

RESOLVING WHAT IS A “FORCED” ABORTION AND STERILIZATION PROCEDURE UNDER SECTION 601(A) OF THE IIRIRA: EXPANDING ASYLUM ELIGIBILITY BEYOND CHINA’S ONE-CHILD POLICY TO PROTECT MARGINALIZED WOMEN

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The United States Congress enacted Section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996 to protect asylum seekers fleeing China’s One-Child Policy (OCP). Such Chinese asylum seekers have primarily utilized the statute to secure asylum grants on the grounds of being subjected to a forced sterilization or forced abortion. However, while the world is familiar with China’s now defunct OCP, researchers have shed light on a lesser-known practice—the global prevalence of involuntary sterilization by medical providers, both forced and coerced, targeting marginalized women. The published case law’s focus on involuntary sterilization within the context of the OCP raises questions of whether the statute provides equal protection to asylum seekers who were subjected to sterilization outside of China and without a similar government-stipulated policy.

This Note explores three groups of marginalized women who are often targeted for involuntary sterilization, as well as the circumstances under which they are forcibly and coercively sterilized. It analyzes how the Board of Immigration Appeals (BIA) and some circuit courts have defined what constitutes a “forced” sterilization or abortion within the context of the OCP. It also presents an analytical framework for why Section 601(a) extends

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to asylum seekers outside of China. Based on this framework, this Note further argues that attorneys and physicians should widely screen their female asylum clients for involuntary sterilization as a means of potentially securing an additional path, with a lower evidentiary burden, towards an asylum grant.

TABLE OF CONTENTS

INTRODUCTION	228
PART I.....	231
A) The Basic Structure of the United States' Asylum System	231
B) China's One-Child Policy	234
1) China Establishes Its One-Child Policy	234
2) Methods of Enforcing the One-Child Policy in China	235
C) Coercive Population Programs Violate Established International Human Rights Standards	236
D) The Creation of Section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)	238
1) The Adjudication of Chinese Asylees' One-Child Policy Cases Prior to Section 601(a)	238
2) Congress Passes Section 601(a) to Repeal <i>Matter of Chang</i> ..	240
E) The Limitations of Section 601(a)	241
PART II.....	243
A) Marginalized Groups of Women Are Targeted for Forced Sterilizations and Coerced Sterilizations	243
1) Women Living with HIV	244
2) Women Who Are Members of Racial and Ethnic Minority Groups.....	246
3) Impoverished Women	248
B) Practices Under Which These Sterilizations Are Forced and Coerced	250
1) Doctors Obtain a Woman's Consent While She Is Under Duress	250
2) The Woman's Consent Is Invalid.....	251
3) The Woman's Consent Was Not Obtained	252
C) Section 601(a)'s Application to Asylum Seekers Who Were Not Persecuted Under China's OCP.....	253
1) A Statutory Interpretation of Section 601(a)	253

2)	U.S. Courts' Interpretation of What Constitutes a "Forced" Abortion and Sterilization Under Section 601(a).....	254
a)	"Forced" Includes Both Physical and Non-Physical Forms of Violence and Threats, But Not Mere Pressure.....	254
b)	Various Interpretations of the Level of State Involvement Required to Find That an Abortion or Sterilization Was "Forced"	256
c)	Resolving "Forced" as Defined by the Courts to Extend Section 601(a) to Other Asylum Seekers	259
PART III	264
A)	A Call to Action for Immigration Advocates	264
1)	Attorneys Need to Routinely Screen Female Clients for Involuntary Sterilization.....	264
2)	Physicians Conducting Medical Evaluations for Asylum Claims Should Screen Female Clients for Involuntary Sterilization ..	266
a)	The Value of Forensic Medical Evaluations for Asylum Seekers	266
b)	How Physicians Should Approach Forensic Medical Evaluations for Involuntary Sterilization	270
CONCLUSION	271

INTRODUCTION

A Garifuna woman wakes up in a Honduran hospital bed after enduring hours of excruciating pain and discomfort while giving birth to her child. She may even still be feeling the effects of the anesthesia administered to her during labor or for a cesarean section. Her physician approaches her about performing a tubal ligation, a medical procedure where her fallopian tubes would be cut, tied, or blocked,¹ to prevent pregnancies in the future. When she expresses her desire to have more children and inquires about what the procedure entails, the physician describes the surgery as a temporary form of birth control that can be reversed later. He does not present alternative contraceptive methods, but instead insists that she sign the consent forms placed in front of her. She does not learn that she is sterile until years later when, applying for asylum, her attorney urges her to get a fertility test.²

Often, women who are marginalized due to their race, ethnicity, socioeconomic status, or other factors are most susceptible to being sterilized without informed consent.³ Their eligibility for asylum is based on evidence of past persecution on account of one or more statutorily protected

1. *Tubal Ligation*, MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/tubal-ligation/about/pac20388360> [<https://perma.cc/GS93-RWPF?type=standard>].

2. This narrative is an amalgamation of client stories from interviews with immigration attorneys who have experience with involuntary sterilization asylum cases not involving China's One-Child Policy (OCP). Any personal identifying information of these clients has been excluded to preserve their anonymity. Telephone Interview with Claudine-Annick Murphy, Staff Att'y, The Legal Aid Soc'y (Dec. 1, 2022); Zoom Interview with Deirdre Stradone, Co-Deputy Dir. of the Immigr. Intervention Project, Sanctuary for Fams. (Nov. 3, 2022).

3. The clients who were involuntarily sterilized outside of China were Indigenous Central American women, particularly Garifuna women. Some were also HIV positive. Telephone Interview with Claudine-Annick Murphy, Staff Att'y, The Legal Aid Soc'y (Dec. 1, 2022); Zoom Interview with Deirdre Stradone, Co-Deputy Dir. of the Immigr. Intervention Project, Sanctuary for Fams. (Nov. 3, 2022); Sylvia Miller, the third immigration attorney I interviewed, has only had clients who were forced to have an abortion apply for asylum under Section 601(a), but they were also Indigenous Central American women. Zoom Interview with Sylvia Miller, Staff Att'y, Colectiva Legal del Pueblo (Jan. 20, 2023).

grounds,⁴ such as race or membership in a particular social group.⁵ If a client is unaware that she was sterilized without consent or that involuntary sterilization makes her eligible for asylum, her attorney may not include this information in her asylum application. This information may only be included if involuntary sterilization is intentionally screened during the client intake process or in later meetings.⁶

Under Section 601(a) of the IIRIRA,⁷ an individual who was subjected to a forced abortion or involuntary sterilization is eligible for asylum based on suffering persecution on account of their political opinion.⁸ Chinese asylum seekers victimized by China's One-Child Policy (OCP)⁹ have been the principal users of this provision because it was enacted in direct response to Chinese asylum seekers fleeing the OCP.¹⁰ Nevertheless,

4. Telephone Interview with Claudine-Annick Murphy, Staff Att'y, The Legal Aid Soc'y (Dec. 1, 2022); Zoom Interview with Deirdre Stradone, Co-Deputy Dir. of the Immigr. Intervention Project, Sanctuary for Fams. (Nov. 3, 2022); see Deborah Ottenheimer et al., *Physician Complicity in Human Rights Violations: Involuntary Sterilization Among Women from Mexico and Central America Seeking Asylum in the United States*, 89 J. FORENSIC LEG. MED. 1, 4 (2022) (observing that, in a study of fourteen Central American women who filed for Section 601(a) asylum, the average number of protected grounds claimed was 1.79).

5. Telephone Interview with Claudine-Annick Murphy, Staff Att'y, The Legal Aid Soc'y (Dec. 1, 2022); Zoom Interview with Deirdre Stradone, Co-Deputy Dir. of the Immigr. Intervention Project, Sanctuary for Fams. (Nov. 3, 2022).

6. See Nermeen S. Arastu, *Access to a Doctor, Access to Justice? An Empirical Study on the Impact of Forensic Medical Examinations in Preventing Deportations*, 35 HARV. HUM. RTS. J. 47, 109 (2022) (describing how medical evaluators can help attorneys learn about and identify less common asylum claims like involuntary sterilization).

7. Section 601(a) of the IIRIRA amended the Immigration and Nationality Act (INA). I refer to the provision as Section 601(a) throughout the Note, and I cite to the *United States Code*.

8. 8 U.S.C. § 1101(a)(42)(B).

9. Sylvia Miller, *From China's One-Child Policy to Central America's Gender-Based Violence Epidemic: An Argument for Expansive Application of the "Coercive Population Control" Political Opinion Ground*, 3 AILA L. J. 7, 8 (2021).

10. Prior to IIRIRA's enactment, the House of Representatives held four congressional hearings with witness testimony on the OCP. Representative Chris Smith, who proposed the provision to the Immigration and Nationality Act (INA) that later became Section 601(a), recounted the stories of multiple Chinese women who had been forced to abort their pregnancies and/or forcibly sterilized and were currently detained in Immigration and Naturalization Service's (INS) custody. Xiou Luo, *The Unintended Consequence of Section 601 of the Illegal Immigration Reform and the Immigrant Responsibility Act: The Rise of U.S.-Based Claims and Their Impact on The Board of Immigration Appeals, Federal Judiciary, and Mass Media*, 20 UCLA ASIAN PAC. AM. L. J. 31, 38-39 (2015).

involuntary sterilization, both forced and coerced, is prevalent outside of China,¹¹ particularly affecting marginalized communities.¹²

As such, some immigration attorneys have successfully secured asylum for their clients by including involuntary sterilization as a qualifying ground.¹³ However, even some of these attorneys are not aware of the extent to which involuntary sterilization is perpetrated against other marginalized communities whom they may not have represented.¹⁴ Additionally, the published case law suggests that some circuit courts may be reluctant to grant asylum based on Section 601(a) claims outside the context of China's OCP because forced abortions or involuntary sterilizations occur under different circumstances in other regions.¹⁵

Courts should expand Section 601(a) protection to more asylum seekers who were involuntarily sterilized outside of China. This Note offers a legal framework for asylum officers and immigration judges to utilize when

11. OPEN SOC'Y FOUNDS., *AGAINST HER WILL: FORCED AND COERCED STERILIZATION OF WOMEN WORLDWIDE 2* (Oct. 4, 2011).

12. OFF. OF THE HIGH COMM'R FOR HUM. RTS. ET AL., *ELIMINATING FORCED, COERCIVE AND OTHERWISE INVOLUNTARY STERILIZATION: AN INTERAGENCY STATEMENT 1* (2014).

13. Ottenheimer et al., *supra* note 4; Miller, *supra* note 9, at 7 n.1. Some immigration attorneys indicated that in many cases where an asylum seeker is granted asylum, the Department of Homeland Security (DHS) attorney stipulates a grant of asylum, and the immigration judge agrees. Often, neither the DHS attorney nor the judge explains the ground(s) on which they are approving the request for asylum. In other cases, immigration judges issue a short order granting asylum, but still without an explanation of the ground(s). So, while immigration attorneys believe that the immigration judges were particularly persuaded by their clients' Section 601(a) claims, especially because judges do not typically see claims on this ground, the judges frequently do not issue an opinion to ascertain the most compelling ground(s). Telephone Interview with Claudine-Annick Murphy, Staff Att'y, The Legal Aid Soc'y (Dec. 1, 2022); Zoom Interview with Deirdre Stradone, Co-Deputy Dir. of the Immigr. Intervention Project, Sanctuary for Fams. (Nov. 3, 2022); Zoom Interview with Sylvia Miller, Staff Att'y, Colectiva Legal del Pueblo (Jan. 20, 2023). To date, only one attorney shared that she has had two clients, both Honduran Garifuna women, presumably receive asylum grants solely on the ground of having been forcibly sterilized, as their experiences with involuntary sterilization were the only testimonies taken on record during their hearings. E-mail from Deirdre Stradone, Co-Deputy Director of the Immigr. Intervention Project, Sanctuary for Fams., to author (Aug. 14, 2023, 7:49 EST) (on file with author).

14. *See infra* note 258 (explaining that the immigration attorneys I interviewed have begun incorporating questions related to involuntary sterilization into their intake process for their Central American female clients, but for two of them, questions probing for involuntary sterilization are not a standard part of their intake procedure for other female clients).

15. *See* Miller, *supra* note 9, at 13 (suggesting that some immigration attorneys have resisted asserting persecution claims under Section 601(a) for women who are not Chinese because involuntary sterilization in their countries is not enforced through state-run population control programs or exacted by a state actor).

assessing Section 601(a) claims by asylum seekers who are not Chinese. This Note further proposes that based on Section 601(a)'s applicability outside of the Chinese context, immigration attorneys should screen their female asylum clients for forced abortion and involuntary sterilization during the intake process as a potential ground for asylum.

Part I of this Note provides a brief explanation of the United States' asylum system. It then describes the history and enforcement of China's OCP and explains how China's OCP defied international human rights standards. Next, it explores the passage of Section 601(a) of the IIRIRA to protect victims of China's OCP before concluding with the potential limitations of applying Section 601(a) to victims who were forced to abort a pregnancy or were involuntarily sterilized outside of China's OCP. Part II highlights three marginalized groups of women who are targeted for forced and/or coerced sterilization across multiple geographical regions and discusses the practices medical providers use to sterilize these women without their full informed consent. Part II includes a statutory interpretation of Section 601(a) and an examination of immigration and circuit case law related to the meaning of "forced" under Section 601(a) within the context of China's OCP. Part II concludes with resolving why Section 601(a) applies to asylum seekers who are not Chinese, despite what the limited case law may suggest at first glance. Finally, Part III posits that immigration attorneys and physicians should, with consent, regularly screen female clients for involuntary sterilization as a possible additional pathway to asylum.

PART I

A) The Basic Structure of the United States' Asylum System

The present-day refugee resettlement program and asylum process in the United States was largely created through the United States Refugee Act of 1980,¹⁶ an amendment to the Immigration and Nationality Act (INA),¹⁷ and the Migration and Refugee Assistance Act,¹⁸ enacted during President Jimmy Carter's administration.¹⁹ To be eligible for asylum, an applicant must demonstrate that they are a refugee, defined as:

16. *On the 40th Anniversary of the Refugee Act of 1980*, HEBREW IMMIGR. AID SOC'Y (Mar. 16, 2020), <https://hias.org/news/on-the-40th-anniversary-of-the-refugee-act-of-1980/> [<https://perma.cc/XJL2-PTZB>].

17. 8 U.S.C. §§ 1101-1105(a), 1151-1363(b), 1401-1504.

18. 22 U.S.C. § 2601.

19. *On the 40th Anniversary of the Refugee Act of 1980*, *supra* note 16.

Any person who is outside any country of such person's nationality, or in the case of a person having no nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail [themselves] . . . of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.²⁰

Asylum applicants must establish a nexus between at least one of these five enumerated categories and their persecution or well-founded fear of persecution.²¹ Demonstrating the nexus can be challenging,²² but it is the crux of applicants' legal argument—that the harm they suffered, or fear of harm, not only rises to the level of persecution,²³ but is also due to at least one of these statutory bases.²⁴ Asylum applicants must also demonstrate that their persecutor is either the government, affiliated with the government, or a private actor who the government is unable or unwilling to control.²⁵

There are two main tracks for applying for asylum: affirmative asylum and defensive asylum.²⁶ Affirmative asylum is for people who are not actively in removal proceedings but are voluntarily applying for asylum in the hopes of gaining lawful status.²⁷ In contrast, defensive asylum is for

20. 8 U.S.C. § 1101(a)(42)(A).

21. The Board of Immigration Appeals (BIA) holds that an asylum applicant is responsible for providing facts that demonstrate that a reasonable person would fear that the danger facing them is due to one of the five enumerated grounds. DREE COLLOPY, *ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE* 41 (Amer. Immigr. Laws. Ass'n ed., 6th ed. 2010).

22. Federal courts have acknowledged that it can be difficult for an asylum applicant to prove their persecutor's motivation(s). *Id.* at 41. If asylum applicants cannot provide sufficient evidence that their persecutor(s) were motivated by at least one of the five protected grounds, then their request for asylum will be denied. *Id.* at 42.

23. Asylum applicants must show that they either experienced past persecution or have a well-founded fear of future persecution. The term "persecution" has not been precisely defined by the INA nor the BIA. *Id.* at 33.

24. The persecutor could want to hurt the applicant because the applicant has one of the beliefs or traits protected by 8 U.S.C. § 1101(a)(42)(A) or because the persecutor incorrectly assumes the applicant has one of these protected beliefs or traits. U.S. CITIZENSHIP AND IMMIGR. SERVS., RAI0 DIRECTORATE – OFFICER TRAINING 11 (2019).

25. IMMIGRATION EQUALITY, *ASYLUM MANUAL*, <https://immigrationequality.org/asylum/asylum-manual/asylum-law-basics-2/asylum-law-basics-elements-of-asylum-law/> [<https://perma.cc/H4Y6-5DL2>] (last visited Feb. 17, 2023).

26. U.N. HIGH COMM'R FOR REFUGEES USA, <https://help.unhcr.org/usa/applying-for-asylum/types-of-asylum/> [<https://perma.cc/JGU8-6633>] (last visited Feb. 11, 2022).

27. *Id.*

people who are actively in removal proceedings and who are applying for asylum as a defense to being deported.²⁸

During the affirmative asylum process, asylum seekers interview with an asylum officer. If their request for asylum is not granted, they are referred to removal proceedings, and their case is moved to immigration court.²⁹ Defensive asylum seekers' cases start in immigration court.³⁰ Those who are denied asylum by an immigration judge can appeal their case to the Board of Immigration Appeals (BIA),³¹ which has the delegated authority to interpret the INA.³² If the BIA rules against an asylum applicant, they can petition the federal appeals court for the circuit in which their asylum application was adjudicated for an additional review of their case.³³ Because the Supreme Court of the United States accepts very few cases to review each year,³⁴ asylum applicants who lose in a federal circuit court are almost always removed and subsequently deported.³⁵

28. *Id.*

29. *Id.*

30. *Id.*

31. EXEC. OFF. FOR IMMIGR. REV., WHAT IF YOU DISAGREE WITH THE JUDGE'S DECISION? AN OVERVIEW OF THE APPEALS PROCESS (Jan. 2022).

32. Luo, *supra* note 10, at 35. The BIA's members effectively function as appellate judges for immigration cases, as the Attorney General delegated authority to the board's members to adjudicate certain appeals, mostly those stemming from immigration judges' decisions in removal proceedings. 84 Fed. Reg. 44538 (Aug. 26, 2019).

33. Luo, *supra* note 10, at 35; *Immigration Court Process, Including Appeals and Deportation Orders*, ASYLUM SEEKER ADVOCACY PROJECT, <https://help.asylumadvocacy.org/faqs-immigration-court/#deny-asylum-appeals> [<https://perma.cc/2Y86-AHZU>] (last visited Feb. 11, 2023). Under the *Chevron* doctrine, which the Supreme Court articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, as an administrative agency, the BIA's decisions receive judicial deference when the statute in question is ambiguous and reasonably interpreted by the agency. This is true even when the BIA's interpretation diverges from what the reviewing court understands to be the best statutory interpretation. Jennifer Safstrom, *An Analysis of the Applications and Implications of Chevron Deference in Immigration*, 34 GEO. IMMIGR. L.J. 53, 54 (2019); *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 56 (2014) (plurality opinion) (citations omitted) ("Principles of *Chevron* deference apply when the BIA interprets the immigration laws. Indeed, 'judicial deference to the Executive Branch is especially appropriate in the immigration context,' where decisions about a complex statutory scheme often implicate foreign relations." (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999))).

34. The Supreme Court hears around 100 to 150 appeals out of the over seven thousand cases that request review each year. Admin. Off. of the U.S. Cts., *About the U.S. Courts of Appeals*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals> [<https://perma.cc/4QZT-9L3N>] (last visited July 4, 2023).

35. Jonathan Blazer & Katie Hoepfner, *Five Things to Know About the Right to Seek Asylum*, ACLU (Sept. 29, 2022), <https://www.aclu.org/news/immigrants-rights/five-things-to-know-about-the-right-to-seek-asylum> [<https://perma.cc/V6FR-BBTK>].

B) China's One-Child Policy

1) China Establishes Its One-Child Policy

After the People's Republic of China was founded in 1949, Mao Zedong, Chairman of the Chinese Communist Party, advocated for the nation's population growth.³⁶ The Chinese Communist Party largely saw this proliferation "as a force for economic prosperity and as the country's most precious capital, leading to openly pro-natalist rhetoric."³⁷ Throughout the 1950s and 1960s, the Chinese government occasionally expressed concerns about overpopulation and sometimes attempted to control family planning, but these efforts were temporary.³⁸ It was not until the famine spurred by the Great Leap Forward³⁹ and the Cultural Revolution's volatility that Chinese leaders directed their full attention towards curbing population growth.⁴⁰ Leading into the 1970s, China's population totaled over 800 million, and the nation's static economic growth was viewed as a consequence of overpopulation.⁴¹

The 1970s saw growing international concern regarding the world's population growth, as other countries, such as India, Bangladesh, and Indonesia, also implemented family planning programs that relied on coercion.⁴² China laid the foundation for its eventual OCP in the early 1970s with the national family planning campaign slogan "Later, Longer, and Fewer."⁴³ The campaign urged couples to marry at "later" ages with "longer" gaps between a first and second child and to have "fewer" children—two at most.⁴⁴ The campaign successfully halved China's population growth

36. Aileen Clarke, *See How the One-Child Policy Changed China*, NAT'L GEOGRAPHIC (Nov. 13, 2015), <https://www.nationalgeographic.com/history/article/151113-datapoints-china-one-child-policy> (on file with the *Columbia Human Rights Law Review*).

37. Rut Noboa, *China's Demographic Challenges: The Long-Term Consequences of the One-Child Policy*, UNIVERSIDAD DE NAVARRA (June 30, 2021), <https://www.unav.edu/web/global-affairs/chinas-demographic-challenges-the-long-term-consequences-of-the-one-child-policy> [<https://perma.cc/EH5Z-ZGC5>].

38. *Id.*

39. Clarke, *supra* note 36; Noboa, *supra* note 37.

40. Noboa, *supra* note 37; Gerrie Zhang, *U.S. Asylum Policy and Population Control in the People's Republic of China*, 18 HOUS. J. INT'L L. 557, 560 (1996).

41. Noboa, *supra* note 37.

42. Junsen Zhang, *The Evolution of China's One-Child Policy and Its Effects on Family Outcomes*, 31 J. ECON. PERSPS. 141, 143 (2017).

43. Zhang, *supra* note 40, at 561.

44. Zhang, *supra* note 42, at 143.

between 1970 and 1976, but this decline eventually plateaued.⁴⁵ In response, China adopted its OCP in 1979.⁴⁶ While limited exceptions were allowed, such as for ethnic minority groups,⁴⁷ the policy largely restricted couples to one child⁴⁸ with the goal of ending the nation's population growth by the twenty-first century.⁴⁹

2) Methods of Enforcing the One-Child Policy in China

The Chinese national government precluded local officials from using physical violence and coercion to implement the OCP.⁵⁰ Instead, local officials were instructed to use a combination of incentives and disincentives to encourage people to abide by the policy.⁵¹ Couples who only had one child were rewarded with financial incentives, like monthly stipends, in addition to educational, medical, and housing benefits.⁵² Couples were disincentivized from having larger families through various mechanisms, including loss of government job prospects,⁵³ job demotions, fines, and loss of access to social services.⁵⁴

While different regions or villages used different techniques,⁵⁵ local and provincial implementation of the OCP eventually came to include increasingly coercive techniques, such as forced IUD insertions, late-term abortions, and forced sterilization of both men and women.⁵⁶ Government

45. Tessa Berenson, *Here's How China's One-Child Policy Started in the First Place*, TIME (Oct. 29, 2015, 11:54 AM), <https://time.com/4092689/china-one-child-policy-history/> [<https://perma.cc/LMF4-UC8U>].

46. Zhang, *supra* note 40, at 561.

47. *Explainer: What Was China's One-Child Policy?*, BBC (Oct. 29, 2015), <https://www.bbc.com/news/world-asia-china-34667551> [<https://perma.cc/3486-F6TZ>].

48. Zhang, *supra* note 40, at 561; Orly Gez, *A Compromise Solution to Prevent Fraudulent Claims Under IIRIRA Section 601(a) – A System of Conditional Grants*, 74 BROOK. L. REV. 1147, 1151 (2009).

49. Luo, *supra* note 10, at 35.

50. *Id.*

51. *Id.*

52. Kimberly Sicard, *Section 601 of IIRIRA: A Long Road to a Resolution of United States Asylum Policy Regarding Coercive Methods of Population Control*, 14 GEO. IMMIGR. L.J. 927, 929 (2000).

53. Penny Kane & Ching Y. Choi, *China's One Child Family Policy*, 319 BRIT. MED. J. 992, 992 (1999).

54. Sicard, *supra* note 52, at 929–30.

55. E. Tobin Shiers, *Coercive Population Control Policies: An Illustration of the Need for a Conscientious Objector Provision for Asylum Seekers*, 13 IMMIGR. & NAT'L L. REV. 476, 483 (1991).

56. Sicard, *supra* note 52, at 930; Noboa, *supra* note 37; Emily Feng, *China's Former 1-Child Policy Continues to Haunt Families*, NPR (July 4, 2021, 7:06 AM),

officials constantly monitored women's reproductive health, and couples who did not obey the policy were often subjected to harsh fines and public scrutiny.⁵⁷ This surveillance structure extended beyond the government to include neighbors, co-workers, and local volunteers.⁵⁸ Although no official national policy sanctioned this type of enforcement, local officials were motivated to pursue these draconian measures because the central government linked job promotions to each region reaching its population growth target.⁵⁹

C) Coercive Population Programs Violate Established International Human Rights Standards

Coercive population programs like the OCP violate numerous established international human rights standards. Reproductive rights are grounded in specific human rights already protected in common national laws and international human rights agreements.⁶⁰ When governments

<https://www.npr.org/2021/06/21/1008656293/the-legacy-of-the-lasting-effects-of-chinas-1-child-policy> [<https://perma.cc/WXF6-HKWK>] (“The doctors would inject poison directly into the baby’s skull to kill it’ . . . ‘Other doctors would artificially induce labor. But some babies were alive when they were born and began crying. The doctors strangled or drowned those babies.”).

57. Sicard, *supra* note 52, at 930.

58. *Id.*

59. Luo, *supra* note 10, at 36.

60. Reproductive rights are based on the recognized rights of individuals to decide how many children to have, choose when to have them, and access resources to inform those decisions. These already protected rights also include the right to make reproduction decisions without facing bias, violence, or compulsion. International Conference on Population and Development, *Programme of Action of the International Conference on Population and Development*, ¶ 7.3 (2004). The Universal Declaration of Human Rights, partly drafted and adopted by China, recognizes that the family, as the foundation of society, is deserving of state protection and thus acknowledges that men and women have the right to get married and have a family. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 16, (Dec. 10, 1948). The document also declares that no one should be subjected “to torture or to cruel, inhuman or degrading treatment” G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 5 (Dec. 10, 1948); *Universal Declaration of Human Rights*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/> [<https://perma.cc/X9BX-UGN4>] (last visited Feb. 11, 2023). Under the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by China in 2001, states must afford the greatest care and aid to the family, especially for its creation. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 10(1) (Dec. 16, 1966); *Status of Ratification Interactive Dashboard*, OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://indicators.ohchr.org/> [<https://perma.cc/4GYQ-F4RN>] (last visited Feb. 11, 2023). China did not make any reservations concerning Article 10 when ratifying the ICESCR. See *Status of Ratification Interactive Dashboard, supra* (concerning China’s only reservation to Article 8.1(a)).

forcibly or coercively sterilize women or allow private individuals to do so, they infringe on:

[T]he right to be free from torture, and cruel, inhuman, or degrading treatment or punishment; the right to the highest attainable standard of physical and mental health; the right to life, liberty, and security of person; the right to equality; the right to nondiscrimination; the right to be free from arbitrary interference with one's privacy and family; and the right to marry and to found a family.⁶¹

Women's right to reproductive health, specifically the prohibition of forced and coerced sterilization, is also explicitly protected by international law.⁶² A noteworthy example of this is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which has been ratified by 187 of the 194 United Nations member states.⁶³ Article 12 of CEDAW requires state parties to provide women equal access to health care, including family planning services, and ensure access to relevant services from pregnancy through post-natal care.⁶⁴ Article 16 further grants women the right to decide how many children they will have and when they will have them, as well as access to the information and measures needed to fully enjoy these rights.⁶⁵

In addition to international law protecting women's fundamental right to make family planning decisions and access family planning services, international bodies have called particular attention to state family planning

61. OPEN SOC'Y FOUNDS., *supra* note 11, at 8. This set of rights is recognized in the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights (ICCPR), and International Covenant on Economic, Social and Cultural Rights (ICESCR).

62. *See infra* text accompanying notes 63–65 (providing an example of an international human rights document that explicitly protects against forced and coerced sterilization).

63. Melanne Vermeer & Rangita de Silva de Alwis, *Why Ratifying the Convention on the Elimination of Discrimination Against Women (CEDAW) is Good for America's Domestic Policy*, GEO. INST. WOMEN, PEACE AND SEC. (Feb. 18, 2021), <https://giwps.georgetown.edu/why-ratifying-the-convention-on-the-elimination-of-discrimination-against-women-cedaw-is-good-for-americas-domestic-policy/> [https://perma.cc/YUQ3-HMDK]. China ratified CEDAW in 1980, and its only reservation concerns paragraph 1 of article 29. *Status of Treaties*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&clang=_en#EndDec [https://perma.cc/YUQ3-HMDK] (last visited Oct. 1, 2023).

64. Convention on the Elimination of All Forms of Discrimination Against Women [hereinafter CEDAW], art. 12, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 20378 (entered into force Sept. 3, 1981); Paula Abrams, *Population Politics: Reproductive Rights and U.S. Asylum Policy*, 14 GEO. IMMIGR. L.J. 881, 888 (2000).

65. CEDAW, *supra* note 64, art. 16.

policies⁶⁶ and nonconsensual medical procedures.⁶⁷ Therefore, countries have a responsibility to seriously investigate allegations of involuntary sterilization and hold individuals who violate these rights accountable.⁶⁸

D) The Creation of Section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)

1) The Adjudication of Chinese Asylees' One-Child Policy Cases Prior to Section 601(a)

During the 1980s, only a few years after implementation of the OCP, international news outlets and academic scholars began reporting on China's invasive, coercive techniques.⁶⁹ The OCP's details shocked the world and

66. The International Covenant on Civil and Political Rights (ICCPR), which has been ratified by 172 U.N. member states as of December 2018, is part of the International Bill of Human Rights. *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, AM. C.L. UNION (Apr. 2019), <https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr> [<https://perma.cc/F88G-VW7R>]. In one of the Human Rights Committee's General Comments to the ICCPR, the committee resolved that states' family planning policies should not be prejudicial or mandatory. Off. of the High Comm'r for Hum. Rts., *CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, ¶ 5, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (July 27, 1990); Abrams, *supra* note 64, at 888. China is not bound by the ICCPR since it never ratified the treaty, but the committee's clarification indicates growing concern about the implementation of state family planning programs. *Status of Ratification Interactive Dashboard*, *supra* note 60.

67. The United Nations' Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment recognizes that "medical treatments of an intrusive and irreversible nature . . . may constitute torture or ill-treatment when enforced or administered without . . . free and informed consent . . ." This is particularly the case when . . . performed on patients from marginalized groups. . . ." Juan E. Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 32, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013).

68. G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2(1) (Dec. 10, 1984); see Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention*, ¶ 14(a), U.N. Doc. CAT/C/SVK/CO/2 (Dec. 17, 2009) (urging Slovakia to investigate all accusations of involuntary sterilization against Roma women quickly and extensively and to prosecute the perpetrators). China ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1988 and registered reservations against Article 20, the Committee Against Torture's authority to investigate allegations of torture, and Article 30, an arbitration provision. *Status of Ratification Interactive Dashboard*, *supra* note 60.

69. Gez, *supra* note 48, at 1155; Luo, *supra* note 10, at 36 (discussing a 1985 *Washington Post* article that described women being removed from their homes and sent

pushed the United States to take decisive action on both the international⁷⁰ and domestic stage. One of these domestic measures included Attorney General Edwin Meese III issuing the U.S. government's first declaration offering guidance on how asylum claims based on the OCP should be adjudicated.⁷¹ In a 1988 memorandum addressed to Alan Nelson, the Commissioner of the Immigration and Naturalization Services (INS),⁷² Meese instructed asylum officers to "give careful consideration" to Chinese asylees who "express a fear of persecution upon return to the PRC because they refuse to abort a pregnancy or resist sterilization after the birth of a second or subsequent child."⁷³ He further hypothesized that these stances could be classified as "an act of political defiance sufficient to establish refugee status."⁷⁴

Despite the Reagan administration's apparent support for granting asylum to victims of China's OCP, Meese's memorandum was neither legally enforceable nor was it directed to the BIA.⁷⁵ As a result, there were soon contradictory rulings for Chinese asylees fleeing the OCP.⁷⁶

A BIA-adjudicated case that ignited public ire was *Matter of Chang*,⁷⁷ the first reported case tackling whether an asylee could be granted asylum

to 24-hour sterilization clinics, as well as the different methods doctors used to kill fetuses. Luo also mentions a previous researcher who testified before Congress that Chinese officials were especially coercive in 1983, requiring women with one child to have IUDs inserted and couples with more than one child to be sterilized).

70. The United States stopped financing the United Nations Fund for Population Activities (UNPFA) in 1985 because the organization provided financial assistance to China, and there were reports about coerced abortions and sterilizations. Sicard, *supra* note 52, at 932–33.

71. Luo, *supra* note 10, at 36; Sicard, *supra* note 52, at 933.

72. Catalyzed by the terrorist attacks on September 11, 2001, Congress passed the Homeland Security Act of 2002. This act dissolved the INS and created three federal agencies under a larger Department of Homeland Security: Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS). U.S. CITIZENSHIP AND IMMIGR. SERVS., OVERVIEW OF INS HISTORY 11 (2012).

73. Luo, *supra* note 10, at 36–37 (emphasis omitted) (quoting Memorandum from Edwin Meese III, Att'y Gen., to Alan C. Nelson, Comm'r, Immigr. & Naturalization Servs. (August 5, 1988)).

74. *Id.* at 37 (emphasis omitted).

75. *Id.*

76. Jamie Jordan, *Ten Years of Resistance to Coercive Population Control: Section 601 of the IIRIRA of 1996 to Section 101 of the REAL ID Act of 2005*, 18 HASTINGS WOMEN'S L.J. 229, 237 (2007).

77. *Id.* at 239 (detailing the heavy criticism the case received, including Congress' prompt attempt to strike down the ruling by passing the Armstrong-DeConcini Amendment. President George H. W. Bush vetoed the amendment, preferring to issue an Executive Order instructing the Secretary of State and Attorney General to more strongly consider asylum grants for those subjected to a government policy of forced abortions and

for opposing coercive family planning policies.⁷⁸ Determining that Meese's guidelines did not apply to decisions issued by immigration judges and the BIA, the BIA held that the OCP was not an act of persecution on its face, and so, asylees could not be granted asylum solely based on being subjected to the policy.⁷⁹ Instead, for the OCP to be found persecutive, an asylee needed to prove a nexus between persecution under the policy and discrimination on account of at least one of the five protected grounds.⁸⁰ Since the BIA recognized the OCP as a universal program to control population growth,⁸¹ asylees had the high evidentiary burden of proving that they were or would be targeted based on at least one of the protected grounds, rather than having their family size restricted by a policy that applied to everyone.⁸²

2) Congress Passes Section 601(a) to Repeal *Matter of Chang*

Between the following Bush administration and the Clinton administration, there were inconsistent developments for how cases concerning Chinese asylees fleeing the OCP should be adjudicated.⁸³ However, partly spurred by political and social events that highlighted human rights abuses occurring in China,⁸⁴ Congress ultimately resolved the

sterilizations); *Matter of Chang*, 20 I&N Dec. 38 (BIA 1989) (granting withdrawal of deportation order and allowing respondent to depart voluntarily).

78. Zhang, *supra* note 40, at 579.

79. *Chang*, 20 I&N Dec. at 38, 43–44.

80. *Id.* at 44.

81. *Id.*

82. *See id.* (stipulating that an asylum seeker alleging persecution under the OCP must submit evidence besides merely being subjected to the policy to establish past persecution or a well-founded fear of persecution on account of one of the five protected grounds).

83. Jordan, *supra* note 76, at 239; Sicard, *supra* note 52, at 933–36.

84. In June 1989, after Deng Xiaoping's use of Chinese troops failed to quiet local demonstrations for democracy, soldiers and police attacked protestors in Tiananmen Square. It is estimated that between hundreds and thousands of people died in the widely-denounced massacre. Sicard, *supra* note 52, at 932; *Tiananmen Square Protests*, HISTORY, <https://www.history.com/topics/china/tiananmen-square> [https://perma.cc/Z83B-F7GF] (June 9, 2023). A few years later, in June 1993, a freighter named *Golden Venture* smuggling 276 Chinese refugees crashed ashore off Queens, New York. Most of the surviving refugees applied for asylum on the political opinion ground, citing the OCP, and most were denied. Sicard, *supra* note 52, at 932; Ashley Dunn, *Golden Venture's Tarnished Hopes; Most of Ship's Human Cargo, a Year Later, is Still Confined*, N.Y. TIMES (June 5, 1994), <https://www.nytimes.com/1994/06/05/nyregion/golden-venture-s-tarnished-hopes-most-ship-s-human-cargo-year-later-still.html> (on file with the *Columbia Human Rights Law Review*).

issue the way the BIA proposed, by passing legislation.⁸⁵ In 1996, President Clinton signed the IIRIRA,⁸⁶ a bill that overruled *Chang's* contentious ruling,⁸⁷ into law.

Under Section 601(a) of the IIRIRA, Congress amended the INA's definition of refugee to include forced abortion or involuntary sterilization as persecution on account of one's political opinion.⁸⁸ Section 601(a) also defined persecution as including a person who failed or refused to undergo an abortion or sterilization or participated in other forms of resistance to a coercive population program.⁸⁹ In addition, Section 601(a) included a provision that a person with a well-founded fear of being forced to undergo an abortion or sterilization or being persecuted for their failure or refusal to undergo either of these procedures will have established a well-founded fear of persecution on the ground of their political opinion.⁹⁰ Effectively, Section 601(a) relieved victims of forced abortions and involuntary sterilizations from the burden of proving that the harm they suffered amounted to persecution and that they were persecuted on account of at least one of the recognized grounds.⁹¹

E) The Limitations of Section 601(a)

While Section 601(a) of the IIRIRA employs general language when talking about individuals who have been involuntarily sterilized or forced to abort a pregnancy, the provision is best understood as a direct response to China's former OCP.⁹² Tellingly, published asylum cases adjudicated based

85. In its *Matter of Chang* ruling, the BIA clarified that its limited role was to determine whether the OCP was selectively applied to Mr. Chang based on his race, religion, nationality, membership in a particular social group, or political opinion. The Board further stated that Congress should pass legislation to resolve the question of whether the U.S.'s immigration laws should offer a remedy for people who may be forcibly sterilized under their homeland's population control program. *Chang*, 20 I&N Dec. at 47.

86. Jordan, *supra* note 76, at 240.

87. *Id.*; Luo, *supra* note 10, at 39 (reviewing the House Judiciary Committee's 1996 Report that stated Section 601 was intended to strike down multiple BIA decisions, namely *Matter of Chang* and *Matter of G-*).

88. 8 U.S.C. § 1101(a)(42)(B).

89. *Id.*

90. *Id.*

91. Gez, *supra* note 48, at 1156 ("[S]ection 601(a) eliminated the burden on OCP applicants of proving a 'nexus' between their persecution under the OCP and one of these protected statuses.").

92. Due to concerns about maintaining a labor force that could sustain the country's economic growth, the Chinese Communist Party began allowing parents from one-child families to have two children in 2013. This two-child limit was later expanded to all Chinese couples in 2016. When birth rates failed to increase by a sizable margin, amidst concern about more residents aging out of the workforce, the Chinese Communist Party

on claims of persecution under Section 601(a) only concern Chinese asylees,⁹³ suggesting the provision has primarily been used by Chinese asylum seekers. Likewise, most of the legal scholarship on Section 601(a) focuses on forced abortions and involuntary sterilizations within the context of the OCP, such as whether asylum protection should be expanded to spouses,⁹⁴ traditionally married partners,⁹⁵ and unmarried partners⁹⁶ of Chinese female victims.

Despite legal scholarship's focus on the OCP, social research indicates that forced and coerced sterilizations are international phenomena,⁹⁷ particularly impacting women who already belong to marginalized communities.⁹⁸ What is at issue here are the definitions of "forced" and "coerced." What elements are needed to find a "forced" sterilization or a "coerced" sterilization under Section 601(a)? The international human rights community understands forced sterilization to occur when an individual is sterilized without their knowledge or over their

announced in 2021 that couples will be allowed to have three children. Sui-Lee Wee, *China Says It Will Allow Couples to Have 3 Children, Up From 2*, N.Y. TIMES, <https://www.nytimes.com/2021/05/31/world/asia/china-three-child-policy.html> (on file with the *Columbia Human Rights Law Review*) (May 31, 2021); *China's Two-Child Policy*, BLOOMBERG, <https://www.bloomberg.com/quicktake/china-s-two-child-policy> (on file with the *Columbia Human Rights Law Review*) (Jan. 22, 2020).

93. Miller, *supra* note 9, at 13; e.g., *In re H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010); *In re J-S-*, 24 I&N Dec. 520 (A.G. 2008); *Ming Xin He v. Holder*, 749 F.3d 792 (9th Cir. 2014).

94. See, e.g., Kala M. Strawn, *Standing in Her Shoes: Recognizing the Persecution Suffered by Spouses of Persons Who Undergo Forced Abortion or Sterilization Under China's Coercive Population Control Policy*, 24 WIS. J.L., GENDER, & SOC'Y. 205 (2009).

95. See, e.g., Megan A. Carrick, *Ensuring that Federal Circuit Courts Adhere to the Spirit of the Law: Why Legally and Non-Legally Married Spouses Deserve Explicit Asylum Protection Under Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act*, 42 CREIGHTON L. REV. 181 (2009); Tamika S. Laldee, *A Proposal for Change in Immigration Policy: Asylum for Traditionally Married Spouses*, 41 CASE W. RES. J. INT'L L. 149 (2009).

96. See, e.g., Raina Nortick, *Singled Out: A Proposal to Extend Asylum to the Unmarried Partners of Chinese Nationals Fleeing the One-Child Policy*, 75 FORDHAM L. REV. 2153 (2007); Heidi Murphy, *Sending the Men Over First: Amending Section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act to Allow Asylum for Spouses and Partners*, 33 VT. L. REV. 143 (2008).

97. OPEN SOC'Y FOUNDS., *supra* note 11, at 2.

98. In some countries, certain populations, such as people living with HIV; people with disabilities; Indigenous peoples and other racial and ethnic minorities; and transgender and intersex people, are sterilized without their full, informed consent. OFF. OF THE HIGH COMM'R FOR HUM. RTS. ET AL., *supra* note 12, at 2; Lisa Reinsberg, *China's Forced Sterilization of Uyghur Women Violates Clear International Law*, JUST SECURITY (July 29, 2020), <https://www.justsecurity.org/71615/chinas-forced-sterilization-of-uyghur-women-violates-clear-international-law/> [<https://perma.cc/PBR4-PGPV>].

objection.⁹⁹ Coerced sterilization happens when an individual is misinformed about the procedure, or they are incentivized or intimidated into being sterilized.¹⁰⁰

Yet, various immigration courts and circuits in the United States have not reached a consensus on the elements necessary for granting asylum under Section 601(a).¹⁰¹ Since methods of forcing and coercing sterilizations in other regions of the world can differ from China's practices,¹⁰² the courts' rulings suggest that people who have been victimized in other countries may be protected by Section 601(a) in some circuits, but not in others.¹⁰³ Unlike asylum seekers protected under Section 601(a), which removes the need to demonstrate that the harm suffered rises to persecution and to establish a nexus,¹⁰⁴ asylum seekers must generally show that race, religion, nationality, membership in a particular social group, or political opinion account for at least one central reason for their past persecution or well-founded fear of persecution.¹⁰⁵

PART II

A) Marginalized Groups of Women Are Targeted for Forced Sterilizations and Coerced Sterilizations

To understand the potential implications of the case law surrounding Section 601(a) on women who have been involuntarily sterilized outside of China, it is necessary to understand which groups of women are typically targeted and the practices medical providers often use to sterilize these women without their consent.

99. OPEN SOC'Y FOUNDS., *supra* note 11, at 2.

100. *Id.*; OFF. OF THE HIGH COMM'R FOR HUM. RTS. ET AL., *supra* note 12, at 2.

101. *See infra* Section II.C.2.b (detailing the circuit split on what constitutes a "forced" abortion or sterilization).

102. *See infra* Section II.A-B (describing some of the marginalized women who face heightened risks of involuntary sterilization and the practices medical providers commonly utilize in the process).

103. *See* 3 Charles Gordon et al., Immigration Law and Procedure § 33.04 (2023) (discussing that courts agree on what constitutes "force" to the extent that it includes both physical force and psychological pressure, but they do not agree on the exact circumstances).

104. *See* Miller, *supra* note 9, at 13, 17 (describing how section 601(a) lowers asylum seekers' evidentiary burden because the statute establishes *per se* persecution on account of political opinion).

105. COLLOPY, *supra* note 21, at 26.

1) Women Living with HIV

Women living with Human Immunodeficiency Virus (HIV) are often targeted for forced and coerced sterilization.¹⁰⁶ Since Acquired Immunodeficiency Syndrome (AIDS) was identified in the United States in 1981 and the HIV virus that causes AIDS was discovered in 1984,¹⁰⁷ scientists have made significant strides in developing medication and treatment that significantly improve the quality and length of life for those living with HIV.¹⁰⁸ HIV transmission primarily occurs through sexual intercourse or the sharing of injection tools, such as needles and syringes.¹⁰⁹ A mother living with HIV can also transmit the virus to her baby during pregnancy, birth, or while breastfeeding.¹¹⁰ In cases where the mother has not received any antiretroviral treatment and continues to carry the virus, her chance of transmitting the virus to her child is less than fifty percent.¹¹¹ Combining treatments—including the mother taking antiretrovirals during pregnancy and childbirth, the child taking antiretrovirals for four to six weeks following birth, and safer methods of feeding the infant, like formula or donor breastmilk—can reduce the risk of transmitting HIV significantly,¹¹² possibly almost to zero.¹¹³

Despite these medication advancements and increased access to antiretrovirals, healthcare providers have forcibly and coercively sterilized women living with HIV in multiple regions throughout the world.¹¹⁴ These

106. OPEN SOC'Y FOUNDS., *supra* note 11, at 5; OFF. OF THE HIGH COMM'R FOR HUM. RTS. ET AL., *supra* note 12, at 3; Priti Patel, *Forced Sterilization of Women as Discrimination*, 38 PUB. HEALTH REV. art. 15 at 2 (2017).

107. Rachel Nall & Ashley Williams, *The History of HIV and AIDS in the United States*, HEALTHLINE (Oct. 12, 2021), <https://www.healthline.com/health/hiv-aids/history> [<https://perma.cc/ZGE3-QVC9>].

108. U.S. Dep't of Health & Hum. Servs., *Aging with HIV*, HIV.GOV (May 17, 2021), <https://www.hiv.gov/hiv-basics/living-well-with-hiv/taking-care-of-yourself/aging-with-hiv/> [<https://perma.cc/Y7SL-XQGV>].

109. *Ways HIV Can Be Transmitted*, CDC (Mar. 4, 2022), <https://www.cdc.gov/hiv/basics/hiv-transmission/ways-people-get-hiv.html> [<https://perma.cc/Y5T7-XJ9N>].

110. *Id.*

111. *New Clues to the Conundrum of Mother-to-Child HIV Transmission*, WEILL CORNELL MEDICINE (Apr. 26, 2021), <https://news.weill.cornell.edu/news/2021/04/new-clues-to-the-conundrum-of-mother-to-child-hiv-transmission> [<https://perma.cc/9HP5-JXPG>].

112. OFF. OF THE HIGH COMM'R FOR HUM. RTS. ET AL., *supra* note 12, at 3.

113. OPEN SOC'Y FOUNDS., *supra* note 11, at 5; U.S. Dep't of Health & Hum. Servs., *Preventing Perinatal Transmission of HIV*, HIV.GOV (Feb. 1, 2023), <https://www.hiv.gov/hiv-basics/hiv-prevention/reducing-mother-to-child-risk/preventing-mother-to-child-transmission-of-hiv> [<https://perma.cc/6Q6J-52QP>].

114. See Int'l Cmty. of Women Living with HIV, Submission to the UN Working Group on the Issue of Discrimination Against Women in Law and in Practice,

practices have been well-documented across Central and South America, Africa, and Asia.¹¹⁵ For example, in a 2012–2013 study of 285 women living with HIV in El Salvador, Honduras, Mexico, and Nicaragua, almost a quarter indicated that their healthcare providers pressured them into sterilization after learning of their HIV status.¹¹⁶ Pregnant women living with HIV whose healthcare providers were aware of their status were six times more likely to be forcibly or coercively sterilized than women who were HIV positive, but whose providers did not know their status.¹¹⁷

A well-known instance of healthcare providers forcibly and coercively sterilizing African women living with HIV occurred in Namibia. In a 2008 study conducted by the Namibian chapter of the International Community of Women Living with HIV (ICW), 40 of the 230 women with HIV reported being forcibly or coercively sterilized.¹¹⁸ In 2014, Namibia's Supreme Court affirmed a 2012 ruling finding that healthcare providers in public hospitals coercively sterilized three women living with HIV while they were in labor.¹¹⁹ These women were only three of many who recounted stories of being pressured or misled into sterilization at Namibian public hospitals.¹²⁰ Even though the Supreme Court did not find sufficient evidence that the women were sterilized due to their HIV status,¹²¹ advocates praised the ruling for establishing that consent cannot be obtained under duress¹²²

https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/righthealth/WS/ICW_HIV.pdf [<https://perma.cc/33EZ-7HH7>] [hereinafter International Community] (listing multiple countries where forced and coerced sterilization of women living with HIV has been reported, including El Salvador, Venezuela, Kenya, Sri Lanka, and Thailand).

115. *Id.*

116. Tamil Kendall & Claire Albert, *Experiences of Coercion to Sterilize and Forced Sterilization Among Women Living with HIV in Latin America*, 18 J. INT'L AIDS SOC. 1, 3 (2015).

117. *Id.* at 4.

118. Robin Baumgarten, *Forced and Coerced Sterilisation: Violating the Rights of Women Living with HIV*, SISTER NAMIBIA, Jul. 2009, at 12, 12; OPEN SOC'Y FOUNDS., *supra* note 11, at 5.

119. *HIV-Positive Women Forcibly Sterilized in Namibia, Court Finds*, CBS NEWS (Nov. 3, 2014, 10:24 AM), <https://www.cbsnews.com/news/hiv-positive-women-forcibly-sterilized-in-namibia-court-finds/> [<https://perma.cc/U8QD-N5KX>].

120. *Id.*; *Partial Victory for HIV-Positive Sterilized Women*, THE NEW HUMANITARIAN (July 30, 2012), <https://www.thenewhumanitarian.org/report/95983/namibia-partial-victory-hiv-positive-sterilized-women> [<https://perma.cc/NY4J-D9JT>].

121. *Government of the Republic of Namibia v. LM and Others*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/women-and-justice/resource/government_of_the_republic_of_namibia_v_lm_and_others [<https://perma.cc/HY65-WLJC>].

122. *Partial Victory for HIV-Positive Sterilized Women*, *supra* note 120 ("This decision is a victory for HIV-positive women throughout Namibia, as it reaffirms their right over

and highlighted the prevalence of the practice in the region.¹²³ Forced and coerced sterilization of women living with HIV is prevalent throughout the world.¹²⁴

2) Women Who Are Members of Racial and Ethnic Minority Groups

Akin to other women whose reproductive rights have historically been violated, such as the United States' history of forcibly and coercively sterilizing Native American and African American women,¹²⁵ women belonging to other racial and ethnic minority groups are also targeted for forced and coerced sterilization.¹²⁶ Women from various Indigenous groups in Latin America have been forcibly or coercively sterilized or suspected of being sterilized without their consent.¹²⁷ For example, as recently as 2022, Panama's Attorney General's office launched an investigation into claims by Ngobé-Buglé women that they were sterilized without their consent in a public hospital.¹²⁸ In Honduras, the Garifuna, an ethnic minority group of African descent, face comprehensive discrimination, including in employment, education, housing, and health services.¹²⁹ These women,

what is done to their body,' said Priti Patel, deputy director and HIV programme manager at the Southern Africa Litigation Centre (SALC) 'This judgment makes clear that obtaining consent while a woman is in labour or in severe pain violates clear legal principles.'").

123. *HIV-Positive Women Forcibly Sterilized in Namibia, Court Finds, supra* note 119 ("These three women are only the tip of the iceberg The government needs to take active steps to ensure all women subjected to this unlawful practice get redress.").

124. Constance Johnson, *Namibia: Supreme Court Ruling Against Forced Sterilizations of HIV-Positive Women*, LIBRARY OF CONGRESS GLOBAL LEGAL MONITOR (Nov. 10, 2014), <https://www.loc.gov/item/global-legal-monitor/2014-11-10/namibia-supreme-court-ruling-against-forced-sterilizations-of-hiv-positive-women/> [https://perma.cc/LPA6-XS6W]; International Community, *supra* note 114, at 4.

125. Over 100,000 women, who were mostly Black, Latina, and Indigenous, were sterilized without their informed consent by medical practitioners working for U.S. government programs over decades. Linda Villarosa, *The Long Shadow of Eugenics in America*, N.Y. TIMES MAG. (Jun. 8, 2022), <https://www.nytimes.com/2022/06/08/magazine/eugenics-movement-america.html> (on file with the *Columbia Human Rights Law Review*).

126. OPEN SOC'Y FOUNDS., *supra* note 11, at 3; OFF. OF THE HIGH COMM'R FOR HUM. RTS. ET AL., *supra* note 12, at 4; Ottenheimer et al., *supra* note 4, at 2.

127. See *infra* text accompanying notes 128–131 (mentioning reports of Indigenous women facing involuntary sterilization in multiple Latin American countries).

128. *Panama Investigates Claimed Forced Indigenous Sterilization*, ASSOCIATED PRESS (Feb. 21, 2022, 4:40 PM), <https://apnews.com/article/panama-panama-city-3903b6c3ed00271b789c23b3200ff854> [https://perma.cc/3HRB-8TVW].

129. Ottenheimer et al., *supra* note 4, at 2; U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Honduras 18 (2022).

especially those living with HIV, have reported that they were forcibly or coercively sterilized in local hospitals and clinics.¹³⁰ Indigenous women in Mexico have also described being sterilized without their consent.¹³¹

Other ethnic minority groups who have been targeted for forced sterilizations or forced abortions are Muslim ethnic minority groups,¹³² notably the Uyghurs and Kazakhs, in Xinjiang, China.¹³³ This coercive population program is part of a larger apparatus, controlled by the Chinese Communist Party (CCP),¹³⁴ under the pretense that these Muslim Central Asian minority groups are responsible for acts of terrorism and religious extremism against the Xinjiang government.¹³⁵ However, international scholars view the population program as part of a mechanism meant to further consolidate the CCP's rule by reducing ethnic minority groups' populations and pressuring them to assimilate.¹³⁶

Hundreds of Uyghurs have been sent to internment camps and detention centers for violating birth control policies.¹³⁷ Once interned, many have been subjected to forced sterilizations, IUD insertions, and abortions,¹³⁸

130. Ottenheimer et al., *supra* note 4, at 3; Telephone Interview with Claudine-Annick Murphy, Staff Att'y, The Legal Aid Soc'y (Dec. 1, 2022); Zoom Interview with Deirdre Stradone, Co-Deputy Dir. of the Immigr. Intervention Project, Sanctuary for Fams. (Nov. 3, 2022).

131. In 2013, Mexico's Secretariat of the Interior determined that 27 percent of Indigenous women who received public health services had been sterilized without their informed consent. CULTURAL SURVIVAL, OBSERVATIONS ON THE STATE OF INDIGENOUS WOMEN'S RIGHTS IN MEXICO 5 (2018).

132. Amy Qin, *China Targets Muslim Women in Push to Suppress Births in Xinjiang*, N.Y. TIMES (Sept. 23, 2021), <https://www.nytimes.com/2021/05/10/world/asia/china-xinjiang-women-births.html> (on file with the *Columbia Human Rights Law Review*).

133. *Id.*; Sigal Samuel, *China's Genocide Against the Uyghurs, in 4 Disturbing Charts*, VOX (Mar. 10, 2021, 8:30 AM), <https://www.vox.com/future-perfect/22311356/china-uyghur-birthrate-sterilization-genocide> [<https://perma.cc/Z5KJ-CN2R>].

134. Under Xi Jinping's rule, hundreds of thousands of Uyghurs and members of other Central Asian ethnic minority groups have been imprisoned. The Xinjiang region is like a police state where its minority residents are under strict surveillance. They are also forced to work in factories while their children are indoctrinated in boarding schools. Qin, *supra* note 132.

¹³⁵ *China Cuts Uighur Births with IUDs, Abortion, Sterilization*, ASSOCIATED PRESS (Jun. 29, 2020, 12:04 AM), <https://apnews.com/article/ap-top-news-international-news-weekend-reads-china-health-269b3de1af34e17c1941a514f78d764c> [<https://perma.cc/Z2L7-A5YW>]; OFF. OF THE HIGH COMM'R FOR HUM. RTS., OCHCR Assessment of Human Rights Concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China, at 34-35 (2022).

136. *China Cuts Uighur Births with IUDs, Abortion, Sterilization*, *supra* note 135; Qin, *supra* note 132.

137. *China Cuts Uighur Births with IUDs, Abortion, Sterilization*, *supra* note 135; Qin, *supra* note 132.

138. Samuel, *supra* note 133.

as well as the forced removal of their wombs.¹³⁹ Particularly considering that the CCP is encouraging the Han majority to have more children to stave off the country's national birth rate decline,¹⁴⁰ it is conceivable that the Uyghurs, Kazakhs, and others are being targeted on account of belonging to ethnic minority groups.¹⁴¹

3) Impoverished Women

Additionally, healthcare providers often focus on poor women for forced and coerced sterilizations.¹⁴² Women with intersectional identities across many marginalized backgrounds, such as race and ethnicity, positive HIV status, and lower socioeconomic status face heightened risks of involuntary sterilization.¹⁴³ There are also reports of forced and coerced sterilization in which poor women have been explicitly targeted.¹⁴⁴ For instance, India has a similar history of sterilization to China in that it once had official numerical targets, discontinued in the 1990s, for its mass sterilization program intended to reduce its population growth rate.¹⁴⁵ Despite the national Indian government discontinuing the use of centralized

139. Heather Chen, *Forced Abortions and Removing Wombs: A Uighur Doctor's Chilling Account of What's Happening in China*, VICE (Sept. 3, 2020, 4:08 AM), <https://www.vice.com/en/article/v7g8m8/forced-abortions-and-removing-wombs-a-uighur-doctors-chilling-account-of-whats-happening-in-china-xinjiang> [https://perma.cc/2KJC-DYA8].

140. The CCP is now encouraging the Han majority to have more than one child, preferably three children, by offering tax and housing credits, assistance with education, and cash payments. Alexandra Stevenson, *China Offers Women Perks for Having Babies. Single Moms Don't Qualify.*, N.Y. TIMES (Jul. 6, 2022), <https://www.nytimes.com/2022/07/06/business/economy/china-reproductive-rights-women.html> (on file with the *Columbia Human Rights Law Review*).

141. *China Cuts Uighur Births with IUDs, Abortion, Sterilization*, *supra* note 135 (“It links back to China’s long history of dabbling in eugenics...you don’t want people who are poorly educated, marginal minorities breeding quickly... What you want is your educated Han to increase their birth rate.”); Reinsberg, *supra* note 98 (referencing a news report from an expert scholar on China’s state policies towards Xinjiang which describes its mandatory birth control and sterilization policies as “raising concerns that Beijing is doubling down on a policy of Han settler colonialism”).

142. See OPEN SOC’Y FOUNDS., *supra* note 11, at 4 (explaining that while some government-led family planning programs target all women, poor women are more vulnerable to being coerced).

143. Ottenheimer et al., *supra* note 4, at 2.

144. See *infra* notes 145–52 and accompanying text (pointing out India’s and Uzbekistan’s practices of involuntarily sterilizing poor women).

145. Jatindra Dash, *Indian Sterilization Targets Remain in All but Name, Critics Say*, REUTERS (Nov. 25, 2014, 5:07 PM), <https://www.reuters.com/article/us-india-health-sterilisation/indian-sterilization-targets-remain-in-all-but-name-critics-say-idUKKCN0J92FT20141125> [https://perma.cc/Y5GE-NX85].

targets, state government and health officials have communicated targets to healthcare providers for each contraceptive method used, including female sterilization.¹⁴⁶ While India's Health Ministry has insisted that any stipulated numbers are not targets, critics of the country's family planning practices have argued that any sort of numerical objective unduly pressures healthcare workers who then pressure unsuspecting women into sterilization.¹⁴⁷ Healthcare providers are incentivized in a number of ways, such as by being paid for each woman sterilized,¹⁴⁸ as well as receiving "threats to withhold or reduce salary, negative performance assessment[s], or suspension and dismissals," if they do not hit specified targets.¹⁴⁹ Women are also incentivized to agree to sterilization through monetary payments that prove compelling when a significant portion of the population survives on meager wages.¹⁵⁰ Local advocates understand India's family planning programs to be largely directed towards impoverished women.¹⁵¹ Similar government-led practices with a disparate impact on poor women have been reported in other countries, such as Uzbekistan.¹⁵²

146. *India: Target-Driven Sterilization Harming Women*, HUM. RTS. WATCH (July 12, 2012, 2:31 PM), <https://www.hrw.org/news/2012/07/12/india-target-driven-sterilization-harming-women> [<https://perma.cc/M5W4-84R3>].

147. Dash, *supra* note 145.

148. Kalpana Wilson, *In the Name of Reproductive Rights: Race, Neoliberalism, and the Embodied Violence of Population Policies*, 91 *NEW FORMATIONS* 50, 63 (2017).

149. *India: Target-Driven Sterilization Harming Women*, *supra* note 146.

150. Dash, *supra* note 145. It has been reported that women who were sterilized in annual sterilization camps in Chhattisgarh were paid 1,400 rupees, the equivalent of fourteen British pounds at the time. Jason Burke, *India Mass Sterilization: Women Were 'Forced' into Camps, Say Relatives*, *THE GUARDIAN* (Nov. 12, 2014, 2:52 AM), <https://www.theguardian.com/world/2014/nov/12/india-sterilisation-deaths-women-forced-camps-relatives> [<https://perma.cc/6H34-ESLA>].

151. Dash, *supra* note 145 ("The poor are being seen as irresponsible breeders ... who need to be permanently dealt with"); *India: Target-Driven Sterilization Harming Women*, *supra* note 146 ("Hounding a poor woman to get sterilized without proper information and leaving her to deal with negative reproductive health consequences cannot be seen as a success"); *The Sterilization War in India That Never Stops*, *GLOB. VOICES* (Mar. 24, 2018, 3:52 AM), <https://globalvoices.org/2018/03/24/the-sterilization-war-in-india-that-never-stops/> [<https://perma.cc/2CRJ-KXEJ>] ("Many feel that Indian policies expose a tendency to only control the number of children the poor have."); Gethin Chamberlain, *UK Aid Helps to Fund Forced Sterilisation of India's Poor*, *THE GUARDIAN* (Apr. 14, 2012, 7:06 PM), <https://www.theguardian.com/world/2012/apr/15/uk-aid-forced-sterilisation-india> [<https://perma.cc/4X58-7P2L>].

152. OPEN SOC'Y FOUNDS., *FORCED STERILIZATION OF WOMEN IN UZBEKISTAN* 39 (2013); Mansur Mirovalev, *Uzbek Women Accuse State of Mass Sterilizations*, *NBC NEWS* (July 17, 2010, 8:47 PM), <https://www.nbcnews.com/id/wbna38293092> [<https://perma.cc/VJ3F-859G>].

B) Practices Under Which These Sterilizations Are Forced and Coerced

1) Doctors Obtain a Woman's Consent While She Is Under Duress

In many instances where women are coercively sterilized, they consent under duress.¹⁵³ Women living with HIV are often goaded into signing consent forms for sterilization as a requirement for receiving antiretrovirals and other HIV medication, including when they are pregnant and require this prenatal care to prevent mother-to-child transmission of the virus.¹⁵⁴ HIV-positive women have also been coerced into agreeing to sterilization as a precondition for accessing reproductive health services, like abortions and caesarean deliveries, as well as preventative health services, such as cervical cancer screenings.¹⁵⁵ In South Africa and Namibia, women living with HIV have recalled hospital staff either directly telling them or leading them to believe that they have to consent to sterilization to receive another medical service, likely the service that prompted their visit.¹⁵⁶ Conditioning the access of women living with HIV to vital medication and other health services on their concession to sterilization is not an uncommon practice.¹⁵⁷

Likewise, other marginalized groups of women also consent to sterilization under duress, typically signing consent forms while they are in labor or being prepared for surgery.¹⁵⁸ While in labor, Romani women have been informed that sterilization is urgently required, and they rushed to consent to the surgery, even in circumstances where the consent forms were hastily prepared or unavailable in a language they could understand.¹⁵⁹ These women consented while experiencing extreme pain, and in some

153. Patel, *supra* note 106.

154. OFF. OF THE HIGH COMM'R FOR HUM. RTS. ET AL., *supra* note 12, at 4.

155. Asmita Basu & Ratna Menon, Violence Against Women, HIV/AIDS Vulnerability and the Law 34 (July 7, 2011) (unpublished working paper) (on file with the Global Commission on HIV and the Law).

156. LOVENESS TAPIWA SATANDE, SEXUAL AND REPRODUCTIVE HEALTH RIGHTS THREATENED THROUGH FORCED STERILISATION OF WOMEN LIVING WITH HIV/AIDS: CASE STUDIES FROM NAMIBIA AND SOUTH AFRICA 2-3 (2010); Maria de Bruyn, *Women, Reproductive Rights, and HIV/AIDS: Issues on Which Research and Interventions Are Still Needed*, 24 J. HEALTH POPULATION & NUTRITION 413, 418 (2006).

157. JUDITH LEVINE, HIV AND THE LAW: RISKS, RIGHTS & HEALTH 66 (Glob. Comm'n on HIV and the Law 2012).

158. Patel, *supra* note 106, at 2.

159. OPEN SOC'Y FOUNDS., *supra* note 11, at 3.

situations, sterilization was even presented as a life-saving measure.¹⁶⁰ Women cannot properly consent to major medical procedures like sterilization while under duress,¹⁶¹ and yet this occurs frequently.

2) The Woman's Consent Is Invalid

There are situations where at first glance, women appear to have consented to being sterilized. However, their consent is invalid because they were not fully aware of what the procedure entailed and what its lasting effects would be¹⁶² or they were not informed about alternative measures that would have allowed them to make a fully informed decision.¹⁶³ In the case of women living with HIV, their healthcare providers often inadequately inform them or purposely misinform them about their available options.¹⁶⁴ Central American women living with HIV have described healthcare providers telling them that they neither had the right to choose their contraceptive nor to decide how many children they would have and when they would have them due to their positive HIV status.¹⁶⁵ Medical providers have also deceived women living with HIV about sterilization being a last resort to prevent mother-to-child HIV transmission,¹⁶⁶ as well as about how later pregnancies would affect both their and their future children's health.¹⁶⁷

Indigenous women and women who belong to other racial or ethnic minorities have been subjected to comparable practices.¹⁶⁸ Indigenous

160. CTR. FOR REPROD. RTS. & PORADNA, *BODY AND SOUL: FORCED STERILIZATION AND OTHER ASSAULTS ON ROMA REPRODUCTIVE FREEDOM IN SLOVAKIA* 56 (2003) ("The doctor told me that if I had a cesarean a third time, then I would die . . . I said that I was young and that I wanted more children . . . I was in great pain at that time . . . I agreed because I was scared.").

161. OPEN SOC'Y FOUNDS., *supra* note 11, at 2; OFF. OF THE HIGH COMM'R FOR HUM. RTS. ET AL., *supra* note 12, at 2.

162. Patel, *supra* note 106, at 4.

163. Holly Atkinson & Deborah Ottenheimer, *Involuntary Sterilization Among HIV-Positive Garifuna Women from Honduras Seeking Asylum in the United States: Two Case Reports*, 56 J. FORENSIC LEGAL MED. 94, 94 (2018).

164. Kendall & Albert, *supra* note 116, at 3 ("Maybe they didn't force me, but by not giving me any options and information, I was obliged to be sterilized. If they had given me the correct information, I wouldn't have accepted sterilization.").

165. Atkinson & Ottenheimer, *supra* note 163, at 94–95.

166. Kendall & Albert, *supra* note 116, at 5; OFF. OF THE HIGH COMM'R FOR HUM. RTS. ET AL., *supra* note 12, at 3.

167. Atkinson & Ottenheimer, *supra* note 163, at 95; Kendall & Albert, *supra* note 116, at 5.

168. *See infra* text accompanying notes 169–172 (demonstrating the circumstances under which Indigenous women and other women belonging to racial or ethnic minorities have been sterilized without their informed consent).

women are often not made aware of other contraceptive methods available to them, and as a result, many are not in positions to make informed decisions about their reproductive health.¹⁶⁹ There have been reports of healthcare providers making little to no effort to make the necessary information available in formats and languages that Indigenous women can understand.¹⁷⁰ Women who belong to racial and ethnic minorities are also deliberately misguided about the permanency of sterilization,¹⁷¹ in addition to not having the sterilization procedure explained in plain language for someone without a medical background.¹⁷² Unfortunately, impoverished women have also been coerced into sterilization due to a lack of information and outright misinformation.¹⁷³ In all these circumstances, women from marginalized communities have been unable to give or withhold informed consent due to deceit and manipulation at the hands of their trusted healthcare providers.

3) The Woman's Consent Was Not Obtained

Sometimes, healthcare providers do not even attempt to create a guise of obtaining a woman's consent, instead choosing to proceed with sterilization with no previous discussion with the patient and informing the woman about the procedure after the fact.¹⁷⁴ At times, women only learn that they have been sterilized years later when they try to get contraceptives¹⁷⁵ or when they are unable to conceive and consult with a doctor to investigate the cause of their complications.¹⁷⁶ A common way doctors sterilize women from marginalized communities without their consent is while they are in labor and undergoing a cesarean section.¹⁷⁷ In other cases, such as for women living with HIV, spouses or parents consent for women without them having

169. OFF. OF THE HIGH COMM'R FOR HUM. RTS. ET AL., *supra* note 12, at 4.

170. *Id.*

171. OPEN SOC'Y FOUNDS., *supra* note 11, at 3; Telephone Interview with Claudine-Annick Murphy, Staff Attorney, The Legal Aid Society (Dec. 1, 2022); Zoom Interview with Deirdre Stradone, Co-Deputy Dir. of the Immigr. Intervention Project, Sanctuary for Families (Nov. 3, 2022).

172. CENTR. FOR REPROD. RTS. & PORADNA, *supra* note 160, at 62.

173. *India: Target-Driven Sterilization Harming Women*, *supra* note 149 ("I tell these women you can get yourself operated. They put rings inside and tie the birth tubes and you can go back to the doctor and take the rings out if you want to have children again.").

174. Patel, *supra* note 106, at 2.

175. *Id.*

176. Telephone Interview with Claudine-Annick Murphy, Staff Att'y, Legal Aid Society (Dec. 1, 2022).

177. Patel, *supra* note 106, at 2; Kendall & Albert, *supra* note 116, at 4; OPEN SOC'Y FOUNDS., *supra* note 11, at 4; Natalia Antelava, *Uzbekistan's Policy of Secretly Sterilising Women*, BBC (Apr. 12, 2012), <https://www.bbc.com/news/magazine-17612550> [<https://perma.cc/B3F8-AC8F>].

expressed any prior interest in being sterilized,¹⁷⁸ and family members may do so based on inaccurate information from healthcare providers.¹⁷⁹ Sterilizing women without their knowledge and consent is a clear violation of their sexual and reproductive rights.

C) Section 601(a)'s Application to Asylum Seekers Who Were Not Persecuted Under China's OCP

1) A Statutory Interpretation of Section 601(a)

Involuntary sterilization is more widespread than the average person may realize and is performed in various countries under circumstances that may differ from China's OCP. The question is whether these other women are also protected by Section 601(a), both under the statute's plain language and how it has been interpreted by immigration judges, the BIA, and circuit courts. Section 601(a) amended the definition of "refugee" under 8 U.S.C. § 1101(a)(42) to read the following:

[A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion.¹⁸⁰

To interpret a statute, courts begin with the plain language of the text and the ordinary meanings of the words used to determine the legislature's intent.¹⁸¹ If the statute's meaning is clear, then there is no need to consult its history.¹⁸² While Section 601(a)'s legislative history indicates that it was enacted to protect Chinese asylum seekers,¹⁸³ the statute's plain text does not stipulate any requirements that would preclude its application outside of China's OCP.¹⁸⁴

178. OFF. OF THE HIGH COMM'R FOR HUM. RTS. ET AL., *supra* note 12, at 4; Atkinson & Ottenheimer, *supra* note 163, at 94.

179. OFF. OF THE HIGH COMM'R FOR HUM. RTS. ET AL., *supra* note 12, at 4.

180. 8 U.S.C. § 1101(a)(42)(B).

181. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

182. *Miller*, *supra* note 9, at 13.

183. *See supra* note 10 and accompanying text (noting that the congressman who proposed the eventual Section 601(a) provision did so in reference to Chinese women who had fled the OCP to the United States).

184. *Miller* posits that a statutory interpretation of Section 601(a) and asylum law's protection of persecution by non-state actors in the event the government is unwilling or

For individuals applying for asylum based on suffering past persecution, Section 601(a) offers two avenues of protection: one for those who have already been forced to abort a pregnancy or who were involuntarily sterilized and another for those who were punished for failing or refusing to submit to one of these invasive procedures or for exhibiting “other resistance to a coercive population control program.”¹⁸⁵ The first instance of past persecution, the focus of this Note, does not detail the context in which the individual must have been forced to abort a pregnancy or involuntarily sterilized. It merely states that someone who has unwillingly undergone either procedure suffered persecution on account of their political opinion.¹⁸⁶ Section 601(a)’s words are unambiguous, and so, the analysis ends there.¹⁸⁷ Since “there is no mention of *who* must have done the forcing, in what country or under what system of government those actions must have taken place, or any other required context,”¹⁸⁸ Section 601(a)’s plain text indicates that any individual who was forced to abort a pregnancy or involuntarily sterilized is eligible for asylum.¹⁸⁹

- 2) U.S. Courts’ Interpretation of What Constitutes a “Forced” Abortion and Sterilization Under Section 601(a)
 - a) “Forced” Includes Both Physical and Non-Physical Forms of Violence and Threats, But Not Mere Pressure

If there is any debate about Section 601(a)’s applicability to asylum seekers who were forced to abort a pregnancy or forcibly sterilized outside the context of China’s OCP, it regards the understanding of what constitutes a “forced” abortion or sterilization, as determined by the BIA and circuit

unable to protect the asylum seeker supports expanding protection under the statute. While Miller’s article focuses on expanding Section 601(a) to protect women, particularly Central American women, who were forced to abort their pregnancies by their rapists or violent partners, this Note expands her analytical framework and has a broader scope in focusing on three marginalized communities who are particularly susceptible to involuntary sterilization on a large scale. Miller, *supra* note 9, at 13.

185. 8 U.S.C. § 1101(a)(42)(B).

186. Miller, *supra* note 9, at 13.

187. *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992) (“When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’”) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); Miller, *supra* note 9, at 13.

188. Miller, *supra* note 9, at 13.

189. *Id.*

courts. The central question is whether their interpretation of "forced" includes practices and procedures performed in other countries. The BIA decided *Matter of T-Z-* in 2007.¹⁹⁰ It became the foundational case in which the agency interpreted the meaning of "forced" under Section 601(a). An abortion is "forced" in cases where "a reasonable person would objectively view the threats for refusing the abortion to be genuine, and the threatened harm, if carried out, would rise to the level of persecution."¹⁹¹ The BIA recognized that "persecution" is not only physical harm and threats of physical harm, but also non-physical harm and threats.¹⁹²

The BIA's articulation that "forced" includes coercive practices beyond the use and intimidation of physical attacks and restraints affirmed previous circuit decisions.¹⁹³ For example, in *Lau May Sui v. Ashcroft*, the Court of Appeals for the Eighth Circuit interpreted "forced to abort a pregnancy" to necessitate the petitioner showing that Chinese officials "used some sort of physical force or undue pressure."¹⁹⁴ In *Wang v. Ashcroft*, the Court of Appeals for the Ninth Circuit determined that a woman's abortions were "forced" because she relented to pressure from family planning officials who cut her wages, threatened to fire her, and warned of other high penalties if she proceeded with her pregnancies.¹⁹⁵ Expanding on its earlier *Wang* ruling, in *Ding v. Ashcroft*, the Ninth Circuit then looked to the dictionary definition of "force."¹⁹⁶ The court held that "force" does not require physical restraints, but is rather best understood as a broad concept that "includes compelling, obliging, or constraining by mental, moral, or circumstantial

190. *Matter of T-Z-*, 24 I. & N. Dec. 163 (B.I.A. 2007).

191. *Id.* at 168. The BIA acknowledged the term "forced" is not defined in the INA. In reaching its understanding of "forced," the agency relied on the ordinary meaning of "forced" based on the general definition of a refugee under the INA, as well as the provision's references to forced abortions and sterilizations and to persecution for refusing those procedures. *Id.* at 167.

192. *Id.* at 168.

193. *Id.* (highlighting that recent court decisions had already articulated that "forced" includes other forms of persuasion apart from the use or threat of physical force and restraints).

194. *Lau May Sui v. Ashcroft*, 395 F.3d 863, 871 (8th Cir. 2005). The court acknowledged that Lau faced economic and psychological pressures from Chinese officials to agree to sterilization. However, Lau was never sterilized. Her Section 601(a) claim was based on the abortion of her third child, which the court determined was not "forced." The court deemed Lau's fear of anecdotal evidence surrounding Chinese officials aborting late-term pregnancies insufficient, as no Chinese officials were aware that she was pregnant. *Id.*

195. *Wang v. Ashcroft*, 341 F.3d 1015, 1020 (9th Cir. 2003), *superseded by statute*, REAL ID Act, *as recognized in* *Li v. Garland*, 13 F.4th 954, 961 (2021).

196. *Ding v. Ashcroft*, 387 F.3d 1131, 1138 (9th Cir. 2004) (citing the New Shorter Oxford English Dictionary (1993) and Webster's New International Dictionary (3d ed.1981)).

means, in addition to physical restraint.”¹⁹⁷ Thus, the courts have widely settled that what constitutes “forced” under Section 601(a) involves not only physical violence or threats of physical violence, but non-physical forms of coercion and manipulation as well.¹⁹⁸

Yet, in *Matter of T-Z-*, the BIA distinguished what constitutes “forced” versus simply succumbing to pressure in its clarification of the Ninth Circuit’s *Wang* and *Ding* decisions.¹⁹⁹ The BIA reasoned that while an individual’s abortion or sterilization may have been influenced by other factors, like threats of economic harm, this fact alone only demonstrates that facing some sort of pressure affected the person’s choice; it does not necessarily mean that the threatened harm would have amounted to persecution if the aggressor followed through with it.²⁰⁰ The BIA clarified its expansive definition of “forced” under Section 601(a) by articulating that while the statute recognizes both physical and non-physical threats as force, not all forms of pressure or influence will meet the threshold of what constitutes “forced.”

b) Various Interpretations of the Level of State Involvement Required to Find That an Abortion or Sterilization Was “Forced”

Though the BIA and circuit courts agree that a “forced” abortion or sterilization does not require physical force, there appears to be disagreement about the level of state influence²⁰¹ required, which is likely a result of the BIA’s distinction between “force” and pressure. In 2007, the Second Circuit decided *Xiu Fen Xia v. Mukasey*.²⁰² This case concerned a Chinese woman who aborted her pregnancy at a private hospital because she feared that she would have been forced to abort her pregnancy, forcibly

197. *Id.* at 1138–39.

198. GORDON ET AL., *supra* note 103.

199. The BIA disagreed with *Ding* and *Wang* to the extent the cases suggested that some threats of economic harm which do not meet the threshold of persecution would establish that an abortion was “forced.” Persecutory economic harm goes beyond bias or disadvantage and must instead be severe and more than the economic misfortunes typically experienced by others from that country. *Matter of T-Z-*, 24 I. & N. Dec. 163, 173 (BIA 2007). Persecution also does not have a concise definition or a list of exclusive harms, which has allowed adjudicators to make determinations on a case-by-case basis. COLLOPY, *supra* note 21, at 33–34.

200. *Matter of T-Z-*, 24 I. & N. at 169–70.

201. My use of the phrases “state influence” or “state involvement” refers to the government being the asylum seeker’s persecutor, either through the existence of a state policy requiring the abortion or sterilization or through a government official ordering the procedure, whether pursuant to a state policy or not.

202. *Xiu Fen Xia v. Mukasey*, 510 F.3d 162 (2d Cir. 2007).

sterilized, induced to pay a large fine, and arrested alongside her family members if government officials discovered her pregnancy during her state mandated gynecological checkups.²⁰³ However, government officials lacked knowledge about Xia's pregnancy and abortion, and as such, the court emphasized that no concrete threats had been levelled against her.²⁰⁴ The consequences Xia feared were merely speculation;²⁰⁵ even if it was absolute that Xia would have been punished if officials uncovered her pregnancy, it could not be established with certainty what that punishment would have been nor that it would have risen to persecution.²⁰⁶

In contrast, earlier in 2007, the Court of Appeals for the Fifth Circuit adopted a more expansive definition of "forced" in its *Yuqing Zhu v. Gonzales* ruling.²⁰⁷ With similar facts to *Xia*, *Zhu* centered on an unmarried Chinese woman who aborted her pregnancy because she not only presumed she was required to under Chinese law, but she also feared losing her job, benefits, housing, and more.²⁰⁸ Like in *Xia*'s case, government officials were unaware of *Zhu*'s pregnancy.²⁰⁹ Yet, the court reasoned that based on the facts known about China's family planning policies,²¹⁰ a reasonable person in *Zhu*'s position would have objectively viewed the possible consequences of refusing an abortion as genuine threats,²¹¹ and those threats could be

203. *Id.* at 164.

204. *Id.* at 163.

205. *Id.* at 165–66 (describing how Xia's fears were not actual threatened harms, but "rather . . . worries about what punishment Xia *might* have faced . . .").

206. *Id.* at 166.

207. *Yuqing Zhu v. Gonzales*, 493 F.3d 588, 597 (5th Cir. 2007). In its July 2007 Immigration Law Advisor legal newsletter, the U.S. Department of Justice's Executive Office for Immigration Review (EOIR) described the Fifth Circuit's ruling as an extension of *Matter of T-Z*, in which government officials were aware of the respondent's wife's pregnancy and threatened to take away her job and fine her. The EOIR also underscored that previous circuit decisions finding that a reproductive procedure was "forced" due to non-physical coercion had involved specific threats. 1 EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., IMMIGRATION LAW ADVISOR 9–10 (July 2007).

208. *Yuqing Zhu*, 493 F.3d at 591.

209. *See id.* at 599 (explaining that the U.S. government cannot argue *Zhu*'s abortion was not forced because Chinese authorities were unaware of her pregnancy).

210. The court pointed out that the 1999 U.S. State Department Country Conditions Report for China showed that forced abortions and sterilizations were still occurring despite the country's official policy prohibiting physically compelled procedures. The court also mentioned the high number of federal court cases of Chinese women in comparable situations who were forced to abort their pregnancies or were forcibly sterilized. *Id.* at 597–98.

211. "Zhu elected to have an abortion in the tenth week of pregnancy, before it was discovered, rather than waiting until its unavoidable discovery by authorities at a time when she might be physically compelled to abort the pregnancy." *Id.* at 599.

deemed as persecution.²¹² Despite both circuits grounding their decisions in the BIA's definition of "forced" in *Matter of T-Z*, they both ultimately reached different conclusions with a comparable set of facts.

The split between circuits on whether government officials' direct knowledge is fundamental to finding that an abortion or sterilization was "forced"²¹³ raises questions of how Section 601(a) applies to private actors. The Ninth Circuit tackled this issue directly, addressing a 2007 case where a woman's abortion was compelled by her employer. In *Zi Zhi Tang v. Gonzales*, a husband applied for asylum on the ground that the Chinese government performed a forced abortion on his wife.²¹⁴ Although the immigration judge emphasized that Tang's wife was not compelled to abort her pregnancy by a government order or official,²¹⁵ the court still found that the abortion was "forced."²¹⁶ While the court did not necessitate the direct role of a government official, it still understood the abortion as taking place within the context of the OCP—a program that included private participation.²¹⁷ The court also noted that Li Zhen's employer's policies necessitating an abortion coincided with official state policy.²¹⁸ So, the Ninth Circuit viewed a state policy as at least relevant and significant in determining whether a non-state actor could "force" an individual to abort a pregnancy.²¹⁹ These circuits have found different levels of state engagement necessary to determine that a reproductive procedure was "forced" under Section 601(a), but what they all share is an analysis grounded in a state policy imposing these procedures.

212. *Id.* at 598.

213. In an unpublished opinion that is not precedent, the Ninth Circuit determined that Feng's abortion was not "forced" because family planning officials had not known she was pregnant, and a previous threat from family officials was too far removed from the pregnancy to establish force. *Feng v. Sessions*, 723 F. App'x 441, 442 (9th Cir. 2018). However, in *Huang v. Gonzales*, the Seventh Circuit contemplated that a Chinese woman with a male first-born who was pregnant again could feel compelled to get an abortion to evade government officials later physically forcing her to abort her pregnancy. The court maintained it would be questionable to label the abortion as voluntary under those circumstances. *Huang v. Gonzales*, 453 F.3d 942, 947 n.2 (7th Cir. 2006).

214. *Zi Zhi Tang v. Gonzales*, 489 F.3d 987, 988–89 (9th Cir. 2007).

215. *Id.* at 991.

216. *Id.* at 988.

217. *Id.* at 991. *See supra* text accompanying note 58 (mentioning that the OCP's enforcement involved the participation of private actors who monitored their fellow citizens).

218. *Id.* (reasoning that Li Zhen's employer's policies were essentially an implementation of the state's official policy).

219. *Miller, supra* note 9, at 14 n.48.

c) Resolving "Forced" as Defined by the Courts to Extend Section 601(a) to Other Asylum Seekers

When considering how the BIA's base understanding of "forced" affects Section 601(a)'s application outside of China's OCP, *Matter of T-Z's* interpretation incorporating elements of both physical force and non-physical compulsion is inclusive of how involuntary sterilization occurs in other regions. For women who were unknowingly sterilized while undergoing surgery,²²⁰ they were forcibly sterilized using physical force. This aligns with how international law defines forced sterilization.²²¹ For women who were deceived into sterilizations through deliberate misinformation, intimidation, or threats,²²² they were "forced" through coercive means, such as non-physical compulsion or psychological pressure. This correlates with how international law defines coerced sterilization,²²³ another form of involuntary sterilization.

Therefore, any scrutiny surrounding a broader application of Section 601(a) arises due to courts' apparent requirement of force by an official state infrastructure, whether implicated by a state policy or direct compulsion by a state official. In some countries, such as Peru,²²⁴ India,²²⁵ and China,²²⁶ involuntary sterilization against certain communities has direct links to the state. However, in other countries, while involuntary sterilization

220. See *supra* Section II.B.3 (noting that sterilizing women during caesarean sections is a common method).

221. OPEN SOC'Y FOUNDS., *supra* note 11, at 8.

222. See *supra* Section II.B.1-2 (addressing how women are often sterilized while they are under duress or without all the information they need to make an informed decision).

223. OPEN SOC'Y FOUNDS., *supra* note 11, at 8; OFF. OF THE HIGH COMM'R FOR HUM. RTS. ET AL., *supra* note 12, at 2.

224. Between 1996 and 2000, under the leadership of President Alberto Fujimori, Peru sterilized over 270,000 women and tens of thousands of men in a state-run birth control program. *Peru Forced Sterilisations Case Reaches Key Stage*, BBC (Mar. 1, 2021), <https://www.bbc.com/news/world-latin-america-56201575> [<https://perma.cc/DG84-KXS5>]. The program was intended to address poverty by lowering birthrates among poor families, who were often from rural and Indigenous communities and spoke little to no Spanish. *Id.* Fujimori maintains that all the women who were sterilized under the program consented, but thousands of Peruvian women contend they were tied down, threatened, and tricked into sterilization by doctors who were incentivized by the state. *Id.*; Anastasia Moloney, *Haunted by Forced Sterilizations, Peruvian Women Pin Hopes on Court Hearing*, REUTERS (Jan. 8, 2021, 8:24 AM), <https://www.reuters.com/article/peru-women-sterilizations/haunted-by-forced-sterilizations-peruvian-women-pin-hopes-on-court-hearing-idUSL8N2JH4WB> [<https://perma.cc/5V8A-LRXG>].

225. See *supra* notes 145–151 and accompanying text (describing India's state-run program targeting impoverished women).

226. See *supra* notes 133–141 and accompanying text (describing China's state-run program targeting Muslim minority ethnic groups).

reportedly occurs in public hospitals and clinics,²²⁷ this does not necessarily implicate state engagement to the extent circuit courts have relied on when analyzing Section 601(a) claims from Chinese asylum seekers. Most importantly, medical providers can also be influenced by their own personal biases²²⁸ or employed by private hospitals or clinics, which would theoretically leave many women unprotected if courts require the government to be the persecutor in some form.

The circuit courts' concentration on the role of a government policy or the actions of a government official is a product of Section 601(a) primarily being invoked by Chinese asylees.²²⁹ The OCP focused on restricting the Han majority.²³⁰ Meanwhile, ethnic minorities were allowed to have more than one child.²³¹ So, while China certainly employed cruel, draconian measures to enforce the OCP in a clear violation of its citizens' reproductive rights, the OCP was a general population restriction that was not discriminatory in who it targeted.²³² Consequently, the attention shifted from the OCP's restrictions to its enforcement, in that the government used forced abortions and involuntary sterilizations to punish those who violated

227. See, e.g., *Panama Investigates Claimed Forced Indigenous Sterilization*, *supra* note 128 (reporting that Indigenous women alleged being sterilized without their consent at a public hospital in Panama); *HIV-Positive Women Forcibly Sterilized in Namibia, Court Finds*, *supra* note 119 (reporting that Namibia's supreme court ruled that health workers had not informed three women at state-run hospitals about the sterilization procedure forms they signed, in addition to inducing their signatures while they were in labor); Antony Sguazzin, *Report: South African State Hospitals 'Forcibly' Sterilized Women with HIV*, TIME (Feb. 25, 2020, 8:05 AM), <https://time.com/5790217/south-africa-hospitals-hiv-women-sterilization/> (reporting that South African state hospitals coerced women into accepting sterilization during childbirth) [<https://perma.cc/MEB4-47B8>].

228. Medical providers possess both implicit and explicit biases against marginalized communities that affect "patient-clinician communication, clinical decision-making, and institutionalized practices." Monica B. Vela et al., *Eliminating Explicit and Implicit Biases in Health Care: Evidence and Research Needs*, 43 ANN. REV. PUB. HEALTH 477, 478 (2022).

229. See *supra* text accompanying notes 94–96 (highlighting legal scholarship covering various types of Section 601(a) claims by Chinese asylum seekers).

230. The Han ethnic group made up over 90 percent of the Chinese population. Kristine Sudbeck, *The Effects of China's One-Child Policy: The Significance for Chinese Women*, 27 NEB. ANTHROPOLOGIST 43, 46 (2012).

231. Allison C. Lund, *The One-Child Policy: A Moral Analysis of China's Most Extreme Population Policy*, HONOR SCHOLAR THESES 1, 25 (DePauw University 2020) (suggesting that China did not apply the OPC against minorities to avoid eugenics accusations).

232. This was the BIA's controversial determination in the *Matter of Chang* ruling. *Matter of Chang*, 20 I&N Dec. 38, 44 (B.I.A. 1989). This was based on the laws of general applicability where laws that are not intended to target a specific community and are fairly applied are not grounds for asylum. U.S. CITIZENSHIP AND IMMIGR. SERVS., *supra* note 24, at 14.

the OCP by having more children than allotted.²³³ This reframing made it so the mere act of getting pregnant with an additional child or resisting a mandatory reproductive procedure opposed the OCP, a state policy, and thus amounted to a political opinion.²³⁴

Therefore, courts centered a "state policy" and a "state official's involvement" in their analysis under Section 601(a) because they needed to develop an analytical framework based on how involuntary abortions and sterilizations typically occurred in China. A narrow lens was reasonable because Section 601(a) was enacted to address China's OCP,²³⁵ and Chinese asylees were most, if not all, of the asylees seeking protection under the statute.²³⁶ However, when considering the circuit split within a broader context, the real disagreement does not concern a need for state involvement on some level. Rather, the dispute appears to be whether an asylum seeker needs to present evidence of a direct, individualized threat or harm, like one from a state official, or whether an indirect, theoretical threat, such as one imposed by a general state policy, suffices. For some courts, this is the difference between "force" and pressure.²³⁷ For women involuntarily sterilized outside of China, there is typically a direct harm or threat of harm due to the inherently personal nature of their interactions with their medical providers who perform the procedure. Therefore, regardless of the circuit courts' position on the requirement of harm in the context of China's OCP, women involuntarily sterilized elsewhere meet the higher threshold of experiencing a direct harm.

Considering other asylum seekers' Section 601(a) claims within the context of their national involuntary sterilization practices, instead of China's OCP, is in line with standard asylum procedures. USCIS officers and immigration judges already rely on assessments of what is happening in asylum seekers' countries of origin to contextualize and evaluate their

233. See *supra* text accompanying notes 73–74 (referencing Attorney General Edwin Meese III's suggestion that Chinese asylum seekers' refusal to abort a pregnancy or refusal to be sterilized could be understood as an act of political defiance).

234. 8 U.S.C. § 1101(a)(42)(B).

235. See *supra* note 10 and accompanying text (explaining Section 601(a)'s legislative history).

236. See *supra* text accompanying notes 93–96 (highlighting legal scholarship covering various types of Section 601(a) claims by Chinese asylum seekers).

237. See *Xia Fen Xia v. Mukasey*, 510 F.3d 162, 166 (2d Cir. 2007) ("Xia cannot establish that she faced a threat that amounted to persecution without the threshold showing that a palpable threat existed."); *Yuqing Zhu v. Gonzales*, 493 F.3d 588, 599 (5th Cir. 2007) ("As we have noted, the IJ found that it was 'the law' that convinced Zhu to abort her pregnancy. Under all relevant facts of Zhu's case, this is sufficient to make her abortion 'forced.'").

asylum applications.²³⁸ These assessments often include the U.S. Department of State's annual country reports on human rights practices, articles and reports by non-governmental organizations and news agencies,²³⁹ and testimony from country conditions experts.²⁴⁰ These resources assist adjudicators in placing asylum seekers' testimonies within the broader context of where they lived to evaluate how consistent and plausible their allegations are with reported conditions in their home countries.²⁴¹ For forced abortions and involuntary sterilization cases, courts have referenced country conditions reports and other related evidence when assessing the veracity of Chinese asylum seekers' well-founded fear of persecution claims concerning involuntary sterilization.²⁴² With there now being more research available about the prevalence of involuntary sterilization outside of China

238. Country conditions assist adjudicators in establishing that asylum seekers are eligible for asylum and credible. Susan K. Kerns, *Country Conditions Documentation in U.S. Asylum Cases: Leveling the Evidentiary Playing Field*, 8 IND. J. GLOB. LEGAL STUD. 197, 200 (2000).

239. See 8 C.F.R. § 208.12 (2022) (authorizing that "in deciding an asylum application . . . the asylum officer may rely on material provided by the Department of State, other USCIS offices, or other credible sources, such as international organizations, private voluntary agencies, news organizations, or academic institutions.").

240. Country conditions experts can possess generalized knowledge about a location, and some also have specialties, like how gangs operate in Mexico. KELCEY BAKER ET AL., *EXPERT WITNESSES IN U.S. ASYLUM CASES: A HANDBOOK* 36 (2018). Their knowledge is grounded in deep insight into a specific location's political, social, and cultural environment, as well as its human rights conditions. *Id.* at 35. They participate in asylum cases in a variety of ways, such as by writing affidavits and/or testifying at the hearing. *Id.*

241. Country condition evidence and testimony can substantiate asylees' claims of past persecution or well-founded fear of persecution by showing that they are supported by the documented human rights concerns or violations in their countries. These resources also help adjudicators see why the foreign governments in question cannot or refuse to shield the asylees and why the persecution they face(d) is on account of an enumerated ground. Sabi Ardan, *Country Condition Evidence, Human Rights Experts, and Asylum Seekers: Educating U.S. Adjudicators on Country Conditions in Asylum Cases*, 13-09 IMMIGR. BRIEFINGS 1, 8 (2013).

242. See *e.g.*, *Huang v. U.S. Att'y. Gen.*, 346 F. App'x 463, 467 (11th Cir. 2009) (noting that the 2004 United States Department of State Country Conditions Report listed forms of punishment in the Fujian Province, which excluded and prohibited forced sterilizations); *Cai Yan Zheng v. Holder*, 509 F. App'x 269, 271 (4th Cir. 2013) (finding that the immigration judge and BIA did not err in relying on the State Department's report that did not corroborate the asylum seekers' claim of being vulnerable to forced sterilization upon return to China due to birthing their children in the United States); *Lin v. Garland*, No. 19-2840, 2022 WL 1487217, at *2 (2d Cir. May 11, 2022) (concluding that none of the country conditions evidence Lin presented, including the State Department's report, addressed how China's family planning policy was enforced and how often in the specific province where Lin was from).

and the practices medical providers use to sterilize these women,²⁴³ Section 601(a) must be thought of within the boundaries of how involuntary sterilization occurs in those countries.

Unlike China's OCP, involuntary sterilization in other regions is directed towards women from marginalized communities.²⁴⁴ Women living with HIV,²⁴⁵ belonging to racial and ethnic minority groups, and experiencing poverty face systemic discrimination,²⁴⁶ which worsens for those with intersectional identities.²⁴⁷ It is no coincidence that medical practitioners set their sights on populations already denigrated by larger society and sometimes even the state itself. Just as having an additional child was seen as resisting the OCP, marginalized women having children is seen as an act of defiance²⁴⁸—one akin to a political opinion. Though there may not always be a state policy, medical providers' focus on women who have already been deemed unworthy and were already less likely to receive state protection is persecution ignored and permitted by the state.

Lastly, as mentioned, the plain meaning of Section 601(a) does not reference China or the OCP.²⁴⁹ It does not explicitly restrict the finding that a forced abortion or an involuntary sterilization is per se persecution in the context of a government being the persecutor.²⁵⁰ This is in line with general

243. See *supra* Section II.A–B (detailing the groups of marginalized women heavily impacted by involuntary sterilization and how medical providers sterilize them).

244. See *supra* Section II.A (focusing on three particular groups of marginalized women medical providers target).

245. Ariadna Huertas-Zurriaga et al., *Reproductive Decision-Making of Black Women Living With HIV: A Systematic Review*, 18 *WOMEN'S HEALTH*, 2 (Apr. 11, 2022), <https://journals.sagepub.com/doi/epub/10.1177/17455057221090827> [<https://perma.cc/4XRY-PWFJ>].

246. Off. of the High Comm'r for Hum. Rts., *Gender Discrimination, Racial Discrimination and Women's Human Rights*, OHCHR.ORG (Sept. 29, 2017), <https://www.ohchr.org/en/stories/2017/09/gender-discrimination-racial-discrimination-and-womens-human-rights> [<https://perma.cc/7XZL-R5T8>] (“Being poor, [belonging to a minority] and female, their socio-economic status infects every sphere of their daily lives – their access to health services, their progress in education, their right to shelter . . .”).

247. *Id.* (“For those most affected by discriminatory practices, it is always multiple and intersecting forms of discrimination that create the most intricate, sticky, choking web of deprivation, of denial of rights . . .”).

248. See, e.g., Sguazzin *supra* note 227 (quoting an affidavit from an investigative report released by the South African government where a nurse said to a patient, “You must be closed up because you HIV people like making babies and it just annoys us. Just sign the forms, so you can go to [the] theater.”); Ottenheimer et al., *supra* note 4, at 4 (reporting that half of the women in the study reported being discriminated against due to their race or ethnicity, which included being lectured about having more children).

249. See *supra* Section II.C.1 (interpreting Section 601(a)).

250. *Id.*

U.S. asylum law, which does not require the government or a government agent to be an asylee's persecutor.²⁵¹ This can be the case, but in circumstances where it is not, asylum seekers can be eligible for asylum by showing that their government is unable or unwilling to control their persecutor(s).²⁵² Congress could revise Section 601(a) to explicitly state that it does not require a coercive population program and is meant to operate within the existing parameters of asylum law.²⁵³ With this revision unlikely,²⁵⁴ the Attorney General could release an executive order with these directives for immigration courts and circuit courts. Considering the marginalized positions women targeted for involuntary sterilization occupy and why they are targeted, Section 601(a) must extend to the very groups of people asylum is meant to protect.

PART III

A) A Call to Action for Immigration Advocates

1) Attorneys Need to Routinely Screen Female Clients for Involuntary Sterilization

Since Section 601(a) extends to individuals who have been involuntarily sterilized outside of China's OCP, attorneys working with asylum seekers should screen all female clients for involuntary sterilization. All training manuals and training sessions for law students and attorneys working on asylum cases should explicitly mention Section 601(a) when addressing the political opinion protected ground. This is especially true for training manuals geared towards pro bono attorneys who understandably have less knowledge and experience than seasoned immigration attorneys.

251. 8 U.S.C. § 1101(a)(42)(A).

252. Miller, *supra* note 9, at 13. See, e.g., *Jonaitiene v. Holder*, 660 F.3d 267, 270 (7th Cir. 2011) ("In order to demonstrate persecution . . . the petitioners must demonstrate that the threatening conduct is by the government, or that it is by private persons who the government is unwilling or unable to control.").

253. See Miller, *supra* note 9, at 13 (stating that Congress expects newly enacted legislation to operate "in harmony with established precedent" unless it clearly states otherwise).

254. See Suzanne Gamboa, *Congress Has Failed for More Than Two Decades to Reform Immigration - Here's a Timeline*, NBC NEWS (Jan. 7, 2023, 6:00 AM), <https://www.nbcnews.com/news/latino/immigration-reform-failure-congress-timeline-rcna64467> [<https://perma.cc/7PTT-5W5R>] (describing how most changes in our immigration laws have resulted from "funding bills, small provisions in other legislation, regulations and executive authority" because Congress has not passed any significant immigration reform in the last twenty years).

Those working with asylum seekers will not probe for involuntary sterilization if they are unaware that it is a ground for asylum eligibility.

Attorneys need to intentionally screen for involuntary sterilization²⁵⁵ because many women are sterilized under circumstances where they are unable to offer consent, including due to anesthesia.²⁵⁶ They may not even know they were sterilized,²⁵⁷ and so, cannot convey that information unless attorneys lead the conversation with contextual questions. Attorneys should be particularly alert with clients whose backgrounds and countries of origin indicate they were at a higher risk of being forcibly or coercively sterilized.²⁵⁸ When asking questions about a client's family and children, attorneys should include questions like the following: Have you tried to get pregnant but been unable to? Have you had unprotected sex and never gotten pregnant despite knowing you were previously fertile? Did you have a cesarean section for any of your pregnancies? How did your medical providers treat you during your visits?²⁵⁹ These types of questions can help attorneys determine the probability of an involuntary sterilization.

255. Ottenheimer et al., *supra* note 4, at 6.

256. *See supra* Section II.B.3 (detailing many situations in which women are sterilized while unconscious).

257. *See supra* text accompanying notes 177–178 (considering that some women learn they were sterilized years after the fact).

258. In interviews with two immigration attorneys who have worked on involuntary sterilization cases and an immigration attorney who has worked on forced abortion cases, they explained there is now increased awareness about the prevalence of these practices against Indigenous Central and South American women. So, they routinely screen for involuntary sterilization and forced abortion, respectively, among their clients from those communities. However, their practices for screening female clients who are not Indigenous and/or from Central and South America differs. Stradone indicated that screening for involuntary sterilization is not a standard question that is included in her general intake process, and Miller indicated likewise regarding forced abortion. Telephone Interview with Claudine-Annick Murphy, Staff Att'y, Legal Aid Soc'y (Dec. 1, 2022); Zoom Interview with Deirdre Stradone, Co-Deputy Dir. of Immigr. Intervention Project, Sanctuary for Fams. (Nov. 3, 2022); Zoom Interview with Sylvia Miller, Staff Att'y, Colectiva Legal del Pueblo (Jan. 20, 2023). Meanwhile, in addition to Central American and Indigenous women, Murphy targets other groups of women, such as African women and Asian women, based on her knowledge of where involuntary sterilization could occur. However, she generally considers other risk factors that would increase a client's likelihood of forced sterilization when determining whether to probe the issue during intake. E-mail from Claudine-Annick Murphy, Staff Att'y, Legal Aid Soc'y, to author (Aug. 7, 2023, 9:27 EST) (on file with author).

259. These questions are based on suggested lines of inquiries by an immigration attorney who has worked on involuntary sterilization cases. Telephone Interview with Claudine-Annick Murphy, Staff Att'y, The Legal Aid Soc'y (Dec. 1, 2022).

After completing the intake process to establish asylum eligibility and regularly meeting with an asylee, an attorney will begin working on the individual's affidavit.²⁶⁰ The courts have signaled that in Section 601(a) cases, the central legal question is whether the abortion or sterilization was "forced."²⁶¹ In retelling an asylum seeker's involuntary sterilization, attorneys must provide details about the individual's interactions with her medical providers,²⁶² such as what information she was told about the procedure (if informed at all), whether she expressed wanting more children, whether she felt intimidated by the doctors, and how she is typically treated by medical professionals. These details may indicate that an asylum seeker did not consent to sterilization, thus making the procedure "forced."²⁶³ It is also useful information for the physician who will read the affidavit to prepare for the forensic medical evaluation.²⁶⁴ When attorneys have reason to believe an asylum seeker was involuntarily sterilized, they should next consult a physician to complete a comprehensive forensic medical evaluation.²⁶⁵

2) Physicians Conducting Medical Evaluations for Asylum Claims Should Screen Female Clients for Involuntary Sterilization

a) The Value of Forensic Medical Evaluations for Asylum Seekers

Alongside attorneys, physicians conducting forensic medical evaluations for asylum claims should also screen their female clients for involuntary sterilization.²⁶⁶ To be granted asylum in the United States, asylum applicants bear the full burden of demonstrating they have a

260. See ASYLUM MANUAL, *supra* note 25 (explaining how asylum applications include declarations where clients recount their lives in their home countries, why they fled, and why they are afraid to return).

261. See *supra* Section II.C.2.a-b. (detailing how courts have concentrated on whether the procedure was truly "forced").

262. Ottenheimer et al., *supra* note 4, at 6.

263. *Id.* ("Thus, gathering extensive detail about the interactions that a woman who reports involuntary sterilization had with her medical team is critical in establishing 'force' and building a stronger case for asylum.").

264. Zoom Interview with Dr. Deborah Ottenheimer, Dir. of Women's Health Servs., Gotham Health, Morrisania (Jan. 13, 2023).

265. *Id.*

266. Ottenheimer et al., *supra* note 4, at 6.

reasonable fear of being persecuted in their country of origin.²⁶⁷ However, many asylum seekers hastily left their homes with little to no evidence of their persecution,²⁶⁸ and all they have to present is their personal stories.²⁶⁹ Depending on their family's and friends' circumstances back home, they may also experience difficulties gathering witness affidavits and other forms of persuasive evidence²⁷⁰—details needed to bolster their claims and meet their evidentiary burden.²⁷¹

Furthermore, asylum law has established a hierarchy that dictates which forms of oppression and adversity are severe enough to merit entry into the United States.²⁷² When paired with adjudicators' discretion to deny asylum even when applicants are eligible for relief,²⁷³ asylum seekers' failure to persuade the adjudicator that they are deserving of asylum or their inability to credibly establish their claims can have detrimental consequences.²⁷⁴ In these cases, the most compelling evidence asylum seekers may have is the physical and/or psychological exhibition of their suffering.²⁷⁵ "The body becomes 'the place that displays the evidence of truth.'"²⁷⁶

The evidence of trauma captured in one's body and mind makes physicians suitable to perform forensic medical evaluations, as these evaluations can positively influence adjudicators' appraisal of asylum

267. Elizabeth Scruggs et al., "An Absolutely Necessary Piece": A Qualitative Study of Legal Perspectives on Medical Affidavits in the Asylum Process, 44 J. FORENSIC & LEG. MED. 72, 73 (2016); COLLOPY, *supra* note 21, at 25–26.

268. Holly G. Atkinson et al., *Impact of Forensic Medical Evaluations on Immigration Relief Grant Rates and Correlates of Outcomes in the United States*, 84 J. FORENSIC & LEG. MED. 1, 2 (2021); Scruggs et al., *supra* note 267, at 73; Kara Gavin, *For Refugees Seeking Asylum, Medical Exams Play a Vital Role*, MICHIGAN MEDICINE (Nov. 29, 2016, 1:00 PM), <https://www.michiganmedicine.org/health-lab/refugees-seeking-asylum-medical-exams-play-vital-role> [<https://perma.cc/9P62-748B>].

269. Atkinson et al., *supra* note 268, at 2.

270. See Scruggs et al., *supra* note 267, at 73 (explaining that refugees can struggle to gather strong evidence from overseas).

271. Gavin, *supra* note 268.

272. See Arastu, *supra* note 6, at 53–54 (noting that many immigrants who enter the United States as refugees based on their misfortune would not have qualified through other paths of gaining lawful immigration status, which prioritize proximity to whiteness, wealth, and labor contribution).

273. COLLOPY, *supra* note 21, at 26.

274. See Jenna M. Peart et al., Letter to the Editor, *The Role of Physicians in Asylum Evaluation: Documenting Torture and Trauma*, 176 JAMA INTERN. MED. 417, 417 (2016) (arguing that for some asylum seekers, a forensic medical evaluation is the difference between the opportunity to remain in the United States with legal status and being deported).

275. Scruggs et al., *supra* note 267, at 73; Gavin, *supra* note 268.

276. Scruggs et al., *supra* note 267, at 73.

seekers' credibility.²⁷⁷ Forensic medical evaluators include physicians, psychologists, and social workers qualified to perform these evaluations according to the Istanbul Protocol, a United Nations guidebook on administering medical examinations for torture and other forms of abuse.²⁷⁸ The investigation's primary goal is to determine the facts surrounding the alleged persecutory treatment, such as by recovering and preserving evidence and resolving how, when, and where the treatment in question occurred.²⁷⁹ Physicians take the asylum seeker's history, complete a physical examination, and consider the provided records.²⁸⁰ These findings inform their medical affidavits, which generally include detailed images, drawings, and descriptions²⁸¹ that an attorney includes with their client's documentation as supporting evidence.²⁸²

If the asylum seeker did not suffer physical violence or endured additional psychological trauma, mental health professionals can also conduct forensic psychological evaluations.²⁸³ These evaluations highlight the psychological effects of an asylum applicant's ill treatment, as many experience various psychiatric illnesses, such as depression, anxiety, and PTSD, due to their persecution.²⁸⁴ Psychological evaluations can also help an adjudicator understand how psychiatric symptoms can impact an asylum seeker's demeanor, as well as their ability to recall details and maintain a consistent testimony.²⁸⁵ Forensic medical evaluations help asylum seekers prove they were previously persecuted or have a well-founded fear of persecution²⁸⁶ and help adjudicators take a trauma-informed approach to

277. Katherine C. McKenzie & Arielle Thomas, *Assisting Asylum Seekers in a Time of Global Forced Displacement: Five Clinical Cases*, 49 J. FORENSIC & LEGAL MED. 37, 37 (2017).

278. Ottenheimer et al., *supra* note 4, at 6.

279. Off. of the High Comm'r for Hum. Rts., Istanbul Protocol, at 17, U.N. Doc. HR/P/PT/8/Rev.1 (2004).

280. Peart et al., *supra* note 274, at 417.

281. *Id.*

282. *Id.* Medical evaluators are responsible for evaluating how consistent the findings are with the asylum applicant's testimony. The Istanbul Protocol lists five levels of consistency: a. "not consistent" b. "consistent with" c. "highly consistent" d. "typical of" and e. "diagnostic of." Ottenheimer et al., *supra* note 4, at 6; Off. of the High Comm'r for Hum. Rts., *supra* note 279, at 36–37.

283. Kim A. Baranowski et al., *Supporting Asylum Seekers: Clinician Experiences of Documenting Human Rights Violations Through Forensic Psychological Evaluations*, 31 J. TRAUMATIC STRESS 391, 391 (2018).

284. *Id.* at 392.

285. *Id.*; Arastu, *supra* note 6, at 57.

286. Medical evaluations are used to support asylum seekers' claims of persecution by showing that they endured physical and/or emotional abuse in the way they describe in their applications. Arastu, *supra* note 6, at 56.

assessing claims.²⁸⁷ Research underlines the positive effect forensic medical evaluations have on asylum applications.²⁸⁸

Unfortunately, attorneys can face many difficulties in obtaining forensic medical evaluations.²⁸⁹ The demand for these evaluations is higher than the number of physicians properly trained and available to complete them.²⁹⁰ Some asylum seekers may also have less access to forensic medical evaluators depending on where they live and whether they need a physical evaluation or a psychological evaluation.²⁹¹ For forensic medical evaluations to substantiate involuntary sterilization, the final test to confirm sterilization²⁹² is an expensive radiological procedure.²⁹³

There are also concerns about how increased use of forensic medical evaluations in asylum applications could heighten the evidentiary standard.²⁹⁴ If adjudicators come to expect forensic medical evaluations for asylum seekers to successfully corroborate their claims, applicants who lack access to these evaluations could be disadvantaged.²⁹⁵ These are all barriers limiting asylum seekers' use of forensic medical evaluations. Therefore,

287. Atkinson et al., *supra* note 268, at 9.

288. A study of the 746 adjudicated asylum cases supported by medical evaluations conducted by Physicians for Human Rights (PHR) between 2000 and 2004 revealed an 89 percent asylum grant rate compared to the 37.5 percent national average who did not receive PHR evaluations. Stuart L. Lustig et al., *Asylum Grant Rates Following Medical Evaluations of Maltreatment Among Political Asylum Applicants in the United States*, 10 J. IMMIGRANT & MINORITY HEALTH 7, 7 (2008). PHR physicians conducted a follow up study of their 2,584 clients who requested various forms of immigration relief, accompanied by forensic medical evaluations, between 2008 and 2018. Of the 67.1 percent of cases with adjudicated asylum claims, an overwhelming 89.6 percent of asylum seekers were granted asylum compared to the national grant rate of 42.4 percent. Atkinson et al., *supra* note 268, at 6. While these studies were restricted to forensic medical evaluations performed by a particular network of physicians, it is apparent that adjudicators generally view them as persuasive evidence.

289. See *infra* text accompanying notes 291–295 (explaining the various concerns with advocating for attorneys to pursue more forensic medical evaluations for their clients).

290. Hope Ferdowsian et al., *Asylum Medicine: Standard and Best Practices*, HEALTH & HUM. RTS. J., June 2019, at 215, 216 (2019).

291. It can be more difficult to access forensic medical evaluators in non-urban areas and to complete mental health evaluations. *Id.*

292. Ottenheimer et al., *supra* note 4, at 6.

293. A hysterosalpingogram (HSG) can cost between \$500 and \$3,000 without insurance coverage depending on the practitioner and where the patient lives unless the attorney can find a radiologist willing to do it at no cost. Marygrace Taylor, *Here's Why You Might Get a Hysterosalpingogram (HSG) Test*, WHAT TO EXPECT (June 2, 2021), <https://www.whattoexpect.com/getting-pregnant/fertility-tests-and-treatments/hsg-test> [<https://perma.cc/DRB2-BL4B>].

294. Lustig et al., *supra* note 288, at 13; Atkinson et al., *supra* note 268, at 9–10.

295. *Id.*

attorneys must act as the first line of offense in evaluating the likelihood of involuntary sterilization. Doing so would ensure that only someone with a reasonable level of suspicion is referred for a forensic medical evaluation.

b) How Physicians Should Approach Forensic Medical Evaluations for Involuntary Sterilization

In some cases, attorneys will reach out to a forensic medical evaluator if they suspect their client was forcibly or coercively sterilized.²⁹⁶ Other times, attorneys may not think to pursue a line of questioning focused on involuntary sterilization.²⁹⁷ Additionally, while attorneys ultimately decide the case's legal strategy, asylum seekers sometimes share details with other parties about the violence they endured that they did not previously disclose to their counsel.²⁹⁸ In all these situations, physicians can help attorneys consider a less common claim of persecution and gender-based violence.²⁹⁹

As standard practice, forensic medical evaluators should probe a female client's reproductive history when conducting evaluations.³⁰⁰ The inquiry should address concerns about infertility and a comprehensive account of their obstetrical and surgical histories.³⁰¹ This approach will generally position physicians well to detect instances of forced and coerced sterilizations; but, like attorneys, physicians should be especially inquisitive towards female clients with characteristics that would have made them targets for involuntary sterilization.³⁰²

296. Dr. Ottenheimer explained that many of her clients are Honduran Garifuna women due to attorneys coming across her collaborative article, "Physician complicity in human rights violations: Involuntary sterilization among women from Mexico and Central America seeking asylum in the United States." Zoom Interview with Deborah Ottenheimer, Dir., Women's Health Servs., Gotham Health, Morrisania (Jan. 13, 2023).

297. Ottenheimer et al., *supra* note 4, at 6; see Arastu, *supra* note 6, at 109 (using medical evaluators being on the lookout for involuntary sterilization among HIV-positive women from minority ethnic groups as an example of how physicians can help attorneys discover less common claims).

298. Dr. Ottenheimer shared that she sometimes receives reports of rape and other forms of sexual violence from asylum seekers that they did not report to their attorneys. Zoom Interview with Deborah Ottenheimer, Dir., Women's Health Servs., Gotham Health, Morrisania (Jan. 13, 2023).

299. Arastu, *supra* note 6, at 109.

300. Ottenheimer et al., *supra* note 4, at 6.

301. *Id.*

302. Murphy and Stradone noted that they regularly screen their female Indigenous Central and South American clients for involuntary sterilization while Miller screens her female Indigenous Central and South American clients for forced abortion. See Telephone

Similar to an attorney drafting their client's affidavit, when a medical evaluator is taking a client's history and creating a medical affidavit, it is of the utmost importance that they focus on "the force, deception, and/or coercion employed by the medical provider" in the experiences the client recounts.³⁰³ Medical evaluators should also consider any psychological harm the woman suffered, as those who were forcibly or coercively sterilized frequently carry deep emotional scars and trauma from their experience.³⁰⁴

The questions posed should examine how the client's medical providers interacted with her and treated her during all stages of her medical care.³⁰⁵ In light of the practices medical providers commonly use to perform involuntary sterilizations, the medical evaluator should ask questions such as: Was she presented with any alternative forms of birth control? Did her medical provider explain the permanency of the procedure? If she was required to sign any paperwork before the procedure, did she understand the paperwork? For a woman living with HIV, did her medical provider threaten to withhold access to her medication or tell her she could never have a child with a negative HIV status?³⁰⁶ Questions like these will allow a physician to assess the likelihood that an asylum seeker was involuntarily sterilized. If a physician reasonably suspects an asylum seeker was involuntarily sterilized, they must verify sterilization with a hysterosalpingogram.³⁰⁷ For attorneys and physicians to provide asylum seekers with the strongest applications, they must work together to screen female clients more widely for involuntary sterilization.

CONCLUSION

Section 601(a)'s legislative history indicates that the provision was invoked to protect Chinese asylum seekers attempting to escape China's

Interview with Claudine-Annick Murphy, Staff Att'y, The Legal Aid Soc'y (Dec. 1, 2022); see also Zoom Interview with Deirdre Stradone, Co-Deputy Dir. of the Immigr. Intervention Project, Sanctuary for Fams. (Nov. 3, 2022); Zoom Interview with Sylvia Miller, Staff Att'y, Colectiva Legal del Pueblo (Jan. 20, 2023).

303. Ottenheimer et al., *supra* note 4, at 6.

304. *Id.*

305. *Id.*

306. These questions are based on the types of inquiries suggested by physicians who have written medical affidavits corroborating involuntary sterilization for asylum seekers, as well as what patients should know before consenting to sterilization. *Id.* at 1, 4.

307. *Id.* A hysterosalpingogram (HSG) is an x-ray procedure that allows doctors to see inside the uterus and fallopian tubes to determine if they are blocked and to what extent. *Hysterosalpingography (HSG)*, THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS (Dec. 2021), <https://www.acog.org/womens-health/faqs/hysterosalpingography> [<https://perma.cc/28M2-BJRQ>].

OCP.³⁰⁸ This is reflected in the published case law, which only involves Chinese asylum seekers in relation to the OCP.³⁰⁹ As such, immigration judges and circuit courts have historically relied on their understanding of the various measures the Chinese government employed in aborting women's pregnancies and sterilizing both sexes.³¹⁰

We now know that involuntary sterilization is rampant across the globe and directed towards women who already live on society's margins.³¹¹ The coercive practices used against these communities may differ from China's OCP in that often there is no official family planning policy or direct involvement of government officials—but the targeting of women whom society has already deemed inferior, unworthy of even bringing new life into this world, amounts to state-sanctioned violence. Immigration advocates should not be discouraged by the case law surrounding Section 601(a) because the provision protects *all* individuals who were forced to abort a pregnancy or involuntarily sterilized.³¹²

As such, attorneys and physicians need to screen all female clients for involuntary sterilization during the intake process and the forensic medical evaluation. With some of the recent developments surrounding women's reproductive rights³¹³ and growing anti-immigrant sentiment in

308. Miller, *supra* note 9, at 12. *See supra* note 10, at 38–39 and accompanying text (discussing Section 601(a)'s legislative history).

309. *See supra* text accompanying note 93 (listing examples of published cases concerning Section 601(a), which all concern the OCP).

310. *See supra* Section II.C.2.a–b (analyzing some Section 601(a) cases where courts' interpretation of "forced" depended on their understanding of how China's OCP was enforced).

311. *See supra* Section II.A (detailing the different groups of marginalized women facing involuntary sterilization across multiple countries and cultures).

312. *See supra* Section II.C.1 (undertaking a statutory interpretation of Section 601(a)).

313. In 2020, a nurse who worked at a U.S. Immigration and Customs Enforcement (ICE) detention center in Ocilla, Georgia filed a whistleblower complaint alleging multiple abuses at the center, including hysterectomies and other unwarranted, invasive gynecological procedures. The report accused Dr. Mahendra Amin, referred to as the "uterus collector," of performing hysterectomies on unsuspecting detained women. Many of the women did not understand why the procedure was being performed. They were likely confused since they often did not speak English, and the detention center did not always provide translators. Nicole Narea, *The Outcry over ICE and Hysterectomies, Explained*, VOX (Sept. 18, 2020, 3:36 PM), <https://www.vox.com/policy-and-politics/2020/9/15/21437805/whistleblower-hysterectomies-nurse-irwin-ice> [<https://perma.cc/VA37-3EWW>]. The women who came forward with allegations led to a 2022 Senate Homeland Security subcommittee hearing that found that female detainees "'appear[ed] to have been subjected to excessive, invasive and often unnecessary gynecologic procedures.'" *Hearing on Treatment of Women in Immigration Detention*, C-SPAN (Nov. 15, 2022), <https://www.c-span.org/video/?524246-1/hearing-treatment->

the United States,³¹⁴ Section 601(a) could supply a compelling claim in an asylum seeker's application, thus providing an additional path to lawful immigration status in an ever-changing political climate.³¹⁵

women-immigration-detention [<https://perma.cc/Z3V8-3KGM>]. Women's reproductive rights also came under attack in June 2022 when the Supreme Court overruled *Roe v. Wade*, eliminating a constitutional right to an abortion. Nina Totenberg & Sarah McCammon, *Supreme Court Overturns Roe v. Wade, Ending Right to Abortion Upheld for Decades*, NPR (June 24, 2022, 10:43 AM), <https://www.npr.org/2022/06/24/1102305878/supreme-court-abortion-roe-v-wade-decision-overturn> [<https://perma.cc/7FU7-WDYM>].

314. In a line of similar actions by other Republican governors, Governor Ron DeSantis used chartered flights to drop off Venezuelan migrants at Martha's Vineyard in September 2022 to express dissatisfaction with the federal government's management of the southern border. Amy Simonson et al., *DeSantis Claims Credit for Sending 2 Planes Carrying Migrants to Martha's Vineyard in Massachusetts*, CNN (Sept. 15, 2022, 8:34 PM), <https://www.cnn.com/2022/09/14/politics/marthas-vineyard-massachusetts-migrants-planes/index.html> [<https://perma.cc/8LCA-7VH7>]. This resulted in a class-action lawsuit due to the fraudulent documents promising refugee benefits, such as cash and job placements, that he used to entice migrants to board the planes. Lloyd Lee, *Florida Officials Made Fake 'Official-Looking' Brochure Advertising Refugee Benefits for Migrants, Lawsuit Against Ron DeSantis Says*, BUSINESS INSIDER (Sept. 20, 2022, 8:23 PM), <https://www.businessinsider.com/florida-officials-made-fake-brochures-for-migrants-lawsuit-ron-desantis-2022-9> [<https://perma.cc/W4YJ-JBGD>]. This is representative of a growing American sentiment where fewer Americans now see immigrants as an important part of this nation's identity than in January 2018. *On Immigration, Most Buying into Idea of "Invasion" at Southern Border*, IPSOS (Aug. 18, 2022), <https://www.ipsos.com/en-us/news-polls/npr-immigration-perceptions-august-2022> (on file with the *Columbia Human Rights Law Review*). While media attention has focused on undocumented immigrants, Republicans have also grown increasingly hostile to legal immigration as well ("It tells me that the party is more interested in reducing the number of foreigners in the United States than in reducing illegal immigration . . ."). Ronald Brownstein, *GOP Increasingly Opposes Legal - Not Just Illegal - Immigration*, CNN (June 26, 2018, 6:13 AM), <https://www.cnn.com/2018/06/26/politics/republicans-oppose-legal-illegal-immigration/index.html> [<https://perma.cc/6G8J-V9KD>].

315. Miller, *supra* note 9, at 18.