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Uncommon Misconceptions: Holding Physicians Accountable for Insemination Fraud

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Introduction

Recently, international headlines announced that four separate OB/GYNS inseminated unsuspecting patients with their own sperm from the 1970s through early 1990s.¹ Decades later, genetic testing would reveal their transgressions. Strangely, Drs. Norman Barwin of Ottawa, Canada; Donald Cline of Indianapolis, Indiana; Gerald Mortimer of Idaho Falls, Idaho; Ben Ramaley of Greenwich, Connecticut; and John Boyd Coates of Berlin, Vermont were not the first such offenders—in fact, according to a 1987 survey by the federal Office of Technology Assessment, approximately two percent of fertility doctors who responded had used their own sperm to inseminate patients.² Cecil Jacobson was convicted of federal mail and wire fraud, travel fraud, and perjury in the mid-1990s.³ In Europe, Dr. Jan Karbaat (now deceased) allegedly used his own sperm to father at least twelve children (from eight to thirty-six years old, according to a 2017 *New York Times* article).⁴ Not surprisingly, this conduct landed all three physicians in legal hot water; Jacobson was convicted on federal charges for mail, travel,

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1. See, e.g., Elizabeth Payne, *Lawsuit Against Fertility Doctor Accused of Using Own Sperm Expands to 150 People 'Adversely Affected'*, OTTAWA CITIZEN (Apr. 6, 2018), <https://ottawacitizen.com/news/local-news/lawsuit-against-fertility-doctor-accused-of-using-own-sperm-expands-to-150-people-adversely-affected>; Christopher F. Schuetze, *Dutch Fertility Doctor Swapped Donors' Sperm with His, Lawsuit Claims*, N.Y. TIMES (Dec. 22, 2017), <https://www.nytimes.com/2017/05/15/world/europe/dutch-fertility-doctor-swapped-donors-sperm-with-his-lawsuit-claims.html>; Shari Rudavsky, *Fertility Doctor Pleads Guilty to Obstruction of Justice in Insemination Case*, INDIANAPOLIS STAR (Dec. 14, 2017), <https://www.indystar.com/story/news/2017/12/14/fertility-doctor-accused-inseminating-own-patients-court-today/951397001/>.

2. Marlene Cimon, *Infertility Doctor Is Found Guilty of Fraud, Perjury*, L.A. TIMES, Mar. 5, 1992, http://articles.latimes.com/1992-03-05/news/mn-4702_1_found-guilty-of-fraud.

3. *United States v. Jacobson*, No. 92-5406, 1993 WL 343172 (4th Cir. 1993).

4. Schuetze, *supra* note 1.

and wire fraud;⁵ Cline pled guilty to obstruction of justice for lying about his actions,⁶ and Barwin⁷ and Mortimer face civil suits.⁸

There is no law that makes it illegal for a male physician to use his sperm to impregnate his own patients, but such conduct clearly breaches ethical standards and fiduciary duties. The physician-patient relationship is a fiduciary one; in Latin, “fiduciary” means “confidence” or “trust.”⁹ A fiduciary relationship entails an expectation of trustworthiness, a power disparity, and interactions that occur under “conditions of trust and vulnerability.”¹⁰ A patient’s confidence in her physician, the bond of trust between them, and the therapeutic space in which patients can feel safe are all fundamental building blocks for treatment compliance, communication, and efficacy. Traditional, paternalistic models of care require patients to depend on physicians’ professional authority, even if their own values, preferences, and needs dictate otherwise.¹¹ This orientation is a far cry from today’s patient-centered care ethos, based on shared decision making.¹² As a result, the physician-patient relationship has grown less cold and clinical and become warmer and more empathic.¹³

Even though lawsuits likely have little deterrence value given contemporary practice standards, physicians who engage in insemination fraud should still be held accountable. Individuals affected should be recognized, supported, and compensated. Current medical standards of practice for insemination are very different from those of the 1970s and 80s. Infectious disease testing of sperm samples and technological advances in cryopreservation have ushered in new standards of care, regulatory schemes, and market players, including sperm banks who distribute tested frozen

5. *Jacobson*, 1993 WL 343172.

6. Rudavsky, *supra* note 1.

7. Payne, *supra* note 1.

8. Rebecca Boone, *Retired Idaho Doctor and Mormon Temple President Denies Fraud in Insemination Lawsuit*, SALT LAKE TR. (May 30, 2018), <https://www.sltrib.com/news/2018/05/30/retired-idaho-doctor-and-mormon-temple-president-denies-fraud-in-insemination-lawsuit/>.

9. *Fiduciary*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/fiduciary> (last visited Jan. 30, 2019).

10. Mark A. Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 463, 488–89 (2002).

11. See K. Grill, *Paternalism*, in *ENCYCLOPEDIA OF APPLIED ETHICS* (SECOND EDITION) 359–69 (Ruth Chadwick ed., 2d ed. 2012).

12. See A.M. Stiggelbout, A.H. Pieterse & J. C. J. M. De Haes, *Shared Decision Making: Concepts, Evidence, and Practice*, 98 PATIENT EDUC. & COUNSELING 1172, 1172–79 (2015).

13. *Id.*

sperm through the mail.¹⁴ Moreover, sperm donors' identities are increasingly known or discoverable.¹⁵ Failing to hold physicians who engaged in insemination fraud accountable, however, creates the impression that such conduct is not legally punishable and runs counter to legal frameworks such as informed consent requirements that protect patients' autonomy and medical decision making in other contexts.¹⁶ Although physicians today are less likely to impregnate patients with their own sperm,¹⁷ genetic testing could still reveal other unethical, negligent, or intentional conduct. This includes using nonconsenting patients' gametes or embryos to impregnate others. The University of California, Irvine had to pay several million dollars in settlements and legal fees after physicians at the university's Center for Reproductive Health engaged in such activities.¹⁸

This Article will deconstruct insemination fraud as a criminal and civil violation, and will explore who has committed such acts, why such behavior violates ethical principles, and why it has been difficult to hold perpetrators accountable thus far. Part I describes historical and contemporary cases of insemination fraud committed by physicians and fertility clinics. Part II describes why insemination fraud violates numerous ethical principles. Part III deconstructs the various legal obstacles to holding physicians

14. See KARA W. SWANSON, *BANKING ON THE BODY: THE MARKET IN BLOOD, MILK, AND SPERM* 229 (2014) ("Buying sperm became normalized within this larger reproductive services complex, and in the 1980s sperm banks began the transition from selling sperm to doctors to selling sperm to would-be parents."); see *id.* at 231 ("By 2001 three sperm banks offered more than one hundred donors from which to choose, and with patients able to order sperm delivered anywhere in the county, they could access specimens from about 1,200 donors.")

15. *New Law Gives All Donor-Conceived Victorians the Right to Know Their Heritage*, VICTORIAN ASSISTED REPRODUCTIVE TREATMENT AUTHORITY, <https://www.varta.org.au/resources/news/new-law-gives-all-donor-conceived-victorians-right-know-their-heritage> (last visited Aug 31, 2018).

16. See, e.g., *Canterbury v. Spence*, 464 F.2d 772, 787 (D.C. Cir. 1972) (holding that doctors have a duty to disclose "all risks potentially affecting" the patient's decision to undergo a medical treatment).

17. See Associated Press, *Fertility Doctor Gets Five Years*, N.Y. TIMES (May 9, 1992), <https://www.nytimes.com/1992/05/09/us/fertility-doctor-gets-five-years.html> (discussing the sentencing of a doctor to five years in prison and monetary damages for lying to patients about using his own sperm to inseminate his patients).

18. Kimi Yoshino, *UCI Settles Dozens of Fertility Suits*, L.A. TIMES (Sept. 11, 2009), <http://articles.latimes.com/2009/sep/11/local/me-uci-fertility11>; Seth Mydans, *Fertility Clinic Told to Close amid Complaints*, N.Y. TIMES (May 29, 1995), <https://www.nytimes.com/1995/05/29/us/fertility-clinic-told-to-close-amid-complaints.html>; Cynthia Sanz, *A Fertility Nightmare*, PEOPLE (July 24, 1995), <https://people.com/archive/a-fertility-nightmare-vol-44-no-4/>; Teri Sforza, *Should UC Go After Fertility Fraud Doctor's Assets?*, ORANGE COUNTY REG. (Jan. 25, 2011), <https://www.ocregister.com/2011/01/25/should-uc-go-after-fertility-fraud-doctors-assets/>.

accountable in criminal and civil actions, as well as personal, social, cultural, and political factors that explain why a patient might not seek or obtain vindication of their rights.

I. Who Has Perpetrated Insemination Fraud?

For decades, insemination using donor sperm was regarded as a dubious practice. In the first successful procedure performed in 1884, Dr. William Pancoast chloroformed the wife of a wealthy merchant who had sought treatment at Philadelphia's Sansom Street Hospital. He then inseminated her with a medical student's sperm while six other medical students looked on, without telling either the woman or her husband what had taken place.¹⁹ The deed came to light only after Dr. Addison David Hard, one of the student witnesses, contacted the child conceived (who was then twenty-five and living in New York City) and authored an article in *Medical World News* describing these appalling events.²⁰

Fast forward to the 1990s, when Cecil Jacobson—a physician and the former head of two leading reproductive centers—was prosecuted for fifty-two federal counts of perjury and mail, wire, and travel fraud charges for inducing false pregnancies in women.²¹ Former patients initially contacted news media, which aired an investigative report. The criminal investigation unearthed suspicious dealings regarding an anonymous sperm donation program that Jacobson allegedly maintained; they found no evidence that this program ever existed.²² Genetic testing showed that Jacobson was biologically related to at least fifteen children between four- and fourteen-years old.²³ He was ultimately sentenced to five years in prison and lost his license to practice medicine.²⁴

19. The doctor did inform the husband after the birth, but the two men decided the woman would be "better off not knowing the truth." Elizabeth Yuko, *The First Artificial Insemination Was an Ethical Nightmare*, ATLANTIC (Jan. 8, 2016), <https://www.theatlantic.com/health/archive/2016/01/first-artificial-insemination/423198/>.

20. *Id.*; see also A.D. Hard, *Artificial Impregnation*, 27 MED. WORLD NEWS 163-64 (1909), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015026093826;view=1up;seq=177>.

21. *Jacobson*, 1993 WL 343172.

22. *Doctor Is Found Guilty in Fertility Case*, N.Y. TIMES (Mar. 5, 1992), <https://www.nytimes.com/1992/03/05/us/doctor-is-found-guilty-in-fertility-case.html> ("[F]ormer receptionists and a laboratory technician who worked for Dr. Jacobsen testified that there were never any anonymous sperm donors at the clinic.").

23. *Id.*

24. Associated Press, *Fertility Doctor Gets Five Years*, N.Y. TIMES (May 9, 1992), <https://www.nytimes.com/1992/05/09/us/fertility-doctor-gets-five-years.html>.

The 1990s witnessed one other incident of Assisted Reproductive Technology (ART) fraud. Whistleblowers at the University of California at Irvine brought investigators' attention to several activities: doctors neglecting to report income, prescribing unapproved drugs to patients, transferring embryos to women without their physicians' consent, and handling records improperly.²⁵ At least fifteen births resulted from unlawful embryo transfers to non-consenting couples. The university faced more than 150 civil lawsuits and paid out millions in settlements.²⁶ Thereafter, the California legislature passed California Code PEN § 367g, which criminalized the fraudulent use or implantation of gametes or embryos in ART for any purposes other than those chosen by the gamete or embryo providers.²⁷

While publicity surrounded the Jacobson and UC Irvine incidents, another seismic development was also occurring, though it would not be discovered for decades. Nearly twenty years passed before direct-to-consumer genetic testing kits—such as 23andMe.com and Ancestry.com—revealed that some physicians inseminated their former patients with their own sperm and were the biological father of the children. In May 2015, news broke around the world that retired Indianapolis physician Donald Cline inseminated patients with his own sperm in the 1970s and 1980s.²⁸ Cline's conduct was discovered when the daughter of his former patient used the genetic testing service 23andMe to identify her relatives, only to discover several half-siblings whose parents had also been Cline's patients.²⁹ Cline told patients that he would use fresh donor sperm from an anonymous medical resident, who would only provide samples for three successful pregnancies.³⁰ In 2014, this daughter and another sibling filed a consumer protection

25. Sforza, *supra* note 18.

26. *Id.*

27. Cal. Penal Code § 367g(b) (2011) ("It shall be unlawful for anyone to knowingly implant sperm, ova, or embryos, through the use of assisted reproduction technology, into a recipient who is not the sperm, ova, or embryo provider, without the signed written consent of the sperm, ova, or embryo provider and recipient.").

28. See Vic Ryckaert & Shari Rudavksy, *Indianapolis Fertility Doctor Accused of Using Own Sperm*, INDIANAPOLIS STAR (Sept. 12, 2016), <https://www.indystar.com/story/news/crime/2016/09/12/fertility-doctor-facing-charges/90253406/>.

29. Angela Ganote, *A Need to Know: DNA Reveals a 30-Year-Old Family Secret*, FOX59 (May 12, 2015, 12:49PM), <https://fox59.com/2015/05/12/a-need-to-know-dna-reveals-a-thirty-year-old-family-secret/>.

30. *Id.*; Tom Davies, *No Jail for Indiana Fertility Doctor Who Lied About Using His Own Sperm to Impregnate Women*, THE STAR (Dec. 15, 2017), <https://www.thestar.com/news/world/2017/12/15/no-jail-for-indiana-fertility-doctor-who-lied-about-using-his-own-sperm-to-impregnate-women.html> (reporting how Dr. Cline told women he used anonymous sperm donors).

complaint with the Indiana Attorney General, who sent Cline a letter describing the allegations against him.³¹ Cline responded to the letter by denying that he ever used his sperm to inseminate patients and alleged that his accusers had committed slander and libel.³² After receiving Cline's denial, the Marion County Prosecutor obtained a warrant to acquire DNA material from him. Genetic tests conclusively showed he was her biological father.³³ Currently, approximately fifty half-siblings have been identified.³⁴ Cline pled guilty in December of 2017 to two counts of felony obstruction of justice and was given a suspended sentence and fined \$500.³⁵ He voluntarily surrendered his medical license on August 23, 2018.³⁶

Cline was not the only physician engaging in such activities during the 1970s and 1980s. In November 2016, around the same time as Cline's activities came to light, Ottawa physician Norman Barwin became embroiled in a civil lawsuit brought by 150 individuals. The plaintiffs included two former patients, two donor-conceived children (of the eleven children identified), and individuals who alleged Barwin contaminated or lost their sperm samples.³⁷ A third civil case was filed on March 30, 2018, against Gerald Mortimer, an OB/GYN in Idaho Falls, by a couple and their adult daughter. The couple conceived after obtaining Mortimer's 'assistance', but their daughter's genetic sample later matched to Mortimer's in a predicted parent-child relationship test run through

31. Mihir Zaveri, *A Fertility Doctor Used His Sperm on Unwitting Women. Their Children Want Answers.*, N.Y. TIMES (Aug. 30, 2018), www.nytimes.com/2018/08/30/us/fertility-doctor-pregnant-women.html (last visited Feb. 3, 2019).

32. Sharon Cohen, *A Fertility Doctor's Secret, a Special Kinship Decades Later*, WTHR (Feb. 26, 2018), www.wthr.com/article/a-fertility-doctors-secret-a-special-kinship-decades-later-0.

33. *Id.*

34. Jessica Hayes, *Indiana Fertility Doctor Donald Cline Surrenders Medical License*, WTTV (Aug. 23, 2018), <https://cbs4indy.com/2018/08/23/indiana-fertility-doctor-donald-cline-surrenders-medical-license/>.

35. Ariana Eunjung Cha, *Fertility Fraud: People Conceived Through Errors, Misdeeds in the Industry Are Pressing for Justice*, WASH. POST (Nov. 22, 2018), https://www.washingtonpost.com/national/health-science/fertility-fraud-people-conceived-through-errors-misdeeds-in-the-industry-are-pressing-for-justice/2018/11/22/02550ab0-c81d-11e8-9b1c-a90f1daae309_story.html?noredirect=on&utm_term=.5ed23d347966.; Steve Jefferson, ASSOCIATED PRESS, *Fertility Doctor Pleads Guilty to Lying About Using Own Sperm, Avoids Jail Time* (Dec. 14, 2017), <https://www.wthr.com/article/fertility-doctor-pleads-guilty-to-lying-about-using-own-sperm-avoids-jail-time>.

36. Shari Rudavsky, *Fertility Doctor Who Used His Own Sperm Will Never Practice in Indiana Again*, INDIANAPOLIS STAR (Aug. 23, 2018), <https://www.indystar.com/story/news/2018/08/23/indianas-medical-licensing-board-says-donald-cline-not-reapply/1073080002/>.

37. *Class Action Against Dr. Norman Barwin*, NELLIGAN O'BRIEN PAYNE LLP., <https://nelligan.ca/class-actions/dr-barwin/> (last visited Aug. 19, 2018).

Ancestry.com.³⁸ In December of 2018, two former patients sued John Boyd Coates of Burlington, Vermont for allegedly substituting his sperm for an anonymous donor's in 1977, resulting in the birth of a daughter.³⁹ An action is also pending in the Netherlands against the late Dr. Jan Karbaat, a physician who operated a sperm bank. After former patients and their children won legal permission in June 2017 to have evidence containing Karbaat's DNA tested, the results were sealed; a second action is now pending to allow comparative testing between Karbaat's results and those of his potential donor-children.⁴⁰

II. Insemination Fraud as an Ethical Violation

Insemination fraud is not only ethically problematic, but it may also give rise to criminal prosecutions and civil tort claims. It is not easy to find an analogous act. Perhaps the closest example occurs when physicians have sexual relations with their parents.

Physician-patient sexual relations are inherently problematic when “the physician uses or exploits trust, knowledge, emotions, or influence derived from the professional relationship.”⁴¹ With the authority that comes from healing knowledge, prescriptive power, and surgical skills, doctors can wield tremendous control over patients—their bodies, psyches, emotions, and even social relationships. Serving others in the healing arts is a tremendous privilege that carries grave responsibilities. The power imbalances that exist between a physician and a patient imply that the physician cannot legitimately obtain a patient's consent to sexual conduct. Sexual relationships with their physicians can harm patients; those who have been sexually involved with their doctors compare the experience to rape or incest, suggesting that such conduct has ubiquitously negative outcomes.⁴² Finally, such behavior violates doctors' vocational duties, because “[p]atients, the

38. Boone, *supra* note 8.

39. Dan D'Ambrosio, *Couple Alleges Vermont Doctor Used His Own Sperm for Artificial Insemination*, BURLINGTON FREE PRESS (Dec. 31, 2018) <https://www.burlingtonfreepress.com/story/news/2018/12/31/artificial-insemination-couple-accuses-doctor-using-his-own-sperm/2451246002/>.

40. Dr. Karbaat, a former sperm bank operator in the Netherlands, passed away in April 2017 at age 89. He refused to provide DNA samples while alive. *Dutch Families Win Right to Test DNA of Sperm Bank Doctor*, BBC NEWS (June 2, 2017), <https://www.bbc.com/news/world-europe-4013110>; see also Schuetze, *supra* note 1.

41. *TMA Board of Councilors Current Opinions*, TEX. MED. ASS'N, <https://www.texmed.org/Template.aspx?id=392#Sexual> (last visited Sept. 3, 2018).

42. H. Russell Searight & David C. Campbell, *Physician-Patient Sexual Contact: Ethical and Legal Issues and Clinical Guidelines*, 36 J. FAM. PRAC. 647, 651 (1993).

public, and physicians themselves, will lose trust in and respect for the medical profession.”⁴³

Only a handful of states criminalize sex between doctors and their patients.⁴⁴ Most prohibitions against such relationships come from ethical standards and state medical licensure board guidelines.⁴⁵ In contrast, approximately half of states criminalize sexual conduct between mental health professionals and patients.⁴⁶ Most of these laws were passed after empirical studies showed that trusted mental health professionals were exploiting their patients in such relationships.⁴⁷ On the other hand, the physician who has an intimate relationship with a patient can be liable for compensation and subject to disciplinary action. The Illinois Medical Practice Act,⁴⁸ for example, penalizes sex with a patient by a fine of up to \$10,000 per occurrence or medical license suspension or revocation. Individuals may also be expelled from professional associations and listed on registries such as the federal National Practitioner Data Bank,⁴⁹ which prevents them from obtaining a medical license or hospital privileges in another state.

While sexual relations between physicians and patients is an ethical violation, physicians’ inseminations of non-consenting (and unaware) patients represents a gross trespass under all standards of practice—including those in place decades ago. When these deceitful acts were committed in the 1970s and 1980s, it was standard practice to use fresh semen—often procured from local medical house staff who were compensated for the specimen(s).⁵⁰ Donors and patients were assured that the anonymity of all parties involved would be preserved.⁵¹ But when a physician masturbates

43. Jim Sabin, *Doctor-Patient Sex*, HEALTH CARE ORG. ETHICS BLOG (Apr. 23, 2009), <http://healthcareorganizationalethics.blogspot.com/2009/04/doctor-patient-sex.html>.

44. Carrie Teegardin, *Failing Grades*, THE ATLANTA JOURNAL-CONSTITUTION: DOCTORS & SEX ABUSE (Nov. 17, 2016), http://doctors.ajc.com/doctors_states_laws/ (discussing the lack of criminal penalties for sexual relations between patients and doctors) (last visited Feb. 3, 2019).

45. *Id.*

46. *Id.*

47. *Id.*

48. Illinois Medical Practice Act of 1987, 225 ILCS 60/22.

49. NATIONAL PRACTITIONER DATA BANK, <https://www.npdb.hrsa.gov/> (last visited Sept. 3, 2018).

50. SWANSON, *supra* note 14.

51. *Id.* at 211, 225–229 (describing how “the professional semen donor needed to be anonymous” and was selected by the doctor performing the insemination before IVF became increasingly popular); Zaveri, *supra* note 31 (describing how Dr. Cline inseminated “women with sperm from anonymous men resembling their partners” in the 70s and 80s).

to produce a sample in one examination room, and then immediately uses that sample to inseminate a patient in another room, the boundaries are blurred between the clinical procurement of a biological sample and the sexual touching associated with masturbation, orgasm, and ejaculation.

Insemination fraud introduces the gravest conflict of interest into the physician-patient relationship. The physician engaging in such acts exploits his patients' ignorance, trust, intense desire to conceive, and vulnerability. Essentially, the physician interposes himself in the marital relationship in lieu of a sperm donor who is supposed to resemble the intended parents. In committing illicit inseminations, physicians also breach other ethical obligations, including the duty to disclose all relevant medical information to patients and to deal honestly with them.⁵² In the deepest sense, these physicians breach the first tenet of the Hippocratic Oath: "first, do no harm."⁵³ Impregnating a patient without her consent should be *categorically* forbidden, irrespective of perpetrators' self-serving rationalizations.

A physician who impregnates patients with his own sperm is doing something far beyond performing a medical procedure to help her conceive. Rather, this physician penetrates his patients in at least three ways. The first penetration comes when the physician inserts medical equipment, including a speculum and disposable insemination catheter, through a patient's cervix into her uterine cavity, injecting his sperm specimen.⁵⁴ Patients have consented to this procedure, but *not* to its performance with the physician's sperm. The second penetration comes when the physician's biological material joins with the patient's, implants into her uterine lining, and forms a placenta, breaching her physiological barriers in the most intimate way possible. The third penetration, more sociocultural than physiological, follows from the child's birth. The resulting child is welcomed into the patient's family and held

52. See generally American Medical Association, *AMA Code of Medical Ethics Opinions on Patient-Physician Relationships*, <https://www.ama-assn.org/sites/default/files/media-browser/code-of-medical-ethics-chapter-1.pdf> (last visited Feb. 3, 2019) (discussing "core obligations" of medical professionals, including duties of disclosure).

53. While common conventions typically attribute the phrase "First, do no harm," to Hypocrates, scholars debate the phrase's true origin. See, e.g., Robert H. Shmerling, MD, *First, Do No Harm*, HARV. HEALTH PUB. (Oct. 14, 2017), <https://www.health.harvard.edu/blog/first-do-no-harm-201510138421> (last visited Jan. 30, 2019).

54. Mayo Clinic, *Intrauterine Insemination*, <https://www.mayoclinic.org/tests-procedures/intrauterine-insemination/about/pac-20384722> (last visited Sept. 3, 2018).

out as their own, obtaining legal rights and privileges to their emotional, social, and financial support.

It is particularly despicable when such unscrupulous physicians—like other predators—use patients’ “desperation” as an excuse for illicit inseminations. For example, at Cecil Jacobson’s trial, his defense attorney said, “[i]f Cecil made any mistakes, it was in losing his objectivity and trying so hard to get patients pregnant.”⁵⁵ Similarly, Donald Cline stated that “[h]e felt that he was helping women because they really wanted a baby.”⁵⁶ These are the same defenses that misogynists proffer to justify sexual harassment (“She needed the attention!” “She was asking for it!”), or when abusers blame victims and present themselves as the injured parties. These assertions hijack vulnerability and commonly reinjure those who are already suffering.⁵⁷ Society is quick to publicly recognize and reject these abuses when committed by the likes of Larry Nassar.⁵⁸ But, somehow, it has proved slower to acknowledge these gross violations when they involve reproductive care. No physician to date has been criminally prosecuted for perpetrating insemination fraud. Moreover, this “desperation” label reinforces damaging and inaccurate stereotypes of people struggling to conceive.⁵⁹ When we assume that someone who “desperately” wants children would do *anything* to conceive, we tend to doubt and devalue their agency.⁶⁰ We regard them as paralyzed or pathological broken souls who can be healed only by a baby.⁶¹

III. Potential Paths to Action and Remedies

At this point, no physicians committing illicit inseminations have been held criminally liable for illicit insemination itself.

55. *Doctor Found Guilty*, *supra* note 22, at A14.

56. *Indianapolis Fertility Doctor Accused of Using His Own Sperm on Patients Appears in Court*, FOX59 (Sept. 13, 2016), <https://fox59.com/2016/09/12/indianapolis-infertility-doctor-accused-of-using-his-own-sperm-on-patients-appears-in-court/> (last visited Feb. 3, 2019).

57. Gerald D. Skoning, *Explanations of (Excuses for) Sex Harassment: Are They Relevant in Court?*, AM. SPECTATOR (Oct. 20, 2017), <https://spectator.org/explanations-of-excuses-for-sexual-harassment-are-they-relevant-in-court/>.

58. Dwight Adams, *Victims Share What Larry Nassar Did to Them Under the Guise of Medical Treatment*, INDIANAPOLIS STAR (Jan. 25, 2018), <https://www.indystar.com/story/news/2018/01/25/heres-what-larry-nassar-actually-did-his-patients/1065165001/>.

59. JODY LYNEÉ MADEIRA, *TAKING BABY STEPS: HOW PATIENTS AND FERTILITY CLINICS COLLABORATE IN CONCEPTION* 24 (2018).

60. *Id.*

61. *Id.* at 25.

Federal fraud charges against Cecil Jacobson did not concern insemination fraud, but inducing false pregnancies through injectable hormones.⁶² Obstruction of justice charges against Cline were predicated on the fact that he lied to the Indiana Attorney General about committing these acts, not the acts themselves.⁶³ While some civil suits against these physicians have been filed, none have resulted in a settlement or verdict as of the writing of this Article. It was so challenging for former patients and donor-conceived children to seek accountability that they resorted to filing a consumer complaint with the Indiana Attorney General, on the grounds that Cline, a regulated professional, had misbehaved.⁶⁴ Why has it been so difficult to hold physicians like Cline who have committed insemination fraud accountable through criminal or civil law for their conduct, or to pass laws regarding such acts?

A. *Obstacles to Criminal Liability*

Several factors make it difficult to file criminal charges against these physicians, including expired statutes of limitation, the effects of time on available and reliable evidence, and a poor “fit” between penal statutes and physicians’ conduct. This Article discusses each of them in turn.

i. Evidentiary Issues and Expired Statutes of Limitation

The lapse in time between Cline’s fraudulent inseminations and the discovery of his conduct presents real problems. Cline’s files were destroyed, leaving no documentation about what women were promised, the procedures they agreed to undergo, and how these procedures were performed.⁶⁵ Many of the interactions occurred between Cline and his patients with no other witnesses because no

62. Jacobson, 1993 WL 343172, at *2-5.

63. Rudavsky, *supra* note 1 (reporting how the criminal case against Cline was triggered by Cline’s lies during investigation into a consumer complaint); Interview with Dr. Cline’s patient, “Judith” (2018) (noting that Cline was in trouble for lying to the Attorney General in two documents, not for artificially inseminating women with his own sperm).

64. Zaveri, *supra* note 31 (“The investigation into Dr. Cline began in 2014 and 2015, when a group of women including Ms. Ballard filed a complaint against Dr. Cline with Indiana’s attorney general, whose office investigates consumer complaints against physicians.”).

65. Angela Ganote, *Local Fertility Doctor Accused of Using His Own Sperm on Patients Charged After FOX59 Investigation*, FOX59 (Sept. 13, 2016), <https://fox59.com/2016/09/09/local-infertility-doctor-accused-of-using-his-own-sperm-on-patients-charged-after-fox59-investigation/> (last visited Feb. 3, 2019) (“However, since all of the cases took place in the late 1970s through the early 80s, Cline says all of those patient records have been destroyed.”).

one—including husbands—usually accompanied the women to treatment appointments, and nurses were not present in the examination rooms.⁶⁶ These evidentiary obstacles jeopardize both criminal prosecution and civil tort violations such as battery.

Cline's donor-conceived children were born between 1974 through 1987.⁶⁷ His conduct was uncovered in 2014. This means that twenty-six to forty years separated the insemination fraud act from the genetic testing revelation. This decades-long gap poses daunting legal problems because the statute of limitations for some potential claims expires after two to ten years. It is certainly possible to argue that these statutes of limitation could be tolled so that it would begin when victims discovered or should have discovered Cline's conduct. However, it is uncertain which event would trigger a victim's duty to inquire further about whether they were biologically related to Cline. Would it be the date when direct-to-consumer genetic testing was first available, or the date when victims received their results from such services? Or perhaps when they learned they had half-siblings, or when they contacted one another?

Indiana law poses a second problem as well. An individual commits the misdemeanor of deception in Indiana if they use entrusted property in a way they know is unlawful or involves substantial risk of loss or detriment, or if they misrepresent the identity or quality of the property.⁶⁸ This act carries a two-year statute of limitations,⁶⁹ but the time "period within which a prosecution must be commenced" does not include the time period when "the accused person conceals evidence of the offense, and evidence sufficient to charge . . . is unknown to the prosecuting authority and could not have been discovered by that authority by exercise of due diligence."⁷⁰ The Indiana Supreme Court has held that tolling the statute of limitations for deception requires "a positive act by the defendant that is calculated to conceal the fact that a crime has been committed."⁷¹ These tolling requirements are

66. Interview with Dr. Cline's patient, "Judith" (2018) (explaining how, other than coming to the initial appointment, Judith's husband did not come to any appointments and there was no nurse present for any appointment).

67. *E.g.*, Cha, *Fertility Fraud*, *supra* note 35 ("She has found roughly 50 people born between 1974 and 1987 who believe Cline is their father."); Rudavsky, *supra* note 36 ("The families believe Cline was the sperm donor on numerous occasions from 1974 to 1988").

68. *See* IND. CODE § 35-43-5-3(a)(3), (6) (2017).

69. IND. CODE § 35-41-4-2(a)(2) (2017).

70. *Id.*

71. *Study v. State*, 24 N.E.3d 947, 957 (Ind. 2015).

ill-suited to offenses like Cline's. However, even if patients glimpsed the sperm sample used, they could not have discerned whether or not it was correct. Indiana law would require patients to show that Cline somehow reassured them that the correct sample was used—an assurance that patients who trust their physician would never have reason to seek unless they suspected wrongdoing. It is an open question, however, whether Cline's assurances to patients that "everything was fine" at appointments following their positive pregnancy tests would have satisfied the "positive act" requirement for deception.

ii. Poor Statutory Fit

It is also difficult to find statutes under which Cline could successfully have been prosecuted. Possibilities include criminal battery, malicious mischief, and rape. But the elements of each do not map well onto Cline's conduct.

a. *Criminal Battery and Malicious Mischief*

Indiana's criminal battery statute states that "a person who knowingly and intentionally . . . in a rude, insolent, or angry manner places any bodily fluid or waste on another person" commits a misdemeanor.⁷² Malicious mischief occurs when a person who recklessly, knowingly, or intentionally places human bodily fluid (including semen) or feces in a location with intent that another will involuntarily touch these substances.⁷³ It would be difficult to prove criminal battery because juries may be concerned that Cline's patients consented to be inseminated with *anonymous* donor sperm (although they would argue that this did not extend to Cline's sample), and there is little to no evidence that Cline conducted the inseminations in a rude, insolent, or angry manner.⁷⁴ As to malicious mischief, Cline intentionally inseminated his patients with his own semen, ensuring that they would involuntarily touch this fluid since it was placed inside their bodily cavities. But it is doubtful that the Indiana legislature intended to apply malicious mischief to the placement of bodily fluid in the context of a medical procedure. It would be strange, for example, to state that a physician who performs a fecal transplant (transferring stool from a healthy donor into the gastrointestinal tract of a patient with

72. IND. CODE § 35-42-2-1(e) (2018).

73. IND. CODE § 35-45-16-2(b).

74. See Interview with Dr. Cline's patient, "Judith" (2018) (answering that she had no idea at the time that anything was untoward about her insemination process).

colitis)⁷⁵ but intentionally used her own stool instead of a sample from a third-party donor would be guilty of malicious mischief. In each case, patients consented to a procedure which inserted that *type* of bodily fluid inside their bodily cavities—although again, Cline’s patients had conditioned consent on the use of either their husband’s sperm or anonymous donor sperm from a medical resident resembling their husband.

b. Rape

Under Indiana Code 35-42-4-1-1(a), rape is committed when “a person knowingly or intentionally has sexual intercourse with another person or . . . causes another to perform or submit to other sexual conduct” where that “other person is compelled by force or imminent threat of force,” is “unaware that the . . . sexual conduct . . . is occurring;” or is incompetent and cannot consent to sexual conduct.⁷⁶ Cline’s former patients were competent, reducing relevant provisions to unawareness of sexual conduct and lack of consent. Several obstacles lie in the way of charging Cline with this offense. Artificial insemination is a clinical act, not a sexual one. But is a medical procedure like insemination still clinical when the physician performing the procedure masturbates to ejaculation in a nearby room, catches his sample, walks to the examination room where his patient is waiting and inserts his sample into her vagina via a syringe and catheter? The point at which the touching *ceases* to become sexual might depend on hard-to-prove factors such as whether the physician became aroused thinking of his patient, and what emotions he experienced while performing the insemination.

As to the consent or lack thereof, obtaining a jury verdict might be difficult because Cline could claim that his former patients consented to receive anonymous donations of sperm and would not, have known the identity of their sperm donor. This argument presumes it is permissible to ask patients if they wish to be inseminated with their physician’s sperm. Juror characteristics such as sex, gender, and age could easily affect how they understand Cline’s behavior, the bounds of women’s consent, and the nature of these touchings.⁷⁷ Of course, these potential arguments would not

75. Rachel E. Sachs & Carolyn A. Edelstein, *Ensuring the Safe and Effective FDA Regulation of Fecal Microbiota Transplantation*, 2 J.L. & Biosciences 396, 396 (2015).

76. IND. CODE § 35-42-4-1(a) (Supp. 2018).

77. See, e.g., Shamena Anwar et al., *The Role of Age in Jury Selection and Trial Outcomes*, 57 J.L. & Econ. 1001, 1002 (2014); but see Dennis Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL., PUB. POL’Y & L. 622, 700 (reviewing past jury studies demonstrates that jurors make decisions based on personal characteristics less often than might be

apply to patients who requested donors with specific characteristics; while some patients were told their donor would be a resident at a nearby hospital who resembled their husbands,⁷⁸ others consented to be inseminated with their husband's sperm.

Finally, jurors might be unwilling to convict Cline of rape given the lack of overt force or threat of force. Rape statutes historically required force⁷⁹ because it was conventionally understood to be a forceful and violent act. Modern rape statutes are predicated upon a theory of “sexual autonomy,” and reject the “[d]efilement” theories that have traditionally undergirded such laws.⁸⁰ Rape is bad, in other words, not because it violates a person's purity, but because it violates their sexual autonomy.⁸¹ Cline's conduct seems highly analogous to “sex by deception” cases, where a suspect procures sex from a victim under deceptive pretenses, pretending that he is the woman's partner.⁸² But charges of rape by deception are heavily disfavored within criminal law;⁸³ courts have repeatedly held “fraud is not force.”⁸⁴ Interestingly, however, Anglo-American courts have applied sex by deception reasoning in two circumstances—when the defendant represented the sexual act as a surgical operation, and when the defendant impersonated the victim's husband.⁸⁵

Rape deprives a person of the opportunity to choose whether and with whom to engage in sexual conduct. Cline's insemination fraud deprived his patients of reproductive autonomy—the privilege to choose with whom and how children are conceived. If rape is “unconsented-to sex,” then insemination fraud is an

expected).

78. Interview with Judith (2018) (notes on file with author) (explaining that she thought Dr. Cline was using a sperm from a medical resident with characteristics that resembled her husband).

79. Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 *YALE L.J.* 1372, 1396 (2013).

80. *Id.* at 1388.

81. *Id.* at 1393.

82. *See, e.g.*, Cal. Penal Code § 261 (stating that a form of sexual assault is where a “person submits under the belief that the person committing the act is someone known to the victim other than the accused, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief.”); David Mack, *She Thought She Was in Bed with Her Boyfriend, Until She Saw His Face*, *BUZZFEED NEWS* (Dec. 1, 2018), <https://www.buzzfeednews.com/article/davidmack/rape-fraud-consent-purdue-abigail-finney-joyce-short-grant>. *See also* *Boro v. Superior Court*, 163 Cal. App. 3d 1224 (1985).

83. Rubenfeld, *supra* note 79, at 1376.

84. *Id.* at 1396.

85. *Id.* at 1397.

unconsented-to method of conception.⁸⁶ Insemination fraud violates a patient's consent to insemination *under certain conditions* and reproductive self-determination. Cline's conduct could transform a clinical touching performed solely to help a patient conceive into a sexual touching performed at least in part for the physician's own sexual gratification. It is no longer so clear that the act is a clinical touching, as it involves masturbatory stimulation, potential erotic thoughts of the waiting patient, and intimate touching of the patient almost immediately after the physician concludes his own sexual experience. Moreover, the physician engaging in such conduct substitutes *his own* procreative intent for that of the patient, taking on a role very different from a physician practicing reproductive medicine—biological father of the patient's child.

B. Civil Remedies

Civil claims against Cline could include a handful of intentional torts, such as battery, intentional infliction of emotional distress, and fraud. Cline's conduct is entirely intentional: his former patients' pregnancies did not result from any negligent or reckless switching or contamination of sperm samples.

That intentionality is important because Indiana's Medical Malpractice Act requires that malpractice claims be submitted to a medical review panel before a plaintiff sues.⁸⁷ The Act "neither specifically includes nor excludes intentional torts from the definition of malpractice."⁸⁸ Indiana courts have determined, however, that conduct is excluded from this requirement if it is "unrelated to the promotion of a patient's health or the provider's exercise of professional expertise, skill or judgment."⁸⁹ While the illicit insemination "plainly occur[ed] during the rendition of health care," it was "not designed to promote the patient's health."⁹⁰ Moreover, no standard of care allows physicians to use their own gametes to impregnate their patients. It is harder to determine, however, whether the act "call[s] into question [the physician's] use of the skill or expertise required of members of the medical profession."⁹¹ Cline needed professional skill to successfully complete the insemination, regardless of which sperm he used. Any alleged torts, however, arose not because of deficient professional

86. *Id.*

87. Ind. Code § 16-9.5-1-1 (2018).

88. *Van Sice v. Sentany*, 595 N.E.2d 264, 266 (Ind. Ct. App. 1992).

89. *Collins v. Thakker*, 552 N.E.2d 507, 510 (Ind. Ct. App. 1990).

90. *Id.*

91. *Id.* at 511.

skills, but because of intentionally erroneous semen. This suggests that plaintiffs would not have to submit illicit insemination claims to the medical review board.

These conclusions are bolstered by the outcome of *Collins v. Thakkar*,⁹² in which Collins, a patient, had a sexual relationship with her physician, Thakkar. She eventually suspected that she was pregnant. Thakkar agreed to examine Collins after hours to confirm the pregnancy.⁹³ During the examination, Thakkar told her that she was not pregnant, but twice, “without her consent and over her protest, did some act with the metal instrument inside her as to inflict excruciating pain . . . ,” after which she had a miscarriage.⁹⁴ Collins sued for wrongful abortion, assault and battery, and intentional infliction of emotional distress. The Indiana Court of Appeals determined that this “wanton and gratuitous” conduct did not constitute “the rendition of health care or professional services.”⁹⁵ Thus, if Cline’s actions are determined to be like Thakkar’s, they would fall outside the purview of the Medical Malpractice Act and would not require medical board review.

Whether they fall inside or outside of the Medical Malpractice Act, battery⁹⁶ and intentional infliction of emotional distress⁹⁷ claims must be brought within two years of the “point at which a particular claimant either knew of the malpractice and resulting injury, or learned of facts that would have led a person of reasonable diligence to have discovered” those issues.⁹⁸ The fraudulent concealment doctrine estops a defendant from raising the statute of limitations “when he has, either by deception or by a violation of duty, concealed from the plaintiff material facts thereby preventing the plaintiff from discovering a potential cause of action.”⁹⁹ A plaintiff must “exercise due diligence in commencing her action after the equitable grounds cease to operate”—here, most likely

92. *Id.*

93. *Id.* at 509.

94. *Collins*, 552 N.E.2d at 509.

95. *Id.*

96. IND. CODE § 34-11-2-4 (Supp. 2018). *See also* *Fager v. Hundt*, 610 N.E.2d 246, 253 (Ind. 1993) (discussing how the fraudulent concealment doctrine applies to the two-year grace period provided to those reaching the age of majority under Ind. Code § 34-1-2-5 (repealed 1998)). For information on the two-year statute of limitations for Medical Malpractice Act claims, see *Anonymous Physician v. Rogers*, 20 N.E.3d 192 (Ind. Ct. App. 2014).

97. *Tsitsopoulou v. Univ. of Notre Dame*, No. 2:10-CV-309, 2011 WL 839669, at *4 (N.D. Ind. Mar. 7, 2011).

98. *Anonymous Physician*, 20 N.E.3d at 196.

99. *Fager*, 610 N.E.2d at 251 (quoting *Burks v. Rushmore*, 534 N.E.2d 1101, 1104 (Ind. 1989)).

when a plaintiff knew they conceived a child genetically related to Cline, or that their child was conceived due to Cline's improper conduct.¹⁰⁰

i. Battery

Battery is the most obvious intentional tort claim that former patients can allege against Cline. Indiana law requires that a defendant "acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and . . . a harmful contact with the person of the other directly or indirectly results."¹⁰¹ Here, the offensive contact would be Cline's use of his own sperm to inseminate his patients. At minimum, that contact is harmful and offensive because 1) Cline's sperm likely materially differed from that to which patients consented to use (from the husband or a donor physically resembling the husband), 2) patients would likely not consent to insemination with their physician's sperm and 3) Cline could be a carrier for genetic diseases.

In common law, battery can give rise to either a claim of an unwanted touching (i.e., an operation on the wrong leg) or a failure to obtain informed consent (i.e., nondisclosure of material risks of a medical procedure).¹⁰² Indiana requires that physicians must make "reasonable disclosure of material facts relevant to the decision which the patient is requested to make."¹⁰³ Normally sounding in negligence, failure to obtain informed consent becomes a battery under Indiana law only when "the physician completely fails to obtain informed consent."¹⁰⁴ In *Cacdac v. West*, however, the Indiana Court of Appeals remarked that "the failure to obtain informed consent claim has elements of both battery and negligence. The greater the physician's failure, the more akin to battery; the lesser the failure, the more akin to negligence"—including "gross negligence, fraud, or the intentional withholding of information."¹⁰⁵ Intentional withholding of information, then, is entirely a battery, with no hint of negligence. For example, in

100. *Id.* (citing *Burks*, 534 N.E.2d at 1105).

101. *Mullins v. Parkview Hosp., Inc.*, 865 N.E.2d 608, 610 (Ind. 2007) (quoting RESTATEMENT (SECOND) OF TORTS § 13 (AM. LAW INST. 1965)).

102. *See, e.g., Cacdac v. West*, 705 N.E.2d 506, 511–12 (Ind. Ct. App. 1999) (explaining that failing to obtain informed consent may constitute battery in some situations).

103. *Mullins*, 865 N.E.2d at 610 (quoting *Culbertson v. Mernitz*, 602 N.E.2d 98, 101 (Ind. 1992)).

104. *Van Sice*, 595 N.E.2d at 267 n.6.

105. *Cacdac*, 705 N.E.2d at 512.

Cacdac. v. West, the patient, West, alleged that she consented to undergo back surgery based on Dr. Cacdac's statements that she risked paralysis if she declined to undergo surgery.¹⁰⁶ She filed suit alleging that Dr. Cacdac fraudulently induced her to consent to surgery through his misrepresentation of paralysis risk.¹⁰⁷ The Indiana Court of Appeals denied the defendant doctor's motion for summary judgment, stating that genuine issues of fact existed.¹⁰⁸

Two factors suggest that Cline committed a battery. First, due to ethical violations and asymmetries in power and information, patients cannot consent to insemination with their physicians' sperm. Second, Cline intentionally withheld the information that he was using sperm samples different from those to which the patient had consented. Cline's former patients would allege that the illicit insemination was an unwanted and non-consented-to touching that exceeded the scope of their consent and that they only consented to the procedure if Cline used the agreed-upon sperm. As recognized, this argument blurs the lines between battery as an unwanted touching and as an informed consent violation. It is unclear whether medical board review would be necessary. The unwanted touching claim might not require review under *Collins* so long as the touching was not considered medical treatment.¹⁰⁹ Characterizing the claim as merely an informed consent failure could trigger review,¹¹⁰ but alleging that patients' consent was fraudulently obtained would exclude it from the review requirement under *Cacdac*.¹¹¹

Against former patients who requested anonymous donor sperm, Cline would likely assert the same consent defense he could to criminal battery. He would assert that these patients had, in fact, received sperm from an anonymous donor since they did not know who had provided the sample. This could be rebutted by testimony that patients did not anticipate that Cline himself would be their donor and would not have consented to undergo that insemination procedure had they known.

106. *Id.* at 508.

107. *Id.*

108. *Id.* at 509.

109. *See Collins*, 552 N.E.2d at 510–11 (explaining that actions taken in the interest or for the benefit of a patient's health fall under the Medical Malpractice Act but "wanton and gratuitous" conduct do not fall the Act's scope).

110. *See Van Sice*, 595 N.E.2d at 267 (finding that the failure to obtain informed consent is a claim for malpractice and therefore must be reviewed by the medical review panel).

111. *See Cacdac*, 705 N.E.2d at 512 (finding that a battery claim, based on fraudulently obtained consent, was not barred as a matter of law).

ii. Fraud

If they allege fraud, Cline's former patients would have to prove that "a material representation of a past or existing fact was made which was untrue and known to be untrue by the party making it or else recklessly made and that another party did in fact rely on the representation and was induced thereby to act to his detriment."¹¹² The crux of this fraud claim would be that Cline knowingly inseminated a patient with his own sperm sample (not that from an anonymous medical resident resembling the plaintiff's husband or from the husband himself) without disclosing that to the patient, and that Cline knew his patients would detrimentally rely on his silence to believe that the correct sperm was used. Once again, Cline could argue that at least some of his former patients did consent to receive anonymous donor sperm, and that he, in fact, gave them anonymous donor sperm because he did not reveal that he had provided the sample.

iii. Intentional Infliction of Emotional Distress

To prove intentional infliction of emotional distress in Indiana, "a plaintiff must prove that the defendant: '(1) engages in extreme and outrageous conduct (2) which intentionally or recklessly (3) causes (4) severe emotional distress to another.'"¹¹³ This conduct has to "go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community," prompting "an average member of the community . . . to exclaim, 'Outrageous!'"¹¹⁴ Moreover, the defendant must intend to "harm one emotionally,"¹¹⁵ and the plaintiff must experience "mental distress of a very serious kind."¹¹⁶

Cline's illicit inseminations of his former patients would likely have been regarded as outrageous even at the time he performed these procedures. The fact that two percent of physicians practicing fertility medicine admitted to the same conduct in an anonymous 1987 federal government survey suggests that this was by no means standard practice then, just as it is not now.¹¹⁷ The devil in the details for this claim, however, is that Cline could argue that the

112. *Id.* at 509–10.

113. *Haegert v. McMullan*, 953 N.E.2d 1223, 1235 (Ind. Ct. App. 2011) (quoting *Curry v. Whitaker*, 943 N.E.2d 354, 361 (Ind. Ct. App. 2011)).

114. *Haegert*, 953 N.E.2d at 1235 (citing *Bradley v. Hall*, 720 N.E.2d 747, 752-3 (Ind. Ct. App. 1999)).

115. *Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991).

116. *Curry*, 943 N.E.2d at 361.

117. *Cimons*, *supra* note 2.

former patients whom he inseminated were *not* distressed, but on the contrary were ecstatic to be pregnant. This delight followed from patients' assumptions that Cline had carried out the successful insemination in accordance with their wishes to use either sperm from their husband or an anonymous resident resembling him. Finally, Cline could assert that he never intended his patients to be distressed at all. Yet, his deception surely caused his patients profound emotional distress decades later when they found out what he had done.

C. Legislative Remedies

In addition to civil and criminal penalties, states could take legislative action and pass statutes directly targeting ART fraud, use of gametes or embryos to impregnate a patient without her consent or using other patients' gametes or embryos in a way inconsistent with their providers' written dispositions.

Following the misconduct at the University of California at Irvine in the mid-1990s, California enacted Cal. Penal Code § 367g, which makes it unlawful for anyone to a) knowingly use gametes or embryos for other purposes than those indicated on a written consent form signed by the person providing these materials; or b) implant these materials into someone who is not the person providing these materials without the provider's signed written consent.¹¹⁸ Significantly, written consent is *not* required of men who donate sperm to a licensed bank.¹¹⁹ Violating this provision carries a punishment of three to five years in prison, a fine of up to \$50,000, or both.¹²⁰

In January 2018, Indiana state Senators Roderick Bray (R) and Michael Delph (R) introduced Senate Bill 239, Fertility Fraud, which would establish both criminal and civil causes of action.¹²¹ The bill provides that a physician can be prosecuted for fertility fraud, a level six felony, as long as charges are brought no later than five years after the state first a) discovers evidence sufficient to charge the physician through DNA analysis; b) becomes aware of a recording that provides sufficient evidence; or c) the defendant confesses.¹²² The statute also establishes a civil fertility fraud cause of action with a statute of limitations that is either ten years from the eighteenth birthday of the donor-conceived child or five years

118. CAL. PENAL CODE § 367g.

119. *Id.* § 367g(d).

120. *Id.* § 367g(c).

121. S.B. 239, 120th Gen. Assemb., Reg. Sess. (Ind. 2018).

122. *Id.* § 5.

from the earliest date of either 1) the time when an individual first discovers evidence sufficient to charge the physician through DNA analysis, becomes aware of a recording that provides sufficient evidence; or 2) the defendant confesses.¹²³ Senators Bray and Delph drafted the bill after consulting with Cline's former patients and donor-conceived children who were distressed by their inability to hold him accountable under Indiana civil or criminal law.¹²⁴

Though SB 239 was assigned to the Senate Committee on Corrections and Criminal Law,¹²⁵ the committee did not take action on the bill. It is unclear why. According to some former patients and donor-conceived children who inquired into the matter, the committee chair felt there were simply more important matters to discuss¹²⁶—prompting them to wonder if Cline might have friends on the committee or in the legislature who had persuaded committee members not to take action. It is difficult to understand why the committee did not hear this bill. When such outrageous events happen in politicians' legislative backyards, why would they not want a perpetrator to be held accountable? Indeed, politicians have three major incentives to pass a fertility fraud bill. First, doing so helps constituents who are former patients or donor-conceived children—and in Cline's case, this amounts to quite a few people. Moreover, governmental and legal authority weakens when existing laws do not allow perpetrators to be held criminally or civilly accountable, and when legislatures do not revise existing laws to adapt to evolving legal landscapes. Finally, insemination fraud endangers public safety, lest half-siblings date, marry, and conceive children with one another. Efforts to pass a fertility fraud bill in the 2019 legislative session are ongoing at the time of publication; the bill was, however, granted a hearing in the Senate Judiciary committee, where it was unanimously passed, and is awaiting a hearing on the floor of the Senate.¹²⁷

123. *Id.* § 1.

124. Shannon Houser, *Indy Fertility Doctor Who Used Own Sperm on Patients Pleads Guilty to Obstruction, Gets No Jail Time*, FOX 59 (Dec. 14, 2017), <https://fox59.com/2017/12/14/indianapolis-fertility-doctor-who-used-own-sperm-on-patients-pleads-guilty-to-obstruction-gets-no-jail-time/>.

125. S.B. 239, 120th Gen. Assemb., Reg. Sess. (Ind. 2018).

126. The Author was present during the committee meeting and heard the conversation between the former patients and the children.

127. S.B. 174, 121st Gen. Assemb. Reg. Sess. (Ind. 2019).

*D. Personal, Social, and Cultural Aspects of Seeking
Accountability*

In addition to the legal obstacles to holding physicians who commit insemination fraud accountable, numerous personal, social, and cultural factors affect whether and how individuals and governments pursue accountability. These reasons include both individual factors affecting former patients and donor-conceived children and institutional-level issues.

i. Individual-Level Factors

Individuals may be unwilling to seek accountability for numerous reasons. A former patient must first have knowledge that their physician engaged in insemination fraud before they can take action. But patients may not hear of breaking news concerning insemination fraud allegations, or they may lack access to genetic testing to confirm their suspicions that they are affected.

Former patients may not seek accountability because they feel that they have not been wronged. Not every former patient will experience insemination fraud as a violation. They might feel that their physician *did* fulfill his duties to help them to conceive and build a family or believe that their physician is incapable of wrongdoing. Or they might feel that so much time has passed that it is not worth investigating decades later.

Interviews with Cline's former patients and donor-conceived children demonstrate that individuals may be unwilling to seek accountability for reasons similar to those of rape victims who resist filing criminal complaints.¹²⁸ Former patients who do feel violated may be reluctant to seek accountability because of how such efforts will affect themselves and others. They may feel shame (and accompanying "self-condemnation, powerless, feelings of disgrace, failure, and inadequacy"),¹²⁹ fear of being stigmatized, or fear of public scrutiny and unwillingness to become targets of media attention—another common sentiment of rape victims.¹³⁰ Former patients might feel as if they are somehow at fault, particularly if they did not tell their child(ren) that they were conceived using donor sperm.¹³¹ Former patients who considered insemination

128. See Karen G. Weiss, *Too Ashamed to Report: Deconstructing the Shame of Sexual Victimization*, 5 FEMINIST CRIMINOLOGY 286, 291–93 (2010).

129. *Id.* at 286.

130. *Id.* at 292–93.

131. For information on studies examining the impact of disclosure, see Marilyn Crawshaw et al., *Disclosure and Donor-Conceived Children*, 32 HUM. REPROD. 1535–36 (2017); Lucy Frith et al., *Secrets and Disclosure in Donor Conception*, 40 SOC. OF

unethical might also feel that they somehow “deserved” to be deceived (much like rape victims); these patients might either blame themselves or expect others to regard them as disgraced or deserving of harm.¹³²

Former patients and donor-conceived children might also be concerned that accountability efforts could adversely affect their partners and children, weakening important social relationships and support networks. Attempts to seek accountability could imply a rejection of their child(ren), or a judgment that these children were somehow unsuitable or unwanted. Such efforts could also imply a rejection of or resentment towards a male partner, who could not father a biological child due to male-factor infertility or lack of opportunity to do so by the physician’s fraudulent conduct. Male-factor infertility has long been a stigmatized condition.¹³³ In personal interviews, Cline’s former patients describe their efforts to keep their husbands’ infertility a secret, which could be revealed if they become involved in a criminal or civil lawsuit.¹³⁴ Former patients could also believe that seeking accountability might undermine parental relationships with donor-conceived children. Donor-conceived children might feel that seeking legal involvement might harm the mother and father who raised them, imply that these parents are somehow at fault, or bring unwanted publicity to family affairs. Women’s efforts to seek accountability may go against stereotypical perceptions of females as peacekeepers and guardians of familial (and national) virtue and morals dating back to the American Revolution.¹³⁵

Finally, individuals may be reluctant to seek accountability because no physician has been found criminally or civilly liable for insemination fraud. Cecil Jacobson’s fraud charges were predicated on inducing false pregnancies through hormonal injections;¹³⁶ Cline was sentenced for felony obstruction of justice for lying about whether he used his sperm to inseminate former patients.¹³⁷

HEALTH & ILLNESS 188, 203 (2018).

132. Weiss, *supra* note 128, at 293.

133. Kenneth Gannon, Lesley Glover, & Paul Abel, *Masculinity, Infertility, Stigma, and Media Reports*, 59 SOCIAL SCIENCE & MEDICINE 1169, 1170 (2004); Tewes Wischmann & Petra Thorn, *(Male) Infertility: What Does It Mean to Men? New Evidence from Quantitative and Qualitative Studies*, 27 REPRODUCTIVE BIOMEDICINE ONLINE 3 236-43, 238 (2013).

134. Interview with “Judith,” (January 2018) (on file with Author).

135. Linda K. Kerber, *The Republican Mother: Women and the Enlightenment, an American Perspective*, 28 AMER. Q. 187, 192–94 (1976); Rosemarie Zagari, *Morals, Manners, and the Republican Mother*, 44 AMER. Q. 192, 192 (1992).

136. *Jacobson*, 1993 WL 343172, at *2–*5.

137. Rudavsky, *supra* note 1.

Existing civil suits against other physicians accused of activities such as Barwin, Mortimer, and Coates are still ongoing.¹³⁸ Legal outcomes thus far are hardly encouraging to a former patient who is undecided about participating in a legal action or lobbying for a fertility fraud statute. Instead, these results imply that there is nothing to be done and that an individual who pursues such options might be putting their self-esteem, privacy, and relationships on the line for little to no reason.

ii. Institutional-Level Factors

States may also be reluctant to expend much effort to hold physicians accountable for fertility fraud. Women's competency to make reproductive decisions has been called into question for decades, particularly concerning abortion and contraception.¹³⁹ Doctors—especially white male physicians—continue to enjoy prominent social positions.¹⁴⁰ According to traditional stereotypes, patients should not question doctors,¹⁴¹ and women should not question men—particularly powerful men.¹⁴² While physicians are often thought to wield the power of life and death over patients, only those who practice reproductive medicine have the potential to *create* life. Fertility physicians who commit insemination fraud have the hubris to assume a role analogous to that of the Roman *pater familias*.¹⁴³ A physician who inserts his own genetics into a

138. See, e.g., *Class Action Against Dr. Norman Barwin*, NELLIGAN O'BRIEN PAYNE, <https://nelligan.ca/class-actions/dr-barwin/> (last accessed Sept. 1, 2018) (noting recent activities of a class action lawsuit against Dr. Barwin).

139. See, e.g., Reva B. Siegel, Lecture, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1669 (2008) (discussing the argument for abortion restrictions in the name of protecting women).

140. See Maggie Fox, *White Male Doctors Earn More Than Women and Black Peers, Study Finds*, NBC NEWS: HEALTH NEWS (June 8, 2016), <https://www.nbcnews.com/health/health-news/white-male-doctors-earn-more-women-black-peers-study-finds-n588146>; Niall McCarthy, *America's Most Prestigious Professions in 2016*, FORBES (Mar. 31, 2016), <https://www.forbes.com/sites/niallmccarthy/2016/03/31/americas-most-prestigious-professions-in-2016-infographic/#2a0a18551926> (ranking "doctor" as the most prestigious profession).

141. BRYAN S. TURNER, MEDICAL POWER AND SOCIAL KNOWLEDGE 44 (1987) (stating that the patient is expected to "follow the doctor's advice without question or interference.").

142. Ephesians 5:22-33 (NIV) ("Wives submit yourselves to your own husbands . . .").

143. The Roman *pater familias* were the senior priests of the household. They held the customary role of father, oversaw their household's moral propriety and well-being, and enjoyed legal privileges over the Familia's property. Richard P. Saller, *Pater Familias, Mater Familias, and the Gendered Semantics of the Roman Household*, 94 CLASSICAL PHILOLOGY 182, 188–99 (1999).

non-consenting patient's family line creates life—an activity culturally regarded as god-like. In exercising paternalistic power in creating a child with his genetic material, he assumes the authority to act contrary to a patient's wishes, insists on the superiority of his moral and ethical interpretation of the insemination act, and ensures that his descendants have legal claims to the privileges and property of the patient's family.

Some states have gone on record supporting pro-natalist aims by including language supporting life in preambles to state statutes. Such language was at issue in the Missouri statutory preamble at issue in *Webster v. Reproductive Health Services*. This preamble stated that life began at conception, that “unborn children have protectable interests in life, health, and wellbeing,”¹⁴⁴ and required that “all Missouri laws be interpreted to provide unborn children with the same rights enjoyed by other persons, subject to the Federal Constitution and this Court's precedents.”¹⁴⁵ Perhaps former patients violated by insemination fraud would have merited more urgent legislative attention had they wished to terminate pregnancies conceived through insemination fraud.

One recent example of exceedingly pro-natalist legislation is Arizona Senate Bill 1393. As signed by the Arizona governor on April 3, 2018, this legislation awards embryos to the spouse in a divorcing couple “who intends to allow the in vitro human embryos to develop to birth.” If both spouses have such intentions and are genetically related to the embryos, the dispute is resolved “in a manner that provides the best chance for the in vitro human embryos to develop to birth.”¹⁴⁶ These provisions supersede any agreements that the couple made prior to undergoing in vitro fertilization (IVF).¹⁴⁷ In compelling genetic parenthood, this statute countermands the usual judicial outcome of embryo disposition divorce disputes where one spouse (usually the husband) wishes to destroy embryos to avoid genetic parenthood, while the other (usually the wife) wishes to gestate the embryos or donate them to another patient. Normally, a court would grant decision-making power over the embryos to the spouse who wished to *avoid* genetic parenthood.¹⁴⁸ Thus, Arizona's pro-natalist commitment is so strong

144. MO. REV. STAT. §§ 1.205.1(1)-(2) (1986); *Webster v. Reproductive Health Svcs.*, 492 U.S. 490 (1989).

145. *Webster*, 492 U.S. at 501.

146. ARIZ. REV. STAT. § 25-308.03 (2018).

147. *Id.*

148. Ariana Eunjung Cha, *Who Gets the Embryos? Whoever Wants to Make Them into Babies, New Law Says*, WASH. POST: HEALTH & SCI. (July 17, 2018), <https://www.washingtonpost.com/national/health-science/who-gets-the-embryos-wh>

that it allows the state to essentially nullify a couple's embryo disposition decisions.

Although insemination fraud and embryo dispositions upon divorce are two distinct reproductive issues, comparing their legislative outcomes is instructive. In insemination fraud, women conceive and birth children through un-consented-to medical protocols, without knowing their physician used his own sperm, violating their expectations, ethics, and expressed desires to use sperm from their husband or from a donor with similar physical characteristics. One might expect a state legislature to enact a law allowing criminal and/or civil legal actions to be brought against alleged perpetrators. But despite Cline's obvious wrongdoing, the Indiana legislature failed to even hear such a bill in committee in 2018.¹⁴⁹ Courts have typically adjudicated embryo disposition divorce disputes by awarding the embryos to the spouse wishing to avoid genetic parenthood;¹⁵⁰ any fertility clinic or other party that used these embryos for any other unconsented-to purpose would be violating criminal and civil laws. The predicted legal outcome would be holding such parties legally accountable. Arizona, however, has enacted a statute requiring that embryos be awarded to the spouse who is most likely to allow them to become children.¹⁵¹ This comparison strongly suggests that legislators feel there is no social problem when women conceive and birth children—regardless of whether they did so through consented-to processes. But when women take affirmative steps not to conceive or give birth by using contraception or undergoing an abortion, or if patients undergoing IVF choose to destroy or donate surplus embryos to research upon divorce, this merits legislative action.

Admittedly, such a comparison is apples-to-oranges in that embryo disposition decisions occur in a different reproductive context than insemination. But the comparison highlights how states can reinforce violations of women's reproductive autonomy either explicitly through legislative action, like Arizona did, or implicitly through inaction, like Indiana did. The comparison also illustrates how gender, politics, values, religion, and other sociocultural factors compel outcomes that seem absurdly contrary

oever-wants-to-make-them-into-babies-new-law-says/2018/07/17/8476b840-7e0d-11e8-bb6b-c1cb691f1402_story.html?utm_term=.2451c7369d63.

149. Bill Actions for Senate Bill 239, INDIANA GENERAL ASSEMBLY, <http://iga.in.gov/legislative/2018/bills/senate/239> (last accessed Sept. 3, 2018).

150. Cha, *Who Gets the Embryos?*, *supra* note 148.

151. ARIZ. REV. STAT. § 25-308.03 (2018).

to customary legal results. In both cases, patients' reproductive decision-making autonomy is critically compromised.

Conclusion

Unfortunately, civil and criminal cases against physicians who perpetrate illicit inseminations are unlikely to be resolved quickly or neatly. Even when criminal charges have been filed, like the obstruction of justice charges against Cline, they have seemed a frustratingly poor fit to former patients and their adult children. A bill criminalizing fertility fraud would certainly make it easier to prosecute such physicians, punishing them directly for illicit insemination instead of for ancillary acts of deceit committed decades later. Civil cases such as those against Barwin, Mortimer, and Coates offer victims a path to recover for several claims, from breach of warranty and lack of informed consent to medical malpractice and consumer protection violations. But these cases are most likely to settle, producing no precedent for holding physicians accountable. Moreover, even if physicians are much less likely to engage in such conduct nowadays due to technological improvements in cryopreservation and increased regulation of donor gametes, more cases of illicit insemination are likely to come to light.

One wonders how best to resolve these cases. Do they demand a new legal theory, designed specifically to address the unique harms these patients face? Or should they be resolved through a combination of new state legislation criminalizing fertility fraud and civil tort suits? It is surely problematic when wronged parties feel that their best or only option is to file consumer complaints to the Attorney General. A \$500 fine is surely an agonizing outcome for a physician who used his own sperm to inseminate patients without their consent. Why have such dramatic cases seen no intervention from state legislatures that are all too eager to involve themselves in other areas of reproductive decision making, like abortion and embryo personhood?

Finally, what happens when the donor children of these unscrupulous physicians find that they have inherited his genetic characteristics, like predispositions to serious hereditary diseases? Could they be compensated if they develop a genetic disease or for the risks of passing genetic disease traits on to their offspring (the physician's grandchildren)? These questions and strong emotions are the only certainties involved in these illicit insemination cases. Currently, legislative action creating criminal and civil causes of

action for fertility fraud is the best (and perhaps the only) way forward, short of a civil suit against Cline himself.