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TESTIMONY IN SUPPORT OF OHIO HB 64

My name is Dr. Jody Lyneé Madeira, and I am Professor of Law, Louis F. Niezer Faculty Fellow, and Co-Director of the Center for Law, Society, & Culture, and an expert in criminal law, torts, law and bioethics, and law and medicine. I am also a member of the Bioethics and Subject Advocacy Faculty at the NIH-funded Clinical and Translational Sciences Institute. I have authored two relevant academic books: *Killing McVeigh: The Death Penalty and the Myth of Closure* (New York University Press, 2012) and *Taking Baby Steps: How Patients and Fertility Clinics Collaborate in Conception* (University of California Press, 2018). I have spoken about and written extensively on fertility fraud. I'm testifying in support of Ohio HB 64.

I certify that I have no affiliation with or involvement in any organization or entity with any financial interest in the subject matter discussed in this written testimony, and that I am not being compensated for my testimony, expertise, or research in any way by any party.

- Fertility fraud occurs when a physician (usually in the 1970s and 1980s) used his own sperm to inseminate a patient, only to have the child conceived through the insemination procedure to uncover this deception decades later, through direct to consumer genetic testing.
- The vast majority of former patients I have interviewed feel as if they were subjected to rape or sexual assault during each insemination, and their adult children who were doctor-conceived feel as if they were born from criminal activity.
    - Fertility fraud effects *continual* harm in addition to the grievous harm of the illicit insemination itself. These harms profoundly every aspect of victims' lives, from personal identity to relational dynamics. The physician also literally inserts his genetic material into his patients' family trees.
    - These harms are entirely foreseeable to the unscrupulous physicians who engaged in fertility fraud.
- There have between 20 and 30 open cases of fertility fraud in the U.S. Notable examples include Donald Cline (76 doctor-conceived children, Indianpolis, IN)
- This conduct has also affected families in other countries all over the world, including Japan, Belgium, the U.K., and Germany. Perhaps the most famous cases are those against Jan Karbaat in the Netherlands and Norman Barwin in Canada.
- Additional instances of fertility fraud that have been closed through settlements and nondisclosure agreements, and many others in which parties are currently deciding what course of action to take.
- There is no law in most states that specifically makes it illegal for a physician to impregnate his patients using his own gametes, although such conduct clearly violates ethical standards and fiduciary duties.
    - Indiana passed legislation creating a civil and criminal cause of action for fertility fraud in 2019.

    - Texas passed legislation that criminalizes fertility fraud as sexual assault in 2019. Legislators could not create a civil claim for fertility fraud because under Texas law all medical malpractice claims must be brought within 10 years of treatment, even when the physician defrauded his patients as to material aspects of that "treatment."
    - Legislation regarding fertility fraud was passed last year in Florida and Colorado, and was close to passing in Nebraska when COVID struck.
    - Another fertility fraud bill, Arizona SB 1237, unanimously passed the Senate and the House Judiciary committee as of March 10th, and is waiting a final House vote.
    - Additional bills are pending in Idaho and Washington.
- Ohio HB 64 protects the interests of both parents and adult individuals who are doctor-conceived.
    - It provides a generous 10-year statute of limitations, tolled until a victim discovers the fertility fraud through genetic testing, recording, or confession.
    - The bill ensures generous liquidated damages of $10,000 for victims, or allows them to pursue other compensatory and punitive damages as well as reimbursement for the fertility procedure itself.
    - Most significantly, it allows patients, their spouses or surviving spouses, or children to bring an action for fertility fraud.
    - It protects a reproductive material donor's ability to set enforceable terms upon their donation.
    - This comprehensive legislation demonstrates that Ohio's elected representatives wish to protect their constituents from unethical practitioners when they are highly vulnerable and dependent upon their physician's care.
- This conduct falls between gaps in the criminal law in the vast majority of states, underscoring the need for a criminal provision.
    - When a physician intentionally fails to abide by ethical principles and the standard of care, this conduct is criminal; numerous criminal statutes apply to professionals that violate core ethical rules (for example, in law, rules against comingling client funds).
    - HB 64 establishes that this conduct constitutes a felony of the third degree, "fraudulent assisted reproduction."
    - In most states, this conduct cannot be prosecuted as rape, because rape statutes do not allow for rape by deception charges.
    - This is unconsented-to penetration; patients had consented to undergo artificial insemination under different circumstances than doctor donation.
- This legislation is needed to protect the legal interests of women and men who sought fertility treatment, and the children they conceived, who are now adults.
    - In at least one state (Idaho, *Mortimer v. Rowlette*), under an unusual state medical malpractice law, the state court dismissed the adult child who was donor-conceived because she was not a patient of the physician because she was not in existence when he harmed her parents
        - Doctors owe duties to third parties who are unknown at the time they commit wrongdoing, and can only remedy these acts *by informing their patients at the time they were committed.*

- Courts have held that doctors are liable to third parties when it was foreseeable that these third parties would be harmed. For example:
    - A doctor who learned that HIV-infected blood was transfused into his 12-year old female patient did not inform her or her family, and was liable years later to the patient and to her sexual partner who had acquired HIV.
    - A doctor negligently infused Rh-negative blood into a teenage female patient but did not inform her or her family, although he knew that act could severely harm her future children. He was held liable years later, after her infant suffered liver damage and other harms from the negligent transfusion.

- Fertility fraud violates the legal and ethical interests of the women who trusted these physicians and underwent artificial insemination.
    - Many of these physicians have had the hubris to later claim that they were helping "desperate" patients or putting their patients' needs first.
    - These physicians intentionally deprived patients of decision-making autonomy (their rights to be secure in their persons, to give consent to medical touchings, and to choose how their families are formed), and intentionally failed to follow agreed-upon procedures for insemination.
    - These physicians intentionally violated their former patients by penetrating them in ways to which they did not consent and injecting unwanted and unconsented-to bodily fluid into their persons
    - These physicians intentionally subjected women to a clinical procedure carried out in a way that furthered his own desires and not his patient's wellbeing.
    - These physicians intentionally subjected victims to the awareness that a trusted professional knew intimate secrets about their family structures and relationships.
    - Through their conduct, these physicians intentionally and maliciously wreaked havoc with the physical, emotional, and psychological wellbeing of his former patients, their partners, and their children.

For these reasons, I enthusiastically support the passage of Ohio HB 64. Thank you so very much for considering my written testimony.

Yours Sincerely,

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