THE SOCIO-LEGAL PROBLEMS OF ARTIFICIAL INSEMINATION

The rapid increase, especially during the past ten years, in use of artificial insemination by barren couples desirous of having and rearing a child[1] creates social and legal problems that society is yet unprepared to cope with.[2] The infrequency of litigation to date is probably not indicative of the future.[3] Since wide use of the practice is comparatively recent, most of the participating couples are still alive, guarding the secret of the method of their child's conception. The greatest part of the legal problems that could arise during the life of the parents would have to be raised by them, and although there will be some, the majority of cases will not develop until the husband dies, and relatives try to gain custody of the child or defeat its inheritance. Thus, a wake of litigation may be expected to follow about thirty years after an increase in the incidence of artificial insemination.[4]

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1. In 1941, Drs. Seymour and Koerner sent 30,000 questionnaires to physicians. Out of 7,642 replies it was reported that at least one pregnancy had been obtained, in each of 9,489 women, through artificial insemination. Seymour and Koerner, *Artificial Insemination,* 116 A.M.A.J. 2747 (1941).

Testimony before a committee hearing of the New York State Legislature in 1951, indicated that there were then about 20,000 children alive in this country through artificial insemination. PLOSCOWE, SEX AND THE LAW 113 (1951).

2. Various problems have been discussed in other legal publications: Koerner, *Medicolegal Considerations in Artificial Insemination,* 8 LA. L. REV. 484 (1948); Notes, 34 IOWA L. REV. 658 (1949), 15 Mo. L. REV. 153 (1950), 34 VA. L. REV. 822 (1948), [1950] WIS. L. REV. 136, 58 YALE L.J. 457 (1949).

3. To date four cases have been reported in English speaking countries. Strnad v. Strnad, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948), held that the husband of a woman, who had a child conceived by artificial insemination with a donor's semen, stood in the same position as a biological father for purposes of determining rights of visitation in a custody proceeding. After this decision the mother moved to Oklahoma where she obtained a divorce and was given exclusive custody, the court saying, according to newspaper reports, that the husband had no rights of visitation because he was not the biological father. The Indianapolis News, Aug. 6, 1949 (mail ed.), p. 1, col. 1.

Hoch v. Hoch, Chieago Sun, Feb. 10, 1945; Time, Feb. 26, 1945, p. 58, in which a Chicago judge said, by way of dicta, that artificial insemination with a donor's semen was not adultery.

R.E.L. v. E.L. [1949] P. 211, held that the birth of a child by artificial insemination, with husband's semen, did not prevent the annulment of a marriage when husband was impotent (see discussion of AIH, p. 623). This case was discussed in English legal periodicals. Notes, 113 JUST. P. 440 (1949), 61 JURID. REV. 85 (1949).

Orford v. Orford, 49 Ont. L.R. 15, 58 D.L.R. 251 (1921). This Canadian case *said* that artificial insemination with a donor's semen, *and without the consent of the husband,* was adultery.

4. This conclusion is pure speculation, based on the supposition that the child's parents want to keep the means of his conception secret, but that other relatives will not care.

The first report of the practice of artificial insemination upon human beings was published in 1799.[5] Until the twentieth century it was assumed that only semen from the patient's husband would be used,[6] but in 1909 an account was printed of the insemination of a woman, whose husband was sterile, with semen from a donor.[7] Today artificial insemination with the husband's semen is termed AIH and, with a donor's semen is termed AID. Only within the past twenty years has public opinion allowed widespread use of AID.[8]

Recent articles in "popular" magazines,[9] printed more for their sensationalistic value than for public edification, have tended to create the false impression that artificial insemination is readily available to any married couple with almost automatic success. As a matter of fact, just the opposite is true. Very few doctors will perform the techniques of artificial insemination, and those who do are extremely selective in accepting patients.[10] Because AIH is generally considered to involve no legal difficulties,[11] it is available to most barren couples, but it is to the credit of the medical profession that the host of unsolved social and legal problems connected with AID have made doctors very careful in selecting couples. They are accepted on the basis of the stability of their marriage, sincerity in wanting a child, ability to provide for him, and sufficient intelligence and understanding to meet many of the problems which may

5. Home, *Account of the Dissection of an Hermaphrodite Dog,* 18 PHILOSOPHICAL TRANSACTIONS OF THE ROYAL SOCIETY OF LONDON 162 (1799), cited in GLOVER, ARTIFICIAL INSEMINATION AMONG HUMAN BEINGS 4 (1948); see also ROHLEDER, TEST TUBE BABIES 40 (1934).

6. GLOVER, *op. cit. supra* note 5, at 7.

7. Hard, *Artificial Impregnation,* 27 THE MEDICAL WORLD 163 (1909), cited in Glover, *op. cit. supra* note 5, at 11.

8. ". . . [B]ut because of public reaction to homologous insemination, [using the semen of the husband] no doctor would have dared to make public any case of heterologous insemination [using the semen of a donor]. It is, therefore, not until the present century that we read of the practice of heterologous artificial insemination." GLOVER, *op. cit. supra* note 5, at 9.

9. *E.g.,* Anonymous, *I Search for my Father,* 100 REDBOOK No. 5, 24 (March 1953). See Greenhill, *Artificial Insemination: Its Medicolegal Implications* SYMPOSIUM ON MEDICOLEGAL PROBLEMS 43 (Levinson ed. 1948).

10. See A. Guttmacher, *Physician's Credo for Artificial Insemination,* 50 WESTERN J. SURG., ORSTETRICS, & GYNECOLOGY 357 (1942).

11. "Thus, homologous insemination is generally agreed upon as being morally or legally sound." Koerner, *Medicolegal Considerations in Artificial Insemination,* 8 LA. L. REV. 484, 494 (1945). ". . . [H]omologous insemination would appear not to pose any particular legal problems. . . ." Note, 15 Mo. L. REV. 153, 154 (1950). "So it would seem that this type of artificial insemination [AIH] and its problems are restricted to the field of medicine." Note, 34 VA. L. REV. 822, 824 (1948). "Although an artificial technique, AIH excites no particular legal problems, since it is impossible to use unless both husband and wife have consented, and since the resulting child is actually their biological offspring." Comment, 58 YALE L.J. 457, 458 (1949).

As will be seen on page 623, however, AIH does raise some legal problems.

arise because of the unsettled state created by the process.[12] Medical science has given the world a new technique[13] which may resolve the plight of many childless couples, but the solution of one problem has created others which must be solved by the social sciences.

THE ROLE OF THE COURTS

How will a court approach a unique set of facts involving artificial insemination, and what law will it apply? Anglo-American courts are theoretically bound by the principle of stare decisis,[14] and though the facts of one case are seldom identical in every respect to those of an earlier decision there is usually enough similarity to enable the court to determine the law to be applied without undue difficulty. In a case concerning artificial insemination, however, the facts will be unique and the method of applying existing law will be of serious concern.

For example, AID may be analogized to adultery because it introduces into the husband's family a child that is not his,[15] or to fact situations held not to be adultery because they did not involve sexual intercourse,[16] or to adoption because the husband has agreed to take the child into his home and assume the duties of parenthood. The final effect will be different in all three; the analogy chosen can determine the legal result obtained. Thus, the method of analogy must be restricted in some way. For example, it is meaningless to indicate that sexual intercourse has always been an essential element of adultery unless it is asked why. Was it the intercourse itself that was considered bad, or only its consequences? After answering the question *why*, and assuming the validity of that answer, all that remains is to determine whether or not it requires that

12. See Guttmacher, *supra* note 10; Russell, *Artificial Insemination. A Plea for Standardization of Donors,* 144 J.A.M.A. 461 (1950); Shield, *Artificial Insemination as Related to the Female,* 1 FERT. & STER. 271 (1950).

13. For descriptions of the medical techniques of artificial insemination, see FARRIS, HUMAN FERTILITY AND PROBLEMS OF THE MALE c. 14 (1950); Barton, Walker & Wiesner, *Artificial Insemination,* [1945] BRIT. MED. J. 40 (June 13, 1945); *The Role of Artificial Insemination in the Treatment of Sterility,* 120 J.A.M.A. 442 (1942). Once a doctor has decided to artificially inseminate a woman the actual process is simple from the patient's viewpoint, and involves no pain.

14. For the theory of stare decisis implicit in this note, see LEVI, AN INTRODUCTION TO LEGAL REASONING (1948), first printed in 15 U. OF CHI. L. REV. 501 (1948).

15. This analogy was made in Orford v. Orford, 49 Ont. L.R. 15, 58 D.L.R. 251 (1921).

16. "In order to make complete proof of the crime [adultery], it must be shown that, while living together, there occurred between the parties acts . . . of sexual intercourse or facts from which such acts may reasonably be inferred." Warner v. State, 202 Ind. 479, 484, 175 N.E. 661, 663 (1930). The requirement of sexual intercourse is well established in all jurisdictions. *E.g.,* Commonwealth v. Moon, 151 Pa. Super. 555, 30 A.2d 704 (1943).

AID be deemed adultery. The same approach can be utilized in attempting to solve other problems created by the unique fact situations which will be presented to the courts because of artificial insemination. Warning should be given, however, that this method may be subject to the same objection made to the less restricted use of analogy. The final outcome can be controlled by stressing particular reasons or results.

AIH

AIH is expected to cause few legal problems.[17] Because both husband and wife are the biological parents of the child, there is no question of adultery or illegitimacy. AIH creates a few problems, however, which are peculiar to it. In 1948 an English court granted a decree of nullity to a wife, whose husband was impotent,[18] even though she had borne a child through AIH. According to English law the child of an annulled marriage was illegitimate. Since then Parliament has enacted a statute legitimizing the child of an annulled marriage if he would have been legitimate had the marriage been dissolved by divorce rather than by annulment.[19] Most American jurisdictions already have statutes of this kind.[20] Those that do not,[21] if they follow common law, will hold the child of an annulled marriage illegitimate. This constitutes a substantial hazard to the practice of AIH since impotency is both a principal reason for which the technique is performed and grounds for annulment in many states.[22]

The divorce statutes of several states are so worded that they may cause further trouble when couples use AIH to overcome impotency. Most states recognize impotency as a valid reason for either annulment or

17. See note 11 *supra.*

18. R.E.L. v. E.L., [1949] P. 211.

19. Matrimonial Causes Act, 14 GEO. 6, c. 25, § 9 (1950).

20. In Indiana, impotency at time of marriage is grounds for divorce, not annulment. IND. ANN. STAT. § 3-1201 (Burns 1946). The child would not be illegitimate because the marriage was valid at his birth. An annulled marriage, however, never existed, so that it was never valid. At least 43 states have laws which can be interpreted as making the offspring of *all* marriages legitimate, even if the marriage is later annulled. 1 VERNIER, AMERICAN FAMILY LAWS § 48 (1931); 4 VERNIER, AMERICAN FAMILY LAWS § 247 (1936).

21. At least three of the jurisdictions that grant an annulment for impotency do not have statutes that legitimize the children of a marriage annulled for impotency: District of Columbia; Iowa, which has a statute specifically saying that children of a marriage annulled for impotency are illegitimate, IOWA CODE ANN. c. 598, § 598.22 (1950); and New York.

22. 1 VERNIERS, AMERICAN FAMILY LAWS § 50 (1931), lists 24 states that grant annulment for impotency.

divorce,[23] but two require impotency which results in sterility.[24] Before artificial insemination all real impotency resulted in sterility, but AIH makes it possible for an impotent husband to become a father. Since sterility is no longer an inevitable result of impotency these states may want to strike it from their requirements for divorce particularly in view of the fact that sterility alone has never been sufficient grounds for divorce,[25] which indicates that it is used in the divorce statutes of these few states as descriptive of the degree of impotency required rather than as a necessary requisite in itself.

AID

Criminal Law

If the parties to AID were accused of committing a crime the charge would most likely be adultery. In determining whether or not AID constitutes the crime of adultery the question of why adultery is a crime must first be answered.

The most frequent rationalization of society's continuous attempt to control voluntary sex expression is the preservation of the family system.[26] Social control of adultery would seem to be especially well explained by this motive, since it always involves marriage partners. The family system is older than man himself, every indication being that it was inherited from his predecessors,[27] and is, therefore, not so much a product of his development as his development is of it. No well-recognized society has existed for any length of time without some type of family structure,[28] for, being the social form within which man evolved, it is basic to his existence. If adultery does tend to destroy the family, then, its control is due to an instinct of self-preservation.

23. Only Connecticut, Louisiana and South Carolina allow neither annulment nor divorce for impotency.

24. "Causes of divorce from bonds of matrimony. (1) That either party, at the time of the contract, was and still is naturally impotent *and incapable of procreation.*" TENN. CODE ANN. § 8426 (Williams 1934). (emphasis added)

The Commonwealth of Pennsylvania allows a divorce if one party "at the time of the contract, was and still is naturally incurably impotent, *or* incapable of procreation." PA. STAT. ANN. tit. 23, § 10 (1930). (emphasis added) The Superior Court of Pennsylvania has held that the legislature really intended to place an "and" between the grounds of impotency and inability to procreate rather than the "or" which appears in the statute. Wilson v. Wilson, 126 Pa. Super. 423, 191 Atl. 666 (1937). This makes the Pennsylvania statute, in effect, identical with the Tennessee statute.

25. "An examination of a host of decided cases in other jurisdictions has failed to disclose a single case where a court has granted a divorce upon the bare ground of sterility." Wilson v. Wilson, *supra* note 24, at 427, 191 Atl. at 666.

26. MAY, SOCIAL CONTROL OF SEX EXPRESSION ix (1931).

27. WESTERMARCK, THE ORIGINS AND DEVELOPMENT OF THE MORAL IDEAS 364 (1908).

28. *Ibid.*

Human emotions are used (either by God, by nature, or by natural selection as you will) to assist the instinct and lead man in the paths that encourage the preservation of his race. These emotions have become, from man's point of view, ends in themselves and as such are protected by law whether they are still necessary for self preservation or not. Perhaps the earliest emotion protected by the control of voluntary sex expression was akin to the feeling of ownership that comes from sole possession of any chattel, accompanied by the pain felt at the loss of a personal possession. Wives, in many primitive societies, were purchased, and adultery seemed to be no more than an economic loss.[29]

Civilized men certainly deemed their wives more valuable than mere property rights, for infidelity gave the husband a social stigma not ordinarily associated with the loss of a chattel. But these secondary ends were still closely related to the basic goal: the preservation of the race through maintenance of a family structure. Since the family was more dependent upon the woman, who kept the home and cared for the children, adultery was limited to extra-marital intercourse by or with her. A man was usually allowed sexual freedom so long as he did not defile another man's wife. This situation existed in ancient times,[30] throughout the Roman Empire,[31] and was adopted into English common law.[32] Although the common law courts recognized the social consequences of having an unfaithful wife, they often spoke of the risk of burdening the husband with a child not his own as the essence of adultery.[33] This risk is still considered one of the serious harms of adultery.[34]

29. MAY, *op. cit. supra* note 26, at 4-5. The economic sanction was strengthened by superstitious beliefs that a wife's unfaithfulness would cause the failure of her husband's crops, or give him bad luck at the hunt. *Id.* at 8-12.

30. See Ohlson, *Adultery: A Review,* 17 B.U.L. REV. 328, 330 (1937).

31. 2 WHARTON, CRIMINAL LAW § 2080 (12th ed. 1932).

32. "There never was an action for adultery known to be maintained at the common law by any but a husband; showing that the offense cannot possibly be committed with any other than a *married* woman." State v. Lash, 16 N.J.L. (1 Har.) 380, 387 (1838). See also Commonwealth v. Lehr, 2 Pa. County Ct. Rep. 341 (1886); State v. Bigelow, 88 Vt. 464, 92 Atl. 978 (1915).

The common law action for open and notorious adultery should be distinguished from the husband's right to sue in trespass, *vi et armis,* for a single act of adultery. The former action could be brought for the intercourse of either a married man or woman, and protected society in general from having to witness what were considered immoral acts, just as society is protected from other nuisances. It offers no guidance for the classification of AID, which could hardly become a public nuisance. The civil action allowed the husband to seek reimbursement for his personal loss and embarassment, well demonstrated by the old word *cuckold.* This action was limited to the husband, whose own sexual freedom was checked only when he took another man's rights, or became a public nuisance. "The husband . . . finds himself humiliated and, to a certain extent, disgraced by the public scandal . . . ." Tinker v. Colwell, 169 N.Y. 531, 536, 16 N.E. 668, 670 (1902).

33. State v. Lash, *supra* note 32, at 387.

34. See 2 WHARTON, CRIMINAL LAW § 2082.

The English ecclesiastical courts recognized motives even further removed from the original purpose of preserving the family. They said that marriage created personal rights in both parties that were ordained by God and guaranteed by His church. Adultery, then, was essentially a breach of the marriage vows, and so they defined it as the intercourse of any married person with someone other than his, or her, spouse.[35]

Undeniably, another harm to the husband, whose wife has extramarital intercourse, is the alienation of her affection. Thus, a single law forbidding adultery provides a sanction against the alienation of affection, the breach of marriage vows, the risk of burdening a husband with a spurious heir, the social stigma resulting from marital infidelity, the loss of any economic values, and, eventually, the extinction of the race through the breakdown of the family system.

Artificial insemination cuts directly across these harms, involving some and lacking others. Because it does not involve sexual intercourse, it would seldom result in the alienation of affection. But the wife who employs AID without her husband's consent is certainly risking the introduction of a spurious heir if her husband should remain ignorant of the means of the child's conception, and the possibility of his jealousy, embarrassment, and anger if he learns the truth about the child's conception. If performed with the husband's approval, however, AID involves neither of these harms. The real harm of adulterating the husband's blood lines is not the introduction of a strange child into the family, because legal adoption does just that, but it is the introduction of that child *without consent of the husband.* When a husband agrees to his wife's AID, therefore, he is not consenting to adultery but destroying one of its bases. Since AID without consent can substantially injure the husband, it would also seem to be a violation of the marriage vows. A husband's consent vitiates this basis of adultery since the wife is serving him by her act.[36]

As regards the basic end sought by the control of voluntary sex expression, AID, without consent, may well tend toward the breakdown of the family system, and perhaps thereby the destruction of the race, but when performed with the consent and desire of both husband and wife, it will further the interests of the family and the race. If the family system is to be a force in the preservation of the race it must create and develop children. AID enables families, which would otherwise be barren, to per-

35. 2 WHARTON, CRIMINAL LAW § 2081. See also Bashford v. Wells, 78 Kan. 295, 96 Pac. 663 (1908); State v. Lash, *supra* note 32; State v. Bigelow, *supra* note 32.

36. It has previously been said that a husband cannot consent to his wife's adultery. But, this is true only because of the sexual intercourse involved, since consent does not affect its immorality.

form this function. The AID family should be expected to fulfill its purpose of transforming the infant into a responsible citizen better than most since AID is a last resort technique and the couples who turn to it must have a great desire to raise a family, a desire that, unfortunately, is not usually a requisite for the conception of children. Further, AID is not performed by a reputable physician unless the couple appears able, in every way, to give a child a good home. Unfortunately, biological children are not guaranteed such an advantageous environment.

Thus, AID with the husband's consent should not be punished as adultery since it does not result in any of the harms associated with that crime. AID without consent, however, does involve some of these harms. The reaction of legal writers has been an attempt to discover which of the harmful elements is the essence of adultery. Those who support artificial insemination tend to stress the elements it lacks, [37] while those who disapprove of the technique emphasize the elements it includes.[38] The principle of strict construction of criminal statutes militates against enforcing the penalties of adultery when only part of its harms are present. Some courts, however, may find from the language of their statutes that only one or two of the harms of adultery were legislated against, making it possible to hold that AID without consent is adultery. In a state which has no law against single acts of adultery, but only against "cohabitation in adultery,"[39] AID would not be a crime.

If a specific instance of AID is held to be adultery the doctor, as well as the mother, will probably be found guilty. This is so, from a practical viewpoint, because a court that holds AID to be adultery will be interested in stopping its practice, which can be most effectively done by imposing the criminal sanctions upon the doctor. Guilt may be established under either of two theories: the doctor may be found to be the actual adulterer, because he has complete control of the semen at the time of insemination making the fact that it is not his immaterial; or he may be found an accessory before the fact having aided the woman in committing the crime of adultery, and, therefore, guilty as a principal.[40]

37. "Apparently the Canadian court [referring to the *Orford* case, see note 3 *supra* and note 38 *infra*] would ignore the absence of any carnal or sexual element in the artificial impregnation procedure and would not follow the precedent of American courts in requiring some act of sexual intercourse as a prerequisite to conviction for adultery." Note, 34 IOWA L. REV. 658, 663 (1949). "It is submitted that the gravamen of the crime is the illicit sexual intercourse and not the reproductive potentialities." Note, [1950] WIS. L. REV. 136, 144.

38. "Sexual intercourse is adulterous because in the case of the woman it involves the possibility of introducing into the family of the husband a false strain of blood." Orford v. Orford, 58 D.L.R. 251, 258 (1921); See note 3 *supra*.

39. IND. ANN. STAT. § 10-4207 (Burns 1942).

40. This course of action is suggested in Seymour and Koerner, *A Medico-Legal Aspect of Artificial Insemination*, 107 J.A.M.A. 1533 (1936).

Civil Sanctions

Closely allied to the crime of adultery is the civil action for criminal conversation.[41] At common law adultery was a private wrong for which the husband could sue in trespass, *vi et armis,*[42] and this civil cause still exists in many states.[43] As in adultery, sexual intercourse has always been a necessary element of criminal conversation,[44] but the basis for the action seems to have been the violation of the husband's exclusive rights to his wife, the embarrassment and social stigma which that loss occasions, and the burden of supporting a child not his own.[45] Since this is not a criminal sanction there is no justification for strict construction, and the fact that the husband is not harmed as much by AID done without his consent as he is by adultery should reduce damages rather than defeat the entire action. The nicer question is: against whom does the action lie? The only two people involved beside the wife are the doctor and the donor. The semen was once the donor's and if a child is born he is its biological father, but it is the doctor who has complete control over the semen at the time of insemination. The donor has no way of knowing whether the husband has consented to the act or not since he does not know for whom he is donating.[46] The doctor, knowing that the woman's husband has not consented, performs the acts which bring the germ cells together with full knowledge of the probable consequences. He is the person who, by an act of his free will, has actually caused the birth of any child that results and is the real adulterer just as much as if the sperm he used had been his own.[47]

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41. See MADDEN, PERSONS AND DOMESTIC RELATIONS 175 (1931).

42. 3 BL. COMM. 139, quoted in Tinker v. Colwell, 193 U.S. 473, 481-482 (1904).

43. The civil action for criminal conversation has been abolished in some states. *E.g.,* IND. ANN. STAT. § 2-508 (Burns 1946).

44. "In its general and comprehensive sense, the term criminal conversation is synonymous with adultery. . . ." Turner v. Heavrin, 182 Ky. 65, 67, 206 S.W. 23 (1918).

45. Tinker v. Colwell, 193 U.S. 473 (1904); Bigaouette v. Paulet, 134 Mass. 123 (1883); Oppenheim v. Kridel, 236 N.Y. 156, 140 N.E. 227 (1923).

46. Doctors stress the importance of keeping the indentity of the couple from the donor and vice versa. Greenhill, *Artificial Insemination: Its Medicolegal Implications,* SYMPOSIUM ON MEDICOLEGAL PROBLEMS 43, 51-52 (Levinson ed. 1948).

47. A husband who did not consent to his wife's AID might try to say that it amounts to adultery for the purpose of obtaining a divorce. The defense of connivance would prevent him from suing on the grounds of AID if he had consented to it. See MADDEN, PERSONS AND DOMESTIC RELATIONS 294 (1931). The question of whether a wife's AID may be grounds for divorce would be asked within a system that grants divorce only for specific acts, and, despite the wording of their statutes, this is not the case in many states today. Adultery is the only ground for divorce provided in the statutory law of New York, yet the law as it actually operates in the courts grants a divorce to any couple whose desire to separate is great enough that they will go to the trouble of fabricating "proof" of adultery. See Wels, *New York: The Poor Man's Reno,* 35 CORNELL L.Q. 303 (1950). The real requirement, in New York, seems to be a desire to separate which is strong enough to last at least until the necessary legal procedures

The AID Child's Right of Inheritance

Can the AID child inherit by intestacy from his mother's husband? Many doctors advise the parents of AID children to execute wills, thereby protecting the child no matter how the courts or legislatures eventually decide this question.[48] All doctors should do this, and even follow up after the child is born to be sure that a will is made, but, for those children whose parents neglect this duty or leave property that is not covered by will, the question must be answered. Here, as in the case of adultery, a court should analyze the present laws of intestacy to discover the results they seek to obtain, and then treat the new situation accordingly.

Consistent with the concept of private property is the idea that the laws of intestacy should seek to duplicate the deceased's unexpressed intention.[49] Rules have evolved which at least profess to be based upon the way in which the average person wants his property distributed.[50] As might be expected, these laws reflect several different human motives, not the least of which is the affection that parents have for their children. It is so basic a part of man's nature to want to leave what wealth he has to his children that the laws of intestacy provide for this as a matter of course. If this were the only motive influencing a man's desire to leave his property there would be little trouble in allowing an AID child, consented to by the husband and raised as his child, to inherit from him.

With the exception of adoption the laws of intestacy are based upon "blood relationship."[51] Those who favor AID often tend to underrate the importance of a man's feeling toward the conception of children "of his own blood." One of man's most basic faiths is his belief in immortality.[52] Many early societies believed that the father was perpetuated

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are over. The situation is much the same in many other states, where only a different procedural key is needed. American law seems clearly to be moving toward the conclusion that married people who have made up their minds that they can no longer live together should be granted a divorce, provided they are given enough time to be sure of their decision. See GROSSMAN, *How Can We Make Divorce Realistic*, 23 N. Y. S.B. BULL. (1951); Walker, *Our Present Divorce Muddle: A Suggested Solution*, 35 A.B.A.J. 457 (1949). When the present judicial trend in divorce is supported by legislation, single acts such as adultery, cruelty, or AID will be immaterial.

48. The effect of this is discussed briefly in Koerner, *Medicolegal Considerations of Artificial Insemination*, 8 LA. L. REV. 484, 496 (1948).

49. See REPPY AND TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS 1-3 (1928).

50. See RHEINSTEIN, CASES AND OTHER MATERIALS ON THE LAW OF DECEDENT'S ESTATES 8-9 (1947). The author quotes HUGO GROTIUS, 2 THE LAW OF WAR AND PEACE c. 7; "Aside from all positive law, intestate succession as it is called, after ownership has been established, has its origin in natural inference as to the wishes of the deceased."

51. See REPPY AND TOMPKINS, *op. cit. supra* note 49, at 80 *et seq.*

52. "No known tribe, race, or people has been without it." HOUF, WHAT RELIGION IS AND DOES 203 (1935); see LAMONT, THE ILLUSION OF IMMORTALITY 207 (2d ed.

in the body of his son; the family became an unbroken chain: each member helping to perpetuate those before him and in turn being perpetuated by those who followed.[53] The descent of family property through blood lines became an integral part of such a society. The desire for immortality is just as much a part of man today as it has ever been, although the mode of its expression has changed. The satisfaction of leaving a part of himself behind after he dies is felt by every parent. Society might be justified in thinking that a man would rather leave his property to the children of a brother or sister, who are biologically related to him, than to his wife's AID child, but that conclusion is certainly not the only one which could be justified. The natural affection of a parent for a child is not based entirely upon consanguinity. The institution of adoption indicates that society will honor a man's desire to designate as his heir a child not biologically his. And the husband in the usual AID situation does intend that the child be his heir.[54] When the husband has for years treated the child as his own and held him out as such to the world it seems unreasonable to suppose that, at his death, he would want to contradict those actions.[55] Furthermore, if this is not the husband's intention there is something lacking in his desire for the child and a doctor would not ordinarily perform AID.[56] The only way in which the technique will fulfill its function is as an alternative to adoption with the child assuming, in every respect, the position of a biological child.

Although the only purpose professed by the laws of intestacy is the supposed intent of the deceased, the rights of the child should not be ignored. The position of the illegitimate child has steadily improved from the common law, which treated him as a child without parents, to the present time, when one state has abolished illegitimacy altogether.[57] The reason most often given is the unreasonable harshness of punishing the child for the acts of his parents. This seems to imply that a child has a right to a share of the estate of his biological parents unless they express a contrary intent in their wills. The implication is an extension of the law in most jurisdictions which holds that biological parents are liable for support whether the child is legitimate or not. It can be ra-

1950); PERRY, THE HOPE FOR IMMORTALITY 3 (1945); PRINGLE-PATTIRSON, THE IDEA OF IMMORTALITY 1 (1922). Tillich, existentially, sees man's belief in immortality as his method of maintaining his "self-affirmation" in the face of inevitable death. TILLICH, THE COURAGE TO BE 169 (1953).

53. See III.1 WESTRUP, INTRODUCTION TO EARLY ROMAN LAW 219 (1939).

54. See note 12, *supra.*

55. Of course the husband who has never consented to his wife's AID child, neither at conception nor any time afterwards, would never be thought to desire it as his heir unless he expressed such a desire in his will.

56. See Guttmacher, *supra* note 10.

57. ARIZ. CODE ANN. § 27-401 (1939).

tionalized by the fact that ordinarily the biological parents are the two persons who, by the exercise of their free wills, have given the child existence. This rationale should apply to the AID, as well as the biological child, since the will of the husband and wife set the AID process in motion.

From the premise that an AID child inherits by intestacy from his mother's husband it does not follow that he takes under the wills of collateral relatives leaving property to the "child," or "heir," of the husband. The controlling factor in these situations is the testator's intention. The fact that in most cases the testator will not have known that the husband's children were not biologically his will make the court's task very difficult. The party arguing against the child should have the burden of proving that the husband had not accepted the child as his heir.[58]

Husband's Duty to Support Child

A father's duty to support his biological children arises at their birth and lasts until they reach the age at which the law considers them able to care for themselves.[59] The reason appears to be that support and protection are needed to bring children to adulthood, and to keep them from being a burden upon society. The duty has always been attached to the biological parent because he is the person whose voluntary act has brought the child into existence.[60]

When the husband consents to AID he performs the act which formerly had made the biological father liable, and therefore assumes the same liability. When the husband does not consent, only the woman and the person who performed the insemination have any voluntary control over the child's conception. Public opinion at present might not react favorably to holding the doctor responsible for the duty of father toward the product of an artificial insemination that he has performed without the husband's consent, although the original premise, *i.e.* that a parent is

58. The argument is that the testator would, in most cases, accept the husband's wishes as to whether or not the child is his heir. The same problem arises under statutes giving benefits to the "children" of veterans, and similar legislation. Does an AID child receive the benefits of a statute of this type? The court must determine *why* the statute was passed and then decide whether or not that purpose requires the inclusion of AID children.

59. In most states the duty to support is not affected by the loss of custody through legal proceedings. See HARPER, PROBLEMS OF THE FAMILY 503 (1952); MADDEN, PERSONS AND DOMESTIC RELATIONS 383 *et seq.* (1931). Indiana is an exception to the general rule. In this state the duty to support is terminated if custody is lost by legal decree, unless the decree specifically provides to the contrary. Husband v. Husband, 67 Ind. 583 (1879).

60. ". . . [H]e who brings a child, a helpless being, into life, ought to take care of that child until it is able to take care of itself . . . ." Chapsky v. Wood, 26 Kan. 650, 652 (1881).

responsible for support because he voluntarily caused the child's existence, leads logically to that conclusion.[61]

Husband's Right to Custody

Should the parents of an AID child be divorced, or the mother die, some question may arise as to the husband's right to custody of the child. Courts often confuse the child's welfare and the rights of the contesting parties as grounds for custody.[62] But the majority rule seems to be that the child's welfare is controlling if it obviously would be better protected by one side or the other; if it appears that the child will fare equally well with either party, then the party having the greater right to custody will prevail.[63]

Ordinarily, the means of a child's conception would not affect his welfare with either party. But some courts may feel that consanguinity would make the mother a better parent, or that the child might place some value upon his biological relationship to his mother (raising the question of AID would probably result in the child's knowledge of the facts of his conception).

If the "right to custody" is a material criterion and can be validly determined, it is probably true that the mother receives some small right that her husband does not receive, for biological parenthood may create an interest and affection, on both sides, that are entirely unrelated to environmental considerations.[64] This right seems so tenous, however, when compared with the right to custody which arises out of years of

61. If the physician performs AID without the consent of his patient's husband he has, by the exercise of his free will, brought the resulting child into existence. It can be argued from this that the doctor should be responsible for the child's support; he has taken the place of a parent.

62. On the same page the New Jersey Superior Court said: ". . . [I]n all cases involving the custody of an infant child the primary consideration is its welfare," and, "normally the parents of legitimate children are entitled against all others to its custody, unless it is shown they are unfit." Lavigne v. Family and Children Soc. of Elizabeth, 18 N.J. Super. 559, 567, 87 A.2d 739, 742 (1952).

The Pennsylvania Superior Court speaks of a mother's right to custody as if it stemmed from the fact that the child's greatest welfare usually lies with its mother. ". . . [A]lthough a mother's right to custody is not absolute, courts have always recognized the propriety of committing a child of tender years to its mother, and it is only for compelling reasons that the mother's right must yield to the best interests and welfare of the child." Shaak v. Shaak, 171 Pa. Super, 122, 126, 90 A.2d 270, 272 (1952).

63. The Supreme Court of Arkansas sums up the situation very well: "The paramount consideration in this case, as in all cases involving the custody of a minor child, is the welfare of the child, but the rights and feelings of the parents must also be weighed and due regard given to the natural desire of the parents to have and rear their offspring." French v. Graves, 205 Ark. 409, 411, 168, S.W.2d 1108, 1109 (1943); Parks v. Crowley, 253 S.W.2d 561, 562 (Ark. 1953). See MADDEN, PERSONS AND DOMESTIC RELATIONS 369 (1931).

64. See pages 629-30, *supra*.

love, care, and devotion,[65] that it should not make any difference unless the rights, earned by love, care, and devotion are equal. Even when the child's welfare is not conclusive and the rights of the parties are weighed, the mother's biological relationship should very seldom be a great enough influence to resolve the issue of custody.

Evidence

In the foregoing discussions it has been assumed that the fact that the child was conceived by AID was either proven or uncontested. Actually, however, the fact may be very difficult to establish. Proof that AID was performed will not prove that the child was conceived thereby, so long as the husband had access to his wife and was not completely sterile. A presumption difficult to rebut arises when a married woman has a child; evidence must be "conclusive" to prove that her husband is not the child's father.[66] Non-access between husband and wife and the husband's sterility are the usual ways of proving that the husband is not the father.[67] Since doctors would not ordinarily perform AID when the couple did not have access to each other,[68] the husband's sterility may often be the only way to rebut his paternity.

The husband is at a distinct advantage in attempting to prove his own sterility. He can submit to an examination by a doctor who may then be called into court to testify to the results. In those states that have created a physician-patient privilege by statute, however, it is possible for him to prevent anyone else from doing the same thing.[69] When the

65. See Chapsky v. Wood, 26 Kan. 650 (1881).

66. Howard v. Howard, 112 F.2d 44 (D.C. Cir. 1940); Bloch v. Ewing, 105 F.Supp. 25 (S.D. Cal. 1952); Darrow v. Geisen, 102 Ind. App. 14, 200 N.E. 711 (1936); Schacter v. Schwartz, 279 App. Div. 896, 111 N.Y.S.2d 70 (1st Dept. 1952); *In re* Bilotta's Estate, 110 N.Y.S.2d 331 (Surr. Ct., 1951); Hoerres v. Wilkoff, 153 Ohio 286, 105 N.E.2d 39 (1952); Barr's Next of Kin v. Cherokee, Inc., 229 S.C. 447, 68 S.E.2d 440 (1952).

67. In Crawford v. Beatrice, 122 Ind. App. 98, 102 N.E.2d 915 (1952), the court found that proof tending to show non-access was sufficient to overcome the presumption of legitimacy. "We consider this a most salutory rule and one that should be relaxed only under the most compelling circumstances." *Id.* at 102, 102 N.E.2d at 917. But, examination of the opinion casts considerable doubt upon the "compelling circumstances" claimed to be present, and gives the impression that the court intends to diminish the force of the presumption without saying so.

68. See note 10 *supra*, and accompanying text.

69. Indiana recognizes a physician-patient privilege. IND. ANN. STAT. § 2-1714 (Burns 1933). It belongs to the patient and must be claimed by him or a person who stands in his place; see NOTES, 23 IND. L.J. 295 (1948); 27 IND. L.J. 256, 265 (1952). See also Peterson, *The Patient-Physician Privilege in Missouri*, 20 U. OF KAN. CITY L. REV. 122 (1952).

The purpose of the privilege is to encourage confidence between patient and physician. Munger v. Swedish American Line, 35 F.Supp. 493 (S.D. N.Y. 1940); Riss & Co. v. Galloway, 108 Colo. 93, 114 P.2d 550 (1941); Cross v. Equitable Life Assurance Society of U.S., 228 Iowa 800, 293 N.W. 464 (1940); New York Life Insurance Co. v.

wife attempts to prove that the child is not her husband's, and is confronted by a statutory physician-patient privilege, she will have to establish his sterility by accounts of his own admissions or other non-expert testimony.

Another method available in some states for proving non-paternity is the blood test.[70] Some doctors try to pick a donor with the same blood type as the husband, and this would reduce the chances of proving non-paternity by blood test, but the practice is far from universal.[71] Nine states have adopted statutes giving the courts power to order blood tests, in paternity proceedings, and admit the results as evidence.[72]

THE ROLE OF THE LEGISLATURE

While the courts are adjusting problems caused by artificial insemination in light of existing law, the duty falls upon the legislature to take affirmative action, where necessary, for the social control of this new technique. The present lack of control is being tolerated because the process has not yet resulted in much litigation.[73] Legislatures may

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Newmann, 311 Mich. 368, 18 N.W.2d 859 (1945); Life and Casualty Insurance Co. v. Walters, 180 Miss. 384, 177 So. 47 (1937); City Council v. Goldwater, 284 N.Y. 296, 31 N.E.2d 31 (1940) (held that books and records are also privileged).

70. Blood tests, if properly done by skilled personnel can conclusively prove non-paternity by showing that the combination of the mother's type and the alleged father's type could not result in the child's type. The tests cannot prove paternity, however, but only that the alleged father has the same blood type as the real father. Consequently the best statutes allow the results of blood tests to be introduced as evidence only when they prove non-paternity. See SCHATKIN, DISPUTED PATERNITY PROCEEDINGS (2d ed. 1947).

71. See Weisman, *The Selection of Donors for Use in Artificial Insemination,* 50 WESTERN J. SURG., OBSTETRICS, & GYNECOLOGY 142 (1942).

72. Indiana House Enrolled Act No. 19 (1953); ME. REV. STAT. c. 153, § 34 (1944); MD. REV. CODE GEN. LAWS art. 12, § 17 (1951); N.J. REV. STAT. § 2:101-2 (for paternity proceedings), § 2:101-3 (in all civil proceedings) (Supp. 1939); N.Y. DOM. REL. LAW § 126-a; N.Y. CRIM. LAW § 684-a; N.C. GEN. STAT. § 8-50.1 (Supp. 1951) (the North Carolina statute allows the results of tests to be entered as evidence whether they prove an exclusion or not); OHIO GEN. CODE ANN. § 8006-16 (for paternity proceedings) and § 12122-2 (for all civil and criminal actions) (Supp. 1952); S.D. Code § 36.0620 (1939); WIS. STAT. § 166.105 (for illegitimacy actions), and § 325.23 (for any civil action) (1951). The Indiana act, passed by the 1953 Legislature, gives the courts power to order blood tests "in any action to prove who is the father of any child," and provides for the admission of the results as evidence only when they prove an exclusion. See SCHATKIN, DISPUTED PATERNITY PROCEEDINGS (2d ed. 1947).

The courts of California have ordered blood tests without statutory authority, although they have shown surprising disregard for their results. In the notorious "Charlie" Chaplin case, blood tests showed that the defendant could not have been the child's father, yet the California District Court of Appeals upheld the jury's verdict of guilty. Berry v. Chaplin, 74 Cal. App. 2d 652. 169 P.2d 442 (1946). A recent New York case held that an exclusion demonstrated by blood tests is sufficient to overcome the presumption of legitimacy. C. v. C., 200 Misc. 631, 109 N.Y.S.2d 276, (Sup. Ct. 1951), Note, 38 CORNELL L.Q. 75 (1952).

73. See note 3 *supra.*

be reluctant to meet the problem squarely because of the controversial issues involved,[74] but if the practice of artificial insemination is to continue society should maintain a certain amount of control over it. The courts are not the proper bodies to express the will of society; a legislature is organized so that it can probe the facts and sample public opinion.

The first question to be asked in considering the social control of any new practice is: shall it be allowed at all? Several groups feel very strongly that artificial insemination should not be permitted, the largest and most powerful among them being the Catholic Church. Its contentions are basic and sincere, and anyone pondering the social advisability of this process should give them serious consideration. The arguments of the Catholic Church should be viewed in light of a Papal declaration, made in 1897, that artificial insemination is illicit.[75] Probably the most complete expression of the Church's position is the work done by the Reverend William Glover.[76] The Reverend Glover objects to artificial insemination on two grounds: because of the means employed in obtaining the semen,[77] and because of the relationship of the child's biological parents.[78]

All of the medically practicable means of obtaining the semen have been termed "pollution" by the Church. Their argument is that any separation of the germ cells from the generative organs (male and female) is "intrinsically" sinful and therefore wrong no matter what end it seeks to accomplish.[79] A husband and wife's desire to have children, which is admittedly a good end, does not, according to the Church, justify the separation. This raises the question as to why separation is sinful. If the separation is "intrinsically" sinful then there can be no answer to the question *why,* because, being intrinsic, its sinfulness is based only upon the nature of the act itself and cannot be explained by anything external to the act. The Reverend Glover suggests a lack of faith in the act's intrinsic sinfulness by assigning reasons for it. He maintains that the separation of generative cells from generative organs is sinful because it defeats the purpose for which God created those cells and gave man power over them: the generation of children. After thus explaining the evil of separation, the Reverend Glover implies that the evil is now independent and therefore remains, even after its original cause has gone.

74 Bills have been introduced into the legislatures of three states which if passed would have made children conceived by artificial insemination legitimate. All three bills failed to pass. See Comment, 58 YALE L.J. 457, 470 (1949).

75. See GLOVER, ARTIFICIAL INSEMINATION AMONG HUMAN BEINGS 63 n.4 (1948).

76. GLOVER, *op. cit. supra* note 75.

77. *Id.* at 67-92.

78. *Id.* at 93-109.

79. *Id.* at 67-92.

Of course, a bad result does not make an act intrinsically evil. If it did, almost every act that man can perform would be intrinsically bad, for almost every act has an occasional bad result. If the Reverend Glover was correct in saying that "separation" is sinful because it prevents the birth of children, then, preventing the birth of children is the intrinsic evil, and "separation" is sinful only so long as it leads to that result. When it is accomplished so that a married couple can have children that they could never have without it, the act achieves the moral status of the new result which science has given it.

The Catholic Church further objects to AID because the child's biological parents are not married.[80] It is a basic principle of the Church that only those persons united in indissoluble monogamous marriage have the right to beget children.[81] The rational support for this principle is that only within such a marriage can children be properly raised and brought to adulthood.[82] The Church again seems to be trying to raise an intrinsic principle on the universally accepted evil of its result and then maintain it after the evil result has disappeared. Actually the AID child has a much greater chance of receiving all the advantages of a home than does the average child. Before a couple will resort to artificial insemination they must want a child very much. A doctor will not perform the techniques unless he is certain that the marriage is stable and that the couple will make good parents.[83] In addition, the child's heredity should be superior because of the care used in selecting donors.[84] Taking everything into account, the child conceived by AID starts life with every advantage.

It might also be argued that the mother and her husband are the two persons who really beget the child, because the decision to bring him into existence, and the duty of raising him are theirs. To insist that the person in whose body the germ cells developed is the begetter is to adopt a rather shallow point of view, for in this instance that person has surrendered all control over the cells to the doctor who in turn acts only upon the insistance of the husband and wife. The donor does not choose to conceive the child, for without the request of the barren couple he would not be a donor.

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80. *Id.* at 93 *et seq.*

81. *Ibid.*

82. "In order that the primary purpose of the sexual act as intended by nature . . . namely, the begetting and upbringing of offspring . . . should be attained in a fitting manner, it is necessary that any such act of intercourse be placed only under conditions in which the attainment of that purpose is found only when the parties performing the act of sexual intercourse are united in the bonds of marriage." *Id.* at 98.

83. See note 10 *supra,* and accompanying text.

84. *Ibid*; see also FARRIS, HUMAN FERTILITY AND PROBLEMS OF THE MALE 165 (1950), Greenhill, *Artificial Insemination: Its Medicolegal Implications,* SYMPOSIUM ON MEDICOLEGAL PROBLEMS 43, 51 (Levinson ed. 1948).

Underlying the Catholic position seems to be an unwillingness to tamper in God's realm. God made man so that he would reproduce in a certain way, and it is wrong for man to change that by introducing artificial means to supplant natural God-given powers. This attitude, though widely held, does not take into account the position of man's intelligence in evolution. Is it unreasonable to suppose that God would use the rational powers He has given man to accomplish His own ends on earth? Man is not an intruder upon nature. His developing intellect is just as much a part of the natural scheme of things as is the world it ponders, and there is no justification for calling a new development unnatural because it was created in the mind of man rather than arising outside of his control. The development of the idea of artificial insemination in the mind of man must undergo the same test of survival as do all other natural changes. If its results promote the self-realization of the individual, and thereby of society, it should eventually be incorporated into our patterns of behavior, and if it discourages individual self-realization it should be quickly discontinued.[85]

Whatever its merit, the feeling that it is somehow wrong for a married woman to bear a child who was biologically fathered by a stranger should not be disregarded. The very fact that it does exist should be a deterrent to the practice of AID. Those who feel that AID is wrong will not resort to its use, but their attitude may injure people who, finding no valid objection, do employ it as the last possible solution to their problem. One of the most convincing practical reasons for not performing AID is that it is not universally accepted as a moral act and those taking part may be subjected to popular chastisement. The children may be looked down upon, and their acceptance of the popular attitude may cause psychological conflicts within their own minds, if they should learn the facts of their conception. For these reasons the act is kept secret by the parents and doctor. There is a general feeling that anything which must be kept secret is somehow wrong, but in this instance the reason for secrecy is the traditional attitude of many people toward the conception of children and not the moral status (at least in terms of results) of the act.

It has been argued that AID is unnecessary because barren couples can solve their problem by adopting children.[86] This contention ignores the woman's psychological need to bear children, and the facts concerning adoption. The number of children available for adoption is completely

85. The term "self-realization" is borrowed from THOMAS HILL GREEN, PROLEGOMENA TO ETHICS (Bradly ed. 1890). The reader should substitute whatever he considers to be the goal of human endeavor.

86. Note, 34 VA. L. REV. 822 (1948).

inadequate to meet the demands of childless couples.[87] The disappointment connected with an unsuccessful attempt to adopt a child is often extreme because of the competitive system used by adoption agencies.[88] The agency tries to choose the two whom it thinks will make the best parents, and, despite every effort to the contrary, a rejected couple may feel that they somehow lack parental qualities. Even those who are successful in adopting a child may not receive the satisfaction of the couple that has a child by AID. A woman can find no substitute for the feeling of personal fulfillment that comes with bearing her own child.[89] Even with adoption and AID many sterile couples must still go childless,[90] but donor inseminations can bring happiness to thousands of barren couples. The AID child is born into a family ready and eager to receive him; why anyone should object because half of his heredity is necessarily received from a carefully selected stranger has yet to be adequately explained.

If it is once agreed that the practice of artificial insemination shall be allowed to continue, the amount and means of control maintained over it by society becomes important. The most popular reaction to social problems is the oft-heard phrase, "there ought to be a law." Many times the best solution can not be achieved through legislation, and it is important that no other possible method be overlooked. Those available for the control of artificial inesemination are: (1) strict control by statute, (2) control by medical profession, within a legislative framework, (3) the present status, *i.e.* judicial control as cases arise in addition to informal control by the profession, or (4) a combination of any or all of the above.

Each aspect of artificial insemination will require a different combination of forces for its control. The criminal and civil sanctions of adultery already discussed, if accepted by the courts, should be strong deterrents to the insemination of women whose husbands have not consented. The same end is sought by the ethical standards of the medical profession.[91] This ethical sanction can be strengthened by legislation

87. Many adoption agencies find they have not one tenth the number of children requested. Michaels, *Casework Considerations in Rejecting the Adoption Application,* 28 J. of Soc. CASEWORK 370, 370-371 (1947). Even if they qualify, a couple usually has to wait two years before even a home study is made.

88. Michaels, *supra* note 87.

89. "Moreover, adoption does not satisfy the woman's maternal instinct, her desire to reproduce herself in her offspring." PLOSCOWE, SEX AND THE LAW (1951). See also SYMPOSIUM ON MEDICOLEGAL PROBLEMS 70 (Levinson ed. 1948).

90. Reports of various doctors show that artificial insemination is successful about 40% of the time. See Greenhill, *supra* note 84, at 45.

91. "Unless the husband joins his wife voluntarily, the consideration of artificial insemination should be abandoned." Koerner, *Medicolegal Considerations* in *Artificial Insemination,* 8 LA. L. REV. 484, 490 (1948). Dr. Koerner is both physician and attorney.

limiting the performance of artificial insemination to physicians or other equally qualified personnel who would feel bound by a code of professional ethics.

The requirement of a written record of the operation, evidencing the husband's consent, can prevent his denying responsibility for the child.[92] Some physicians, however, feel that a complete absence of written records is phychologically beneficial in that it helps the couple forget that the child is not completely theirs and insures anonymity as well.[93] The only real advantage of records is that they prove that the child is the product of AID and not adultery, and that the husband consented to it and therefore has all the rights and duties of a parent. In the absence of records difficulties might arise because the husband is able to prove (by his nonaccess, sterility, or by blood tests) that the child is not his. Couples who receive AID are so carefully chosen, however, that there is little chance that this will happen, and doctors may feel that the small risk is outweighed by the advantages of complete secrecy.

The need for records would be reduced if even more care were taken in selecting donors. If the donor has the same blood group, type, and Rh factor as the husband,[94] one avenue for proving that the child is not the husband's is closed; proof of sterility will be the only practical means left by which the husband can establish his non-paternity. Such proof will be especially difficult because it must show sterility for a sufficient period before the birth of the child; present sterility would not ordinarily be enough. Nonaccess is not present in the normal AID situation, and it may be wise for doctors to refuse to perform AID when there is obviously no access between husband and wife. In view of the small chance that official records would ever be needed and of the damage they could do, there does not seem to be sufficient reason to prevent doctors from keeping whatever records they consider best.

The careful choice of donors not only reduces the need for permanent records but adds immeasurably to the happiness of the parents and child. This is certainly an area in which high standards should be enforced. All donors should possess good genetic characteristics: High fertility, high I.Q., and good social adjustment are stressed by most doctors. Since half of the child's heredity can be chosen it might just as well be made as eugenic as possible. In addition to these general genetic qualifications each donor should resemble the husband as nearly as pos-

92. Several doctors have suggested that extensive records be kept, including signed permission of the husband. Koerner, *supra* note 91, at 494, and 499.

93. Guttmacher, *Physician's Credo for Artificial Insemination,* 50 WESTERN J. SURG., OBSTETRICS, & GYNECOLOGY 357 (1942).

94. See note 71 *supra,* and accompanying text.

sible, in both appearance and personality.[95] The present scarcity of qualified men who are willing to serve as donors makes this ideal difficult to attain. But increased public acceptance of the procedure should result in a constantly increasing number of available donors.

CONCLUSION

Even if the practice of artificial insemination were stopped tomorrow serious problems would arise because of what has already been done. At present, society must depend upon the courts for solutions to the problems, most of which are caused by applying nineteenth century law to a twentieth century technique.

The future of artificial insemination is in the hands of the state legislatures, who must take their cue from the will of the people. But with its facilities for finding and evaluating facts, the legislature today should be as much a molder of public opinion as it is a follower, especially in a field as new as this one. Intelligent legislative action is needed for the control and social adjustment of artificial insemination. The legal status of the child should be determined by legislation, and the practice carefully controlled so that its children will be healthy, intelligent, and born into a family ready and able to raise them to be happy, well adjusted, socially responsible citizens.

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95. For professional instructions on selecting the donor, see Guttmacher, Haman & MacLeod, *The use of Donors for Artificial Insemination. A Survey of Current Practices,* 1 FERT. & STER. 264 (1950); Shield, *Artificial Insemination as Related to the Female,* 1 FERT. & STER. 271 (1950); Weisman, *The Selection of Donors for Use in Artificial Insemination,* 50 WESTERN J. SURG., OBSTETRICS, & GYNECOLOGY 142 (1942).