
Fertility Fraud in the Land of Lincoln: Why Illinois Must Pass Comprehensive Legislation to Address Donor Fraud in Artificial Insemination

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FERTILITY FRAUD IN THE LAND OF LINCOLN: WHY ILLINOIS MUST PASS COMPREHENSIVE LEGISLATION TO ADDRESS DONOR FRAUD IN ARTIFICIAL INSEMINATION

I. INTRODUCTION

Imagine the following scenario: you have been aware for as long as you can remember that you were conceived via artificial insemination using donor sperm.¹ As you age, you want to learn about your possible half-siblings, so you purchase an at-home DNA kit.² You take a DNA swab and send it off, expecting to discover you have a couple of half-siblings. Just a few weeks later, you receive an email with your results, and, to your shock, you have dozens of half-siblings.³ This is a surprise. The physician informed your parents at the time of insemination that he would only use a sperm donor a maximum of three times.⁴ As you dig deeper, you realize that all of your newly discovered half-siblings are tied back to one person, your parents' old fertility physician. It then hits you—the doctor utilized his sperm to impregnate your mother.⁵

This is the story of Jacoba Ballard.⁶ She is just one of many individuals who discovered their biological father was their mother's old fertility physician.⁷ After discovering that her mother's fertility doctor, Dr. Donald Cline, was her father, Ballard connected with a handful of her half-siblings.⁸ Eventually, Ballard, and six of her half-siblings, met with Dr. Cline who admitted to using his own sperm, but justified it by citing scripture from the Bible.⁹ Ballard and her siblings reported Dr. Cline to law enforcement but learned his actions were not illegal under existing law.¹⁰

This Comment provides an overview of fertility fraud and the inadequacy of existing Illinois law to tackle this complex issue. Part II is a

1. Sarah Zhang, *The Fertility Doctor's Secret*, THE ATLANTIC (MAR. 18, 2019, 5:23 PM), <https://www.theatlantic.com/magazine/archive/2019/04/fertility-doctor-donald-cline-secret-children/583249/> [<https://perma.cc/NLP4-RKTB>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Zhang, *supra* note 1.

8. *Id.*

9. *Id.*

10. *Id.*

background on fertility fraud, providing a brief overview of the artificial insemination process, giving examples of infamous cases of fertility fraud, discussing current state legislation addressing the issue, and briefly touching on proposed federal and state legislation. Part III answers why fertility fraud requires specific legislation, beginning by explaining the ethical and medical dangers created by fertility fraud, then discussing why existing Illinois laws do not adequately address the issue. Finally, Part III proposes the passage of specific civil and criminal fertility fraud legislation in Illinois and highlights specific provisions that should be included in any legislation. Part IV explores fertility fraud legislation's impact and why Illinois should prioritize passing this type of legislation to protect its citizens.

II. BACKGROUND

This Part provides background on artificial insemination and fertility fraud. Next, this Part discusses the history of fertility fraud in the United States. Finally, this Part discusses how fertility fraud is currently being regulated throughout the country.

A. Basics of Artificial Insemination

Approximately twelve to fifteen percent of couples in the United States suffer from infertility, defined as an inability to get pregnant after one year of trying.¹¹ Many couples who cannot conceive turn to a procedure known as artificial insemination.¹² This process involves a physician “insert[ing] sperm directly into a woman’s cervix, fallopian tubes, or uterus.”¹³ The first recorded instance of artificial insemination resulting in a live birth occurred in 1884 at Sansom Street Hospital in Philadelphia.¹⁴ The physician, Willian Pancoast, was visited by a woman, age thirty-one, who was unable to conceive.¹⁵ At first, Dr. Pancoast believed her inability to conceive was due to

11. *How common is infertility?*, NAT’L INST. OF CHILD HEALTH & HUM. DEV., [https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/common#:~:text=Studies%20suggest%20that%20after%201, had%20a%20live%2Dborn%20baby.&text=\(In%20couples%20younger%20than%20age,3%20months%20of%20trying.5](https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/common#:~:text=Studies%20suggest%20that%20after%201, had%20a%20live%2Dborn%20baby.&text=(In%20couples%20younger%20than%20age,3%20months%20of%20trying.5) [<https://perma.cc/S7PU-FTTL>] (last updated Feb. 8, 2018).

12. *Infertility and Artificial Insemination*, WEBMD, <https://www.webmd.com/infertility-and-reproduction/guide/artificial-insemination> [<https://perma.cc/9P5K-6XAD>] (last updated Aug. 1, 2021).

13. *Id.*

14. Elizabeth Yuko, *The First Artificial Insemination Was an Ethical Nightmare*, THE ATLANTIC (Jan. 8, 2016), <https://www.theatlantic.com/health/archive/2016/01/first-artificial-insemination/423198/> [perma.cc/M7JD-TG2L].

15. *Id.*

female fertility issues, but later discovered “the issue was actually the husband’s low sperm count.”¹⁶ Instead of presenting the possibility of artificial insemination to the couple, Dr. Pancoast used chloroform, causing the female patient to lose consciousness, and then artificially inseminated her with sperm from a local medical student.¹⁷ Nine months later, when the woman gave birth to a healthy baby boy, Dr. Pancoast revealed the truth to her husband.¹⁸ However, due to the taboo surrounding infertility, Dr. Pancoast and the patient’s husband decided it was best to not reveal the truth about the baby’s biological father to the patient.¹⁹ The truth was not revealed until decades later when one of the medical students, who was present for the procedure, came forward.²⁰

Before the creation of commercial sperm banks, most physicians believed it was their responsibility to find donors, and they typically did so privately, often relying on their personal connections.²¹ A study conducted in 1979 by the University of Wisconsin, surveying 471 physicians who performed artificial insemination, found that sixty-six percent used sperm donated by “medical students, residents, and university graduate students.”²² The first reported instance of frozen sperm being used in artificial insemination in the United States took place at the University of Iowa in 1954.²³ However, many physicians continued to utilize fresh sperm, which was believed to be more effective.²⁴ The shift to using frozen sperm did not happen until the 1990s, when the American Society for Reproductive Medicine recommended that all donated sperm be quarantined for at least 180 days to ensure it was HIV-free.²⁵

Today, women who wish to get pregnant using donor sperm have two options.²⁶ First, they can utilize sperm donated by a friend or family

16. *Id.*

17. It is of particular note that Dr. Pancoast admitted to intentionally choosing the most attractive male student to serve as the donor. *Id.*

18. *Id.*

19. *Id.*

20. Yuko, *supra* note 14.

21. Jody Lyneé Madeira, *Understanding Illicit Insemination and Fertility Fraud, From Patient Experience to Legal Reform*, 39.1 COLUM. J. GENDER & L. 110, 129 (2020).

22. *Id.* at 131.

23. For a history of sperm banks in the United States, see generally Kara W. Swanson, *The Birth of the Sperm Bank*, 71 THE ANNALS OF IOWA 241 (2012).

24. Sarah Chicoine, *The Birth of Fertility Fraud: How to Protect Washingtonians*, 95 WASH. L. REV. ONLINE 168, 173 (2020).

25. *Id.*

26. *Donor Sperm Insemination*, UCSF HEALTH, <https://www.ucsfhealth.org/treatments/donor-sperm-insemination> [<https://perma.cc/RM25-96NK>] (last visited Mar. 11, 2023).

member.²⁷ Second, and more commonly, women can purchase sperm from a sperm bank.²⁸ As of 2021, the global sperm market was valued at \$5.08 billion, with North America controlling 43.4% of the market revenue.²⁹ All donated sperm undergoes rigorous testing for various infectious and genetic diseases.³⁰ In most cases, the donor is unaware of the recipient's identity and signs away all legal rights to any children conceived with their sperm.³¹ Artificial insemination using donor sperm has allowed countless individuals and couples, who otherwise could not conceive, to have children.³² In 1979, it was estimated that between 6,000 and 10,000 children were born through artificial insemination with donor sperm in the United States.³³ By 2010, that number had risen to an estimated 30,000 to 60,000 births annually in the United States.³⁴ However, the actual number is likely higher, as accuracy impossible, given the lack of regulation of donated sperm.³⁵

In most cases, artificial insemination using donor sperm is a beneficial process for all parties involved. Sperm donors receive various benefits, including compensation, free medical care, and a sense of helping others achieve their dream of becoming parents.³⁶ It also provides the recipient of the donated sperm, who may otherwise not be able to conceive, the opportunity to carry and birth a child.³⁷ However, in some cases of artificial insemination, something more sinister happens, which, when discovered years later, can devastate those involved.

27. *Id.*

28. *Id.*

29. *Sperm Bank Market Size Worth \$752 Billion by 2030: The Brainy Insights*, GLOBE NEWSWIRE (Sept. 30, 2022, 8:12 PM), <https://www.globenewswire.com/en/news-release/2022/09/30/2525972/0/en/Sperm-Bank-Market-Size-Worth-7-52-Billion-by-2030-The-Brainy-Insights.html> [perma.cc/W2PT-FDWD].

30. UCSF HEALTH, *supra* note 26.

31. *Donor Insemination*, AM. PREGNANCY ASS'N, <https://americanpregnancy.org/getting-pregnant/donor-insemination/> [perma.cc/23AZ-UNQN] (last visited Mar. 11, 2023).

32. Ashley Fetters, *Finding the Lost Generation of Sperm Donors*, THE ATLANTIC (May 18, 2018), <https://www.theatlantic.com/family/archive/2018/05/sperm-donation-anonymous/560588/> [perma.cc/2H4Y-SPSU].

33. *Id.*

34. *Id.*

35. Wendy Kramer, *30k–60k US Sperm and Egg Donor Births Per Year?*, HUFFPOST https://www.huffpost.com/entry/a-call-to-to-stop-using-t_b_8126736 [perma.cc/S8FT-C9CE] (last updated Dec. 6, 2017).

36. Sperm donors are compensated per donation, often earning about \$100 per donation. Additionally, sperm banks routine medical care to active donors, including regular wellness exams and genetic testing. *See, e.g., 5 Reasons to Become a Sperm Donor*, PHX. SPERM BANK, <https://www.phoenixspermbank.com/blog/5-reasons-to-become-a-sperm-donor/> [perma.cc/FE79-8SUZ] (last visited Mar. 11, 2023).

37. Rachel Nall, *Everything You Need to Know About Artificial Insemination*, HEALTHLINE (Mar. 8, 2023), <https://www.healthline.com/health/artificial-insemination#benefits> [perma.cc/48WA-AARQ].

B. History of Fertility Fraud

Fertility fraud occurs when a physician utilizes their sperm to artificially inseminate a patient without receiving proper informed consent.³⁸ The cases of fertility fraud we know about typically involve couples who cannot conceive due to male infertility issues and opt to use donor sperm. However, instead of using anonymously donated sperm, physicians who commit fertility fraud use their sperm, unbeknownst to the patient.³⁹ In some rare cases, physicians have committed fertility fraud when the couple elects to undergo artificial insemination using the male partner's sperm.⁴⁰ However, this Comment focuses on the more common scenario of physicians replacing anonymously donated sperm with their own. Regardless of the specifics, fertility fraud results in the patient unknowingly conceiving their fertility physician's child.⁴¹

1. Dr. Cecil Jacobson

The first well-known case of fertility fraud in the United States was that of Dr. Cecil Jacobson.⁴² He was proven, through DNA evidence, to have fathered the children of at least fifteen patients.⁴³ Dr. Jacobson was eventually convicted on fifty-two counts of perjury and fraud, for which he was sentenced to five years in prison and stripped of his medical license.⁴⁴ However, most of the charges stemmed from Dr. Jacobson injecting patients with a hormone that caused them to receive false positive results when taking a pregnancy test.⁴⁵ Additionally, it was alleged that he purposely misinterpreted ultrasounds to make patients believe they were viewing a fetus.⁴⁶ After a few months, Dr. Jacobson told patients they had suffered a miscarriage when they had never been pregnant.⁴⁷ While he suffered civil and criminal consequences because of his actions, the outcome would likely not have been the same if he had only been caught using his sperm.⁴⁸

38. Chicoine, *supra* note 24, at 168–69.

39. *Id.*

40. OUR FATHER (Blumhouse Productions May 11, 2022).

41. *Id.*

42. Madeira, *supra* note 21, at 111.

43. *Id.* at 116.

44. *Id.* at 117.

45. *Id.* at 116.

46. *Id.*

47. *Id.*

48. Madeira, *supra* note 21, at 117.

When Dr. Jacobson spoke about his fertility acts, he claimed he had used his sperm because he felt fresh sperm was more effective than frozen sperm.⁴⁹ Additionally, he felt that he could better guarantee the safety of his sperm, which he alleged was of high priority given the AIDS epidemic.⁵⁰ In Dr. Jacobson's mind, his course of action presented no ethical problems.⁵¹

Dr. Jacobson should have served as a warning of the dangers of fertility fraud and the inability of the existing laws to address the issue. However, little was done to prevent the situation from occurring again or provide an adequate legal remedy for victims.⁵² In future cases of fertility fraud, physicians continue to receive little, if any, punishment.

2. *Dr. Donald Cline*

In the last two decades, cases of fertility fraud have been discovered at an increasing rate.⁵³ This uptick in uncovered cases is primarily due to the recent popularity of at-home DNA testing kits, such as 23andMe.⁵⁴ One of the more infamous recent cases of fertility fraud, the subject of the Netflix documentary *Our Father*, is that of Dr. Donald Cline.⁵⁵ In the 1970s and 1980s, Dr. Cline ran an Indianapolis-area fertility clinic.⁵⁶ His secret was uncovered in 2014, when some children he had secretly fathered took at-home DNA tests.⁵⁷ As of May 2022, Dr. Cline was confirmed to have fathered *ninety-four children*.⁵⁸ In many cases, the children were unaware that they had been conceived using donor sperm, and, in other cases, the patient was under the impression their

49. Robert F. Howe, *Fertility Doctor's Intention*, WASH. POST (Nov. 23, 1991), <https://www.washingtonpost.com/archive/politics/1991/11/23/fertility-doctors-intention/6fd99134-e0e9-49e2-82fa-9a70d107ece3/> [perma.cc/EJJ2-57N3].

50. *Id.*

51. *Id.*

52. In addition to California, which passed a fertility fraud law in 1996, no other states passed legislation addressing the issue until 2019. See *Federal Legislation in Assisted Reproduction*, RIGHT TO KNOW, <https://righttoknow.us/fertility-fraud-laws/> [perma.cc/8RAV-7SZA] (last updated Aug. 14, 2023, 2:24 PM).

53. *Id.*

54. *Id.*

55. OUR FATHER, *supra* note 40.

56. Zhang, *supra* note 1.

57. *Id.*

58. *Indiana women sue Netflix for outing them as disgraced Indy fertility doctor's 'secret children'*, 13 WTHR (May 24, 2022 6:59 AM), <https://www.wthr.com/article/news/local/lawsuit-marion-county-indiana-netflix-blumhouse-productions-our-doctor-donald-cline/531-c41ea649-032c-4d45-8218-1456767e4c81> [https://perma.cc/AG63-8K3T].

partner's sperm had been used.⁵⁹ In all cases, none of the patients consented, nor were they aware, that Dr. Cline used his sperm.⁶⁰

Once Dr. Cline's actions were discovered, many of his children contacted law enforcement to discuss possible legal options.⁶¹ They learned that Indiana had no specific laws addressing fertility fraud.⁶² According to the various individuals who wrote letters on behalf of Dr. Cline, he used his sperm when he did not have a donor to avoid disappointing his patients.⁶³ Dr. Cline pled guilty to two felony charges of obstruction of justice for lying to investigators about using his sperm to impregnate patients unknowingly.⁶⁴ In terms of punishment, he was fined \$500, given one year of probation, and lost his medical license.⁶⁵ Dr. Cline is not the only individual who committed fertility fraud and suffered little to no consequences.

3. *Dr. Gerald Mortimer*

Another infamous case was Dr. Gerald Mortimer, who was sued by Sally Ashby, Howard Fowler, and their daughter, Kelli Rowlette.⁶⁶ Ashby and Fowler were patients of Dr. Mortimer, who had hopes of getting pregnant through artificial insemination using donor sperm.⁶⁷ The procedure was successful, and, a short time later, they had their daughter, who, unbeknownst to them, was the biological daughter of Dr. Mortimer.⁶⁸ Rowlette discovered the truth in July 2017 after taking an at-home DNA test.⁶⁹ Rowlette and her parents filed a civil suit against Dr. Mortimer, alleging several causes of action, including medical malpractice, lack of informed consent, fraud, battery, intentional

59. When many of these doctors, including Dr. Cline, committed fertility fraud, there was still significant secrecy surrounding donor insemination. Many doctors counseled their parents not to tell their children the truth. Additionally, records were rarely kept, so there was no paper trail between the patient and the donor. *See id.*

60. *Id.*

61. Izzy Karpinski, 'Our Father': Angela Ganote opens up about the role she played in story of Dr. Donald Cline, FOX 59 NEWS, (May 13, 2022 8:45 AM), <https://fox59.com/morning-news/our-father-angela-ganote-opens-up-about-the-role-she-played-in-story-of-dr-donald-cline/> [<https://perma.cc/N8LF-EY6W>].

62. Rani Amani, *Daddy Doctor: Why The Rights Of Intended Parents Are Not Adequately Protected In Indiana*, 18 IND. HEALTH L. REV. 123, 124 (2021).

63. Zhang, *supra* note 1.

64. Amani, *supra* note 62, at 124.

65. Zhang, *supra* note 1.

66. *Rowlette v. Mortimer*, 352 F. Supp. 3d 1012, 1019 (D. Idaho 2018).

67. *Id.* at 1018.

68. *Id.*

69. *Id.*

infliction of emotional distress, breach of contract, and violation of Idaho's consumer protection laws.⁷⁰

The judge consolidated each cause of action into a single medical malpractice case, but when doing so, he dismissed the daughter from the claim entirely.⁷¹ The judge found that Rowlette lacked standing, reasoning Dr. Mortimer owed her no duty of care as she had not been conceived when the alleged fraudulent act occurred.⁷² The parents' case was subsequently dismissed, and while the exact reason is unknown, typically, when judges agree to dismiss a case at such a late stage, it is because the parties reached an out-of-court settlement.⁷³

4. *Dr. Kim McMorris*

Eve Wiley, born and raised in Texas, learned she was conceived using an anonymous sperm donor at the age of sixteen.⁷⁴ It was not until she took an at-home DNA test in 2018 that she discovered the anonymous sperm donor was her mother's old fertility physician, Kim McMorris.⁷⁵ When she learned the truth, Eve contacted Dr. McMorris to learn why he did what he did.⁷⁶ He responded by saying, "[i]t is easy to look back and judge protocols/standards used 33 years ago and assume they were wrong in today's environment, it was not wrong 33 years ago as that was acceptable practice for the times."⁷⁷

Initially, the Texas Medical Board refused to take action against Dr. McMorris, citing issues related to the statute of limitations.⁷⁸ However, they agreed to reopen the complaint in 2019 at the encouragement of Indiana University professor Jody Lyneé Madeira, who studies

70. *Id.* at 1019.

71. *Id.* at 1033.

72. *Rowlette*, 352 F. Supp. 3d at 1021.

73. Grace Hansen, *Case dismissed against retired Idaho Falls doctor who used his sperm to inseminate patient*, E. IDAHO NEWS (May 11, 2021, 4:56 PM), <https://www.eastidahonews.com/2021/05/case-dismissed-against-retired-idaho-falls-doctor-who-used-his-own-sperm-to-inseminate-patient/> [perma.cc/2XYF-ZLAF].

74. Jacqueline Mroz, *Their Mothers Chose Donor Sperm. The Doctors Used Their Own.*, N.Y. TIMES (Aug. 21, 2019), <https://www.nytimes.com/2019/08/21/health/sperm-donors-fraud-doctors.html> [perma.cc/SU5Z-S2CC].

75. *Id.*

76. Kyra Phillips et al., *Texas woman weeks to change law after DNA test reveals shocking truth about her genetic family tree*, ABC NEWS (May 3, 2019, 9:55 PM), <https://abcnews.go.com/US/texas-woman-seeks-change-law-dna-test-reveals/story?id=62809127> [perma.cc/7N2J-4D47].

77. *Id.*

78. Robert T. Garrett, *East Texas doctor accused of 'fertility fraud' may face unethical conduct, but not treatment, investigation*, DALL. MORNING NEWS (Oct. 30, 2019 6:51 PM), <https://www.dallasnews.com/news/politics/2019/10/30/east-texas-doctor-accused-of-fertility-fraud-may-face-unethical-conduct-but-not-treatment-investigation/> [perma.cc/PQ23-HKRB].

fertility fraud.⁷⁹ Dr. McMorris retired in 2021, and it is unclear if the investigation by the medical board had been completed.⁸⁰ During this time, Eve discovered she had at least seven other half-siblings, who all shared Dr. McMorris as their biological father.⁸¹ Existing criminal laws in Texas did not cover Dr. McMorris' actions. Thus, Eve turned to the legislative process and lobbied lawmakers, which resulted in a passed bill that criminalized fertility fraud in Texas.⁸²

The cases described above are just a few of the numerous cases of fertility fraud revealed in the United States over the last fifty years. Additionally, there are even more if you look beyond just our country.⁸³ Most important to remember is that there are likely many cases of fertility fraud never been reported on or still waiting to be uncovered. "In 1987, a national survey of fertility [physicians] found that two percent had used their sperm to inseminate patients."⁸⁴ While this is not a statistically significant percentage, if accurate, there are likely many children out there who were unknowingly conceived when their mother's fertility physician used his sperm without consent.

C. How Fertility Fraud is Currently Legislated

Currently, only twelve states have specific laws addressing fertility fraud, and they vary widely in the types of relief they provide to victims.⁸⁵ These states are Arkansas, Arizona, California, Colorado, Florida,

79. *Id.*

80. Ellen Trachman, *After Last Week's Column, The Sperm-Swapping Doctor Retires*, ABOVE THE L. (Apr. 21, 2021, 5:17 PM), <https://abovethelaw.com/2021/04/after-last-weeks-column-the-sperm-swapping-doctor-retires/> [perma.cc/F4H6-REW2].

81. Charlotte Huffman & Mark Smith, *Texas fertility doctor fathered 7 children by patients under his care, at-home DNA kits show*, WFAA, (Nov. 24, 2020 10:33 PM) <https://www.wfaa.com/article/news/local/ investigates/ investigates-dna-at-home-kit-fertility-doctor-seven-biological-offspring-patients/287-56870905-0787-4c00-b32a-a63eef34f05c> [perma.cc/ZY2H-8BRW].

82. *Id.*; *Dallas Woman's Push to Make Fertility Fraud a Crime Results in New Law on the Books in Texas*, NBCDFW (June 5, 2019) <https://www.nbcdfw.com/local/dfw-morningnews-dallas-womans-push-to-make-fertility-fraud-a-crime-results-in-new-law-on-the-books-in-texas/137428/> [https://perma.cc/45VY-WTZC].

83. Daniel Boffey, *Netherlands fertility doctor used own sperm to father 21 children*, THE GUARDIAN (Feb. 2, 2022, 9:15 AM) <https://www.theguardian.com/world/2022/feb/02/netherlands-fertility-doctor-jos-beek-father-21-children> [https://perma.cc/5KDL-A68Y]; Joanna Moorhead, *The man who may have secretly fathered 200 children*, THE GUARDIAN (July 15, 2017, 1:00 PM) <https://www.theguardian.com/lifeandstyle/2017/jul/15/the-man-who-may-have-secretly-fathered-200-children> [https://perma.cc/XC99-5QDS]; Elizabeth Payne, *Settlement against disgraced Ottawa fertility doctor Norman Barwin gets court approval*, OTTAWA CITIZEN (Nov. 2, 2021) <https://ottawacitizen.com/news/local-news/class-action-against-disgraced-ottawa-fertility-doctor-gets-court-approval> [https://perma.cc/Q6VB-9UFR].

84. Zhang, *supra* note 1.

85. RIGHT TO KNOW, *supra* note 52.

Indiana, Iowa, Kentucky, Nevada, Ohio, Texas, and Utah.⁸⁶ Below is further detail about legislation in five of those states, chosen because they represent the wide variety of approaches taken by jurisdictions with fertility fraud laws.

1. *California*

In 1995, it was discovered that three doctors at the University of California Irvine's Center for Reproductive Health had been stealing embryos and eggs from patients and would implant them into other patients without the "donor's" consent.⁸⁷ In the following year, in response to this incident, California passed specific legislation addressing fertility fraud, becoming the first state to do so, but it did not include a civil cause of action.⁸⁸ It instead created a criminal statute, which made it illegal 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."⁸⁹ Violators of this law face three to five years in prison and a fine of up to \$50,000.⁹⁰

2. *Indiana*

Before Dr. Donald Cline's fertility fraud was discovered, Indiana had no specific legislation addressing the issue.⁹¹ However, due to Dr. Cline's actions, Indiana passed specific fertility fraud legislation in 2019, becoming just the second state to do so.⁹² The newly created law makes fertility fraud a level six felony, the lowest level in the state of Indiana, carrying punishment of a prison sentence ranging from six months to two and a half years and a fine of up to \$10,000.⁹³ Additionally, the law creates a civil cause of action that allows the patient, their spouse or partner, and the resulting child in fertility fraud cases to bring a claim against the physician.⁹⁴

86. *Id.*

87. Madeira, *supra* note 21, at 111.

88. *Id.*

89. CAL. PENAL CODE § 367g(b) (West 2011).

90. *Id.* § 367g(c).

91. Chicoine, *supra* note 24, at 176.

92. *Id.* at 184.

93. IND. CODE ANN. § 35-43-5-4(b)(10) (West 2021); IND. CODE ANN. § 35-50-2-7(b) (West 2019).

94. IND. CODE ANN. § 34-24-5-2 (West 2019).

Moreover, the Indiana legislature explicitly addresses the statute of limitations issues frequently arising in these cases.⁹⁵ “This is an especially important part of the statute because in many fertility fraud cases, the fraud is not discovered until decades after the artificial insemination.”⁹⁶ The Indiana law states that the claim must be brought within ten years of the child’s eighteenth birthday.⁹⁷ However, the statute of limitations is tolled until the plaintiff discovers sufficient DNA evidence to bring a claim against the defendant.⁹⁸ Once the plaintiff obtains the necessary evidence, they have five years to bring a claim.⁹⁹ Finally, the statute contains specific provisions regarding damages available to the plaintiff.¹⁰⁰

3. Texas

In July 2019, the Texas legislature passed a law, which makes fertility fraud a form of felony sexual assault.¹⁰¹ The law specifically makes it illegal for a physician to use “reproductive material” from a donor without the patient’s express consent to that specific donor’s reproductive material.¹⁰² The law does not explicitly address the statutes of limitations, but, in Texas, the statute of limitations does not apply to sexual crimes when the alleged defendant has committed the same or similar crime against five or more victims.¹⁰³ If there are fewer than five victims, the statute of limitations is ten years from the commission of the crime or two years from the date the offense was discovered.¹⁰⁴ Individuals convicted under this law face between six months and two years in prison and a fine of up to \$10,000.¹⁰⁵ Texas has no civil remedy for fertility fraud.¹⁰⁶

4. Arizona

In March 2021, Arizona passed legislation, allowing victims of fertility fraud to bring civil action against the offending physician.¹⁰⁷ The legislation specifically allows the patient, the patient’s spouse, or the child

95. Chicoine, *supra* note 24, at 185.

96. *Id.*

97. IND. CODE ANN. § 34-11-2-15(a)(1) (West 2019).

98. *Id.* § 34-11-2-15(b)(1).

99. *Id.*

100. IND. CODE ANN. § 34-24-5-4 (West 2019).

101. Chicoine, *supra* note 24, at 186.

102. TEX. PENAL CODE ANN. § 22.011(b)(12) (West 2021).

103. TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(ii) (West 2021).

104. *Id.* art. 12.01(2)(E).

105. TEX. PENAL CODE ANN. §§ 12.35(a)–(b) (West 2017).

106. *See id.*

107. RIGHT TO KNOW, *supra* note 52.

to file a cause of action against a healthcare provider who uses their reproductive material without the patient's written consent.¹⁰⁸ A civil cause of action must be brought within five years of either discovering sufficient evidence for a case, or the defendant's confession.¹⁰⁹ It allows a possible award of compensatory and punitive damages or \$10,000 liquidated damages.¹¹⁰ Finally, each child can also file a separate cause of action.¹¹¹

5. Florida

In October 2020, Florida passed a new law, creating the crime of reproductive battery.¹¹² This new crime makes it a third-degree felony for a healthcare practitioner to intentionally transfer reproductive material to an individual if they know the recipient did not consent to receive reproductive material from that donor.¹¹³ An individual convicted of this new crime faces up to five years in prison and a \$5,000 fine.¹¹⁴ The law further states that, if the healthcare practitioner uses their reproductive material, the crime becomes a felony in the second-degree, punishable by fifteen years in prison and a \$10,000 fine.¹¹⁵ Moreover, the statute of limitations begins running once the crime is discovered and reported to law enforcement.¹¹⁶ Finally, the law states a woman consenting to an anonymous sperm donor is not a defense to fertility fraud.¹¹⁷

D. Proposed Fertility Fraud Legislation

Victims of fertility fraud in the forty remaining states, including Illinois, which lack specific legislation addressing fertility fraud, are forced to use archaic laws to address the physician's fraudulent actions. However, in most cases, these laws are inadequate.¹¹⁸ Thus, to adequately protect citizens, the Illinois legislature must pass specific legislation addressing fertility fraud. In recent years, legislation tackling the issue of fertility fraud has been introduced at both the state and federal

108. ARIZ. REV. STAT. ANN. § 12-567(A) (2021).

109. *Id.* § 12-567(F).

110. *Id.* § 12-567(C).

111. *Id.* § 12-567(D).

112. FLA. STAT. ANN. § 784.086(2)(a) (West 2020).

113. *Id.*

114. FLA. STAT. ANN. § 775.082(3)(e) (West 2019); FLA. STAT. ANN. § 775.083(1)(c) (West 2021).

115. FLA. STAT. ANN. § 784.086(2)(b) (West 2020); FLA. STAT. ANN. § 775.082(3)(d) (West 2019); FLA. STAT. ANN. § 775.083(1)(b) (West 2021).

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

117. *Id.* § 784.086(4).

118. RIGHT TO KNOW, *supra* note 52.

levels.¹¹⁹ While these proposed bills are promising, they have not shown much progress since their introduction.

1. Proposed Illinois Legislation

In the Spring of 2022, Illinois State Senator David Koehler introduced SB4199, more commonly referred to as the “Illinois Fertility Fraud Act.”¹²⁰ This bill allows a mother victimized by fertility fraud, their spouse, or their child conceived through the fertility fraud, to bring an action against the healthcare provider who committed the fraudulent artificial insemination.¹²¹ An individual who prevails in their case is entitled to reasonable attorney’s fees, compensatory damages, and punitive damages, or they can opt to receive liquidated damages in the amount of \$50,000.¹²² Additionally, this bill amends Illinois’s Criminal Code to include fertility fraud as grounds to hold an individual liable for criminal sexual assault.¹²³ Finally, the bill would increase the statute of limitations to twenty years after one of the following events occurs: (1) the procedure was performed; (2) the eighteenth birthday of the fraudulently conceived child; (3) any of the victims first discovers sufficient evidence, or becomes aware of the existence of a record that would provide sufficient evidence, to bring an action against the defendant; or (4) the offending physician confesses to the crime.¹²⁴

The Illinois Fertility Fraud Act has received substantial bipartisan support.¹²⁵ Six additional Illinois State Senators signed on as co-sponsors within one month of introducing the bill.¹²⁶ Of these additional co-sponsors, four are Democrats and two are Republicans.¹²⁷ Unfortunately, the bill never left committee assignments.¹²⁸ This meant that, when the Illinois 102nd General Assembly closed on

119. Fertility Fraud Act, S. SB4199, 102nd Gen. Assemb., (IL 2022), <https://www.ilga.gov/legislation/BillStatus.asp?GA=102&DocTypeID=SB&DocNum=4199&GAID=16&SessionID=110&LegID=140778>; Protecting Families from Fertility Fraud Act of 2022, H.R. 8600, 117th Cong. (2022), <https://www.congress.gov/bill/117th-congress/house-bill/8600/text?s=1&r=48> [<https://perma.cc/LRW4-KGDS>].

120. Fertility Fraud Act, S. SB4199, 102nd Gen. Assemb., (IL 2022), <https://www.ilga.gov/legislation/BillStatus.asp?GA=102&DocTypeID=SB&DocNum=4199&GAID=16&SessionID=110&LegID=140778> [<https://perma.cc/RE7V-U2ZH>].

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. Fertility Fraud Act, S. SB4199, 102nd Gen. Assemb., (IL 2022), <https://www.ilga.gov/legislation/BillStatus.asp?GA=102&DocTypeID=SB&DocNum=4199&GAID=16&SessionID=110&LegID=140778> [<https://perma.cc/RE7V-U2ZH>].

127. *Id.*

128. *Id.*

January 10, 2023, all pending bills, including the Illinois Fertility Fraud Act, died along with it.¹²⁹ Thus, there is no longer any pending legislation in Illinois addressing fertility fraud, and there will not be until Senator Koehler, or another congressperson, introduces a new bill addressing the issue.

2. *Proposed Federal Legislation*

Fertility fraud is not an issue that can exclusively be dealt with at the state level. It can also be tackled at the federal level. In July of 2022, Representative Stephanie Bice (R-OK) and Representative Mikie Sherrill (D-NJ) introduced House Resolution (H.R.) 8600, which is more commonly referred to as the “Protecting Families from Fertility Fraud Act of 2022.”¹³⁰ This legislation creates “a new federal crime for knowingly misrepresenting the nature or source of DNA used in assisted reproductive procedures and other fertility treatments.”¹³¹ The newly created crime carries a punishment of imprisonment for up to ten years.¹³²

Additionally, this bill adds this newly created crime as a predicate offense for the Racketeer Influenced and Corrupt Organizations (RICO) Act.¹³³ This would provide federal prosecutors better avenues to prosecute fertility doctors who have engaged in a pattern of fertility fraud.¹³⁴ Additionally, it provides victims of fertility fraud with additional avenues for recourse.¹³⁵ However, to bring a charge under the “Protecting Families from Fertility Fraud Act of 2022,” it must be established that interstate commerce was somehow involved in the fraudulent artificial insemination.¹³⁶ This could include such actions as the victim traveling to another state to receive the fraudulent fertility treatment, the treating physician obtaining materials or supplies through

129. *Id.*; see *How A Bill Becomes A Law In Illinois*, RESTORE JUSTICE ILLINOIS (Jan. 28, 2020), <https://restorejusticeillinois.org/how-a-bill-becomes-a-law-in-illinois/> [<https://perma.cc/8VCJ-MLZJ>].

130. *Bice, Sherrill Introduce Bill in Response to “Our Father” Documentary*, STEPHANIE BICE (Aug. 16, 2022), <https://bice.house.gov/media/press-releases/bice-sherrill-introduce-bill-response-our-father-documentary> [perma.cc/4UYA-MC58].

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. Protecting Families from Fertility Fraud Act of 2022, H.R. 8600, 117th Cong. § 2249(b) (2022), <https://www.congress.gov/bill/117th-congress/house-bill/8600/text?s=1&r=48> [<https://perma.cc/F867-YPNG>].

interstate commerce, or the victim making payment for the treatment through means of interstate commerce.¹³⁷

As of March 2023, there had not been much movement with the “Protecting Families from Fertility Fraud Act of 2022.”¹³⁸ Immediately after being introduced in July 2022, the bill was sent to the House Committee on the Judiciary.¹³⁹ It was subsequently referred to the Subcommittee on Crime, Terrorism, and Homeland Security.¹⁴⁰ This referral is the last reported action on this legislation.¹⁴¹ Introducing legislation on the matter is an essential step in addressing the issue of fertility fraud; however, there is still a long way to go before this proposed legislation becomes official law. Thus, the Illinois legislature cannot wait for the federal government to act and must prioritize passing state legislation addressing fertility fraud.

III. ANALYSIS

This Part explains why having legal protections against fertility fraud is necessary. Then, this Part analyzes the existing civil and criminal laws in Illinois that could be used to address fertility fraud and why they are inadequate. Therefore, this Part argues that Illinois must protect its citizens from fertility fraud by passing specific legislation addressing the issue. Finally, this Part outlines the necessary components that should be included in any fertility fraud bill passed by the Illinois legislature.

A. *The Dangers of Fertility Fraud*

Shockingly, not everyone sees an issue with physicians using their sperm without consent to artificially inseminate their patients. One child conceived through Dr. Donald Cline’s fraudulent actions reported receiving several comments, mainly on social media, defending Dr. Cline’s actions. Including one individual who wrote, “[y]ou should be proud that your mom got pregnant with you; he did you a favor, he did your mom a favor. And, remember he is smart, and he is a doctor.”¹⁴² Additionally, friends and families of Dr. Cline defended his actions, arguing that he used his sperm to give his patients a child, just like so many of them desperately wanted.¹⁴³ One woman even

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. Madeira, *supra* note 21, at 139.

143. Zhang, *supra* note 1.

stated, “Dr. Cline always put his patients first. Empathetic and full of compassion, he sought ways to help families through this most tender period when both husband and wife feel helpless.”¹⁴⁴ These views ignore the ethical dilemmas and medical dangers created by physicians engaging in fertility fraud.

1. *The Ethical Concerns of Fertility*

Fertility fraud presents several ethical problems. First, a physician using their sperm to impregnate a patient without their consent violates the core principles of the physician-patient relationship.¹⁴⁵ Trust, knowledge, regard, and loyalty are commonly thought of as the four elements that form a physician-patient relationship, and fertility fraud, at the very least, violates the trust and knowledge requirement.¹⁴⁶ It has long been agreed upon that a physician’s sexual relationship with their patient violates the physician-patient relationship.¹⁴⁷ This is no different from a physician who commits fertility fraud. According to one of Dr. Cline’s patients, “I felt like I had been raped,” she further stated, “I wanted an anonymous donor. I trusted you to tell us the truth and we were your victims. You took advantage of us with your secrecy, your dishonesty, and your power of your expertise.”¹⁴⁸

Violations of the physician-patient relationship through fertility fraud have had devastating impacts on not just the patient, but their family as well.¹⁴⁹ Many children who learn they are the product of fertility fraud suffer from a significant identity crisis, which sometimes destroys existing familial relationships.¹⁵⁰ Josh, one child conceived using Dr. Cline’s sperm, felt he was conceived through a criminal act, stating, “I felt like I was a product of rape.”¹⁵¹ Josh also had concerns that Dr. Cline’s actions resulted from some underlying mental illness, which he worries could impact him.¹⁵² Josh’s concern that medical conditions could have

144. *Id.*

145. Madeira, *supra* note 21, at 163.

146. Fallon E. Chipidza et al., *Impact of the Doctor-Patient Relationship, THE PRIMARY CARE COMPANION FOR CNS DISORDERS* (Oct. 22, 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4732308/#:~:text=Trust%2C%20knowledge%2C%20regard%2C%20and,an%20impact%20on%20patient%20outcomes> [perma.cc/3AGK-AAJ7].

147. See generally H. Russell Searight & David C. Campbell, *Physician-Patient Sexual Contact: Ethical and Legal Issues and Clinical Guidance*, 36 J. FAM. PRACT. 647, 648 (1993); AMA Code of Medical Ethics, Op. 1.1.1 (2016); AMA Code of Medical Ethics, Op. 9.1.1 (2016).

148. Madeira, *supra* note 21, at 135–36.

149. *Id.* at 146–47.

150. *Id.* at 145.

151. *Id.* at 146.

152. *Id.*

been unknowingly passed along to him by Dr. Cline is shared by many children conceived through fertility fraud.¹⁵³

2. *Medical Concerns of Fertility Fraud*

Fertility fraud does not just create ethical problems, it also can result in several medical issues for the children conceived through this fraudulent artificial insemination. When a patient opts to get pregnant using artificial insemination, they will often purchase anonymous donor sperm from a sperm bank.¹⁵⁴ In order for an individual to be approved as a sperm donor, there are several steps they must complete.¹⁵⁵ First, they are required to submit a complete family and medical history.¹⁵⁶ Additionally, prospective sperm donors must undergo various medical tests to ensure the quality of their sperm.¹⁵⁷ This includes tests for genetic conditions, a mental health screening, and tests for various communicable diseases, such as HIV and hepatitis.¹⁵⁸ These requirements ensure that patients only purchase the highest quality sperm.¹⁵⁹ Some sperm banks report that only one percent of their applicants are approved as sperm donors.¹⁶⁰ These precautionary measures help protect any children conceived from inheriting physical and mental health conditions.¹⁶¹

However, when a fertility physician chooses to use his sperm, they have not undergone the testing required of potential sperm donors.¹⁶² This has resulted in health conditions passed to many children conceived through fertility fraud.¹⁶³ In reality, many physicians who used their sperm to impregnate their patients would never have been approved as sperm donors, due to health conditions.¹⁶⁴ Dr. Donald Cline, for example, would have been denied as a sperm donor because he has

153. *Id.* at 113.

154. Maria Masters, *Using a Sperm Donor to Get Pregnant*, WHAT TO EXPECT (May 19, 2022), <https://www.whattoexpect.com/getting-pregnant/fertility-tests-and-treatments/sperm-donor/> [perma.cc/E9JD-79KL].

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. Masters, *supra* note 154.

161. *Id.*

162. See Madeira, *supra* note 21, at 169.

163. Lucy Mangan, *Our Father review – an undeniably gripping tale of a fertility doctor's shocking crimes*, THE GUARDIAN (May 11, 2022, 8:14 PM), <https://www.theguardian.com/tv-and-radio/2022/may/11/our-father-review-an-undeniably-gripping-tale-of-a-fertility-doctors-shocking-crimes> [perma.cc/73JM-KPCZ].

164. OUR FATHER, *supra* note 40.

rheumatoid arthritis.¹⁶⁵ This is for a good reason, considering many of the children he secretly fathered now suffer from the same or similar conditions.¹⁶⁶

Additionally, many children who were fraudulently conceived must worry about their children unknowingly meeting their relatives and the possibility a romantic relationship could develop.¹⁶⁷ Two of Dr. Cline's patients had children on the same softball team.¹⁶⁸ Another one of Dr. Cline's patients stated, “[d]id you not consider we all live in a relatively close area? Did you really think that we wouldn't meet? That we wouldn't maybe date? That we wouldn't have kids who might date? Did you never consider that?”¹⁶⁹ Given the number of ethical and medical concerns created by fertility fraud, one would think it must be illegal, but that is far from the case in most states.¹⁷⁰

B. *Why Current Illinois Laws Do Not Properly Address the Issue of Fertility Fraud*

When reading about cases of fertility fraud, most assume the physician's conduct must violate civil or criminal laws.¹⁷¹ While at first glance it seems there are a few different civil and criminal statutes which could be applicable, time and time again, we have seen those who commit fertility fraud receive little to no punishment.¹⁷² Nowhere is that more apparent than in the case of Dr. Cline, who served no jail time for committing fertility fraud at least ninety times.¹⁷³ At the time, Indiana had no specific legislation addressing fertility fraud.¹⁷⁴ According to former deputy prosecutor, Tim Delaney, there was no statute in the Indiana Criminal Code under which he could prosecute Dr. Cline.¹⁷⁵

165. *Id.*

166. *Id.*

167. Zhang, *supra* note 1.

168. *Id.*

169. *Id.*

170. RIGHT TO KNOW, *supra* note 52.

171. Madeira, *supra* note 21, at 136 (“How can there not be something in this sexual assault law?”).

172. Madeira, *supra* note 21, at 118–19, 121.

173. Amani, *supra* note 62, at 124 n.8; *Indiana women sue Netflix for outing them as disgraced Indy fertility doctor's 'secret children'*, WTHR (May 24, 2022, 6:59 AM) <https://www.wthr.com/article/news/local/lawsuit-marion-county-indiana-netflix-blumhouse-productions-our-doctor-donald-cline/531-c41ea649-032c-4d45-8218-1456767e4c81> [perma.cc/9YY3-3B85].

174. Amani, *supra* note 62, at 124.

175. Tim Delaney, *Tim Delaney on The Prosecution of Dr. Donald Cline*, BOSE MCKINNEY & EVANS LLC (May 10, 2022), <https://www.boselaw.com/2022/05/tim-delaney-on-the-prosecution-of-dr-donald-cline/> [perma.cc/C37Y-EBW2].

Many people thought he could have charged Dr. Cline under existing Indiana battery or sexual assaults.¹⁷⁶ However, the Marion County Prosecutor's Office did not think Dr. Cline's conduct met the required elements for battery or sexual assault.¹⁷⁷ A conviction for criminal battery requires evidence that the defendant, without consent, touched another, resulting in harm.¹⁷⁸ However, from a legal standpoint, Dr. Cline's patients *consented* to being touched for the purposes of artificial insemination.¹⁷⁹ Moreover, in order to prosecute an individual for sexual assault, the State must prove that the defendant compelled the victim to submit to sexual touching through the use of force or threat of imminent force.¹⁸⁰ There was no evidence that Dr. Cline used or threatened to use force against his victims.¹⁸¹ Delaney further stated that, even if they felt they could bring criminal charges against Dr. Cline, the statute of limitations had likely passed.¹⁸² Ultimately, Dr. Cline was convicted of obstruction of justice and received a one-year suspended sentence.¹⁸³

Some experts, including Sean Tipton, the chief policy officer for the American Society for Reproductive Medicine, argue that fertility fraud can be addressed under existing laws.¹⁸⁴ However, the case of Dr. Cline should serve as a warning for Illinois, and many other states, that their current laws do not adequately protect their citizens from fertility fraud.

1. Battery

In Illinois, criminal battery occurs when a person “knowingly without legal justification causes bodily harm to an individual or makes physical contact of an insulting or provoking nature with an individual.”¹⁸⁵

176. Richard Dahl, *How Did the Doctor in Netflix's 'Our Father' Get Off Scot-Free?*, FIND LAW (June 02, 2022), <https://www.findlaw.com/legalblogs/legally-weird/how-did-the-doctor-in-netflixs-our-father-get-off-scot-free/> [<https://perma.cc/HQ59-YJJU>].

177. Amani, *supra* note 62, at 145.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. Delaney, *supra* note 175.

183. Sarah Zhang, *A Decades-Old Doctor's Secret Leads to New Fertility-Fraud Law*, THE ATLANTIC (May 7, 2019), <https://www.theatlantic.com/science/archive/2019/05/cline-fertility-fraud-law/588877/> [perma.cc/XNJ4-JUHH]; 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> [perma.cc/S6Y9-LYPF].

184. Ariana E. Cha, *Fertility fraud: People conceived through error, misdeeds in the industry are pressing for justice*, WASH. POST (Nov. 22, 2018), https://www.washingtonpost.com/national/health-science/fertility-fraud-people-conceived-through-errors-misdeeds-in-the-industry-are-pressing-for-justice/2018/11/22/02550ab0-c81d-11e8-9b1c-a90f1daae309_story.html [perma.cc/N3G6-KLQA].

185. 720 ILL. COMP. STAT. ANN. 5/12-3 (West 2011).

A prosecutor attempting to charge a physician who committed fertility fraud with battery in Illinois would likely face the same challenges as Marion County deputy prosecutor Tim Delaney did in the case of Dr. Cline. It would be difficult to prove that a patient unknowingly inseminated with their physician's sperm suffered bodily harm, given that they consented to the procedure and achieved their goal of conceiving a child. Additionally, even if the prosecutor can prove the elements of criminal battery, they are likely to face many procedural and evidentiary hurdles, which will be discussed further below.¹⁸⁶

Individuals in Illinois can also file a civil cause action against another for battery.¹⁸⁷ To succeed on a civil claim of battery, the plaintiff must prove, by a preponderance of the evidence: "(1) an intentional act on the part of the defendant; (2) resulting in offensive contact with the plaintiff's person; and (3) lack of consent to the defendant's conduct."¹⁸⁸ When the civil battery relates to a medical procedure, the plaintiff "must establish one of the following: (1) no consent to the medical procedure performed; (2) the procedure was contrary to the injured party's will; or (3) substantial variance of the procedure from the consent granted."¹⁸⁹

The main focus of medical battery cases is the patient's lack of authorization, not the healthcare provider's intent.¹⁹⁰ A woman who is the victim of fertility fraud can argue that her physician committed medical battery by failing to receive informed consent to use his sperm in artificial insemination. However, as seen in past cases of fertility fraud, the physician can argue that the patients consented to an anonymous sperm donor, which they received at the time of insemination.¹⁹¹ Furthermore, while a plaintiff may have a good chance of succeeding in their civil case of medical battery, they will likely run into procedural issues related to the statute of limitations and standing.

2. *Medical Malpractice*

Bringing a successful case for medical malpractice presents many similar challenges as a battery case. To succeed in bringing a case against a physician for medical malpractice, the plaintiff must prove: "(1) the proper standard of care against which the professional's conduct must be measured; (2) a negligent failure to comply with the standard; and (3) that the injury for which the suit is brought had as one

186. Madeira, *supra* note 21, at 186.

187. 720 ILL. COMP. STAT. ANN. 5/12-3 (West 2011).

188. McNeil v. Brewer, 710 N.E.2d 1285, 1055 (Ill. App. Ct. 1999).

189. Holzrichter v. Yorath, 987 N.E.2d 1, 17-18 (Ill. App. Ct. 2013).

190. *Id.* at 18.

191. Madeira, *supra* note 21, at 188.

of its proximate causes the negligence of the professional.”¹⁹² As with battery, the plaintiff would likely run into challenges proving they suffered an actual injury because the physician can argue they provided the plaintiff with their desired result: a child.¹⁹³

In addition to proving they suffered an injury, the plaintiff must also affirmatively prove actual damages.¹⁹⁴ Unless the patient can “demonstrate that he has sustained a monetary loss as the result of some negligent act on the physician’s part, his cause of action cannot succeed.”¹⁹⁵ In cases of fertility fraud, there is typically no monetary damage suffered by the women inseminated with their physician’s sperm. Additionally, plaintiffs cannot recover damages based on a wrongful life argument because they are not arguing that they should never have been born.¹⁹⁶ Some children produced via fertility fraud have suffered from hereditary medical disorders that could be included in damages.¹⁹⁷ However, this would only be an option if the child could conclusively prove their standing, which courts have previously refused to find.¹⁹⁸

Even if a plaintiff can successfully overcome all of the hurdles discussed above regarding medical malpractice cases, it is still unlikely a court will find for the plaintiff. Historically, courts have been unwilling to recognize a cause of action for ethical malpractice.¹⁹⁹ In medical malpractice cases where the central allegation relates to an injury caused by the physician’s “deviation from principles of medical ethics—rather than deviations from technical knowledge, professional decision-making, or skill—courts deny injured plaintiffs a remedy under traditional theories of medical malpractice.”²⁰⁰ Patients have repeatedly attempted to argue that physicians have a duty to comply with the ethical standards of their profession, and thus failing to do so can serve as an independent basis for liability.²⁰¹ However, nearly every court presented with this argument has rejected it, finding that “a violation of the American Medical Association’s medical ethics does not in itself amount to a breach of the legal standard of care.”²⁰² Therefore, even if a plaintiff overcomes the numerous procedural challenges and proves all

192. Saxton v. Toole, 608 N.E.2d 233, 238 (Ill. App. Ct. 1992).

193. Madeira, *supra* note 21, at 196–97.

194. N. Ill. Emergency Physicians v. Landau, Omahana & Kopka, Ltd., 837 N.E.2d 99, 107 (Ill. 2005).

195. *Id.*

196. Amani, *supra* note 62, at 129–30.

197. Mangan, *supra* note 163.

198. Rowlette v. Mortimer, 352 F. Supp. 3d 1012, 1021 (D. Idaho 2018).

199. Nadia N. Sawicki, *Ethical Malpractice*, 59 HOUS. L. REV. 1069, 1076 (2022).

200. *Id.* at 1101.

201. *Id.* at 1102.

202. *Id.* at 1104.

elements of medical malpractice have been met, a court is still unlikely to find for them, as the alleged breach of duty relates to the purely ethical duty of care.²⁰³

3. *Informed Consent*

In Illinois, informed consent is a type of medical malpractice claim that requires a plaintiff to prove: “(1) the physician had a duty to disclose material risks; (2) he failed to disclose or inadequately disclosed those risks; (3) as a direct and proximate result of the failure to disclose, the patient consented to treatment she otherwise would not have consented to; and (4) plaintiff was injured by the proposed treatment.”²⁰⁴ This typically requires disclosing information to the patient about their diagnosis, prognosis, the risks and benefits of the proposed treatment, and any alternative treatments.²⁰⁵ However, Illinois courts have never ruled that physicians must provide patients with *every* possible risk related to the procedure to receive informed consent.²⁰⁶ A savvy defense attorney could argue that not disclosing the true identity of the sperm donor does not violate any laws related to informed consent because physicians are not required to provide all details.

Moreover, an analysis of traditional informed consent cases reveals that they are distinct from fertility fraud cases.²⁰⁷ Victims of fertility fraud typically do not make allegations about not being adequately informed about the procedure’s risks or any alternative treatments.²⁰⁸ An example of this in the fertility context would be if a physician did not inform a patient that a procedure carried the risk of sterilization. Additionally, patients must prove they suffered an injury to bring a successful claim against a physician for failure to obtain informed consent.²⁰⁹ Similar to criminal battery, a patient who is the victim of fertility fraud would likely have difficulties proving they suffered any injury. The patient suffered no immediate physical or mental harm, and again, the physician can argue that the plaintiffs achieved their desired result in conceiving a child.²¹⁰

203. *Id.* at 1101.

204. *Coryell v. Smith*, 653 N.E.2d 1317, 1319 (Ill. App. Ct. 1995).

205. *Roberts v. Patel*, 620 F. Supp. 323, 325 (N.D. Ill. 1985).

206. *Miceikis v. Field*, 347 N.E.2d 320, 324 (Ill. App. Ct. 1976).

207. *Chicoine*, *supra* note 24, at 169.

208. *Id.* at 191–92.

209. *Id.*

210. *Madeira*, *supra* note 21, at 196–97.

4. Criminal Sexual Assault

According to the Illinois Criminal Code, a person commits criminal sexual assault if they “commit an act of sexual penetration and uses force or threat of force [or] knows that the victim is unable to understand the nature of the act or is unable to give knowing consent.”²¹¹ The plaintiff must first establish that the victim suffered from sexual penetration.²¹² In cases of fertility fraud, there is no question whether the victim was penetrated, as artificial insemination involves inserting a tube containing the donated sperm, into the vagina, through the cervical opening, and into the uterus.²¹³ The question then becomes whether the penetration was sexual in nature. One could argue that it is inherently sexual, as the physician must engage in the sexual act of masturbation to obtain the sample.²¹⁴ However, it can be argued that masturbation is not closely linked enough to the penetrating act to make it sexual.²¹⁵

Even if the victim can establish that sexual penetration occurred, they still must be able to prove that the physician used force or threat of force or did not receive informed consent.²¹⁶ To date, no victims of fertility fraud have alleged that any physicians used or threatened to use force during the insemination process. Additionally, no drugs are given during artificial insemination, which can impair the patient’s ability to understand and consent to the procedure.²¹⁷ Therefore, to prove criminal sexual assault based on fertility fraud, one must prove they did not consent to the sexual penetration. Here, the issue is not whether the victim consented to the artificial insemination procedure. In all cases, the victims had consented and explicitly sought this procedure. In reality, the patients did not consent to being artificially inseminated with that specific sperm. Thus, even if victims could prove they suffered from sexual penetration, they would likely face challenges in proving they did not consent to such penetration.

211. 720 ILL. COMP. STAT. ANN. 5/11-1.20(a)(1)–(2) (West 2016).

212. *Id.*

213. WebMD, *supra* note 12.

214. Madeira, *supra* note 21, at 177 (“When a physician procures his sperm sample through masturbation and moments later uses that sample to inseminate his female patient, the violation is compounded. The patient is not only being penetrated for an unconsented-to purpose, but these women unwittingly help the physician sow his seed as widely as possible.”).

215. Dr. Cline was not in the same room as the patients when he masturbated, and he alleged he did it because he did not have another viable donor. OUR FATHER, *supra* note 40.

216. 720 ILL. COMP. STAT. ANN. 5/11-1.20(a)(1)–(2) (West 2016).

217. *Intrauterine Insemination*, N.Y. – PRESBYTERIAN, <https://www.nyp.org/womens/reproductive-assistance/intrauterine-insemination-iii#:~:text=The%20UI%20process%20takes%20only,a%20view%20of%20your%20cervix> [perma.cc/5THH-JWK2] (last visited on Mar. 12, 2023, 9:40 PM).

5. *Intentional Infliction of Emotional Distress*

When considering possible claims to bring against a physician that commits fertility fraud, intentional infliction of emotional distress appears to be a viable option. To bring a civil cause of action for intentional infliction of emotional distress, the plaintiff must allege facts to establish: “(1) that the defendant’s conduct was extreme and outrageous; (2) that the defendant knew that there was a high probability that his conduct would cause severe emotional distress; and (3) that the conduct in fact caused severe emotional distress.”²¹⁸

People may assume that fertility fraud constitutes “extreme and outrageous” conduct, but this is a high threshold.²¹⁹ The plaintiff must prove that the defendant’s conduct was “so extreme as to go beyond all possible bounds of decency.”²²⁰

There are no known cases in Illinois where the court has had to directly tackle the issue of whether intentional infliction of emotional distress applies to fertility fraud. However, in the case of *Ashby v. Mortimer*, which involved an accusation of fertility fraud of an Idaho physician, the court found sufficient evidence of severe emotional distress to allow the case to proceed to the jury.²²¹ However, courts have also refused to recognize severe emotional distress in other cases involving fertility treatments.²²² For example, in the case of *Andrews v. Keltz*, Nancy and Thomas Andrews received IVF treatments from Dr. Keltz.²²³ The couple agreed to undergo the procedure using their own egg and sperm; however, the physician inadvertently used an unknown individual’s sperm.²²⁴ The Andrews sued Dr. Keltz for several things, including severe emotional distress.²²⁵ The court rejected their claim, finding “that the birth of a healthy child is not a cognizable injury.”²²⁶ Following this reasoning, a court could find the physician’s actions in a case of fertility

218. *Kolegas v. Heftel Broad. Corp.*, 607 N.E.2d 201, 211 (Ill. 1992).

219. *Id.*

220. *Id.*

221. *Ashby v. Mortimer*, No. 4:18-CV-00143-DCN, 2020 WL 572718, at *7–10, *14 (D. Idaho Feb. 5, 2020).

222. *See generally Andrews v. Keltz*, 15 Misc. 3d 940 (N.Y. Sup. Ct. 2007); *Paretta v. Med. Offs. For Hum. Reprod.*, 195 Misc. 2d 568, 576 (N.Y. Sup. Ct. 2003); *Harnicher v. Univ. of Utah Med. Ctr.*, 962 P.2d 67, 72 (Utah 1998).

223. *Keltz*, 15 Misc. 3d at 941. In vitro fertilization (IVF) is one of the most common methods of assisted reproductive technology. “IVF works by using a combination of medicines and surgical procedures to help sperm fertilize an egg, and help the fertilized egg implant in your uterus.” *What is IVF?*, PLANNED PARENTHOOD <https://www.plannedparenthood.org/learn/pregnancy/fertility-treatments/what-ivf> (last visited Oct. 1, 2023) [<https://perma.cc/Z4GW-CK2M>].

224. *Keltz*, 15 Misc. 3d at 941–42.

225. *Id.* at 942.

226. *Id.* at 945.

fraud to be “extreme and outrageous” but still reject the claim because the patient birthed a healthy child, and, therefore, there was no legally recognized injury.

When pursuing a civil case based on a claim of intentional infliction of emotional distress, the plaintiff must also prove that the defendant should have known that their conduct would have resulted in emotional distress.²²⁷ Physicians could argue that they never intended or imagined that the patients, or their children, would learn the truth. When many of the defendant’s actions took place, the use of donor sperm was still a taboo topic.²²⁸ Physicians often advised their patients not to tell their children they were conceived using donor sperm, advice which many parents followed.²²⁹ The children often only discovered their father’s real identity upon taking an at-home DNA kit.²³⁰ The ability to learn information regarding one’s genealogy on-demand was likely not foreseen by the physicians who committed fertility fraud over thirty years ago. Thus, the physicians could reasonably argue that they did not know or anticipate their actions would cause severe emotional distress to the patient or their child. Finally, even if the plaintiff can prove the substantive elements of intentional infliction of emotional distress, they must still overcome procedural barriers related to their claim.

6. *Fraud*

In Illinois, the criminal statutes only address specific types of fraud, including bank fraud; fraudulent tampering; insurance fraud; fraud on a governmental entity; credit/debit card fraud; computer fraud; and financial exploitation of an elderly or disabled person.²³¹ Unfortunately, fertility fraud does not fall within any of these categories. However, a victim of fertility fraud could file a civil suit against their physician for fraud. To be successful, the plaintiff must prove “the elements of common law fraud [which] are: (1) false statement of material fact; (2) defendant’s knowledge that the statement was false; (3) defendant’s

227. *Kolegas v. Heftel Broad. Corp.*, 607 N.E.2d 201, 211 (Ill. 1992).

228. For much to the early and mid-19th century, the practice of artificial insemination was not accepted in the United States. A national survey in 1953 found that only twenty-eight percent of respondents approved of artificial insemination. One big reason for this disapproval was the official condemnation of the practice by the Roman Catholic Church through the 1950s. See, e.g., Swanson, *supra* note 23; Judith N. Lasker, *Doctors and Donors: A Comment on Secrecy and Openness in Donor Insemination*, 12 POL. AND THE LIFE SCI. 186, 186–87 (1993).

229. Lasker, *supra* note 228, at 186–87.

230. Madeira, *supra* note 21, at 112.

231. 720 ILL. COMP. STAT. ANN. 5/17 (West 2020).

intent that the statement induces the plaintiff to act; (4) plaintiff's reliance on the statement; and (5) plaintiff's damages resulting from reliance on the statement."²³²

Of the above elements, a plaintiff would likely face challenges proving that the physician made a "false statement of material fact."²³³ In cases of fertility fraud, that statement in question would be that the patient was to receive sperm from an anonymous donor. The physicians never made an affirmative statement that they would not provide the sperm, nor did they hold themselves out as being unaware of the donor's identity. Thus, the physician could argue that they did not make a false statement, but instead just adhered to one of the core elements of artificial insemination, donor anonymity. Additionally, they may further argue that they did not even fraudulently conceal information because donor anonymity is a core part of artificial insemination and the patient never expected to be informed of the donor's identity.

Additionally, a victim of fertility fraud could pursue a civil cause of action based on fraudulent concealment. In order to be successful, the plaintiff must prove the following: (1) defendant concealed a material fact intended to induce a false belief; (2) defendant had a duty to speak; (3) reasonable inquiry would not have resulted in the plaintiff learning the truth or the defendant was denied the opportunity to conduct a reasonable inquiry; (4) plaintiff was justified in relying on defendant's silence; (5) if plaintiff had been aware of the concealed information, they would have acted differently; and (6) plaintiff's reliance resulted in damages.²³⁴

A physician that has committed fertility fraud, facing a civil suit for fraudulent concealment, would likely focus their argument on the fact that they had no duty to inform the patient of the donor's identity. Similar to the defense for fraudulent misrepresentation, the physician's lawyer could argue that, if they were to reveal that they were the sperm donor, they would be defeating the entire purpose of anonymous sperm donation. Thus, the physician can argue that by concealing the true source of the sperm, they were complying with the patient's wishes for a child conceived via an anonymous donor. Finally, even if an individual can prove the elements of either fraudulent misrepresentation or fraudulent concealment, they still must prove standing and comply with the applicable statute of limitations.

232. *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 591 (Ill. 1996).

233. *Id.*

234. *Bauer v. Giannis*, 834 N.E.2d 952, 957-58 (Ill. App. Ct. 2005).

C. *Procedural Issues Created by Addressing Fertility Fraud With Current Laws*

Even if a victim of fertility fraud can prove all of the elements of one or more of the substantive laws discussed above, their claim may fail due to procedural challenges. This includes who has standing to bring the suit and whether or not the suit time barred.

1. *Standing*

Fertility fraud not only impacts the individual who underwent artificial insemination, but also profoundly impacts their spouse and the child conceived through fertility fraud.²³⁵ Unfortunately, the courts that have addressed the issue have found that individuals other than the patient lack standing to file suit.²³⁶ For example, in *Rowlette v. Mortimer*, the Idaho court found the child conceived through Dr. Mortimer's fraudulent actions lacked standing.²³⁷ The court reasoned the physician owed the child no duty of care because the child was not a patient.²³⁸ Moreover, the father and the child would not have standing in a case involving battery or sexual assault, as the physician never physically touched either of them.

There is promising caselaw in Illinois to support a finding that a physician owes a duty of care to their patient's future children.²³⁹ For example, in the case of *Renslow v. Mennonite Hospital*, a thirteen-year-old, Emma, was negligently given a blood transfusion using the incorrect blood type.²⁴⁰ Eight years later, Emma gave birth to a child who suffered severe complications due to hyperbilirubinemia caused by the negligent blood transfusion.²⁴¹ Emma sued her former physician, but he argued that he owed no duty of care to Emma's child, who had not yet been conceived when the negligent act occurred.²⁴² However, the Illinois Supreme Court found that the physician should have foreseen that Emma would likely become pregnant.²⁴³ Thus, the court held that he owed a duty of care to Emma and her future children.²⁴⁴

235. Madeira, *supra* note 21, at 146–47.

236. *Rowlette v. Mortimer*, 352 F. Supp. 3d 1012, 1021 (D. Idaho 2018).

237. *Id.*

238. *Id.*

239. *Renslow v. Mennonite Hosp.*, 367 N.E.2d 1250, 1251 (Ill. 1977).

240. *Id.*

241. *Id.*

242. *Id.* at 1255–56.

243. *Id.*

244. *Id.* at 1256.

Based on this reasoning, it seems likely that Illinois courts would also find that physicians who commit fertility fraud owe a duty of care to any children fraudulently conceived. In cases of fertility fraud, there is no question that the physician should have foreseen that their patient would become pregnant, as the entire purpose of the treatment was to assist the patient in conceiving a child. However, the legislature should not leave it up to the court to determine if victims of fertility fraud have proper standing. Instead, they should ensure that all impacted parties have standing to pursue a cause of action based on fertility fraud by explicitly addressing it in the statute.

2. *Statute of Limitations*

Even if a victim of fertility fraud can prove all necessary elements to hold their physician liable under an existing Illinois law, such as battery or sexual assault, their claim is very likely to fail because the statute of limitations has already expired. In Illinois, the statute of limitations for the majority of felony criminal charges, such as felony battery, is three years,²⁴⁵ while the statute of limitations for a criminal misdemeanor is only eighteen months.²⁴⁶ Thus, to pursue criminal charges against a physician who commits fertility fraud, the State must file charges within three years of the fraudulent artificial insemination.²⁴⁷ The only exception to this would be if the State were pursuing a charge for criminal sexual assault, which has no statute of limitations.²⁴⁸

The statute of limitations for civil cases depends on the cause of action alleged by the plaintiff. The statute of limitations is two years for cases that allege an injury to the person, such as battery or intentional infliction of emotional distress.²⁴⁹ The statute of limitations for a cause of action that alleges fraud through concealment is five years.²⁵⁰ In cases where the cause of action relates to medical malpractice, a variety of factors impact the determination of the statute of limitations.²⁵¹ Generally, an individual in Illinois can bring a suit for medical malpractice within two years from the date the plaintiff “knew, or through reasonable diligence should have known,” about the injury caused by the physician’s malpractice.²⁵² However, this deadline can be extended if

245. 720 ILL. COMP. STAT. ANN. 5/3-5(b) (West 2023).

246. *Id.*

247. *Id.*

248. *Id.* 5/3-5(a).

249. 735 ILL. COMP. STAT. ANN. 5/13-202 (West 2016).

250. 735 ILL. COMP. STAT. ANN. 5/13-215 (West 1982).

251. 735 ILL. COMP. STAT. ANN. 5/13-212 (a)–(b) (West 2015).

252. *Id.* 5/13-212 (a).

the injury is not easily discoverable, but at no point can an individual file a suit for medical malpractice more than four years after the injury occurred.²⁵³ One additional exception to the general statute of limitations for medical malpractice cases applies to victims injured before turning eighteen.²⁵⁴ In this case, the statute of limitations is eight years, but at no point can such a case be brought after the injured person turns twenty-two.²⁵⁵

The biggest challenge regarding the statute of limitations is determining when the time begins to run. The statute of limitations begins the moment the crime is complete.²⁵⁶ Moreover, courts have found that when a single “overt act from which subsequent damages may flow” occurs, the date of that overt act is when the statute of limitations begins to run.²⁵⁷ In the case of fertility fraud, this would be the artificial insemination date. However, as explained before, most patients, and their resulting children, do not discover the truth for decades after the insemination occurred, long after the statute of limitations has expired.²⁵⁸

It is possible to toll the statute of limitations if the defendant fraudulently conceals the cause of action.²⁵⁹ Under this scenario, a person has five years to bring suit once discovering the fraudulently concealed cause of action.²⁶⁰ However, the Illinois Supreme Court has found that in order for the statute of limitations to be tolled due to fraudulent concealment, the defendant’s alleged actions “must consist of affirmative acts or representations calculated to lull or induce a claimant into delaying the filing of his or her claim, or to prevent a claimant from discovering a claim.”²⁶¹ Moreover, the Illinois Supreme Court has explicitly stated in its decisions that mere silence does not constitute fraudulent concealment.²⁶²

A fertility fraud victim could argue that the physician fraudulently concealed the necessary information to bring a claim, and thus the statute of limitations should be tolled. However, this argument is likely to fail, because the physician did not take affirmative action to conceal the identity of the sperm donor. All the physician did was remain silent on the donor’s true identity. Further, they could argue that they were complying with the basics of anonymous donation by concealing the

253. *Id.*

254. 735 ILL. COMP. STAT. ANN. 5/13-212(b) (West 2015).

255. *Id.*

256. *Khan v. Deutsche Bank AG*, 978 N.E.2d 1020, 1028 (Ill. 2012).

257. *Bank of Ravenswood v. City of Chicago*, 717 N.E.2d 478, 484 (Ill. App. Ct. 1999).

258. *Madeira*, *supra* note 21, at 112.

259. 735 ILL. COMP. STAT. ANN. 5/13-215 (West 1982).

260. *Id.*

261. *Orlak v. Loyola Univ. Health Sys.*, 885 N.E.2d 999, 1009 (Ill. 2007).

262. *Id.*

donor's identity. Passing specific legislation would prevent future victims of fertility fraud from having to spend the time and money proving their suit was filed within the statute of limitations. In order to protect victims of fertility fraud, Illinois must address the gaps in existing civil and criminal laws and provide procedural protections by passing legislation that explicitly addresses fertility fraud.

D. Proposed Comprehensive Fertility Fraud Legislation

In order to adequately protect its citizens, Illinois must pass comprehensive legislation addressing the issue of fertility fraud. While it is true that there is pending legislation at the federal level, Illinois should not wait for that bill to pass. Instead, it must prioritize passing statewide fertility fraud legislation.²⁶³ Moreover, any bill passed at the federal level would only apply to cases where interstate commerce was involved.²⁶⁴ Thus, passing a fertility fraud bill at the state level would prevent residents from going through the extra hassle of proving their case involved interstate commerce.

Regardless of the specifics of the legislation, any bill passed by the Illinois legislature must include both criminal and civil remedies to ensure the physician is punished for their actions while compensating the victims. This Section highlights essential components, which should be included in future legislation and uses existing laws in other states to help guide the development of such legislation.

1. Civil Remedy

Any legislation addressing fertility fraud must create a specific civil cause of action for which victims can sue their physicians. This will prevent victims and their attorneys from having to manipulate existing laws in order to hold the physician accountable. Additionally, it will clear up existing procedural issues. When crafting the civil component of the legislation, Illinois should look to Indiana's fertility fraud bill for guidance.²⁶⁵ The Indiana bill includes five essential provisions, which should be incorporated into Illinois legislation.²⁶⁶

First, it explicitly states that the mother/patient, their spouse, and the child conceived through the fertility fraud are all eligible to bring their

263. Protecting Families from Fertility Fraud Act of 2022, H.R. 8600, 117th Cong. (2022), <https://www.congress.gov/bill/117th-congress/house-bill/8600/text?s=1&r=48> [<https://perma.cc/362R-6MXZ>].

264. *Id.* § 2249(b).

265. IND. CODE ANN. § 34-24-5 (West 2019).

266. *Id.* § 34-24-5-2.

own cause of action against the physician.²⁶⁷ This is crucial to include, as prior attempts at filing suit against these physicians have led to issues related to standing. In the past, courts have found that the children or spouse of the mother lacked standing because the physician did not owe them a duty of care.²⁶⁸ However, this fails to acknowledge the mental and physical impacts these individuals may suffer as a result of the physician's actions.²⁶⁹ Thus, legislation in Illinois must include a provision that provides that the mother, their spouse, and the resulting child all have standing.

Second, the Indiana bill addresses the statute of limitations issues that have repeatedly arisen when individuals have attempted to file suit under existing civil laws.²⁷⁰ The Indiana bill states that there is a five-year statute of limitations for cases of fertility fraud.²⁷¹ The statute of limitations does not begin to run until the date the fertility fraud is discovered by one of the victims.²⁷² This will prevent physicians who committed fertility fraud decades ago from avoiding liability, simply because their actions were not discovered for many years. In order to prevent lengthy litigation surrounding the statute of limitations and ensure physicians are held liable, Illinois must include a similar provision in future legislation. The legislation should clearly state the statute of limitations and include language dictating that time begins running once the fraud is discovered.

Third, the Indiana bill provides for both compensatory and punitive damages.²⁷³ The compensatory damages can be used to reimburse the victim for medical bills stemming from the fertility fraud.²⁷⁴ This could be in the form of mental health treatment for the woman who was the victim of fertility fraud. Additionally, compensatory damages can be used to repay the child for similar medical expenses, and those due to hereditary issues passed along from the physician. However, given the extreme violation of medical ethics, victims should also be eligible to receive punitive damages. These are damages meant to penalize the

267. *Id.*

268. *Rowlette v. Mortimer*, 352 F. Supp. 3d 1012, 1021 (D. Idaho 2018).

269. *Madeira*, *supra* note 21, at 146 (“For the [children], discovering they had been conceived through an illicit insemination using Cline’s sperm was profoundly disturbing. Josh felt as if he had been conceived through a criminal act: ‘I definitely told my mom very, very, very early on, like in the first week or something, that I felt like I was a product of rape.’”).

270. IND. CODE ANN. § 34-11-2-15 (West 2019).

271. *Id.* § 34-11-2-15(b).

272. *Id.*

273. IND. CODE ANN. § 34-24-5-4 (West 2019).

274. Plaintiff is entitled to recover compensatory damages to cover necessary medical care resulting from the defendant’s negligent actions. *See Chicago City Ry. Co. v. Henry*, 75 N.E. 758, 759 (Ill. 1905).

defendant for their actions.²⁷⁵ Physicians have resources, such as a high salary and malpractice insurance that can be used to compensate the victims.²⁷⁶ Thus, it only seems fair that the physician should use those resources to compensate their victims. Additionally, imposing punitive damages upon those who commit fertility fraud sends a message to fertility specialists everywhere that this behavior will not be tolerated.²⁷⁷ However, because many courts are hesitant to impose punitive damages, Illinois must include an express provision allowing for compensatory and punitive damages.²⁷⁸

Fourth, the Indiana bill states that each child produced through fertility fraud represents a separate cause of action against the doctor.²⁷⁹ Most physicians who commit fertility fraud do not do so just once.²⁸⁰ For example, Dr. Cline has over ninety children who were conceived through his fraudulent actions.²⁸¹ Each child conceived through fertility fraud represents a family whose life has been forever changed due to the selfish actions of one individual, and each of these families deserves compensation. Thus, including a provision similar to this in future Illinois legislation will ensure that all victims are protected, not just those who file suit first.

Finally, the Indiana bill states that filing a suit under the fertility fraud statute does not prohibit other remedies.²⁸² This makes it clear that civil and criminal remedies can be pursued simultaneously. Additionally, an individual can file suit based on other causes of action, either as an alternative cause of action or for actions related to fertility fraud. Finally, it clarifies that victims can pursue remedies outside the judicial system,

275. Legal Information Institute, *Punitive damages*, CORNELL L. SCH., https://www.law.cornell.edu/wex/punitive_damages [perma.cc/UV8C-JZ8T] (last visited Aug. 14, 2023, 3:39 PM).

276. The average salary of a fertility specialist in the United States is \$244,741 as of July 25, 2023. See *Fertility Specialist Salary in the United States*, SALARY.COM, <https://www.salary.com/research/salary/posting/fertility-specialist-salary> [perma.cc/5RKH-H6FE] (last visited Aug. 14, 2023, 3:40 PM).

277. See RESTATEMENT (SECOND) OF TORTS § 908 (1979) (“Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.”).

278. Michael Conklin, *Factors Affecting Punitive Damage Awards*, 21 FLA. COASTAL L. REV. 1, 1 (2021).

279. IND. CODE ANN. § 34-24-5-5(a) (West 2019).

280. The following doctors committed fertility fraud on multiple occasions: Dr. Quincy Fortier, Dr. Cecil Jacobson, Dr. Jos Bek, Dr. Jan Karbaat, and Dr. Donald Cline. Adrian Horton, *Baby God: How DNA Testing Uncovered a Shocking Web of Fertility Fraud*, THE GUARDIAN (Dec. 2, 2022, 2:56 PM), <https://www.theguardian.com/tv-and-radio/2020/dec/01/baby-god-dna-testing-fertility-fraud-quincy-fortier-nevada> [perma.cc/2SDJ-8YEJ]; *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> [perma.cc/98R8-NHKS]; Boffey, *supra* note 83; Moorhead, *supra* note 83; Zhang, *supra* note 1.

281. WTHR, *supra* note 173.

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

such as filing a complaint with the state's medical board. Regardless of the legislation in Illinois, victims must be able to pursue multiple avenues for remedy if they so choose. Including a provision similar to Indiana's will protect that right.

2. Criminal Remedy

While a civil cause of action is essential to provide victims with monetary compensation, a criminal element in the legislation is also crucial. This will not only serve as punishment for the physician's actions, but also serve as a warning to other fertility doctors. States have taken many different approaches to their criminal fertility fraud legislation.²⁸³ Some have created a new, specific cause of action for fertility fraud, while others have updated their sexual assault laws to include fertility fraud.²⁸⁴ Illinois should develop its legislation using portions of different laws to best protect its citizens.

In particular, Illinois should follow the approach taken by Florida, which created a crime known as reproductive battery.²⁸⁵ This law prohibits a health care provider from intentionally transferring human reproductive material to a recipient, knowing that they have not consented to the use of that specific reproductive material.²⁸⁶ Violating this law constitutes a felony in the third degree, which can result in up to five years imprisonment and a \$5,000 fine.²⁸⁷ However, this law also states that if the reproductive material being used without consent is from the doctor, then it is a felony in the second degree.²⁸⁸ That would raise the penalty to up to fifteen years imprisonment and a \$50,000 fine.²⁸⁹ However, the Florida legislation covers more than just cases where doctors use their sperm without the patient's consent.²⁹⁰ For example, it also applies to cases where a patient agrees to the use of sperm that has been tested for certain genetic conditions, and the physician uses material that has, in fact, not been tested. However, the law still recognizes that some instances of fertility fraud, like a doctor using their sperm, are morally worse than others and should carry harsher penalties.

The Florida law also contains other important provisions that should be included in future Illinois laws. First, it establishes the statute of

283. RIGHT TO KNOW, *supra* note 52.

284. *Id.*

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

286. *Id.* § 784.086(2)(a).

287. *Id.*

288. *Id.* § 784.086(2)(b).

289. *Id.*

290. *Id.* § 784.086(2)(a).

limitations and explicitly states that the time does not begin running until the discovery of the doctor's actions by the victim.²⁹¹ As we repeatedly saw above, one of the biggest hurdles to convicting a physician of fertility fraud under existing laws is the statute of limitations. Thus, Illinois must follow in Florida's footsteps and include such a provision in its legislation. Additionally, the law states that the fact that the victim consented to the use of an anonymous donor is not a defense.²⁹² Removing one of the more common defenses for fertility fraud will make the path to conviction easier.

While the Florida law serves as a good model for future Illinois legislation, it fails to do one thing, which is to classify the physician's actions as sexual assault.²⁹³ Illinois should include a provision in their law stating that a physician who uses their sperm to impregnate an individual without their consent must register as a sex offender. There is an inherently sexual nature to a physician using their own sperm, as oftentimes it requires them masturbating close to the victim both in time and proximity.²⁹⁴ Additionally, including this penalty is often crucial to the victims, as they often consider what happened to them a form of sexual assault and want to see it punished as such.²⁹⁵

Individuals who have studied the issue of fertility fraud often echo the idea that labeling the conduct as a form of sexual assault is critical in providing the victims with justice.²⁹⁶ According to fertility fraud expert and professor of law at Indiana University Maurer School of Law, "the Texas bill really gets to the heart of what fertility fraud is," which is doctor's betrayal of the doctor-patient relationship by "inserting himself literally or some part of himself into the woman's bodily cavity, betraying her autonomy, and also inserting himself, his own genetic lineage into her family tree—against her will."²⁹⁷ Illinois should follow Texas's lead and include a provision in future legislation that designates anyone guilty of fertility fraud must register as a sexual offender. Doing so will ensure that the physicians are punished in a way that recognizes the inherently sexual nature of their crime and provides victims with the justice they deserve.

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

292. *Id.* § 784.086(4).

293. *See id.* § 784.086.

294. Zhang, *supra* note 1.

295. Leila Ettachfini, *Doctors Can Legally Inseminate Patients with Their Own Sperm in Most States*, VICE MEDIA GROUP (Apr. 22, 2019, 7:58 PM), <https://www.vice.com/en/article/pajdn7/fertility-fraud-insemination-laws-donald-cline> [perma.cc/F4SC-XUVM] ("Moreover, classifying fertility fraud as a sex crime more accurately portrays what the wrongful practice is: a betrayal of the doctor-patient fiduciary relationship.").

296. *Id.*

297. *Id.*

IV. IMPACT

Fertility fraud is an issue that will only become more prevalent in the coming years. While most victims only recently discovered the truth, the majority of the acts took place prior to the year 2000.²⁹⁸ When the physicians committed these acts, taking a DNA test was more complex and challenging than it is today.²⁹⁹ People typically only did so if there was a question about their child's paternity; even then, it was often not an easy process.³⁰⁰ Thus, the physicians who committed fertility fraud likely never thought their victims would discover the truth. However, the physicians did not consider the invention of the at-home DNA kit. Thanks to technological advances and companies like 23andMe and Ancestry.com, people now have easy and affordable access to at-home DNA kits.³⁰¹ As of 2019, over 26 million people had submitted their DNA to one of the four leading DNA kit companies.³⁰² These kits have allowed people to learn important information about their health and family genealogy.³⁰³ Unfortunately, this has also led to some people learning something more sinister—their mother's fertility doctor is their biological father.³⁰⁴

The popularity of at-home DNA tests is unlikely to slow down soon, meaning even more cases of fertility fraud will likely be uncovered in

298. Horton, *supra* note 280.

299. The first at-home DNA company was not established until 2007. Sofia Sokolove, *How Did DNA Kits Become so Popular—and What's Next*, ALCALDE (June 30, 2018, 2:24 PM) <https://alcalde.texasexes.org/2018/06/how-did-dna-kits-become-so-popular-and-whats-next/#:~:text=%E2%80%9CIf%20you%20do%20it%20right,to%2Dconsumer%20genetic%20testing%20kit> [perma.cc/Q97P-8KXL].

300. Past DNA test methods required much more genetic material, had a long turnaround time, and were more expensive. Tests cost between \$300 and \$500, the results only included information about paternity, and did not include any ancestry or health information. *Introduction to DNA Testing History*, DNA DIAGNOSTICS CENTER, <https://dnacenter.com/history-of-dna-testing/> [perma.cc/9MW6-SV67] (last visited on Mar. 12, 2023).

301. A DNA kit from 23andMe costs \$229, which includes complete health and ancestral information. *Health + Ancestry Service*, 23ANDME., <https://www.23andme.com/dna-health-ancestry/> [perma.cc/SYV3-YUJ8] (last visited on Mar. 12, 2023).

302. Antonio Regalado, *More than 26 million people have taken an at-home ancestry test*, MIT TECH. REVIEW (Feb. 11, 2019), <https://www.technologyreview.com/2019/02/11/103446/more-than-26-million-people-have-taken-an-at-home-ancestry-test> [perma.cc/586Y-P2D2].

303. Libby Copeland, *You Can Learn a Lot About Yourself From a DNA Test. Here's What Your Genes Cannot Tell You*, TIME (Mar. 2, 2020, 6:24 PM), <https://time.com/5783784/dna-testing-genetics/> [perma.cc/EJW6-2MMQ].

304. Dr. Cline's horrific actions were not discovered until one of his fraudulently conceived children, Jacoba Ballard, took an at-home DNA test using a kit from 23andMe. Shari Rudavsky, *When you find out your mother's fertility doctor is likely your biological father*, INDYSTAR (Aug. 27, 2017, 6:00 AM), <https://www.indystar.com/story/news/2017/08/27/when-you-find-out-your-mothers-fertility-doctor-ithe-doctor-helped-women-conceive-but-he-lied-them-h/577701001> [perma.cc/CHR5-HM28].

the coming years.³⁰⁵ Additionally, further discovery of cases of fertility fraud will likely contribute to an increased use of at-home DNA kits. Every time a new doctor is found to have engaged in these practices, it will likely lead to an increase of individuals in the area taking DNA tests.³⁰⁶ Especially for individuals who know they were conceived using an anonymous sperm donor. Therefore, it is crucial that we do not continue to let technological advancements outpace our legal system and pass laws targeting fertility fraud.

It can be argued that the impact of newly passed fertility fraud laws will not be measurable because they would not apply retroactively, and most cases occurred many years ago. The United States Constitution expressly prohibits the states from passing ex-post facto laws, which are laws that apply retroactively.³⁰⁷ However, it has long been settled that “the constitutional prohibition against ex-post facto laws concerns criminal matters solely and has no application to civil law.”³⁰⁸ Unfortunately, this means that any criminal components of fertility fraud legislation passed by Illinois could not be applied retroactively. However, nothing prohibits the legislature from including a provision of the bill that makes it clear that the civil components of the legislation would apply retroactively. Additionally, there is nothing to prevent current fertility doctors from engaging in these or other deceptive practices related to fertility treatment. Therefore, including a criminal component of the law is necessary not only to punish any individual who commits these heinous acts in the future, but also to send a message to all fertility doctors in Illinois that this behavior will not be tolerated.

V. CONCLUSION

Some believe that existing laws can address the issue of fertility fraud and that passing new legislation will not have a measurable impact, and thus, efforts to do so would be futile. Indiana University Maurer School of Law Professor, Jody Lyneé Madeira, said it best: “This conduct isn’t acceptable, and patients have to be protected. We shouldn’t have to

305. Regalado, *supra* note 302.

306. Josh Noblet took a DNA test after watching the documentary *Our Father*, noticing his resemblance to some of the other victims and that he suffered from the same autoimmune disorder. This DNA test revealed that he was, in fact, one of the countless children conceived through Dr. Cline’s fraudulent actions. Angela Ganote, *Man learns who his real father is through Netflix documentary*, KTLA (Nov. 16, 2022, 2:20 PM), <https://ktla.com/news/man-notices-detail-in-netflix-documentary-realizes-mom-was-fertility-doctors-victim-family-says> [<https://perma.cc/J6UY-N85N>].

307. U.S. CONST. art. 1, § 10.

308. *Steinmetz v. Bd of Trustees of Cmty. Coll. Dist. No. 529*, 385 N.E.2d 745, 747 (Ill. App. Ct. 1978).

have a law; this should be common sense.”³⁰⁹ Furthermore, while it is true that legislatures do not like to create new crimes, some actions are so indefensible that it is necessary to send a message to people that the specific conduct in question is unacceptable.³¹⁰

Illinois should follow the lead of states like Indiana, Florida, and Texas and pass comprehensive legislation addressing fertility fraud. This legislation should include both criminal and civil causes of action and specifically address specific procedural issues, like standing and the statute of limitations. Passing this legislation will provide victims of fertility fraud with an easy route to pursue a civil cause of action, regardless of when the action occurred. Additionally, it will criminalize this behavior in future instances and send a message to all physicians that this behavior will not be tolerated. More than anything, this type of legislation would provide meaningful recognition to the victims that what they experienced was wrong in the eyes of our state. In conclusion, the State of Illinois should protect its citizens by prioritizing the passing of legislation that tackles fertility fraud.

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309. Elaine S. Povich, *Fighting Fertility Fraud: New State Laws Go After Misuse of Sperm*, STATELINE (July 3, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/state-line/2019/07/03/fighting-fertility-fraud-new-state-laws-go-after-misuse-of-sperm> [perma.cc/E4FN-BVY8].

310. *Id.* “We thought this was worth doing,” said Indiana state Rep. Ed DeLaney, the Democrat who authored the bill that eventually passed. *Id.* “We violated one of our rules: We do not like to create new crimes. We were swimming against our normal stream, but this was an exception.” *Id.*

