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ESCAPING ACCOUNTABILITY: ICE FORCIBLY STERILIZES DETAINEES IN DETENTION CENTERS

*by Mehraz Rahman**

INTRODUCTION

In September 2020, a whistleblower-nurse from the Immigration and Customs Enforcement (ICE) Irwin Detention Center in Georgia alleged that the ICE gynecologist, Dr. Mahendra Amin, committed medical negligence when he forcibly sterilized fifty-seven women at the center.¹ Immigrants who underwent forced hysterectomies said they did not know until later that the procedure performed on them may have been unnecessary; even though only a total of two hysterectomies are on record from the past year, many detainees said that they underwent other invasive gynecological procedures that they did not fully understand.² When five gynecologists reviewed patients' cases from the Irwin County Detention Center, they found that Dr. Amin consistently recommended

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¹ Rachel Treisman, *Whistleblower Alleges 'Medical Neglect,' Questionable Hysterectomies of ICE Detainees*, NPR (Sept. 16, 2020), <https://www.npr.org/2020/09/16/913398383/whistleblower-alleges-medical-neglect-questionable-hysterectomies-of-ice-detaine>.

² Caitlin Dickerson, Seth Freed Wessler, & Miriam Jordan, *Immigrants Say They Were Pressured into Unneeded Surgeries*, N.Y. TIMES (Sept. 29, 2020), <https://www.nytimes.com/2020/09/29/us/ice-hysterectomies-surgeries-georgia.html>.

surgical interventions that were not medically necessary, even though nonsurgical treatment options were available.³ They also found that he had overstated the risks of the women's health conditions, such as cysts and masses, and had listed symptoms that some of the women said they never experienced in order to justify such procedures.⁴

I. BACKGROUND

ICE's recent actions against migrant women are not the first time in American history the U.S. government sterilized non-English-speaking women without their consent. In the early 1970s, whistleblower Dr. Bernard Rosenfeld, then a resident at the Los Angeles County Medical Center, drew attention to women of Mexican origin sterilized by the state of California without their consent or knowledge.⁵ Dr. Rosenfeld's whistleblowing efforts led to litigation in *Madrigal v. Quilligan*,⁶ seeking damages for plaintiffs known as the "Madrigal Ten," who medical professionals pressured into signing English documents they did not understand asking for their consent to sterilization procedures while they were in labor.⁷ While the court denied the Madrigal Ten the remedies they sought, the case led to a wave of activism regarding the need for informed consent in procedures performed on non-English-speaking people.⁸

As demonstrated by *Madrigal*,⁹ ICE has repeatedly violated migrants' human rights by performing forced hysterectomies without detainees' informed consent, and their actions would fail both the strict scrutiny and undue burden tests. Thus, ICE violated migrants' constitutionally protected rights to bodily autonomy and procreation, which are guaranteed under the

³ *Id.*

⁴ *Id.*

⁵ *Madrigal v. Quilligan*, 639 F.2d 789 (9th Cir. 1981) (unpublished table decision); Maya Manian, *The Story of Madrigal v. Quilligan: Coerced Sterilization of Mexican-American Women*, Research Paper No. 2018-04, UNIV. OF S.F. SCH. OF L. (Apr. 4, 2018).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

Fifth and Fourteenth Amendment's Due Process Clauses and the Fifth Amendment's Equal Protection Clause.¹⁰

II. LEGAL ANALYSIS

A. Informed Consent

By forcefully sterilizing fifty-seven migrant women, ICE violated the detainees' right to informed consent. Under federal regulations, informed consent provides that a person who has the capacity to make a decision about their own body—or a guardian, if they are a minor—must be informed of the alternatives of the proposed procedure, discuss the risks of the procedure, and must show that they understand the proposed medical contract.¹¹ The patient or their guardian must also sign a written document of consent that discloses the nature of the proposed procedure and discusses the elements required for informed consent.¹²

In *Cruzan v. Director, Missouri Department of Health*,¹³ the U.S. Supreme Court expanded on the idea that informed consent is required for medical procedures, stating that the “notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment.”¹⁴ As Justice Cardozo emphasized in *Schloendorff v. Society of New York Hospital*,¹⁵ the doctrine of informed consent provides that “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages.”¹⁶

¹⁰ See *Skinner v. Oklahoma*, 316 U.S. 535, 541, 544 (1942); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 852–53, 872–73, 876–88 (1992).

¹¹ 42 C.F.R. § 50.202(f); 45 C.F.R. § 205.35(a)(2)(ii).

¹² *Id.*

¹³ See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990).

¹⁴ *Id.*

¹⁵ See *Schloendorff v. Soc'y of N.Y. Hosp.*, 211 N.Y. 125, 129–30 (1914).

¹⁶ *Id.*

Gynecologists who reviewed patients' cases from the Irwin County Detention Center found that Dr. Amin consistently recommended surgical interventions that were not medically necessary, overstated risks, and even listed symptoms that some women had never experienced to justify such procedures.¹⁷ Dr. Amin performed these sterilization procedures on many women who stated they were not suffering from the conditions that he used to justify the procedures, suggesting that he fabricated the conditions to provide cover for executing the invasive procedures.¹⁸ The women also stated that they did not explicitly know what type of procedure was being performed on them, which further indicates that Dr. Amin did not properly inform them prior to them receiving the procedures.¹⁹ Moreover, the detention center did not always use language translators for its non-English-speaking detainees, adding to the likelihood that many of the people who underwent the procedures had not given informed consent.²⁰ Since the informed consent doctrine requires a medical provider to make sure that the patient sufficiently understands the procedure they are receiving, Dr. Amin performed these medical procedures without informed consent and violated the bodily autonomy to which everyone is entitled.²¹

B. Strict Scrutiny Test and the Right to Procreation

ICE also violated the detainees' constitutional rights to procreation under the strict scrutiny test.²² Under *Skinner v. Oklahoma*,²³ the Supreme Court held that

¹⁷ *Id.*

¹⁸ See Dickerson, *supra* note 2.

¹⁹ *Id.*

²⁰ Nicole Narea, *The Outcry Over ICE and Hysterectomies, Explained*, Vox (Sept. 18, 2020), <https://www.vox.com/policy-and-politics/2020/9/15/21437805/whistleblower-hysterectomies-nurse-irwin-ice>.

²¹ See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990); *Schloendorff v. Soc'y of N.Y. Hosp.*, 211 N.Y. 125, 129–30 (1914).

²² See *Skinner*, 316 U.S. at 544; U.S. CONST. amend. XIV.

²³ See *Skinner*, 316 U.S. at 541, 544.

procreation is a fundamental right held by every person in the United States.²⁴ The Court determined that when the government violates a fundamental right such as the right to procreate, the policy must withstand “strict scrutiny” or otherwise be found unconstitutional.²⁵ Under both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment, the “strict scrutiny” test requires the government to demonstrate a compelling state interest and that there would be no other, less invasive method of achieving the interest.²⁶ In *Zadvydas v. Davis*,²⁷ the Supreme Court clarified that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”²⁸ As such, noncitizens are included in the group of people who possess the fundamental right to procreation. Performing hysterectomies without obtaining informed consent violated detainees’ constitutional right to procreate, which can be analyzed under strict scrutiny.²⁹ The strict scrutiny test may help determine whether the U.S. government, acting through ICE, violated its detainees’ constitutional rights when it forcefully sterilized them.³⁰

Under the strict scrutiny test, ICE would have difficulty demonstrating that these sterilizations served a compelling state interest. Although unlikely, ICE may be able to provide a compelling state interest to perform gynecological procedures without gaining informed consent from the migrant detainees if it claimed to relieve the migrant women of the burden of child-rearing while in ICE custody or another such interest. However, the board-certified gynecologists’ findings suggested that ICE could have achieved the type of relief it purported to provide with less invasive methods than sterilization, such as nonsurgical treatment or, in some cases, no medical treatment at all.³¹

²⁴ *Id.* at 544; U.S. CONST. amend. XIV.

²⁵ *Skinner*, 316 U.S. at 541, 544.

²⁶ *Id.*; U.S. CONST. amend. XIV.

²⁷ *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

²⁸ *Id.*

²⁹ See *Skinner*, 316 U.S. at 541.

³⁰ See *id.*

³¹ See Dickerson, *supra* note 2.

C. Undue Burden and Reproductive Freedoms

A U.S. court may either decide that forced hysterectomies are constitutional under the strict scrutiny test and rule that ICE met the requirements by demonstrating a compelling state interest or find that the strict scrutiny test does not apply. If the court finds that the strict scrutiny test does not apply, then ICE still violated the detainees’ constitutional rights under the undue burden test, which arose under *Planned Parenthood v. Casey*.³² This test says a U.S. court must balance the state actor’s interest with individual liberties.³³ The state’s action also cannot have the purpose or effect of placing a substantial obstacle in the individual’s life if the state does not have a compelling interest and, therefore, the government does not have the right to restrict an individual’s pursuit of an abortion.³⁴ The Court applied the undue burden test to provisions of an anti-abortion law from Pennsylvania, ultimately holding that requiring spousal notice before obtaining an abortion, requiring reporting of failure to provide such notice, and other anti-abortion provisions impose undue burdens on a woman’s choice to pre-viability abortion under the Due Process clause.³⁵

If undue burden applies to the liberty interest of abortion, as the Court determined in *Casey*,³⁶ the same test must—by analogy—apply to the fundamental right to procreate, as the Court found in *Skinner*,³⁷ and the right to decide whether or not to procreate by choosing to terminate or continue a pregnancy, as the Court solidified in *Roe v. Wade*.³⁸ These Supreme Court rulings would require courts to balance ICE’s interest in forcefully sterilizing detainees with a substantial obstacle that the procedure would place in their lives.³⁹ After undergoing a forced hysterectomy,

³² See *Planned Parenthood v. Casey*, 505 U.S. 833, 852–53 (1992).

³³ *Id.* at 852–53.

³⁴ *Id.*

³⁵ *Id.* (upholding the essential holding of *Roe v. Wade*).

³⁶ See *id.*

³⁷ See *Skinner v. Oklahoma*, 316 U.S. 535, 541, 544 (1942).

³⁸ See *Roe v. Wade*, 410 U.S. 113, 169–70 (1973).

³⁹ See *Skinner*, 316 U.S. at 541, 544; *Casey*, 505 U.S. at 852–53.

an individual faces the substantial obstacle of never being able to bear a child. This substantial obstacle goes beyond requiring spousal notice before obtaining an abortion or driving extra miles to another abortion center to obtain an abortion procedure. Infringing on the right to choose to obtain an abortion and the right to procreate, both relating to a person's reproductive freedoms, involve severe interference with an individual's bodily rights.⁴⁰ Therefore, when performing forced hysterectomies, in addition to acting tortiously by violating the doctrine of informed consent, ICE also violated the detainees' constitutional right to bodily autonomy, as grounded in the Fifth Amendment's Due Process clause.⁴¹

ICE committed egregious human rights violations by contravening migrants' human rights when Dr. Amin performed forced hysterectomies without detainees' informed consent. These human rights violations against constitutionally protected rights to bodily autonomy and procreation, which are guaranteed under the Fifth and Fourteenth Amendment's Due Process Clauses and the Fifth Amendment's Equal Protection Clause, would fail both the strict scrutiny and undue burden tests.⁴²

⁴⁰ See *Casey*, 505 U.S. at 852–53.

⁴¹ U.S. CONST. amend. V.

⁴² See *Skinner*, 316 U.S. at 541, 544; *Casey*, 505 U.S. at 852–53, 872–73, 876–88. As of April 2022, the current Supreme Court bench sits precariously perched in that it may soon overrule one or both the strict scrutiny and undue burden tests as they apply to the right to terminate pregnancies. In *Dobbs v. Jackson Women's Health*, the Court is set to decide whether a Mississippi regulation banning most abortions after fifteen weeks of pregnancy is constitutional. While it is impossible to accurately predict, this Court appears ready to rule in some fashion, in either *Dobbs* or another near-future abortion-related case, that could alter jurisprudence surrounding reproductive rights. If the Court strikes down either or both the *Roe* or *Casey* standards, the analysis in this Article may no longer apply. Andrew C. McCarthy, *Roberts and Roe: The Supreme Court Considers a Narrow Question on Abortion*, HILL (Dec. 2, 2021), <https://thehill.com/opinion/judiciary/583927-roberts-and-roe-the-supreme-court-considers-a-narrow-question-on-abortion/>.

III. RECOMMENDATIONS

To provide relief for migrant women and ensure the U.S. government does not continue to violate human rights by performing forced hysterectomies without informed consent, legislators must enact policies that enforce existing laws that allow people to bring lawsuits against the United States and create avenues to diminish barriers to filing suit. Policies have tried, and failed, to address the issue of informed consent, the constitutional right to reproductive freedoms, and forced sterilizations. In 2021, the U.S. House of Representatives passed a resolution “condemning unwanted, unnecessary medical procedures on individuals without their full, informed consent.”⁴³ However, this resolution fails to provide meaningful protection because it is not binding, does not require ICE to change its policies, and does not even mandate investigating ICE's detention centers for violating its detainees' right to informed consent.

This Article recommends that legislators create laws that explicitly provide and develop an accessible legal recourse avenue for people held in these detention centers to bring claims involving informed consent and constitutional rights regarding bodily autonomy against ICE. The laws must also, when appropriate, meaningfully allow individuals to file claims against agencies that enable ICE and the United States to fail to prevent and investigate when allegations arise. Even though ICE violates the detainees' constitutional rights by performing forced hysterectomies, the detainees face cumbersome barriers to filing suit against ICE.

Under the Federal Tort Claims Act (FTCA), individuals may seek compensatory damages for personal injuries, death, or loss of property caused by a wrongful act of the government.⁴⁴ However, this legislation should include a provision that makes FTCA claims more accessible to those who have undergone procedures without informed consent due to a language

⁴³ See *Condemning Unwanted, Unnecessary Medical Procedures on Individuals without Their Full, Informed Consent*, H.Res. 1153, 116th Cong. (1st Sess. 2020).

⁴⁴ Federal Tort Claims Act, 28 U.S.C.A. § 2674 (1946).

barrier; further, this provision should also ensure that the agencies will not be able to block detainees from filing suit by denying access to the necessary resources.⁴⁵ Moreover, the *Bivens* doctrine established by the Supreme Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, allows individuals to file lawsuits for damages when a federal officer who is acting within the scope of their federal duties violates certain constitutional rights.⁴⁶

The Biden Administration has an obligation to create an interagency task force like the Interagency Task Force on the Reunification of Families, which was established in 2021 to address the separation of migrant families caused by the Trump Administration's Zero-Tolerance Policy.⁴⁷ Thus far, the Task Force has identified almost 4,000 children separated from their families because of this policy, made plans to build infrastructure to reunite almost 400 families, and discussed potential settlements for injured families, demonstrating the success that such task forces may have.⁴⁸ Under an interagency task force with ICE, the Department of Homeland Security, the Department of Justice, and the Department of State, the parties must identify victims of forced sterilization procedures and engage in negotiations to provide mass settlements to victims and their families.

In addition to enforcing avenues to file suit and provide settlements, there must also be a method to hold ICE accountable for any violations of the laws or constitutional rights that protect detainees' bodily autonomy. Once the laws are set in place and the task force has set forth recommendations or negotiated settlements, the Department of Homeland Security and

⁴⁵ *Id.*

⁴⁶ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (remedy for Fourth Amendment violation); see also *Davis v. Passman*, 442 U.S. 228, 243–44 (1979) (holding that the right to bring a *Bivens* claim may apply to claims against federal officers brought under the Fifth Amendment).

⁴⁷ Leila Fadel, *Biden Task Force Makes Progress Reuniting Families Separated at the Border*, NPR (Feb. 2, 2022), <https://www.npr.org/2022/02/02/1077522543/biden-task-force-makes-progress-reuniting-families-separated-at-the-border>.

⁴⁸ *Id.*

the Office of the Attorney General must be vigilant in enforcing the new regulations on ICE. The chief Congressional oversight committees, United States Senate Committee on Homeland Security and Governmental Affairs and the House Committee on Oversight and Reform, already perform oversight to ensure that the laws are being appropriately enforced. In 2020, the House Committee on Oversight and Reform demanded an emergency investigation into the alleged forced hysterectomies at the ICE Irwin Detention Center⁴⁹ and that ICE cease deportations of victims and witnesses alleging these medical atrocities.⁵⁰ The oversight committees should more effectively exercise their powers by enforcing an investigation conducted by entities external to ICE and requesting that ICE incorporate the Committee's report information into its facilities inspection plans.

If ICE violates migrant detainees' constitutionally protected rights by performing forced hysterectomies, enforcing and strengthening those migrants' ability to bring claims against ICE and the United States would deter ICE or similar governmental agencies from infringing on the fundamental right to procreate any further.

CONCLUSION

Dr. Amin performed forced hysterectomies on migrant women without informed consent and violated the bodily autonomy to which everyone is entitled because the informed consent doctrine requires a medical provider to make sure that the patient sufficiently understands the procedure they are receiving.

⁴⁹ See Press Release, Carolyn B. Maloney, Chairwoman, House Comm. on Oversight and Reform, Oversight Committee Chairs Demand "Emergency Investigation" into Alleged "Medical Atrocities" in ICE Detention (Sept. 15, 2020), <https://oversight.house.gov/news/press-releases/oversight-committee-chairs-demand-emergency-investigation-into-alleged-medical>.

⁵⁰ See Press Release, Carolyn B. Maloney, Chairwoman, House Comm. on Oversight and Reform, Oversight and Homeland Security Committees Demand ICE Cease Deportations of Victims and Witnesses Alleging Medical Mistreatment at Detention Facilities (Nov. 12, 2020), <https://oversight.house.gov/news/press-releases/oversight-and-homeland-security-committees-demand-ice-cease-deportations-of>.

ICE also violated the strict scrutiny test because it would have difficulty demonstrating that these sterilizations served a compelling state interest and, even if it did, that it could not have achieved the type of relief it purported to provide with less invasive methods than sterilization, such as nonsurgical treatment or, in some cases, no medical treatment at all. The right to choose to obtain an abortion and the right to procreate, both relating to a person's reproductive freedoms, involve severe interference with an individual's bodily rights.⁵¹ Since the undue burden test applies to the liberty interest of abortion, the same test must also apply to the fundamental right to procreate.⁵² Under this test, in addition to acting tortiously by violating the doctrine of informed consent, ICE also violated the detainees' constitutional right to bodily autonomy, as grounded in the Fifth Amendment's Due Process clause.⁵³

The path forward in preventing forced sterilizations on individuals held in ICE detention centers is three-fold: first, secure migrant women's existing avenues to bring informed consent tort claims and constitutional claims regarding the right to procreate against governmental agencies and the United States; second, ensure that these avenues are actually accessible, regardless of detention statuses or language barriers; third, a method to hold ICE accountable to survivors and their families for violating their detainees' constitutional rights. The legislation this Article proposes would help topple barriers to filing suit and enforce ICE's accountability in not violating migrants' human rights. The United States' long-standing practices of forcefully sterilizing migrant and incarcerated women must end.

⁵¹ See *Casey*, 505 U.S. at 852–53.

⁵² See *id.*

⁵³ U.S. CONST. amend. V.