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## NOTES

### DADDY DOCTOR: WHY THE RIGHTS OF INTENDED PARENTS ARE NOT ADEQUATELY PROTECTED IN INDIANA \*

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#### I. INTRODUCTION

In 2019, *Almost Family*, a television series, premiered.<sup>1</sup> It follows the story of a woman whose father, a fertility doctor, secretly inseminated several of his patients with his own sperm.<sup>2</sup> Rather than focusing on the obvious ethical dilemma, the show seems to make light of the situation as just another obstacle that was caused by foolish but good intentions.<sup>3</sup>

Unlike *Almost Family*'s depiction, fertility fraud is a serious violation. For thirty-five years, Liz White ("White") believed that her son's biological father was an anonymous sperm donor.<sup>4</sup> White and her husband resorted to sperm donation in order to become parents, and they thought that their sperm donor was an anonymous medical resident.<sup>5</sup> However, White later learned "that the sperm had come not from [an anonymous donor] but from the fertility doctor who had inseminated her."<sup>6</sup> This fertility doctor was Dr. Donald Cline ("Cline"), who ran

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\* This Note was completed in February 2020.

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1. *Almost Family*, IMDB.COM, <https://www.imdb.com/title/tt9165444/> [<https://perma.cc/93TD-UEGY>] (last visited Feb. 1, 2020).

2. Kelly Lawler, *Fox's 'Almost Family' is a Drama Disaster That Makes Light of a Heinous Crime*, USA TODAY (Oct. 2, 2019), <https://www.usatoday.com/story/entertainment/tv/2019/10/03/almost-family-review-fox-drama-unmitigated-disaster/3817928002/> [<https://perma.cc/AV8R-6BUJ>].

3. Justin L. Mack, *Why Fox's 'Almost Family' Angers Some Children of an Infamous Indiana Fertility Doctor*, INDY STAR (Oct. 23, 2019), <https://www.indystar.com/story/news/health/2019/10/23/real-almost-family-donald-cline-case-no-comedy/3995192002/> [<https://perma.cc/JS6L-S7SP>].

4. Shari Rudavsky, *'I Was Raped 15 Times and Didn't Even Know It': Fertility Fraud Bill Advances*, INDY STAR (Jan. 23, 2019), <https://www.indystar.com/story/news/2019/01/23/donald-cline-aftermath-fertility-fraud-bill-advances-indiana-senate/2656610002/> [<https://perma.cc/3XKQ-FDYS>].

5. *See id.*

6. *Id.*

an Indianapolis-area fertility clinic during the 1970s and 1980s.<sup>7</sup> He fathered more than fifty children.<sup>8</sup>

In 2017, Cline “pleaded guilty to two felony obstruction of justice charges, acknowledging that he lied to state investigators when denying . . . accusations that he used his own sperm” to inseminate patients.<sup>9</sup> Consequently, he “was [solely] given a one-year suspended sentence.”<sup>10</sup> Marion County prosecutors did not file other charges against Cline because they felt that they were limited in the charges that they could pursue.<sup>11</sup> At the time, Indiana did not have a law against fertility fraud.<sup>12</sup> Though, this changed in 2019, after Cline’s former victims, including White, combined efforts to modify Indiana law to protect other individuals from doctors similar to Cline.<sup>13</sup>

Fertility fraud manifests when an adult learns, through genetic testing, that he was not only donor-conceived but also doctor-conceived.<sup>14</sup> Hence, the donor-conceived child’s sperm donor is actually his parents’ fertility doctor. Cline, unfortunately, is not the only doctor to have committed fertility fraud in the United States.<sup>15</sup> Memorably, Dr. Cecil Jacobson (“Jacobson”) “defrauded certain women and their husbands by representing that the women would be inseminated

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7. 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/4M4U-RK7V].

8. Sarah Zhang, *A Decades-Old Doctor’s Secret Leads to New Fertility-Fraud Law*, ATLANTIC (May 7, 2019), <https://www.theatlantic.com/science/archive/2019/05/cline-fertility-fraud-law/588877/> [https://perma.cc/JQC7-PTBK].

9. Zaveri, *supra* note 7.

10. Tom Davies, *No Jail for Fertility Doctor Who Lied About Using Own Sperm*, ASSOCIATED PRESS (Dec. 14, 2017), <https://www.apnews.com/128c7319ef774b3ab90b6c99e0986c5d> [https://perma.cc/5SZ9-LUX5].

11. Tom Davies, *Indiana Doctor’s Offspring Pushing State Fertility Fraud Law*, ASSOCIATED PRESS (Jan. 23, 2019), <https://www.apnews.com/91f17c7b87fa4039b109bd871e656e62> [https://perma.cc/6P72-XZVV].

12. Davies, *supra* note 10.

13. Rudavsky, *supra* note 4.

14. Professor Jody Lynce Madeira, Address at the Indiana University Robert H. McKinney School of Law Faculty Colloquia Series (Nov. 12, 2019) (notes on file with the author) [hereinafter Faculty Colloquia Series]; see Jody Lynce Madeira, *Fertility Fraud: An Update*, AM. SOC’Y REPROD. MED. (Oct. 21, 2019), <https://www.asrm.org/news-and-publications/news-and-research/legally-speaking/fertility-fraud-an-update/> [https://perma.cc/P9LC-4EY3]; see also Dov Fox et al., *Fertility Fraud, Legal Firsts, and Medical Ethics*, 134 OBSTETRICS & GYNECOLOGY 918, 918 (2019) (defining fertility fraud as “a doctor’s failure to obtain his fertility patient’s consent before inseminating her using his own sperm”).

15. Robert T. Garrett, *Fertility Fraud is Real. The Texas Senate Approved a Bill to Make It a Crime*, DALL. MORNING NEWS (Apr. 11, 2019), <https://www.dallasnews.com/news/politics/2019/04/11/fertility-fraud-is-real-the-texas-senate-approved-a-bill-to-make-it-a-crime/> [https://perma.cc/X62R-LPXB].

with sperm from an anonymous donor.”<sup>16</sup> Instead, “Jacobson inseminated the[] women with his own sperm.”<sup>17</sup> Likewise, Drs. Kim McMorries, Gerald Mortimer, John Coates, Paul Jones, and an anonymous Sacramento doctor inseminated their patients with their own sperm, rather than sperm from anonymous donors.<sup>18</sup> Similar cases exist around the world,<sup>19</sup> and technology such as direct-to-consumer (“DTC”) genetic testing and social media will certainly continue to shed light on this type of wrongdoing.<sup>20</sup>

The United States fertility industry is largely unregulated,<sup>21</sup> and Cline’s misconduct highlights a significant problem with it. The number of fertility fraud cases and incidents of sperm bank negligence is rising.<sup>22</sup> As a result, such beg the question: should the United States fertility industry be better regulated to protect the rights of intended parents and even donor-conceived children?<sup>23</sup> Thus far, California, Indiana, and Texas have tried to tackle this issue by implementing fertility fraud laws,<sup>24</sup> and Colorado has proposed legislation to make fertility fraud a felony.<sup>25</sup>

While Indiana’s fertility fraud law may be the first of its kind,<sup>26</sup> it inadequately protects the rights of intended parents. This Note makes the novel

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16. United States v. Jacobson, 785 F. Supp. 563, 566 (E.D. Va. 1992).

17. *Id.*

18. Madeira, *supra* note 14; Garrett, *supra* note 15; Brian Maass, *First Lawsuit Filed Against Fertility Dr. Paul Jones Accuses Him of Deception*, CBS DENV. (Oct. 29, 2019), <https://denver.cbslocal.com/2019/10/29/paul-jones-fertility-lawsuit-fertility-sperm/> [<https://perma.cc/BKK8-ACDN>].

19. Madeira, *supra* note 14; Agence France-Presse in The Hague, *Dutch Fertility Doctor ‘Secretly Fathered at Least 49 Children’*, GUARDIAN (Apr. 12, 2019), <https://www.theguardian.com/world/2019/apr/12/dutch-fertility-doctor-secretly-fathered-at-least-49-children> [<https://perma.cc/DWW2-FTXG>].

20. See Garrett, *supra* note 15; Fox et al., *supra* note 14.

21. Wendy Kramer, *Sperm Donation Needs Federal Regulation*, TIME (Apr. 25, 2016), <https://time.com/4299641/sperm-donation-needs-federal-regulation/> [<https://perma.cc/KT3G-7YCF>]; but cf. Judith Daar, *Federalizing Embryo Transfers: Taming the Wild West of Reproductive Medicine?*, 23 COLUM. J. GENDER & L. 257 (2012) (arguing that regulation of ART exists); cf. Michael Ollove, *Advocates and Experts Debate Need for More Regulation of Fertility Services*, KAISER HEALTH NEWS (Mar. 19, 2015), <https://khn.org/news/advocates-and-experts-debate-need-for-more-regulation-of-fertility-services/> [<https://perma.cc/XG8F-Q42L>] (“[P]rofessional self-regulation is extensive.”).

22. See Jacqueline Mroz, *Their Children Were Conceived with Donated Sperm. It Was the Wrong Sperm.*, N.Y. TIMES (June 3, 2019), <https://www.nytimes.com/2019/06/03/health/sperm-banks-fertility-artificial-insemination.html> [<https://perma.cc/7STB-PXQQ>].

23. See *id.*

24. Madeira, *supra* note 14.

25. Sam Tabachnik, *Proposed Bill Would Finally Make It a Felony for Doctors to Inseminate Patients with Their Own Sperm*, DENV. POST (Jan. 9, 2020), <https://www.denverpost.com/2020/01/09/fertility-fraud-paul-jones-sperm-doctor-colorado/> [<https://perma.cc/SQ3M-KV9H>].

26. Zhang, *supra* note 8.

claim that Indiana's fertility fraud law, the Senate Enrolled Act 174, does not adequately protect the rights of intended parents because its criminal penalty is too lax. Additionally, this Note uniquely argues that Indiana should implement a version of the Uniform Parentage Act ("UPA"). Although other articles address the rights of intended parents or fertility fraud,<sup>27</sup> the effect of Indiana's new fertility fraud law on the rights of intended parents in the State has not yet been explored.

### *A. Map of Review*

Section II of this Note discusses the history of fertility fraud and gamete donation, thereby describing relevant cases and definitions. It also addresses the lack of regulation in the United States and Indiana fertility industries as well as details Indiana's change in this area of the law. Section III of this Note offers an analysis of Indiana's new fertility fraud law, arguing that it is insufficient in protecting intended parents from fertility fraud due to the law's minor criminal penalty. Moreover, it compares Indiana's law to other state fertility fraud laws and asserts that Indiana's law is inferior to them. Lastly, Section IV of this Note asserts that Indiana should adopt a version of the UPA to safeguard intended parents from negligence.

## II. AN OVERVIEW OF GAMETE DONATION, FERTILITY FRAUD, AND THE FERTILITY INDUSTRY IN THE UNITED STATES AND INDIANA

To facilitate a better understanding of gamete donation and fertility fraud, this section provides background information for these practices. In detail, it describes the history of gamete donation, outlines necessary definitions and cases, and discusses relevant concerns. Additionally, this section explains the lack of regulation in the United States and Indiana fertility industries. This section finally specifies changes in Indiana law pertaining to gamete donation and fertility fraud.

### *A. A Brief History of Gamete Donation*

In 1884, William Pancoast ("Pancoast"), a Philadelphia physician, performed the first successful artificial insemination.<sup>28</sup> A couple visited Pancoast because they were unable to conceive, and Pancoast determined that this was due to the husband's low sperm count.<sup>29</sup> After two months of unsuccessful treatment,

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27. See generally Jody Lynce Madeira, *Uncommon Misconceptions: Holding Physicians Accountable for Insemination Fraud*, 37 LAW & INEQ. 45 (2019) [hereinafter *Uncommon Misconceptions*]; see generally Jody Lynce Madeira, *Understanding Illicit Insemination and Fertility Fraud, from Patient Experience to Legal Reform*, 39.1 COLUM. J. GENDER & L. 110 (2020) [hereinafter *Understanding Illicit Insemination*].

28. Elizabeth Yuko, *The First Artificial Insemination Was an Ethical Nightmare*, ATLANTIC (Jan. 8, 2016), <https://www.theatlantic.com/health/archive/2016/01/first-artificial-insemination/423198/> [https://perma.cc/5EYY-CGWF].

29. *Id.*

Pancoast took matters into his own hands.<sup>30</sup> Specifically, he anesthetized his patient and inseminated her with donated sperm in front of six medical students.<sup>31</sup> The sperm was donated by one of the medical students, who was nominated as the most attractive of the six.<sup>32</sup> Pancoast did not disclose any of this information to the couple until a healthy baby boy was born nine months later.<sup>33</sup> And, even then, Pancoast only confessed to the husband;<sup>34</sup> “the two men decided that [the wife] would be better off not knowing the truth.”<sup>35</sup>

With the commercialization of sperm banks, sperm donation gained popularity roughly 100 years after Pancoast’s feat.<sup>36</sup> The donors were mainly from universities,<sup>37</sup> and they were “screened for genetic diseases” and “matched phenotypically to the recipient’s husband.”<sup>38</sup> By 1977, artificial insemination with donor sperm produced about 3,567 children.<sup>39</sup> This estimate at least octupled by 2010, “the most recent year for which good data is available.”<sup>40</sup> That year, between “30,000 to 60,000 babies born in the United States were conceived through sperm donation.”<sup>41</sup>

### *B. Necessary Definitions and Information*

This subsection states important gamete donation definitions and information that uniquely relate to intended parents. For example, it describes the gamete donation process and the individuals that may participate in it. Additionally, this subsection explains fertility fraud and outlines potential motivations and significant concerns, such as consanguinity, behind the dishonest conduct.

#### *1. What Is Gamete Donation?*

Out of 100 American couples, approximately twelve to thirteen of them have trouble conceiving.<sup>42</sup> Consequently, many couples resort to gamete donation

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30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. See Wendy Kramer, *A Brief History of Donor Conception*, HUFFPOST (Dec. 6, 2017), [https://www.huffpost.com/entry/a-brief-history-of-donor-conception\\_b\\_9814184](https://www.huffpost.com/entry/a-brief-history-of-donor-conception_b_9814184) [<https://perma.cc/L9BS-YMWR>].

37. *Id.*

38. *Id.*

39. *Id.*

40. Ashley Fetters, *The Overlooked Emotions of Sperm Donation*, ATLANTIC (July 9, 2018), <https://www.theatlantic.com/family/archive/2018/07/sperm-donations-emotional-consequences/564587/> [<https://perma.cc/9NK4-BHA8>].

41. *Id.*

42. *Female Infertility*, U.S. DEP’T HEALTH & HUM. SERV., <https://www.hhs.gov/opa/>

when a partner is unable to provide his own sperm or her own eggs.<sup>43</sup> In short, gamete donation is the use of another individual's eggs or sperm "in order to help an intended parent[] have a child."<sup>44</sup>

Although gamete donation is a viable solution to infertility, it also raises ethical considerations.<sup>45</sup> These considerations include anonymity, payment, recruitment and screening of donors, assessment and screening of recipients, safety, and the donor-conceived child.<sup>46</sup> In general, gamete donation is a delicate topic because it tests the genetic filiation of the family unit, a vital component of society.<sup>47</sup>

## 2. *What Is an Intended Parent, a Donor-Conceived Child, or a Gamete Donor?*

Intended or recipient parents are the terms used for the individuals who will raise a donor-conceived child.<sup>48</sup> Gamete donation permits "one of the intended parents to keep [a] genetic link to the child."<sup>49</sup> Relatedly, a donor-conceived person is an individual who was conceived through sperm or egg donation.

Furthermore, a gamete donor is an individual who donates his or her gametes, such as sperm or eggs, to help another person conceive.<sup>50</sup> Accordingly, a sperm donor is a man who gives his sperm to a sperm bank or fertility clinic "so that it can be used to help women get pregnant."<sup>51</sup> Although payment fluctuates, "an active [sperm] donor who produces specimens twice a week might make \$1,500 a month."<sup>52</sup>

Similarly, an egg donor is a fertile woman who donates an egg to an infertile woman to help her have a child.<sup>53</sup> Egg donation is part of assisted reproductive

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reproductive-health/fact-sheets/female-infertility/index.html [https://perma.cc/JXU2-2HZY] (last visited Oct. 25, 2019).

43. *Gamete (Eggs and Sperm) and Embryo Donation*, REPRODUCTIVEFACTS.ORG, <https://www.reproductivefacts.org/news-and-publications/patient-fact-sheets-and-booklets/documents/fact-sheets-and-info-booklets/gamete-eggs-and-sperm-and-embryo-donation/> [https://perma.cc/HWK5-7PZQ] (last updated 2014).

44. *Id.*

45. See European Soc'y of Human Reprod. & Embryology Task Force on Ethics & Law, *III. Gamete and Embryo Donation*, 17 HUM. REPROD. 1407 (2002).

46. *Id.*

47. *Id.*

48. *Gamete (Eggs and Sperm) and Embryo Donation*, *supra* note 43.

49. *Id.*

50. *Id.*

51. *Sperm Donor*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sperm%20donor> [https://perma.cc/E3GW-6Y2N] (last visited Oct. 25, 2019).

52. Tamar Lewin, *10 Things to Know About Being a Sperm Donor*, N.Y. TIMES (Nov. 3, 2016), <https://www.nytimes.com/2016/11/08/health/sperm-donor-facts.html> [https://perma.cc/5NE3-SJ6X].

53. Amanda Chatel, *How Does Egg Donation Work? Experts and Egg Donors Share What*

technology (“ART”), such as in vitro fertilization (“IVF”).<sup>54</sup> An egg donor generally earns \$8,000 for her donation.<sup>55</sup> Though, the American Society of Reproductive Medicine (“ASRM”) suggests that compensation to egg donors exceeding \$5,000 requires justification, and payments in excess of \$10,000 are inappropriate.<sup>56</sup>

### 3. *How Does Gamete Donation Work?*

Gamete donation functions either by inserting donor sperm into a woman’s reproductive tract or by combining donor eggs with sperm and transferring the resulting embryos to a woman’s uterus.<sup>57</sup>

Some people use donated gametes . . . because of medical issues, such as no or poor-quality eggs or sperm. [Others] use donation so they do not risk passing down genetic disorders to their children. Donation can [also] be used for social reasons such as same-sex couples or for single men and women.<sup>58</sup>

### 4. *What Is Fertility Fraud?*

As previously described, fertility fraud is established when a donor-conceived person discovers that his biological father is his parents’ fertility doctor and not the sperm donor that his parents selected or consented to.<sup>59</sup> “In [a] typical fertility fraud fact pattern, an adult learns that he or she has different paternal genetic relations and/or unexpected half-genetic siblings.”<sup>60</sup> Subsequently, communications with these new relatives often suggest that something is awry, eventually revealing that the donor-conceived person is actually doctor-conceived.<sup>61</sup>

Some states may group the fertility fraud fact pattern with wrongful life

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*They Want You to Know*, BUSTLE (Aug. 5, 2019), <https://www.bustle.com/p/how-does-egg-donation-work-experts-egg-donors-share-what-they-want-you-to-know-18232805> [<https://perma.cc/5GEE-XR2A>].

54. Jayne Leonard, *How Does the Egg Donation Process Work?*, MED. NEWS TODAY (Mar. 22, 2019), <https://www.medicalnewstoday.com/articles/314750.php> [<https://perma.cc/LS52-RWJP>]; *id.*

55. Chatel, *supra* note 53.

56. Michelle J. Bayefsky et al., *Compensation for Egg Donation: A Zero-Sum Game*, 105 FERTILITY & STERILITY 1153, 1153 (2016) (discussing compensation to egg donors).

57. *Reproductive Technologies: V. Gamete Donation*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/science/encyclopedias-almanacs-transcripts-and-maps/reproductive-technologies-v-gamete-donation> [<https://perma.cc/EB2H-4FKH>] (last visited Oct. 25, 2019).

58. *Gamete (Eggs and Sperm) and Embryo Donation*, *supra* note 43.

59. *See* Madeira, *supra* note 14.

60. *Id.*

61. *See id.*

cases.<sup>62</sup> However, a wrongful life case is “a malpractice claim brought by or on behalf of a child born with a birth defect alleging that he or she would never have been born if not for the negligent advice or treatment provided to the parents by a physician or health-care provider.”<sup>63</sup> Accordingly, fertility fraud cases are distinguishable from wrongful life cases because doctor-conceived persons are not arguing that they would have never been born.<sup>64</sup> Instead, these individuals take issue with the *process* of their conception, not the *outcome*.<sup>65</sup>

Aside from *what* fertility fraud is, the question of *why* is also imperative to understanding the wrongful practice. Why would a fertility doctor engage in this type of misconduct? Although one may never truly know the response to this question,<sup>66</sup> there are educated guesses and potential answers. For example, a physician may substitute his own sperm for that of a sperm donor because he deludingly believes that he is helping desperate couples.<sup>67</sup> The physician may argue that the sperm donation that the patient selected and consented to failed to impregnate her.<sup>68</sup> Also, a doctor may commit fertility fraud due to mental health issues, such as narcissistic personality disorder, sexual perversion, or because he did not properly coordinate sperm donors.<sup>69</sup> Regardless of the twisted motivation, the practice is truly abhorrent. It shatters personal identity and has destroyed families.<sup>70</sup>

One final question surrounding fertility fraud is *how* it affects families or donor-conceived children. In addition to feeling violated,<sup>71</sup> intended parents and doctor-conceived persons are concerned about inheritable mental or genetic conditions.<sup>72</sup> Eve Wiley, daughter of Dr. Kim McMorries, turned to DTC genetic testing to learn more about her family’s medical history after her child was born with significant health problems.<sup>73</sup> An additional concern is consanguinity,

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62. Faculty Colloquia Series, *supra* note 14.

63. *Wrongful Life*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/legal/wrongful%20life> [<https://perma.cc/FJ8M-FBQS>] (last visited Feb. 1, 2020).

64. Faculty Colloquia Series, *supra* note 14.

65. *Id.*

66. See *Understanding Illicit Insemination*, *supra* note 27, at 138.

67. See Fox et al., *supra* note 14.

68. See Paige Skinner, *Biological Dad Was Her Mother’s Fertility Doctor*, DALL. OBSERVER (May 6, 2019), <https://www.dallasobserver.com/arts/watch-eve-wiley-found-out-her-biological-dad-was-her-mothers-doctor-11658200> [<https://perma.cc/E37K-L4P8>].

69. Faculty Colloquia Series, *supra* note 14.

70. *Understanding Illicit Insemination*, *supra* note 27, at 113; see Fox et al., *supra* note 14.

71. See Faculty Colloquia Series, *supra* note 14; Rudavsky, *supra* note 4.

72. Faculty Colloquia Series, *supra* note 14.

73. Chantalle Edmunds, *Woman, 31, Discovers Her Biological Father Is Her Mother’s Fertility Doctor When She Uses an Ancestry Website and After 14 Years of Mistakenly Calling a Sperm Donor ‘Dad,’* DAILY MAIL (Apr. 30, 2019), <https://www.dailymail.co.uk/news/article-6978769/Woman-discovers-biological-father-mothers-fertility-doctor.html> [<https://perma.cc/3J8V-SPAU>].

especially in close-knit communities like the area that Cline practiced in.<sup>74</sup>

### *C. The Lack of Regulation in the United States Fertility Industry*

This subsection deconstructs the unregulated United States fertility industry. First, it briefly and generally describes the industry. Second, it outlines current industry regulations and procedures, if any. Last, it discusses problems associated with the industry as well as relevant cases that highlight these problems.

#### *1. What Is the United States Fertility Industry?*

The fertility industry is booming.<sup>75</sup> Today, there are over 100 sperm banks and approximately 480 fertility clinics in the United States.<sup>76</sup> “Investors are pouring money into companies that promise to help people conceive,” especially since one in seven women will experience fertility issues.<sup>77</sup> Though, investors are not only spending on *treating* infertility but also on *preserving* fertility.<sup>78</sup> These investment areas represent two sizeable and growing areas of the fertility business.

Currently, the United States fertility business earns about \$25 billion.<sup>79</sup> By 2026, this estimate is projected to rise to \$41 billion.<sup>80</sup> This nearly twofold increase is unsurprising given the growing demand for ART and IVF.<sup>81</sup> Additionally, the industry continues to draw venture capitalists,<sup>82</sup> who spent \$624 million on fertility firms in 2018.<sup>83</sup>

While the fertility industry is expanding in the United States, the business is also expanding in other nations around the world.<sup>84</sup> What distinguishes the United

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74. Faculty Colloquia Series, *supra* note 14; Bonnie Steinbock, *What’s Wrong with a Fertility Doctor Using His Own Sperm?*, HASTINGS CTR. (Apr. 19, 2019), <https://www.thehastingscenter.org/whats-wrong-with-a-fertility-doctor-using-his-own-sperm/> [<https://perma.cc/TE7L-CDYM>].

75. *The Fertility Business Is Booming*, ECONOMIST (Aug. 8, 2019), <https://www.economist.com/business/2019/08/08/the-fertility-business-is-booming> [<https://perma.cc/AW9H-34GF>].

76. *Fertility Clinics & Infertility Services: \$5.8 Billion United States Industry Analysis, 2018 – ResearchAndMarkets.com*, AP NEWS (Nov. 30, 2018), <https://apnews.com/BusinessWire/de2625f77685482bb56020b3c4cc8d7d> [<https://perma.cc/LP7H-6BMR>].

77. *The Fertility Business Is Booming*, *supra* note 75; Alexis Christoforus, *The Fertility Industry Is Booming*, YAHOO! (Nov. 17, 2019), <https://finance.yahoo.com/news/the-booming-business-of-infertility-165325772.html> [<https://perma.cc/V8FB-HQYP>].

78. *The Fertility Business Is Booming*, *supra* note 75.

79. *Id.*

80. *Id.*

81. *Fertility Clinics & Infertility Services: \$5.8 Billion United States Industry Analysis, 2018 – ResearchAndMarkets.com*, *supra* note 76.

82. Christoforus, *supra* note 77.

83. *The Fertility Business Is Booming*, *supra* note 75.

84. *Id.*

States industry from the rest of the world is that it is not tightly regulated.<sup>85</sup> This also applies to ART, which includes gamete donation.<sup>86</sup>

## 2. *How Is the United States Fertility Industry Barely Regulated?*

In 1981, the first child conceived through ART in the United States was born.<sup>87</sup> Consequently, the practice and use of ART grew during the 1980s. Almost forty years have passed since then, and still “no comprehensive policy governs ART in” this country.<sup>88</sup> Instead, there is a “patchwork of . . . state and federal regulation that essentially leave the [United States] fertility industry unregulated.”<sup>89</sup>

Even though the American fertility business is hardly supervised,<sup>90</sup> Congress attempted to take one step toward regulating ART with the Fertility Clinic Success Rate and Certification Act of 1992 (“FCSRCA”).<sup>91</sup> Congress adopted this Act to address concerns about the quality and comparability of the information that infertility patients received about ART.<sup>92</sup> Specifically, the FCSRCA directs all fertility clinics to report their success rates to the Centers for Disease Control and Prevention (“CDC”) in a standardized manner.<sup>93</sup> However, the CDC does not have the authority to enforce ART clinics to do so.<sup>94</sup> As a result, there are no legal consequences for clinics that do not report their success rates.<sup>95</sup>

Relatedly, “neither the fertility industry nor any other entity is required to collect data or report statistics on the numbers of human beings conceived using

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85. *Fertility Clinics & Infertility Services: \$5.8 Billion United States Industry Analysis, 2018* – ResearchAndMarkets.com, *supra* note 76; see also Naomi Cahn, *When Fertility Clinics Get It Wrong*, FORBES (Aug. 8, 2019), <https://www.forbes.com/sites/naomicahn/2019/08/08/when-fertility-clinics-get-it-wrong/#576971431f4a> [<https://perma.cc/9C57-L7KU>] (“The political economy of assisted reproduction in the United States wards off meaningful oversight or enforceable rules that operate to deter misconduct in other countries.”).

86. Maya Sabatello, *Regulating Gamete Donation in the U.S.: Ethical, Legal and Social Implications*, 4 LAWS 352, 353 (2015).

87. *The Fertility Clinic Success Rate and Certification Act*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/art/nass/policy.html> [<https://perma.cc/FC8T-PQCQ>] (last visited Oct. 25, 2019).

88. Alicia Ouellette et al., *Lessons Across the Pond: Assisted Reproductive Technology in the United Kingdom and the United States*, 31 AM. J.L. & MED. 419, 422 (2005).

89. *Id.* at 435.

90. *But cf.* Daar, *supra* note 21; *cf.* Ollove, *supra* note 21.

91. *The Fertility Clinic Success Rate and Certification Act*, *supra* note 87.

92. *Id.*

93. *Id.*; *National ART Surveillance*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/art/nass/index.html> [<https://perma.cc/C868-ARL4>] (last updated May 7, 2019); see also 42 U.S.C. § 263a-1 (2019).

94. See Sonia Suter, *Giving in to Baby Markets: Regulation Without Prohibition*, 16 MICH. J. GENDER & L. 217, 252 (2009).

95. Ouellette et al., *supra* note 88, at 419.

donor sperm.”<sup>96</sup> Therefore, even though fertility clinics are mandated to report success rate data to the CDC, this information is not narrowly shaped to identify the children successfully conceived using gamete donation. As a result, the United States has no reliable method of estimating how many donor-conceived children are born annually.<sup>97</sup> However, experts believe that 30,000 to 60,000 American children born each year are conceived through sperm donation.<sup>98</sup> Nevertheless, this “number is only an educated guess.”<sup>99</sup>

Apart from the FCSRCA, the United States fertility business is also regulated by the United States Food and Drug Administration (“FDA”). Particularly, the FDA requires all ART programs to register with the federal government.<sup>100</sup> The agency also inspects these programs, including their documentation and written protocols.<sup>101</sup> Additionally, the FDA regulates gametes, meaning sperm or eggs, as human reproductive tissue.<sup>102</sup> However, similar to the CDC’s limited enforcement capabilities under the FCSRCA, the FDA’s authority is narrow as well.<sup>103</sup> In particular, the FDA “is limited to preventing the transmission of communicable diseases such as AIDS and hepatitis.”<sup>104</sup>

While the CDC and FDA oversee aspects of the fertility industry, the business is still left largely unregulated. For example, federal law does not require infertility programs to be licensed or accredited.<sup>105</sup> Plus, there is no federal law that tackles the misappropriation of donor gametes. For this reason, various states are beginning to take matters into their own hands.<sup>106</sup>

The closest resource the United States has to any type of true regulation or oversight of ART is the ASRM’s guidelines. These guidelines address certain

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96. Wendy Kramer, *30-60K US Sperm and Egg Donor Births per Year?*, HUFFPOST (Dec. 6, 2017), [https://www.huffpost.com/entry/a-call-to-to-stop-using-t\\_b\\_8126736](https://www.huffpost.com/entry/a-call-to-to-stop-using-t_b_8126736) [<https://perma.cc/9Y54-K9AY>].

97. *Id.*

98. Ashley Fetters, *Finding the Lost Generation of Sperm Donors*, ATLANTIC (May 18, 2018), <https://www.theatlantic.com/family/archive/2018/05/sperm-donation-anonymous/560588/> [<https://perma.cc/NZ3C-5HUP>].

99. Karen Clark & Elizabeth Marquardt, *The Sperm-Donor Kids Are Not Really All Right*, SLATE (June 14, 2010), <https://slate.com/human-interest/2010/06/new-study-shows-sperm-donor-kids-suffer.html> [<https://perma.cc/V2N5-MAV2>].

100. Practice Comm., Am. Soc’y for Reprod. Med. & Practice Comm., Soc’y for Assisted Reprod. Tech., *Recommendations for Gamete and Embryo Donation: A Committee Opinion*, 99 FERTILITY & STERILITY 47, 47 (2013).

101. *Id.* at 47-48.

102. *What You Should Know – Reproductive Tissue Donation*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/vaccines-blood-biologics/safety-availability-biologics/what-you-should-know-reproductive-tissue-donation> [<https://perma.cc/89Q8-KRGJ>] (last updated Nov. 5, 2010).

103. Mroz, *supra* note 22.

104. *Id.*; see also 21 C.F.R. § 1271.75 (2019).

105. Ouellette et al., *supra* note 88, at 420.

106. See Tabachnik, *supra* note 25.

issues connected to fertility services.<sup>107</sup> For instance, the guidelines for gamete donation discuss the selection, screening, and management of donors.<sup>108</sup> The ASRM also provides guidelines for record keeping.<sup>109</sup> Exclusively, it recommends that donor records be kept permanently, rather than for ten years as required by the FDA.<sup>110</sup> Along with the ASRM, the American Association of Tissue Banks and the American Fertility Society attempt to remedy issues of insufficient federal regulation as well.<sup>111</sup>

### 3. *How Does the Unregulated United States Fertility Industry Negatively Impact Intended Parents?*

In 2017, a couple (the “Zelts”) sued Xytex Corporation (“Xytex”), a sperm bank, for “allegedly misrepresenting a sperm donor’s mental health, educational level, and IQ to induce . . . couple[s] to purchase his sperm for artificial insemination.”<sup>112</sup> Precisely, Xytex described the sperm donor “as a genius-level neuroscientist with bachelor’s and master’s degrees who was pursuing a Ph.D. in neuroscience engineering.”<sup>113</sup> Instead, the sperm donor was a “schizophrenic felon” who had extensive psychiatric and criminal histories.<sup>114</sup>

Technology and the internet have certainly increased our access to information. The Zelts learned that Xytex made misrepresentations about their sperm donor after conducting an internet search on the donor and combing through public records.<sup>115</sup> Moreover, DTC genetic testing is gaining popularity and beginning to reveal sperm bank negligence or cases of fertility fraud. Specifically, a rising number of intended parents are just discovering, years after the fact, that they received the wrong sperm donation.<sup>116</sup>

Sperm banks are loosely regulated.<sup>117</sup> Therefore, sperm bank negligence, or *donor mix-ups*, are not surprising given the number of sperm banks that use

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107. See Suter, *supra* note 94, at 252-53.

108. Practice Comm., Am. Soc’y for Reprod. Med. & Practice Comm., Soc’y for Assisted Reprod. Tech., *supra* note 100, at 48-53.

109. *Id.* at 53.

110. *Id.*

111. Tatiana Posada, *Whose Sperm Is It Anyways in the Wild, Wild West of the Fertility Industry?*, 34 GA. ST. U. L. REV. 847, 866 (2018).

112. Mary Anne Pazanowski, *Couple Can’t Sue Xytex, Sperm Bank That Misrepresented Donor*, BLOOMBERG L. (Feb. 4, 2019), <https://news.bloomberglaw.com/health-law-and-business/couple-cant-sue-xytex-sperm-bank-that-misrepresented-donor> [<https://perma.cc/E9AR-JMJ7>].

113. Tamar Lewin, *Sperm Banks Accused of Losing Samples and Lying About Donors*, N.Y. TIMES (July 21, 2016), <https://www.nytimes.com/2016/07/22/us/sperm-banks-accused-of-losing-samples-and-lying-about-donors.html> [<https://perma.cc/4NRT-PP46>].

114. *Id.*

115. *Zelt v. Xytex Corp.*, No. 1:17-CV-4851-TWT, 2018 WL 1014627, at 1 (N.D. Ga. 2018).

116. Mroz, *supra* note 22.

117. *Id.*

outdated methods of labeling specimens, such as pen and paper.<sup>118</sup> For instance, an African-American donor's specimen was mistakenly substituted for that of a precisely-selected Caucasian donor's.<sup>119</sup> The switch, unfortunately, occurred because "[s]perm vial numbers at the bank were written in pen and ink, and the facility's records were not computerized."<sup>120</sup>

"There are few legal remedies for parents who receive the wrong sperm . . ." <sup>121</sup> Courts have upheld that there is no injury if the donor-conceived child is healthy because whether one donor is better than another is essentially unknown.<sup>122</sup> Also, in the Zelts' case, the Eleventh Circuit left the couple with little recourse by finding that the applicable state law did not recognize the birth of a child with undesirable inherited characteristics as a compensable legal injury.<sup>123</sup>

The number of donor-conceived children that are inheriting genetic diseases, learn that their donor was untruthful about his health history, discover that the sperm bank failed to inform them of reported illness, or uncover that they were doctor-conceived is growing.<sup>124</sup> Also, intended parents are accusing sperm banks of careless recordkeeping, using misleading descriptions to market sperm, or misappropriating sperm donated or banked for personal use.<sup>125</sup> These discoveries and accusations represent significant problems with the United States fertility industry's shortage of regulation.

#### *D. The Lack of Regulation in the Indiana Fertility Industry and Indiana's Change in This Area of the Law*

This subsection reviews the Indiana fertility business. First, it explains relevant regulations and laws in Indiana. Second, it briefly summarizes Indiana's failed Gamete Donation Act. Last, it describes a change in this area of Indiana law, such being the Senate Enrolled Act 174. This Act is also commonly referred to as Indiana's fertility fraud law.

##### *1. How Is the Indiana Fertility Industry Regulated?*

"There are two basic levels in the [United States] legal system: federal law and state law."<sup>126</sup> Federal laws and regulations apply to all 50 states, while state laws

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118. *Id.*

119. *Cramblett v. Midwest Sperm Bank, LLC*, 230 F. Supp. 3d 865, 867 (N.D. Ill. 2017).

120. *Mroz*, *supra* note 22.

121. *Id.*

122. *Harnicher v. Univ. of Utah Med. Ctr.*, 962 P.2d 67, 72 (Utah 1998) ("[I]t is impossible to know whether the children of [the correct donor] would have been superior in any way to the [healthy] triplets . . .").

123. *Zelt v. Xytex Corp.*, 766 F. App'x 735, 739, 741 (11th Cir. 2019).

124. *Kramer*, *supra* note 21.

125. *Lewin*, *supra* note 113.

126. *Lesley Daunt, State vs. Federal Law: Who Really Holds the Trump Card?*, HUFFPOST (Mar. 20, 2014), [https://www.huffpost.com/entry/state-vs-federal-law-who-\\_b\\_4676579](https://www.huffpost.com/entry/state-vs-federal-law-who-_b_4676579) [https://

and regulations only apply to the specific state in which they were enacted.<sup>127</sup> Hence, in terms of ART, Indiana is subject to the FCSRCA, FDA, and its own laws or regulations.

Like the United States fertility industry, “[t]he regulation of private fertility clinics and gamete banks by individual states is also often lacking.”<sup>128</sup> Still, compared to the federal government, Indiana seems to have taken steps toward better regulating its particular fertility business. For instance, Indiana obligates physicians to collect the following information from sperm donors: name, address, date of birth, and social security number.<sup>129</sup>

In line with the FDA’s regulations, Indiana tests sperm donations for communicable and sexually transmitted diseases.<sup>130</sup> However, a physician *may* order more tests for a donor “to rule out the presence of [other] infectious disease[s].”<sup>131</sup> If a *required* medical or laboratory test indicates the presence of certain communicable or dangerous illnesses, physicians must report the donor to the State Department and “attempt to notify [the] donor or recipient.”<sup>132</sup> These diseases include syphilis, hepatitis, and HIV.<sup>133</sup> Similarly, hospitals, birthing centers, and abortion clinics must relate cases of artificial insemination with the incorrect gamete to the State Department because they are reportable events.<sup>134</sup>

Further, physicians may only use sperm donations if particular conditions are met.<sup>135</sup> First, the gamete donation must be “frozen and quarantined for at least [180] days.”<sup>136</sup> Second, the donor must be retested for HIV after 180 days.<sup>137</sup> Indiana penalizes health care providers that do not comply with the required regulations.<sup>138</sup>

## 2. Indiana’s Failed Gamete Donation Act

In 2019, Indiana attempted to better regulate gamete donation with House Bill 1369.<sup>139</sup> A portion of the bill, which exclusively addressed sperm and egg donation, was referred to as the Indiana Gamete Donation Act.<sup>140</sup> The Act

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perma.cc/VR34-PYJW].

127. *Id.*

128. Sabatello, *supra* note 86; *see also* Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 162 (2017).

129. IND. CODE § 16-41-14-12 (2019).

130. *See* IND. CODE § 16-41-14-6 (2019); *see* 410 IND. ADMIN. CODE § 25-2-2 (2019).

131. 410 IND. ADMIN. CODE § 25-2-4 (2019).

132. IND. CODE § 16-41-14-9 (2019); *see generally* IND. CODE § 16-41-2-1 (2019).

133. IND. CODE § 16-41-14-5 (2019).

134. 410 IND. ADMIN. CODE §§ 15-1.4-2.2, 26-6-2, 27-6-2 (2019).

135. IND. CODE § 16-41-14-7 (2019).

136. *Id.*

137. *Id.*

138. IND. CODE §§ 16-41-2-8, -14-19 (2019).

139. H.B. 1369, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019).

140. *Id.*

“amend[ed] provisions regarding testing of donated human sperm and eggs,” and set forth requirements for gamete donation agreements.<sup>141</sup> It was a proposed new chapter for the Indiana Code.<sup>142</sup>

Consistent with the ASRM’s guidelines,<sup>143</sup> the Gamete Donation Act required gamete donors to undergo mental health and medical evaluations by specialists.<sup>144</sup> Likewise, it obligated intended parents to also complete a mental health evaluation.<sup>145</sup> Plus, the Act required fertility clinics to comply with FDA guidelines,<sup>146</sup> thereby attempting to cure the FDA’s inability to adequately regulate the fertility industry.<sup>147</sup> Nonetheless, the Indiana Gamete Donation Act was unfortunately not adopted.<sup>148</sup>

### 3. Indiana’s Change in This Area of the Law

Although the Indiana Legislature failed to adopt the Gamete Donation Act, it passed the Senate Enrolled Act 174 in 2019.<sup>149</sup> Governor Holcomb signed the Act into law after Cline’s wrongdoing.<sup>150</sup> The Act “allows for civil action in response to fertility fraud and increases the penalty for fertility deception to a Level 6 felony.”<sup>151</sup> A Level 6 felony is the “lowest [felony] level under Indiana law.”<sup>152</sup> Regardless, the Act is “the first such law in the country.”<sup>153</sup>

Under the Senate Enrolled Act 174, a woman who conceives after infertility treatment “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 [sperm] or [egg], without the [woman]’s informed written consent.”<sup>154</sup> The woman’s surviving spouse or the resulting child may also initiate this action.<sup>155</sup>

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141. *Id.*

142. *Id.*

143. Practice Comm., Am. Soc’y for Reprod. Med. & Practice Comm., Soc’y for Assisted Reprod. Tech., *supra* note 100, at 48-53.

144. H.B. 1369.

145. *Id.*

146. *See id.*

147. Mroz, *supra* note 22; *see also* 21 C.F.R. § 1271.75 (2019).

148. H.B. 1369.

149. Kara Kenney, *Governor Signs Fertility Fraud and Deception Bill into Law*, RTV6 INDIANAPOLIS (May 6, 2019), <https://www.theindychannel.com/news/politics/governor-signs-fertility-fraud-and-deception-bill-into-law> [<https://perma.cc/2UGV-HDZM>].

150. *Id.*

151. Casey Smith, *What You Should Know About These Indiana Laws Going into Effect July 1*, INDY STAR (July 1, 2019), <https://www.indystar.com/story/news/politics/2019/07/01/new-indiana-laws-july-1-2019-firearms-abortion-scooters-more/1459500001/> [<https://perma.cc/L5Q7-FWNG>].

152. Madeira, *supra* note 14.

153. Zhang, *supra* note 8.

154. IND. CODE § 34-24-5-2 (2019).

155. *Id.*

Next, the Act provides that a prevailing plaintiff is entitled to compensatory and punitive damages as well as liquidated damages of \$10,000.<sup>156</sup> Compensatory, or actual, damages are of a sufficient amount to indemnify the harm, loss, or injury suffered.<sup>157</sup> On the other hand, punitive damages are awarded in addition to compensatory damages when a defendant acted with recklessness, malice, or deceit.<sup>158</sup> Further, punitive damages penalize the wrongdoer. Lastly, liquidated damages are a type of compensatory damages,<sup>159</sup> and they set forth damages for breach of contract ahead of time.<sup>160</sup>

Aside from civil causes of action for fertility fraud, the Act creates a criminal cause of action.<sup>161</sup> However, it originally advanced without a criminal penalty because a senate committee believed that there were protections already in place for intended parents under Indiana law.<sup>162</sup> Nonetheless, the Act was “amended to reinsert the criminal cause of action” because Cline’s victims asserted that the criminal penalty was imperative in keeping doctors accountable.<sup>163</sup> Also, Marion County prosecutors were limited in making a criminal case against Cline under state law before the Act was adopted.<sup>164</sup>

### III. INDIANA SHOULD IMPLEMENT A MORE STRINGENT CRIMINAL PENALTY FOR FERTILITY FRAUD

This section analyzes the Senate Enrolled Act 174, also commonly known as Indiana’s fertility fraud law. First, it compares Indiana’s law with other state fertility fraud laws, thereby illustrating how the Act’s criminal penalty is too lax in protecting the rights of intended parents. Second, it specifically discusses the interests of intended parents. Last, it examines gaps in Indiana law, analyzes the Senate Enrolled Act 174’s effect on Indiana intended parents, and asserts that Indiana should implement a more stringent criminal penalty for fertility fraud.

#### *A. The Senate Enrolled Act 174 Compared to Different State Fertility Fraud Laws*

Today, only three states have laws that exclusively tackle fertility fraud:

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156. IND. CODE § 34-24-5-4 (2019).

157. *Actual Damages*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/actual\\_damages](https://www.law.cornell.edu/wex/actual_damages) [https://perma.cc/Y2L9-WFRR] (last visited Feb. 1, 2020).

158. *Punitive Damages*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/punitive\\_damages](https://www.law.cornell.edu/wex/punitive_damages) [https://perma.cc/BE3E-72KS] (last visited Feb. 1, 2020).

159. *Liquidated Damages*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/liquidated\\_damages](https://www.law.cornell.edu/wex/liquidated_damages) [https://perma.cc/T2NK-XMV8] (last visited Feb. 1, 2020).

160. *Id.*

161. Madeira, *supra* note 14.

162. Kelly Reinke, *Lawmakers Remove Criminal Penalty from Fertility Fraud Bill*, FOX 59 (Jan. 23, 2019), <https://fox59.com/2019/01/23/lawmakers-remove-criminal-penalty-from-fertility-fraud-bill/> [https://perma.cc/E5QW-DSYE].

163. Madeira, *supra* note 14.

164. *Id.*

California, Indiana, and Texas.<sup>165</sup> However, Colorado has proposed a bill to address the wrongful practice, “while Florida and Delaware are working on legislation this session.”<sup>166</sup> This subsection outlines the fertility fraud laws in California and Texas. Also, it compares the Senate Enrolled Act 174 to them.

### 1. California

After more than ten years of trying to conceive, a California couple visited a fertility doctor at the University of California at Irvine (“UCI”).<sup>167</sup> The doctor created twenty-one embryos, using the couples’ gametes, and froze all of them for future use.<sup>168</sup> In 1995, the couple learned that three of their embryos were implanted in another woman without their consent.<sup>169</sup> This woman gave birth to twins, the couple’s biological children.<sup>170</sup>

During the 1990s, “[s]tealing human tissue was not a crime.”<sup>171</sup> Health care providers at UCI, in approximately thirty cases, allegedly took women’s eggs or patient embryos without their consent and gave them to other women.<sup>172</sup> No less than fifteen births followed from this wrongful conduct, and UCI whistleblowers reported this egg-theft scandal to officials.<sup>173</sup>

Following the UCI scandal, the California Legislature adopted section 367g of the California Penal Code.<sup>174</sup> Such “criminalize[s] the fraudulent use or implantation of gametes or embryos in ART for any purposes other than those chosen by the gamete or embryo provider[.]”<sup>175</sup> Specifically, section 367g of the California Penal Code makes it unlawful for health care providers to knowingly use gametes or embryos for a different purpose than that specified by the gamete or embryo provider through written consent.<sup>176</sup> It also makes it unlawful for health care providers to knowingly “implant these materials into someone who is not the person providing these materials without the provider’s signed written consent.”<sup>177</sup> However, written consent is not mandatory for sperm donors that

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165. Tabachnik, *supra* note 25.

166. *Id.*

167. Cynthia Sanz, *A Fertility Nightmare*, PEOPLE (July 24, 1995), <https://people.com/archive/a-fertility-nightmare-vol-44-no-4/> [<https://perma.cc/2SM4-D8E8>].

168. *Id.*

169. *Id.*

170. *Id.*

171. Register Staff Writer & Teri Sforza, *Should UC Go After Fertility Fraud Doctor’s Assets?*, ORANGE COUNTY REG. (Jan. 25, 2011), <https://www.ocregister.com/2011/01/25/should-uc-go-after-fertility-fraud-doctors-assets/> [<https://perma.cc/X46K-B9ET>].

172. Sanz, *supra* note 167.

173. Register Staff Writer & Sforza, *supra* note 171.

174. Madeira, *supra* note 14.

175. *Uncommon Misconceptions*, *supra* note 27, at 49.

176. CAL. PENAL CODE § 367g (2019).

177. *Uncommon Misconceptions*, *supra* note 27, at 65 (citations omitted); *see also id.*

donate to a licensed sperm bank.<sup>178</sup> An individual who violates section 367g of the California Penal Code is punished by imprisonment for three to five years, fined up to \$50,000, or both.<sup>179</sup>

Until 2019, the year that the Senate Enrolled Act 174 was passed in Indiana, California was the only state in the nation that expressly outlawed fertility fraud.<sup>180</sup> Though, these two pieces of legislation are dissimilar in a couple of ways. First, the Indiana law distinctively addresses the use of a health care provider's *own* gametes in ART.<sup>181</sup> Thus, the Senate Enrolled Act 174 seems more focused on the rights of intended parents,<sup>182</sup> whereas section 367g of the California Penal Code focuses more so on the rights of gamete or embryo providers.<sup>183</sup> Second, the Indiana law imposes a lesser criminal penalty, a Level 6 felony, on violators of it. Particularly, under Indiana criminal law, an individual who commits a Level 6 felony is "imprisoned for a fixed term of between six months . . . and two and one-half years."<sup>184</sup> Also, the person may not be fined in excess of \$10,000.<sup>185</sup> This criminal penalty is much less than that imposed by section 367g of the California Penal Code.<sup>186</sup>

## 2. Texas

In 2003, Eve Wiley ("Wiley"), a Texas woman, learned that she was donor-conceived.<sup>187</sup> Although confused at first, she was also excited to learn more about her biological father, Donor #106.<sup>188</sup> Soon thereafter, she met Donor #106.<sup>189</sup> Though, in a turn of events, Wiley later discovered that her mother's fertility doctor impregnated "her mother with his own sperm, making him – not Donor #106 – her biological father."<sup>190</sup>

After lobbying to change Texas law, Wiley successfully pushed the Texas

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178. PENAL § 367g.

179. *Id.*

180. Leila Ettachfani, *Doctors Can Legally Inseminate Patients with Their Own Sperm in Most States*, VICE (Apr. 22, 2019), [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/M66T-4VPJ>].

181. IND. CODE § 34-24-5-2 (2019).

182. *See id.*

183. *See* PENAL § 367g.

184. IND. CODE § 35-50-2-7 (2019).

185. *Id.*

186. *See* PENAL § 367g.

187. Kyra Phillips et al., *Texas Woman Seeks to Change Law After DNA Test Reveals Shocking Truth About Her Genetic Family Tree*, ABC NEWS (May 3, 2019), <https://abcnews.go.com/US/texas-woman-seeks-change-law-dna-test-reveals/story?id=62809127> [<https://perma.cc/9MF2-BRU5>].

188. *Id.*

189. *Id.*

190. *Id.*

Legislature to pass a fertility fraud law.<sup>191</sup> In 2019, Texas passed Senate Bill No. 1259,<sup>192</sup> which makes “fertility fraud a new category of sexual assault” in the State.<sup>193</sup> The law expressly makes it a sexual assault for a health care provider, who is performing ART on a patient, to “use[] human reproductive material from a donor knowing that the [patient] has not expressly consented to the use of material from that donor.”<sup>194</sup> “Physicians violating this provision can be sentenced to between six months and two years in prison and be fined up to \$20,000.”<sup>195</sup> Additionally, a physician found guilty under the Texas “law must register as a sexual offender.”<sup>196</sup>

While the Texas and Indiana fertility fraud laws are alike in that violators may be imprisoned for similar amounts of time,<sup>197</sup> the Senate Bill No. 1259 is unique in that it classifies fertility fraud as a new category of sexual assault.<sup>198</sup> Hence, the Texas law seems to better get at what fertility fraud really is.<sup>199</sup> Not only has a physician betrayed his patient’s trust but also the doctor-patient fiduciary relationship.<sup>200</sup> Further, the physician has literally inserted a “part of himself into the [patient]’s bodily cavity” without her consent, thereby violating her autonomy.<sup>201</sup>

### *B. Fertility Fraud and the Interests of Intended Parents*

While intended parents have several different interests, there are three that are most relevant to this Note: patient autonomy, being touched by a doctor with appropriate motives, and receiving properly screened gametes. This subsection describes each of these interests in order.

#### *1. Patient Autonomy*

Patient autonomy is “[t]he right of patients to make decisions about their

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191. Edmunds, *supra* note 73.

192. Robert T. Garrett, *Dallas Woman’s Push to Make Fertility Fraud a Crime Results in New Law on the Books in Texas*, DALL. MORNING NEWS (June 5, 2019), <https://www.dallasnews.com/news/politics/2019/06/05/dallas-woman-s-push-to-make-fertility-fraud-a-crime-results-in-new-law-on-the-books-in-texas/> [<https://perma.cc/YJ2B-6Y5H>] [hereinafter *Dallas Woman’s Push*].

193. Garrett, *supra* note 15.

194. S.B. 1259, 86th Leg. (Tex. 2019); *Dallas Woman’s Push*, *supra* note 192.

195. Madeira, *supra* note 14.

196. Jeffrey Martin, *Fertility Doctors Using Their Own Sperm for Fertilization Leads to ‘Fertility Fraud’ Legislation in 3 States*, NEWSWEEK (Nov. 5, 2019), <https://www.newsweek.com/fertility-doctors-using-their-own-sperm-fertilization-leads-fertility-fraud-legislation-3-1469975> [<https://perma.cc/J3HR-HU39>].

197. See S.B. 1259; see H.B. 1369, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019).

198. S.B. 1259.

199. Ettachfini, *supra* note 180.

200. *Id.*

201. *Id.*

medical care without their health care provider trying to influence the decision.”<sup>202</sup> Patient autonomy does not permit a physician to make a health care decision for the patient.<sup>203</sup> Though, the physician may educate the patient on his or her condition.<sup>204</sup> According to the Code for Professional Ethics for the American College of Obstetricians and Gynecologists, respect for patient autonomy is fundamental.<sup>205</sup>

In *Kaplan v. Mamelak*, a patient sued his surgeon for medical malpractice and battery, claiming that he suffered pain after the surgeon twice operated on the patient’s wrong herniated disks.<sup>206</sup> The California court reasoned that “a battery occurs if [a] physician performs a ‘substantially different treatment’ from that covered by the patient’s expressed consent.”<sup>207</sup> Thus, a doctor who operates on a patient without the patient’s informed or express consent commits a battery. Similarly, under Indiana law, “[t]he failure to obtain informed consent rises to the level of battery only when [a] physician completely fails to obtain” it.<sup>208</sup> An obstetrician-gynecologist, or fertility doctor, is obligated to obtain informed consent from each patient.<sup>209</sup> Informed consent transpires when communication between a doctor and patient “results in the patient’s authorization . . . to undergo a specific medical intervention.”<sup>210</sup>

Consent to inseminate with a specific specimen “does not constitute consent to insemination with *any* type of sperm whatsoever.”<sup>211</sup> Doctors who impregnated their patients with their own sperm “never obtained consent to do so.”<sup>212</sup> Instead, these doctors agreed to inseminate the patient with a sperm donation or a husband’s sample.<sup>213</sup> Thus, intended parents in fertility fraud cases have a right to autonomy.

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202. William C. Shiel, *Medical Definition of Patient Autonomy*, MEDICINENET, <https://www.medicinenet.com/script/main/art.asp?articlekey=13551> [<https://perma.cc/6GF7-959V>] (last visited Feb. 1, 2020).

203. *Id.*

204. *Id.*

205. *Code of Professional Ethics of the American College of Obstetricians and Gynecologists*, AM. C. OBSTETRICIANS & GYNECOLOGISTS, [https://webcache.googleusercontent.com/search?q=cache:WSCyVNq\\_au0J:https://m.acog.org/About-ACOG/ACOG-Departments/Committees-and-Councils/Volunteer-Agreement/Code-of-Professional-Ethics-of-the-American-College-of-Obstetricians-and-Gynecologists+&cd=1&hl=en&ct=clnk&gl=us&client=safari](https://webcache.googleusercontent.com/search?q=cache:WSCyVNq_au0J:https://m.acog.org/About-ACOG/ACOG-Departments/Committees-and-Councils/Volunteer-Agreement/Code-of-Professional-Ethics-of-the-American-College-of-Obstetricians-and-Gynecologists+&cd=1&hl=en&ct=clnk&gl=us&client=safari) [<https://perma.cc/88SW-ATM5>] (last visited Mar. 26, 2020).

206. *Kaplan v. Mamelak*, 162 Cal. App.4th 637, 637 (Cal. Ct. App. 2008).

207. *Id.* at 646.

208. *Van Sice v. Sentany*, 595 N.E.2d 264, 267 n.6 (Ind. Ct. App. 1992).

209. *Code of Professional Ethics of the American College of Obstetricians and Gynecologists*, *supra* note 205.

210. *Informed Consent*, AMA, <https://www.ama-assn.org/delivering-care/ethics/informed-consent> [<https://perma.cc/E9JX-LY7U>] (last visited Feb. 1, 2020).

211. *Understanding Illicit Insemination*, *supra* note 27, at 166 (emphasis added).

212. *Id.*

213. *Id.*

## 2. *Touching and Appropriate Motives*

Within the last year, at least six gynecologists were accused of sexual assault.<sup>214</sup> Although the majority of physicians cannot fathom engaging in this type of behavior, “[i]t is no longer sufficient to rely solely on physicians’ professed good intentions to ensure that patients are adequately protected.”<sup>215</sup>

Patients have a right to be treated for legitimate medical reasons as well as an interest in being touched for clinical reasons and within the course of professional duties.<sup>216</sup> Fertility doctors, or obstetrician-gynecologists, that engage in sexual misconduct abuse their professional power and violate patient trust.<sup>217</sup> Relatedly, “[a] physician who obtains sexual gratification from inseminating a patient with an appropriately anonymous donor sperm sample is engaging in an illicit touching.”<sup>218</sup> The physician, simply, is using his patient for an inappropriate purpose.<sup>219</sup> Moreover, “[w]hen a physician procures his own sperm sample though masturbation and moments later uses that sample to inseminate[] his female patient, the violation is compounded: the patient is not only being penetrated for an unconsented-to purpose” but also “unwittingly help[s] the physician sow his seed as widely as possible.”<sup>220</sup>

## 3. *Properly Screened Gametes*

As previously discussed, the FDA “requires basic screening for infectious diseases and [specific] risk factors before a man can become a sperm donor.”<sup>221</sup> Additionally, certain states may require further screening.<sup>222</sup> Today, the FDA particularly requires sperm donors to be tested for communicable diseases.<sup>223</sup>

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214. Christina Caron, *Identifying Red Flags at the Ob-Gyn*, N.Y. TIMES (Jan. 22, 2020), <https://parenting.nytimes.com/pregnancy/ob-gyn-sexual-assault?smtyp=cur&smid=tw-nytimes> [<https://perma.cc/86HE-3876>].

215. *Id.*

216. See Amy Blair & Katherine Wasson, *Professionalism and Appropriate Expression of Empathy When Breaking Bad News*, 17 AMA J. ETHICS 111, 113 (2015).

217. *Code of Professional Ethics of the American College of Obstetricians and Gynecologists*, *supra* note 205.

218. *Understanding Illicit Insemination*, *supra* note 27, at 177; see also Comm. on Ethics, *Sexual Misconduct*, AM. C. OBSTETRICIANS & GYNECOLOGISTS (Jan. 2020), <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2020/01/sexual-misconduct> [<https://perma.cc/EM2L-Z4XZ>] (“The patient-physician relationship is damaged when there is either confusion regarding professional roles and behavior or clear lack of integrity that allows sexual exploitation and harm.”).

219. See *Understanding Illicit Insemination*, *supra* note 27, at 177.

220. *Id.*

221. *Sperm Donation*, MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/sperm-donation/about/pac-20395032> [<https://perma.cc/29R8-JUU2>] (last visited Feb. 1, 2020).

222. *Id.*

223. *What You Should Know – Reproductive Tissue Donation*, *supra* note 102.

These diseases include HIV, hepatitis, and other sexually transmitted infections.<sup>224</sup> Sperm donors are not only tested for infectious or communicable diseases before providing their sample but also six months after the sample is received.<sup>225</sup>

To protect intended parents, the ASRM also recommends that sperm donors undergo a physical exam, semen testing, genetic testing, and a psychological evaluation.<sup>226</sup> In addition, a sperm donor should be between eighteen and thirty-nine years old, and he should have his family medical history, personal history, and sexual history evaluated.<sup>227</sup>

Although some of these regulations or recommendations were not yet in place when certain patients were illicitly inseminated, these patients still had an interest in verifying that their sperm donors were disease-free.<sup>228</sup> Moreover, these individuals “had interests in expecting that their physicians would use sperm donor samples that had been appropriately screened in at least [three additional] senses:” (1) to confirm the sample’s origin, (2) to confirm that the donor phenotypically matched the husband, and (3) to prevent consanguinity.<sup>229</sup>

### *C. The Senate Enrolled Act 174’s Effect on Indiana Intended Parents*

This subsection specifically analyzes the impact of Indiana’s fertility fraud law on intended parents and asserts that the Indiana Legislature should adopt a more stringent criminal penalty for fertility fraud. First, it outlines gaps in Indiana criminal law. Then, it describes how the Senate Enrolled Act 174 potentially fills these gaps as well as the Act’s advantages, disadvantages, and potential solutions.

#### *1. Relevant Gaps in Indiana Criminal Law*

Fertility fraud cases often “fall within gaps in civil and criminal law.”<sup>230</sup> For example, in Indiana, the State’s rape statute does not correspond well with Cline’s conduct.<sup>231</sup> Under Indiana law, rape occurs when “a person knowingly or intentionally has sexual intercourse with another person or knowingly or intentionally causes another person to perform or submit to other sexual conduct.”<sup>232</sup> Additionally, the other person must either be (1) “compelled by force or imminent threat of force,” (2) “unaware that the sexual intercourse or other sexual conduct” is happening, or (3) mentally disabled or deficient to consent to

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224. *Id.*

225. *Sperm Donation*, *supra* note 221.

226. *Id.*

227. *Id.*

228. *Understanding Illicit Insemination*, *supra* note 27, at 169.

229. *Id.*

230. *Id.* at 113.

231. *Uncommon Misconceptions*, *supra* note 27, at 57.

232. IND. CODE § 35-42-4-1 (2019).

sexual intercourse or sexual conduct.<sup>233</sup>

In terms of Cline's misconduct, only the second provision seems applicable because Cline's patients were unaware that they were being inseminated with his sperm.<sup>234</sup> However, Marion County prosecutors did not pursue Cline under Indiana's rape statute because they "believed that it would be too difficult to prove that Cline's actions were sexually motivated without an admission from him saying so."<sup>235</sup> Therefore, Cline's "acts are not traditionally prosecutable as rape or sexual assault" because his victims "consented" to the inseminations.<sup>236</sup>

In addition, Indiana's sexual battery statute is also inconsistent with Cline's conduct. Sexual battery in Indiana is a Level 6 felony for the context of this Note.<sup>237</sup> The statute states that an individual commits sexual battery if he or she touches another individual who is either (1) "compelled to submit to the touching by force or the imminent threat of force" or (2) unable to consent to the touching due to mental disability or deficiency.<sup>238</sup> Also, a person commits sexual battery if he or she "touches another person's genitals, pubic area, buttocks, or female breast when that person is unaware that the touching is occurring."<sup>239</sup> For each of these provisions, the wrongdoer must engage in the touching with an "intent to arouse or satisfy [his or her] own sexual desires or the sexual desires of another person."<sup>240</sup>

None of the aforementioned sexual battery provisions seem to apply to Cline's conduct. Specifically, "Cline did not use or threaten force against his patients, did not give them drugs of which they were unaware, and had consent to touch their genital areas."<sup>241</sup>

Moreover, Indiana's criminal battery and malicious mischief statutes "do not map well onto Cline's conduct" either.<sup>242</sup> For instance, an individual commits criminal battery, a Class B misdemeanor, if he "knowingly or intentionally: (1) touches another person in a rude, insolent, or angry manner; or (2) in a rude, insolent, or angry manner places any bodily fluid or waste on another person."<sup>243</sup> Prosecution of Cline under this statute would likely fail because "there is little to no evidence that Cline conducted the inseminations in a rude, insolent, or angry manner."<sup>244</sup> Also, prosecution may be problematic because Cline's patients consented to insemination with donor sperm.<sup>245</sup>

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233. *Id.* (emphasis added).

234. Ettachfini, *supra* note 180.

235. *Id.*

236. *Understanding Illicit Insemination*, *supra* note 27, at 113.

237. *See* IND. CODE § 35-42-4-8 (2019).

238. *Id.*

239. *Id.*

240. *Id.*

241. *Understanding Illicit Insemination*, *supra* note 27, at 190.

242. *Uncommon Misconceptions*, *supra* note 27, at 57.

243. IND. CODE § 35-42-2-1 (2019).

244. *Uncommon Misconceptions*, *supra* note 27, at 57.

245. *Id.* at 58.

Finally, Indiana's malicious mischief statute states that an individual commits a Class B misdemeanor if he recklessly, knowingly, or intentionally places human bodily fluid or fecal waste "in a location with the intent that another person will involuntarily touch" it.<sup>246</sup> Moreover, if the person "recklessly failed to know that the bodily fluid . . . was infected with" hepatitis, HIV, or tuberculosis, then he may be convicted of either a Level 6 felony, Level 5 felony, or Level 4 felony depending on the circumstances.<sup>247</sup> With respect to Cline's case, the Indiana Legislature probably did not intend to "apply malicious mischief to the placement of bodily fluid in the context of a medical procedure."<sup>248</sup> Also, reports do not indicate that Cline's victims were infected with any infectious or communicable diseases.

## 2. *The Senate Enrolled Act 174: Advantages and Disadvantages*

This subsection summarizes the Senate Enrolled Act 174's advantages and disadvantages. It initially describes how the Act fills gaps in Indiana criminal law, thereby better protecting the interests of intended parents. Then, it explains the Act's deficiencies and asserts that the Indiana Legislature should adopt a more stringent criminal penalty for fertility fraud.

### a. *Advantages*

As previously mentioned, the Senate Enrolled Act 174 is "the first such law in the country."<sup>249</sup> To reiterate, it allows a woman who conceives after infertility treatment to "bring an action against a health care provider who knowingly or intentionally treated the woman by using the health care provider's own [sperm] or [egg], without the [woman]'s informed written consent."<sup>250</sup>

The Act fills gaps in Indiana criminal law by better protecting patient autonomy, which is an interest of intended parents. In detail, the Act enforces that consent to inseminate with one sperm sample does not constitute consent to inseminate with any sperm sample. Thus, with respect to consent, the Act remedies gaps left by Indiana's rape, sexual battery, and criminal battery statutes.

Additionally, the Act's criminal penalty is either greater than or equal to the penalties for sexual battery, criminal battery, or malicious mischief.<sup>251</sup> For example, a person who commits criminal battery or malicious mischief may not be imprisoned for more than 180 days,<sup>252</sup> which is significantly less than the Act's

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246. IND. CODE § 35-45-16-2 (2019).

247. *Id.*

248. *Uncommon Misconceptions*, *supra* note 27, at 57.

249. Zhang, *supra* note 8.

250. IND. CODE § 34-24-5-2 (2019).

251. Compare H.B. 1369, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019), with IND. CODE § 35-42-4-8 (2019), and IND. CODE § 35-42-2-1 (2019), and § 35-45-16-2.

252. See IND. CODE §§ 35-42-2-1, -45-16-2, -50-3-3 (2019) (showing that criminal battery and malicious mischief are both Class B misdemeanors).

possible imprisonment term of six months to two and one-half years.<sup>253</sup> Thus, in comparison to the various Indiana criminal statutes that Cline could not be prosecuted under, the Act imposes a serious criminal penalty and better protects the interests of intended parents by treating illicit insemination as a serious crime.

*b. Disadvantages and potential solutions*

Although the Senate Enrolled Act 174 is a step in the right direction, there is still room for improvement. Particularly, the Act does not suitably protect intended parents from illicit touching by a physician or from receiving improperly screened gametes.

First, the Act is insufficient because it does not completely fill the gap left by Indiana's rape statute. To illustrate, there are two relevant types of touching for the purposes of this Note: clinical and sexual. As previously described, a clinical touch occurs when a physician touches a patient for clinical reasons and within the course of professional duties.<sup>254</sup> Alternatively, a sexual act includes genital penetration with an object, along with an intent to "gratify the sexual desire of any person."<sup>255</sup>

Although Cline or other fertility fraud perpetrators could argue that their illicit inseminations were clinical touches or acts, how are these inseminations "still clinical when the physician . . . masturbates . . . in a nearby room, catches his sample, walks to the [patient] examination room," and then "inserts [the] sample into [the patient's] vagina via a syringe and catheter?"<sup>256</sup> Further, how is illicit insemination not a sexual act when Cline was likely under "orgasm's physiological effects when he inseminated his patients?"<sup>257</sup>

The Senate Enrolled Act 174 does not protect intended parents from illicit touching by a physician.<sup>258</sup> To cure this, the Indiana Legislature, similar to the Texas Legislature, should classify illicit insemination as a sex crime because it involves a sexual act. Liz White, one of Cline's victims, asserts that "the [fifteen] times . . . Cline inseminated her . . . constituted nothing less than sexual assault."<sup>259</sup> Moreover, classifying fertility fraud as a sex crime more accurately portrays what the wrongful practice is: a betrayal of the doctor-patient fiduciary relationship.<sup>260</sup>

Relatedly, Indiana physicians who are convicted of sex crimes may have their

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253. See Smith, *supra* 151; see IND. CODE §§ 35-43-5-3, -50-2-7 (2019).

254. Blair & Wasson, *supra* note 216.

255. *What Is a Sexual Act, Sexual Contact, or Sexual Activity?*, ROCKLAND COMMUNITY C., <https://www.sunyrockland.edu/about/title-ix/sexual-assault-violence-harassment-faq/what-is-a-sexual-act-sexual-contact-or-sexual-activity> [https://perma.cc/WZK3-92TC] (last visited Feb. 1, 2020).

256. *Uncommon Misconceptions*, *supra* note 27, at 58.

257. *Understanding Illicit Insemination*, *supra* note 27, at 192.

258. See IND. CODE § 34-24-5-2 (2019).

259. Rudavsky, *supra* note 4.

260. Ettachfini, *supra* note 180.

medical licenses either suspended, denied, or revoked.<sup>261</sup> Therefore, illicit insemination should also be categorized as a sex crime because this classification may better deter future perpetrators.<sup>262</sup> Further, this classification is superior because it may involve a more serious felony level and require perpetrators to register as sex offenders.<sup>263</sup> This could additionally deter offenders by removing a perpetrator from society and putting those with similar objectives on notice.<sup>264</sup>

Second, the Senate Enrolled Act 174 is insufficient because it does not fill the gap left by Indiana's malicious mischief statute. For instance, the Act does not better allow for the prosecution of individuals who illicitly inseminate their patients and recklessly infect them with an infectious or communicable disease.<sup>265</sup> Therefore, the Act does not hold future fertility fraud perpetrators accountable for the improper screening of gametes, an important interest of intended parents. To better protect these individuals, the Indiana Legislature must amend the Senate Enrolled Act 174. And, similar to Indiana's malicious mischief statute, the Legislature should impose a higher criminal penalty for physicians who inseminate their patients with their own improperly screened or infected gametes.<sup>266</sup>

#### IV. INDIANA SHOULD ADOPT A VERSION OF THE UNIFORM PARENTAGE ACT

This section describes the UPA and argues that Indiana should adopt a version of it. Initially, this section describes the UPA and explains its statutory scheme. Then, this section compares Indiana law to the UPA and claims that intended parents would be better protected if a version of the UPA was implemented.

##### *A. The Uniform Parentage Act*

The UPA “is a set of uniform rules for establishing parentage, which may be adopted by state legislatures on a state by state basis.”<sup>267</sup> In 1973, the National Conference of Commissioners on Uniform State Laws promulgated the first UPA.<sup>268</sup> This version of the UPA “declare[d] equal rights for children regardless

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261. See IND. CODE § 25-1-1.1-2 (2019).

262. See Elizabeth J. Letourneau et al., *Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence Against Women*, MED. U.S.C. (Sept. 2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/231989.pdf> [<https://perma.cc/7CQE-5A4L>].

263. See IND. CODE § 35-42-4-1 (2019).

264. See JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* 30-51 (West Academic Publishing, 7th ed. 2016).

265. See IND. CODE § 34-24-5-2 (2019).

266. See IND. CODE § 35-45-16-2 (2019).

267. *Uniform Parentage Act Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/u/uniform-parentage-act/> [<https://perma.cc/VYD5-2ZJG>] (last visited Feb. 1, 2020).

268. DAVID L. FAIGMAN ET AL., *MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY* § 31:8 (2019-2020 ed. 2019).

of their parents' marital status.<sup>269</sup> At the time, several states discriminated against illegitimate children.<sup>270</sup> In fact, these children were often deemed non-persons with no legal right to paternal support and unable to inherit from relatives.<sup>271</sup> Through the late 1960s and early 1970s, the Supreme Court of the United States (the "Supreme Court") struck these notions down in *Gomez v. Perez* and *Stanley v. Illinois*.<sup>272</sup> The Supreme Court began asserting that discrimination of illegitimate children was unconstitutional on equal protection grounds.<sup>273</sup> The UPA was introduced soon thereafter, and it was implemented by nineteen states in some manner.<sup>274</sup>

During the early 2000s, the UPA underwent its first substantial revision.<sup>275</sup> This update "added a streamlined, administrative voluntary acknowledgment of paternity process for establishing parentage of nonmarital children as well as provisions regarding genetic testing."<sup>276</sup> Additionally, it revised the UPA's provisions concerning ART and added a provision on surrogacy agreements.<sup>277</sup> These provisions recognized the parentage of children born from surrogacy agreements.<sup>278</sup> Because surrogacy was a new process at the time, only eleven states adopted some form of the 2002 UPA.<sup>279</sup>

The UPA was most recently updated in 2017 in response to the Supreme Court's ruling in *Obergefell v. Hodges*, which recognized the fundamental right of same-sex couples to marry.<sup>280</sup> While this new update's central impulse was to revise the UPA to better protect children of same-sex couples, it also revised the UPA's surrogacy provisions and added new provisions that addressed the rights of donor-conceived children.<sup>281</sup> The 2017 update revised the UPA in five essential ways.<sup>282</sup> However, only one revision is fundamental for this Note: the introduction of Article 9, which "addresses the right of children born through [ART] to access medical and identifying information regarding any gamete

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269. See *Uniform Parentage Act Law and Legal Definition*, *supra* note 267.

270. Courtney G. Joslin, *Uniform Parentage Act (2017): What You Need to Know*, A.B.A. (May 11, 2018), [https://www.americanbar.org/content/dam/aba/events/family\\_law/2018/16uniformparentage.pdf](https://www.americanbar.org/content/dam/aba/events/family_law/2018/16uniformparentage.pdf) [<https://perma.cc/FFN2-MVG8>].

271. Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 350 (2011).

272. See *Gomez v. Perez*, 409 U.S. 535 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972).

273. Maldonado, *supra* note 271, at 351.

274. FAIGMAN ET AL., *supra* note 268.

275. *Id.*

276. Joslin, *supra* note 270, at 1.

277. Melissa Henig, *What Is the Legal Definition of a Parent Under the Uniform Parentage Act?*, LAWYERS.COM, <https://www.lawyers.com/legal-info/family-law/paternity/legal-definition-parent-under-uniform-parentage-act.html> (last visited Feb. 1, 2020) (copy on file with the author).

278. *Id.*

279. *Id.*; FAIGMAN ET AL., *supra* note 268, at n.2.

280. FAIGMAN ET AL., *supra* note 268; see *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

281. Henig, *supra* note 277; Joslin, *supra* note 270.

282. FAIGMAN ET AL., *supra* note 268.

providers.”<sup>283</sup>

Specifically, Article 9 provides that a gamete bank or fertility clinic must collect identifying donor information and medical history at the time of donation.<sup>284</sup> Identifying information includes one’s full name, birth date, permanent address, and current address.<sup>285</sup> On the other hand, medical history involves any present and past illness of the donor in addition to the family, social, and genetic histories of the donor.<sup>286</sup>

In addition, Article 9 specifies that, upon request, a gamete bank or fertility clinic must make a good-faith effort to provide a donor-conceived child with his or her donor’s identifying information if the child is at least eighteen years of age.<sup>287</sup> If a donor-conceived child is under eighteen years of age, then a gamete bank or fertility clinic must make a good-faith effort to provide the child’s parent or guardian with access to the donor’s nonidentifying medical history.<sup>288</sup>

Finally, with respect to recordkeeping, Article 9 requires a gamete bank or fertility clinic to collect and maintain each gamete donor’s identifying information and medical history.<sup>289</sup> Moreover, in accordance with federal and state laws, a gamete bank or fertility clinic must collect and maintain gamete screening and testing records as well as comply with reporting requirements.<sup>290</sup>

### *B. The Uniform Parentage Act and Indiana*

This subsection argues that the Indiana Legislature should adopt a version of the UPA. First, it compares Indiana law and the UPA. Then, it explains how intended parents are better protected if a version of the UPA is adopted in Indiana.

#### *1. Comparing Indiana Law and the UPA*

Thus far, only four states have enacted the 2017 UPA, while six others are

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283. Joslin, *supra* note 270, at 9 (emphasis omitted).

284. UNIF. PARENTAGE ACT § 903 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2017).

285. UNIF. PARENTAGE ACT § 901 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2017).

286. *Id.*

287. UNIF. PARENTAGE ACT § 905 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2017).

288. *Id.*

289. UNIF. PARENTAGE ACT § 906 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2017).

290. *Id.*

introducing it.<sup>291</sup> Unfortunately, Indiana is not one of these states.<sup>292</sup> Though, Article 9 of the UPA and Indiana law are alike in some ways.

Similar to Article 9, Indiana requires that practitioners obtain the following information from sperm donors: (1) name, (2) address, (3) birth date, and (4) social security number.<sup>293</sup> A practitioner is a person who “performs donor insemination” or “receives, processes, or stores semen intended for donor insemination.”<sup>294</sup> Indiana’s requirements are similar to Article 9 in that they obligate gamete banks or fertility clinics to acquire identifying information on sperm donors. Additionally, comparable to the recordkeeping provision in Article 9, Indiana practitioners must keep records of identifying information and the results of mandated testing.<sup>295</sup>

Alternatively, unlike Article 9, Indiana does not require gamete banks or fertility clinics to obtain a sperm donor’s medical history.<sup>296</sup> Further, Indiana does not provide for donor-conceived children or intended parents to access a sperm donor’s identifying or medical information.<sup>297</sup> Even previously proposed law, such as Indiana’s failed Gamete Donation Act, did not allow for this access.<sup>298</sup>

## 2. *Adopting a Version of the UPA Better Protects Indiana Intended Parents*

Although Indiana recently implemented the Senate Enrolled Act 174 and has laws aimed at gamete donation, the State’s fertility industry, in general, is still largely unregulated.<sup>299</sup> Therefore, the Indiana Legislature must ensure that the State’s laws are wholly protecting the interests of families created by gamete donation.

As discussed above, intended parents have an interest in receiving properly screened gametes.<sup>300</sup> Indiana, currently, only tests sperm donations for communicable or sexually transmitted infections.<sup>301</sup> Though, a physician *may* order more tests for a donor “to rule out the presence of [other] infectious disease[s].”<sup>302</sup> Adopting Article 9 would expand this area of Indiana law. For example, it would require the collection of a sperm donor’s full medical history,

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291. *Parentage Act*, UNIFORM L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f> [<https://perma.cc/RP36-7BLG?type=image>] (last visited Aug. 20, 2020).

292. *Id.*

293. IND. CODE § 16-41-14-12 (2019).

294. IND. CODE § 16-41-14-4 (2019).

295. *See* IND. CODE § 16-41-14-14 (2019).

296. *See generally* IND. CODE § 16-41-14-1 to -20 (2019).

297. *See generally id.*

298. *See supra* Section II.

299. *See id.*

300. *See supra* Section III.

301. *See* IND. CODE § 16-41-14-6 (2019); *see* 410 IND. ADMIN. CODE § 25-2-2 (2019).

302. 410 IND. ADMIN. CODE § 25-2-4 (2019) (emphasis added).

including present and past illnesses.<sup>303</sup>

Moreover, under Article 9, a sperm donor's genetic history must be collected.<sup>304</sup> With respect to receiving properly screened gametes, this addition to Indiana law would allow intended parents to confirm a donor's identity, his physical resemblance to the husband, and his disease-free status.<sup>305</sup> Therefore, this addition would better protect intended parents from fertility fraud, sperm bank negligence, and donor dishonesty.<sup>306</sup> Also, the implementation of Article 9's recordkeeping provision would likely have the same effect on the interests of intended parents.

Adopting Article 9 would better protect intended parents by increasing regulation and oversight of the Indiana fertility business. These heightened procedures would probably have a deterrent effect on future fertility fraud perpetrators. They could also remedy sperm bank negligence or misrepresentation cases.<sup>307</sup> For instance, in Cline's case, there were no regulations that required sperm donations to be properly tested during his period of misconduct.<sup>308</sup> This lack of oversight likely emboldened Cline and other fertility fraud perpetrators to illicitly inseminate their own patients because, in the end, who would find out? Aside from any current law in place, allowing donor-conceived children or intended parents to access a donor's identifying or medical information would formally answer this question.

## V. CONCLUSION

Fertility fraud is a serious violation. Specifically, the wrongful practice shatters personal identity and has destroyed families.<sup>309</sup> Hoosiers personally felt these effects when the reality of illicit insemination hit close to home in 2017. By 2019, Indiana enacted a fertility fraud law to hold illicit inseminators, like Cline, accountable for their misconduct.<sup>310</sup>

The number of fertility fraud cases and incidents of sperm bank negligence is growing.<sup>311</sup> Such reveals a significant problem with the United States fertility industry, and, in Cline's case, the Indiana fertility industry. As a result, the following question is posed: should the Indiana fertility business be more

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303. UNIF. PARENTAGE ACT § 901 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2017).

304. *Id.*

305. *See Understanding Illicit Insemination, supra* note 27, at 169.

306. *See Harnicher v. Univ. of Utah Med. Ctr.*, 962 P.2d 67, 72 (Utah 1998) (rejecting an intended parent's claim for emotional distress after a donor mix-up ruined his chances of resembling the donor-conceived child).

307. *See generally id.* at 72; *see generally Zelt v. Xytex Corp.*, 766 F. App'x 735, 739, 741 (11th Cir. 2019).

308. *Understanding Illicit Insemination, supra* note 27, at 169.

309. *Id.* at 113; Fox et al., *supra* note 14.

310. H.B. 1369, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019).

311. Mroz, *supra* note 22.

regulated to better protect the interests of intended parents? The answer is yes.

Although Indiana's fertility fraud law may be the first of its kind,<sup>312</sup> the Indiana Legislature should implement a more stringent criminal penalty in order to better protect intended parents in the State. The benefits of adopting such a penalty are illustrated by comparing the Senate Enrolled Act 174 to gaps in Indiana law and examining the Act in light of the interests of intended parents.

Additionally, adopting a version of the UPA will improve protections for Indiana intended parents. For example, in comparison to current Indiana law, the UPA's provisions regarding gamete donation are extensive and may assist in holding illicit inseminators or negligent sperm banks more accountable.

Because technology will continue to reveal fertility fraud or sperm bank negligence,<sup>313</sup> the Indiana Legislature must take appropriate measures to combat it. While the Senate Enrolled Act 174 is a step in the right direction, there is still room for improvement.

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312. Zhang, *supra* note 8.

313. See Garrett, *supra* note 15; Fox et al., *supra* note 14.