

UNDERSTANDING ILLICIT INSEMINATION AND FERTILITY FRAUD, FROM PATIENT EXPERIENCE TO LEGAL REFORM

JODY LYNEÉ MADEIRA

Abstract

Recently, several cases have been filed in North America and Europe alleging that fertility physicians inseminated former patients with their own sperm only to have this conduct come to light decades later when their unsuspecting adult children use direct-to-consumer genetic tests and learn that they are not biologically related to their fathers and often that they have multiple half-siblings. For instance, Donald Cline of Indianapolis, Indiana, has over sixty doctor-conceived children, with more continuing to come forward. Although these cases induce disgust, it has thus far proven difficult to hold these physicians legally accountable because their conduct falls within gaps in existing civil and criminal laws. This Article explores the legal contours of fertility fraud cases involving illicit physician inseminations, explaining why it falls through gaps in existing criminal and civil law and why it is essential to take whatever measures are necessary to hold physicians accountable. Part I discusses six physicians who have thus far faced criminal or civil charges for their conduct in North America and explores how artificial insemination has long been a stigmatized practice cloaked in secrecy. Part II discusses how fertility fraud violates various ethical and legal interests of female and male former patients and their doctor-conceived children. Part III assesses how Cline's illicit inseminations affected parents and progeny and how Cline's progeny learn of new genetic connections, what they think of Cline and his motivations, how they derive support from one another, their reactions to criminal proceedings against Cline, and why they regard a legislative "fertility fraud" bill as an ideal outcome. Part IV analyzes why it is difficult to hold physicians criminally and civilly liable under existing law, including excerpts from an interview with the prosecutor in the Cline case. Finally, Part V discusses successful efforts to overcome these difficulties through passing fertility fraud legislation in Indiana and Texas.

INTRODUCTION

In the opening scenes of the 1994 *Lifetime* movie *Seeds of Deception*, suspenseful piano music begins to play as a black screen displays the ominous words, "inspired by actual events." A doctor enters a medical office corridor from an interior door, and strides

confidently towards the nurse's station, depositing a sperm sample vial *en route* to a patient records shelf. A nurse picks up the vial and, with a confused expression, asks the doctor about its contents:

Nurse: Dr. Jacobson?

Doctor: Hmm?

Nurse: This is a semen sample?

Doctor: Of course, from today's donor.

Nurse: Today's . . . ? I didn't see anyone.

[Doctor leaves the shelf and approaches the nurse.]

Doctor: And you won't. In this practice, I'm the only one who deals with the donors.

Nurse: Yes, sir.

Doctor: I realize that you're new here, but you must realize that my patients are guaranteed anonymity. And that's what they get.

Nurse: Yes, sir.

This movie plotline is the story of Cecil Jacobson, a physician who became infamous in the 1990s for hormonally stimulating false pregnancies and inseminating unsuspecting patients with his own sperm. Jacobson was not the only physician in the 1990s to commit heinous violations of patients' rights. The *Orange County Register* exposed scandals at the University of California, Irvine's Center for Reproductive Health, where physicians Ricardo Hector Asch, Jose Balmaceda and Sergio Stone allegedly misappropriated eggs and embryos from some patients and transferred them into others without consent, conceiving at least fifteen children in the process.¹ The university faced over twenty-five lawsuits by angry patients against the physicians and the school, which paid more than \$27 million to settle claims.²

With the advent of direct-to-consumer testing, cases like Jacobson's are becoming more commonplace across the world. Parents Pam and John Branum were shocked to discover that their daughter, Annie, had been conceived at a University of Utah fertility

¹ See MARY DODGE & GILBERT GEIS, *STEALING DREAMS: A FERTILITY CLINIC SCANDAL* 14, 151 (2003); Julie Marquis, Tracy Weber & Michael G. Wagner, *Egg Misuse May Have Involved 30 More Patients*, *UCI Reports*, L.A. TIMES (July 6, 1995), http://articles.latimes.com/1995-07-06/news/mn-20673_1_fertility-clinic [<https://perma.cc/2VVG-K5KH>].

² See Esther Schrader, *50 Couples to Get \$10 Million to End UCI Fertility Clinic Suits*, L.A. TIMES (July 19, 1997), <http://articles.latimes.com/1997/jul/19/news/mn-17879> [<https://perma.cc/Z3WZ-5XCF>]; 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> [<https://perma.cc/55BL-H5ZW>].

clinic through the sperm of technician Tom Lippert, a felon with a kidnapping conviction; Lippert had already died when the fraud was discovered.³ Beginning in 2016, cases began to emerge where male OB/GYNs had used their own sperm in the 1970s through 1990s to inseminate unsuspecting patients, only to have their deeds exposed decades later through direct-to-consumer genetic testing services. In North America, Donald Cline of Indianapolis, IN, has pled guilty to obstruction of justice after lying about his conduct,⁴ and others such as Norman Barwin of Ottawa, Canada;⁵ Gerald Mortimer of Idaho Falls, ID;⁶ John Boyd Coates of Berlin, VT;⁷ and a doctor identified by the initials G.H. of Sacramento, CA,⁸ face civil suits. In the Netherlands, former patients and alleged doctor-conceived children of the late Jan Karbaat, a physician who ran a sperm bank from his house, are seeking the right to have his DNA material compared to their own so that they may prove a genetic relationship.⁹

Former patients of these physicians speak of feeling violated and assaulted, their personal dignity and bodily integrity trampled, their family plans routed, and their trust

³ See Aliah Git, *Family Discovers Fertility Fraud 20 Years Later*, CBS NEWS (Jan. 14, 2014), <https://www.cbsnews.com/news/fertility-fraud-discovered-20-years-later-it-almost-seems-surreal> [<https://perma.cc/525T-YWFL>]; CeCe Moore, *Artificial Insemination Nightmare Revealed by DNA Test*, YOUR GENETIC GENEALOGIST (Jan. 7, 2014), <http://www.yourgeneticgenealogist.com/2014/01/artificial-insemination.html> [<https://perma.cc/YT8W-G549>].

⁴ See *Fertility Doctor Used His Sperm on Unwitting Women, Now Dozens of Children Want Answers*, SBS: THE FEED (Sept. 7, 2018), <https://www.sbs.com.au/news/the-feed/fertility-doctor-used-his-sperm-on-unwitting-women-now-dozens-of-children-want-answers> [<https://perma.cc/2A9G-QNSN>].

⁵ See Jamie Long, *Fertility Doctor Suspended, Admits to 4th Sperm Mixup*, CBC (Nov. 2, 2016), <http://www.cbc.ca/news/canada/ottawa/fertility-doctor-suspended-admits-to-4th-sperm-mixup-1.1398706> [<https://perma.cc/2G3Q-DXQ6>].

⁶ *Rowlette v. Mortimer*, 352 F.Supp.3d 1012 (D. Idaho 2018).

⁷ Complaint and Demand for Trial by Jury, *Rousseau v. Coates*, No. 2:18-CV-205, 2019 WL 3220327 (D. Vt. Dec. 4, 2018).

⁸ Complaint, *Grinnell v. Kaiser Found. Hosps.*, No. 34-2019-00252206-CU-MM-GDS (Cal. Super. Ct. filed Mar. 11, 2019); see also Matthew Renda, *Lawsuit Claims Doctor Inseminated Patient with His Own Sperm*, COURTHOUSE NEWS SERV. (Mar. 12, 2019), <https://www.courthousenews.com/lawsuit-claims-doctor-inseminated-patient-with-his-own-sperm>. [<https://perma.cc/K63G-6H4H>].

⁹ See *Dutch Families Win Right to Test DNA of Sperm Bank Doctor*, BBC (June 2, 2017), <https://www.bbc.com/news/world-europe-40131107> [<https://perma.cc/R9NU-YKV9>]; Christopher F. Schuetze, *Dutch Fertility Doctor Swapped Donors' Sperm with His, Lawsuit Claims*, N.Y. TIMES (May 15, 2017), <https://www.nytimes.com/2017/05/15/world/europe/dutch-fertility-doctor-swapped-donors-sperm-with-his-lawsuit-claims.html> [<https://perma.cc/NA6B-HPEP>].

broken. In an era where male infertility was heavily stigmatized, these women and men trusted their physicians to help them conceive, only to learn of egregious breaches of trust and gross trespasses upon their family relationships. Women were inseminated with sperm they had not consented to use and were intimately touched by a doctor who had moments before masturbated to ejaculation to produce that sperm sample. Men who consented only to the use of their own sperm, not donor sperm, were denied the opportunity to become biological parents when their samples were contaminated or unused. These men and women love the children they conceived, birthed, and raised, but remain adamant that they would never have consented to use their physicians' samples, even if it was ethical for their physicians to make this request in the first place.

For their part, the adult children born from illicit inseminations also struggle to come to terms with their conception. Often, these children did not even know that their parents had used donor sperm and had believed their psychological father and biological progenitor to be one and the same. Discovering the truth wrecks personal identity and destroys familial relations. Many doctor-conceived children confess they feel as if they were conceived through rape. Some have become estranged from their parents and siblings with whom they grew up. Children who knew they were “donor kids” must grapple with the knowledge of who their sperm donor was, and what that man did to their mothers and others, often wondering if the physician-donor passed along undesirable genetic traits.

Although fertility fraud cases induce social disapproval, it has proven difficult to hold the physicians legally accountable. As the recent case of Donald Cline illustrates, these cases seem to fall within gaps in civil and criminal law. Because women “consented” to the inseminations, these acts are not traditionally prosecutable as rape or sexual assault. Moreover, fraud can be a tough theory to argue depending on nuances of state law. These cases don't fall within “fraud in the factum,” where a plaintiff agrees to undergo a procedure because of a misrepresentation that prevents her from accurately comprehending accompanying risks, duties, and obligations, such as signing an informed consent form that she is told is for artificial insemination but is actually for a hysterectomy. Instead, illicit inseminations constitute fraud in the inducement, where a plaintiff enters into an agreement knowing what it is about—here, intrauterine insemination—but gives consent based on false information the defendant provides.¹⁰

¹⁰ Fraud in the inducement is exemplified by *Boro v. Superior Court*, 163 Cal. App. 3d 1224, 1226 (1985), in which the defendant phoned the plaintiff and falsely told her he was a physician and that she had a life-threatening disease curable only through a painful surgery or sex with an anonymous donor. *Id.* at 1227. Upon learning the truth, the plaintiff brought rape charges against the defendant. *Id.* The court found these charges improper

This Article explores the legal contours of fertility fraud cases involving illicit physician inseminations, using the case against Donald Cline as a primary example to explain why these harms fall through gaps in existing criminal and civil law, and why it is essential to hold physicians accountable. The Cline case is the largest fertility fraud case in the United States to date; as of April 2019, there are now over fifty-eight doctor-conceived children. Moreover, its facts illustrate a wide range of fertility fraud scenarios, including the physician's substitution of his own sperm for both anonymous donors and patients' husbands. Additionally, Cline knew that his patients were in close geographic proximity to one another and could foresee that they were from similar social circles and/or socioeconomic backgrounds, raising profound concerns of consanguineous relationships. Finally, the Cline siblings have sought to hold Cline accountable in several forums—efforts that have either been successful or are still ongoing. These include filing a consumer complaint with the Indiana Attorney General, filing civil lawsuits,¹¹ and passing a “fertility fraud” bill creating civil and criminal causes of action for former patients, their partners, and doctor-conceived children.

Part I discusses six physicians who have thus far faced criminal or civil charges for their conduct in North America and explores how artificial insemination has long been a stigmatized practice cloaked in secrecy. Part II discusses how fertility fraud violates various ethical and legal interests of female and male former patients and their doctor-conceived children. Part III assesses how Cline's illicit inseminations affected parents and progeny and how Cline's progeny learn of new genetic connections, what they think of Cline and his motivations, how they derive support from one another, their reactions to criminal proceedings against Cline, and why they regard a legislative “fertility fraud” bill as an ideal outcome. Part IV analyzes why it is difficult to hold physicians criminally and civilly liable under existing law, including excerpts from an interview with the prosecutor in the Cline case. Finally, Part V discusses successful efforts to overcome these difficulties through passing fertility fraud legislation in Indiana and Texas.

because they constituted fraud in the inducement; the defendant's deception had been about a collateral matter (a cure for a life-threatening disease) and not about the act done (sex). *Id.* at 1230–31. Civil claims may have different outcomes, however; particularly with respect to STD transmissions. *See Doe v. Johnson*, 817 F.Supp. 1382, 1395 (W.D. Mich. 1993) (denying the defendant's motion to dismiss because “a defendant owes a plaintiff a legal duty to, at the very least, disclose the fact that s/he may have the HIV virus”).

¹¹ Sarah Zhang, *The Fertility Doctor's Secret*, THE ATLANTIC (Mar. 18 2019), <https://www.theatlantic.com/magazine/archive/2019/04/fertility-doctor-donald-cline-secret-children/583249/> [<https://perma.cc/C59D-YUAD>].

I. Contemporary Fertility Fraud Cases and Legal Loopholes

To date, six North American physicians have faced criminal or civil charges for inseminating former patients with their own sperm: Cecil Jacobson in Virginia, Ben Ramaley in Connecticut, Donald Cline in Indiana, Norman Barwin in Ottawa, Canada, Gerald Mortimer in Idaho, John Boyd Coates in Vermont, G.H. in California, and Kim McMorries in Texas. In doing so, these physicians violated several of their patients' and progenies' legal and ethical interests.

A. Current Fertility Fraud Cases

The fertility fraud cases featured in news media have fairly similar fact patterns. In the 1970s, physicians represented to married patients in heterosexual relationships that they were using sperm from an anonymous medical resident resembling the husband, or using a sample from the husband, but instead substituted his own sperm without the patient's consent. There are a few variations on that fact pattern, however. In a few cases, the physician demonstrates an unusual level of involvement with his patient or has a continued relationship with the doctor-conceived child.

1. Fertility Fraud as Sperm Substitution and Illicit Insemination

In one type of fertility fraud case, the physician performs an illicit insemination, but does not have a continuing relationship with his patients after a particular event, either the establishment of a viable pregnancy or delivery of the child. Physicians such as Donald Cline released patients into the care of their obstetricians after confirming their pregnancies were healthy (conventionally around the tenth to twelfth week of pregnancy). Other physicians performed illicit inseminations, and then provided follow-up care for the duration of the pregnancy, even delivering their own genetic offspring. These physicians do not, however, stay in touch with or have contact with their doctor-conceived children as the children grow.

a. Cecil Jacobson

In the 1960s, Cecil Jacobson was Chief of George Washington University Medical School's Reproductive Genetics Unit; by the 1980s, he had transitioned from academia to a leadership position in a Fairfax County, Virginia, reproductive center.¹² In 1995,

¹² Robert F. Howe, *Fertility Doctor Accused of Using His Own Sperm*, WASH. POST (Nov. 20, 1991), https://www.washingtonpost.com/archive/politics/1991/11/20/fertility-doctor-accused-of-using-his-own-sperm/bcc3844b-38d0-4277-8053-3fc2e6d90366/?utm_term=.fce76cfadb16 [https://perma.cc/2J2Z-DKK2].

Jacobson was charged with multiple counts of mail fraud, wire fraud, travel fraud, and perjury for producing false pregnancies and inseminating patients with his own sperm.¹³ To induce pregnancy symptoms in his patients, Jacobson injected the women with the hCG hormone; patients received positive results on pregnancy tests, experienced normal pregnancy symptoms, and received early ultrasounds where they were shown “fetuses” (in actuality, “nearby organs or simply fecal matter”¹⁴), but were told around three months their fetuses had passed.¹⁵ After patients contacted news media about Jacobson’s conduct and the television channel aired an investigative report, several patients sued, and federal investigators charged him with thirty-two counts of mail fraud (mailing bills to patients whom he had deceived) and ten counts of wire fraud (using telephones to make patient appointments) as well as travel fraud (inducing patients to cross state lines to reach his Virginia clinic) and perjury for making false statements during a prior civil suit.¹⁶

But the criminal investigation also unearthed other problematic conduct; Jacobson had claimed to recruit anonymous sperm donors, but several employees testified at his trial that “there were never any anonymous sperm donors at the clinic.”¹⁷ After Jacobson’s patients who had successfully conceived from the “anonymous donor program” agreed to genetic testing, results showed that Jacobson was biologically related to at least fifteen children between four and fourteen years old, including a child born to a patient who had only consented to insemination using her husband’s sperm.¹⁸ Jacobson may have fathered as many as seventy-five children whose parents have not agreed to genetic testing.¹⁹

¹³ See Brief for U.S. as Appellee at *5, *U.S. v. Jacobson*, 4 F.3d 987 (4th Cir. 1993).

¹⁴ *U.S. v. Jacobson*, 4 F.3d 987, slip op. at *1 (4th Cir. 1993).

¹⁵ *Id.* at *2.

¹⁶ See *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> [<https://perma.cc/J2NA-NUY8>].

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

Jacobson was ultimately convicted on fifty-two counts of fraud and perjury.²⁰ After the verdict was announced, Jacobson said, “I’m in shock, I really am . . . I spent my life trying to help women have children. If I felt I was a criminal or broke the law, I would never have done it.”²¹ A *New York Times* story covering the case emphasized, “[h]owever morally questionable those actions are, there are no laws prohibiting a doctor from donating sperm to a patient or impregnating an unwitting woman with his sperm.”²² Jacobson was ultimately sentenced to five years in prison and lost his medical license. Jacobson’s conduct was the subject of news and popular media, including a 1993 book, *Babymaker: Fertility, Fraud, and the Fall of Doctor Cecil Jacobson*,²³ a 1994 made-for-television movie with the teaser, “To give someone a child, he would stop at nothing,”²⁴ a *Saturday Night Live* skit starring John Goodman, Chris Farley, and Dana Carvey,²⁵ several television show episodes,²⁶ and a 2005 documentary, *The Sperminator*.²⁷

²⁰ *Id.*

²¹ *Id.*

²² See *Doctor Is Found Guilty in Fertility Case*, *supra* note 16.

²³ See RICK NELSON, *BABYMAKER: FERTILITY, FRAUD, AND THE FALL OF DOCTOR CECIL JACOBSON* (1993).

²⁴ See *THE BABYMAKER: THE DR. CECIL JACOBSON STORY*, <https://www.imdb.com/title/tt0109193/> [<https://perma.cc/MYZ7-E3H7>].

²⁵ See *Saturday Night Live: Deep Thoughts: Drumsticks to Dolphins* (NBC television broadcast Mar. 14, 1992) <http://www.nbc.com/saturday-night-live/video/deep-thoughts-drumsticks-to-dolphins/2724049?snl=1> [<https://perma.cc/C2SD-VEQ7>]; *Saturday Night Live: My 75 Kids* (NBC television broadcast Oct. 8, 2018), <http://snltranscripts.jt.org/91/91okids.phtml> [<https://perma.cc/VHN6-JY7M>].

²⁶ See *Saturday Night Live: Deep Thoughts: Drumsticks to Dolphins*, *supra* note 25; *Saturday Night Live: My 75 Kids*, *supra* note 25; *Law & Order: Seed* (NBC television broadcast Feb. 15, 1995), <https://www.imdb.com/title/tt0629413/> [<https://perma.cc/39AY-3S5Y>]; *Fringe: A Better Human Being* (Fox television broadcast Feb. 17, 2012), <https://www.imdb.com/title/tt2125859/> [<https://perma.cc/E5BM-T7HG>]; *Awake: The Little Guy* (NBC television broadcast Mar. 8, 2012); *Reaper: Coming to Grips* (CW television broadcast Apr. 29, 2008), <https://www.imdb.com/title/tt1218228/> [<https://perma.cc/Y9ZL-KU8K>]; CECIL JACOBSON, https://en.wikipedia.org/wiki/Cecil_Jacobson [<https://perma.cc/782N-BQ5Q>].

²⁷ See *Psycho: The Sperminator* (Channel 4 Television Corporation television broadcast Aug. 30, 2005), <https://www.imdb.com/title/tt0498842/> [<https://www.imdb.com/title/tt0498842/>] [<https://perma.cc/9BN7-JXFC>].

b. Ben Ramaley

In 2002, Dr. Ben Ramaley, an OB/GYN practicing in Greenwich, CT, helped “Jane Smith,” a Caucasian woman, and her husband “John Smith,” an African-American man, to conceive twins, ostensibly using the husband’s sperm.²⁸ After the twins were born with a “strikingly fair complexion,” the couple grew concerned because the twins looked so different from them and sought a paternity test that revealed that the husband was not the twins’ biological father.²⁹ The couple sued Ramaley in 2005, claiming Ramaley had substituted his own sperm for the husband’s.³⁰ The complaint stated that Ramaley “had intentionally used his own [sperm] in an extreme and outrageous act.”³¹ The case settled within months, and “a gag order was imposed.”³²

The state Department of Public Health opened an investigation into Ramaley’s conduct in January of 2007.³³ An independent consultant that the board brought in from the American Board of Obstetrics and Gynecology found that Ramaley did not properly label sperm specimens, failed to have a tracking system for procedures, kept “scant” clinic records that did not indicate who performed which procedures, and that there was no record Ramaley’s patients had signed an informed consent form.³⁴ In November of 2009, Ramaley was disciplined by the Connecticut Department of Public Health and was fined \$10,000, but was allowed to keep an unrestricted license.³⁵ The Department of Public Health “drew no conclusions and found no deviation from the standard of care”

²⁸ See Debra Friedman, *Wrong Man’s Sperm Produces Twins—And a Shocking Accusation*, GREENWICH TIME (Nov. 12, 2009), <https://www.newstimes.com/news/article/Wrong-man-s-sperm-produces-twins-and-a-215289.php> [<https://perma.cc/4T3X-HEAC>] [hereinafter Friedman, *Wrong Man’s Sperm*].

²⁹ *Id.*

³⁰ See Debra Friedman, *Red Flags Raised with Alarming Medical Board Decisions*, GREENWICH TIME (June 5, 2011) [hereinafter Friedman, *Red Flags*].

³¹ Friedman, *Wrong Man’s Sperm*, *supra* note 28.

³² Friedman, *Red Flags*, *supra* note 30; see also Liz Sadler, *Dr. ‘Jerk’-yll Sperm Probe*, N.Y. POST (Nov. 13, 2009).

³³ See Friedman, *Red Flags*, *supra* note 30.

³⁴ See Friedman, *Wrong Man’s Sperm*, *supra* note 28.

³⁵ See Friedman, *Red Flags*, *supra* note 30.

concerning the alleged use of Ramaley's sperm.³⁶ In 2008, Ramaley signed a consent order in Connecticut conceding that he would not contest the allegation that he had used the incorrect sperm.³⁷ The statement of facts in the consent order for his case stated that Ramaley had used the "wrong man's sperm" in the procedure,³⁸ but did not address whether he used his own sperm.³⁹ According to the *Greenwich Time*, because Department of Public Health board members only "hear a few brief statements of fact about the case" in a consent order, it had known "almost nothing about the history of the case before signing off on a consent order, according to board members' own admissions."⁴⁰ Shockingly, the Department of Public Health had the authority to order Ramaley to undergo a DNA test, but did not.⁴¹ None of Ramaley's patients knew of these accusations for seven years afterwards.⁴² Ramaley signed a second consent order in March of 2009 with New York. He surrendered his New York license rather than accept a proposed \$10,000 fine with a one-year suspension and three-year probation.⁴³

Ramaley did not face criminal charges. Connecticut health officials did not see a need to turn the case over to prosecutors because there "was no evidence to support criminal intent."⁴⁴ As of 2014, internet reviews of his services suggest Ramaley was still practicing in Connecticut.⁴⁵

³⁶ Friedman, *Wrong Man's Sperm*, *supra* note 28.

³⁷ *See id.*

³⁸ Friedman, *Red Flags*, *supra* note 30.

³⁹ *See* Friedman, *Wrong Man's Sperm*, *supra* note 28.

⁴⁰ Friedman, *Red Flags*, *supra* note 30.

⁴¹ *See* Friedman, *Wrong Man's Sperm*, *supra* note 28.

⁴² *See id.*

⁴³ *See id.*

⁴⁴ *See id.*

⁴⁵ *Dr. Ben Ramaley: Fertility Doctor Accused of Using Own Sperm to Artificially Inseminate Woman*, HUFFPOST (May 25, 2011), https://www.huffingtonpost.com/2009/11/13/dr-ben-ramaley-fertility_n_357611.html [<https://perma.cc/3T9Z-KJ2M>]; DR. BEN RAMALEY, MD – REVIEWS, https://www.vitals.com/doctors/Dr_Ben_Ramaley.html [<https://perma.cc/7R8V-K488>].

c. Donald Cline

In May 2015, international news headlines proclaimed that retired Indianapolis physician Donald Cline had intentionally inseminated patients with his own sperm in the 1970s and 1980s.⁴⁶ His conduct was discovered after an unwitting donor child, Maggie,⁴⁷ used 23andMe to identify her relatives, only to discover several half-siblings whose parents had all received treatment from Cline.⁴⁸ Cline's patients were told either that he would use their husbands' sperm or that he would use fresh donor sperm from medical residents, who would each provide samples for only three successful pregnancies.⁴⁹ Maggie and another sibling filed a consumer protection complaint with the Indiana Attorney General in 2014. After the Attorney General sent Cline a letter describing the allegations against him, Cline responded in January 2015, denying everything: "I can emphatically say that at no time did I ever use my own sample for insemination . . . I followed suggested guidelines of the period . . . I also did nothing morally or legally wrong."⁵⁰ Cline's denial gave the Attorney General's office the excuse they needed to take further action. The Marion County Prosecutor's Office obtained a warrant to acquire DNA material from Cline and were able to swab him on site.⁵¹ Genetic testing results conclusively showed that Cline was the siblings' biological father.⁵²

While waiting for the Attorney General's investigation, Maggie and two other siblings had also contacted Cline's descendants through Facebook, reaching his

⁴⁶ See *Fertility Doctor Used His Sperm on Unwitting Women, Now Dozens of Children Want Answers*, *supra* note 4.

⁴⁷ Aliases have been used to protect individuals' identities.

⁴⁸ See Angela Ganote, *A Need to Know: DNA Reveals a 30-year-old Family Secret*, FOX59 (May 12, 2015), <http://fox59.com/2015/05/12/a-need-to-know-dna-reveals-a-thirty-year-old-family-secret/> [<https://perma.cc/ECN9-N8YS>].

⁴⁹ See *id.*

⁵⁰ See Vic Ryckaert & Shari Rudavsky, *Indianapolis Fertility Doctor Accused of Using Own Sperm*, INDYSTAR (Sept. 12, 2016), <https://www.indystar.com/story/news/crime/2016/09/12/fertility-doctor-facing-charges/90253406/> [<https://perma.cc/R37P-TSW9>].

⁵¹ See Kate Briquet, *Fertility Doc Was Secretly the Father*, DAILY BEAST (Sept. 12, 2016), <https://www.thedailybeast.com/fertility-doc-was-secretly-the-father> [<https://perma.cc/M8XU-8UP8>].

⁵² See *Fertility Doctor Used His Sperm on Unwitting Women, Now Dozens of Children Want Answers*, *supra* note 4.

granddaughter and eventually his acknowledged son, who confronted his father.⁵³ Cline eventually admitted to his family that he had used his own sperm to inseminate former patients.⁵⁴ In March 2016, Cline agreed to meet in person with Maggie and other siblings, and estimated he had donated his sperm about 50 times to “unknowing patients who desperately wanted children.”⁵⁵

Cline pled guilty in December 2017 to two counts of felony obstruction of justice and was given a suspended sentence and fined \$500.⁵⁶ His medical license was revoked in August 2018.⁵⁷ At his sentencing, Cline apologized, stating “I was foolish in my actions, and I should not have lied.”⁵⁸ He did not say how often he had used his own sperm.⁵⁹ His doctor-conceived children felt that the obstruction of justice charges did little to hold him accountable, and were angry that he has never been held liable for the actual illicit inseminations.⁶⁰ The Cline siblings have used 23andMe, Ancestry.com, and the Donor Offspring, Parent & Sibling Registry to find and contact other siblings. Each time a new connection is made, he or she is contacted by a welcoming sibling.⁶¹ The siblings stay in

⁵³ See Ganote, *supra* note 48.

⁵⁴ Interview with Maggie (Mar. 21, 2017) (on file with author).

⁵⁵ See Sharon Cohen, *Fertility Doctor’s Secret Reveals Discovery of at Least 23 Half-Siblings*, FOX NEWS (Feb. 26, 2018), <http://www.foxnews.com/health/2018/02/26/fertility-doctors-secret-reveals-discovery-at-least-23-half-siblings.html> [<https://perma.cc/ZMD7-GLPN>]; see also Interview with Maggie (Mar. 21, 2017) (on file with author).

⁵⁶ See Steve Jefferson, *Fertility Doctor Pleads Guilty to Lying about Using Own Sperm, Avoids Jail Time*, WTHR (Dec. 15, 2017), <https://www.wthr.com/article/fertility-doctor-pleads-guilty-to-lying-about-using-own-sperm-avoids-jail-time> [<https://perma.cc/8XVP-LJ5M>].

⁵⁷ See Jessica Hayes, *Indiana Fertility Doctor Donald Cline Surrenders Medical License*, FOX59 (Aug. 23, 2018), <https://fox59.com/2018/08/23/indiana-fertility-doctor-donald-cline-surrenders-medical-license/> [<https://perma.cc/T44J-UZF8>].

⁵⁸ See Cohen, *supra* note 55.

⁵⁹ See Associated Press, *Indiana Fertility Doctor Who Used Own Sperm to Impregnate Women Surrenders Medical License*, CHI. TRIBUNE (Aug. 23, 2018), <https://www.chicagotribune.com/suburbs/post-tribune/news/ct-ptb-indiana-fertility-doctor-st-0824-story.html> [<https://perma.cc/F3PL-N95G?type=image>].

⁶⁰ See Zhang, *supra* note 11.

⁶¹ Interview with Bryan (Feb. 27, 2017) (on file with author).

contact with one another through social media, get together in person from time to time, and several text each other privately.⁶²

d. Norman Barwin

Norman Barwin of Ottawa, Canada, is currently facing a civil suit for a host of claims, including inseminating patients with his sperm without their consent.⁶³ At one time, Barwin was a pillar of Ottawa's Jewish and arts communities and the former president of several organizations, including the Canadian Fertility Society, the Planned Parenthood Federation of Canada, and Planned Parenthood Ottawa.⁶⁴ He is a recipient of the Queen's Golden Jubilee medal and the Order of Canada (but he returned that award in 2013 after admitting to professional misconduct).⁶⁵ Barwin was first sued in 1995 by two patients for using the wrong sperm samples; similar lawsuits followed in 2004, 2006, and 2010.⁶⁶ He admitted to artificially inseminating four women with incorrect samples in 2013 during a professional misconduct investigation by the College of Physicians and Surgeons of Ontario.⁶⁷ At that time, the College barred him from practicing medicine for two months. In November 2016, Barwin was sued in a class action lawsuit by former patients Davina and Daniel Dixon, their daughter, Rebecca, and Rebecca's half-sister,

⁶² *Id.*

⁶³ See Paul Taylor-Sussex, *The Alleged Actions of Fertility Doctor Norman Barwin Have Affected Countless Individuals and Families Across Canada*, NELLIGAN LAW (Oct. 23, 2018), <https://nelliganlaw.ca/blog/personal-injury-lawyer/barwin-fertility-case-the-many-ways-people-have-been-affected/> [https://perma.cc/BD83-3QGC].

⁶⁴ See Elizabeth Payne, *Timeline: A Look at the Story of Dr. Norman Barwin*, OTTAWA CITIZEN (May 3, 2018), <https://ottawacitizen.com/news/local-news/timeline-a-look-at-the-story-of-dr-norman-barwin> [https://perma.cc/YY9Z-RXX5].

⁶⁵ See *Ottawa Doctor Loses Order of Canada After Sperm Mix-Ups*, CBC (Sept. 25, 2013), <https://www.cbc.ca/news/canada/ottawa/ottawa-doctor-loses-order-of-canada-after-sperm-mix-ups-1.1398704> [https://perma.cc/K3M2-LSYQ].

⁶⁶ See Long, *supra* note 5; Amber Kanwar, *Sperm Donor Mix-Up: Where Do These Two Girls Come From?*, GLOBE & MAIL (Apr. 8, 2017), <https://www.theglobeandmail.com/life/parenting/sperm-donor-mix-up-where-do-these-two-girls-come-from/article570411/> [https://perma.cc/96XW-TFEK].

⁶⁷ See Will Campbell, *Dr. Bernard Norman Barwin Suspended for Inseminating Women with Wrong Sperm*, HUFFPOST (Apr. 2, 2013), https://www.huffingtonpost.ca/2013/01/31/bernard-norman-barwin-suspended-wrong-sperm_n_2592710.html [https://perma.cc/8H7F-NPZ4]; Rosie DiManno, *After Impregnating Women with Wrong Sperm, a Grudging Apology from 'Baby God'*, STAR (Jan. 31, 2013), https://www.thestar.com/news/gta/2013/01/31/fertility_expert_dr_norman_barwin_admits_impregnating_women_with_the_wrong_sperm.html [https://perma.cc/V7AX-WEFR]; Long, *supra* note 5.

Kathryn (Kat) Palmer, for allegedly using his own sperm without consent.⁶⁸ Rebecca and Kat represent a class of children conceived from his sperm (11 have been identified thus far); Davina represents a class of women who endured inseminations with unconsented-to sperm samples; and Daniel represents a class of men whose sperm samples were contaminated, lost, or unused in Barwin's custody.⁶⁹ There are now more than 150 plaintiffs among the various classes. Claims include breach of contract (including express and implied warranties); negligence (failure to use selected sperm, keep proper records, prevent contamination of sperm samples, implement proper policies, employ competent employees, adequately train employees, and comply with ordinary standards/ethics); battery; negligent misrepresentation (concealing paternity); infliction of mental suffering; breach of fiduciary duties; damages for pain, suffering, loss of enjoyment of life, loss of income, and expenses of therapy; deprivation of medical history knowledge; rights to child support; and reckless conduct, such as disregarding patients' health, safety, and welfare from the "cavalier use of his own sperm."⁷⁰

e. John Boyd Coates

The newest fertility fraud lawsuit was filed on December 4, 2018, against John Boyd Coates of Berlin, Vermont, by former patients Cheryl and Peter Rousseau.⁷¹ Cheryl and Peter had children from prior marriages but wanted a child together after they married in 1974.⁷² Because Peter had undergone an irreversible vasectomy, Cheryl consulted Coates, who told her he would obtain a donated sample from an anonymous medical student resembling Peter who had been "tested for purposes of being a donor."⁷³ Coates required that Peter retain an attorney to draw up a contract to confirm that he would adopt any child born of the insemination and required Cheryl to undergo testing.⁷⁴ Following these

⁶⁸ See Statement of Claim, *Dixon v. Barwin* (2016), No. 16-70454CP (Ont. Sup. Ct. J.).

⁶⁹ *Id.* at 5.

⁷⁰ *Id.* at 10–18.

⁷¹ See Complaint and Demand for Trial by Jury, *Rousseau v. Coates*, No. 2:18-CV-205, 2019 WL 3220327 (D. Vt. Dec. 4, 2018).

⁷² *Id.* at *2.

⁷³ *Id.* at *3.

⁷⁴ *Id.* at *3–4.

tasks, Cheryl visited Coates to undergo insemination twice in 1977.⁷⁵ In May 1977, Cheryl learned that she was pregnant and gave birth to a daughter, Barbara, in December.⁷⁶ Coates delivered Barbara and served as Cheryl's gynecologist for a year afterwards.⁷⁷ Coates' actions remained a secret until Barbara used direct-to-consumer genetic testing to learn more about her biological father and from the results determined Coates had to have provided the sample.⁷⁸ In their lawsuit, the Rousseaus claim medical negligence, violations of informed consent, fraud, negligent and intentional infliction of emotional distress, battery, breach of contract, and consumer protection act violations.⁷⁹ They also filed suit against Central Vermont Medical Center for negligent supervision and respondeat superior.⁸⁰ The Rousseaus are alleging that, because Coates' conduct was fraudulently concealed from them until October 2018, they could not bring suit earlier and now seek compensatory and exemplary damages, stating that Coates' conduct was "outrageously reprehensible, had the character of outrage frequently associated with a crime and were done with malice."⁸¹

f. Dr. Kim McMorries

In April of 2019, news broke of a fertility fraud case in Texas. Margo Williams of Texarkana had undergone artificial insemination through an unidentified doctor, allegedly with sperm that she and her husband had chosen: Sperm Donor 106 from California Cryobank.⁸² Margo conceived, and gave birth to a daughter, Eve.⁸³ When she

⁷⁵ *Id.* at *4.

⁷⁶ *Id.*

⁷⁷ See Complaint and Demand for Trial by Jury at *4, *Rousseau v. Coates*, No. 2:18-CV-205, 2019 WL 3220327 (D. Vt. Dec. 4, 2018).

⁷⁸ *Id.* at *5.

⁷⁹ *Id.* at *5–9.

⁸⁰ *Id.* at *10–11.

⁸¹ *Id.* at *11–12.

⁸² See Robert T. Garrett, *Fertility Fraud is Real. The Texas Senate Approved a Bill to Make It a Crime*, DALLAS MORNING NEWS (Apr. 12, 2019), <https://www.dallasnews.com/news/texas-politics/2019/04/11/fertility-fraud-real-texas-senate-approved-bill-make-crime> [<https://perma.cc/FLG6-N7EP>] [hereinafter Garrett, *Fertility Fraud is Real*].

⁸³ *Id.*

was 16, Eve learned that she was donor-conceived through information she obtained while reading her mother's e-mails.⁸⁴ After Eve turned 18, she submitted her mother's medical records to obtain Donor 106's medical records.⁸⁵ It wasn't until she used direct-to-consumer genetic testing that Eve learned that she was not, in fact, related to Donor 106.⁸⁶ Instead, she was matched to her first cousin. Upon speaking with him, she learned who his uncle was, and was able to construct a mirror tree with connections to other relatives.⁸⁷ She eventually learning that there was only one possible person who could have provided the sperm sample: her mother's doctor.⁸⁸

According to the *Dallas Morning News*, Eve knows of another fertility fraud case in Texas, as well as alleged cases in Colorado, New York, Oklahoma, Washington, and Idaho.⁸⁹ Eve has stated publicly that the doctor has acknowledged in e-mails that he is her genetic father.⁹⁰ Rather than filing a civil lawsuit, Eve has channeled her energies into passing a fertility fraud bill in Texas. Senate Bill 1259 establishes that a sexual assault is without the victim's consent if "the actor is health care services provider who, in the course of performing an assisted reproduction procedure on the other person, uses human reproductive material from a donor knowing that the other person has not expressly consented to the use of material from that donor."⁹¹ Human reproductive material includes sperm, eggs, or "a human organism at any stage of development from fertilized ovum to embryo." Under S.B. 1259, fertility fraud would be a "state jail felony, punishable by between six months and two years in jail and a fine of up to \$10,000," with a statute of limitations of up to two years following discovery. The bill was passed unanimously by the Senate and the House, signed into law by Governor Greg Abbott, and took effect September 1, 2019.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Garrett, *Fertility Fraud is Real*, *supra* note 82.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ An Act Relating to the Prosecution of the Offense of Sexual Assault, S.B. 2159, 86th Leg., Reg. Sess. (Tex. 2019), <https://capitol.texas.gov/tlodocs/86R/billtext/pdf/SB01259E.pdf#navpanes=0> [<https://perma.cc/TR5W-UD27>].

2. Fertility Fraud that Involves Continuing Relationships with Patients and Doctor-Conceived Children

In some fertility fraud cases, physicians not only substitute their own sperm for that from an anonymous donor or a patient's husband, but also have continuing medical relationships with their patients and even their doctor-conceived daughters. Such doctors may display unusually strong emotions, or violate other boundaries, such as performing pelvic examinations upon their unsuspecting doctor-conceived daughters.

a. Gerald Mortimer

On March 30, 2018, former patients Sally Ashby and Howard Fowler and their daughter, Kelli, filed a fertility fraud lawsuit against Gerald Mortimer, an OB/GYN in Idaho Falls.⁹² Sally and Howard sought Mortimer's assistance with conceiving.⁹³ Mortimer told Sally he would use a sperm mixture where 85% would be from Howard and 15% from an anonymous college student donor who resembled him. Mortimer himself did not meet these characteristics.⁹⁴ Sally became pregnant with Kelli in August of 1980. Mortimer delivered Kelli and was Sally's OB/GYN for several years.⁹⁵ The family eventually moved to Washington for Howard's job, and when Sally told Mortimer of their plans, she recalled that he cried.⁹⁶ As an adult, Kelli sent in a DNA sample to Ancestry.com and learned in July 2017 that she was matched to Mortimer with a predicted parent-child relationship.⁹⁷ Significantly, this likely means that Mortimer himself had sent in a DNA sample to Ancestry.com and gave approval for his identity to be matched to other relations—in other words, that he was hoping to be found. At the time, she didn't know who Mortimer was, and was not even aware that her parents had undergone insemination.⁹⁸ In doubt, she gave Sally access to her account to view her

⁹² See Complaint at *1, *4–5, *Rowlette v. Mortimer*, 352 F.Supp.3d 1012 (D. Idaho 2018).

⁹³ *Id.* at *3.

⁹⁴ *Id.*

⁹⁵ *Id.* at *5.

⁹⁶ *Id.*

⁹⁷ *Id.* at *6.

⁹⁸ See Complaint at *6, *Rowlette v. Mortimer*, 352 F.Supp.3d 1012 (D. Idaho 2018).

results.⁹⁹ Sally contacted Howard, now her ex-husband; for months, the two wondered whether they should tell Kelli who Mortimer was.¹⁰⁰ But in October 2017, Kelli discovered her birth certificate among old papers, and saw that Mortimer had signed it.¹⁰¹ She was “horrified,” and her parents finally told her the entire story.¹⁰² In their suit, the family has brought several claims, such as medical negligence, failure to obtain informed consent, fraud, battery, intentional and negligent infliction of emotional distress, breach of contract, consumer protection act violations, respondeat superior, and negligent supervision.¹⁰³

b. G.H.

On March 12, 2019, Patrice Grinnell and her daughter Ashley Grinnell filed suit against G.H., a physician, and Kaiser Foundation Hospitals in Sacramento, California, alleging that G.H. inseminated Patrice with his own sperm in 1987 without her consent, conceiving Ashley.¹⁰⁴ According to the complaint, G.H. had told Patrice that the sperm sample was from an anonymous donor.¹⁰⁵ Horrifically, the lawsuit also alleges that G.H. was Ashley’s gynecologist for years, and thus that G.H. conducted pelvic examinations on his own daughter.¹⁰⁶ Patrice and Ashley learned of G.H.’s conduct in March of 2018, after genetic testing revealed that G.H. had to have provided the sperm used in the insemination procedure in which Ashley was conceived.¹⁰⁷ According to Kaiser Permanente’s public statement, G.H. is now retired and no longer practices at its facilities.¹⁰⁸ Kaiser Permanente condemned the alleged conduct, stating that, “if true, [it]

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at *7.

¹⁰² *Id.*

¹⁰³ *Id.* at *7–14.

¹⁰⁴ See Complaint, Grinnell v. Kaiser Found. Hosps., No. 34-2019-00252206-CU-MM-GDS (Cal. Super. Ct. filed Mar. 11, 2019).

¹⁰⁵ *Id.*

¹⁰⁶ See Renda, *supra* note 8.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

would be a clear violation of trust, ethics and our standards.”¹⁰⁹ The company pledged to conduct a full investigation and reiterated its commitment to cooperating with the Grinnells.¹¹⁰

B. A Brief History of Sperm Donation Practices

In 1866, after years of gaining expertise performing gynecological surgery on slave women, notorious physician J. Marion Sims made fifty-five insemination attempts for six women at his hospital in New York City.¹¹¹ The first recorded instance of donor insemination that resulted in a live birth took place in Philadelphia in 1844, when William Pancoast, a medical school professor at Jefferson Medical College, inseminated a chloroformed merchant’s wife before an audience of six students; Pancoast had obtained the sperm sample from one of his students and did not tell the woman or her husband what he had done.¹¹² The matter only came to light after one of the student witnesses published an account of it in a medical journal decades later.¹¹³ In the early to mid-1900s, recruiting donors became much more difficult than simply selecting a medical student from among those present. Reliable donors would move or become unavailable, and the procedure could potentially lead to unintended legal consequences for donors and parents, such as imposition of unwanted paternity and child support, denial of inheritance rights, accusations of adultery, and denials of paternity upon divorce.¹¹⁴

Until the mid-1900s, artificial insemination itself was highly stigmatized. According to Achilles, the image of a sperm donor was a “stranger with strange motivations:

¹⁰⁹ *Id.*

¹¹⁰ *See id.*

¹¹¹ *See* KARA SWANSON, *BANKING ON THE BODY* 201 (2014).

¹¹² *See* Jackie Rosenhek, *The Art of Artificial Insemination*, DR.’S REV., <http://www.doctorsreview.com/history/history-artificial-insemination/> [<https://perma.cc/A6FL-XYLT>]; Elizabeth Yuko, *The First Artificial Insemination Was an Ethical Nightmare*, THE ATLANTIC (Jan. 8, 2016), <https://www.theatlantic.com/health/archive/2016/01/first-artificial-insemination/423198/> [<https://perma.cc/W8G2-2GLZ>].

¹¹³ *See* A.T. Gregoire & Robert C. Mayer, *The Impregnators*, 16 FERTILITY & STERILITY 130, 130–34 (1965), [https://www.fertstert.org/article/S0015-0282\(16\)35476-0/pdf](https://www.fertstert.org/article/S0015-0282(16)35476-0/pdf) [<https://perma.cc/4K46-3JCQ>].

¹¹⁴ *See* Kara Swanson, *Adultery by Doctor: Artificial Insemination, 1890-1945*, 87 CHI.-KENT L. REV. 591, 592 (2012).

unknown, unregulated, and undesirable.”¹¹⁵ When the news of the first successful inseminations from frozen sperm broke, the scientists responsible for pioneering frozen human sperm technologies, Raymond Bunge and Jerome Sherman, found themselves ostracized to the extent that the American Society for the Study of Sterility cancelled its annual best research paper competition rather than award it to them.¹¹⁶ A legislator who had introduced insemination bills was targeted with extreme abuse and received hundreds of “vicious” phone calls and much correspondence.¹¹⁷ This stigma gradually waned. Media coverage of insemination practices grew more favorable in the 1950s, following articles in *Women’s Home Companion* and *Reader’s Digest*, and more patients began to seek out physicians to perform the procedure. In 1964, Dr. Wilfred Finegold had published a lay guidebook to self-insemination and insemination had become a “major technique” at Vanderbilt by 1975.¹¹⁸

Before the advent of sperm banks, physicians believed it essential that *they* undertake the responsibility of finding and managing sperm donors; several did so privately through individual contacts and transactions.¹¹⁹ For instance, Dr. Frances Seymour recruited her donors from a hospital blood donor registry, confirmed their health, and then kept them hospitalized until a patient’s insemination was successful, paying them \$100 to \$150 for their troubles.¹²⁰ In the early 1940s, Dr. Abner Weisman published his guidelines for donor selection, which included considering the donor’s physical and personality characteristics. He preferred that donors had children of their own; screened his donors through blood tests, syphilis tests, and urinalysis; and wanted to avoid “sly, shrewd, and cunning men who might seek to breach the wall of secrecy between donor and recipient.”¹²¹

Historically, then, secrecy has been the watchword with sperm donation. Physicians “not only kept quiet themselves but also enjoined their patients from ever mentioning,

¹¹⁵ Rona Achilles, *Protection from What? The Secret Life of Donor Insemination*, 12 POL. & LIFE SCI. 171, 171–72 (1993).

¹¹⁶ See SWANSON, BANKING ON THE BODY, *supra* note 111, at 215–16.

¹¹⁷ See *id.* at 216.

¹¹⁸ *Id.* at 218.

¹¹⁹ See *id.* at 206.

¹²⁰ See *id.* at 205.

¹²¹ *Id.* at 206–07 (internal quotations and citations omitted).

even within their own families, the origins of their donor children.”¹²² In the 1950s, Dr. Sophia Kleegman used taxis to deliver donors’ fresh samples to keep them away from the office where the inseminations would take place; other physicians maintained separate entrances for donors and recipients and prescribed set times for donors to come to clinics.¹²³ One 1992 article reported that physicians have continued to urge patients to keep inseminations secret, even to the point of advising women never to tell their husbands that they are infertile.¹²⁴ This secrecy had several purposes. Physicians believed it encouraged more men to donate, perpetuating a profitable practice, because they feared that requiring open donation would make it harder to recruit donors.¹²⁵

Much of this secrecy also stemmed from fears that exposure would destroy the nascent family, harm the child, humiliate the infertile male, and label the mother an adulteress.¹²⁶ Other reasons included fears of the legal consequences for legitimacy and inheritance rights if a child’s actual paternity was discovered (a donor child could be proof of adultery in a divorce proceeding).¹²⁷ Donor insemination was viewed as adultery by doctor.¹²⁸ Thus, the donor had to be invisible, sourced from “ghost fathers.”¹²⁹

Sperm banks were not a reliable source of sperm until sperm could be frozen and thawed and still remain viable, which occurred in the mid-1950s; on April 9, 1954, the *Cedar Rapids Gazette* published a story on babies who had been conceived using frozen and banked semen.¹³⁰ At that time, freezers at institutions like the University of Iowa and the University of Arkansas held frozen sperm samples on an informal basis, these collections were privately maintained and controlled by individual physicians or small

¹²² See SWANSON, BANKING ON THE BODY, *supra* note 111, at 209.

¹²³ See *id.* at 207.

¹²⁴ See Judith N. Lasker, *Doctors and Donors: A Comment on Secrecy and Openness in Donor Insemination*, 12 POL. & LIFE SCI. 186, 186–88 (1993).

¹²⁵ See *id.*

¹²⁶ See SWANSON, BANKING ON THE BODY, *supra* note 111, at 209.

¹²⁷ See *id.*

¹²⁸ See *id.* at 202.

¹²⁹ See *id.* at 210.

¹³⁰ See Kara W. Swanson, *The Birth of the Sperm Bank*, 71 ANNALS IOWA 241, 241 (2012).

groups of physicians for their own patients.¹³¹ It was not until the early 1970s that commercial sperm banks opened their doors; by 1973, three were in business, existing alongside nine private banks at university medical centers and banks organized by physicians in private practice.¹³²

Gradually, artificial insemination became more mainstream. A 1979 University of Wisconsin survey of 471 physicians found that 66% performed the procedure, obtaining donor sperm from medical students, residents, and university graduate students.¹³³ But the degree of secrecy inherent in the procedure still made some wary; patients feared sperm mix-ups, even if they did not consider whether their physician was actually their child's biological father:

Several of the women I interviewed about their experience with donor insemination expressed anxiety over this type of issue, especially while they were still pregnant. Some were worried about racial mix-ups; others didn't really believe that the donor was matched to their husband's characteristics as they had been promised. One woman said that she and her husband had often joked that all the donors were really one man who would go behind a screen and put on a different wig depending on the request. Unfortunately, secrecy reinforces practitioners' control over donor choice, lending itself to abuse as well as to patient uncertainty.¹³⁴

Thus, what Cline told patients undergoing insemination with donor sperm—that the sample would come from an anonymous medical resident who would father no more than three children, and that the patients should take no steps to discover the donor's identity—was actually common practice at the time. Critically, this conduct was made possible by a standard of care in which fresh sperm was thought to be more effective, even as frozen sperm was becoming more readily available. Frozen sperm “would not be a significant part of reproductive medicine until the 1980s.”¹³⁵ Of note, Cline was the

¹³¹ See SWANSON, *BAKING ON THE BODY*, *supra* note 111, at 214.

¹³² See *id.* at 221.

¹³³ See *Donor Insemination: New Survey of an Undocumented Practice*, 9 HASTINGS CTR. REP. 2, 2–3 (1979).

¹³⁴ See Lasker, *supra* note 124.

¹³⁵ See Swanson, *The Birth of the Sperm Bank*, *supra* note 130, at 272.

only physician in Indiana at the time who would perform inseminations using fresh sperm.¹³⁶

II. How Parents and Doctor-Conceived Children Experience Illicit Insemination

Herein, we will be focusing on the Donald Cline case in Indianapolis, Indiana, as a primary example of fertility fraud. Thus far, I have interviewed a number of former patients and siblings, all of whom describe their parents' reactions to the case. The following section describes how these individuals uncovered Cline's conduct, how this astonishing discovery affected their personal and familial identities, how they have coped with its fallout, and why it is so important to both parents and children that Cline be held liable for his conduct. As discussed in more detail in Section IV, it was profoundly unlikely that Cline could be held criminally liable under Indiana law specifically for these illicit inseminations. Cline pled guilty to two counts of Obstruction of Justice—crimes in which the state of Indiana was the aggrieved party to whom Cline had lied, not his former patients and their children. This perceived lack of criminal accountability upset many of Cline's former patients and their doctor-conceived children, who felt he had escaped punishment for the underlying acts of illicit insemination.

A. Parents

Judith was a former patient of Cline's in the early 1980s.¹³⁷ Because her husband had no viable sperm, Judith had to use donor sperm to conceive a child. At the time, she recalled, "Cline was the only one using fresh sperm donations in the whole state, and he was considered the best infertility specialist in the state."¹³⁸ Cline told Judith that he would obtain a sperm sample from a medical resident at a hospital across the street who had approximately the same physical characteristics and the same blood type as her husband. "He explained to us to keep this confidential . . . to protect the anonymity of the donor," she emphasized.¹³⁹

¹³⁶ See Interview with Judith (Jan. 26, 2018) (on file with author).

¹³⁷ See *id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

Because there was a “tremendous amount of stigma” around male infertility at that time, Judith wanted to “protect” her husband by keeping his infertility a secret.¹⁴⁰ Thus, she didn’t tell anyone that she was consulting Cline, and did not even discuss these issues with her husband:

It was very hard for him to talk about his infertility. He was thinking about, well, maybe we should just not have children . . . It was not a discussion even in our marriage after that fact was found out. I could see just by looking at him there was not going to be any further discussion about his physical [condition]. Even though I was comforting him and said, “This isn’t about you.”¹⁴¹

Judith conceived her eldest son through Cline’s assistance in 1982. Judith estimates that she saw Cline about eighteen times, three times per month for the five months she was trying to conceive, and then for an additional three visits after her pregnancy was confirmed, whereupon Cline transferred her to another OB/GYN. At all times, Judith recalled, Cline was pleasant to deal with: “He was nice. He was kind. He emulated hope and I was grateful for that. So, I bought into that . . . I trusted his story 100 percent.”¹⁴² After her first child was born, Judith and her husband moved to a different state, where another physician helped her to conceive another child.

Judith was adamant that, had she known what Cline was doing, she would never have agreed to the inseminations:

And it’s very long standing in our . . . field that there are patient and doctor [categories and a] professional can never cross a sexual line; it can’t even cross a friend line. So, I never conceptualized this kind of lying and betrayal. I expected the doctors to be truthful and honest . . . [I]f he had told me that he didn’t have enough donors and he had said, “Hey, I have more women on the list for insemination, I don’t have enough donors,” . . . I would not like hearing that, but I can handle it . . . Had he told me it was going to be him using his own semen I would have been absolutely creeped out . . . I would have rather had some anonymous good-looking guy on the street that I really didn’t know, and

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Interview with Judith (Jan. 26, 2018) (on file with author).

he could come in and donate his semen into the condom and into the syringe and then, boom. I had no problems releasing all accountability of him having to pay child support or anything like that . . . I would not want to know my donor. I really didn't want to know my donor, right? I was just feeling blessed each time that there was somebody out there and I didn't need to know his name; I didn't need to know his face.¹⁴³

Judith was particularly disturbed that Cline's conduct breached acceptable medical bioethical norms and standards of conduct: "We wanted to get pregnant, we were sad about not being pregnant, but was I desperate enough to allow my physician to inseminate his sperm in me? It would cross all ethics, that I couldn't live with myself . . . There's nothing right about it. It's wrong."¹⁴⁴

When her children were teenagers, Judith told them that they had been conceived using donor sperm—a conversation that occurred after her eldest son came home from school one day armed with questions about family blood types from his high school biology class. "His sadness for dad, that was his immediate response," she recalled.¹⁴⁵ "And so [he told him] that you're my dad and nobody else is."¹⁴⁶

Judith's eldest son actually found out about Cline's deception before she did; he saw news coverage of Donald Cline's arraignment on September 12, 2016, and immediately called his mother. Because he knew where and when his mother had undergone treatment, her son felt fairly certain that he and his mother could be part of that unfolding story. "He heard the news and said, 'Isn't this where you went for your infertility where you got pregnant with me?'" Judith recounted.¹⁴⁷ "And I said, 'Yes, that's exactly the building.' And he said, 'Well, that guy, that man has been arrested for obstruction of justice,' and then he sent me the next text: 'I just looked at his family on Facebook and I look exactly like his one son.'"¹⁴⁸

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Interview with Judith (Jan. 26, 2018) (on file with author).

Judith recalls her emotional reaction immediately upon learning that she had been inseminated with Cline's sperm:

The disbelief . . . that this was probably really true . . . we were both blown away. It was such a sad moment for me as a professional in the world to have another professional take advantage of my youth and his profession with other women—mothers trying to just be pregnant and keep it in secrecy. I immediately thought of him as having a sexual disorder and probably pathology or narcissism.¹⁴⁹

Judith's first instinct was to try to understand why Cline had engaged in such conduct: "I had trouble focusing . . . That first month was really tough," she recalled.¹⁵⁰ She found this sense-making process difficult: "It was hard for me to realize that I was a victim unknowingly, and then to discover thirty-five years later, and then in having to change the memory."¹⁵¹ Up until that point, Judith's memories had been very positive: "I remember so clearly coming to his office and being so fascinated at that I could get pregnant in five and half months, and how awesome that was, and how grateful I was of the donors and that they'd come and take out their time."¹⁵² Knowing that she had been one of Cline's victims made her feel physically violated, even dirty:

I felt like I had been raped, because the definition of medical touch and medical thinking is very clinically oriented. And touch following an orgasmic experience or ejaculation experience is much different . . . He didn't have to lie . . . The worst part for me to work through was, did he use me as a stimulus for his ejaculation, or was he using some other woman? . . . Thirty-five years later, I just want to go take a shower.¹⁵³

Judith described this sense of violation in the victim impact letter that she sent to the judge prior to Cline's sentencing hearing in December of 2017:

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

Your behavior as a medical professional was absolutely wrong. To me, you were an older man, and that is not at all what I wanted. I wanted an anonymous donor. I trusted you to tell us the truth and we were your victims. You took advantage of us with your secrecy, your dishonesty, and your power of your expertise.¹⁵⁴

Judith coped with these unwelcome developments by talking with others she trusted: “I started with my closest cousins, my sister, and my best friends.”¹⁵⁵ She also started to attend legal proceedings. It was when she met Prosecutor Tim Delaney and the primary detective, however, that she learned that it was unlikely that Cline would be charged with the offenses she thought his conduct merited:

I remember sitting at the table with Tim Delaney [and some of Cline’s doctor-conceived children] . . . and I remember saying, “How can there not be something in this sexual assault law? Let me get this really straight with you.” And I remember being really clear with him about what is a medical procedure, and how it shifted from the medical procedure into a sexual act . . . and how his touch changed, or his thoughts changed, or even when he was leaving the room to go ejaculate. I put it all very clearly out there . . . He said, “You consented [to] the touch.” I said, “I consented [to] the medical procedure.”¹⁵⁶

Despite this mismatch between her experience of illicit insemination and its legal characterization, attending court proceedings became very important to Judith, “for accountability and to also say we have a voice and I represent that voice.”¹⁵⁷ She was determined to attend everything she could: “I went to every court hearing there was, even if it was brief. I still went in because I wanted the presence of us as mothers in the courtroom, the presence of the donor children that were born from him in the courtroom.”¹⁵⁸ Her eldest son also started to attend legal proceedings, even remarking at one proceeding, “This is the first time I’ve ever been in the same room with my biologic

¹⁵⁴ Interview with Judith (Jan. 26, 2018) (on file with author).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

parents.”¹⁵⁹ But neither Judith nor her son regarded Cline as part of their family: “It is what it is, but it’s not a family connection . . . Cline’s just out there. He’s not family.”¹⁶⁰

Judith still lives in close proximity to Cline and his family members and sees them in the community. This proximity can be uncomfortable:

I see [Cline’s daughter] at the same nail salon and his granddaughter. And they obviously knew my face. So, I haven’t figured out what to say yet to them. I’m polite, I would be kind, but I haven’t really found the words yet to acknowledge, “I’m not mad at you.” . . . I don’t know, do I say, “I’m sorry that this whole thing had to happen?” And maybe that’s what I’ll say. Just to say like, you know, “It’s not about you. I’m not angry. I’m just sad that it all happened.”¹⁶¹

These interactions can grow even more disconcerting within the close confines of a courtroom. At the last sentencing hearing in December of 2017, when Cline pled guilty, courtroom dynamics led to an awkward interaction:

I went in and I realized Cline and his family always came last . . . I sat myself in the second row or third row, and they sat behind me. And I didn’t want to be stared at. I purposely got up and sat behind them, and they would turn around and look at me. His daughter—one of his daughters—turned around and looked at me many times, like a scowl look, like, “How dare you?”¹⁶²

Seeing Cline at the hearing brought on a definite physical reaction:

[I]t was like, wow, I remember my whole body was just, my stomach was churning . . . [T]his is a man I haven’t seen for thirty-five years . . . He looks really different than how I remember him . . . So just to get myself settled, it took me awhile.¹⁶³

¹⁵⁹ *Id.*

¹⁶⁰ Interview with Judith (Jan. 26, 2018) (on file with author).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

Judith very much wanted answers—particularly to the questions of *why* Cline used his own sperm, how he determined which patients would receive his sperm, and why he marked the records of these patients with an asterisk. But she doubted that Cline will ever be truthful about his motives for substituting his own sperm. She finds it suspicious that he becomes vague and uncommunicative only when asked about the illicit inseminations:

Every time he gets asked a direct question that has anything to do with accountability, he hums . . . then he says, “Can’t remember.” Then if you ask him something around that time that has nothing to do with his accountability . . . he’s very clear and well-spoken.¹⁶⁴

Judith was also sure that Cline is not remorseful: “For the first time you can now hear the voice of somebody who really doesn’t have remorse or a conscience about what he did . . . He’s justified it everywhere. And in his head, that’s where he’s going to stay.”¹⁶⁵ If she were given the opportunity to meet with him, Judith would tell him, “You hurt so many people who were already hurting. Had you just told us the truth, we could have figured out what was best for us. That’s all we wanted.”¹⁶⁶

Judith’s frustration with the prosecutors’ inability to criminally charge Cline for the illicit inseminations prompted her to look for a solution elsewhere: the Indiana legislature. “We believe that there should be a law in place to make sure this doesn’t happen again for someone else,” she emphasized.¹⁶⁷ It upset her that Cline’s donor children could accidentally meet, date, or perhaps even marry and have children. It is important to Judith to ensure that others do not have to worry about these safety concerns: “We’re really stay[ing] true to our principles. We stay grounded. We’re not into retaliation. We’re into accountability and we’re into safety for everybody that has to deal with this particular medical issue. And we want to stay medical.”¹⁶⁸ Thus, in 2018 and 2019, she and other parents and their doctor-conceived children lobbied for a bill that would provide a civil and criminal cause of action for fertility fraud, as discussed in the conclusion. Pursuing these goals made Judith feel that she is turning the horror of Cline’s conduct into something productive, and thereby regaining autonomy:

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Interview with Judith (Jan. 26, 2018) (on file with author).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

I think I sort of lost power in that room so many years ago, and now I'm trying to get that power back and do it in a way that I can live with, that I don't set in motion behaviors that I can't live with that are disrespectful to me.¹⁶⁹

For now, Judith has reached a point of equilibrium: "I felt—I feel sadness for his wife. I don't feel sad for any children as young adults participating in his behavior . . . I mean, he is a felon. He's a convicted felon. So he loses privileges that go along with that."¹⁷⁰ But she continues to be emotionally hurt when reading others' callous comments to news stories or even Facebook posts that excuse Cline for his conduct or even paint him as a hero: "You should be proud that your mom got pregnant with you; he did you a favor, he did your mom a favor. And remember he's smart and he's a doctor, why wouldn't we want to have a doctor that's our biological dad."¹⁷¹

B. "Doctor-Conceived" Children

Finding out that one was conceived through donor gametes is a surprise unto itself. Discovering that you were conceived through *misappropriated* donor gametes, as in illicit insemination using sperm from your mother's fertility doctor, is not something that most people can readily imagine. There are some qualities of fertility treatment that set it apart from other medical treatments, such as a different level of intimacy between doctors and patients and the relationship in which lives are created and families are built:

If you go in for a knee replacement, you're told you're getting this model, and you get that model, this is a problem. This is not just a knee replacement; this is a living being you are creating . . . You are actually being offered, in my opinion, an even greater control over conception . . . You're getting what you do not want and what you did not ask for. Whether it has this sort of trauma or even victim awareness, I think is, it makes it different, but I would still say this is rape, this is conception without consent.¹⁷²

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Interview with James (Apr. 29, 2018) (on file with author).

In this section, a few of Cline's doctor-conceived children, who refer to themselves as siblings, discuss how they uncovered their genetic relationship to Cline, the emotions that discovery generated, how their sibling relationships have affected this experience, their reactions to legal proceedings against Cline, why they feel he committed fertility fraud, and why they support a "fertility fraud" bill that would facilitate civil and criminal suits.

1. How Siblings Discovered Their Genetic Relationships to Cline

This section highlights four stories of how the children conceived through Cline's illicit inseminations learned of his conduct and how this revelation reverberated among their family relationships.

a. Maggie

Most of the siblings learned of their connection to Cline through a direct-to-consumer genetic testing service such as 23andMe.com or Ancestry.com. But as one of the very first, Maggie has a different story. Because she already knew that she was conceived using donor gametes, she was curious about her ancestry and conducted a search on a now-defunct site that allowed adopted children, biological parents who had placed children for adoption, and doctor-conceived children to post and seek information. She could search for potential siblings by entering the name of a doctor or fertility clinic. Under Cline's name, she found a posting from a woman conceived through donor sperm with an e-mail address. Maggie explained, "I put that in Facebook, and as soon as that person popped up, I literally turned around from my computer and looked at my husband, and my words were, 'Holy shit, this has to be my sister.' We looked so much alike."¹⁷³ She contacted this woman through Facebook and e-mail and learned that she had also been in contact with another individual. Maggie began to form bonds with her half-siblings at this time: "We just kind of became friends. And we were like, so here's the thing we all know, that we're from donor sperm. We're just going to go through this journey together."¹⁷⁴ When Maggie and her two new friends completed kits from 23andMe.com and received their results, they were shocked: "Sure enough, we were all related. But what caught us off guard is, when our results came back, not only were the three of us related, but we were related to . . . seven other people as well. So, there was eight of us."¹⁷⁵

¹⁷³ Interview with Maggie (Mar. 21, 2018) (on file with author).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

Four of the siblings started investigating their mutual genetic connections more closely. By this time, the siblings knew that their mothers had consulted Cline. Three asked their mothers to take DNA tests in the hopes of reaching out to relatives to complete the informational chain: “We were plugging in names and names and names . . . I [contacted matching relatives and] said, “Is Cline anywhere? Do you have any name like that?”¹⁷⁶ Finally, one woman responded because of an extended personal connection, and confirmed that Cline was her cousin. This was progress—but Maggie did not immediately conclude that Cline himself had been her father:

It was narrowed down, but then I didn’t know. I thought, “Okay, well, it could be one of his children, it could be a brother of his.” We didn’t know he was an only child at the time. That’s when we started thinking, “Surely to goodness not. This can’t be. This can’t be the doctor. This can’t be.” . . . That’s when we were like, “Well, does he have a brother, a son, a nephew, somebody that’s related to him that . . . would be using their sperm?” At the time, we didn’t think he was using his, because our mothers were told that he was using donor sperm from a medical resident . . . [But] when there was eight of us, we’re like, “Something’s off.”¹⁷⁷

What happened next brought Cline’s immediate family—and ultimately Cline himself—into the picture in a very sudden and unusual way. According to Maggie,

Finally, one of the siblings blew up and sent a mass message on Facebook, a group message, including all of us, to all of [Cline’s] grandchildren and his children that were on Facebook. No children under the age of 18, they were all adults . . . That initial Facebook message was just basically, like, “Hey, we have this issue we’re trying to figure out. We’re connected with you somehow. We’re all the kids of donor insemination. Do you have any information?” The granddaughter responded and she said, “Sorry I can’t help you. Nobody in my family has ever had infertility issues or anything. I think you have the wrong person.” . . . Finally, that sibling responded and she said, “Look, we don’t know if it was your grandpa or somebody else in your family, but we’re pretty for sure that somebody in your family used their sperm and we’re related to you.” . . . Immediately, all of them blocked us on Facebook. Well, about a week later, his son . . . contacted me and he

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

said, “I researched you and looked you up and I saw a picture of you with [a mutual religious leader].”¹⁷⁸

Maggie began communicating with Cline’s acknowledged son. Initially, when the son asked Cline if he has ever used his own sperm to perform inseminations, Cline denied doing so. But when Maggie met with Cline’s son in person, he confirmed that Cline had eventually admitted to this conduct. Cline’s son asked Maggie what she wanted to do with that information, and she replied that she wanted to meet Cline in person. Cline’s son was happy to facilitate such a meeting, so long as his mother, Cline’s wife, was spared the pain of knowing what her husband had done.

The meeting took place at a restaurant, with several siblings in attendance. When Cline entered, Maggie instantly thought he looked like a frail old man: “He came in walking with a cane . . . He walked in slow, and he was like, ‘Yes, I just can’t barely walk.’ I honestly think he was trying to play on everybody’s sympathy.”¹⁷⁹ Throughout the meeting, Maggie recalled that Cline was “just matter of fact . . . He went around the table and he was like, ‘Well, who are you? When were you born? What do you do for a living?’ It was like, really odd.”¹⁸⁰ Cline was also very evasive in responding to the siblings’ questions: “Every answer was like, ‘Well, I honestly couldn’t answer that. All records were destroyed.’”¹⁸¹ Maggie grew angry when Cline quoted Bible verses during this meeting, including Jeremiah 1:5:

There’s a verse in Jeremiah that basically God wanted you before you were even conceived. I looked at him, and I said, “Put it away.” I said, “I don’t want to hear about God. I don’t want you to use God to justify your actions.” . . . I said, “Don’t use my religion to try to play on me. Don’t. Don’t even involve it because this has nothing to do with God, except for the fact that you were playing God.”¹⁸²

Maggie had come to the meeting expecting that she would obtain little to no answers to her questions:

¹⁷⁸ *Id.*

¹⁷⁹ Interview with Maggie (Mar. 21, 2018) (on file with author).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

Honestly, I wanted the truth, but I prepared myself to not have the truth. I knew in my heart he was going to lie, because the thing is, when you can't even tell your children that you raised with your wife the truth, how are you going to tell these people, even though we share your DNA and you are actually biologically our father and you're going to have no ties to us? Why are you going to tell us the truth?¹⁸³

It was after the meeting that Maggie filed her consumer complaint with the Attorney General, ending any contact she had with Cline's acknowledged son—a connection she misses: "I honestly think he probably is a really great guy . . . I wrestled with that, filing the Attorney General report and everything because of him . . . Then I thought, you know, I can't do this . . . I can't keep this quiet."¹⁸⁴ Maggie felt that, in the end, keeping others safe and seeking accountability had to take precedence: "I know that he loves his mother, just like the rest of us do, but where do you start to protect somebody else's mother that you don't know, and not protect your own mother or yourself?"¹⁸⁵

b. Bryan

Siblings who have uncovered their connections to Cline at later points discuss how surreal the process has been. When a new sibling appears on one of the genetic testing services' lists of relatives, they are messaged by one or more existing siblings who reach out to introduce themselves and to explain the circumstances of their conception.

But Bryan's experience is even more complex because it triggered such profound family disruption. Bryan was only 16 when his father died. As an adult, he took a genetic test to obtain more information about his ancestry: "I had an uncle on who I thought was my biological father's side who had done a bunch of genealogy and stuff like that, but I still had interest in a weird kind of, my bloodline's range."¹⁸⁶ Bryan still remembers the morning when he got his results, which confirmed that he's basically "an English white boy."¹⁸⁷ But that day, he also was astonished to learn that he had multiple half-siblings. "It was a Wednesday . . . one of the early Wednesdays in August," Bryan recalled. "I

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Interview with Maggie (Mar. 21, 2018) (on file with author).

¹⁸⁶ Interview with Bryan (Feb. 27, 2017) (on file with author).

¹⁸⁷ *Id.*

popped over to the DNA relatives and I saw . . . [a message saying] ‘This is a half sibling’ . . . At that point, I think there were five or six listed.”¹⁸⁸

Though Bryan was certainly curious about the results, an abnormally busy work schedule soon displaced everything else until about one week later, when he received a Facebook message from two of the original siblings. “Because I had popped up on [the genetic site], they were under the impression when they reached out that I was aware of the situation,” Bryan recalled.¹⁸⁹ “I mean, a whole string of messages [appeared] even before I had a chance to read them and respond.”¹⁹⁰

At first, he thought these messages were part of a scam. “When I first saw them, my wife and I had just gotten our kids to bed, and I’m in our room and I’m on my phone, and I see this, and I’m like, ‘What the hell is this?’” Bryan explained.¹⁹¹ But when he read news articles that had been attached to the siblings’ message and saw that these articles mentioned the siblings who had contacted him, Bryan realized that he had to take this news seriously: “I go back onto [the genetic site] and sure enough, their names are here, and so I start thinking, ‘Well shit, this has some potential truth to it.’”¹⁹² Bryan immediately called his mother:

My assumption is that she had no idea either. I call her, and the best way I can think to ask her is, I said, “Hey, I’ve got to talk to you about something. Let me start with this, do you remember the name of the doctor that you and dad used?” . . . I did know that they had done some sort of fertility treatments . . . Immediately she said, “Yeah, his name was Donald Cline.” Right then I was like, “Well, guess this is true.” I told her. I said, “Well, I have some information and it appears that this is what had happened,” that instead of using dad’s sample, that Cline used his own sample . . . In hindsight it’s a little strange because she wasn’t shocked-shocked. She was like, “What? This makes no sense.” Her initial reaction also had [a] struggle, reconciling the fact that her and other women who saw him, because she even had friends who had

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Interview with Bryan (Feb. 27, 2017) (on file with author).

visited him as well, felt that he basically walked on water, that he was just this amazing personable doctor . . . We realize we have to tell my brother. This isn't news that you necessarily tell on the phone if you can avoid it . . . Since I was the one that found all this out and had already in the less than twenty-four hours done as much research as I could and had all this information, I was the one that told my brother . . . He got extremely angry . . . at Cline and at the situation.¹⁹³

But Bryan would learn something else that was potentially more painful: that his parents had purposefully kept secret the fact that he and his brother were conceived through donor sperm in the first place. When his mother disclosed this information, Bryan was visiting his brother to tell him of Cline's conduct, accompanied by his mother:

About thirty, forty-five minutes in, my mom speaks up and she goes, "Well, there's something else I need to tell you guys." That is when she tells us that her and my dad actually knew that a donor was used, but . . . Cline had told her and my dad that he would use a mixed sample . . . both a donor and my father, so that there was always a chance that the children conceived would be my father's. Whether Cline actually did that, who knows . . . This is now another huge blow and I'm in shock by this . . . My mom continued to tell us . . . that her and my dad had made a pact that they would never tell us, and that when my dad passed away when we were sixteen, she had just made the decision that that was going to be something she was going to take to her grave.¹⁹⁴

Bryan was extremely distressed by this information: "At the time, it was very shocking. Like, wow, you were really not going to tell us."¹⁹⁵ Over the next few weeks and months, he recalled, "I just grew angrier and angrier with my mother for keeping this information from me . . . I wanted space and I wanted some time to work through some of this."¹⁹⁶ Since these twin traumatic discoveries, Bryan's family relations have deteriorated to the point that he is now estranged from some family members. He is adamant that it was more painful to learn of his secret doctor-conceived status than to discover that he had been fathered by his parents' fertility physician:

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

The family dynamic piece for me from all this has been by far the biggest issue. The Cline issue has almost kind of been like just a weird, strange aside for me. Maybe that's to do with the fact that I haven't had a father for twenty years . . . I already spent a ton and ton of time coming to terms with life without a father, and so now to simply find out that my biological father is different than the man who raised me, I don't know . . . That is where I feel most wronged, personally, is that I was never told that.¹⁹⁷

2. The Emotional Impact of Learning About Cline's Parentage and Conduct

For the siblings, discovering they had been conceived through an illicit insemination using Cline's sperm was profoundly disturbing. Josh felt as if he had been conceived through a criminal act: "I definitely told my mom very, very, very early on, like in the first week or something, that I felt like I was a product of rape."¹⁹⁸ Maggie also felt as if she was born from rape, and reacted with "disgust."¹⁹⁹ This knowledge caused her to question her very identity:

There's [sic] days where I have to place myself away from this and escape it, because it eats at you really bad. Then there's [sic] days where I'm fine, and then there's [sic] days where I sit there and think, "Why in the hell am I even alive?" . . . That's not suicidal thoughts. I want to make that clear. No. It's just like me thinking, "Why am I here? Why am I here?" It's really messed with my religion . . . because I thought, "Why would God let this happen to me?"²⁰⁰

Moreover, Josh was worried that Cline's motivation to commit these illicit inseminations stemmed from an underlying mental health issue that could somehow affect him: "He obviously had some cognitive defect that made him want to treat women in the way he did and just impregnate them."²⁰¹

¹⁹⁷ *Id.*

¹⁹⁸ Interview with Josh (Feb. 27, 2018) (on file with author).

¹⁹⁹ Interview with Maggie (Mar. 21, 2018) (on file with author).

²⁰⁰ *Id.*

²⁰¹ Interview with Josh (Feb. 27, 2018) (on file with author).

Several siblings had not known that they were conceived from donor sperm until Cline's conduct came to light. Like Bryan, they found it more disturbing to learn that they were conceived from donor sperm than that the sperm had come from their parents' physician. Josh felt fortunate that he already knew he was a "donor kid": "I see others that did not know that they were supposed to come from a donor, and they are now finding this out, and having to confront their parents. [It] has probably been more difficult than the folks that have known that they came from a donor all along."²⁰² Bryan is adamant that it was far more traumatic to learn of his donor parentage; he characterizes a parental disclosure of donor parentage as an act of love:

One of the biggest struggles with all this is that we all grow up and we develop with a certain understanding of self, who we are as individuals, and all of a sudden that story and that understanding is changed. The story and the understanding of self that we have been operating under is all of a sudden not true. That understanding of self obviously has a big role in how we identify, and who we understand ourselves to be. I find that very, very important for growth, for maturity. For parents to be honest about what their child's story is and to help them develop as true as possible [an] understanding of self that they can, to do that is an act of love, in my opinion. To not is withholding an act of love, in a way.²⁰³

Moreover, this emotional toll is renewed by the frequent appearance of new half-siblings. Maggie remarked, "Some days I'm okay, and then I find another sibling and all this anxiety comes up. It takes everything that I have to just go to work. Then when I come home, I just lay in bed and watch TV because I just want to be isolated from the world."²⁰⁴

3. Relations with Other Siblings

When the Cline siblings speak of their relationship with one another, communication and social media are at the heart of these connections. Josh is regularly in contact with his siblings through a Facebook page and text messages. He regularly checks for new siblings:

²⁰² *Id.*

²⁰³ Interview with Bryan (Feb. 27, 2017) (on file with author).

²⁰⁴ Interview with Maggie (Mar. 21, 2018) (on file with author).

All day long, last thing before I go to bed, I'm gonna [sic] fall asleep, first thing I do when I get up in the morning is to check and . . . just everything about it just consumed me for an extensive amount, a period of time where it just—it literally took over my life.²⁰⁵

Connecting with other half-siblings and meeting them in person has had tremendously positive benefits for some siblings. Initially, Josh coped with the news that he was Cline's son by an all-consuming focus on gathering all the information possible and meeting every relative he could:

I wanted to know, and I wanted to know now. I went from not caring about anything with that to wanting to know every little detail . . . I couldn't have kids of my own and had to have donor children of my own and gone through that whole process and then to find out that my mother's fertility doctor was impregnating his patient . . . There's probably no one that can fit that situation in the world, and it's weird.²⁰⁶

Everyone around him seemed like a potential relative: "I don't quite do this much anymore, but at the beginning, first, you know, when I was really consumed with it, first six, eight months, year, whatever, I would just walk around and I'd analyze everyone. Are you my brother? Are you my sister? Because I don't know."²⁰⁷

Several of the siblings felt an immediate connection with one another when they met. As Josh related, "There was an immediate connection because you're, first of all, talking about something that's extremely private."²⁰⁸ Maggie agreed: "I can't explain it. It was just right off the bat, it was like 'you're my brother, you're my sister.' The only thing that I feel cheated of is years together, and wondering what it would have been like had we known each other when we were younger."²⁰⁹ It is difficult to describe to others what it's like to walk into a room full of sisters and brothers that you've never met. Bryan puts it this way:

²⁰⁵ Interview with Josh (Feb. 27, 2018) (on file with author).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Interview with Maggie (Mar. 21, 2018) (on file with author).

It was good. The way I've described it to people is that it truly was like going to a family reunion and being introduced to, say, like some second cousins that you were told you had met back when you were like three or four . . . Initially, it's a little awkward . . . But as the afternoon goes on, you start talking, and you become just kind of more like acquaintances or friends that know that you actually have a deeper connection.²¹⁰

Other siblings are still in awe that they are part of such a large tribe. "The sibling side of things, man, it's just, it's just hard to wrap your brain around. It is weird and it is strange, and it is good. It's just very odd," Bryan observed.²¹¹ "There's a weird aspect of almost kind of embracing the uniqueness of it . . . If I ever get to the point that I want to share more openly, it makes for one hell of a dinner party story."²¹²

Siblings have proven to be important source of support for one another. "They've been amazing, absolutely amazing," stressed Maggie.²¹³ "They are the only ones that understand and that can ever understand . . . For the most part, we have accepted each other as brothers and sisters."²¹⁴ James observed, "I would say they are very important to the coping."²¹⁵ One of the times when siblings prove most supportive is when new siblings appear on a genetic testing site and it is time to reach out and bring them into the fold. Bryan explained that he tries to take as gentle an approach as possible:

I reached out on [the genetic site] and I tried to take the approach that maybe I would have hoped maybe somebody had taken with me, which I basically said, "Hey, my name is [Bryan]. You may have noticed that we have a connection on [the genetic site], and you may have noticed that there are a number of us that have a very close connection . . . There's a reason for this and if you would like to know more, let me know," and kind of leave it at that . . . I didn't want to link to any articles . . . I just wanted to say, "Hey, there are answers if you want them," and fully put

²¹⁰ Interview with Bryan (Feb. 27, 2017) (on file with author).

²¹¹ *Id.*

²¹² *Id.*

²¹³ Interview with Maggie (Mar. 21, 2018) (on file with author).

²¹⁴ *Id.*

²¹⁵ Interview with James (Apr. 29, 2018) (on file with author).

as much as I could the ball in their court . . . Because my stance is that this is a very scary and overwhelming situation that can feel like it's getting out of control very quickly. I'm old enough at this point that I realize that, if folks can feel like they have some control, it can provide a ton of comfort.²¹⁶

James enjoys reaching out to new siblings and helping them through a tough time:

I'm able to help them understand, yeah this is tough, I totally get it, but you will make it through this. This doesn't mean anything bad about you. Kind of just helping them address all the sort of crazy things that can kind of pop out of it. It is just so primitive to your core. It's hard to explain in a sort of natural reaction. It's your sense of identity.²¹⁷

But not all of the siblings describe these new relationships as "sibling" connections. Sabine remarked, "I think they feel more like friends to me."²¹⁸ She felt that this is partly because she has met them only after she became an adult: "Maybe cousins. But even that, I feel like, my cousins and I saw each other a few times a year growing up. So we have lots of stories . . . and you have those relationship and that bond that started from the time you were born."²¹⁹ Sabine wondered how much the fact that she lived elsewhere also affects these relationships: "Maybe it would be different if I lived [closer], but right now I'm a little bit removed from the situation."²²⁰ James also felt close to his siblings, but was not sure exactly how to define the relationship:

I don't really see my half siblings as family. Not in a rejecting sort of way, but . . . so far, I think they are great people. I care for them all. They're definitely not friends; they are something different. They could feel like family to me one day.²²¹

²¹⁶ Interview with Bryan (Feb. 27, 2017) (on file with author).

²¹⁷ Interview with James (Apr. 29, 2018) (on file with author).

²¹⁸ Interview with Sabine (Apr. 5, 2018) (on file with author).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

One of the most unique things about the Cline case is that the siblings use social media and other electronic technologies to find one another and keep in touch. “We have a [platform] . . . which is how we mostly keep in touch and converse, because there’s a bunch of people on there that don’t want to be public, and this is a way where we can communicate,” Josh explained.²²² Many siblings have noticed that fathers are largely absent from the picture.²²³ Bryan noted, “while I know some of the mothers’ names, I don’t know any of the fathers’ names at all . . . If I had to guess, [the stigma,] that’s a huge piece. That’s why people aren’t reaching out or the fathers aren’t as involved with everything.”²²⁴

Ironically, social media communication has also focused siblings’ interactions away from their past and toward present relationships. As James recounted, “it’s been a shift in attention. It’s been a shift away from Cline, and much more to[wards] our growing, funny little community, to be honest.”²²⁵ This has become particularly evident since Cline’s sentencing hearing in December of 2017. “For me, it’s the super tribe. Some of us, it’s more like a family,” James continued.²²⁶

4. Siblings’ Reactions to Legal Proceedings

The siblings have complicated and varied reactions to the obstruction of justice criminal proceedings against Cline. Maggie was frustrated that Cline’s conduct seemed to fall within a critical gap in the law, and specifically, frustrated with the prosecutor’s inability to charge Cline with rape or sexual assault:

Even if you look at it as [an] aspect of our mothers who used donor sperm, what about the ones that weren’t even supposed to be from donor sperm? If you don’t consider rape and everything . . . well, then, how is it still not rape for a woman that goes to the reproductive endocrinologist, their fertility specialist, and says, “We’re using your husband’s sperm,”

²²² Interview with Josh (Feb. 27, 2018) (on file with author).

²²³ Interview with Bryan (Feb. 27, 2017) (on file with author).

²²⁴ *Id.*

²²⁵ Interview with James (Apr. 29, 2018) (on file with author).

²²⁶ *Id.*

but yet uses his own. How is that not a violation? How is that not assault?²²⁷

Sabine, however, did not seem particularly surprised that criminal law did not cover Cline's situation: "It's frustrating that there's no law on the books, but who would have thought that we needed a law that said, 'Oh, by the way, you can't switch up the genetic material. You can't switch up your sperm for someone else's. You can't go against patients' wishes.'"²²⁸ Bryan regards the criminal law's inability to capture Cline's actions as just one of many examples of where the law hasn't caught up with technology: "That's what laws are meant to do, is they're meant to codify things that we feel are morally and ethically wrong. This is just one [instance in which] the system has not caught up with the capabilities of science which—Imagine that, government not keeping up with industry."²²⁹

Legal proceedings were very important to several siblings. Josh attended hearings so that Cline could see that there were many who wanted to hold him accountable for his actions: "I hope he could see that at the sentencing when there was a bunch of us. There was seven and eight of us and some of the mothers and stuff. I think that was definitely important to convey to him, 'This is what you did.'"²³⁰ Josh felt awkward being there, however: "I wasn't trying to be intimidating when I was there; I was kind of trying to maybe hide a little bit. It was just such an awkward situation. I wanted to make my presence known, but I didn't want to cause a scene."²³¹

Maggie did not expect Cline to utter profound apologies or earth-shattering revelations. "I previously prepared myself . . . I already heard his lies and saw how he had no empathy when I met him," she recalled.²³²

I had already mentally prepared myself for him to play this victim role. I had prepared myself for everything to come out of his mouth to not be

²²⁷ Interview with Maggie (Mar. 21, 2018) (on file with author).

²²⁸ Interview with Sabine (Apr. 5, 2018) (on file with author).

²²⁹ Interview with Bryan (Feb. 27, 2017) (on file with author).

²³⁰ Interview with Josh (Feb. 27, 2018) (on file with author).

²³¹ *Id.*

²³² Interview with Maggie (Mar. 21, 2018) (on file with author).

truthful and for him to pretend to be this man that just made a mistake and how his actions—he was so sorry and everything else.²³³

Maggie was disappointed with the legal outcome—“I feel like we were let down”—yet understands the judge’s complicated position at Cline’s sentencing hearing: “I honestly think that the judge was fair. I don’t blame her. Some do think that he should have gotten jail time. I would have loved to have seen that, but I was prepared and figured he wouldn’t.”²³⁴

Other siblings also didn’t expect much from the legal system; Bryan presumed almost from the first that “justice” was not going to be forthcoming:

I came to terms pretty quickly that there just wasn’t going to be justice for us, and I shifted pretty quickly to the mindset of prevention of future acts as opposed to justice for past ones . . . I think early on—and I think [Josh] and I share this perspective from our conversations—is that we realized there is no justice for us personally . . . Whatever did happen with Cline was probably going to be minimal. That he no longer practices, he’s almost 80 years old; what are you going to do to the guy?²³⁵

Bryan instead emphasized the importance of putting “legislation or systems in place to prevent this from happening to other people.”²³⁶

Even if Cline had been given a harsher sentence, it is hard for many siblings to picture what that would have been like, or how they would have felt about it. Sabine, for one, didn’t feel terribly punitive towards Cline:

I don’t even know if I wanted [a] jail sentence. Because what good is it to put a 70-something year old man into jail? . . . Is it gonna [sic] rehabilitate him? Well, no. Is it gonna [sic] stop him from doing that anymore? No, because he’s not practicing anymore . . . I guess [a jail sentence] probably would have sent a message, but . . . I never wanted to

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

destroy his life. And I'm not necessarily looking for revenge . . . I more was looking for a deterrent to other people who are thinking of doing the same thing."²³⁷

James describes a very different approach to punishment:

I would love to see some sort of required rehabilitation program or reconciliation program. I think his assets certainly should be available . . . That would probably, I mean, I feel a little gross in saying it, but honestly, in hindsight, for how much of my life has been spent on that, it does feel like he gave me an awful sort of origin story and on top of that, really fucked up my life for a while, just finding out about it.²³⁸

Moreover, in James' experience, the siblings' actions in redressing Cline's conduct are very important because some—or most—of their mothers were unlikely to attempt to hold Cline accountable:

My mom is also in a sort of emotional conflict; she very much wants to avoid discussion, so it is hard to say. I don't want to push it too hard. From her perspective though, also, she loves her kids . . . It couldn't have been that wrong because here we are. Right? Hey that's great. I love that perspective, mom, but he did also deceive you in some respect. She's not interested in retribution; she only follows the news.²³⁹

5. Siblings' Beliefs About Cline's Motivations

Siblings' beliefs about what motivated Cline to use his own sperm to inseminate unsuspecting patients are often tied to their impressions of his behavior, particularly during the private meeting that Maggie arranged and his conduct during legal proceedings.

²³⁷ Interview with Sabine (Apr. 5, 2018) (on file with author).

²³⁸ Interview with James (Apr. 29, 2018) (on file with author).

²³⁹ *Id.*

a. The Meeting

The siblings had varied expectations and desires about how this meeting would go. James thought it might be helpful in figuring out his own role in this situation, and how he felt about Cline:

I mean, it's just devastating on my own family, and on others. It's something that, it creates this very strange sense of trauma among anyone who sees progeny, and there could be a lot of us. That was more my thinking, "Okay, what's the bigger—what can we learn from this?" I really wanted to figure out, "Do I hate this guy? Do I want to see him in jail? Do I just want to understand why?" I just needed to know something. I think that was my view.²⁴⁰

Others, however, had different needs: "Others were focused on process on the medical side . . . and some of the story and just clarifying his narrative."²⁴¹ James observed that almost all of the meeting was spent trying to clarify exactly what had happened: "So, that was mainly our exchange back and forth, on the how's and the why's and the when's . . . He wasn't very easy to work with. So, I don't think many of us came away with much sensation, much feeling of satisfaction."²⁴²

In the meeting itself, the first thing that most siblings noticed was Cline's physical appearance. Sabine was struck by how "frail" he looked, but was not sure whether this fragility was genuine: "I know that some of that, at least, was just a ploy."²⁴³ James, too, was struck by how Cline carried himself: "He's an old man. His body language at the time very much just spoke of sort of sadness and he's moving slow, and he has a cane. He seemed very forlorn, kind of shuffling. He seemed a little dazed."²⁴⁴

Cline's robust personality seemed to contradict his frail physical appearance, however. James described Cline's demeanor as clinical and controlling:

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Interview with Sabine (Apr. 5, 2018) (on file with author).

²⁴⁴ Interview with James (Apr. 29, 2018) (on file with author).

He comes in and he's playing the doctor. So, for him, this is almost, in some respects, it's a really strange client visit . . . He just needs to explain it. So, he just came in and he just said, "Hey, this has been going on. Let me explain to you the way I'm coming at it."²⁴⁵

Cline's demeanor persisted until the end, when at least one sibling got emotional. James recalled:

It just felt like, well, now that I've conveyed that information . . . "Well, if the problem is still bothering you in a week, give me a call." It was strange . . . I think in his mind, he was more hoping that this was making any sort of legal issue go away.²⁴⁶

Sabine was "unimpressed" with Cline's answers to the siblings' questions, and, like Maggie, was disturbed that Cline attempted to explain his actions by "quoting scripture": "It feels very false to me."²⁴⁷ She noted that his assurance "that he tried to do it for altruistic reasons and to help his patients" also felt like a "lie."²⁴⁸ For her, deception was the name of his game:

I feel like I don't trust anything that he said to us in that meeting . . . I think he was only admitting to what he had already been caught for and what he already, what had already been proven and he wasn't willing to give up any more than that.²⁴⁹

She got the overall impression that he just didn't care:

I don't think he takes any ownership of it. I don't think he takes any responsibility. . . Part of it reminded me of an old Scooby-Doo episode where at the end they catch the guy and the guy said, "Well, I would have gotten away with it, too, if it wasn't for you dastardly kids," or something like that. And I feel like he's the Scooby Doo villain . . . I

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ Interview with Sabine (Apr. 5, 2018) (on file with author).

²⁴⁸ *Id.*

²⁴⁹ *Id.*

don't think he respects us; I don't think he cares. Or he has accepted any role that he may have [played] in disrupting people's lives.²⁵⁰

Thus, Sabine feels that any apology that Cline has given has been insincere: "I don't believe it would be an authentic apology."²⁵¹ But at the same time, she doesn't want her existence to be something that merits an apology:

Yeah, the way that I was created was not the way that he set it out to be, but I also don't wanna [sic] go through the rest of my life thinking that my existence is a mistake or that someone needs to apologize for [it]. Like, I think you should have been honest with my mom and dad. I think you should have told them what you were doing . . . But I also don't wanna [sic], I don't know, regret that I'm here. I've had a good life. I don't want to say that that's a mistake or something that someone needs to be terribly sorry about.²⁵²

The siblings are mystified as to why Cline would use his own sperm to inseminate patients. Several ascribe a narcissistic motivation to Cline's conduct. Greg observed, "He was definitely playing God."²⁵³ Maggie believes that Cline egotistically believed that he would never be caught. She was struck by his dispassionate demeanor, but also thinks there was a "thrill" element to this behavior as well:

After meeting him, he doesn't have any empathy. One, I think he wasn't going to get caught. I don't know if it was the thrill of it, but I can honestly tell you I don't think he cared about his patients. This is just my opinion. I feel like he wanted to play God. He had this complex of, "Look what I can do," and I don't know if it was the thrill of, "I'm doing this and I'm not getting caught." I wish I did know why he did it.²⁵⁴

Maggie was especially upset that Cline didn't see how his conduct could produce horrible results if his donor children met and became attracted to one another: "I don't understand

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ Interview with Greg (Mar. 24, 2018) (on file with author).

²⁵⁴ Interview with Maggie (Mar. 21, 2018) (on file with author).

how you can support this knowing that your children are not married and this is affecting them as well. Your children could marry not only a cousin but one of [their] brothers or sisters. They could marry an aunt or an uncle.”²⁵⁵

Some siblings commented on the theory that Cline carried out illicit inseminations out of guilt for performing abortions in the 1970s: “As a Catholic, this was him paying penance, that by bringing life into the world he was paying penance for, making up for the fact that he had performed abortions in his earlier days.”²⁵⁶

Other siblings believe that Cline’s illicit inseminations were driven primarily by business concerns—great demand for fresh sperm, and low supply—and frozen sperm were not as likely to produce a viable pregnancy. “So far, all of the siblings are within like a five- to six-year range. I think that shortly after, storage technology advanced and he was able to stop doing this,” Bryan noted.²⁵⁷

Still others have had changing, and at times contradictory, feelings about Cline’s motivations. Sabine’s feelings about why Cline used his own sperm changed as more and more siblings came forward:

We met with him, and he said, “I had so many patients that were . . . desperate to have a baby, they were willing to do anything, and sometimes I didn’t have donors. Sometimes I only had short, Hispanic donors and the parents are both Caucasian and tall. And that’s not gonna [sic] work. So, yeah, I donated. I provided my own sperm,” and he kind of made it out to be like it was from the goodness of his own heart. And when there were seven or eight of us, it was like, “Okay, I can see that.” Maybe he really was just a doctor who was trying his best for his patients, didn’t wanna [sic] let anybody down . . . And [maybe] he thought, this is the least I can do; this is the way I can make all of their hopes and dreams come true . . . And then, as it came out more that there were more and more and more of us . . . I wasn’t really upset with him for providing his own sperm when someone was expecting it to be a donor. When it got to the point of no, there are people who thought that . . . it was going to be a biological child from me and my husband, and

²⁵⁵ *Id.*

²⁵⁶ Interview with Bryan (Feb. 27, 2017) (on file with author).

²⁵⁷ *Id.*

from my husband's sperm . . . that is horrible. That is just despicable, and you're no longer doing it for the good of anybody except yourself.²⁵⁸

It was at that point that Sabine's thoughts about Cline's motivations started to become darker and more unsettling: "I don't know if he is that unfeeling, if he had some psychological need to do that. If he got some sort of thrill out of it."²⁵⁹ That made her feel gross: "If it's a sexual perversion, or a mental issue . . . but that's when it started to be like, 'Ugh, that's who I came from?'"²⁶⁰ Thereafter, she was more bothered by it: "At first, I was not upset about it, and then as it became more apparent that he was not doing it for any potential good reasons, then it became harder to wrap my head around."²⁶¹

6. Siblings' Personal Feelings About Cline

Siblings' feelings toward Cline are complicated and vary enormously from person to person. This is understandable, given that fertility treatment is very different from other medical services. Josh noted:

I guess I have different emotions. People are asking me "Are you angry or are you mad at him? How do you feel?" And it changes . . . During one of the obstruction of justice proceedings—I think it was the sentencing when he was reading his statement—and I think just by nature, you just feel bad for the old guy . . . How long does he have to live? And he's pretty much now more or less confined to his house.²⁶²

He thinks an appropriate punishment would be for Cline to

basically, take all of his money and . . . set up some sort of foundation to repay everyone that shows up in the database for their DNA tests. You

²⁵⁸ Interview with Sabine (Apr. 5, 2018) (on file with author).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² Interview with Josh (Feb. 27, 2018) (on file with author).

know, pay for anything and everything related to all that, and helping other people that have to deal with this issue.²⁶³

James, too, is aware of what Cline has already lost and doesn't see the need for further criminal punishment: "He's lost his social esteem, his face is out there in the news; he has to live with this with his family. I don't think I could hurt him much more, and I don't think I would want to. I feel sorry for him. I feel sad."²⁶⁴

Other siblings, such as Bryan, view Cline through a different emotional lens. "I've had no desire to confront Cline, I've had no desire to meet him. To be honest, I haven't really even felt much of a desire for vengeance or punishment for him," Bryan reflected.²⁶⁵ "While there's certainly a part of me that wants him to be held accountable because I do feel like he wronged our mothers . . . it is difficult to reconcile what his actions mean for me personally, because if he hadn't taken those actions, I wouldn't be here."²⁶⁶ Instead of angry, Bryan feels "wronged in some strange, indirect way" that makes it hard to sustain anger: "I know other siblings have been very angry at him, but I have a hard time doing that. If anything, I think that I throw him in a bucket along with a whole host of other individuals that I feel have wronged people, have taken advantage of people."²⁶⁷

None of the siblings interviewed thus far regard Cline as a part of their "family." Maggie explicitly contrasted her willingness to regard her siblings as family members with her refusal to extend this status to Cline himself:

I've been asked a question, "Well, how can you call them your brother and sister and be so close to them, but yet you won't claim him as your dad?" I'm like, "Here's the thing. He's my biological father, we share DNA," but like I told them, I get to pick and choose [my family]. That

²⁶³ *Id.*

²⁶⁴ Interview with James (Apr. 29, 2018) (on file with author).

²⁶⁵ Interview with Bryan (Feb. 27, 2017) (on file with author).

²⁶⁶ *Id.*

²⁶⁷ *Id.*

man does not dictate my life . . . We consider each other family, but we don't consider him our family.²⁶⁸

Bryan observed that “his actions almost, I’m just thinking out loud here, maybe disqualify him from that family relationship.”²⁶⁹ Bryan’s “indifference” towards Cline also meant that there was no impetus to even have enough of a relationship with Cline to try to obtain answers, such as why he had committed these acts:

This is going to sound very transactional, but I feel like there’s nothing to gain from a relationship with him. There’s nothing I need from him at all . . . I have a hard time feeling, saying that I feel personally wronged, [so] I don’t feel like I need answers from him about anything.²⁷⁰

Sabine is similarly disinterested: “I don’t feel like I have to meet his family; I don’t feel like I have to have any sort of relationship with him.”²⁷¹ She does, however, want to know his medical history: “Your medical history is now my medical history, and we are in this together, dude, and you’re not giving me any information.”²⁷² She resents the fact that Cline has not been more forthcoming with this information: “I would like to say [to him], ‘You chose to do this. You chose to create all of these people, and now you’re not taking any ownership of that choice. And I don’t really want you as a father, so . . .’”²⁷³ Sabine reminds herself to not be bothered by the implications of her genetic ties to Cline:

I try to box it off and ignore. I also try to say genetics only make up part of who you are . . . Yes, he gave me DNA, but that doesn’t have to dictate who you are as a person, or what choices you make, or how your brain or body works. And just because his works that way doesn’t mean that yours does, either.²⁷⁴

²⁶⁸ Interview with Maggie (Mar. 21, 2018) (on file with author).

²⁶⁹ Interview with Bryan (Feb. 27, 2017) (on file with author).

²⁷⁰ *Id.*

²⁷¹ Interview with Sabine (Apr. 5, 2018) (on file with author).

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

7. Siblings' Efforts to Pass a Fertility Fraud Bill

Maggie became determined early on to try to effect change and tried to find out as much as she could about Cline's conduct and potential legal solutions: "Honestly, because I feel like the more information that I have and the more stuff that I hear about him, that I can document that, and hopefully we can get laws changed and maybe they can do something else."²⁷⁵ After conducting research and finding the Cecil Jacobson case, Maggie became more and more convinced that Cline's conduct had happened more frequently than anyone had thought: "I thought, this isn't just us. There's a lot of people out here that this has happened to. That's when I was like, 'Something has to be done.' This is 2018 and our laws need to catch up."²⁷⁶

After Cline's case received so much publicity, Maggie expected that Indiana legislators would want to take action: "I thought that I may bring more awareness and changes to laws . . . That was my hope, that hey, now that this has happened, maybe now our politicians and senators will be like, 'Okay, we need to do something about this.'"²⁷⁷

Maggie, Judith, and others worked with Indiana Senator Rodric Bray to introduce a fertility fraud bill, SB 239, in Spring of 2018; the legislature took no action on it, however, and the committee chair, Senator Mike Young, did not even hear it in committee.²⁷⁸ This angered Maggie: "I'd like to meet the man, because I'd like to tell him a few things. I would like to sit down with him and say, 'Let me tell you how this has affected me.' . . . It's like, do they not have any empathy?"²⁷⁹ Yet Sabine is optimistic that such a bill will be passed in the future: "It's frustrating that you can't charge him, but I'm hopeful that . . . some sort of bill or legislation will be passed that will say, 'Hey this is not gonna [sic] happen again in the future.'"²⁸⁰ James is hopeful that any future bill might also take care of some problems in the medical system, of which Cline is a symptom:

²⁷⁵ Interview with Maggie (Mar. 21, 2018) (on file with author).

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ See S.B. 239, 120th Gen. Assemb., 2d Reg. Sess. (Ind. 2018), <http://iga.in.gov/legislative/2018/bills/senate/239> [<https://perma.cc/WYW2-2CP3>].

²⁷⁹ Interview with Maggie (Mar. 21, 2018) (on file with author).

²⁸⁰ Interview with Sabine (Apr. 5, 2018) (on file with author).

It's this idea that there is an enlightened wise man . . . they're free to make decisions for you. They're free to decide how much information is enough for you. They're free to pretend like they have all the answers when they might not. I can definitely see how problems start creeping in, if there is no way to hold them accountable or know that they have done something wrong. Like using someone else's sperm, using your own sperm in those situations; oh no, I'm sure there's a lot more cases of those coming out. I'm jaded enough to just say, "Well, that makes total sense." I wonder where else . . . doctors can't really be caught yet, and I would start wondering what else we will see in the future.²⁸¹

III. How Fertility Fraud Violates the Ethical and Legal Interests of Parents and Progeny

The core conundrum with fertility fraud is that, although our gut feelings tell us that Cline perpetrated terrible wrongs, it is at first unclear exactly why these actions are so heinous. One way to attack this challenge is to grapple with how fertility fraud violates the ethical and legal interests of female and male patients and the children conceived. It is immediately apparent that victims may experience some violations in an almost technical manner, while others are much more deeply felt. For instance, victims probably feel a greater sense of violation from the fact that Cline physically penetrated female patients to insert his sperm than the fact that he charged them a separate fee which was supposed to compensate the sperm donor for his sample.²⁸² Moreover, Cline's acts have prompted his victims to experience guilt, shame, and insecurity; former patients are revictimized when they hold themselves partially responsible for what has taken place. The interests identified herein are broad and sundry: Individuals whose physicians owe them a duty have interests in being cared for by practitioners who uphold principles of biomedical ethics (do no harm, respect autonomy, and be truthful); interests in receiving gametes that have been appropriately screened to confirm donor identity, physical resemblance, and freedom from transmittable and genetic disease; interests in preserving anonymity; and interests in being treated by a physician with proper clinical motives.

A. Violations of Interests Associated with Biomedical Ethics

Many victims' interests implicate the original four ethical principles in Beauchamp and Childress's classic *Principles of Biomedical Ethics*:

²⁸¹ Interview with James (Apr. 29, 2018) (on file with author).

²⁸² Interview with Judith (Jan. 26, 2018) (on file with author).

(1) *respect for autonomy* (a norm of respecting the decision-making capacities of autonomous persons), (2) *non-maleficence* (a norm of avoiding the causation of harm), (3) *beneficence* (a group of norms for providing benefits and balancing benefits against risks and costs), and (4) *justice* (a group of norms for distributing benefits, risks, and costs fairly).²⁸³

These principles encompass “rules of truth-telling, confidentiality, privacy . . . informed consent,” and other matters, which “sharpen the [ethical principles’] requirements.”²⁸⁴ For purposes of this discussion, the term “patient” includes both female and male partners who sought fertility assistance from a physician.²⁸⁵ Violations of biomedical ethics can be grouped into four sub-interests: the interest in being treated by a physician who fulfills his ethical duties to the patient, the interest in having gametes appropriately screened, the interest in anonymity (both the parents’ ignorance of the donor’s identity, and the donor’s ignorance of the parents’ and child’s identities), and the interest in being treated by a physician with proper motives.

1. Patients’ Interest in Being Treated by a Physician Who Fulfills Ethical Duties to the Patient

In order for a physician to fulfill ethical duties to a patient, he must endeavor to do no harm, respect patients’ autonomy, and tell the truth.

a. Do No Harm

The bioethical imperative of “first, do no harm” illustrates non-maleficence, one of the original four principles identified by Beauchamp and Childress.²⁸⁶ Non-maleficence stands for the principle that doctors should heal, not harm. This is overly simplistic, as processes of healing often require inflicting some harm, so the ideal may be better

²⁸³ TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 12 (2001).

²⁸⁴ *Id.* at 13.

²⁸⁵ *See* Rowlette v. Mortimer, 352 F.Supp.3d 1012, 1024 (D. Idaho 2018) (finding that the husband was also a patient because the couple as a unit were being treated for infertility).

²⁸⁶ *See* BEAUCHAMP & CHILDRESS, *supra* note 283, at 12.

phrased as ensuring that “the benefits will outweigh the harms.”²⁸⁷ Non-maleficence is balanced against beneficence, or doing good, both of which are often assessed in light of autonomy, or what the patient wants. In some sense, “do no harm” seems so broad that it might seem to swallow other bioethical principles, but it can be distinguished; non-maleficence, an obligation not to harm, is different from beneficence, which includes obligation to prevent harm, remove harm, and promote good.²⁸⁸ Critically, we apply *all* principles to physicians at one time; thus, Cline was obliged to conduct inseminations in a non-harmful manner (by using appropriate donors and following proper medical protocols), *and* was obliged to remove harms (curing those conditions that could prevent conception) and promote good (encouraging trust, listening to his patients, providing appropriate guidance).

We often assume that “do no harm” is hardwired into what it means to be a doctor—with the assumption that doctors try to practice within normative legal and ethical boundaries. Sometimes these professional obligations are so important that we create legal standards for violating them; for example, we regard doctors as fiduciaries, as people who have legal or ethical relationships of trust with one or more others. Society, too, has an interest in holding professionals to ethical standards; these standards are so paramount that societal interests are violated even if individual patients are unaware of specific breaches.²⁸⁹ These principles include not embezzling money from patients or involving them in improper emotional or sexual relationships.²⁹⁰ Critically, patients cannot waive these interests; the calling to obey them is inherent in what it means to be a physician.²⁹¹ Therefore, physicians who use their own sperm to inseminate their patients breach essential societal and individual boundaries of trust and candor.

²⁸⁷ See Daniel K. Sokol, “*First Do No Harm*” Revisited, 347 BR. MED. J. f6426, f6426 (2013), https://www.bmj.com/content/bmj/347/bmj.f6426.full.pdf?casa_token=vluZEGPvNF4AAAAA:zk00Pyu1geVDPPhUYGePUkIL_KNOR9knKWdgtZgCrJ9eX_ipe788Aa6SXQrwRENOhgqs0H7yBYA4 [https://perma.cc/57EN-PABX].

²⁸⁸ See BEAUCHAMP & CHILDRESS, *supra* note 283, at 114–15.

²⁸⁹ See Jody Madeira, Steven R. Lindheim & Mark V. Sauer, *Against Seminal Principles: Ethics, Hubris, and Lessons to Learn From Illicit Inseminations*, 110 FERTILITY & STERILITY 1003, 1003 (2018).

²⁹⁰ See *id.*; H. Russell Searight & David C. Campbell, *Physician-Patient Sexual Contact: Ethical and Legal Issues and Clinical Guidance*, 36 J. FAM. PRACT. 647, 647 (1993).

²⁹¹ See BEAUCHAMP & CHILDRESS, *supra* note 283.

b. Respect Patients' Autonomy

It is readily apparent that subjecting patients to an unconsented-to medical procedure is a profound violation of patients' ethical and legal interests. Critically, patients' consent is interpreted quite narrowly. Consent to insemination with a certain type of sperm sample is exactly that and does not constitute consent to insemination with any type of sperm whatsoever. For decades, the case of *Mohr v. Williams*²⁹² has been a staple in American torts casebooks. Dr. Williams, an ear disorder specialist, examined both of Mrs. Mohr's ears. He diagnosed several conditions in her right ear, but could not make a full examination of the left ear.²⁹³ Mrs. Mohr consented to allow Dr. Williams to operate on her right ear.²⁹⁴ But while she was unconscious, Dr. Williams found that Mrs. Mohr's right ear was not as diseased as he had thought, while the left ear was more diseased; consequently, he operated only on the left ear.²⁹⁵ Following the surgery, Mrs. Mohr sued Dr. Williams, claiming that he had damaged her hearing and that he had committed assault and battery because she had never consented to surgery on her left ear.²⁹⁶ The Minnesota Supreme Court ruled in favor of Mrs. Mohr, stating that "every person has a right to complete immunity of his person from physical interference of others . . . and any unauthorized touching of the person of another, except it be in the spirit of pleasantry, constitutes an assault and battery."²⁹⁷ This principle has become enshrined in the doctrine of informed consent.²⁹⁸

Physicians who used their own sperm to inseminate their patients never obtained consent to do so. Instead, they agreed to either use a husband's sperm or procure a sample from an anonymous medical resident who physically resembled the husband and who would only donate samples for three successful pregnancies. Not only was Cline not a medical resident at that time, but he bore no physical resemblance to the vast majority of

²⁹² 104 N.W. 12 (Minn. 1905).

²⁹³ *Id.* at 13.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 16.

²⁹⁸ See *Moore v. Regents of Cal.*, 793 P.2d 479 (Cal. 1990); *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972); *Schloendorff v. Soc'y v. N.Y. Hosp.*, 105 N.E. 92 (N.Y. Ct. App. 1914).

husbands,²⁹⁹ and his former patients vehemently deny ever imagining that Cline would use his own sperm for those purposes.³⁰⁰ The principle of “do no harm” bolsters patients’ contentions that they could justifiably never consider Cline as a potential donor. Furthermore, while there is an argument that Cline technically complied with the “anonymous sperm donor” requirement because patients did not know that *he* donated the sperm sample, this argument is defeated by at least two other factors: ethical prohibitions against physician donation of gametes to patients and Cline’s failure to comply with requirements including donor medical resident status, physical resemblance, and the three successful pregnancy donation ceiling. Patients, for their part, understood their sperm donor to be “anonymous” in multiple senses: They would not know who provided a sample and the donor would not know patients’ identities or even the outcomes of their donations.³⁰¹

c. Be Truthful

A third interest is that protected by laws against fraud: Patients have a right not to be deceived. If they are promised a particular item—for instance, sperm from their husband or from an anonymous medical resident resembling their husband—they have a right to that item. If they are given an entirely different item—for example, sperm from Cline—then they have a right to be told as soon as the error is discovered. When these interests are violated, patients can bring an action for fraud, misrepresentation, or deception.

When the wrong gametes are *intentionally* used, rather than *negligently* provided, it seems that these interests are especially strong, particularly when the physician responsible explicitly told patients not to take any steps to identify the sperm donor. Patients hold these interests regardless of whether they expected that the husband’s sperm would be used *or* had agreed to the use of donor sperm. But when a physician substitutes his own sperm for the husband’s after the husband provides a sample, further questions arise, including why the appropriate sample was not used, what has happened to it, and whether it has been contaminated or misappropriated.

Courts have held that a failure to inform patients of crucial information related to the *negligent* misappropriation of embryos could give rise to a claim of emotional distress, suggesting that the same would be true for an *intentional* failure to inform patients

²⁹⁹ See Interview with Judith (Jan. 26, 2018) (on file with author).

³⁰⁰ See *infra* Section IV.A.

³⁰¹ See Interview with Judith (Jan. 26, 2018) (on file with author).

following intentional illicit insemination. In *Perry-Rogers v. Obasaju*,³⁰² Deborah Perry-Rogers and Robert Rogers, an African-American couple, and Donna and Richard Fasano, a white couple, both sought IVF treatment from OB-GYN Dr. Nash and embryologist Dr. Obasaju at the Brooklyn Fertility Center and Central Park Medical Services.³⁰³ Both Deborah Perry-Rogers and Donna Fasano received their own embryos, but Donna also received some of the Rogers' embryos.³⁰⁴ Deborah did not conceive, but Donna did—with twins.³⁰⁵ Dr. Obasaju told Dr. Nash about the mix-up during the first month of Donna Fasano's pregnancy, and Dr. Nash advised Donna that one or both of the fetuses might not be hers, might be black, and might not be healthy, but refused to disclose the name of the other affected couple.³⁰⁶ The Rogers were told that one of their embryos had been transferred into a woman who became pregnant, but they also could not obtain information about the identity of these other patients.³⁰⁷ The Fasanos chose to carry the pregnancy to term and raise the children as twins.³⁰⁸ The Rogers hired a private investigator, who eventually identified the Fasanos after Donna gave birth to twin boys—one white, one black.³⁰⁹ After the Rogers sued Drs. Nash and Obasaju for emotional distress, the court refused to dismiss their claims, finding it “was foreseeable that the information that defendants had mistakenly implanted plaintiffs' embryos in a person

³⁰² 282 A.D.2d 231 (N.Y. Sup. Ct. 2001). In this case, the plaintiffs sued after the defendants mistakenly implanted their embryo into the uterus of another woman. *Id.* The court allowed the plaintiffs to proceed with their suit because they did not seek emotional distress damages from a sick or unplanned child's birth, but for emotional harm from “their having been deprived of the opportunity of experiencing pregnancy, prenatal bonding and the birth of their child, and by their separation from the child for more than four months after his birth.” *Id.* at 231. It was foreseeable that the news that the mistaken implantation “would cause emotional distress over the possibility that the child that they wanted so desperately, as evidenced by their undertaking the rigors of in vitro fertilization, might be born to someone else and that they might never know his or her fate.” *Id.* at 232.

³⁰³ *Fasano v. Nash*, No. 107068/99, 2000 WL 35534976 (N.Y. Sup. Ct. Mar. 2, 2000).

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Fasano v. Nash*, No. 107068/99, 2000 WL 35534976 (N.Y. Sup. Ct. Mar. 2, 2000).

whom they would not identify, which information was not conveyed until after such person became pregnant, would cause emotional distress.”³¹⁰

B. Patients’ Interest in Appropriately Screened Gametes

Both female and male patients who were unknowingly subjected to illicit insemination had interests in expecting that their physicians would use sperm donor samples that had been appropriately screened in at least four senses: (1) confirming the sperm sample’s origin prior to insemination; (2) confirming that a donor physically resembled the husband; (3) confirming to the extent possible that the donor was disease-free; and (4) confirming to the extent possible that a sperm donor could not donate more than three times so as to prevent consanguineous relationships. If illicit insemination occurred today, patients would hold another interest in appropriately screened gametes: proper testing for appropriate genetic conditions and HIV status. Notably, doctor-conceived children could not claim interests in screening for donor identity and physical resemblance, as they were not in existence when the fraud occurred, but could claim interests in screening for diseases and genetic conditions as well as limitations on frequent donations to prevent consanguineous relations, because these matters would foreseeably affect their health and welfare after birth.

Some dimensions of these interests—confirming donor identity and disease-free status—are strongest for the women who actually received the false sperm samples, since their autonomy and bodily cavities were literally invaded by that illicit insemination. Moreover, for the women who conceived and carried their pregnancies to term, Cline’s sperm fertilized their eggs, and this genetic union in turn led to a months-long intensive occupation. In each pregnant victim, Cline’s biological child implanted in her uterus, exchanged sustenance and waste materials via an umbilical cord and placenta, and even introduced small amounts of fetal DNA into her bloodstream. Women were delighted to be pregnant, but they did not know—and would not know for decades—that Cline had substituted his own sperm for their chosen sample.

Male patients of Cline’s, on the other hand, had an interest in confirming proper donor identity and a much stronger interest in confirming that the donor physically resembled them. Depending on whether he provided a sperm sample, a husband could articulate one of two different interests: deprivation of the opportunity to have a child who resembled him through the use of agreed-upon donor sperm, or deprivation of the opportunity to have a genetically-related child. The latter would be the more compelling

³¹⁰ Perry-Rogers v. Obasaju, 282 A.D.2d 231, 232 (N.Y. Sup. Ct. 2001).

interest. Both of these interests overlap with another interest in proper screening, either for physical resemblance or genetic disease, though this was not applicable in Cline's time. But to date, courts have proven entirely unsympathetic to claims that their children did not physically resemble them and have even accorded virtually no weight to a father's interest in having a genetically related child. These claims have failed largely because of case law prohibiting wrongful life causes of action, such as when the plaintiffs sue after the birth of a healthy child following an unsuccessful sterilization surgery; courts simply hold that the birth of a healthy child is not a legal harm.³¹¹ These cases can be distinguished from those in which fertility clinics negligently transferred a couple's embryo into another patient, such as *Perry-Rogers v. Obasaju*.³¹²

For instance, in *Harnicher v. Univ. of Utah Medical Center*, the Utah Supreme Court rejected a father's claim of emotional distress for allegedly thwarting his chance to have a child with a shared physical resemblance and/or shared genetics.³¹³ Stephanie and David Harnicher conceived triplets through vitro fertilization (IVF) using a mixture of David's sperm and donor sperm they believed to be from Donor 183, but subsequent testing revealed that the triplets' father was actually Donor 83.³¹⁴ The couple sued the clinic, claiming that its "mistaken use of the wrong donor thwarted their intention of believing and representing that David is the children's biological father," and caused bodily harm and emotional distress to the point of mental illness.³¹⁵ Stephanie had testified at trial that she could state with probability that Donor 183's children would have been "better-looking," and that she had been damaged by "the difference in personality or traits and characteristics inherited" in a "feeling-wise" sense: She was "sadden[ed]."³¹⁶ The Utah Supreme Court rejected the bodily harm claim because the Harnichers had denied

³¹¹ See, e.g., *O'Toole v. Greenberg*, 477 N.E.2d 445 (N.Y. Ct. App. 1985).

³¹² See *Perry-Rogers*, 282 A.D.2d at 231. In this case, the plaintiffs sued after the defendants mistakenly implanted their embryo into the uterus of another woman. *Id.* The court allowed the plaintiffs to proceed with their suit because they did not seek emotional distress damages from a sick or unplanned child's birth, but rather for emotional harm from "their having been deprived of the opportunity of experiencing pregnancy, prenatal bonding and the birth of their child, and by their separation from the child for more than four months after his birth." *Id.*

³¹³ 962 P.2d 67 (Utah 1998).

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.* at 72.

suffering any bodily harm in an earlier deposition.³¹⁷ It further found that, since the clinic's negligence merely "thwarted the couple's intention to believe and represent that the triplets are David's biological children," there was no emotional distress: "Exposure to the truth about one's own situation cannot be considered an injury and has never been a tort. Therefore, destruction of a fiction cannot be grounds for either malpractice or negligent infliction of emotional distress."³¹⁸ The court reasoned that it would be impossible to tell whether Donor 183's children would have been "superior in any way to the triplets," the children's characteristics "could not have been reliably predicted," and there were no allegations that the triplets were "unhealthy, deformed, or deficient" or that there was a "racial and ethnic mismatch."³¹⁹

While *Harnicher* might sound the death knell for men who lost an interest in physical resemblance to their offspring, one might expect a different outcome for a man who expected his own sperm to be used, as in *Andrews v. Keltz*.³²⁰ Nancy and Thomas Andrews sought help from Dr. Keltz at the New York Medical Services for Reproductive Medicine to conceive a child, and agreed to undergo IVF using their own eggs and sperm. Nancy subsequently gave birth to a daughter with darker skin than herself or Thomas; a DNA test confirmed that Thomas was not her father.³²¹ The couple sued Dr. Keltz, the embryologist involved, and the owner and managing director of the NYMSFRM for negligence, severe emotional distress, lack of informed consent, breach of contract, fraud, and assault and battery.³²² To the extent that the Andrews claimed that they had been forced to raise a daughter of a different race, nationality, and color, the court stated that there was no cognizable legal injury for the birth of a healthy child, and that it had rejected similar claims for distress from the birth of a child with a serious disease: "plaintiffs in this case cannot recover for mental distress arising from having a child who is not Mr. Andrews' biological offspring."³²³ The court characterized this claim as too speculative, based "essentially on 'wrongful nonbirth,' the deprivation of an

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Harnicher*, 962 P.2d at 72.

³²⁰ 838 N.Y.S.2d 363 (Sup. Ct. 2007).

³²¹ *Id.* at 365–66.

³²² *Id.* at 365.

³²³ *Id.* at 368.

opportunity by a woman to have a child by her husband.”³²⁴ The Andrews could, however, pursue claims for distress as to whether their genetic material had been used for unauthorized purposes; these claims had a “guarantee of genuineness” because the Andrews had “been provided with absolutely no explanation as to how this occurred or what was done with the sperm that he provided to the clinic.”³²⁵

If illicit inseminations were occurring today, patients’ interests would also include screening for genetic diseases, such as Fragile X and Cystic Fibrosis. But there is only limited legal recognition for parental claims following the birth of a child with a serious genetic condition; some courts have held that parents cannot sue for emotional distress on those grounds. Take, for example, *Paretta v. Medical Offices for Human Reproduction*, in which Josephine and Gerald Paretta underwent IVF using an egg donor, who had been screened and tested positive as a carrier for cystic fibrosis.³²⁶ The Paretts were allegedly told that the egg donor did not have a history of mental illness or genetic diseases.³²⁷ The program’s policy was to screen donors and, if a donor was a carrier, offer parents the opportunity for screening to determine whether they were also carriers. Gerald Paretta was never screened, however, and Josephine gave birth to a daughter with cystic fibrosis.³²⁸ The Paretts sued, alleging medical malpractice and emotional distress.³²⁹ The court dismissed the emotional distress claims, stating that “notwithstanding the birth of a child afflicted with an abnormality, and certainly depending on the nature of the affliction, parents may yet experience a love that even an abnormality cannot fully dampen.”³³⁰ Although the Paretts alleged that their physicians’ negligence had been directly responsible for their daughter’s congenital condition, the court found that their daughter, “like any other baby, does not have a protected right to be born free of genetic defects,” and that allowing children to recover against doctors for IVF malpractice would be to “give children conceived with the help of modern medical technology more rights

³²⁴ *Id.* at 369.

³²⁵ *Id.*

³²⁶ 760 N.Y.S.2d 639, 642 (Sup. Ct. 2003).

³²⁷ *Id.* at 641.

³²⁸ *Id.*

³²⁹ *Id.* at 642.

³³⁰ *Id.* at 645.

and expectations than children conceived without medical assistance.”³³¹ Thus, while women and men undergoing insemination today would not expect to face the knowing creation of a genetic risk; would expect to receive sperm that was not tainted, would not cause genetic defects in offspring, that had passed certain standards, and that was tested according to proper methods; there currently appears to be little legal room for patients to vindicate these interests through civil litigation.

C. Patients’ Interest in Protecting Anonymity

Patients can choose to exercise their interests in privacy and anonymity in the dual sense of remaining ignorant of the sperm donor’s identity and knowing that the donor remains ignorant of the parents’ and children’s identities. Patients’ ability to protect and act on these interests can be imperiled or breached when other interests are breached, such as the interest in physician truthfulness and in receiving properly screened sperm samples. To some degree, both female and male patients who agree to use anonymous donor sperm may have an interest in maintaining donor anonymity, in that it preserves a sense of peace from *not* knowing who fathered their child. Even if an anonymous sperm donor’s identity is later discovered through means like direct-to-consumer genetic testing, his name will likely carry little to no emotional baggage for patients because he will likely remain a complete stranger. But when the sperm donor is one’s former fertility physician, learning of that person’s identity carries very different consequences.

Parents undergoing insemination using donor sperm are willing to allow a third party into their lives—but to the very limited extent of perhaps seeing the donor’s childhood picture and learning basic facts such as height, weight, and accomplishments. Their agreement to undergo insemination might be conditioned on anonymity in perpetuity, to the extent possible. And patients may want that anonymity to swing both ways—protecting them from learning who provided the sperm sample and preventing the donor himself from knowing the consequences of his donation, or what child his donation conceived.

Illicit inseminations flagrantly breach both types of anonymity interests. Female and male patients who received their unscrupulous physicians’ sperm must not only grapple with the knowledge that their physician fathered their child, but that that physician knew of this biological relationship and did not tell them, for unknown reasons. Not only have they been duped, but another person has known of this duplicity for decades. If he had access to that child, the physician would have the opportunity to follow her as she grew,

³³¹ *Id.* at 646.

knowing she was biologically his offspring—a form of knowledge, and therefore a power, that the parents had intended to deny to any third-party donor. Parents wonder not only whether their child shares any of the doctor’s characteristics but are left to ponder *why* the doctor substituted his own sperm in the first place, and whether he derived perverse pleasure from keeping this genetic secret.

A series of hypotheticals concerning parental and donor anonymity may assist in exploring these issues more fully. First, let’s say that the Smiths conceive a child using anonymous donor sperm, but on the day the child is born, their doctor enters the hospital room and says, “Hey—you might want to know that I used sperm from a guy named John White who is an Ivy League graduate and lives in Boston.” This disclosure violates anonymity and is probably unwelcome, but the parents do not know anything more about John White, and John White knows nothing about the child’s birth or about the Smiths.

A second hypothetical adds an extra sense of violation to the one-sided breach of donor anonymity. The Joneses conceive a child using anonymous donor sperm, and on the day the child is born, their doctor enters their room and says, “Hey—you might want to know that in a strange twist of fate I just happened to use your neighbor Bob’s sperm for the procedure.” Unless the Joneses are unusually fond of Bob, this disclosure is likely more unwelcome than the disclosure of donor John White as a stranger-at-a-distance, because donor Bob is a nearby acquaintance. When the couple looks at their child, chances are that they are going to think of Bob and will be on the lookout to see whether his traits appear in that child. The Joneses also have to wonder if Bob knows he is the child’s biological father or if he will find out—and if he knows, whether he is looking at the child with an interest and curiosity that is more paternal than neighborly.

A third hypothetical poses even more grave anonymity violations. The Browns conceive a child using anonymous donor sperm, and on their child’s twenty-first birthday, their doctor knocks on their front door and says, “Hey—you might want to know that I used my friend Joe’s sperm for the procedure, and Joe really wanted to donate sperm because he wanted to father as many kids as possible, and I’ve been keeping him up to date on the children that have been born as a result.” This is the most unwelcome disclosure to date, because although Joe might be a stranger-at-a-distance, the Browns now know that the donor has suspect, perhaps pathological reasons for donating, and that he has been following the progress of the children for several years, unbeknownst to the parents. In other words, Joe has known of the child’s paternity, which the Browns did not, and Joe also knew that the Browns did not know that he knew, or that he has received updates about the child’s progress. This also seems a more egregious

breach on the part of the doctor, who allowed Joe, a third-party donor, unprecedented access to the Browns' private information without their consent.

The fact pattern of the illicit insemination presents even more heinous anonymity violations. Here, doctors in effect become Joe, breaching additional ethical boundaries, and direct-to-consumer genetic testing announces the unwelcome news of this biological relationship decades after a child's conception and birth. Here, the doctor violates yet another norm against having compromising, unethical relationships with their patients, and for unclear but inherently sinister reasons.

In my book *Killing McVeigh: The Death Penalty and the Myth of Closure*, I outlined how an involuntary relationship arose between Oklahoma City bomber Timothy McVeigh and family members and survivors of the bombing.³³² Originally, this relationship grew out of the fact that McVeigh was primarily responsible for this traumatic event that had changed their lives forever.³³³ As years passed, however, this relationship grew stronger because media coverage of McVeigh intensified, and victims felt powerless to escape.³³⁴ Thus, McVeigh's execution provided some family members and survivors with a sense of finality because McVeigh was finally silenced.³³⁵ An involuntary relationship can also arise between a physician who commits illicit inseminations and his former patients and doctor-conceived children; the stronger that relationship is, the more invasive and traumatic it becomes. In the first hypothetical, the Smiths have a forced relationship with donor John White, and they cannot ever get White out of their lives because they know he is the genetic father of their child. The same is true for the Joneses in the second hypothetical, but they also know donor Bob in a social sense, and so their forced relationship with him takes on additional layers. Moreover, Bob himself has access to the child. In the third hypothetical, *even though* Joe is a stranger, the Browns have a stronger involuntary relationship with Joe than the Smiths or the Joneses because this relationship is complicated by Joe's donation motives and his continued, years-long surveillance of his genetic children. In other words, Joe has known he fathered the Browns' child, and therefore has known something indelibly intimate about the Browns as well—but the Browns know little, if anything, about Joe. In the fourth and final illicit insemination example, both of these realizations become true, *and*

³³² See generally JODY LYNEÉ MADEIRA, *KILLING MCVEIGH: THE DEATH PENALTY AND THE MYTH OF CLOSURE* 5–37 (2012).

³³³ See *id.*

³³⁴ See *id.*

³³⁵ See *id.*

the parents know quite a bit about the physician as well. Patients who endured illicit inseminations cannot ever get him out of their lives because the physician has literally become part of their genetic heritage, *and* they must cope with the knowledge that he knew this terrible truth and kept it secret for decades.

Finally, illicit insemination is uniquely problematic for patients because it produced a beloved result: their child(ren). In some way, parents might be afraid that rebuking the doctor for his conduct also implies a rejection of their child. Therefore, some victims of fertility fraud may feel extremely conflicted about their physician's conduct. Patients might have held their physicians in high esteem for helping them to conceive; toppling these pedestals is a particularly painful endeavor, even after cracks emerge in the revered figures atop them. Patients cannot conceptualize their children as wrong; they deeply love their children, they know that their child is so much more than her genetic origin, and their willingness to undergo insemination demonstrates their comfort raising a child who was not their genetic offspring (albeit with appropriate sperm samples).

D. Patients' Interest in Being Touched by a Physician with Proper Motives

Finally, patients have an interest in being treated by physicians that have legitimate reasons for practicing medicine and that touch patients with clinical intentions in the course of professional duties.

The purest, most selfless reason to practice medicine is an empathetic longing to help others cope with and overcome health conditions. Other potential rationales, such as a desire to make money or to hold a powerful occupation, may be less admirable, but are not inherently at odds with professional norms of practice. But motives like fulfilling illicit desires are entirely unacceptable.

One of the most troubling aspects of a fertility fraud claim is the inevitable speculation about *why* a physician would inseminate his patients with his own sperm and why he felt better illicitly fathering children than using donor sperm. Was it a business decision, to conserve financial resources, or for convenience? Were there sexual motives involved? Was the physician mentally ill? Sperm donors who are not physicians may also have troubling motives for donating, but that is different; their sperm samples are usually received and utilized by a neutral physician. The physician-as-intermediary interposes a distance between the donor and recipient couples, which helps to immunize them from these impure motives. Indeed, it is unlikely that physicians would ever know of donors' motives, and even more unlikely that patients themselves would come to learn of such facts. There is no such cleansing distance when the donor *is* the doctor.

In a similar vein, patients are entitled to be touched for healing purposes—not to help doctors fulfill their illicit desires. It is possible that a physician such as Cline used his actual female patient as an object of sexual desire while masturbating, which compounds female victims’ perceptions of being “raped.” A physician who obtains sexual gratification from inseminating a patient with an appropriately anonymous donor sperm sample is engaging in an illicit touching, even if the patient never realizes it, simply because her physician is using her as a means to an utterly unsuitable end. When a physician procures his own sperm sample through masturbation and moments later uses that sample to inseminate his female patient, the violation is compounded. The patient is not only being penetrated for an unconsented-to purpose, but these women unwittingly help the physician sow his seed as widely as possible.

E. Interests of Doctor-Conceived Children

Children conceived through fertility fraud also possess several interests; some are variations on the interests that their parents hold, while others are unique. Among the interests that children possess are an interest in not being deceived, an interest in appropriately stored gametes, an interest in anonymity, and an interest in standing to pursue civil fertility fraud lawsuits.

1. Children’s Interest in Not Being Deceived

Just as parents have an interest in not being deceived by their physicians, doctor-conceived children also have an interest in knowing their medical history and in meeting other paternal relatives, including half-siblings. Indeed, Rebecca Dixon, one of the two siblings representing the class of Barwin’s doctor-conceived children in the class-action suit *Dixon v. Barwin*, alleged that Barwin owed his doctor-conceived children a fiduciary duty and that his concealment of that relationship deprived them of the opportunity to have any relationship or connection with their biological father and biological half-siblings.³³⁶ This issue becomes particularly thorny if the doctor is deceased, as in the case against Jan Karbaat, a fertility physician who operated a private clinic at Medisch Centrum Bijdorp outside Rotterdam until his death in 2017.³³⁷ At the time of his death,

³³⁶ See Statement of Claim at 17, *Dixon v. Barwin* (2016), No. 16-70454CP (Ont. Sup. Ct. J.).

³³⁷ See Christopher F. Schuetze, *Dutch Fertility Doctor Swapped Donors’ Sperm With His, Lawsuit Claims*, N.Y. TIMES (May 15, 2017), <https://www.nytimes.com/2017/05/15/world/europe/dutch-fertility-doctor-swapped-donors-sperm-with-his-lawsuit-claims.html> [<https://perma.cc/NA6B-HPEP>]; *Children From Donor Sperm Win Right to Collect Fertility Clinic Doctor’s DNA*, DUTCH NEWS (June 2, 2017), <https://www.dutchnews.nl/news/2017/06/children-from-donor-sperm-win-right-to-collect-fertility-clinic-doctors-dna/> [<https://perma.cc/G2UG-B59T>].

several former patients and their children were preparing a case against him for fertility fraud. Soon after he passed, they had secured several evidentiary items that could contain DNA, including a nose trimmer, toothbrush, and comb.³³⁸ The former patients and donor children sued in the Netherlands to have this evidence subjected to DNA testing as soon as possible, lest it degrade over time, and for the right to compare Karbaat's DNA to their own to determine whether he had fathered any donor children.³³⁹ The Court of Rotterdam held that, although it had not been proven that Karbaat was guilty of fertility fraud, there was evidence that he had not fulfilled his administrative record-keeping duties, such as tracking and documenting donors, and that he continued his fertility activities after his clinic was closed.³⁴⁰ These activities, the court found, suggested that Karbaat did not act as a reasonably skilled specialist.³⁴¹ Thus, the court ordered that Karbaat's materials undergo DNA testing, and that the results be sealed and put into secure custody until the terms of their release could be settled.³⁴²

2. Children's Interest in Appropriately Screened Gametes

Doctor-conceived children also have an interest in ascertaining whether steps were taken to limit the frequency of donation and in learning how many samples from a given donor were actually used in insemination attempts, particularly when the patients who received the same donor's sperm are in a common geographic locale. Guidelines of the American Society for Reproductive Medicine (ASRM) state that each donor should be restricted to no more than 25 births per 800,000 individuals.³⁴³ Recent guidelines state that limiting sperm donations also "takes into account the potential impact on both the offspring and the donor's children of learning they may have multiple genetic half-

³³⁸ RBROT Rotterdam 6 februari 2017, KG 2017, 4250 m.nt RACH (Jan Karbaat) (Neth.) [hereinafter Karbaat Judgment], [https://linkeddata.overheid.nl/front/portal/document-viewer?id=http%3A%2F%2Flinkeddata.overheid.nl%2Fterms%2Fjurisprudentie%2Fid%2FECLI%3ANL%3ARBROT%3A2017%3A4250&callback=&dates=&fields=\[https://perma.cc/LND2-XKLY\]](https://linkeddata.overheid.nl/front/portal/document-viewer?id=http%3A%2F%2Flinkeddata.overheid.nl%2Fterms%2Fjurisprudentie%2Fid%2FECLI%3ANL%3ARBROT%3A2017%3A4250&callback=&dates=&fields=[https://perma.cc/LND2-XKLY]).

³³⁹ *See id.*

³⁴⁰ *See id.*

³⁴¹ *See id.*

³⁴² *See id.*

³⁴³ *See* Am. Soc'y Reprod. Med., *Guidelines for Sperm Donation*, 77 FERTILITY & STERILITY 2, 2-5 (2002).

siblings.”³⁴⁴ The UK’s Human Fertilisation and Embryology Authority (HFEA) states that each sperm donor can only be used to “create” ten families, which it estimates happens with less than 1% of donors.³⁴⁵ In 2011, the *New York Times* reported that one sperm donor had conceived 150 children, with more on the way, and that on web sites and chat groups there are “many” other instances where a particular donor is responsible for 50 or more donor siblings.³⁴⁶ For physicians like Donald Cline whose patient populations were overwhelmingly concentrated in a limited geographic area—like the Indianapolis metropolis—it was entirely foreseeable that each subsequent use of his own sperm increased the likelihood that his donor children could meet, date, have sex, marry, and have children. Moreover, it is only possible to enforce limits if sperm donors provide their samples to banks or clinics; these mechanisms do not track donors who provide samples through Facebook postings for clients who do not want to or cannot afford to obtain samples through a bank or clinic. One such unlicensed donor claims to have fathered 800 children.³⁴⁷

Doctor-conceived children also have interests in being free from genetic disease, knowing their family medical history, and having a stable family identity—not one disturbed by the revelation that one’s biological father is actually one’s parents’ physician. Although physicians who inseminate patients with their own sperm cannot be in a doctor-patient relationship with their future offspring prior to conception,³⁴⁸ physicians can owe legal duties to their patients’ future children. Take, for instance, the facts of *Renslow v. Mennonite Hospital*, where Emma, a 13-year-old with Rh-negative blood, was negligently given transfusions of Rh-positive blood.³⁴⁹ When she became pregnant eight years later, her child was born prematurely and suffered grave

³⁴⁴ See Ethics Comm., Am. Soc’y Reprod. Med., *Interests, Obligations, and Rights in Gamete Donation: A Committee Opinion*, 102 FERTILITY & STERILITY 675, 680 (2014).

³⁴⁵ See DONATING YOUR SPERM, <https://www.hfea.gov.uk/donation/donors/donating-your-sperm/> [<https://perma.cc/ES56-XUKK>].

³⁴⁶ See Jacqueline Mroz, *One Sperm Donor, 150 Offspring*, N.Y. TIMES (Sept. 5, 2011), <https://www.nytimes.com/2011/09/06/health/06donor.html?mtrref=undefined&gwh=966DDD1BFF66E4A125FFF8D868D7A8E&gwt=pay> [<https://perma.cc/2WF4-BG8C>].

³⁴⁷ See Natalie Morton & Sarah Bell, *I Fathered 800 Children, Claims Sperm Donor*, BBC (Jan. 13, 2016), <https://www.bbc.com/news/health-35262535> [<https://perma.cc/NE94-QYPD>].

³⁴⁸ See *Rowlette v. Mortimer*, 352 F.Supp.3d 1012, 1021–23 (D. Idaho 2018).

³⁴⁹ 367 N.E.2d 1250 (Ill. 1977).

complications from hyperbilirubinemia.³⁵⁰ When Emma sued her former physician, he claimed that he owed no duty of care to a child who had not even been conceived at the time he was negligent.³⁵¹ But the Illinois Supreme Court thought differently, holding that the physician had a duty to Emma's infant because it was foreseeable that her future children would experience serious complications from his negligence.³⁵² Similarly, physicians engaging in illicit insemination owe duties to their doctor-conceived children because certain harms were foreseeable, including psychological and potential genetic injuries and the possibility of consanguineous relationships.

3. Children's Interest in Anonymity

The anonymity interests of doctor-conceived children might well run counter to those of the parents. Children who are not genetically related to one or more of the parents who raised them should at the very least have access to their genetic parent's medical history. This access would normally be provided at a time when the parents tell their child that he was conceived through donor gametes.

There is considerable debate in the United States over whether or not to disclose to child that she was conceived through donor gametes. According to an ASRM Ethics Committee opinion, a "strong trend in favor of encouraging disclosure has emerged;" the committee concludes that disclosure is "strongly encouraged, while ultimately the choice of recipient parents."³⁵³ Proponents of disclosure argue that nondisclosure "violates that child's autonomy," since "human beings . . . have a fundamental interest in knowing their biological origins."³⁵⁴ Other popular rationale in favor of disclosure are "'the child's 'right' to know, the importance of honesty in the parent-child relationship, possible harm to the child in not knowing, a desire to avoid accidental or traumatic disclosure, or simply, that 'there is no reason not to tell.'"³⁵⁵ Research on families who have disclosed doctor-conceived status conclude that disclosure does not negatively affect the child, and

³⁵⁰ *Id.* at 1251.

³⁵¹ *Id.* at 1253.

³⁵² *Id.* at 1255–56.

³⁵³ Ethics Comm., Am. Soc'y Reproductive Med., *Informing Offspring of Their Conception by Gamete or Embryo Donation: An Ethics Committee Opinion*, 109 FERTILITY & STERILITY 601 (2018).

³⁵⁴ *Id.* at 602.

³⁵⁵ *Id.*

has positive effects on family relationships.³⁵⁶ The ASRM Ethics Committee recommends that gamete donors and recipients should be counseled on the possibility of “unplanned disclosure” given direct-to-consumer genetic testing.³⁵⁷ Significantly, as discussed in Part III, for siblings who did not know they were conceived through donor sperm, learning of their status has been especially traumatic, eroding family norms of trust and communication.³⁵⁸

There are also reasons why families choose not to disclose. Some parents are afraid that it will negatively affect their child and disrupt family relationships, that the child’s relationship with the non-genetically related parent will suffer, and that it will interfere with parental privacy.³⁵⁹ Parents could be concerned that their child may be stigmatized, making it difficult to “normalize” their family.³⁶⁰ Finally, the parents might yearn to be seen as “real” parents, and might feel threatened when they consider the possibility that the child might wish to find their donor.³⁶¹

In international law, there is growing support for a child’s right to know the identities of their parents and their medical history, particularly in Articles 7 and 8 of the United Nations Convention of the Rights to the Child (CRC)³⁶² and Article 8 of the European Convention on Human Rights (ECHR).³⁶³ Article 7 of the CRC provides that a child has “the right from birth to a name, the right to acquire a nationality, and, as far as possible, the right to know and be cared for by his or her parents;” this is not possible if the identity of one or both parents is unknown, such as when the child is abandoned or conceived through donor insemination.³⁶⁴ Article 8 of the CRC gives a child the right “to

³⁵⁶ *See id.*

³⁵⁷ *See id.*

³⁵⁸ *See supra* Section III.

³⁵⁹ *See* Ethics Comm., Am. Soc’y Reproductive Med., *supra* note 353.

³⁶⁰ *See id.*

³⁶¹ *See id.*

³⁶² G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989) [hereinafter CRC]. This treaty has 196 countries that are parties, including every member of the United Nations except for the United States.

³⁶³ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. The ECHR has been joined by all Council of Europe member states.

³⁶⁴ CRC, *supra* note 362.

preserve his or her identity, including nationality, name, and family relations as recognized by law without unlawful interference;” an illegal deprivation of an individual’s identity elements compels state parties to “provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.”³⁶⁵ Article 8 of the ECHR, addressing the right to respect for privacy surrounding one’s family and family life, incorporates “a right to respect for his private and family life, his home and his correspondence,” and prohibits “interference by a public authority” except as necessary for national security, public safety, national economic well-being, preventing disorder or crime, protecting health or morals, and protecting others’ rights and freedoms.”³⁶⁶ In the case against Dutch physician Jan Karbaat, who allegedly inseminated patients with his own sperm up until approximately 2009, the Court of Rotterdam noted that protecting the child’s identity interests can prompt the invasion of parental rights, and that, if the rights and freedoms of parents and children conflict, the decision must be made by weighing these parties’ interests against each other.³⁶⁷ Respect of children’s identity rights also underpin the recent enactment of new donor conception laws in Victoria, Australia, on March 1, 2017.³⁶⁸ Previously, only doctor-conceived children born after 1998 could obtain their donors’ identities upon turning 18. The new law extends those rights to children born before 1998.³⁶⁹

4. Children’s Interest in Having Standing to Pursue Civil Fertility Fraud Lawsuits

Perhaps the most fundamental and important interest that doctor-conceived children have is being able to impose accountability on physicians who engage in illicit insemination. America’s first illicit insemination ruling came on October 25, 2018, in *Rowlette v. Mortimer*, in which Sally Ashby, Howard Fowler, and their daughter, Kelli Rowlette, sued physician Gerald Mortimer.³⁷⁰ After Mortimer filed a motion to dismiss,

³⁶⁵ *Id.*

³⁶⁶ ECHR, *supra* note 363.

³⁶⁷ *See* Karbaat Judgment, *supra* note 338.

³⁶⁸ *See* Victorian Assisted Reprod. Treatment Auth., *New Law Gives All Donor-Conceived Victorians the Right to Know Their Heritage*, <https://www.varta.org.au/resources/news/new-law-gives-all-donor-conceived-victorians-right-know-their-heritage> [<https://perma.cc/RZ46-FD3C>].

³⁶⁹ *See id.*

³⁷⁰ *Rowlette v. Mortimer*, 352 F.Supp.3d 1012, 1017 (D. Idaho 2018).

the court in a rather shocking twist dismissed Kelli as a plaintiff.³⁷¹ Idaho law requires that all claims involving inadequate health care be brought as a single medical malpractice claim, and mandates that only patients have a cause of action for medical malpractice. Because Kelli was not yet conceived, the judge held that she could not possibly have been a patient of Mortimer and dismissed her from the suit. As an added injustice, the judge expressed his subjective beliefs about what had actually distressed Kelli—her parents' decision not to disclose, not Mortimer's unlawful acts. Although the judge deemed Mortimer's acts "abhorrent and concerning," the work of "evil hands and selfish motives," he concluded that the physician's deception had not caused Kelli's distress.³⁷² Mysteriously, the judge opined that "the underlying cause for the shock . . . did not stem from the fact that Dr. Mortimer could be her biological father, but rather that the person she thought was her biological father—Fowler—was not."³⁷³

Doctor-conceived children have strong interests that should be legally protected through criminal charges and civil liability for fertility fraud. After all, law is charged with protecting the vulnerable and giving them an opportunity to obtain answers and accountability. There are other ways in which doctors can owe legal duties to individuals outside a physician-patient relationship, particularly when the physician's violation of medical standards of care causes foreseeable harms.³⁷⁴ Patients undergo insemination for one reason: to conceive a child. It would be cruel and irrational to deny that a physician performing an insemination could not foresee how this conduct could harm any resulting children. At a minimum, potential harms include unexpected and traumatic disclosures of doctor-conceived status, disrupted personal identities, severely damaged trust in medical professionals, destabilized family relationships, and increased possibilities of consanguineous relationships within a particular geographic area.

³⁷¹ *Id.* at 1021–23.

³⁷² *Id.* at 1017–18, 1022–23.

³⁷³ *Id.* at 1022–23.

³⁷⁴ *See, e.g.,* *Renslow v. Mennonite Hosp.*, 367 N.E.2d 1250 (Ill. 1977); *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976); *Reisner v. Regents of the Univ. of Cal.*, 37 Cal. Rptr. 2d 518 (Cal. Ct. App. 1995).

IV. Cline's Conduct Falls Within Gaps in Criminal Law

A. Why It is Difficult to Hold Physicians Liable for Fertility Fraud

There are several reasons why it is difficult to hold physicians criminally liable for fertility fraud, including expired statutes of limitation, lengthy time periods between conduct and the filing of criminal or civil charges, destruction of evidence such as medical records, and a poor “fit” between state statutes and physicians’ conduct. In an academic interview, Tim DeLaney, a former Deputy Prosecutor of Marion County who was in charge of the obstruction of justice case against Donald Cline in 2017, described how difficult it would have been to hold Cline criminally liable for his decades-old illicit inseminations.³⁷⁵ These obstruction of justice charges originally stemmed from consumer complaints that two of Cline’s doctor-conceived children filed with the Indiana Attorney General.³⁷⁶ It was fortunate that Cline pled guilty to felony obstruction of justice; Marion County’s elected prosecutor, Terry Curry, had stated in a press release that there were “significant limitations” to prosecuting him for other offenses.³⁷⁷ This application of felony obstruction of justice was extremely novel. As DeLaney explained, “usually, that’s in the context of, ‘I’m obstructing justice by faking evidence in a murder,’ or something like that. I’m unaware of it ever being in the context of a consumer complaint with regards to the Attorney General’s office. So, it was very, very strange.”³⁷⁸

However novel it might have been, obstruction of justice was a fairly unexciting charge to Cline’s victims and members of the public because it penalized his deception surrounding the illicit inseminations, and not the inseminations themselves. Moreover, this charge required that the state of Indiana usurp the victims’ role as the party that Cline had deceived, superseding Cline’s former patients and their children. But the alternative was letting Cline walk free:

³⁷⁵ Interview with Tim Delaney, Deputy Prosecutor, Marion County Prosecutor’s Office (Apr. 27, 2018) (on file with author).

³⁷⁶ See Scott L. Miley, *Zionsville Gynecologist Faces Further Disciplinary Action*, HERALD BULLETIN (May 31, 2018), https://www.heraldbulletin.com/news/state_news/zionsville-gynecologist-faces-further-disciplinary-action/article_9944407b-5e25-527e-a654-8af598d394b0.html [<https://perma.cc/FB8K-P88J>].

³⁷⁷ See *Fertility Doctor Gets No Jail Time for Lying About Using Own Sperm*, INDY CHANNEL (Dec. 14, 2017), <https://www.theindychannel.com/news/local-news/crime/fertility-doctor-gets-no-jail-time-for-lying-about-using-own-sperm>. [<https://perma.cc/QV4A-85AE>].

³⁷⁸ Interview with Tim Delaney, Deputy Prosecutor, Marion County Prosecutor’s Office (Apr. 27, 2018) (on file with author).

[T]here was [sic] a lot of different theories that were bandied about, and many of them just don't work from the statutory standpoint, and that was always a big problem, was trying to find something that would fit. Maybe if it had happened yesterday, there were other theories that were gonna [sic] be available to us, but when you deal with not only the limitations periods but you also deal with the absence of documentation, the problems with memory—I mean we were obviously gonna [sic] have serious issues getting reliable and consistent testimony.³⁷⁹

1. Evidentiary Issues and Expired Statutes of Limitation

More than thirty years have elapsed between Cline's fraudulent inseminations, presenting very real evidentiary and statute of limitations problems. Because Indiana law only requires physicians to keep medical records for seven years,³⁸⁰ Cline's files have all been destroyed,³⁸¹ so there is no evidence about who he treated, what agreements were made, and which donor's sperm was used. According to interviews with former female patients, most interactions took place only between themselves and Cline.³⁸² Husbands usually did not accompany their wives to appointments, lest they be tainted by the stigma of male infertility, and former patients recall that Cline did not employ a nurse to accompany him into examination rooms.³⁸³ Moreover, Cline's conduct was uncovered in 2014, and his doctor-conceived children were born from 1974 through 1987,³⁸⁴ leaving a spread of twenty-six to forty years between his conduct and civil or criminal liability, potentially imperiling witness recall. These evidentiary obstacles jeopardize both criminal prosecution of Cline and patients' ability to sue him for civil tort violations such as battery.

³⁷⁹ *Id.*

³⁸⁰ IND. CODE § 16-39-7-1 (2009).

³⁸¹ Administrative Complaint at 3, *In re the license of: Donald L. Cline, M.D.*, Cause No. 2018 MLB 0021 (Ind. Med. Licensing Bd. Oct. 17, 2018).

³⁸² *See* Interview with Judith (Jan. 26, 2018) (on file with author).

³⁸³ *See id.*

³⁸⁴ *See Fertility Doctor Used His Sperm on Unwitting Women, Now Dozens of Children Want Answers*, *supra* note 4.

This lengthy period of time would cause statute of limitations difficulties. In Indiana, rape charges must be brought within five years.³⁸⁵ Beyond that period, they can be brought for five years after new evidence such as DNA comes to light.³⁸⁶ Sexual battery charges also must be brought within five years,³⁸⁷ and a misdemeanor charge of criminal deception must be brought within two years.³⁸⁸ However, these statutes of limitation could be tolled until victims discovered or should have discovered the fraudulent insemination under Indiana Code § 35-41-4-2(h)(2), which is applicable here because Cline “concealed evidence of the offense, and evidence sufficient to charge [him] . . . [was] unknown to the prosecuting authority and could not have been discovered by that authority by exercise of due diligence.”³⁸⁹ This would allow charges to be brought after direct-to-consumer genetic testing revealed a genetic relationship to Cline or to other half-siblings, but it is unclear what notifications would trigger a victim’s duty to inquire further. Would it be the knowledge that their parents sought treatment from Cline, following news of his conduct? What about the date when it was first possible to use direct-to-consumer genetic testing? Could it be the date that doctor-conceived children received their results, or when they learned that they had half-siblings, or when they first got in contact with their new relations? Or would it be the date of Cline’s guilty plea, December 14, 2017?³⁹⁰ As DeLaney remarked:

We [would] have gotten into an argument, when was DNA testing available to you versus when would 23andMe make that DNA testing meaningful, because you’re not gonna [sic] go swab your former doctor.

³⁸⁵ IND. CODE § 35-42-4-1(a) (2014); IND. CODE § 35-41-4-2(a)(1) (2019).

³⁸⁶ IND. CODE § 35-41-4-2(n) (2019). However, there is no statute of limitations on aggravated rape involving a deadly weapon or serious injury. IND. CODE § 35-41-4-2(c) (2019); *see also* IND. CODE § 35-42-4-1 (2014). Rape is a level 3 felony in Indiana if sexual intercourse or conduct is compelled by force or imminent threat of force, the victim is unaware that the sexual act is occurring, or the victim is “so mentally disabled or deficient” so as to be incapable of consent. IND. CODE § 35-42-4-1(a) (2014). Rape is a Level 1 felony if it is committed by or under threat of deadly force, the perpetrator has a deadly weapon, it results in serious bodily injury to another besides the defendant, or the rape is facilitated by the perpetrator’s secret administration of a drug to the victim. IND. CODE § 35-42-4-1(b) (2014).

³⁸⁷ IND. CODE § 35-42-4-8 (2014); IND. CODE § 35-41-4-2(a) (2019).

³⁸⁸ IND. CODE § 35-43-5-3 (2019); IND. CODE § 35-41-4-2(a)(2) (2019).

³⁸⁹ IND. CODE § 35-41-4-2(h)(2) (2019).

³⁹⁰ *See* Shari Rudavsky, *Fertility Doctor Pleads Guilty to Obstruction of Justice in Insemination Case*, INDYSTAR (Dec. 14, 2017), <https://www.indystar.com/story/news/2017/12/14/fertility-doctor-accused-inseminating-own-patients-court-today/951397001/> [<https://perma.cc/3ESA-7JKQ>].

So, we would have gotten down a deep rabbit hole about when the limitations period [ended].³⁹¹

2. Cline's Conduct Falls Within Gaps in Criminal Law

It is difficult to find criminal statutes under which Cline could successfully have been prosecuted. Cline's conduct falls within loopholes in the applicable laws, including criminal deception, criminal battery, malicious mischief, sexual battery, and rape.

One potential criminal charge was theft of honest services. As DeLaney described it, this count could state, "I contracted with you for this and you gave me that.' . . . [I]t was gonna [sic] be a theft of dishonesty essentially."³⁹² There is a federal theft of honest services law: 18 U.S.C. § 1346 states that a "scheme or artifice to defraud includes a scheme or artifice to deprive another of the intangible right of honest services." In *Skilling v. United States*, the U.S. Supreme Court interpreted this statute narrowly to cover only schemes to deprive of honest services through bribes or kickbacks from a third party who was not deceived.³⁹³ DeLaney realized that "it was gonna [sic] be a real tough road to hoe"—particularly because Indiana does not have a comparable statutory cause of action.³⁹⁴

Several other potential charges are only misdemeanors and are woefully inadequate when applied to Cline's conduct. Nonetheless, in Indiana criminal battery applies to a person who "knowingly and intentionally (1) touches another person in a rude, insolent, or angry manner; or (2) in a rude, insolent, or angry manner places any bodily fluid or waste on another person."³⁹⁵ This statute is quite clearly meant to capture spitting, expelling, or throwing bodily fluids on another person; such conduct is a felony if the perpetrator "knew or recklessly failed to know that the bodily fluid or waste placed on another person was infected with hepatitis, tuberculosis, or human immunodeficiency

³⁹¹ Interview with Tim Delaney, Deputy Prosecutor, Marion County Prosecutor's Office (Apr. 27, 2018) (on file with author).

³⁹² *Id.*

³⁹³ 561 U.S. 358, 409 (2010).

³⁹⁴ Interview with Tim Delaney, Deputy Prosecutor, Marion County Prosecutor's Office (Apr. 27, 2018) (on file with author).

³⁹⁵ IND. CODE § 35-42-2-1(c)(1)-(2) (2018).

virus.”³⁹⁶ But there is no evidence that Cline inseminated his patients in a rude, insolent, or angry manner, and placing fluids “on” a person is not the same as putting them *in* a person; in most instances, any ingestion of bodily fluid is accidental. Moreover, as Cline could argue, patients *wanted* sperm to be placed inside them. However, that consent is only valid in so far as the physician was using sperm from the agreed-upon source.

A second misdemeanor, malicious mischief, occurs when a person “recklessly, knowingly, or intentionally” places one of several human bodily fluids (including semen) or feces “in a location with the intent that another person will involuntarily touch the bodily fluid or fecal waste.”³⁹⁷ While Cline worked with semen in the practice of conducting inseminations, and ensured that his patients would “touch” his semen since it was placed inside their uteruses, it is doubtful that the Indiana legislature intended this statute to apply to the placement of bodily fluid in the context of a medical procedure. Again, Cline would defend on the grounds that his patients consented to undergo insemination—although this claim may be defeated by patients’ assertions that they assumed they were receiving either their husband’s sperm or a sample from an anonymous medical resident who resembled their husbands.

Indiana’s misdemeanor criminal deception law introduces another statute of limitations wrinkle. This offense applies to a perpetrator who “misapplies entrusted property . . . in a manner that the person knows is unlawful or that the person knows involves substantial risk of loss or detriment to either the owner of the property or to a person for whose benefit the property was entrusted.”³⁹⁸ It also applies to a person who “sells, offers, or displays for sale or delivers less than the represented quality or quantity of any commodity.”³⁹⁹ The criminal deception law’s two-year statute of limitations can be tolled by concealment of evidence,⁴⁰⁰ but the Indiana Supreme Court has held that this requires a “a positive act by the defendant that is calculated to conceal the fact that a crime has been committed.”⁴⁰¹ For instance, in *Study v. State*, the prosecutor alleged that Study committed bank robbery and then several “acts of concealment,” including wearing

³⁹⁶ IND. CODE § 35-42-2-1(f) (2018).

³⁹⁷ IND. CODE § 35-45-16-2(c) (2014).

³⁹⁸ IND. CODE § 35-43-5-3(a)(3) (2019).

³⁹⁹ IND. CODE § 35-43-5-3(a)(4)(B) (2019).

⁴⁰⁰ IND. CODE § 35-41-4-2(h) (2019).

⁴⁰¹ *Study v. State*, 24 N.E.3d 947, 957 (Ind. 2015).

a mask and concealing the getaway car and physical evidence from the robbery; the Indiana Supreme Court found that none of these acts were sufficient “positive acts” because they did not prevent law enforcement from discovering the robbery or delay the investigation.⁴⁰² In *State v. Amos*, however, continued e-mails sent from a seller of fraudulent securities reassuring purchasers they would soon receive the delayed returns on their investment were “positive acts.”⁴⁰³

But unlike crimes like bank robbery, which entail evidence of their commission, one vial of sperm looks identical to any other vial, so it would have been impossible for Cline’s patients to know they were being victimized. Moreover, Cline asked all of his patients not to attempt to discover the donor’s identity.⁴⁰⁴ To commit the requisite “positive act,” Cline would have had to reassure patients that he used the correct sperm sample, but patients would not have asked for such reassurance because they never suspected wrongdoing. Even if one could get past the “positive act” requirement, Cline could argue that he did, in fact, give patients sperm from a better source than an anonymous medical resident. As DeLaney explained:

The argument out there that we anticipated is, “You didn’t want to know who this was. I told you it was going to be a resident; well, you got a full doctor.” . . . [Cline’s attorney could argue] the circumstances of who it was [is] something you [as the patient] were largely indifferent to, as long as it was an intelligent individual.”⁴⁰⁵

DeLaney believed that that these obstacles “were actually probably going to be a fatal hurdle for us.”⁴⁰⁶

Finally, sexual battery applies when a perpetrator intending to satisfy his or another’s sexual desires either compels another person to submit to touching by actual or threatened force, or touches someone who is “so mentally disabled or deficient” that they cannot consent; or touches another’s “genitals, pubic area, buttocks, or female breast”

⁴⁰² *Id.* at 954.

⁴⁰³ *Amos v. State*, 83 N.E.3d 1221, 1231 (Ind. Ct. App. 2017).

⁴⁰⁴ Interview with Judith (Jan. 26, 2018) (on file with author).

⁴⁰⁵ Interview with Tim Delaney, Deputy Prosecutor, Marion County Prosecutor’s Office (Apr. 27, 2018) (on file with author).

⁴⁰⁶ *Id.*

when that person is unaware of the touching.⁴⁰⁷ Felony sexual battery occurs when deadly force is used or threatened, or if the victim is given a drug or controlled substance without their knowledge.⁴⁰⁸ Cline's conduct does not seem to fall within these bounds. Cline did not use or threaten force against his patients, did not give them drugs of which they were unaware, and had consent to touch their genital areas, albeit for the purposes of inseminating them with the appropriate sperm.

The most obvious felony that could apply to Cline's conduct is rape. Under Indiana Code Section 35-42-4-1-1(a), rape is committed when a person knowingly or intentionally engages in sexual intercourse or sexual conduct with another person who is compelled by force or imminent threat of force, unaware that the sexual conduct is occurring, or is incompetent and cannot consent to sexual conduct. Because Cline's former patients were competent, the only applicable statutory provisions relate to unawareness of sexual conduct and lack of consent. Cline could defend on the grounds that insemination is a clinical, not sexual, act. This might not be successful; it is questionable whether an insemination is still clinical when the physician performing the procedure has masturbated to ejaculation in a nearby room immediately before inserting this fluid into her vagina via a syringe and catheter. But to make this charge stick, the prosecution would have to prove that the physician received sexual gratification through the insemination—a burden that would be difficult or impossible to meet without evidence such as a diary entry. Tim DeLaney confirmed that rape would have been a very difficult charge for several reasons:

I don't know that it is [sexual] because we're talking about a clinical act at this point; the act he performed prior to entering into the room was obviously in some extent sexual [sic], but that was done by himself . . . The circumstances, or what was the result of the touching [for the insemination] was perhaps tainted in some way, but the actual touching itself was consensual. Even putting aside whether it was sexual conduct, they knew and were not forced to allow him to put the syringe . . . inside them. So, there was no lack of consent to that, and that was a big problem for me . . . Even if I could shoehorn this in . . . is that what we think of when we think of rape? Is that appropriate? And here I did not see that, because rape is an inherently violent act . . . What we had was

⁴⁰⁷ IND. CODE § 35-42-4-8(a) (2014).

⁴⁰⁸ IND. CODE § 35-42-4-8(b) (2014).

something subtler, and it wasn't, I didn't think, appropriate to charge him with rape in that context.⁴⁰⁹

Cline could also defend against a rape charge on the grounds that patients had consented to receive anonymous sperm, which presumes that it was ethical and legal to ask patients to accept their physician as a sperm donor and that patients would have assumed the class of "anonymous" donors would include their physician. The success of these arguments would likely relate to how prosecutors and juries understood Cline's behavior, the boundaries of patient consent, and the nature of the touching, as well as on prosecutor and jury characteristics such as sex, gender, age, religion, and political views. Cline's victims, of course, could attempt rebut these points by emphasizing that they were supposed to receive sperm from their husbands or from an anonymous medical resident who resembled their husbands.

Another barrier to a rape conviction could be a lack of overt force or threat of force. This was a traditional requirement of rape statutes and conventional expectations surrounding the offense.⁴¹⁰ In contrast, contemporary reforms to rape statutes are oriented towards respecting and protecting the victim's "sexual autonomy."⁴¹¹ Cline's conduct is more like "rape by deception," where a suspect engages in sexual conduct with another under false pretenses, such as impersonating a romantic partner.⁴¹² Although some state rape laws incorporate rape by deception, this theory is usually disfavored within criminal law because it penalizes conduct that is not forceful,⁴¹³ although this act clearly violates victims' autonomy. States that disallow rape by deception often allow such charges in two circumstances: when the defendant represented the sexual act as a surgical operation, and when the defendant impersonated the victim's husband.⁴¹⁴ But these exceptions would also be challenging to prove. Insemination is not a surgical procedure, and as previously discussed it would be difficult to prove that Cline was fulfilling sexual motivations through performing inseminations. At the time that Cline was being

⁴⁰⁹ Interview with Tim Delaney, Deputy Prosecutor, Marion County Prosecutor's Office (Apr. 27, 2018) (on file with author).

⁴¹⁰ See Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1396 (2013).

⁴¹¹ See *id.* at 1388.

⁴¹² See, e.g., *Boro v. Superior Court*, 163 Cal. App. 3d 1224 (1985).

⁴¹³ See Rubenfeld, *supra* note 410, at 1376.

⁴¹⁴ See *id.* at 1397.

prosecuted, a rather infamous case of rape by deception was making its way through the criminal process. The facts of this case are troubling: Several Purdue University students were sleeping in the same room, including a woman and her boyfriend; after the boyfriend left his girlfriend's bed, Donald Ward crept in and had sex with the woman while impersonating her beau.⁴¹⁵ At trial, the jury acquitted Ward, rejecting the prosecutor's theory of rape by deception.⁴¹⁶ This outcome sent a clear message that similar charges might lead to similar results, including in the case against Cline.

Reforming Indiana's rape law to include deceptive conduct would facilitate holding physicians liable for illicit insemination. Cline was undoubtedly engaging in sexual conduct immediately prior to the insemination because he obtained his sample through masturbation; he was experiencing orgasm's physiological effects when he inseminated his patients moments afterwards.⁴¹⁷ A person who commits rape by deception deprives women of sexual choice and autonomy, much as Cline deprived his patients of reproductive autonomy in not providing agreed-upon gametes. If rape is "unconsented-to sex," then insemination fraud is an unconsented-to conception,⁴¹⁸ in which a physician substitutes *his own* procreative intent for his patients'.

For these reasons, charging Cline with obstruction of justice wasn't just low-hanging fruit, but the only viable criminal charge. Moreover, it was a felony and carried the same criminal punishment as other charges that Cline's victims would have found more satisfactory. DeLaney saw, therefore, that the common-sense solution was to charge the easiest crime:

⁴¹⁵ Following Ward's acquittal, his attorney, Kirk Freeman, stated in a news interview:

That's not rape just in the fact that lots of women this weekend are going to have sex with Navy Seals, going to have sex with football heroes, going to have sex with guys that rescue kittens from the middle of the interstate, and are going to have sex with men who tell them, "I love you and I'm ready for a commitment." Just because they are lying or being deceptive doesn't make it rape.

Dave Bangert, *Sex, Lies and . . . Wait, That Wasn't Rape in a Purdue Dorm?*, J. & COURIER (Feb. 8, 2018), <https://www.jconline.com/story/opinion/columnists/dave-bangert/2018/02/08/bangert-sex-lies-and-wait-wasnt-rape-purdue-dorm/319603002/> [<https://perma.cc/CQ3K-NZWP>].

⁴¹⁶ *See id.*

⁴¹⁷ *See* Interview with Judith (Jan. 26, 2018) (on file with author).

⁴¹⁸ *See* Rubinfeld, *supra* note 410, at 1376.

If we met all of the hurdles that we encountered with regard to the initial [insemination] act in 1979 [for the child who brought the consumer complaint], none of those felonies [or misdemeanors] . . . would have been at the same level at which we charged, and so they would have had no different outcome in terms of sentencing.⁴¹⁹

DeLaney preferred to keep things as clean-cut as possible, lest charging Cline with a more novel crime threaten his ability to obtain an obstruction of justice conviction:

We've got a laser focus on a charge that is perfectly applicable and appropriate given the circumstances, versus making a real stretch for the same outcome . . . It's almost like he re-upped the crime in 2015, is what it was. He basically committed the same kind of felony 35 years later.⁴²⁰

Nonetheless, DeLaney found it dissatisfying that he could not hold Cline liable for the underlying illicit inseminations and knew that this charge was dissatisfying to victims. It was especially challenging to address the misfit between Cline's victims' intensely personal stories and the obstruction of justice offense: "I know that people feel that obstruction of justice is not a terribly sexy thing, but it was what was available to us."⁴²¹ He also was not used to handling offenses that triggered this depth of emotion:

I do white collar crimes typically, and there can be emotions involved, but it's usually dollars and cents. I've done some violent crime stuff, and there are obviously emotions there, so you can get that, but this was an unusual set of emotions. And I think it's not just the victims involved here, I think it's everybody. Because one of the things that's so strange about this case is most of the people that I heard from, weighing in on it—I'm talking about just members of the general public and people I've seen commenting on the media and things like that—most people felt that he had done something wrong, but when pressed, it was kind of this inchoate response to what he did . . . So, we had this weird thing where I had a group of people out there chiming in saying, "I really feel like he did something wrong, but I can't tell you what it is," and then another

⁴¹⁹ Interview with Tim Delaney, Deputy Prosecutor, Marion County Prosecutor's Office (Apr. 27, 2018) (on file with author).

⁴²⁰ *Id.*

⁴²¹ *Id.*

vocal minority saying, “No, I think he did [nothing wrong] . . . Maybe it wasn’t perfect, but they got what they wanted.”⁴²²

Delaney went on to describe one particularly emotional moment at Cline’s December 2017 sentencing hearing, when two of the siblings gave victim impact testimony against him. Though there had been “some pre-hearing negotiation on the limits of what could be said,” two testifying siblings very much wanted to tell their stories about how Cline’s conduct had disrupted their lives.⁴²³ DeLaney recounted:

I think there was an instinct by most of the families involved of making a catharsis out of the sentencing hearing . . . Obstruction of justice is a procedural crime; it’s not like murder. It’s something a lot more limited . . . Obviously, they gave a lot of statement[s] to the media afterwards.⁴²⁴

3. Cline’s Conduct Falls Within Gaps in Civil Law

Civil claims against Cline could include a handful of intentional torts, such as battery and intentional infliction of emotional distress, as well as fraud and misrepresentation. These claims offer former patients much more solid legal ground than criminal charges, but doctor-conceived children would be on less stable ground in the absence of fertility fraud legislation, aside from claims for emotional distress.

One possible difficulty in the civil context is that former patients would most likely discover that they had been harmed when their children receive DNA testing results. That creates a catch-22: A child conceived through an insemination that Cline performed would not be compelled to undergo genetic testing, although that question is vital to the legal interests of their parent(s).

Even though Cline’s conduct was entirely intentional, and his former patients’ pregnancies did not result from any negligent or reckless misappropriation or contamination of sperm samples, the plaintiffs would have to submit these claims to a medical review panel before filing suit, as required under Indiana law.⁴²⁵ Indiana precedent has found that claims do not have to be submitted to a medical review panel if

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ IND. CODE § 34-18-8-4 (2019).

they concern conduct “unrelated to the promotion of the patient’s health or the provider’s exercise of professional expertise, skill, or judgment,” but this language is interpreted narrowly.⁴²⁶ Illicit insemination is not tortious because of Cline’s deficient professional skills, but because the physician intentionally and fraudulently substituted sperm that the patient did not consent to use. The Indiana Court of Appeals has held that, in a case where a physician had a sexual relationship with his patient, impregnated her, and thereafter subjected her to an unconsented-to abortion during an “examination” conducted after office hours, the physician’s conduct was “wanton and gratuitous” and did *not* constitute the rendition of health care or professional services.⁴²⁷ Although one could argue that illicit inseminations do not constitute the “rendition of health care” because they do not promote the patient’s health and are carried out pursuant to a physician’s expertise, any civil suits in the Cline case would almost certainly have to be submitted to a medical review panel.

It appears that the standard of care in the 1970s and 1980s would not permit a physician’s use of his own sperm, and certainly not without the patient’s consent, particularly when the patient had agreed to very different terms: using the sperm of her husband or an anonymous medical resident resembling her husband. It is an especially obvious breach for a physician to substitute his sperm for that of the patient’s husband. Moreover, evidence of insemination practices from that time period suggests that this substitution was simply not done. A 1987 survey by the federal Office of Technology Assessment anonymously queried 367 physicians concerning artificial insemination practices; according to a subsequent report, the husband or partner most frequently provided the sperm sample (54%, n=367), followed by sperm banks (22.3%), a physician-selected donor (21.3%), or a recipient-selected donor (1%), while only 0.4% of sperm samples came from “other sources,” including the physician.⁴²⁸ Moreover, of 266 physicians responding to the question, “Which of the other following sources have you used to obtain fresh sperm in the past year?” only 2%, or roughly five physicians, reported using their own sperm.⁴²⁹ It is perhaps telling that the survey options include a category where physicians could report that *they* provided the sperm sample; other

⁴²⁶ Collins v. Thakkar, 552 N.E.2d 507, 510 (Ind. Ct. App. 1990).

⁴²⁷ *Id.*

⁴²⁸ U.S. CONGRESS OFFICE OF TECH. ASSESSMENT, ARTIFICIAL INSEMINATION: PRACTICE IN THE UNITED STATES: SUMMARY OF A 1987 SURVEY tbl. 2-27 (1988).

⁴²⁹ *Id.* at tbl. 2-41.

choices included other doctors, medical students, graduate students, hospital personnel, and andrology laboratories.⁴³⁰

Civil claims, like criminal claims, can be tolled under Indiana law. Claims for the torts of battery⁴³¹ and intentional infliction of emotional distress⁴³² 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.⁴³³ Under the fraudulent concealment doctrine, a defendant is estopped 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.”⁴³⁴ Once the plaintiff is aware of the deception, she must “exercise due diligence in commencing her action after the equitable grounds cease to operate.”⁴³⁵

Battery is the most obvious intentional tort claim that Cline’s former patients could allege. At common law, a claim of battery can encompass either claims 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).⁴³⁶ As to the former, under Indiana law, battery requires that a defendant “act[] intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such contact, and . . . a harmful contact with the person of the other directly or indirectly results.”⁴³⁷ As to the latter, Indiana requires that physicians must make “reasonable disclosure of material facts relevant to the decision which the patient is

⁴³⁰ *Id.* at 92.

⁴³¹ See *Fager v. Hundt*, 610 N.E.2d 246, 253 (Ind. 1993); *Anonymous Physician v. Rogers*, 20 N.E.3d 192 (Ind. Ct. App. 2014).

⁴³² See IND. CODE § 34-11-2-4 (2013); *Tsitsopoulou v. Univ. of Notre Dame*, No. 2:10-CV-309, 2011 WL 839669 (N.D. Ind. Mar. 7, 2011).

⁴³³ *Hundt*, 610 N.E.2d at 253.

⁴³⁴ *Id.* at 251.

⁴³⁵ *Id.*

⁴³⁶ See VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE, AND SCHWARTZ’S TORTS: CASES AND MATERIALS 188–89 (13th ed. 2015).

⁴³⁷ *Mullins v. Parkview Hosp., Inc.*, 865 N.E.2d 608, 610 (Ind. 2007).

requested to make;⁴³⁸ to be liable, a physician must “completely fail[]” to obtain informed consent.⁴³⁹ The Indiana Court of Appeals in *Cacdac v. West* remarked that “the failure to obtain informed consent 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.”⁴⁴⁰ Intentional withholding of information, then, is entirely a battery, with no hint of negligence.

Here, the offensive contact would be Cline’s use of his own sperm to inseminate his patients, and potentially his performance of the insemination. This conduct is harmful and offensive for several reasons: (1) It violates patients’ dignity in that they never consented to such conduct, and indeed should never have been asked to do so; (2) Cline used entirely different sperm samples that in no way met patients’ specified criteria; and (3) Cline could be a carrier for genetic diseases that he then passed on to his doctor-conceived children. Cline’s conduct is properly tried as a battery. Cline intentionally withheld the information that he was using sperm samples different from those to which the patient had consented. As a defense to battery, Cline would likely assert the same “consent” defenses as he would to criminal battery, arguing that former patients who needed anonymous donor sperm in fact received sperm from an anonymous donor since they did not know who had provided the sample. Moreover, he could argue that patients cannot satisfy the burden of proof because they have little to no evidence that they did *not* consent to this insemination. Patients, in turn, would assert the same rebuttal: They did not anticipate that Cline would be their donor, Cline is not a medical resident, and Cline likely does not resemble their husbands. As to the lack of evidence, patients could counter that they have enough evidence for the trier of fact to make a determination.

Former patients would likely prevail on this claim, although a number of interesting legal questions arise. First, there is the question of when former patients would know or should know of Cline’s conduct, triggering the statute of limitations. Former patients would have to confirm that they were informed through their children’s genetic testing results; difficulties would arise if children did not wish to test or did not wish to disclose the results to their parents. Moreover, when would the statute of limitations begin to run? Would this occur when news stories covering Cline’s fertility fraud first appeared, potentially putting former patients on notice? Or when former patients’ children received

⁴³⁸ *Id.* at 610.

⁴³⁹ *Id.* at 511 (citing *Van Sice v. Sentany*, 595 N.E.2d 264, 268 (Ind. Ct. App. 1992)).

⁴⁴⁰ *Cacdac v. West*, 705 N.E.2d 506, 512 (Ind. Ct. App. 1999).

genetic testing results, knowing that they might not notify their parents immediately (or ever)? Or would the tolling period end when Cline pled guilty to obstruction of justice?

Another potential civil claim would be fraud, which requires patients 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.”⁴⁴¹ The crux of this fraud claim would be that Cline intentionally and without his patient’s consent inseminated the patient with his own sperm sample instead of using a sample from the patient’s husband or an anonymous medical resident resembling the husband, with the knowledge that his patient would detrimentally rely on his silence and believe that the correct sample was used. With respect to patients who consented to receive anonymous donor sperm, Cline could again argue that he had provided the sample anonymously; patients could rebuff such arguments by stating that this conduct was ethically and legally unsound, that Cline did not resemble their husbands, and that he was not a medical resident. Cline could also assert that former patients cannot bear the burden of proving that they did not consent to undergo insemination in those circumstances. Patients would have the same counterarguments as to other civil claims. Once again, a jury would likely resolve these claims in favor of former patients.

One final civil charge is intentional infliction of emotional distress, for which “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.”⁴⁴² This conduct has to “go beyond all possible bounds of decency, and be regarded as atrocious and utterly intolerable in a civilized community,” prompting “an average member of the community . . . to exclaim, ‘Outrageous!’”⁴⁴³ Moreover, the defendant must intend to “harm one emotionally,”⁴⁴⁴ and the plaintiff must experience “mental distress of a very serious kind.”⁴⁴⁵ Because it was not the standard of care at the time to allow a physician to use his own sperm to inseminate his patients without their consent,⁴⁴⁶

⁴⁴¹ *Id.* at 509–510.

⁴⁴² *Haegert v. McMullan*, 953 N.E.2d 1223, 1235 (Ind. Ct. App. 2011).

⁴⁴³ *Id.* (citing *Bradley v. Hall*, 720 N.E.2d 747, 752–53 (Ind. Ct. App. 1999)).

⁴⁴⁴ *Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991).

⁴⁴⁵ *Curry v. Whitaker*, 943 N.E.2d 354, 361 (Ind. Ct. App. 2011).

⁴⁴⁶ *See* Interview with Judith (Jan. 26, 2018) (on file with author).

Cline's conduct would likely be considered outrageous even at that time. Cline could counterclaim, however, that he did not intend to inflict emotional harm, and that his former patients did not experience "mental distress of a very serious kind" because they were *delighted* to have conceived. Patients would respond that, while they, of course, loved their children, they never consented to allow Cline to use his own sperm and experienced profound distress when they learned what Cline had done. Doctor-conceived children could also bring extremely convincing intentional infliction of emotional distress claims. It was foreseeable that these illicit inseminations could cause grievous family discord, subject the children to the risks of consanguineous relationships, and raise concerns of future generations marrying their first cousins.

But even if other criminal and civil theories had been viable, Cline could have a jury nullification argument: the idea that he did it to help "desperate" patients. As Delaney observed:

[Cline's] argument that "I was only doing this because I was so desperate to help" is essentially a call to the jury and focus instead on the . . . innocent motivation on the part of the defendant . . . His argument would be, "Don't worry about it because my motives were pure; I'm a good guy, and so you, the jurors, should not apply the law too stringently here."⁴⁴⁷

Still, given the public ire these cases have generated, and the likelihood that an appropriately selected jury would have great empathy for patients and their children, it is most likely that this jury nullification argument would backfire on Cline.

V. The Necessity of Passing a Fertility Fraud Bill

A fertility fraud bill greatly increases the chances that patients and doctor-conceived children could hold physicians accountable. Without such legislation, criminal charges would be impossible to bring and civil charges, while more viable, would certainly not be slam-dunk claims, particularly for doctor-conceived children.⁴⁴⁸ The ASRM, however, takes the position that these issues are likely covered by existing law. Sean Tipton, the Chief Policy Officer for ASRM, has stated, "It's terribly obvious that for a physician to

⁴⁴⁷ Interview with Tim Delaney, Deputy Prosecutor, Marion County Prosecutor's Office (Apr. 27, 2018) (on file with author).

⁴⁴⁸ See, e.g., *Rowlette v. Mortimer*, 352 F.Supp.3d 1012 (D. Idaho 2018).

substitute his own sperm for donor sperm is an awful thing . . . But it seems to me that there are existing legal remedies.”⁴⁴⁹

Fertility fraud bills were introduced in both Indiana and Texas in early 2019; both bills were the result of direct advocacy from former patients and doctor-conceived children. Each bill took a very different approach to holding physicians accountable: While the Indiana legislation created civil and criminal causes of action for fertility fraud, the Texas legislation sought to criminalize fertility fraud as sexual assault.

A. Indiana’s Fertility Fraud Bill

Efforts to pass a fertility fraud bill began in the 2017 legislative session, when Maggie encountered her state senator, Rodric Bray (R), at a community event and told him about the strange sequence of events that had unfolded due to Cline’s fertility fraud.⁴⁵⁰ Bray was so moved that he gave Maggie his cell phone number and pledged to help her.⁴⁵¹ In 2018, Bray sponsored Senate Bill 239, which was co-authored by Senator Michael Delph (R). The bill was assigned to the Senate Committee on Corrections and Criminal Law, chaired by Senator Michael Young (R), where it languished until the end of the that term.⁴⁵²

In the 2019 session, identical fertility fraud bills were reintroduced in the Indiana House and Senate; both propose to create new criminal and civil causes of action. Senator Rodric Bray had been elected President pro tempore for the 2019 legislative session,⁴⁵³ and could no longer introduce the bill, prompting the Cline half-siblings to find other authors. At the beginning of the 2019 session, Senate Bill 174, authored by Senator Jack Sandlin (R), was introduced and referred once again to the Senate Corrections and

⁴⁴⁹ See Ariana Eunjung, *Fertility Fraud: People Conceived Through Errors, Misdeeds in the Industry are Pressing for Justice*, WASH. POST (Nov. 23, 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=.9d0218f0d9b8 [<https://perma.cc/3RSY-C359>].

⁴⁵⁰ Interview with Maggie (Mar. 21, 2017) (on file with author).

⁴⁵¹ *Id.*

⁴⁵² S.B. 239, 120th Gen. Assemb., 2d Reg. Sess. (Ind. 2018), <http://iga.in.gov/legislative/2018/bills/senate/239> [<https://perma.cc/WYW2-2CP3>].

⁴⁵³ See Rodric Bray *Sworn in as New President Pro Tem of Senate*, BANNER GRAPHIC (Nov. 21, 2018), <https://www.bannergraphic.com/story/2568319.html> [<https://perma.cc/H6EN-3KAS>].

Criminal Law committee, and House Bill 1264, authored by Representative Jim Pressel (R), was referred to the House Committee on Public Health.⁴⁵⁴ Facing pressure early in the session, Senator Michael Young stated that he did not plan to hear the bill in his committee on the grounds that physicians like Cline would already be prosecuted under existing Indiana criminal law.⁴⁵⁵ In a news interview, Senator Young stated, “We can’t force a prosecutor to bring the case. Whether they say it is too difficult or not is not the issue . . . The issue is we already have laws, so we don’t need another one.”⁴⁵⁶ Seeking to broker a new path for S.B. 174, Senator Sandlin persuaded Senator Randall Head (R), chair of the Senate Judiciary Committee, to transfer the bill to his committee.⁴⁵⁷

But progress came with a price; before allowing the transfer, Senator Young elicited a promise from Judiciary Committee Chair Senator Head that the criminal elements would be removed from the bill.⁴⁵⁸ Senator Head stated, “The choice was no bill or something, and I chose something.”⁴⁵⁹ Cline’s doctor-conceived children opposed that change; one deemed it “deplorable” and stated, “He’s clearly not listening to our county prosecutors, who have spent years looking at the existing laws . . . and trying to come up with what avenue can we charge him.”⁴⁶⁰ The bill passed out of the Senate Judiciary

⁴⁵⁴ H.B. 1264, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019), <http://iga.in.gov/legislative/2019/bills/house/1264> [<https://perma.cc/TE3Y-2KBD>].

⁴⁵⁵ See Kelly Reinke, *Lawmakers Remove Criminal Penalty From Fertility Fraud Bill*, CBS4 (Jan. 23, 2019), <https://cbs4indy.com/2019/01/23/lawmakers-remove-criminal-penalty-from-fertility-fraud-bill/> [<https://perma.cc/V5YE-SQJM>].

⁴⁵⁶ See Tom Davies, *Indiana Doctor’s Offspring Pushing State Fertility Fraud Law*, ASSOCIATED PRESS NEWS (Jan. 23, 2019), <https://www.apnews.com/91f17c7b87fa4039b109bd871e656e62> [<https://perma.cc/B9B9-X6M6>].

⁴⁵⁷ See Shari Rudovsky, *‘I Was Raped 15 Times and Didn’t Even Know It’: Fertility Fraud Bill Advances*, INDIANAPOLIS STAR (Jan. 23, 2019), <https://www.indystar.com/story/news/2019/01/23/donald-cline-aftermath-fertility-fraud-bill-advances-indiana-senate/2656610002/> [<https://perma.cc/8HF3-NY9S>].

⁴⁵⁸ See Riley Eubanks, *Fertility Fraud Bill Loses Felony Element*, PHAROS TRIB. (Jan. 23, 2019), https://www.pharostribune.com/news/state_news/article_b405a5ee-6e2d-5de7-a474-8527a9c3a8a2.html [<https://perma.cc/LS4X-Z7ZP>].

⁴⁵⁹ See Rudovsky, *supra* note 457.

⁴⁶⁰ See Associated Press, *UPDATE: Indiana Doctor’s Offspring Pushing State Fertility Fraud Law*, INDIANAPOLIS BUS. J. (Jan. 23, 2019), <https://www.ibj.com/articles/72163-update-indiana-doctors-offspring-pushing-state-fertility-fraud-law> [<https://perma.cc/DTZ2-AFVM>].

Committee (10-0).⁴⁶¹ On February 21, 2019, in third reading on the Senate floor, the bill was amended to reinsert the criminal cause of action as well as a request for a “summer study” committee on fertility laws,⁴⁶² and was approved unanimously (49-0).⁴⁶³ The bill was referred to the House the following day.⁴⁶⁴ In the House, the bill was referred to the House Judiciary Committee, and was heard on April 1, 2019, where it was once again voted out of committee unanimously (12-0).⁴⁶⁵ Initially, the bill criminalized a health care professional’s misrepresentation relating to “a medical procedure, medical device, or drug; *or* human reproductive material.”⁴⁶⁶ The committee amended the bill to change the “or” to “and,” narrowing the felony element to *only* misrepresentations involving reproductive material.⁴⁶⁷ On April 8, 2019, the Senate approved the bill unanimously (93-0).⁴⁶⁸ The Governor signed the bill, and it took effect on July 1, 2019.⁴⁶⁹

B. Texas’s Fertility Fraud Bill

In early 2019, Eve Wiley and her mother, Margo Williams, approached Texas State Senator Joan Huffman (R) to author a bill on fertility fraud after Wiley learned that her mother’s fertility doctor had substituted his sperm for a donor that her mother and father had chosen from a sperm bank. Senate Bill 1259 specifies that it is sexual assault for a “health care services provider, who, in the course of performing an assisted reproduction

⁴⁶¹ See Rudovsky, *supra* note 457.

⁴⁶² S. Doc. No. MO017407/DI 106 (2019), <http://iga.in.gov/static-documents/e/b/1/5/eb154a38/SB0174.02.COMS.AMS006.pdf> [<https://perma.cc/C7HW-AJTB>].

⁴⁶³ ACTIONS FOR SENATE BILL 174, <http://iga.in.gov/legislative/2019/bills/senate/174#document-c3a982d5> [<https://perma.cc/78X8-WL8S>].

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

⁴⁶⁶ S.B. 174 §6(b)(2)(A), 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019), <http://iga.in.gov/static-documents/d/3/a/f/d3af2a5a/SB0174.04.COMH.pdf> [<https://perma.cc/G4FA-8Y2F>].

⁴⁶⁷ S.B. 174, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019), <http://iga.in.gov/static-documents/b/5/3/6/b536354a/SB0174.06.ENRH.pdf> [<https://perma.cc/SMA6-789A>].

⁴⁶⁸ ACTIONS FOR SENATE BILL 174, <http://iga.in.gov/legislative/2019/bills/senate/174#document-c3a982d5> [<https://perma.cc/78X8-WL8S>].

⁴⁶⁹ See Randy Spieth, *New Fertility Fraud Law Goes Into Effect in Response to Indiana Doctor*, Fox59 (July 1, 2019), <https://fox59.com/2019/07/01/new-fertility-fraud-law-goes-into-effect-in-response-to-indiana-doctor/> [<https://perma.cc/UGX9-MR72>].

procedure on the other person, uses human reproductive material from a donor knowing that the other person has not expressly consented to the use of material from that donor.”⁴⁷⁰ This act would carry a criminal penalty of a state jail felony, punishable between six months and two years in jail and a fine of up to \$10,000, and charges could be brought up to two years after the conduct was detected.⁴⁷¹ On April 8, S.B. 1259 was unanimously approved by the Senate Committee on Criminal Justice (6-0) and was referred to the House, which passed it unanimously on May 17, 2019.⁴⁷² It was signed into law by Governor Greg Abbott on June 4, 2019.⁴⁷³

CONCLUSION

In the 1994 movie *Seeds of Deception*, documenting the criminal activities of Cecil Jacobson, the agony of Jacobson’s victims is packaged as a painful but short morality play: unethical doctor harms patients, patients suffer, unethical doctor’s actions come to authorities’ attention, and unethical doctor is tried and found guilty. Unfortunately, civil and criminal cases against physicians who perpetrated illicit inseminations are unlikely to be resolved so 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 the illicit inseminations instead of some ancillary acts of deceit committed decades later. Civil cases such as those against Barwin and Mortimer 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.⁴⁷⁴ These cases are most likely to settle, however, producing no precedent for

⁴⁷⁰ An Act Relating to the Prosecution of the Offense of Sexual Assault, S.B. 2159, 86th Leg., Reg. Sess. (Tex. 2019), <https://capitol.texas.gov/tlodocs/86R/billtext/pdf/SB01259E.pdf#navpanes=0> [<https://perma.cc/TR5W-UD27>].

⁴⁷¹ See Garrett, *Fertility Fraud is Real*, *supra* note 82.

⁴⁷² An Act Relating to the Prosecution of the Offense of Sexual Assault, S.B. 2159, 86th Leg., Reg. Sess. (Tex. 2019), <https://capitol.texas.gov/tlodocs/86R/billtext/pdf/SB01259E.pdf#navpanes=0> [<https://perma.cc/TR5W-UD27>].

⁴⁷³ See Robert T. Garrett, *Dallas Woman’s Push to Make Fertility Fraud a Crime Results in New Law on the Books in Texas*, DALLAS MORNING NEWS (June 5, 2019), <https://www.dallasnews.com/news/texas-politics/2019/06/05/dallas-womans-push-make-fertility-fraud-crime-results-new-law-books-texas> [<https://perma.cc/GDE2-UXPR>].

⁴⁷⁴ See *supra* Section I.

holding physicians who commit such acts liable.⁴⁷⁵ Moreover, additional cases involving illicit insemination are likely to come to light through direct-to-consumer genetic testing, 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.

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 with the Attorney General and agonizing when a physician who used his own sperm to inseminate patients without their consent receives only a suspended sentence and a \$500 fine and keeps his medical license. 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? Why is it imperative for a state like Arizona to enact a bill like Senate Bill 1393, which amends state dissolution of marital property law to require that any embryos in a custody dispute be awarded to the “spouse who intends to allow the in vitro human embryos to develop to birth”—even though the couple likely chose another disposition option on their fertility clinic embryo disposition forms?⁴⁷⁶ Finally, what happens when other, more grievous harms are alleged, such as when the donor children of these unscrupulous physicians find that they have inherited genetic characteristics, like predispositions to serious hereditary diseases? Could they be compensated for the risks of passing these characteristics on to their offspring, the physicians’ grandchildren? In other areas of litigation like Diethylstilbestrol (DES) (a drug prescribed to pregnant women that was later linked to a rare vaginal cancer in female children) product liability cases, courts have limited the pharmaceutical manufacturers’ liability the first generation (although effects were also observed in grandchildren).⁴⁷⁷ That, then, is the only thing that is certain about these illicit insemination cases: They generate many questions and strong emotions, but few answers.

⁴⁷⁵ *See id.*

⁴⁷⁶ *See* ARIZ. REV. STAT. ANN. § 25-318.03 (2018).

⁴⁷⁷ *See* ABOUT DES, <https://www.cdc.gov/des/consumers/about/index.html> [<https://perma.cc/FVV7-DXP3>]; *Enright v. Eli Lilly & Co.*, 155 A.2d 64 (1990); *Grover v. Eli Lilly & Co.*, 591 N.E.2d 696 (1992).