, *Remembering the "Forgotten Child": The American Indian Child Welfare Crisis of the 1960s and 1970s*, 37 AM. INDIAN Q. 136, 136, 139 (2013) (discussing the history of Indian child removal—first to boarding schools and then to non-Indian families—with the ultimate aim of terminating the unique tribal status of Native Americans and detribalizing thousands of Native people).

88. Dillingham, *supra* note 9, at 27; Marks Jarvis, *supra* note 9, at 1; GAO REPORT, *supra* note 9*,* at 1.

89. *See* MARGARET D. JACOBS, A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD (2014); THE GENOA INDIAN SCH. DIGIT. RECONCILIATION PROJECT, https://genoaindianschool.org/home [https://perma.cc/M47X-BMVD] (last visited March 12, 2022); *see generally* 3 SHARING OUR STORIES OF SURVIVAL: NATIVE WOMEN SURVIVING VIOLENCE (Sarah Deer et al. eds., 2007) (discussing the trauma of being removed to boarding schools as children and the violence that occurred there).

90. Pub. L. No. 95-608, 92 Stat. 3069 (1978); Lorie M. Graham, *"The Past Never Vanishes:" A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1 (1998) (discussing child removal abuses before ICWA, including the Association of American Indian Affairs finding that twenty-five to thirty percent of Indian children were removed from their tribes and families, with an approximation of ninety percent of Indian child placements in non-Indian homes and setting); H.R. Rep. No. 95-1386, at 9 (1978) (Congressional report from the Committee on Interior and Insular Affairs).

91. *Native Woman Sues*, *supra* note 16; Torpy, *supra* note 3, at 5.

children in foster care, granting the return of her three children and awarding her $17,000 in damages.[92]

The second part of Serena's case, regarding her involuntary sterilization, had a less favorable outcome. In January 1979, after a seven-day trial, a jury determined Serena was not involuntarily sterilized because she had signed a consent form.[93] Nonetheless, practitioners, patients, and advocates know that involuntary sterilization can occur even if a signed consent form is on file.[94] Although Serena recognized her signature, she stated that she did not remember signing the consent form or being instructed about the surgery.[95] Testimony at the trial confirmed that Serena had signed under extreme pressure from caseworkers while she was exhausted and even indicated that she had signed the consent form the day after her delivery and sterilization surgery.[96] According to Serena: "The real reason I was sterilized is because I am poor, because I am a Native American, and because I was living with a Black man."[97] Serena's story is not unusual.[98] If anything, racist ideas about the inferiority of minoritized racial groups, like Native Americans, as sanctioned in federal Indian law and legal history,[99] marks eugenics as a logical strategy to diminish "inferior" minority groups.[100]

Although Serena's sterilization did not occur in an IHS facility, the hospital received federal HEW funding,[101] and thus Serena's case exposed involuntary sterilization abuses of Native American women perpetrated by the federal government. According to one anthropologist who testified before a Senate Committee in 1974, "one Native American woman of childbearing age is sterilized permanently for every 7

92. *Native Woman Sues*, *supra* note 16. The return of Serena's children was considered a huge win for Native American families. *Id.* Still, county authorities refused to return Serena's children until threatened with contempt of court. Torpy, *supra* note 3, at 5–6.

93. *Sterilization Charge Is Denied*, NAVAJO TIMES (Ariz.), Jan. 25, 1979, at A-20.

94. Dillingham, *supra* note 9, at 27; Marks Jarvis, *supra* note 9, at 30; GAO REPORT, *supra* note 9, at 23.

95. *Sterilization Charge Is Denied*, *supra* note 93.

96. *Sterilization Case Goes to Court*, WASSAJA (Cal.), Sept. 1977, at 36 [hereinafter *Sterilization Case*].

97. *Id.*; *see Native Woman Sues*, *supra* note 16 ("The medical reason for the sterilization of Serena, a welfare recipient, was officially stated as 'socioeconomic' and the prime reason for the removal of her children, according to the support coalition, was her association with black people.").

98. Carpio, *supra* note 10, at 46 (conducting multiple interviews with Native American women who were involuntarily sterilized without their informed consent or even knowledge, including and citing their stories under pseudonyms).

99. *See* ROBERT A. WILLIAMS JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289–90 (1955).

100. *See* WILLIAMS, *supra* note 99; *Tee-Hit-Ton Indians*, 348 U.S. at 289–90.

101. *See Sterilization Charge Is Denied*, *supra* note 93.

Native American children born."[102] For Native activists, including Dr. Pinkerton-Uri, who worked with the Claremore, Oklahoma, IHS hospital, Serena's case generated suspicions regarding other IHS hospitals serving Indigenous women.[103] Serena's case ultimately paved the way for Dr. Pinkerton-Uri's and the GAO's investigations, leading to greater scrutiny of Native American sterilization abuses.

Not all cases regarding involuntary sterilization of Native American women garnered publicity like Serena's. Several other suits brought by Native women for involuntary sterilization were settled outside court,[104] including the 1977 class-action lawsuit brought by three Northern Cheyenne women from Montana following the release of the GAO report.[105] These three women filed suit against HEW, alleging their sterilizations were done without their full consent or knowledge.[106] Their attorney, Michael Zavala, "directed his suit only against the hospital physicians who allegedly coerced the women into sterilization by implying that they would lose their welfare benefits, that they needed the surgery, or that the surgery could be reversed at a future date."[107] All of these actions directly violated the amended HEW regulations following *Relf*.[108] However, each of the three women accepted a cash settlement, conditioned on their silence regarding the terms of the deal and their sterilization experiences, before the case went to trial.[109] In many ways, these Northern Cheyenne women could be considered lucky that they received reparation for their sterilization abuse, even if it silenced them. Many other Native American women who suffered sterilization abuses did not seek any legal remedy or speak of those abuses for a very long time, if ever, because of the emotional trauma of being involuntary sterilized.[110]

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102. *Sterilization Case*, *supra* note 96, at 36.

103. Torpy, *supra* note 3, at 6.

104. *Id.*

105. Richard M. Harley, *Indian Women Plan To Sue U.S. in Sterilization Cases*, CHRISTIAN SCI. MONITOR, May 27, 1977, at 6, PROQUEST DOCUMENT ID 5911966758.

106. *Id.*

107. Torpy, *supra* note 3, at 9 ("The women's attorney believed that the lawsuit ended this way in order to avoid additional publicity that might encourage further litigation by other victims.").

108. *See supra* text accompanying note 53.

109. Torpy, *supra* note 3, at 9.

110. *See Native Woman Sues*, *supra* note 16; Marks Jarvis, *supra* note 9, at 1; Marks Jarvis, *supra* note 16, at B-6; *U.S. Gov't Report*, *supra* note 16, at A10; AMÁ, *supra* note 16; *see also* Carpio, *supra* note 10, at 48–49 (pointing out that legal remedy is also unlikely because of the expense and not completely feasible because the burden of proof is on the petitioner seeking remedy against a major governmental agency).

B. Activism and Investigation of Native Sterilization

Not all medical practitioners managed to negotiate for silence regarding accusations of sterilization abuses. In 1972, a healthy twenty-six-year-old Native woman entered Dr. Constance Redbird Pinkerton-Uri's office requesting a womb transplant after being sterilized by the IHS six years earlier.[111] This request led Dr. Pinkerton-Uri to investigate accusations against the federal government for genocide against Indigenous people.[112] She demanded a congressional investigation, which prompted Senator James Abourezk, a Democrat of South Dakota, to request information about "medical research involving American Indian subjects[,] research on the control of trachoma[, and] permanent sterilization of Indians at Indian Health Service facilities and contract facilities" from the GAO on April 30, 1975.[113] The results of this GAO investigation released on November 4, 1976, were astounding.

The GAO report investigated *only* a third of the areas serviced by the IHS: Aberdeen, South Dakota, Albuquerque, New Mexico, Oklahoma City, Oklahoma, and Phoenix, Arizona,[114] were selected because they attended to a significant number of the Native American population.[115] The GAO reported that during the three-fiscal-year period between 1973 and 1976, 3,406 Native American women were sterilized in the four selected areas.[116] These figures are more startling when they are broken down. For example, in the Phoenix area, there were, on average, 10,700 Native women of childbearing age between 1973 and 1976.[117] Of this number, 684 were sterilized—approximately 6.4%.[118] There were roughly 13,000 Native women of childbearing age each year in the Aberdeen area, and 638 sterilizations occurred—approximately 4.91%.[119] With approximately 21,500 Native women, there were 1,482 sterilizations performed in Oklahoma City—approximately 6.89%.[120] According to the 1970 United States

111. Marks Jarvis, *supra* note 9, at 1.
112. *Id*.
113. GAO REPORT at 1–18 (containing investigations on the health and drug experimentations on Native Americans, including Native children).
114. Dillingham, *supra* note 9, at 27.
115. *Id.*
116. GAO REPORT, *supra* note 9, at 3, 18 ("Data for fiscal year 1976 is for a 12-month period ending June 30, 1976. . . . For the same period, 142 male sterilization procedures were reported. IHS' information system does not classify these sterilizations as voluntary and therapeutic."); Lawrence, *supra* note 2, at 407 (noting sterilization numbers do not include those done in Albuquerque because all those sterilizations were done in contract facilities).
117. GAO REPORT, *supra* note 9, at 28.
118. *Id.* (dividing the total number of sterilization procedures by the average number of childbearing women, resulting in 6.4% of childbearing women being sterilized).
119. *Id.*
120. *Id.*

Census, Native people only accounted for 763,594[121] of the 203,392,031 total resident population of the United States,[122] meaning that Native people only accounted for 0.38% of the total United States population in 1970. Of the total sterilizations, 3,001 Indigenous women were within childbearing years (fifteen to forty-five years old), and 1,024 women were sterilized in IHS contract facilities—roughly thirty-five percent of the total number of sterilizations.[123] These contracted health care facilities provided services and personnel that IHS hospitals lacked.[124] Although the GAO report did not claim or confirm that IHS was directly involved in coerced involuntary sterilizations of Native American women, the report stated that IHS had not followed required HEW regulations, which placed the responsibility of ensuring contract facility compliance on the agency.[125] Thus, it is reasonable to infer that involuntary sterilizations were the result of IHS failures, since officials failed to monitor informed consent procedures and did not contractually require doctors or facilities to follow HEW regulations.[126] Where the IHS had performed sterilizations, GAO investigators found that the agency used informed consent forms that did not adhere to the standards set in place by HEW.[127]

To abide by the district court's order in *Relf*, HEW issued regulations that "continued a July 1973 moratorium on sterilizing persons who were under 21 years of age or mentally incompetent" and in-

121. *1970 Census—Subject Reports: American Indians*, U.S. CENSUS BUREAU tbl. 2 (1973), https://www.census.gov/library/publications/1973/dec/pc-2-1f.html [https://perma.cc/LV6N-VEYP].

122. *Decennial Census of Population and Housing by Decades*, U. S. CENSUS BUREAU, https://www.census.gov/programs-surveys/decennial-census/decade.1970.html [https://perma.cc/UTY8-DZV7] (last visited March 12, 2022).

123. *Id.* at 4.

124. *See* KLUCHIN, *supra* note 13, at 108 ("The IHS provided poor health care in rundown, underfunded, understaffed, and underequipped hospitals and clinics that could not meet the needs of Native Americans. Understaffing prevented many Native Americans from receiving health care quickly. To compensate, the IHS contracted out its services, which encouraged forced sterilization, as the IHS made no effort to regulate contract facilities.").

125. Dillingham, *supra* note 9, at 27.

126. *Id.*

127. *Id.*; *see* Marks Jarvis, *supra* note 9, at 30; GAO REPORT, *supra* note 9, at 19 ("We found no evidence of IHS sterilizing Indians without a patient consent form on file, although we did find several weaknesses in complying with HEW's sterilization regulations. The primary weaknesses related to (1) sterilization of persons under 21 years of age, (2) inadequately documenting what the Indian subjects were told before signing the consent form (largely attributable to the use of consent forms that failed to meet HEW standards), (3) lack of widespread physician understanding of the regulations, and (4) the lack of definitive requirements for informed consent when sterilizations are performed by contract doctors at contract facilities."); Relf v. Weinberger, 372 F. Supp. 1196, 1201 (D.D.C. 1974) (amending HEW regulations).

formed consent was required for sterilizing an individual.[128] Regulations dictated that:

> Informed consent must be evidenced by a document which is either (1) a written consent document detailing all the basic elements of informed consent or (2) a short form written consent document indicating that the basic elements of informed consent have been presented orally to the patient, and a summary of the oral presentation. Both forms must contain the following statement at the top: "Your decision at any time not to be sterilized will not result in the withdrawal or withholding of any benefits provided by programs or projects."[129]

The GAO investigation noted several violations of these HEW standards by the IHS and its contract facilities.[130] In particular, the GAO investigation noted four areas of IHS non-compliance with HEW sterilization standards. The non-compliance included the sterilizations of persons (women) under twenty-one years old, the lack of widespread physician understanding of the amended HEW regulations, inadequate documenting of informed consent forms, and failure to definitively require informed consent for sterilizations at contract facilities by contract doctors.[131] Such rampant disregard for patient protection made Native women vulnerable and more susceptible to involuntary sterilization through coercion and abuse by medical staff.[132]

Between July 1, 1973, and March 30, 1976, there were thirty-six moratorium violations for sterilizing women under twenty-one years of age.[133] Although the national IHS director had contacted IHS area directors to inform them of the HEW moratorium and reconfirmed the regulations multiple times, the report quotes the deputy director of program operations as stating that most IHS areas "were under the impression they could either perform sterilization on minors or mental incompetents with proper (72 hours) informed consent and/or that they could employ the age of majority of the respective state in which procedure was performed (18 years [old] in most cases)."[134] This lack of widespread physician understanding of the amended HEW regula-

128. GAO REPORT, *supra* note 9, at 4.

129. *Id.* at 19; *see id.* at 2. According to the report, the six basic elements of informed consent are: "fair explanation of the procedures to be followed," "a description of the attendant discomforts and risks," information about potential benefits, communication of other appropriate alternatives that would provide beneficial results, "an offer to answer any inquiries concerning the procedures," and an advisement that the individual may stop the procedure or activity at any point. *Id.* at 6–7. Sterilization required physicians to provide additional information about other family planning options and to convey that the procedure was irreversible. *Id.* at 19.

130. *Id.* at 19.

131. *Id*.

132. Carpio, *supra* note 10, at 43.

133. GAO REPORT, *supra* note 9, at 4, 22; Carpio, *supra* note 10, at 43.

134. GAO REPORT, *supra* note 9, at 21–22.

tions allowed these moratorium violations to occur.[135] Of these thirty-six violations, only twelve violations could be explained by a legitimate medical reason.[136] Outside the moratorium violation context, the GAO reviewed and assessed the medical justification given for sterilizations in the Phoenix area from April through September of 1975, but investigators did not make much of the fact that nineteen sterilization cases "could not be resolved from the records," even with the assistance of a physician.[137] The GAO report also stated that "IHS administrative clerks inadvertently authorized payment for five cases at contract facilities," as well as covering the procedures at IHS hospitals.[138] In other words, the federal government paid for sterilizations that went against HEW regulations to curb sterilization abuses confirmed by the court in *Relf*.

Similarly, the GAO report highlighted the inadequate informed consent procedures that officials attributed to "HEW's inability to develop specific sterilization guidelines and a standardized consent form for all its agencies to use."[139] The GAO documented the IHS's complete failure to comply with consent regulations within its own facilities: not a single one of the 113 consent forms reviewed fully complied with HEW regulations.[140] The use of these forms was the "most blatant illustration of misinforming American Indian women about their rights or the necessity of surgical procedures."[141] Using these forms meant that sterilized Native women could not be "adequately informed about the risks, discomforts, and irreversibility of the proce-

135. *See id.*; Carpio, *supra* note 10, at 44.

136. GAO REPORT, *supra* note 9, at 21.

137. *Id*. at 24–25.

138. *Id*. at 22.

139. *Id*. at 23–26.

140. *Id*. at 23 (reporting findings after review of 113 consent forms for voluntary sterilizations performed within a six-month period in 1975 at IHS facilities in Aberdeen, Oklahoma City, and Phoenix).

141. Carpio, *supra* note 10, at 44. An evaluation of consent forms showed that, of the 113 consent forms used, ninety-one sterilization consents were documented using the HSM-83 form, typically used for "medically required, rather than voluntary," or non-therapeutic sterilizations. GAO REPORT, *supra* note 9, at 23. Ten sterilization consents were documented with standard form 522, used for all types of surgery. Neither complied with HEW regulations because the forms:

> (1) failed to indicate that the basic elements of informed consent had been presented orally to the patient, (2) were not supplemented as short form documents by written summaries of what the patient was orally presented, and (3) failed to contain the required printed statement advising individuals of their rights in case they decide not to be sterilized.

Id. The forms also did not advise patients that their decision regarding sterilization would have no effect on their federal benefits. *Id.* at 26. Though HAS-83, the consent form used in twelve of the 113 cases, complied with HEW regulations, medical personnel did not adequately document the requisite oral presentation to meet informed consent protocols. *Id.* at 24.

dure" before the sterilization and left them vulnerable to coercion.[142] Similarly, a review of consent forms in the Albuquerque area found that three of six facilities did not meet HEW standards.[143] According to the GAO report:

> IHS officials in the Albuquerque and Aberdeen areas said that they do not monitor the adequacy of informed consent received by contract care doctors or facilities. They also said that the contracts they have with doctors and facilities do not stipulate that HEW regulations for sterilization procedures are to be followed.[144]

The GAO noted that in fact, HEW regulations made the IHS responsible for ensuring contract facility compliance with HEW sterilization guidelines, pointing out that the regulations applied to any federally financed health service program, "whether *by grant or contract*, administered by the Public Health Service."[145]

Despite its damning findings, there were three overall weaknesses of the GAO investigation itself. First, the investigation was limited in scope. GAO investigators studied just one-third of the IHS coverage areas and did not interview IHS hospital staff or sterilized Native women,[146] exclusively relying on IHS documents.[147] Second, the investigation disregarded the cultural differences and power differential between the medical staff and Native American women.[148] The report missed consideration of the possible need for translators; some Native American women may not have spoken or read English, like the Mexican American women in *Madrigal v. Quilligan*. Even if patients knew English, they might not have understood the medical terminology out-

142. GAO REPORT, *supra* note 9, at 24 ("We did not interview sterilized patients to determine if they were adequately informed about the risks, discomforts, and irreversibility of the procedure because . . . we believe that such an effort would not have been productive.").

143. *Id.* at 25–26 ("The consent forms mainly failed to provide full disclosure or space for additional comments on what the patient was told about the basic elements of informed consent. The forms also failed to include the required statement, 'Your decision at any time not to be sterilized will not result in the withdrawal or withholding of any benefits provided by programs or projects.'").

144. *Id.* at 26.

145. *Id*. (quoting 42 C.F.R. § 50.201).

146. Letter from Elmer Staats, U.S. Comptroller Gen., to Sen. James Abourezk 4 (Nov. 4, 1976), https://www.gao.gov/assets/hrd-77-3.pdf [https://perma.cc/62L7-5ANA]. There was an agreement between Senator Abourezk's and Comptroller General Staats's offices that the investigators would not interview sterilized Native women. *Id.* The GAO believed "such an effort would not be productive because recently published research noted a high level of inaccuracy in the recollection of patients 4 to 6 months after giving informed consent." *Id.*

147. Dillingham, *supra* note 9, at 27.

148. Carpio, *supra* note 10, at 48 (discussing the failure to account for cultural difference and potential translation issues between the English-speaking medical system and Native American women).

lining the procedure and its implications.[149] Third, the investigation suffered from a misguided focus—concentrating on a surface-level inquiry into the consent forms that included women's signatures. Scholars and practitioners largely agree that involuntary sterilization can occur even if a consent form is signed and on file, and investigators never questioned under what conditions the documents were signed or whether there was evidence of other undocumented sterilizations.[150] Of these issues, the greatest shortcoming was the disregard of Native women's voices. Without the interviews of sterilized Native women, the GAO investigators could not fully comprehend the extent of the sterilization abuses within the IHS. In many ways, the GAO report silenced the sterilized Native women's voices by refusing to interview them. Overall, the IHS's inability to follow HEW regulations and the shortcomings of the GAO investigation itself accentuate the horrifying thought that 3,406 Indigenous women were likely sterilized without proper informed consent and thus, involuntarily.[151]

Thankfully, as the GAO administered its governmental investigation of IHS sterilizations and other Native abuses occurring in Native communities,[152] Native advocates, like Dr. Pinkerton-Uri, were simultaneously conducting studies of their own.[153] As highlighted by the GAO report, many Native women depended on IHS hospitals and contract facilities for their healthcare needs.[154] According to Dr. Pinkerton-Uri's study, many Indigenous women generally agreed to sterilization operations because they were afraid or threatened with the removal of their children or the loss of welfare benefits.[155] The GAO report incidentally confirms the women's fear by revealing the pattern of improper informed consent procedures that frequently failed to notify women that their decision had no bearing on benefits.[156] Similarly, Dr. Pinkerton-Uri's study revealed that most Native women were heavily sedated during a Caesarean section or in much

149. *See id.* at 48; KLUCHIN, *supra* note 13, at 102 ("Many Mexican, Puerto Rican, and Native American women found that physicians exploited the language barrier between them when patients did not speak English fluently."); *1978:* Madrigal v. Quilligan, *supra* note 18 (California implemented bilingual informational material that described the sterilization procedure and consequence after *Madrigal v. Quilligan*, which involved ten Mexican American women, some who barely spoke or read English).

150. Dillingham, *supra* note 9, at 27; Marks Jarvis, *supra* note 9, at 1; GAO REPORT, *supra* note 9, at 4.

151. *See* KLUCHIN, *supra* note 13, at 109.

152. *See* GAO REPORT, *supra* note 9, at 3 (researching trachoma in American Indians, including Native children).

153. *See* KLUCHIN, *supra* note 13, at 109–11.

154. *See* GAO REPORT, *supra* note 9, at 3.

155. Marks Jarvis, *supra* note 9 at 30; *Genocidal Practices Continue*, WIN AWENEN NISITOTAM (Sault Ste. Marie Tribe of Chippewa Indians, Mich.), July 1978, at 6.

156. *See supra* notes 141, 143.

labor pain when consent was sought.[157] Additionally, most women could not understand the consent forms because they were written in English at the twelfth-grade level.[158] Dr. Pinkerton-Uri interviewed "well over 1000 sterilized Indian women[, and a]ll but one of them . . . was influenced in her decision to be sterilized by an IHS doctor—only one had made the choice on her own."[159]

Dr. Pinkerton-Uri's study with the Indian Women United for Social Justice group regarding the Claremore Oklahoma Hospital perhaps offers the most startling example of abuse among the fifty-one IHS hospitals. Records from 1973 indicate a fifty-eight-bed hospital performed 194 sterilizations on Native Americans in one year.[160] One out of every four Indians admitted were sterilized, with four tubal ligations performed on women under twenty years old and thirteen hysterectomies performed on women under thirty years old, including one on a twenty-two-year-old.[161] Racist ideology pervades healthcare practices; for example, while Native women faced coercive sterilizations, doctors denied sterilizations requested by non-Native women,[162] and a doctor at Claremore Oklahoma Hospital alarmingly asserted that Indian tissue was medically different from his own.[163] Overall, Dr. Pinkerton-Uri and other Native activists claimed that roughly twenty percent of Native American women were sterilized[164]

157. *Genocidal Practices Continue*, *supra* note 155, at 7 ("Often the consent is obtained when a woman is admitted for childbirth, even while she is still groggy from anesthetics.").

158. Marks Jarvis, *supra* note 9 at 30; *see* Carpio, *supra* note 10, at 46–48; *see also* Lawrence, *supra* note 2, at 413 (detailing interviews with Native American women who had been sterilized after being pressured by authorities or given consent forms while under anesthesia).

159. *Genocidal Practices Continue*, *supra* note 155, at 6.

160. *Id.* at 7.

161. *Id.*

162. *See* JOHANNA SCHOEN, CHOICE AND COERCION: BIRTH CONTROL, STERILIZATION, AND ABORTION IN PUBLIC HEALTH AND WELFARE (2005); KLUCHIN, *supra* note 13, at 114–48 (discussing representative hospital policy requiring "fit" white women to obtain certification of lack of mental fitness from three doctors before the hospital would perform contraceptive sterilization procedures).

163. *Id. See generally Claremore Hospital in Lawsuits*, WASSAJA, Jan.–Feb. 1975, at 10 (discussing the malpractice and civil rights lawsuits filed against Claremore Indian Hospital).

164. *Genocidal Practices Continue*, *supra* note 155, at 6 ("Noting that thousands of sterilizations were performed in just four IHS regions during the fiscal years 1973–76, Dr. Uri calculates that at such a rate, the IHS would wipe out all pureblood Indian races in less than 15 years."). Dr. Pinkerton-Uri claimed that "[a]ll the pureblood women of the Kaw tribe of Oklahoma have now been sterilized. At the end of this generation the tribe will cease to exist!" *Id. See generally* Douglas Martin, *William Mehojah, a Kaw Leader, Dies at 82*, N.Y. TIMES, (May 5, 2000), https://www.nytimes.com/2000/05/05/us/william-mehojah-a-kaw-leader-dies-at-82.html [https://perma.cc/75G6-HZM3] (noting the last full-blooded Kaw member, William Mehojah, died in 2000). Other scholars' works have cited higher percentages of Native women were sterilized. *See* Lawrence, *supra* note 2, at 400

involuntarily through practices upheld by the federal government's laws, regulations, and administration. Some blatantly called it genocide.[165]

V. POSSIBLE LEGAL REMEDIES AND NEXT STEPS

In its failure to protect Native women by, among other things, properly monitoring federally employed physicians, the United States enabled and permitted involuntary sterilization of Native American women in the 1970s through its laws, HEW and IHS administrative regulations, and court decisions. The government's culpability in inflicting the harm is evident, and therefore it has a duty to provide some type of compensation for the harm. In the case of involuntarily sterilized Native American women, recognition and reparation are two legal remedies that could rectify the clearly documented harm caused by the United States government.

A. The Importance of Recognition

Above all, official recognition that the federal government enabled the involuntary sterilization of Native American women during the twentieth century is the central and most crucial legal remedy possible. Although laws regarding sterilization were facially neutral, the administrative acts implemented by the federal government had disparate impacts upon Native American women and other women of color. It was through these disparate impacts that mass sterilization of Native American women occurred. Unlike some other individuals in socially disadvantaged minority groups, most involuntarily sterilized Native American women never received legal recognition for the abuse. In many ways, this lack of recognition furthers the psychological injury of those sterilized. Without recognition, no further legal remedy can occur. Thus, the United States must acknowledge its role in the sterilization abuses of Native American women and their respective tribes. This recognition could come in the form of an official apology, similar to that of states who have already apologized for their role in eugenics.[166]

("Native Americans accused the Indian Health Service of sterilizing at least 25 percent of Native American women who were between the ages of fifteen and forty-four during the 1970s."); KLUCHIN, *supra* note 13, at 108 ("Between 1970 and 1976, IHS hospitals and affiliates sterilized between 25 and 42 percent of all Native American women of child-bearing age." (footnote omitted)).

165. *Genocidal Practices Continue*, *supra* note 155, at 6; *Claremore Hospital in Lawsuits*, *supra* note 163, at 10; *see* Lawrence, *supra* note 2, at 414; Carpio, *supra* note 10, at 50.

166. *See supra* note 20 and accompanying text.

B. Reparations

Monetary compensation from the federal government to the involuntarily sterilized Native women (or their families, if the victim is deceased) and their tribes would be the ideal form of reparation, made possible by formal recognition.[167] This is not a novel or impossible idea. A few states have already enacted compulsory sterilization compensation acts to provide reparation to those involuntarily sterilized and still living. North Carolina was the first state to pass a compensation act, and its Eugenics Asexualization and Sterilization Compensation Program of 2013 is a good example of how such compensation should work.[168] According to the Justice for Sterilization Victims Foundation, North Carolina's eugenics program sterilized close to 7,600 men and women, and forty percent of the victims were minorities, including African American and Native American women.[169] North Carolina's department of administration set aside a ten-million-dollar fund to compensate individuals who were sterilized under the orders of the state eugenics board.[170] In 2014, 220 survivors received checks for $20,000.[171] Congress even recognized these state compensation acts by passing a law that excludes payments from state eugenics compensation programs from being considered as income for tax and other purposes.[172]

North Carolina's Eugenics Asexualization and Sterilization Compensation Program of 2013, however, was not perfect. Because the statute limits compensation to those sterilized under orders by the Eugenics Board of North Carolina, individuals who were sterilized by local health or welfare departments (facilities that often administered HEW family planning services) are ineligible to receive compensation. Another stipulation within the act provides that only victims themselves were eligible to receive compensation; victims' families or tribes receive nothing if the victim is deceased.[173]

In July 2021, California enacted the Forced or Involuntary Sterilization Compensation Program, administered by the California Victim

167. *See Genocidal Practices Continue*, *supra* note 155, at 6.
168. N.C. GEN. STAT. § 143B-426.50 (2014).
169. N.C. JUST. FOR STERILIZATION VICTIMS FOUND., QUESTIONS & ANSWERS ON EUGENICS IN N.C. 2 (2014), https://files.nc.gov/ncdoa/JSV/JS-brochure.pdf [https://perma.cc/P8E6-YMDZ] (noting statistics regarding who was affected by the North Carolina Eugenics Board program and other information).
170. N.C. GEN. STAT. § 143B-426.57 (2014).
171. Eric Mennel, *Payments Start for N.C. Eugenics Victims, But Many Won't Qualify*, NPR (Oct. 31, 2014, 5:04 PM), https://www.npr.org/sections/health-shots/2014/10/31/360355784/payments-start-for-n-c-eugenics-victims-but-many-wont-qualify [https://perma.cc/NS7C-PAF7].
172. 42 U.S.C. § 18501 (excluding state eugenics compensation programs from being considered as income in determining eligibility for federal public benefits).
173. N.C. GEN. STAT. § 143B-426.50 (2014).

Compensation Board, to compensate "[a]ny survivor of state-sponsored sterilization conducted pursuant to eugenics laws that existed in the State of California between 1909 and 1979."[174] California's compensation act applies to victims of the state eugenics law, repealed in 1979, and to female prison inmates sterilized while under the custody and control of the Department of Corrections and Rehabilitation.[175] Like North Carolina's compensation program, however, this compensation act is also limited to individuals who are still living and were sterilized at a facility under the control of the State Department of State Hospitals or the State Department of Developmental Services.[176] There is no denying that survivors who suffered sterilization are entitled to compensation. However, sterilization of one family member affects all family members because of the psychological and emotional trauma resulting from the sterilization, and lateral and intermediate family members should be allowed to receive compensation if victims are deceased.

The federal government must provide legal compensation for involuntarily sterilized Native American women. Although some Native American women may qualify for existing compensation acts, an overwhelming number of Native women are ineligible because they were not sterilized in states that have enacted a compensation act or they do not meet the restrictions set by state compensation acts.[177] Therefore, the United States government needs to provide direct compensation to all Indigenous women who were involuntarily sterilized (or to their families, if the victim is deceased) and to their respective tribes. The sterilization of Indigenous women had a devasting impact on their tribes' survival. Although recognition and reparation will not allow Native women who were involuntarily sterilized to have more children or undo the damage to Native American communities, these two possible legal remedies will offer some closure, acknowledgement, and reparation for this harm inflicted on them.[178]

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174. CAL. HEALTH & SAFETY CODE § 24210 (West 2021).

175. *Id.*

176. *Id.*

177. *See* GAO REPORT, *supra* note 9, at 18. Note that none of the areas highlighted in the GAO report have enacted compensations acts. *Id.* Further, notice the stipulations highlighted in North Carolina and California's compensation acts do not include IHS facilities or IHS contract facilities. N.C. GEN. STAT. § 143B–426.50 (2014); CAL. HEALTH & SAFETY CODE §§ 24210–24217 (West 2021).

178. AMÁ, *supra* note 16 (concerning the abuses to Native American women, including involuntary sterilization). The documentary film *Amá* explains how restorative justice typically focuses on shaping remedies based on what is sought and desired by the impacted victims. Because involuntary sterilization is a difficult subject, and many Native Americans were affected, a variety of remedies are sought, including recognition. *Id. But see, e.g.*, Mary Annette Pember, *'Amá' and the Legacy of Sterilization in Indian Country*, REWIRE NEWS GRP., (Mar. 15, 2018, 5:00 PM), https://rewirenewsgroup.com/article/2018/03/15/ama-legacy-sterilization-indian-

VI. CONCLUSION

Overall, the United States government permitted involuntary sterilization of Native American women during the 1970s. Facially neutral laws and administrative acts regarding sterilization had disparate impacts on minority and socially disadvantaged communities, particularly Indigenous women, because of the complicated tribal relationship with the federal government. In effect, involuntary sterilization inflicted a form of genocide on Native Americans, especially when considered in tandem with the rampant removal of Native children from their families in the same era.[179] As a result, sterilized Native women and their respective tribes should receive recognition and reparation as possible legal remedies to rectify the legal harm committed.

country/ [https://perma.cc/FE4E-VULA] ("Apologies or money from the government can't give me my unborn children . . . I am just sharing my personal experience to feed that little light inside of me. Maybe it will help somebody." (quoting Jean Whitehorse, a Navajo woman featured in the film)).

179. *See supra* note 165 and accompanying text.