

# “Dr., I Don’t Want Your Baby!”: Why America Needs a Fertility Patient Protection Act

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*ABSTRACT: For almost a century, fertility physicians have inseminated their patients with their own sperm, without the patients’ consent. The physicians are largely unscathed due to the near absence of state and federal regulation of the industry (it is self-regulating), stigma surrounding the procedure, and a lack of civil and criminal recourse for their actions. Due to the rise of easily accessible online DNA testing kits and websites, the conceived children have uncovered a horrifying truth: their mother’s fertility doctor is their biological father. As of September 2020, six states have criminalized this behavior in very different ways: misuse of gametes, sexual assault, deception, and reproductive battery. This Note proposes a federal act, the Fertility Patient Protection Act (the “Act”), encompassing elements of three different state statutes. The baseline penalty of the Act will be reproductive battery. There will also be a criminal deception provision that will be a fact-specific add-on penalty. The Act will additionally include a civil cause of action.*

I.	INTRODUCTION.....	906
II.	LIFTING THE VEIL OF SECRECY OVER ARTIFICIAL INSEMINATION AND ITS POTENTIAL FOR ABUSE .....	908
	A. BRIEF HISTORY .....	908
	B. UNCOVERING FERTILITY PHYSICIANS’ DISTURBING BEHAVIOR.....	913

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III.	THE NEED FOR UNIFORM LEGISLATION VIA A FEDERAL STATUTE .....	921
A.	<i>CURRENT STATUTORY TREATMENT OF INSEMINATION ABUSE</i> .....	922
B.	<i>CRIMINAL STATUTE COMPARISON</i> .....	927
1.	Deception vs. Sexual Assault .....	927
2.	Misuse of Gametes.....	930
3.	Reproductive Battery .....	930
C.	<i>CIVIL REMEDIES: WHICH IS BEST?</i> .....	931
IV.	FEDERAL ACT .....	931
A.	<i>CONGRESS HAS AUTHORITY TO PASS THIS ACT UNDER THE COMMERCE CLAUSE</i> .....	932
B.	<i>THE FERTILITY PATIENT PROTECTION ACT</i> .....	934
C.	<i>PROPOSED STATUTORY LANGUAGE</i> .....	936
D.	<i>ALTERNATIVE SOLUTIONS</i> .....	940
1.	California and Louisiana Specific Modification .....	940
2.	Civil Penalties as Child Support .....	940
3.	Uniform Act.....	941
4.	Every State Should Pass This Act.....	941
V.	CONCLUSION .....	941

## I. INTRODUCTION

The year is 1989. Jane Doe has been unable to conceive naturally with her partner. After years of frustration, she decides to pursue alternative means of conception and settles on using artificial insemination. Because of her partner's low sperm motility, she must use a sperm donor. She eventually finds the perfect match—Donor #3003, a college professor with blue eyes and brown hair just like her partner's. Nine months and a thousand dollars later, Jane gives birth to a beautiful little girl, Baby Doe. Eighteen years later, Baby Doe is told she was conceived artificially. Baby Doe reaches out to the sperm clinic to see if her mother's sperm donor, #3003, wants to meet. Fortuitously, he is willing, and they develop a wonderful friendship—he even walks her down the aisle at her wedding. Fast forward to 2017, Baby Doe submits her genetic information to 23andMe,<sup>1</sup> excited to see if she shares DNA with any other people inseminated with Donor #3003—the man she has been calling “Dad.” Much to her horror, the results show that she is not genetically related

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1. 23andMe is an online genetic testing service.

to Donor #3003 at all, but rather to her mother’s fertility doctor.<sup>2</sup> The worst part? There is absolutely nothing that she can do.<sup>3</sup>

Stories like this have unfortunately become commonplace with the rise of easily accessible online DNA testing.<sup>4</sup> Because artificial insemination is a self-regulating industry, there are few, if any, federal<sup>5</sup> or state<sup>6</sup> rules monitoring how a fertility doctor conducts an artificial insemination procedure. More concerning, there are no federal penalties,<sup>7</sup> and up until mid-2019,<sup>8</sup> there were no specific state criminal or civil penalties for this type of behavior, either.<sup>9</sup> As of September 2020, only four states have statutorily confronted doctors inseminating their own sperm into their patients, with two other states doing so more generally.<sup>10</sup> In the rest of the 44 states, this behavior goes largely unpunished.<sup>11</sup>

2. This story is factually similar to what happened in Texas with a patient of Dr. Kim McMorries. See generally Kyra Phillips, Cindy Galli, Megan Christie & Halley Freger, *Texas Woman Seeks to Change Law After DNA Test Reveals Shocking Truth About Her Genetic Family Tree*, ABC NEWS (May 3, 2019, 10:55 PM), <https://abcnews.go.com/US/texas-woman-seeks-change-law-dna-test-reveals/story?id=62809127> [<https://perma.cc/Sg2R-UKVQ>] (describing a patient unknowingly inseminated with her doctor’s sperm, and her daughter developing a relationship with the consented-to donor only to find out he was not her biological father).

3. There was no criminal legal recourse at the time this story was published. It should be noted, however, that Texas has since created a sexual assault statute to address it. See *infra* Section III.A. Names are omitted and the story is dramatized.

4. See *infra* Section II.B.

5. See generally Ariana Eunjung Cha, *The Children of Donor H898*, WASH. POST (Sept. 14, 2019, 3:06 PM) [hereinafter Cha 1], [https://www.washingtonpost.com/health/the-children-of-donor-h898/2019/09/14/dcc191d8-86da-11e9-a491-25df61c78dc4\\_story.html](https://www.washingtonpost.com/health/the-children-of-donor-h898/2019/09/14/dcc191d8-86da-11e9-a491-25df61c78dc4_story.html) [<https://perma.cc/2NgK-T6QX>] (delineating the FDA as the only federal regulator, and only to a small extent).

6. See Elizabeth L. Gibson, *Artificial Insemination by Donor: Information, Communication and Regulation*, 30 J. FAM. L. 1, 39 (1991).

7. See generally Sarah Zhang, *A Decades-Old Doctor’s Secret Leads to New Fertility-Fraud Law*, ATLANTIC (May 7, 2019) [hereinafter Zhang 1], <https://www.theatlantic.com/science/archive/2019/05/cline-fertility-fraud-law/588877> [<https://perma.cc/JRP2-3SG3>] (detailing how federal prosecutors attempted and failed to prosecute a fertility doctor due to a lack of applicable law).

8. The first statute of its kind went into effect July 1, 2019 in Indiana. See IND. CODE ANN. § 35-43-5-3 (West 2019).

9. Ariana Eunjung Cha, *Fertility Fraud: People Conceived Through Errors, Misdeeds in the Industry Are Pressing for Justice*, WASH. POST (Nov. 22, 2018, 3:46 PM) [hereinafter Cha 2], [https://www.washingtonpost.com/national/health-science/fertility-fraud-people-conceived-through-errors-misdeeds-in-the-industry-are-pressing-for-justice/2018/11/22/o2550abo-c81d-11e8-9b1c-a90f1daae309\\_story.html](https://www.washingtonpost.com/national/health-science/fertility-fraud-people-conceived-through-errors-misdeeds-in-the-industry-are-pressing-for-justice/2018/11/22/o2550abo-c81d-11e8-9b1c-a90f1daae309_story.html) [<https://perma.cc/J3AS-K8N5>] (“The law is not set up to handle claims like this. But that doesn’t mean it shouldn’t be.”).

10. See *infra* Section III.A. As of September 1, 2020, only Texas, Colorado, and Florida explicitly criminalized physician’s inseminating their sperm into their patients without consent. Indiana more generally criminalized the behavior but instituted a physician-specific civil cause of action against this behavior. California and Louisiana have more generally criminalized this behavior without mentioning physicians. *Id.*

11. *Id.*

This Note argues there needs to be both criminal and civil penalties for this behavior in the form of a federal act: The Fertility Patient Protection Act (the “Act”). The criminal penalties of the doctor’s actions should include reproductive battery and fertility deception.<sup>12</sup> This latter penalty will be fact specific. The Act will additionally include a civil cause of action, allowing victims an extra avenue of compensation.

This Note first discusses the background of artificial insemination, including the fertility abuse that has been perpetuated by physicians for over a century. Next, this Note examines how the increased use of easily accessible online DNA testing, in addition to other factors, has uncovered abuse by fertility physicians and caused some states to introduce statutes criminalizing this behavior. This Note then introduces the state fertility criminal and civil statutes that are currently in place and examine their pros and cons. Next, this Note discusses how, because of the interstate travel of patients and donor sperm, the Commerce Clause is triggered, granting Congress the authority to create a federal law criminalizing the doctors’ behavior. This Note then introduces a proposed federal act, including two criminal provisions mirroring Indiana and Florida’s legislation and one civil provision, mirroring Indiana’s legislation, with many additions. Finally, this Note presents alternative solutions.

## II. LIFTING THE VEIL OF SECRECY OVER ARTIFICIAL INSEMINATION AND ITS POTENTIAL FOR ABUSE

### A. BRIEF HISTORY

“Artificial insemination is the use of instruments to deposit semen in[to] a woman’s reproductive tract, either at the cervix or within the uterus.”<sup>13</sup> Women choose artificial insemination for a multitude of reasons. It is a useful alternative if the male partner is infertile,<sup>14</sup> for example due to “a vasectomy or . . . chemotherapy.”<sup>15</sup> Additionally, it is suitable when the couple wants “to avoid transmitting an unwanted genetic trait,”<sup>16</sup> if the male partner, for example, has a genetic disorder.<sup>17</sup> People seeking to start a family outside of the traditional cisgender opposite-sex paradigm, such as single women and

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12. Throughout this Note, “fertility deception” is synonymous with fertility misrepresentation/fraud. The term “deception” comes from Indiana’s fertility misrepresentation statute. See IND. CODE ANN. § 35-43-5-3.

13. Kara W. Swanson, *Adultery by Doctor: Artificial Insemination, 1890–1945*, 87 CHI.–KENT L. REV. 591, 592 (2012).

14. Erica Haines & Ken Daniels, *International Social Science Perspectives on Donor Insemination: An Introduction*, in DONOR INSEMINATION: INTERNATIONAL SOCIAL SCIENCE PERSPECTIVES 1, 2 (Ken Daniels & Erica Haines eds., 1998).

15. Judith N. Lasker, *The Users of Donor Insemination*, in DONOR INSEMINATION, *supra* note 14, at 8.

16. *Id.* at 12.

17. See Haines & Daniels, *supra* note 14, at 2.

members of the LGBTQ+ community, also use artificial insemination to conceive.<sup>18</sup>

Donor insemination is the use of artificial insemination with a donor sperm instead of the male partner’s sperm.<sup>19</sup> There are four types of artificial insemination, all of which can be used with donor sperm: intracervical insemination, intrauterine insemination, intrauterine tuboperitoneal insemination, and intratubal insemination.<sup>20</sup> Intrauterine insemination (“IUI”),<sup>21</sup> the most common procedure of the four, involves a doctor directly inserting a donor’s semen into the woman’s vagina.<sup>22</sup> The procedure is considered “the simplest and least expensive form of alternative conception.”<sup>23</sup> When comparing it to other methods of alternative conception,<sup>24</sup> “[i]t’s . . . far less invasive . . . and . . . require[s] little (if any) medication.”<sup>25</sup> It is a relatively quick procedure, “tak[ing] only a few minutes,” and as of 2018, costs only about \$800 without insurance.<sup>26</sup> The cons, however, are unfortunately reflected in the procedure’s “fairly low” success rate of 20 percent and “[t]he risk of multiples.”<sup>27</sup>

While donor sperm is known for its use with artificial insemination, specifically donor insemination, it is used for other types of assisted reproductive technology (“ART”) as well, such as in vitro fertilization (“IVF”).<sup>28</sup> IVF is when a woman’s eggs are fertilized in a lab with the sperm of either a “partner or a donor” and then the fertilized egg is implanted back

18. See Lasker, *supra* note 15, at 7.

19. Nicole Harris, *Artificial Insemination: Procedures, Costs, and Success Rates*, PARENTS (Apr. 23, 2019), <https://www.parents.com/getting-pregnant/infertility/treatments/artificial-insemination-procedures-costs-and-success-rates> [<https://perma.cc/4SXW-TYW2>].

20. Stephen Joseph, *Types of Artificial Insemination—Choosing What Is Right for You*, ADVANCED FERTILITY CARE, <https://www.azfertility.com/types-of-artificial-insemination> [<https://perma.cc/9SAQ-DP53>].

21. Nivin Todd, *Infertility and Artificial Insemination*, WEBMD (July 24, 2019), <https://www.webmd.com/infertility-and-reproduction/guide/artificial-insemination#1> [<https://perma.cc/M6AD-UY94>].

22. *Donor Insemination*, AM. PREGNANCY ASS’N (Apr. 24, 2012), <https://americanpregnancy.org/getting-pregnant/donor-insemination> [<https://perma.cc/7DDP-E4K2>].

23. Lasker, *supra* note 15, at 8; *IUI vs. IVF: Pros and Cons*, CONCEIVEABILITIES (Aug. 21, 2018) [hereinafter *IUI vs. IVF*], <https://www.conceiveabilities.com/about/blog/iui-vs-ivf-pros-and-cons> [<https://perma.cc/3GA8-LMTM>].

24. Such as in vitro fertilization (“IVF”).

25. See *IUI vs. IVF*, *supra* note 23.

26. See *id.* (comparing IUI to IVF, which costs approximately \$12,000 with insurance). However, it should be noted that IVF can also utilize sperm donor insemination.

27. See *id.*; see also *How Well IUI Works by Patient Type*, FERTILITYIQ, <https://www.fertilityiq.com/iui-or-artificial-insemination/how-well-iui-works-by-patient-type#iui-birth-rate-and-multiples-in-context> [<https://perma.cc/R9ZV-MNNQ>] (“Across all patients, IUI cycles have . . . multiples-per-pregnancy of 8–30%.”).

28. *Donor Sperm*, BOSTONIVF, <https://www.bostonivf.com/treatments/donor-sperm> [<https://perma.cc/D9YB-AYXK>].

into the woman.<sup>29</sup> This procedure is far more expensive than direct donor insemination, and can cost around \$15,000.<sup>30</sup>

Although the history of artificial insemination, specifically donor insemination, is not well-documented,<sup>31</sup> the practice dates back a couple centuries.<sup>32</sup> The first ever *known*<sup>33</sup> experiment concerning artificial insemination actually involved an animal.<sup>34</sup> In the mid-1700's, a scientist named Lazzaro Spallanzani, performed a successful artificial insemination procedure on “a female dog in heat.”<sup>35</sup> The first account of artificial insemination in a human was not published until 1909, “describ[ing] events in 1884.”<sup>36</sup> The procedure took place during a medical school class when the doctor took “sperm from ‘the best looking [class] member’” and inseminated a woman “who successfully conceived.”<sup>37</sup>

The history of artificial insemination is so sparsely documented because of the immense secrecy surrounding the procedure—secrecy that both patients and physicians are responsible for perpetuating. Physicians in the past, would “strongly encourage their patients to keep their [artificial insemination] experience . . . a secret from everyone.”<sup>38</sup> This “everyone” sometimes included the other member of the couple involved<sup>39</sup> and even “the obstetrician . . . deliver[ing] the baby.”<sup>40</sup> This secrecy has existed since the first documented human artificial insemination. In that instance, the woman had

29. *What is IVF?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/pregnancy/fertility-treatments/what-ivf> [<https://perma.cc/T7UZ-M7MD>].

30. *Id.*

31. See Erica Haimes, *The Making of ‘the DI Child’: Changing Representations of People Conceived Through Donor Insemination*, in DONOR INSEMINATION, *supra* note 14, at 56 (“[T]he element of secrecy involved prohibit[ed] . . . the publication of findings.” (citation omitted)).

32. Simone Bateman Novaes, *The Medical Management of Donor Insemination*, in DONOR INSEMINATION, *supra* note 14, at 108.

33. It is possible that there are many artificial insemination experiments that are not documented—possibly because they were failures. *Failed IUI*, MEDICOVER FERTILITY, <https://www.medicoverfertility.in/blog/failed-iui,192,n,5475> [<https://perma.cc/TWB7-BWXE>] (“Studies have shown that pregnancy rate for each natural cycle is about 4–5%, and when the cycle is stimulated with fertility drugs, the pregnancy rate is 7–16%.”).

34. See Novaes, *supra* note 32, at 108.

35. *Id.*

36. Haimes & Daniels, *supra* note 14, at 2.

37. *Id.*

38. Lasker, *supra* note 15, at 24.

39. Sarah Zhang, *The Fertility Doctor’s Secret: Donald Cline Must Have Thought That No One Would Ever Know. Then DNA Testing Came Along.*, ATLANTIC (Mar. 18, 2019, 5:23 PM) [hereinafter Zhang 2], <https://www.theatlantic.com/magazine/archive/2019/04/fertility-doctor-donald-cline-secret-children/583249> [<https://perma.cc/5JUQ-6L7B>].

40. Lasker, *supra* note 15, at 24.

no idea she was inseminated<sup>41</sup> because she was chloroformed.<sup>42</sup> The doctor only told the husband about the procedure after the fact, who “agreed to never tell his wife.”<sup>43</sup> Thus, “[t]he end[s] justified the means. The healthy baby justified the lie.”<sup>44</sup>

The immense secrecy surrounding artificial insemination arose from both practical and historical reasons. The former focuses most on the pragmatism of donor anonymity. “Anonymity has . . . made it easier for clinics [in the United States] to find willing donors.”<sup>45</sup> Not only the donor, but also the couple, may want to retain their anonymity to protect themselves against unwanted “intrusion by a third party.”<sup>46</sup> Another more socioemotional reason stems from “the desire of the parents to present themselves as a ‘normal’ family.”<sup>47</sup> This aspiration of normalcy roots itself both in the fear of the child “turning” on the non-biological parent<sup>48</sup> once the child discovers the father is not their biological dad, but also in the more archaic apprehension of public stigmatization following the procedure.<sup>49</sup>

This fear of stigma goes back to a deep-rooted and antiquated belief that artificial insemination is morally suspect.<sup>50</sup> Alternative conception was initially “akin to adultery,”<sup>51</sup> because the birth of the child did not take place via the usual method of husband–wife conception.<sup>52</sup> The stigma was also partially attributed to the fact that masturbation was necessary to procure the sperm—an act historically discouraged by societal standards and religious norms.<sup>53</sup>

41. Zhang 2, *supra* note 39.

42. Chloroform was used as an anesthetic. History.com Editors, *Ether and Chloroform*, HISTORY (Aug. 21, 2018), <https://www.history.com/topics/inventions/ether-and-chloroform> [<https://perma.cc/H6C6-HMJ7>].

43. Zhang 2, *supra* note 39.

44. *See id.*

45. Meghana Keshavan, “There’s No Such Thing as Anonymity’: With Consumer DNA Tests, Sperm Banks Reconsider Long-Held Promises to Donors,” STAT (Sept. 11, 2019), <https://www.statnews.com/2019/09/11/consumer-dna-tests-sperm-donor-anonymity> [<https://perma.cc/MKT8-73J3>]. In other countries, however, giving sperm donations anonymously is illegal. *Id.* (identifying “Australia, New Zealand, and the United Kingdom” as countries that prohibit the practice).

46. *See* Robert Snowden & Elizabeth Snowden, *Families Created Through Donor Insemination*, in DONOR INSEMINATION, *supra* note 14, at 49. Donor insemination contracts are outside the scope of this Note. For more information on these contracts, see generally Rachel Rebouché, *Contracting Pregnancy*, 105 IOWA L. REV. 1591 (2020).

47. Snowden & Snowden, *supra* note 46, at 46.

48. *See id.* at 47 (quoting a dad, “I’d be afraid perhaps he might turn against me”).

49. *See id.*

50. Novaes, *supra* note 32, at 109.

51. Ken Daniels, *The Semen Providers*, in DONOR INSEMINATION, *supra* note 14, at 79.

52. *See id.*

53. *See* Novaes, *supra* note 32, at 109 (“[T]he fact that masturbation was required to provide semen made the practice all the more suspect.”); *see also* Michael S. Patton, *Masturbation from Judaism to Victorianism*, 24 J. RELIGION & HEALTH 133, 133 (1985) (“Masturbation was condemned in Judaism and Christianity as the ‘secret sin’ and became the basis for social taboo as a sexual deviation in Western civilization.”).

Even the Catholic Church got involved in 1897, with the Vatican “condemn[ing] instrumental insemination as a violation of natural law.”<sup>54</sup>

The cloud of secrecy over the procedure can also be traced back to the physicians involved and the idea of “medical paternalism.”<sup>55</sup> “Given that many early semen providers were medical students, there was a sense in which the profession was . . . protecting itself and its members” by perpetuating the secrecy of the procedure.<sup>56</sup> By propagating this secrecy, doctors, to this day, retain an unhealthy amount of power over the entire procedure.<sup>57</sup>

Physicians have “crucial leverage in” the process<sup>58</sup> and have positioned themselves as “gatekeepers” by “impos[ing] their perception of the way infertility should be handled and . . . defin[ing] the situations in which [the] treatment may be legitimately provided.”<sup>59</sup> Doctors have also firmly established themselves as self-appointed “mediators” during the process, “mak[ing] it possible for semen transfer to [occur], without requiring the two parties to meet.”<sup>60</sup> Additionally, in many countries, physicians have even granted themselves the power to choose the anonymous donor.<sup>61</sup> “[C]ouples resorting to AID [artificial insemination by donor] have been heavily influenced by their doctors’ recommendations regarding secrecy.”<sup>62</sup> Furthermore, physicians self-regulate the process, and states allow this through the absence of regulation.<sup>63</sup>

By maintaining secrecy over donor insemination and appointing themselves power over the entire process, doctors, for almost a century,<sup>64</sup> have inseminated their own, non-consented-to sperm into their patients. They have done so, largely, without facing any substantive legal repercussions. One notable example of how the secrecy around the procedure enabled doctors to escape accountability occurred in the late 1950s. A New Zealand doctor allegedly forgot to procure the donor semen for a scheduled insemination procedure.<sup>65</sup> As a solution, he “use[d] his own semen,”<sup>66</sup> without ever informing the couple, even after the patient conceived.<sup>67</sup> The couple saw the

54. Novaes, *supra* note 32, at 109.

55. See Daniels, *supra* note 51, at 79 (“The origin of keeping semen providers in obscurity can be traced to medical paternalism . . .”).

56. *Id.*

57. See *id.* (“[T]he control of the process remain[s] firmly in the hands of the doctors.”).

58. See Novaes, *supra* note 32, at 106.

59. See *id.*

60. *Id.* at 111.

61. See *id.* at 120.

62. Gibson, *supra* note 6, at 39.

63. See *id.*

64. Unfortunately, there is no exact timetable. It is likely that doctors did this before the first recorded time. See Haimes, *supra* note 31, at 56.

65. Daniels, *supra* note 51, at 77–78.

66. *Id.* at 78.

67. See *id.*

doctor again years later wanting more sperm from the same donor.<sup>68</sup> The doctor, having had a vasectomy by that time, told the couple “that the ‘donor’ was no longer available.”<sup>69</sup>

B. UNCOVERING FERTILITY PHYSICIANS’ DISTURBING BEHAVIOR

“The results of a 1987 survey conducted by the federal Office of Technology Assessment . . . showed that as many as 2% of the fertility doctors polled had . . . us[ed] their own sperm to inseminate [their] patients.”<sup>70</sup> Since that poll, new technological developments have led to easily accessible online DNA testing.<sup>71</sup> Now, more than ever, people who are curious about their genealogical family trees have affordable access to information.<sup>72</sup> “These are boom times for consumer DNA tests. The number of people who have mailed in their saliva for genetic [testing] doubled during 2017, reaching a total of more than 12 million.”<sup>73</sup> With more people searching for their ancestors and siblings, it is no surprise that these abuses are being uncovered with an unprecedented fervor.

In addition to the rise of DNA testing, some scholars believe that a generational shift has produced a suitable environment for identifying previous abuses of fertility physicians.<sup>74</sup> Instances of this behavior, once thought forever private, are now rapidly surfacing.<sup>75</sup>

The generation whose 50-year-old secrets are now being unearthed could not have imagined a world of \$99 mail-in DNA kits . . . . [T]here’s going to be a lot of shocking results coming out . . . . [I]n 20 years’ time . . . our expectations of privacy will have caught up with the new reality created by the rise of consumer DNA tests.<sup>76</sup>

In addition to “the rise of direct-to-consumer genetic testing,” another shift in the past five years has allowed for the “sharp spike in fertility fraud

68. *Id.*

69. *Id.*

70. Marlene Cimon, *Infertility Doctor is Found Guilty of Fraud, Perjury*, L.A. TIMES (Mar. 5, 1992, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1992-03-05-mn-4702-story.html> [<https://perma.cc/5P4J-67BX>]. There are no surveys that are more current.

71. Such as 23andMe and Ancestry.com to name a few.

72. See Sarah Zhang, *When a DNA Test Shatters Your Identity*, ATLANTIC (July 17, 2018) [hereinafter Zhang 3], <https://www.theatlantic.com/science/archive/2018/07/dna-test-misattributed-paternity/562928> [<https://perma.cc/D54X-6CRS>].

73. *Id.*

74. *Id.*

75. *See id.*

76. *Id.*

cases nationwide”: the “decreasing stigma towards infertility.”<sup>77</sup> Unlike in the past, where artificial insemination was taboo, the procedure has become normalized and commonplace, with women increasingly using artificial insemination to reproduce.<sup>78</sup> Thus, as more families are utilizing the procedure and discovering the abuses, they are attempting to find justice in the legal system, with little to no success, as evidenced below.

The first highly-publicized case of a doctor inseminating his patients was Dr. Cecil Jacobson, who was prosecuted in the 1990s.<sup>79</sup> DNA tests ultimately uncovered “that [he] had fathered 15 children for his patients”<sup>80</sup> without obtaining their consent to use his sperm.<sup>81</sup> The prosecution in his case estimated “that [he] may have fathered as many as 75 children.”<sup>82</sup> He was convicted “on 52 counts of fraud and perjury.”<sup>83</sup> His punishment was a five-year prison sentence, and the loss of his medical license.<sup>84</sup>

Due to the enormous public use of online DNA testing, more doctors’ abuses are continuously being discovered. In 2018, Dr. Donald Cline from Indiana was prosecuted for procedures he performed in the ‘70s and ‘80s.<sup>85</sup> Thanks to genetic testing sites,<sup>86</sup> “approximately fifty half-siblings have been identified.”<sup>87</sup> In some of the instances, Dr. Cline explicitly misrepresented the sperm, telling his patients that they were getting their husbands’ sperm when

77. Leila Ettachfini, *Doctors Can Legally Inseminate Patients with Their Own Sperm in Most States*, VICE (Apr. 22, 2019, 2:58 PM), [https://www.vice.com/en\\_us/article/pajdn7/fertility-fraud-insemination-laws-donald-cline](https://www.vice.com/en_us/article/pajdn7/fertility-fraud-insemination-laws-donald-cline) [<https://perma.cc/7CN4-N24G>].

78. For example:

The global artificial insemination market is estimated to grow . . . and reach the market value around USD 3.0 billion by 2026. The use of artificial insemination technology in the workforce has increased as infertility increases, women become more preferred for childbirth and the amount of subfertile pairs who need assistance with childbirth has increased.

Acumen Rsch. & Consulting, *Artificial Insemination Market Size Worth US\$ 3 Bn by 2026*, GLOBENEWSWIRE (June 28, 2019, 10:00 AM), <https://www.globenewswire.com/news-release/2019/06/28/1876088/0/en/Artificial-Insemination-Market-Size-Worth-US-3-Bn-by-2026.html> [<https://perma.cc/J42U-H4QP>].

79. *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/2RY6-P625>].

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. Jody Lynee Madeira, *Uncommon Misconceptions: Holding Physicians Accountable for Insemination Fraud*, 37 LAW & INEQ. 45, 48 (2019).

85. See Mihir Zaveri, *A Fertility Doctor Used His Sperm on Unwitting Women. Their Children Want Answers.*, N.Y. TIMES (Aug. 30, 2018), <https://www.nytimes.com/2018/08/30/us/fertility-doctor-pregnant-women.html> [<https://perma.cc/UC8C-556A>].

86. *Id.*

87. Madeira, *supra* note 84, at 50.

ultimately he was providing his own.<sup>88</sup> While one would assume that his gross misconduct would result in serious criminal penalties, his sentencing was infuriatingly weak—he “was given a suspended sentence and fined \$500.”<sup>89</sup>

A 2018 lawsuit against Dr. John Boyd Coates of Vermont alleges that “40 years ago . . . [he] switched out sperm samples donated by an unnamed medical student and substituted his own.”<sup>90</sup> Another 2018 lawsuit filed was against Dr. Gerald Mortimer, for mixing in his own semen after convincing his patient that they would have a better chance of conception by using an 85/15 percent “mixture” of the husband’s semen with that of an “anonymous” donor.<sup>91</sup> The couple was evidently mortified when “their daughter’s genetic sample . . . matched . . . Mortimer’s,”<sup>92</sup> after receiving multiple “assurances”<sup>93</sup> from Mortimer “that the donor would be an anonymous college student meeting certain physical characteristics of [the husband].”<sup>94</sup>

One of the most heartless deceptions, discovered in mid-2018, was the result of fertility doctor Kim McMorries in Texas.<sup>95</sup> The fertility clinic told the conceived child in question that a specific donor, #106, was her father; the clinic later putting the two in contact.<sup>96</sup> The woman ended up forming a close relationship with the *alleged* donor.<sup>97</sup> It wasn’t until much later that DNA tests conclusively proved that the donor was not her real father, but rather Dr. McMorries was.<sup>98</sup> The doctor’s excuse was that he had been taught by his “mentors” to mix a donor’s sperm sample with the husband’s, sometimes even with “two donor samples.”<sup>99</sup> He rationalized his behavior, asserting that at the

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88. Zaveri, *supra* note 85.

89. See Madeira, *supra* note 84, at 50.

90. M.L. Nestel, *Fertility Doctor Sued by Couple for Using His Own Sperm to Impregnate Women*, NEWSWEEK (Dec. 29, 2018, 2:18 PM), <https://www.newsweek.com/fertility-doctor-ob-gyn-sperm-lawsuit-dr-john-boyd-coates-dna-genetic-test-1274540> [<https://perma.cc/H6S3-W4HZ>].

91. See Ellen Trachman, *Fertility Doctor Tries to Squirm His Way Out of Liability*, ABOVE LAW (Sept. 5, 2018, 10:14 AM) [hereinafter Trachman 1], <https://abovethelaw.com/2018/09/fertility-doctor-tries-to-squirm-his-way-out-of-liability> [<https://perma.cc/3DCX-LJE2>].

92. See Madeira, *supra* note 84, at 50–51.

93. Trachman 1, *supra* note 91.

94. *Id.*

95. See Phillips et al., *supra* note 2; Lise Olsen, *Conception Deception*, TEX. OBSERVER (Sept. 15, 2020, 8:00 AM), <https://www.texasobserver.org/fertility-fraud-east-texas-kim-mcmorries> [<https://perma.cc/3YWK-2CB6>].

96. See Phillips et al., *supra* note 2.

97. See *id.*

98. See *id.*

99. See *id.*

time, him and his physician peers never thought that they would get caught.<sup>100</sup> As of September 2020, Dr. McMorries is still practicing medicine.<sup>101</sup>

In March 2019, a suit was filed against a Californian physician anonymously named “G.H.”<sup>102</sup> Allegedly, in 1987, after promising his patient an anonymous donor sperm, he instead inseminated his own sperm into her without her consent.<sup>103</sup> The woman born from this deception found out in 2018 via genetic testing.<sup>104</sup> Disturbingly, up until then, G.H. was her gynecologist and routinely “conducted pelvic examinations on his own daughter.”<sup>105</sup> Also in 2019, a lawsuit was filed against Dr. Paul Jones from Colorado.<sup>106</sup> The suit alleges Dr. Jones “secretly used his own sperm to impregnate a woman, fathering her two daughters without consent.”<sup>107</sup> Through DNA websites, the daughters since “found at least five half-siblings they previously had no idea existed.”<sup>108</sup> Six other families have since filed lawsuits against Dr. Jones.<sup>109</sup> His response: “anonymity should benefit both sides, including the sperm donor.”<sup>110</sup>

In September 2020, two lawsuits were filed against California fertility doctors. One was against Dr. Michael Kiken, who “represented in 1979 that the sperm donor would be Christian and would resemble [the patient’s] husband, who was Norwegian, Irish and English.”<sup>111</sup> Instead, the conceived child ended up being half Ashkenazi Jew, half Irish and French, and a carrier for Tay-Sachs disease.<sup>112</sup> The patient went back to Dr. Kiken a year later for

100. *Id.* (“The thinking at that time was that if the patient got pregnant, there was no way to know which sperm affected the conception . . . No one ever considered the effect of genetic testing 32 years later.” (alteration in original)).

101. *Id.*; Olsen, *supra* note 95.

102. Jody Lynecé Madeira, *Understanding Illicit Insemination and Fertility Fraud, From Patient Experience to Legal Reform*, 39 COLUM. J. GENDER & L. 110, 127 (2020).

103. *Id.*

104. *Id.*

105. *Id.*

106. Tamar Lapin, *Fertility Doctor Secretly Used Own Sperm to Impregnate Woman: Suit*, N.Y. POST (Oct. 29, 2019, 10:23 PM), <https://nypost.com/2019/10/29/fertility-doctor-secretly-used-own-sperm-to-impregnate-woman-suit> [<https://perma.cc/9663-N7WD>].

107. *Id.*

108. *Id.*

109. *Paul Jones, Grand Junction Fertility Doctor, Responds to Lawsuit*, CBS DENV. (Jan. 25, 2020, 11:24 PM) [hereinafter *Paul Jones, Grand Junction Fertility Doctor*], <https://denver.cbslocal.com/2020/01/25/paul-jones-grand-junction-fertility-lawsuit> [<https://perma.cc/F84A-6DG5>].

110. *Id.*

111. Debra Cassens Weiss, *Fertility Doctors Used Their Sperm for Pregnancies, Contrary to Patients’ Wishes*, 2 *Lawsuits Allege*, ABA J. (Sept. 18, 2020, 10:59 AM), <https://www.abajournal.com/news/article/2-suits-allege-fertility-docs-used-their-own-sperm-for-in-vitro-fertilization-contrary-to-patients-wishes> [<https://perma.cc/QV2E-3GDU>].

112. *Id.*; Lisa Fernandez, *California Mother Files Fertility Fraud Suit, Alleging Doctor Used His Own Sperm to Impregnate Her*, FOX29: PHILA. (Sept. 17, 2020), <https://www.fox29.com/news/california-mother-files-fertility-fraud-suit-alleging-doctor-used-his-own-sperm-to-impregnate-her> [<https://perma.cc/5V64-US67>]; Jenni Fink, *Doctor Used His Own Sperm Instead of Anonymous*

help conceiving a second child “and [was] once again promised it would be the same anonymous donor used for [her] daughter’s conception.”<sup>113</sup> DNA tests showed that the two siblings had been conceived using the same donor sperm—Dr. Kiken.<sup>114</sup> The second lawsuit was against Dr. Phillip Milgram. Dr. Milgram “told [his patient] that the anonymous sperm donor was a physician from the University of California at San Diego who had good health.”<sup>115</sup> The suit alleges that Dr. Milgram, at the time of the insemination, was regularly abusing drugs and suffering from multiple mental health disorders.<sup>116</sup> Both disturbing genetic discoveries were learned through 23andMe.<sup>117</sup>

Due to online testing, doctors are not the only ones forced to face a new reality. Sperm clinics must also deal with the now virtual impossibility of donor anonymity.<sup>118</sup> Clinics are struggling to respond adequately, some turning to legal recourse.<sup>119</sup> For example, one clinic has “order[ed] a woman to cease and desist efforts to contact a long-ago donor she had identified after using 23andMe.”<sup>120</sup> But what about the legal recourse for patients uncovering details from the online sites, implicating their doctors as their child’s father? Currently, legal remedies are limited at best.<sup>121</sup>

A huge problem perpetuating the secrecy of the industry, and the amount of power given to the physicians, is the lack of state and federal regulation. The industry itself is primarily self-regulated.<sup>122</sup> As a result, there are few requirements that sperm clinics must follow, and most are just recommendations.<sup>123</sup> As of 2016, U.S. sperm clinics were “not required to update donor . . . information, to share any information . . . receive[d], or to maintain records that accurately report the number of children produced by a given donor—one man could produce dozens of offspring.”<sup>124</sup> Additionally,

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*Donor, Fertility Fraud Lawsuit Alleges*, NEWSWEEK (Sept. 17, 2020, 11:01 AM), <https://www.newsweek.com/doctor-used-his-own-sperm-instead-anonymous-donor-fertility-fraud-lawsuit-alleges-1532624> [<https://perma.cc/UD6C-TYY2>].

113. Fink, *supra* note 112.

114. *Id.*

115. Weiss, *supra* note 111.

116. *Id.*

117. *Id.*

118. See Keshavan, *supra* note 45.

119. See *id.*

120. *Id.*

121. See *infra* Section III.A.

122. See Alexa Tsoulis-Reay, *There Are No More Secrets in Sperm Donation*, CUT (Nov. 22, 2016), <https://www.thecut.com/2016/11/there-are-no-more-secrets-in-sperm-donation.html> [<https://perma.cc/4Y4S-U88V>]; see also Keshavan, *supra* note 45 (“There are about two dozen sperm banks in the United States; each operates independently and with minimal government oversight.”).

123. The American Society for Reproductive Medicine (“ASRM”) “produces ethics and practice guidelines” for fertility physicians to follow. AM. SOC’Y FOR REPROD. MED., OVERSIGHT OF ASSISTED REPRODUCTIVE TECHNOLOGY 3 (2010), <https://www.asrm.org/globalassets/asrm/asrm-content/about-us/pdfs/oversiteofart.pdf> [<https://perma.cc/4TXD-2Y6U>].

124. See Tsoulis-Reay, *supra* note 122.

because the clinics “self-report” any medical history that they do have, there is the very real “possibility of passing on mental illnesses and congenital defects that were undisclosed, undiagnosed, or unknown.”<sup>125</sup>

There is a stark lack of state regulations, with only a handful of states having any sort of directives regarding the artificial insemination industry.<sup>126</sup> “The main purpose of the first legislation regarding AID was to clarify the status of children born to married persons as a result of the procedure,”<sup>127</sup> and state statutes still contain this type of language today.<sup>128</sup> Current state statutes are also primarily concerned with “protecting a donor from parental responsibilities,”<sup>129</sup> with keeping donor confidentiality,<sup>130</sup> and with broad patient consent of having the procedure.<sup>131</sup>

There is still hope, however, that states will pass legislation to more heavily regulate this industry. In a move in the right direction, in 2018, “Washington and Vermont became the first states to require clinics to collect donors’ medical history and to disclose that information to any resulting child.”<sup>132</sup> As of 2018, California and Rhode Island had also introduced similar bills.<sup>133</sup>

In addition to a lack of state regulation, the only federal oversight of the industry is by the Federal Drug Administration (“FDA”), and is currently “limited to screening for sexually transmitted diseases.”<sup>134</sup> In 2018, the FDA rejected a petition seeking more federal regulations, which would have included “limit[ing] the number of births per donor . . . and requir[ing] donors to provide post-conception medical updates,” claiming that it was not their job to do so.<sup>135</sup> Unfortunately, this rejection has resulted in a number of unpleasant outcomes.

A lack of federal and state oversight has caused staff members of artificial insemination clinics to often develop the program guidelines themselves.<sup>136</sup>

125. *Id.*

126. See Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 163 (2017).

127. Gibson, *supra* note 6, at 35.

128. See, e.g., ALASKA STAT. ANN. § 25.20.045 (West 2020).

129. See, e.g., ALA. CODE § 26-17-702 cmt. (2020).

130. See, e.g., ARIZ. REV. STAT. ANN. § 36-441 (2020).

131. See, e.g., CONN. GEN. STAT. ANN. § 45a-772(b) (West 2007) (requiring the “consent of the husband and wife desiring the utilization of [artificial insemination by donor] for the purpose of conceiving a child or children”).

132. Ariana Eunjung Cha, *44 Siblings and Counting*, WASH. POST (Sept. 12, 2018) [hereinafter Cha 3], <https://www.washingtonpost.com/graphics/2018/health/44-donor-siblings-and-counting/> [https://perma.cc/ZG5H-K62F].

133. See *id.*

134. See Cha 1, *supra* note 5.

135. See Cha 3, *supra* note 132.

136. See Robert Blank, *Regulation of Donor Insemination*, in DONOR INSEMINATION, *supra* note 14, at 134 (citing Ken Daniels & Karyn Taylor, *Formulating Selection Policies for Assisted Reproduction*, 37 SOC. SCI. & MED. 1473, 1475-76 (1993)).

This can lead to an overall lack of uniformity among sperm banks, allowing more mistakes to occur. For example, a majority of sperm banks do not verify assertions made by sperm donors, such as whether they have higher education degrees or had learning disabilities throughout their childhood.<sup>137</sup> In addition, more shockingly, the only official guideline mandated by the industry, in regard to genetic testing of the donor sperm, is for cystic fibrosis.<sup>138</sup> While most clinics claim they independently test for other genetic disorders, some significant heritable conditions, like autism spectrum disorder, are completely ignored.<sup>139</sup>

While the lack of regulation points to an overwhelming need for legislation, there may be a reason for the hesitation. One theory is that politicians prefer not to dirty their hands regulating assisted reproduction when they are already tackling issues like “abortion and surrogacy.”<sup>140</sup> Additionally, some scholars have argued that imposing governmental regulations within a “physician-patient relationship” could “threaten individual liberty and medical privacy.”<sup>141</sup> There is also the fear that legislation in this industry could “freeze[] technology in place.”<sup>142</sup> Furthermore, some critics worry that additional regulations could make the procedure “substantially more expensive.”<sup>143</sup>

The lack of criminal and civil penalization for physician wrongdoing is just as important as the lack of regulation. Currently only four states—Colorado, Indiana, Texas, and Florida—specifically penalize physicians inseminating their own sperm into their patients without express consent.<sup>144</sup> Punishment for criminal conduct is otherwise left to the physician-run medical board in each state.<sup>145</sup> Some states, ironically, have penalties regarding animal artificial insemination, but none whatsoever related to

137. See Cha 1, *supra* note 5.

138. See *id.*

139. See *id.* A recent study found that autism spectrum disorder is approximately 80 percent heritable. See Dan Bai, Benjamin Hon Kei Yip & Gayle C. Windham, *Association of Genetic and Environmental Factors with Autism in a 5-Country Cohort*, 76 JAMA PSYCHIATRY 1035, 1036 (2019).

140. See Fox, *supra* note 126, at 163; see also Michael Ollove, *States Not Eager to Regulate Fertility Industry*, PEW CHARITABLE TRS. (Mar. 18, 2015), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/3/18/states-not-eager-to-regulate-fertility-industry> [<https://perma.cc/96LJ-PFZC>] (“Lawmakers are wary of touching assisted reproduction, Darnovsky said, because of the incendiary politics that surround the issue of abortion, which touches on conception and embryos.”).

141. See Blank, *supra* note 136, at 136 (citation omitted).

142. See *id.* at 135.

143. See Gibson, *supra* note 6, at 38.

144. IND. CODE ANN. § 35-43-5-3 (West 2019); TEX. PENAL CODE ANN. § 22.011 (West 2019).

145. See, e.g., ARK. CODE ANN. § 17-95-410 (West 2019); see also CAL. BUS. & PROF. CODE § 2220.5(a) (West 2010) (“The Medical Board of California is the only licensing board that is authorized to investigate or commence disciplinary actions relating to physicians . . .”).

human artificial insemination.<sup>146</sup> Given the immense secrecy surrounding the industry and lack of federal and state oversight, it is no surprise physicians are getting away with inseminating their own sperm into their patients without consent. “Despite our innate moral sense that lying to your patients and using your own sperm is wrong, it’s actually very difficult to prosecute as a crime given the passage of time and gaps in state laws. And it’s even difficult to prove civil liability.”<sup>147</sup>

The difficulty in prosecuting primarily arises from the lack of proper characterization of the doctor’s behavior. Prosecutors don’t know what to qualify this crime as—is it assault, fraud, battery, a civil tort, a breach of contract?<sup>148</sup> The list of possibilities is seemingly endless and yet the crime may not perfectly fit the elements of any of those offenses. As a result, the punishment for doctors inseminating their own sperm into their patients can be as weak as the loss of their medical license and a small fine.<sup>149</sup>

As of September 1, 2020, no physician who inseminated his own sperm into his unwitting patients has been convicted under a statute that criminalizes this specific conduct.<sup>150</sup> A prime example is the aforementioned Dr. Cline case. He was not prosecuted for inseminating his own sperm into his patients, but rather “for obstructing justice due to initially lying to investigators about his actions.”<sup>151</sup> His penalty was even more pathetic, where he was able to completely avoid jail time because Indiana did not have a fertility fraud statute at the time of his prosecution.<sup>152</sup> By contrast, the one

146. See, e.g., MO. ANN. STAT. § 267.655 (West 2013) (stating “[t]he following civil penalties may be imposed,” followed by a long list of civil penalties related to animal artificial insemination fraud); see also, e.g., *id.* § 267.660 (codifying “[a]ny person violating any provision . . . shall be deemed guilty of a misdemeanor” in relation to animal artificial insemination fraud).

147. Ellen Trachman, *Surprise! The DNA Test Revealed That Your Mom’s Fertility Doctor is Your Father*, ABOVE LAW (Mar. 20, 2019, 3:42 PM) [hereinafter Trachman 2], <https://abovethelaw.com/2019/03/surprise-the-dna-test-revealed-that-your-moms-fertility-doctor-is-your-father/?rf=1> [<https://perma.cc/78LZ-C8RW>].

148. In the New York case, *Andrews v. Keltz*, the plaintiffs sued the defendants for sperm contamination, using a bundle of different claims. *Andrews v. Keltz*, 838 N.Y.S.2d 363, 365 (Sup. Ct. 2007) (“This is a medical malpractice action and negligence action which also includes causes of action for lack of informed consent, breach of contract, fraud and assault and battery.”).

149. Fertility specialist Donald Cline, who had inseminated at least 50 of his patients, was only fined \$500 and given a yearlong probation. Greg Portz, *Fertility Fraud; Pharma’s ‘Patient’ Advocacy; Mass. Nursing Homes Fined*, MEDPAGE TODAY (Mar. 20, 2019), <https://www.medpagetoday.com/publichealthpolicy/ethics/78690> [<https://perma.cc/RWA2-R2WK>]. “He also lost his medical license, a symbolic gesture since he stopped practicing in 2009.” *Id.*

150. See Madeira, *supra* note 84, at 54; see also Adam Liptak, *When Dad Turns Out to be the Fertility Doctor*, N.Y. TIMES MAG. (Dec. 11, 2019), <https://www.nytimes.com/2019/12/11/magazine/fertility-fraud-sperm.html?smtyp=cur&smid=tw-nytmag> [<https://perma.cc/ZU8W-J3WL>] (“Every lawsuit to date by former patients and their children has been unsuccessful . . .”).

151. Trachman 2, *supra* note 147.

152. Tom Davies, *No Jail for Fertility Doctor Who Lied About Using Own Sperm*, AP NEWS (Dec. 14, 2017), <https://apnews.com/128c7319ef774b3ab90b6c99e0986c5d> [<https://perma.cc/HQ55->

case resulting in a criminal penalty was that of Dr. Jacobson. However, his five-year sentence was based on mail fraud, wire fraud, travel fraud, and perjury.<sup>153</sup> At the time, no fertility fraud statutes existed.

In addition to the lack of a proper legal characterization and penalty for the doctors’ behavior, some prosecutors may be “reluctant” to get involved.<sup>154</sup> They fear that prosecuting the doctor and essentially “[t]aking sides,” would “label a child ‘damaged’ and make an implicit judgment about the relative worth of one life over another.”<sup>155</sup> However, if a doctor violated a federal law, this rationale should not supersede pursuing justice when deciding to prosecute.<sup>156</sup>

Judges have also thrown out these cases before the doctors can be punished, likely because until recently, there had not been a sufficient statute governing this behavior. For example, in the previously mentioned case involving Dr. Mortimer, the daughter conceived from the fraudulent sperm sued the doctor.<sup>157</sup> The federal judge dismissed the claim because the daughter “was never a patient of [the] Dr.[’s]” and thus he “did not breach any duty of care to [her], because [the doctor] owed her none.”<sup>158</sup> With prosecutors reluctant to prosecute, and judges dismissing these cases, it is no wonder few states have successfully created statutes criminalizing this behavior; the need for a federal act is increasingly apparent.

### III. THE NEED FOR UNIFORM LEGISLATION VIA A FEDERAL STATUTE

Through the urging of the victims and the victims’ children, four states, Colorado, Indiana, Texas, and Florida, have statutorily confronted the issue of physicians inseminating their sperm into their patients without the patient’s consent.<sup>159</sup> Two other states, California and Louisiana, have fertility statutes referring to similar behavior, but fail to explicitly mention physician wrongdoing.<sup>160</sup> Additionally, Nebraska and Ohio have introduced bills to

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M6SK] (“Dr. Donald Cline was given a one-year suspended sentence after pleading guilty to two counts of obstruction of justice.”).

153. Robert F. Howe, *Jacobson Guilty on All 52 Counts of Fraud, Perjury*, WASH. POST (Mar. 5, 1992), <https://www.washingtonpost.com/archive/politics/1992/03/05/jacobson-guilty-on-all-52-counts-of-fraud-perjury/672bb1d9-2e4a-4a28-9748-3a02coccoc18> [<https://perma.cc/HD4L-YY5D>].

154. Cha 2, *supra* note 9.

155. *Id.*

156. Hence, one reason why it is so important to create a federal act to criminalize this behavior.

157. See Trachman 1, *supra* note 91; Liptak, *supra* note 150.

158. See Liptak, *supra* note 150.

159. See *infra* Section III.A.

160. See *infra* Section III.A.; Elaine S. Povich, *Fighting Fertility Fraud: New State Laws Go After Misuse of Sperm*, PEW CHARITABLE TRS. (July 3, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/07/03/fighting-fertility-fraud-new-state-laws-go-after-misuse-of-sperm> [<https://perma.cc/FB6T-NHL8>] (explaining California’s statute “doesn’t single out physicians like the Indiana and Texas laws do”).

penalize the act, but they have not yet been made into law as of September 2020.<sup>161</sup> This Part will predominately focus on Colorado, Florida, Indiana, and Texas' laws by examining their differences, strengths, and shortcomings.

#### A. CURRENT STATUTORY TREATMENT OF INSEMINATION ABUSE

Presently, only six states have tackled the issue of insemination abuse: California, Louisiana, Colorado, Texas, Indiana, and Florida. For the most part, each state has handled the issue differently. California and Louisiana criminalize only certain aspects of fertility misconduct without explicitly mentioning wrongdoing by the doctor inseminating his own sperm.<sup>162</sup> In contrast, Colorado, Texas, Indiana, and Florida explicitly refer to fertility physicians in their fertility statutes. Colorado recently created a cause of action called "misuse of gametes" in which a conviction results in both criminal and civil liability.<sup>163</sup> Texas criminalizes this behavior as sexual assault;<sup>164</sup> Indiana classifies it as "deception," and like Colorado, provides both criminal and civil penalties.<sup>165</sup> Florida created a new crime entirely, reproductive battery, paired with a civil penalty and a victim-friendly statute of limitations.<sup>166</sup> There are pros and cons to categorizing fertility abuse as misuse of gametes, reproductive battery, sexual assault or deception.

The California statute states the following: "It shall be unlawful for anyone to knowingly implant sperm, ova, or embryos, through the use of assisted reproduction technology, into a recipient who is not the sperm, ova, or embryo provider, without the signed written consent of the sperm, ova, or embryo provider and recipient."<sup>167</sup> Louisiana's statute is structurally similar to California's statute.<sup>168</sup> As mentioned above, neither of these explicitly cover when physicians inseminate their own sperm into their patients, and therefore cannot serve as effective models for squarely confronting physician

161. H.B. 486, 133d Gen. Assemb., Reg. Sess. (Ohio 2020); Legis. B. 748, 106th Legis., Reg. Sess. (Neb. 2020) (indefinitely postponed).

162. CAL. PENAL CODE § 367g (West 2011); LA. STAT. ANN. § 14:101.2 (1999).

163. COLO. REV. STAT. ANN. § 18-13-131 (West 2020); *id.* § 13-21-132.

164. *See* TEX. PENAL CODE ANN. § 22.011 (West 2019).

165. IND. CODE ANN. § 35-43-5-3 (West 2019); *see id.* § 34-24-5-2.

166. FLA. STAT. ANN. § 784.086 (West 2020).

167. CAL. PENAL CODE § 367g.

168. The Louisiana statute states:

A. No person shall knowingly use a sperm, ovum, or embryo, through the use of assisted reproduction technology, for any purpose other than that indicated by the sperm, ovum, or embryo provider's signature on a written consent form. B. No person shall knowingly implant a sperm, ovum, or embryo, through the use of assisted reproduction technology, into a recipient who is not the sperm, ovum, or embryo provider, without the signed written consent of the sperm, ovum, or embryo provider and recipient. C. Knowing violation of the provisions of this Section shall be grounds for immediate revocation of the violator's professional license.

LA. STAT. ANN. § 14:101.2 (1999).

abuse. More importantly, neither of these statutes adequately cover all of the possible insemination scenarios, containing too many loopholes for physicians to defend that their behavior does not fit the statute’s elements. For example, if the patient explicitly consented to an anonymous donor, there would be no violation of these statutes because technically the physician was representing his sperm anonymously. Also, the categorizations of the fertility abuse as “Other Injuries to Persons” or “Offenses Affecting the Public Sensibility” do not represent the significance of the crime.<sup>169</sup>

Moreover, because the California and Louisiana statutes do not explicitly criminalize a physician’s abusive behavior, their statutory language will not be included in this Note’s proposed Act. In contrast, the Colorado, Indiana, Texas, and Florida statutes specifically reference physician-fertility misconduct. Thus, these statutes more appropriately reflect the physician insemination issue.

The Colorado statute provides a three-fold cause of action: civil, criminal and state physician licensing. A civil and criminal cause of action results “if a health care provider, in the course of performing or assisting with an assisted reproduction procedure, knowingly uses gametes from a donor without the express consent of the patient to use the donor’s gametes.”<sup>170</sup> The criminal action titled “misuse of gametes” results in a class 6 felony if convicted.<sup>171</sup> In Colorado, a class 6 felony carries only a sentence of one year to 18 months in prison.<sup>172</sup> The civil liability, if convicted, provides the plaintiff liquidated damages in the amount of \$50,000 or compensatory damages,<sup>173</sup> and allows “a separate cause of action for each child born as the result of the assisted reproduction procedure.”<sup>174</sup> Additionally, the Colorado legislature made

169. *Id.*; CAL. PENAL CODE § 367g. Given the statute’s categorization in the state’s penal code, it appears as though the California legislature was close to categorizing this behavior as sexual assault but failed to explicitly make it so. The state lists the statute under title 9 of the California Penal Code which in full reads “Of Crimes Against the Person Involving Sexual Assault, and Crimes Against Public Decency and Good Morals,” but the legislature ultimately put this provision into the “Other Injuries to Persons” chapter. CAL. PENAL CODE § 367g.

170. *HB20-1014: Misuse of Human Reproductive Material*, COLO. GEN. ASSEMBLY, <https://leg.colorado.gov/bills/hb20-1014> [<https://perma.cc/P6J9-H3SW>]. The civil statute specifies the action is “against a health care provider who, in the course of performing or assisting an assisted reproduction procedure on a patient, knowingly uses gametes from a donor that the patient did not expressly consent to.” COLO. REV. STAT. ANN. § 13-21-132(2) (West 2020). The criminal statute specifies, “[a] health care provider commits misuse of gametes if the health care provider knowingly treats or assists in the treatment of a patient through assisted reproduction by using gametes from a donor that the patient did not expressly consent to.” *Id.* § 18-13-131(1).

171. *Id.* § 18-13-131.

172. *Id.* § 18-1.3-401(V)(A).

173. *Id.* § 13-21-132(3) (“A plaintiff who prevails in an action pursuant to this section is entitled to reasonable attorney fees and either: (a) All damages reasonably necessary to compensate the plaintiff for any injuries suffered as a result of the health care provider’s actions, including but not limited to emotional or mental distress; or (b) Liquidated damages of fifty thousand dollars.”).

174. *Id.* § 13-21-132(4).

changes to its medical practice licensing laws. A “misuse of gametes” criminal conviction is grounds for discipline<sup>175</sup> that can result in a denial of the physician’s medical license.<sup>176</sup>

Like Colorado’s “misuse of gametes,” Florida’s statute also creates a new crime: “reproductive battery.”<sup>177</sup> The statute states that “[a] health care practitioner may not intentionally transfer into the body of a recipient human reproductive material or implant a human embryo of a donor, knowing the recipient has not consented to the use of the human reproductive material or human embryo from that donor.”<sup>178</sup> The statute makes this crime a third degree felony, unless the “health care practitioner . . . is the donor”—in which case it is a felony of the second degree.<sup>179</sup> Under Florida law, a felony of the second degree includes a \$10,000 fine<sup>180</sup> and a prison sentence up to 15 years.<sup>181</sup> In addition, the law’s statute of limitations is victim-friendly since it “does not begin to run until the date on which the violation is discovered and reported to law enforcement or any other governmental agency.”<sup>182</sup> The statute also establishes that patient consent to an anonymous donor is not a defense to reproductive battery.<sup>183</sup> Additionally, under Florida law, general health professionals, physicians, and osteopathic medicine practitioners who commit reproductive battery are now subjected to disciplinary action.<sup>184</sup> The discipline can result in permanent license revocation and a fine up to \$10,000 per separate offense.<sup>185</sup>

Unlike Colorado and Florida, Texas does not create a new crime, but instead uses sexual assault as the felony. The statute states that it is sexual assault when “a health care services provider . . . 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.*”<sup>186</sup> This offense is a felony punishable by 180 days to two years in prison and a fine up to \$10,000.<sup>187</sup>

175. *Id.* § 12-255-120(hh).

176. *Id.* § 12-255-121(2)(a)(I).

177. FLA. STAT. ANN. § 784.086 (West 2020).

178. *Id.* § 784.086(2).

179. *Id.* § 784.086(2)(b).

180. *Id.* § 775.083(1)(b). The fine is reduced to \$5000 for a third-degree felony. *Id.* § 775.083(1)(c).

181. *Id.* § 775.082(6)(d). The prison term is reduced to a five-year maximum sentence for a felony of the third degree. *Id.* § 775.082(6)(e).

182. *Id.* § 784.086(3).

183. *Id.* § 784.086(4).

184. *Id.* § 456.072(1)(pp) (health professionals generally); *id.* § 458.331(1)(ww) (physicians); *id.* § 459.015(yy) (those practicing osteopathic medicine).

185. *Id.* § 456.072(2)(d), (6).

186. TEX. PENAL CODE ANN. § 22.011(b)(12) (West 2019) (emphasis added).

187. *See id.*; *id.* § 12.35.

Additionally, if convicted, the doctor must register as a sex offender.<sup>188</sup> This crime’s statute of limitations is two years from the discovery date.<sup>189</sup> As shown, this statute requires that the patient must *expressly* consent to the use of the particular donor sperm inseminated. Under this statute, the mens rea element relies on the doctor’s knowledge that the patient did not expressly consent, and the actus reus element is the intentional insemination of the doctor’s own sperm.

While Texas focused more on the sexual component of the behavior, Indiana narrowed in on the misrepresentation aspect of the crime. The Indiana criminal fertility “deception” statute states that “[a] person who . . . with *intent to defraud*, misrepresents the identity of the person or another person or the identity or quality of property . . . commits deception.”<sup>190</sup> The statute makes it a felony “if the misrepresentation relates to: (A) a medical procedure, medical device, or drug; and (B) human reproductive material.”<sup>191</sup> The legislature fails to explicitly include fertility doctors as the perpetrators of the crime and just says “person,” which is unfortunate as those appear to be the main offenders.<sup>192</sup> This statute is also not concerned with whether the patient consented. Instead, the legislature focuses on categorizing the illicit behavior as fraud; the mens rea element is the intent to defraud the patient via misrepresenting the donor sperm.

In addition to its criminal statute, Indiana implemented a “civil fertility fraud”<sup>193</sup> statute to allow the victim even more compensation. Unlike Indiana’s criminal statute, Indiana’s civil statute does explicitly mention a physician defendant. The statute permits either the original patient, the original patient’s spouse, or the conceived child to sue the physician, and explicitly states that the cause of action arises from a healthcare provider inserting his own sperm into the patient without consent.<sup>194</sup> The statute allows for compensatory and punitive damages or \$10,000 in liquidated damages.<sup>195</sup> The civil statute additionally provides a generous statute of limitations of five

188. Jacqueline Mroz, *Their Mothers Chose Donor Sperm. The Doctors Used Their Own.*, N.Y. TIMES (Aug. 26, 2019), <https://www.nytimes.com/2019/08/21/health/sperm-donors-fraud-doctors.html> [<https://perma.cc/5TRT-2UJ3>].

189. Robert T. Garrett, ‘*Very Validating*’: Texas House Advances Dallas Woman’s Bill to Make Fertility Fraud a Crime, DALL. MORNING NEWS (May 17, 2019, 1:52 PM), <https://www.dallasnews.com/news/politics/2019/05/17/very-validating-texas-house-advances-dallas-woman-s-bill-to-make-fertility-fraud-a-crime> [<https://perma.cc/BG3K-DMXM>].

190. IND. CODE ANN. § 35-43-5-3(a)(6) (West 2019) (emphasis added).

191. *Id.* § 35-43-5-3(b)(2).

192. *See supra* Section II.B.

193. IND. CODE ANN. § 34-24-5-1 to 34-24-5-6 (“Civil Fertility Fraud”).

194. *Id.* § 34-24-5-2 (stating that a specified party “may bring an action against a health care provider who *knowingly or intentionally* treated the woman for infertility by using the *health care provider’s own spermatozoon* or ovum, *without the patient’s informed written consent* to treatment using the spermatozoon or ovum” (emphasis added)).

195. *Id.* § 34-24-5-4.

years from the date of discovery.<sup>196</sup> The ability to have five, full years after discovery to prosecute is significant, especially for patients who made the unfortunate genetic discovery years before this statute was enacted and will still get their day in court.

The penalties of the four statutes are comparable but contain serious differences. The Texas and Indiana felonies result in six months to two years—two-and-a-half years in Indiana—if convicted and up to a \$10,000 fine.<sup>197</sup> However, in Indiana, defendants may petition the court to have their level 6 felony “converted to a [c]lass A misdemeanor,”<sup>198</sup> which is not more than one year in prison and up to a \$5,000 fine.<sup>199</sup> Thus, this procedural loophole cuts the penalty in half, which victims and advocacy groups argue is not enough of a punishment.<sup>200</sup> In Texas, rather, in addition to the monetary fine and imprisonment, the physicians who used their own sperm to inseminate their patients “must register as sex offenders.”<sup>201</sup> This presents an expanded, long-lasting punishment.

Certain aspects of Colorado and Florida’s statutes also merit some comment. In Colorado, the prison term is approximately equal in length to that of Indiana and Texas. However, Colorado’s civil penalty of \$50,000 is five times more than any other individual state’s monetary fine. Similarly, although Florida’s \$10,000 fine is the same as Indiana and Texas’, its

196. *Id.* § 34-11-2-15 (“Sec. 15. (a) Except as provided in subsection (b), an action for civil fertility fraud . . . must be commenced not later than: (1) ten (10) years after the eighteenth birthday of the child; or (2) if subdivision (1) does not apply, twenty (20) years after the procedure was performed. (b) An action for civil fertility fraud that would otherwise be barred under this section may be commenced *not later than five (5) years after the earliest of the date on which:* (1) the person first discovers evidence sufficient to bring an action against the defendant through DNA (deoxyribonucleic acid) analysis; (2) the person first becomes aware of the existence of a recording . . . that provides evidence sufficient to bring an action against the defendant; or (3) the defendant confesses to the offense.” (emphasis added)).

197. Elizabeth Byrne, *Texas House Passes Bill Classifying Fertility Fraud as Sexual Assault*, TEX. TRIB. (May 17, 2019), <https://www.texastribune.org/2019/05/16/texas-house-bill-fertility-fraud-crime> [<https://perma.cc/6gHL-U75N>]; see IND. CODE ANN. § 35-50-2-7(b). While it may initially appear that the Indiana fertility fraud statute makes the act a Level 6 felony, depending on when the crime occurred—before or after 2014—the sentence is only six months to two-and-a-half years long, “with the advisory sentence being one (1) year,” along with a maximum fine of \$10,000. IND. CODE ANN. § 35-50-2-7(b).

198. *See id.* § 35-50-2-7(f).

199. *Id.* § 35-50-3-2.

200. Meghan Keneally, ‘*Inappropriately Light Sentences*’ in *Sexual Assault Cases Can Hurt Reporting of Future Crimes: Experts*, ABC NEWS (Dec. 20, 2018, 3:59 AM), <https://abcnews.go.com/US/inappropriately-light-sentences-sexual-assault-cases-hurt-reporting/story?id=59748226> [<https://perma.cc/BDG3-R7JE>] (“[A]side from letting the perpetrators walk free or serve minimal jail time, [overly lenient] sentences can also send a message to victims that it is not worth trying to go through the justice system . . .”).

201. Mroz, *supra* note 188; Cristin Schmitz, *Wrongful Impregnation of Patients with Fertility Doctors’ Own Sperm Raises Novel Criminal Law Questions, Experts Say*, LAW.’S DAILY (Apr. 30, 2018, 10:39 AM), <https://www.thelawyersdaily.ca/articles/6418> [<https://perma.cc/2C4L-B9RJ>].

maximum prison sentence of 15 years is at least six times longer than the other three states’ maximum sentences.

### B. CRIMINAL STATUTE COMPARISON

Having a criminal penalty as the foundation of this Note’s proposed Act is critical. Civil penalties alone are insufficient because they do not adequately express society’s condemnation of what should be considered abhorrent behavior. Only criminal penalties can effectively do that. In choosing the optimal statutory foundation to use for this Note’s Act, this Section next examines the four states’ categorizations of the criminal behavior, and then each state’s civil causes of action as possible additional penalties under this Note’s proposed Act.

#### 1. Deception vs. Sexual Assault

In first comparing Indiana and Texas’ treatment of the issue, there are a plethora of reasons for and against criminalizing this behavior as deception instead of sexual assault. At first glance, the behavior of the fertility doctor appears to mirror the legal definitions of deception and misrepresentation.<sup>202</sup> The doctor is deceiving his patient who likely believes that the donor sperm is from someone she chose from a list, when in reality it is from the man performing the insemination procedure. An attorney in support of this categorization, Canadian civil litigator Joanna Birenbaum, argues that “fraud or [even] breach of trust” is the best criminal pathway as it is ultimately an authority figure abusing his position of “trust to deceive and to convert someone else’s reproductive material to his own ends.”<sup>203</sup>

Although classifying the physician’s criminal behavior as deception, as Indiana does, seems to fit that definition, this categorization arguably dehumanizes the procedure. Artificial insemination, even though it is a medical procedure, is still an intimate undertaking, and the consequences personally affect the respective lives of the patients and their families. University of Calgary law professor Lisa Silver agrees, asserting that while categorizing this behavior as “[f]raud and/or false pretenses are . . . possibilities, . . . they ‘just don’t seem to reflect the disturbing nature of

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202. The legal definition of “deceit” is: “deliberate and misleading concealment, false declaration, or artifice.” *Deceit*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/deceit#legalDictionary> [<https://perma.cc/3YEL-RQ3Y>]. The legal definition of “misrepresentation” is: “an intentionally or sometimes negligently false representation made verbally, by conduct, or sometimes by nondisclosure or concealment and often for the purpose of deceiving, defrauding, or causing another to rely on it detrimentally.” *Misrepresentation*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/legal/misrepresentation> [<https://perma.cc/LE3V-36JZ>]. Even though the Indiana statute is explicitly called “Deception,” the language of the statute includes the word, “misrepresents,” as well. Thus, in the rest of this Note, the two words will be used interchangeably, but are both referring to the “Deception” statute.

203. Schmitz, *supra* note 201.

[this] arrogant conduct.”<sup>204</sup> Professor Silver continues, stating that “fraud is [usually] directed toward *depriving people of money and property*, and is not equipped to underline societal condemnation for acts such as these, which deprive someone of their *self-worth and bodily integrity*.”<sup>205</sup> While the physician’s conduct is certainly disingenuous, by solely labeling their behavior as deception or misrepresentation, the victim may feel that the state legislature is trivializing their injury by equating it to a monetary dispute.

Rather than deception, a substantial number of academics believe that sexual assault is actually the proper categorization due to its deterrence effect. For example, one attorney argues, “[g]iven the ways in which society often trivializes sexual misconduct, particularly when perpetrated against women, the criminal law [of sexual assault] has an important role to play in publicly denouncing and deterring” physician fertility abuse.<sup>206</sup> A doctor on trial for sexual assault would likely be a stronger warning to other fertility physicians against this type of behavior, than a doctor on trial for fraud charges.

In addition to its deterrence effect, critics view categorizing the behavior as sexual assault appropriate because the criminal act is sexual by nature. Indiana University law professor Jody Madeira, “who advocated for the” passage of the Indiana fertility fraud “deception” bill,<sup>207</sup> actually prefers the direction that Texas took by classifying the act as sexual assault.<sup>208</sup> She asserts: “The Texas [statute] gets to the heart of what [the doctor’s behavior] is: . . . [literally] inserting . . . some part of himself into [a] woman’s bodily cavity, betraying her autonomy, and . . . inserting . . . his own genetic lineage into her family tree—against her will.”<sup>209</sup> Professor Madeira argues that a doctor “masturbat[ing] . . . in a nearby room” to collect his semen and then implanting his semen directly into his patient ultimately does sexualize the procedure.<sup>210</sup>

However, there are also a significant number of academics opposed to classifying this criminal behavior as sexual assault. For example, some scholars argue that the Texas statute “is a step too far,”<sup>211</sup> and “conflicts with the spirit and letter of the law that supports family formation through the use of sperm donors.”<sup>212</sup> They contend that this statutory treatment sexualizes assisted

204. *Id.* (third alteration in original).

205. *Id.* (emphasis added).

206. *See id.*

207. *See* Zhang 1, *supra* note 7.

208. *See* Ettachfimi, *supra* note 77.

209. *Id.* (emphasis added). Texas legislator, Stephanie Klick, agrees that this procedure is sexualized by the doctors the moment they penetrate their patients with the medical device and insert their own genetic material. *See* Mroz, *supra* note 188.

210. Madeira, *supra* note 84, at 58.

211. *See* Mroz, *supra* note 188.

212. Ellen Trachman, 2 States Pass Laws to Reduce Doctor Creepiness, ABOVE LAW (June 12, 2019, 5:44 PM), <https://abovethelaw.com/2019/06/2-states-pass-laws-to-reduce-doctor-creepiness/?rf=1> [<https://perma.cc/AgN7-UK94>].

conception, a procedure that is “asexual by design.”<sup>213</sup> Others critique this classification by arguing against muddying up the “already deeply messy” criminal law of sexual assault.<sup>214</sup> Also, sexual assault cases have a very low conviction rate—less than one percent.<sup>215</sup> Because there is stigma associated with being a convicted sex offender, juries are often reticent to convict for fear of “ruin[ing] the poor man’s life forever.”<sup>216</sup>

Other academics, such as the leader of the American Society for Reproductive Medicine’s (“ASRM”) ethics committee, believe that applying the sexual assault language of Texas’ fertility statute “and imposing the ramifications that [sexual] assault imposes, is highly problematic and more harmful than helpful.”<sup>217</sup> For example, if a physician makes a mistake “and grabs the wrong vial,” this conduct could still result in the doctor having to register as a sex offender in Texas.<sup>218</sup> The ASRM ethics committee leader is additionally worried that the potentially severe ramifications of a possible mistake may result in doctors too afraid to practice fertility medicine in the states with those penalties.<sup>219</sup>

Besides classification differences, the Indiana and Texas statutes handle patient consent differently—one discusses it while the other entirely disregards it.<sup>220</sup> The Texas statute specifies that the patient must expressly consent to the insemination of the donor sample.<sup>221</sup> The Indiana criminal fertility statute does not even mention consent.<sup>222</sup> A lack of express consent from the patient regarding the donor in question is the primary issue, and thus it is necessary that consent is included in any future proposed statutory language.

213. *See id.*

214. *See* Schmitz, *supra* note 201.

215. Liza Anderson, *Why Are We So Bad at Prosecuting Sexual Assault?*, DALL. MORNING NEWS (Sept. 15, 2019, 2:00 AM), <https://www.dallasnews.com/opinion/commentary/2019/09/15/why-are-we-so-bad-at-prosecuting-sexual-assault> [<https://perma.cc/2VAH-T79U>].

216. MELISSA S. MORABITO, LINDA M. WILLIAMS & APRIL PATTAVINA, *DECISION MAKING IN SEXUAL ASSAULT CASES: REPLICATION RESEARCH ON SEXUAL VIOLENCE CASE ATTRITION IN THE U.S.* 93 (2019) (emphasis omitted).

217. *See* Mroz, *supra* note 188.

218. *Id.* (“[A] jury might find that the physician knew *or should have known* that the material was not what the patient selected.” (emphasis added)).

219. *Id.*

220. IND. CODE ANN. § 35-43-5-3 (West 2019) (no consent required); TEX. PENAL CODE ANN. § 22.011 (West 2019) (consent required).

221. *See* TEX. PENAL CODE ANN. § 22.011(b)(12). This is important with doctors claiming anonymity. For example, Dr. Paul Jones argued that his patients gave consent to his “anonymous” sperm because they consented to an anonymous donor. *See Paul Jones, Grand Junction Fertility Doctor, supra* note 109.

222. IND. CODE ANN. § 35-43-5-3.

## 2. Misuse of Gametes

Even more tame than Indiana's use of "deception," Colorado's phrasing of "misuse of gametes," with its scientific-sounding moniker, is too far removed from the actual disturbing behavior of the medical professional committing the egregious act. Additionally, misuse is hardly an adequate description for what the physician is doing.<sup>223</sup> He is not just improperly using the sperm or not using it as intended, he is specifically inseminating his patient with his own genetic material without her knowledge. Thus, this phrase should not be included in this Note's Act. However, Colorado's criminal statute does have two specific redeeming qualities that Indiana's does not: express patient consent of the donor sperm, and the statute explicitly mentions health care providers as potential defendants.<sup>224</sup>

## 3. Reproductive Battery

Florida's criminal statute is the best of the four states because it covers a wide range of potential scenarios while avoiding the criticisms of the other state statutes. It neither categorizes the behavior as sexual assault nor the less-serious crimes of deception or misuse of gametes. Instead, the statute is classified as a new crime, reproductive battery. Florida's statute also contains two felony tiers to represent how different fact patterns can change the penalty, with the doctor inseminating his own sperm resulting in the harshest punishment.

Critics of categorizing the behavior as battery have voiced concern that the crime's elements do not properly apply to fertility abuse.<sup>225</sup> For example, under Indiana law, criminal battery is when "a person who knowingly and intentionally . . . in a rude, insolent, or angry manner places any bodily fluid or waste on another person."<sup>226</sup> Indiana's battery statute would not be applicable to fertility abuse because that act is typically not done in a rude, angry manner. Florida eases that worry since its statute's elements fit somewhere between sexual assault and criminal battery. Also, critics, including law professor Judy Madeira, worry that it could be difficult to convince a jury that battery resulted if the patient had consented to an anonymous sperm donor.<sup>227</sup> However, Florida's statute explicitly outlines that consent to an anonymous sperm donor is not a defense to the crime.

While categorizing the behavior as battery would appease some, supporters of the sexual assault classification might feel frustrated that

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223. According to *Black's Law Dictionary Online*, *misuse* is equivalent to "[a] good, substance, privilege, or right used improperly, unforeseeably, or not as intended." *Misuse*, LAW DICTIONARY, <https://thelawdictionary.org/misuse> [<https://perma.cc/WXU2-79W6>].

224. COLO. REV. STAT. ANN. § 18-13-131 (West 2020).

225. Madeira, *supra* note 84, at 57.

226. *Id.* (alteration in original) (quoting IND. CODE §35-42-1(c) (2018)).

227. *Id.*

reproductive battery does not accurately represent the sexualized nature of the behavior. By virtue of its name, however, reproductive battery depicts the forced and non-consented-to insemination of the physician’s semen into his patient’s reproductive organs. Thus, arguably, while not explicitly calling the behavior sexual assault, Florida’s reproductive battery statute still gets to the heart of the crime: a betrayal of a woman’s reproductive autonomy by forcing her to conceive a child from a donor she did not agree to. Additionally, it is arguable that this categorization would remove the stigma associated with sexual assault cases and lead to more convictions than if the crime was labeled as sexual assault.

### C. CIVIL REMEDIES: WHICH IS BEST?

Indiana and Colorado’s civil remedies are arguably superior to the others. Indiana explicitly titles the civil cause of action “civil fertility fraud” which encompasses one significant aspect of the action—physicians deceiving their patients.<sup>228</sup> However, Indiana’s penalty of up to \$10,000 in liquidated damages is not enough to compensate the victims, nor are Texas or Florida’s civil remedies. The victims are forced to accept the severe deceit they endured by the physicians they trusted, and the sons and daughters of the victims have to come to terms with being “the product of [their] mother’s abuser.”<sup>229</sup> Additionally, like with the most recent lawsuit filing in California, the doctor may pass on a heritable genetic disorder like Tay-Sachs, leaving irreparable damage.<sup>230</sup> The Colorado civil cause of action resulting in a \$50,000 fine in liquidated damages or whatever the appropriate compensatory damages, thus appears to be a more sufficient amount to compensate the victims.

### IV. FEDERAL ACT

There needs to be a federal act to standardize this behavior’s criminal and civil liability. This Part first discusses what language and remedies need to be included in the Act. Next, this Part broadly examines why Congress has the authority to pass this Act. Then, this Part introduces the proposed Act before discussing alternative solutions.

As a starting point, the Act should include language mirroring Florida’s statute by classifying the behavior as reproductive battery. However, because in many scenarios the doctor is also explicitly misrepresenting the sample to the patient, language similar to the Indiana “deception” statute should

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228. According to *Black’s Law Dictionary Online*, *fraud* is equivalent to “some deceitful practice or willful device, resorted to with intent [sic] to deprive another of his right, or in some manner to do him an injury. As distinguished from [sic] negligence, it is always positive, intentional.” *Fraud*, LAW DICTIONARY, <https://thelawdictionary.org/fraud> [<https://perma.cc/WV85-6GPD>].

229. Fernandez, *supra* note 112 (“‘He secretly used his own sperm,’ [the victim] said of what happened in 1978. ‘Now I have to know that he violated me and that my children, who I love dearly, are the result of his disgusting conduct.’”).

230. Fink, *supra* note 112.

also be included. The proposed Act needs both reproductive battery and deception criminal provisions because categorizing this behavior as solely one or the other does not cover every potential situation of fertility abuse. If the Act only covered deception, the physician may be able to argue some loopholes. For example, if the patient had requested an anonymous donor, the doctor could argue that he fits into this category.<sup>231</sup> Or, if the patient had requested a donor sperm who is a doctor with brown hair and brown eyes, like our hypothetical physician, the doctor could argue that he fits this description and is consequently not misrepresenting the sperm. Thus, by having reproductive battery as the baseline felony of the Act, the prosecution can more easily convict these physicians who might slip through the cracks of a deception statute.

Although Indiana's deception statute is not alone sufficient,<sup>232</sup> it should still be used on a fact-specific basis along with Florida's reproductive battery statute. For example, if the patient was promised donor #1001, who was a blue-eyed, blonde-hair astronaut, but instead received the fertility doctor's semen, this should be classified as both reproductive battery and fraudulent deception. Thus, when a doctor inseminates his own (or another non-consented-to person's) sperm *and* misrepresents the sperm, the prosecution can utilize both provisions of the Act, increasing the sentence.

Finally, it is important that the Act also incorporates a civil cause of action, ideally similar to Indiana's civil fertility fraud statute. The civil provision should also include Colorado's civil penalty, but instead of compensatory damages or \$50,000 in liquidated damages, it should just include compensatory damages or a flat \$50,000 fine. This is needed to considerably increase the potential monetary penalty and allow the penalty to be punitive<sup>233</sup>, creating a significant deterrent and punishment. Also, there should be no way to bar a victim pursuing civil remedies if they have already pursued criminal recourse and vice versa.<sup>234</sup>

#### A. CONGRESS HAS AUTHORITY TO PASS THIS ACT UNDER THE COMMERCE CLAUSE

Congress likely has authority to pass this Act under the Commerce Clause<sup>235</sup> due to the interstate travel of the fertility patients and donor

231. "As to the consent or lack thereof, obtaining a jury verdict might be difficult because Cline could claim that his former patients consented to receive anonymous donations of sperm and would not, have known the identity of their sperm donor." Madeira, *supra* note 84, at 58.

232. This Note is arguing for an overall reproductive battery classification rather than solely using a misrepresentation label for the health care practitioner's actions.

233. Liquidated damages will not be enforced if punitive. *Liquidated Damages: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/liquidated-damages> [<https://perma.cc/H3Y3-R6Q5>].

234. See IND. CODE ANN. § 34-24-5-6 (West 2019).

235. A detailed analysis of the Commerce Clause is outside the scope of this Note. For more discussion, see generally *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964), both holding that the Commerce Clause was

sperm.<sup>236</sup> While there is less documentation about interstate travel for donor insemination like IUI, people travel extensively to find the cheapest IVF clinic.<sup>237</sup> Because it is more expensive for patients using donor sperm for their IVF procedure,<sup>238</sup> there is an even greater incentive to travel out of state to find affordable care. To add to the influx of travel, some specific states and clinics offer patients partial compensation of the treatment’s cost if they go to their specific clinic.<sup>239</sup> Sometimes, interstate travel is due to a patient wanting to use a particular doctor as well.<sup>240</sup> It stands to reason that if patients are already willing to travel out of state for procedures, as more states enact criminal fertility statutes, it is more likely patients will elect to have procedures in the states whose statute(s) they prefer. Ultimately this will result in extensive forum shopping.<sup>241</sup> Additionally, sperm samples frequently travel across state lines before they are eventually received by the patient.<sup>242</sup> Thus, even if the sperm sample is coming from the proper donor and not the doctor, it is a matter of interstate commerce when the sample crosses a state line. Congress would therefore be justified in promulgating a federal criminal

properly used, partially dependent on the fact that interstate travel was involved. It should be noted, however, that the Supreme Court’s interpretation of the Commerce Clause is dependent on the views of the current sitting Court, and historically, is subject to change with new Justices.

236. Megan Leonhardt, *Women Are Traveling Far and Wide for Affordable IVF—Here’s Why It’s So Expensive*, CNBC (Aug. 13, 2019, 3:09 PM), <https://www.cnn.com/2019/08/13/women-are-traveling-far-and-wide-for-affordable-ivf.html> [https://perma.cc/HE93-TT45].

237. “[T]housands of women each year . . . opt to travel to clinics in other states (and sometimes other countries) in search of affordable in vitro fertilization . . . .” *Id.* As previously mentioned, IVF can include the use of a sperm donor.

238. *Id.* (“Women using an egg or sperm donor . . . should expect to pay more.”). This is compared to those using the sperm of a spouse. *Id.*

239. Katie Kindelan, *The Crippling Cost of Infertility: Here’s What You Need to Know About Resources, Organizations That Help*, GOOD MORNING AM. (Apr. 22, 2019), <https://www.goodmorningamerica.com/wellness/story/crippling-cost-infertility-resources-organizations-62358334> [https://perma.cc/953X-K6DM] (“Certain hospitals, foundations [for example, one in Chicago] and even states, such as New York, now offer grants and scholarships to help cover the cost of infertility treatments.”). Thus, people are more eager to travel out of state to find places doing this.

240. See Sarah Fowler, *Why This Mom Is Traveling from Illinois to Mississippi to See a Madison Fertility Doctor*, CLARION LEDGER (Feb. 20, 2019, 11:50 AM), <https://www.clarionledger.com/story/news/2019/02/20/mississippi-fertility-doctor-preston-parry-offers-hope-iui-ivf-in-vitro-fertilisation/2881773002> [https://perma.cc/A8ZH-BEJN].

241. For example, if Jane Doe is from State A, which only provides civil recourse, and the physician-defendant is from State B, which provides both civil and criminal recourse, Jane Doe is much more likely to choose the physician-defendant’s forum.

242. California Cryobank claims to be the largest sperm bank in the United States. They have only four physical locations. They allow shipping to anywhere in the United States and are thus likely shipping sperm across state lines continuously. Soo Youn, *America’s Hottest Export? Sperm*, GUARDIAN (Aug. 15, 2018, 6:00 AM), <https://www.theguardian.com/science/2018/aug/15/americas-hottest-export-sperm-fertility> [https://perma.cc/F2TG-WW8Z]; see *Ordering and Shipment*, CAL. CRYOBANK, <https://www.cryobank.com/how-it-works/ordering-and-shipment> [https://perma.cc/5VJL-B8YU].

and civil penalty for fertility doctors inseminating their patients with their own sperm.

*B. THE FERTILITY PATIENT PROTECTION ACT*

For the reasons outlined in the introduction to this Part, this Note's proposed federal act, the Fertility Patient Protection Act, includes two criminal provisions and one civil provision. The first criminal provision mirrors Florida's criminal statute and classifies any physician or healthcare practitioner's insemination of a patient with his own sperm or another person's sperm that was not consented to, as reproductive battery. The mens rea element of reproductive battery relies on the doctor's knowledge of an express lack of consent by the patient to using material from the donor. The second criminal provision mirrors Indiana's criminal statute and establishes a lesser offense for criminal fertility deception as an add-on provision, depending on a fact-based inquiry. For this portion of the Act, the mens rea element is the doctor's intent to defraud his patients through misrepresenting the donor material. One change to Indiana's statute that the Act reflects is specifying that the crime is directed at the actions of physicians or health care practitioners rather than just "persons."<sup>243</sup> Finally, the third provision of the Act is a civil fertility fraud cause of action mirroring Indiana's civil fertility fraud statute combined with Colorado's civil penalty, to serve as an additional monetary punishment independent of any criminal conviction in other proceedings.

Conviction under the Fertility Patient Protection Act varies with each provision. Under the criminal reproductive battery provision, the offense is two-tiered depending on the facts. If the physician intentionally transfers sperm that was not consented to, but is not his own sperm, the offense carries a minimum sentence of two years and a maximum sentence of five years. If, however, the physician intentionally transfers his own non-consented-to sperm, the offense carries a mandatory minimum sentence of ten years with a maximum sentence of 15 years. Under the criminal fertility deception provision, the mandatory minimum add-on sentence is one year with a maximum sentence of 18 months. Under the civil fertility fraud provision, the offense carries a mandatory minimum sentence of six months and compensatory damages or a \$50,000 fine, whichever is greater. The Act accounts for when a doctor uses his sperm multiple times on his patients without their consent, and thus includes a graduated system of mandatory minimum sentences based on how many counts the prosecutor proves in a conviction (e.g., ten years for one count, 50 years for five counts, etc.).

The Act is not just limited to prosecuting physicians but encompasses anyone along the chain of custody who swaps out the donor sperm with their own. This is explicit in the Act's definition of "health care practitioner"

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<sup>243</sup> IND. CODE ANN. § 35-43-5-3(a) (West 2019).

which includes any person who intentionally swaps out the consented-to reproductive material. A few years ago, it was discovered that a Utah fertility clinic employee, who was not a fertility doctor, “swapped his sperm with other specimens, . . . [which were] subsequently used in fertilization.”<sup>244</sup> The Act is designed to cover this behavior as well.

The civil fertility fraud part of the Act will also allow for compensation in case of the defendant’s death. With the Utah case above, where the clinic employee “swapped” out his own sperm, it was not until 23 years later that the patient discovered what had happened, and by that time, the employee was deceased.<sup>245</sup> To encompass situations such as this, the civil fertility fraud statute will allow a victim to sue the estate. This is similar to tort claims in which the victim is still able to recover from the defendant’s estate. For instance, in a personal injury suit where both the defendant and plaintiff died in a car accident, the plaintiff’s family can still recover damages.<sup>246</sup>

Additionally, the reproductive battery and criminal fertility deception provisions will include a five-year statute of limitations like Indiana’s civil penalty for fertility fraud, rather than the two-year statute of limitations that Texas currently has. Sexual assault victims are often unwilling to come forward for years.<sup>247</sup> Thus, even a three-year extension may increase the likelihood of victims coming forward and physicians being legally disciplined. The statute of limitations will not begin to run until the crime has been discovered and reported to law enforcement, like in the Florida statute. The civil fertility fraud provision will also include a five-year statute of limitations but will mirror Indiana’s statute for when the statute of limitations begins to run—the plaintiff discovers the evidence via genetic analysis, discovers a record of the evidence or the defendant confesses.

Finally, while doctors inseminating their own sperm are likely doing so intentionally,<sup>248</sup> as mentioned above, there is the possibility that genuine doctor error could result in a conviction. For example, if the physician accidentally uses a different donor sperm than the one intended, he could

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<sup>244</sup>. Micah Vaughn, Amjad Hossain & John Y. Phelps, *Liability for Mismanagement of Sperm Specimens in Fertility Practices*, 103 FERTILITY & STERILITY 29, 30 (2015).

<sup>245</sup>. *Id.*

<sup>246</sup>. Ira Maurer, *What Happens to a Lawsuit When a Defendant or Plaintiff Dies?*, MAURER L. FIRM (Apr. 28, 2017), <https://www.maurerlaw.net/blog/what-happens-to-a-lawsuit-when-a-defendant-or-plaintiff-dies> [<https://perma.cc/9BU3-GWNM>].

<sup>247</sup>. Shaila Dewan, *Why Women Can Take Years to Come Forward with Sexual Assault Allegations*, N.Y. TIMES (Sept. 18, 2018), <https://www.nytimes.com/2018/09/18/us/kavanaugh-christine-blasey-ford.html> [<https://perma.cc/QT3T-RFPA>] (“When the perpetrator is someone they trusted, it can take years for victims even to identify what happened to them as a violation.”). A victim’s fertility doctor easily falls into this category of trusted perpetrator. It is reasonable to assume that a patient having just discovered that her doctor violated her in this way may react similarly to a sexual assault victim and be hesitant to report the person they once trusted.

<sup>248</sup>. Schmitz, *supra* note 201 (“It is hard to imagine how fertility doctors can accidentally inseminate multiple women with their own sperm.”); *see* Mroz, *supra* note 188.

present genuine error as a defense. Additionally, there may be unique circumstances where the fertility doctor has legitimately donated his own sperm to a bank, the patient asks for an anonymous sperm, and the doctor, at random, chooses his own donation from the pool of donors. It is critical that this Act does not criminalize these mistakes without allowing the doctor to present a defense that could lessen his sentence. Thus, these mistakes will be categorized as an affirmative defense—of course, the patient could still argue that she would not have expressly consented to her doctor’s sperm being used, even if it was at random. It is the burden of the defense to present a prima facie case that the sperm was in fact chosen at random. However, the presumption will be that the doctor did not make a mistake.

### C. PROPOSED STATUTORY LANGUAGE

The following is proposed legislation that Congress should enact.<sup>249</sup>

#### **An Act**

To provide criminal penalties against doctors and health care practitioners who inseminate their own sperm into their patients without consent.

*“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,”*<sup>250</sup>

#### Section 1: Short Title

This Act may be cited as “The Fertility Patient Protection Act.”

#### Section 2: Findings and Purposes

(a) Findings—The Congress finds that<sup>251</sup>:

(1) fertility patients have been inseminated with sperm from their own doctors instead of sperm from the donors that the patients selected;<sup>252</sup> and

(2) a fertility patient’s constitutional right to privacy<sup>253</sup> entitles him or her to receive only the samples that he or she explicitly consented to receive.

249. The following proposed statutory language includes direct language from Florida and Indiana’s statutes.

250. For similar language, see, for example, Government Employee Fair Treatment Act of 2019, S. 24, 116th Cong. (2019). This language appears to be typical of federal acts.

251. For similar language, see, for example, National Voter Registration Act of 1993, 52 U.S.C. § 20501(a) (2018). This language appears to be typical of federal acts.

252. This does not just refer to specific persons that the patients selected, but also includes if the patients chose an anonymous donor and were instead inseminated by their physician.

253. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (“[C]hoices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by

- (b) Purposes—The purposes of this<sup>254</sup> Act are:
- (1) to criminalize the act of a physician or health care practitioner swapping out a fertility patient’s consented-to semen donor for his own non-consented-to semen or any other person’s non-consented-to semen;
  - (2) to protect a future fertility patient against this conduct;
  - (3) to encourage continued participation in alternative methods of reproduction; and
  - (4) to deter a physician or health care practitioner from providing the patient with semen other than the patient’s chosen donor.

### Section 3: Definitions

- (a) As used in this Act, the term “health care practitioner” includes any person currently or previously employed in the health care industry who intentionally replaces the human reproductive material of a donor with his or her own or someone else’s human reproductive material, knowing that the patient has not expressly consented to the use of that donor’s reproductive material.
- (b) [omitted]<sup>255</sup>

### Section 4: Reproductive Battery

- (a) “A [physician or] health care practitioner [shall] not intentionally transfer into the body of a recipient human reproductive material or implant a human embryo of a donor, knowing the recipient has not consented to the use of the human reproductive material or human embryo from that donor.”<sup>256</sup>
- (b) “A [physician or] health care practitioner who violates this section commits reproductive battery . . . .”<sup>257</sup>
- (1) This offense carries a mandatory minimum sentence of two years and maximum sentence of five years in prison.<sup>258</sup>
  - (2) “A [physician or] health care practitioner who violates this section and who is the donor of the reproductive material,” is an

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the Constitution, . . . are among the most intimate that an individual can make.”); *see also* *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”). Without having all of the facts, like knowing the donor is her doctor, the woman’s decision to terminate is essentially taken away from her.

254. For similar language, *see*, for example, 52 U.S.C. § 20501(b). This language appears to be typical of federal acts.

255. The rest of the definitions are omitted for continuity purposes of this Note.

256. FLA. STAT. ANN. § 784.086(2) (West 2020).

257. *Id.* § 784.086(2)(a).

258. *Id.* (using five-year maximum from the third-degree felony definition in Florida); *id.* § 775.082(6)(e).

offense carrying a mandatory minimum sentence of ten years and maximum sentence of 15 years in prison.<sup>259</sup>

(c) “It is not a defense to the crime of reproductive battery that the recipient consented to an anonymous donor.”<sup>260</sup>

#### Section 5: Criminal Fertility Deception Add-on

“(a) A [physician or health care practitioner] who . . . with intent to defraud, misrepresents the identity of the person or another person or the identity or quality of property . . . commits [criminal fertility] deception . . . .”<sup>261</sup>

“(b) [It is] [a]n offense under . . . [this section] . . . if the misrepresentation relates to:

[(1)] a medical procedure, medical device, or drug; and

[(2)] human reproductive material . . . .”<sup>262</sup>

(c) The penalty is a mandatory minimum one-year prison sentence and maximum 18-month sentence added to the sentencing in Section 4.

#### Section 6: Mandatory Restitution for the Criminal Offenses

If convicted under Sections 4 or 5, the defendant will pay the victim mandatory restitution as governed by 18 U.S.C. § 2248,<sup>263</sup> in an amount no less than \$10,000.

#### Section 7: “Civil Fertility Fraud”<sup>264</sup>

(a) “A . . . woman who gives birth to a child after being treated for infertility by a physician [or health care practitioner];

[(b)] [the] spouse of the woman;

[(c)] [the] surviving spouse of the woman; or

[(d)] [a] child born as a result of the actions of a physician [or health care practitioner] described in this [Act]; may bring an action against [said] health care [practitioner, physician or applicable estate,] who knowingly or intentionally treated the woman for infertility by using the”<sup>265</sup> physician or health care practitioner’s human reproductive

259. *Id.* § 784.086(2)(b) (using 15-year maximum from the second-degree felony definition in Florida); *id.* § 775.082(6)(d).

260. *Id.* § 784.086(4).

261. IND. CODE ANN. § 35-43-5-3(a) (West 2019).

262. *Id.* § 35-43-5-3(b).

263. 18 U.S.C. § 2248(b) (2018) (“The order of restitution under this section shall direct the defendant to pay to the victim . . . the full amount of the victim’s losses as determined by the court . . . . For purposes of this subsection, the term ‘full amount of the victim’s losses’ includes any costs incurred by the victim for—(A) medical services . . . (C) . . . child care expenses; (D) lost income; (E) attorneys’ fees . . . and (F) any other losses suffered by the victim as a proximate result of the offense.”).

264. The chapter title of IND. CODE ANN. §§ 34-24-5-1 to 34-24-5-6.

265. *Id.* § 34-25-5-2.

material or other person’s human reproductive material, without the patient’s express written consent to treatment using said material.

(e) The penalty includes compensatory damages or a \$50,000 fine, whichever is greater, and a mandatory minimum six-month prison sentence.

Section 8: Statute of Limitations (applicable to Sections 4, 5, and 7):

(a) The statute of limitations for reproductive battery or criminal fertility deception “does not begin to run until the date on which the violation is discovered and reported to law enforcement or any other governmental agency.”<sup>266</sup>

(1) Any criminal action for reproductive battery or criminal fertility deception will be barred if not commenced within five (5) years of the date as defined in Section 8(a).

(b) “An action for civil fertility fraud that would otherwise be barred under this section may be commenced not later than five (5) years after the earliest of the date on which:

(1) the person first discovers evidence sufficient to bring an action against the [physician or health care practitioner] through DNA (deoxyribonucleic acid) analysis;

(2) the person first becomes aware of the existence of a recording . . . that provides evidence sufficient to bring an action against the [physician or health care practitioner]; or

(3) the defendant confesses to the offense.”<sup>267</sup>

Section 9: “Sentencing on Multiple Counts of Conviction”<sup>268</sup>

Sentencing on multiple counts of conviction will follow the United States Sentencing Commission’s Federal Sentencing Guidelines USSG § 5G1.2<sup>269</sup> and § 3D1.3.<sup>270</sup>

Section 10: Affirmative Defense

It is an affirmative defense if the physician or healthcare practitioner inseminated his own sperm by mistake. It is the burden of the defense to

266. FLA. STAT. ANN. § 784.086(3) (West 2020).

267. IND. CODE ANN. § 34-11-2-15.

268. U.S. SENT’G GUIDELINES MANUAL § 5G1.2 (U.S. SENT’G COMM’N 2018).

269. *Id.* § 5G1.2(d) (“If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law.”).

270. *Id.* § 3D1.3 (“When the counts involve offenses of the same general type to which different guidelines apply, apply the offense guideline that produces the highest offense level.”).

present a prima facie case that the sperm was in fact chosen at random. The presumption is that it was not a mistake.

#### D. ALTERNATIVE SOLUTIONS

##### 1. California and Louisiana Specific Modification

Although this Act should be ratified, in the alternative, for states like California and Louisiana that already have a workable statutory foundation, the states should amend their statutes to include a penalty for doctors committing fertility wrongdoing. As referenced previously in Section III.A, these two states have statutes penalizing intentional implantation of sperm into the wrong recipient. As a modification, California and Louisiana should additionally include a sentence penalizing when the sperm is knowingly implanted into a recipient *from a donor that has not been consented to*. For example, the California statute would state “it shall be unlawful for anyone to knowingly implant sperm, ova, or embryos, through the use of assisted reproduction technology *from a donor other than the donor from whom the donee/recipient consented to receive a sample.*”<sup>271</sup> Similarly, for the Louisiana statute, the language would reflect that “no person shall knowingly implant sperm, ova, or embryos, through the use of assisted reproduction technology *from a donor who is not the consented to donor.*”<sup>272</sup>

##### 2. Civil Penalties as Child Support

Another alternative is for plaintiffs to have the option to pursue a civil penalty in family court for retroactive child support. Additionally, states should require that the doctor pay child support for every child he has fathered from an insemination procedure. For children who have already aged out (older than 18), the doctor must give back-pay to the patient. If the patient is deceased, the money should go directly to the resulting child or if they are deceased to that child’s descendants. The purpose of this civil penalty is to be so severe that it acts as an additional deterrent against future conduct.<sup>273</sup>

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271. See CAL. PENAL CODE § 367g (West 2011) for the original statute.

272. See LA. STAT. ANN. § 14:101.2 (1999) for the original statute.

273. Future defendants may fear a more significant monetary penalty, rather than a statistically unlikely sexual assault conviction. See *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> [<https://perma.cc/3L48-V4DG>] (“Out of every 1000 sexual assaults, 995 perpetrators will walk free.”); see also Andrew Van Dam, *Less than 1% of Rapes Lead to Felony Convictions. At Least 89% of Victims Face Emotional and Physical Consequences.*, WASH. POST (Oct. 6, 2018, 6:00 AM), <https://www.washingtonpost.com/business/2018/10/06/less-than-percent-rapes-lead-felony-convictions-least-percent-victims-face-emotional-physical-consequences> [<https://perma.cc/MYJ6-EHLZ>] (“[Only] 0.7 percent of rapes and attempted rapes end with a felony conviction for the perpetrator . . .”).

### 3. Uniform Act

If Congress is hesitant to pass the Act, an alternative solution is to draft a uniform act. According to the Uniform Law Commission,<sup>274</sup> uniform acts that are more likely to be accepted by state legislatures are “acts to avoid conflict of laws when the laws of more than one state may apply.”<sup>275</sup> Conflict of laws could readily occur here as patients from states different than the doctor choose one forum over the other based on their differing laws.<sup>276</sup> Thus, it is likely that the Uniform Law Commission would accept a proposed fertility physician abuse uniform act.

### 4. Every State Should Pass This Act

One final alternative is for every state to separately pass this Act. One problem that arises is that six states already have some sort of fertility statute, and two more states have created a workable statutory foundation that is going through their state legislature. Thus, the rest of the 42 states could adopt this Act, however, this goes against the point of creating uniform legislation, which is why a federal law would be much more effective.

## V. CONCLUSION

Stigma related to artificial insemination and a lack of state-wide and federal regulation of the fertility industry has perpetuated fertility abuse and allowed physicians to inseminate their own sperm into their patients, without patient consent. To combat this behavior and ensure it does not continue, Congress should criminalize this behavior and offer severe criminal and civil penalties to significantly deter this behavior. Using the proposed federal Act, this behavior should be criminalized as reproductive battery first and foremost, with additional criminal deception and civil fertility fraud causes of action. The Florida and Indiana fertility legislation discussed should be used as a foundation, with some changes, as shown in the proposed Act.<sup>277</sup> Hopefully, the Fertility Patient Protection Act will change for good the barren landscape that is criminal and civil fertility physician legislation.

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274. “The Uniform Law Commission drafts uniform laws for the states to consider and enact.” *FAQS: What is a Uniform State Law?*, UNIF. L. COMM’N, <https://www.uniformlaws.org/aboutulc/faq> [<https://perma.cc/UP7T-2SNV>].

275. *See New Project Criteria*, UNIF. L. COMM’N, <https://www.uniformlaws.org/projects/overview/newprojectcriteria> [<https://perma.cc/V82P-8AJW>].

276. *See supra* Section IV.A.

277. *See supra* Section IV.C.