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Artificial insemination and its legal unknowns

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INTRODUCTION

There are several million childless couples throughout the world and probably about two million married couples in the United States who, involuntarily, are unable to beget children.[27] Many of these cases come to the attention of the physician who is expected to offer advice and assistance.

Depending on the circumstances of each case, there are several alternative choices open to the childless couple:[23,27]

(1) They can adjust to a barren marriage.

(2) They can divorce and remarry (assuming one or the other is fertile).

(3) They can adopt children.

(4) They can have artificial insemination, either by the husband or by a third party donor depending on which is applicable.

(5) They can have corrective measures done (eg. surgery in some cases).

This paper deals primarily with the problems con-

fronting those persons in whom artificial insemination is chosen.

GENERAL CONSIDERATIONS

HISTORY

Artificial insemination had its legendary beginning in the fourteenth century when the Arabs used the procedure to fecundate their enemies' mares with the semen of inferior stallions. In 1700, Jacobi successfully inseminated, artificially, the eggs of fish and Spallanzine, in 1785, utilized this procedure on insects, amphibians and dogs. Near the end of the eighteenth century, John Hunter accomplished the first known artificial insemination in humans. He successfully impregnated the wife of a merchant, who was sterile because of hypospadias, with the husband's semen. Normal pregnancy followed. Artificial impregnation was successfully carried out, for the first time in the United States, by Sims in 1866. Since that time it has been practiced widely, though without complete acceptance, in England, the United States and other countries.[22,26,27]

Estimates as to the number of babies produced by this means vary considerably. Various authors list the total number as between 40,000 and 200,000.[20.27] Regan[32] states that there were 20,000 by 1951. Lombard[27] be-

lieves there are 3,700 to 25,000 living children by donor insemination. Friedman[20] believes there are currently 1,000 to 1,200 births per year as a result of artificial insemination, while Guttmacher[22] gives a higher figure of 5,000 to 7,000 annually. Smith[36] states that there are 200,000 AID children living in the world today.

ANIMAL BREEDING

Animal husbandry has benefited from artificial insemination for several years. It has been utilized increasingly more since the beginning of the twentieth century. In 1960, approximately two-thirds of dairy calves were sired artifically.[22]

Artificial insemination has several advantages to the animal breeder:[25]

"(1) It makes better use of young sires who are incapable of frequent service.

(2) It increases the number of pregnancies that can be fathered by valuable proved sires.

(3) It increases the percentage of conceptions in some horses by making possible insemination every other day during estrus and in cows habitually ovulating too late in estrus to accept

.. the bull.

(4) It overcomes coital difficulties caused by differences in size or weight between a breeding pair.

(5) It prevents the spread of venereal disease from an infected female to the unaffected male, such as dourine in horses and trichomonas in cattle.

(6) It permits the crossing of different species when there is difficulty in obtaining normal matings."

Thus, artificial insemination has a bright past and an even brighter future in animal husbandry. The procedure is a relatively simple one, mechanically, both in animals and human beings. However, in the latter, there are strong medical, legal and moral problems that do not arise in the artificial impregnation of animals.

AIH VS. AID - INDICATIONS

Although medically the mechanics are similar, a distinction must immediately be made between artificial insemination with the husband's semen (AIH or homologous insemination) and artificial insemination from an unrelated donor (AID or heterologous insemination). As will be seen later, heterologous insemination carries

with it many legal and moral implications that do not arise if the husband's semen is used.

Indications differ for AIH and AID. In fact, Guttmacher[22] divides artificial insemination in humans into three groups based on the indications. Groups A and B deal with AIH, while group C deals with AID. In group A are those cases in which mechanical factors stand in the way of completely normal intravaginal coitus between two otherwise fertile individuals. Such things as impotence, retrograde ejaculation, vaginismus, excessive obesity, hypospadias or tumors are mentioned in this category. Homologous insemination has a good chance of being therapeutic in this group if simply overcoming the mechanical difficulty will result in fertilization. Other factors, however, must be considered in all cases. Several successes have been reported.

The indications in group B are not so clear cut. Usually sterility here is of undetermined origin, or is due (apparently) to subnormal semen. Mentioned here are such things at uterine displacement, conical cervix, abnormal cervical secretions (cervical hostility)[39] and subnormal semen. Guttmacher and others believe that, only rarely, will AIH be of any benefit in this group, principally because little improvement will be gained

over natural intercourse. It merely serves as a substitute under most circumstances. However, current research in intrauterine insemination to by-pass cervical abnormalities, transferring sperm cells to different seminal plasma and techniques for freezing semen may offer some hope in the future for couples falling in this category.

Indications for donor insemination (group C) fall clearly into two general categories: (1) Permanent sterility of the husband (but with the wife being fertile) and (2) abnormal (or incompatable) genetic makeup of the husband (Rh incompatability, Huntington's Chorea, Tay-Sachs, etc.). Assuming the wife is indeed fertile, the chances for success in this group are very good. It is because of the moral and legal implications that AID is such an awesome undertaking.

PROCEDURE

Before artificial insemination is to be attempted, several preliminary studies must be made. The marriage must be verified and the physician should be satisfied with the parties' intellectual and physical capacity, with their emotional maturity and with the permanence of the marriage.[10,27] The fertility and genetic status

of both partners should be carefully evaluated. With full consideration of these factors it must be decided whether AID, AIH, a combination of the two (pooled semen)[27] or some other alternative would be the procedure of choice.

It should be noted that the majority of physicians favor a complete infertility investigation of the female prior to insemination. However, a minority viewpoint holds that artificial impregnation should be attempted for two months prior to doing these studies since 40 percent can be saved the added expense and inconvenience by becoming pregnant within this time.[22]

Timing of the procedure is an important practical consideration. Several methods of determining time of ovulation have been proposed: menstrual intervals, basal body temperature, character of cervical mucus, cervical fern test, endometrial biopsies, vaginal smears and hormone assays. Guttmacher[22] believes the menstrual history is the easiest and most reliable. After averaging the time of the cycle for six months, he subtracts fourteen days from this number and assumes that to be the day of ovulation. He inseminates three times each month---72 and 24 hours before and 24 hours after the day of ovulation in the first month. In month two he subtracts one

day from this schedule and in month three he adds one day to it.

If donor insemination is decided upon, the selection of a donor is exclusively within the control of the physician. This selection is attended by special hazzards and will be discussed later.

The technique for carrying out artificial insemination is relatively simple. The sperm sample is collected in a sterile, dry container from the donor or the husband by masturbation or interrupted coitus. It is then taken immediately to the place where the procedure is to be done (office, hospital, etc.). Usually a two hour time lapse between collection and insemination is allowed.[39] The donor and recipient should remain completely anonymous to each other and, of course, should not meet.

The specimen is drawn into a sterile glass syringe and deposited in the vagina of the female (intravaginally, paracervically, cervical cup).[22] Intrauterine insemination is generally contraindicated for several reasons:[22] (1) It is unphysiological, (2) results are no better, (3) violent uterine cramps sometimes follow if more than 0.1 cc is injected and (4) the danger of infection is greater.

RESULTS

Children resulting from donor insemination are usually good because both parents are carefully selected. In a resolution, submitted in 1955, the American Society for the Study of Sterility had this to say:[26]

"Those physicians who have carried out donor insemination for several decades can attest than in many cases it is a more desirable procedure than adoption. One great advantage of donor insemination is that it provides the opportunity for the husband to share the months of his wife's pregnancy and her childbirth.

"From observation over many years, the membership is impressed by the almost universal good results achieved in respect to children and the entire family unit. The fact that, in some instances, parents have returned for as many as 4 children by donor insemination, is further proof of the happiness it bestows."

Another author states:[26]

"These children mean more to the families than children conceived normally. But for artificial insemination, motherhood would be denied the wife. The husband knows that at least half of the child's inheritance is good---it comes from his own wife: and he has his physician's assurance that the other half is of the

best. Babies conceived in this manner are wanted children. They are welcomed into families with love. I know of not a single case where things have worked out badly."

The usual complications of pregnancy may occur, including abortion, toxemia, placenta praevia and abruptio placenta. Guttmacher[22] reports an average success rate for 690 cases, from seven clinicians, as 69 percent.

RELIGIOUS AND MORAL ISSUE

GENERAL

Any discussion of artificial insemination would be incomplete without reference to the religious and moral aspects of this problem. There are few situations where the doctor, the lawyer and the clergyman are so intimately entwined in a common problem of this nature. Donor insemination bears so directly on sex, marriage and family that it is only natural that theologians and others would have a strong voice in its rejection or acceptance by the general public. In a sense, at least, it creates a problem that has no parallel in historic religious or cultural doctrine.

There is considerable confusion and little definite opinion on the subject of artificial insemination. Most of the controversy deals with AID. Only the Roman Catholic and Anglican Churches have stated a definite opinion while Protestant and Jewish Faiths have given only sporadic and uncoordinated viewpoints.[26,37]

CATHOLIC VIEWPOINT

The Catholic Church clearly condemns and rejects

donor insemination, but leaves some room for a difference of opinion as regards AIH. Pope Pius XII has made several allocutions on this matter.[26] The first was addressed to the Fourth International Congress of Catholic Doctors in September, 1949. In the Pope's words:[26]

"Whoever gives life to a little human being, receives from nature herself, in virtue of that very relationship, the responsibility for its conservation and education. But between the lawful husband and the child who is the fruit of an active element derived from a third party (even should the husband consent) there is no link of origin, no moral and juridical bond of conjugal procreation..... It would be false to think that the possibility of resorting to this means might render valid a marriage between persons who are unfit to contract it by reason of the impediment of impotence.....

"We formally exclude artificial insemination from marriage. The conjugal act in its natural structure is a personal action, a simultaneous and immediate cooperation of the parties which, by the very nature of the actors and the peculiar character of the act, is the expression of that mutual self-governing which, in the

words of holy scripture, effects a union 'in one flesh' ....."

Pope Pius XII reaffirmed this stand in an allocution to the Second World Congress on Fertility and Sterility in 1956:[26]

"Artificial insemination is not within the rights acquired by a couple by virtue of the marriage contract, nor is the right to its use derived from the right of offspring as a primary objective of matrimony.

"The marriage contract does not confer the right because its aim is not 'progeny' but 'natural acts' capable of generating a new life. Therefore, artificial insemination violates the natural law and is contrary to what is right and moral."

But the Pope modified this statement somewhat by leaving the door open, at least partially, to AIH:[26]

"This does not mean that one must necessarily condemn the use of certain artificial means, with the view either of facilitating the conjugal act or attaining the objective of the normal act."

From these Papal allocutions it can be seen that there is no doubt of the Catholic position on AID. However, Catholic authorities differ as to the licity of AIH.[26]

PROTESTANT OPINIONS

A thirteen member Commission appointed by the Archbishop of Canterbury in 1945, considered artificial insemination and decided, in general, against donor insemination. This Anglican Commission recommended laws making donor insemination a criminal offense---statutes were not forthcoming. Dean Matthews of St. Paul's expressed one dissenting opinion and criticized the Commission for being too eager to reach an absolute judgement on this matter. There was unanimous agreement that "assisted insemination by the husband is justifiable."[26]

There is no unanimous agreement among the other Protestant Churches on this subject. Most liberal Protestant Churches have taken a rather non-committal viewpoint.[26]

JEWISH ATTITUDES

The practice of AID is largely forbidden by Orthodox Jews, but children so conceived are considered legitimate. Special circumstances are set forth where AIH is permissable.[22]

Several opinions favorable to both AID and AIH have been expressed by the Reform Rabbinate.[22]

'NATURAL LAW'

All conservative churches who are opposed to artificial fecundation justify their position on the argument that there is a 'natural law' which is immutable and that artificial insemination is against this 'natural law'.[22]

Levisohn[26] takes exception to the idea that AID ought to be made illegal on the declaration of certain religious authorities. He believes that this matter should not be made illegal simply because it conflicts with the views of some segments of our society. Since there is room for honest difference of opinion and many medical, legal and religious leaders are favorable toward it, he believes the majority rather than the few should decide.

LEGAL UNCERTAINTIES

PARTIES INVOLVED

"Artificial insemination is indeed a parvenu in the field of law."[12] Other scientific advances in the twentieth century, such as lie detectors, chemical tests for intoxication and narcoanalysis, may be measured by precedents against self-incrimination and due process. But there is nothing in the common law to answer the legal unknowns of artificial insemination.[12] To compound this, there is only one piece of legislation and a paucity of court cases concerning this matter. Consequently, the physician who practices artificial impregnation truly "stands on insecure ground and close to a number of dangerous pitfalls."[15]

But the physician is not alone on this legal tightrope. He must also be aware that his efforts may assist in bringing a child into the world who will find himself in a no-mans-land between bastardy on the one hand and legitimacy on the other. The wife who becomes fecundated and her husband and the donor may find themselves spinning in a maelstrom of legal confusion. The donor's wife may conceivably sue for divorce on the grounds of adult-

ery[35]---therefore, her consent is necessary.[16]

If the insemination procedure is carried out in a hospital, it may become a party in litigation. The hospital is protected legally if full consent (and understanding) is had from both husband and wife. The hospital may, however, feel obligated to refuse permission for the procedure on administrative grounds (ie. social and moral implications and public policy).[18]

The physician's nurse may be an accessory to the crime of adultery if she witnesses the impregnation.

AIH

There is general agreement among all of the authorities that AIH creates no particular legal problems. The court in the Doornbos case[2] (discussed elsewhere) states: "Homologous artificial insemination is not contrary to public policy and good morals and does not present any difficulty from the legal point of view." Ordinary laws relating to malpractice[11] and professional liability[14] would probably be sufficient to protect the rights of all parties. There will be no question of the child's legitimacy.[11,14] If the physician uses due diligence and exercises ordinary knowledge and skill, he, in all probability, won't suffer liability even though the child

is defective.[14,23] The practitioner is merely "assisting" the parties to achieve an ethically sound goal.[21]

In an article appearing in the Iowa State Medical Society Journal (1956), Throckmorton[40] points out one possible legal problem arising from AIH even though the child is legitimate. A child conceived by AIH could bar annulment because, by consenting to AIH, the mother approves the marriage.

This is not true in England. AID, at least, (and presumably AIH) is not necessarily approbation of marriage[24] (ie. does not consumate or approve the marriage).[4] The test there is whether or not the wife's intention, as evidenced by her conduct, is to acquiesce in the marriage should the husband remain impotent after the birth of the child.[17] This "intention" relates to the time the procedure of artificial insemination is conducted. Acts which might amount to approbation would not be so regarded if, at the time the procedure was carried out, the wife was unaware that the marriage could be annulled.

POSSIBLE CRIMINAL CONSEQUENCES OF AID

Adultery - Fornication

Most authors agree that the primary criminal issue

arising from heterologous insemination is whether or not the wife, by being inseminated, is committing the illegal act of adultery. There is a split of opinion and the enigma revolves around a determination of whether or not sexual intercourse is a necessary element of the crime.[19,29,36,40]

Black's Law Dictionary[1] describes adultery as the "voluntary sexual intercourse of a married person with a person other than the offender's husband or wife." This authority points out, however, that in some states (as in Roman and Jewish law), adultery is committed only when the wife is having extra marital intercourse--- coitus between a married man and an unmarried woman is "not of the grade of adultery."

Smith[36] points out that in some jurisdictions the single party, be it the man or the woman, commits fornication. If both parties are single, it is always fornication. Male and female parts must come together, but neither full penetration or the completed act are necessary elements. Other acts of sexual indiscretion are not adulterous, as with fondling of pudenda by hand only. This legal definition of adultery coincides with the popular concept. Pregnancy is not necessary, but it may result from an adulterous act.

If this accepted definition is followed by the courts it would be inconceivable for them to find a woman, who had received AID in the usual manner, guilty of adultery.

There are essentially two points of view then: (1) Those that say AID is not adultery, accept the legal definition,[28] and say that the elements of cohabitation, carnal knowledge, lust and passion are absent.[11] When adultery is committed in the usual fashion, these factors are present. AID is not considered adulterous by the proponents of this view, but without the husband's consent it may be grounds for divorce[21] and the physician and the donor may be guilty of criminal conspiracy. (2) The second view is that set down in the Doornbos case[2] (discussed elsewhere). The court concluded: "Heterologous artificial insemination, with or without the husband's consent, is contrary to public policy and good morals and constitutes adultery on the part of the mother..." The child is considered conceived outside the marriage and this is against public policy.[11] Since adultery is considered a crime, the husband's consent doesn't matter because he cannot consent to a criminal act.[19] An English court in the Russell case[8] (discussed elsewhere) said "fecundation 'ab extra' is adultery."

In a Canadian case[7] (discussed elsewhere) the court described adultery as the "voluntary surrender to another person of the reproductive power or faculties of the guilty person."

Smith[36] explains that "a majority of court decisions, and certainly the better reasoned ones, are to the effect that AID does not constitute adultery." Statutes of the individual states are the final authority as regards the definition of adultery and "it is a rule of statutory construction that criminal statutes are to be construed strictly."[12] In civil law proceedings, a loose interpretation of statutory law may be employed by the courts.[12] In most states sexual intercourse is necessary for adultery.[12] Nevertheless the problem of legislative intent may arise, and when the court feels the legislature did not have artificial insemination in mind when writing the law, it may rule that AID is adultery because it is contrary to public policy.

The donor may or may not be guilty of adultery (if married)[19] or fornication (if unmarried)[1,36] depending upon the jurisdiction---applying the same rules and reasoning as in the case of the recipient wife. Again it is generally agreed that intercourse is a necessary element.[19]

An editorial in the British Medical Journal (May, 1947) explains that "though aiding and abetting adultery is neither a criminal offense or an actionable wrong and though it would strain legal imagination too far to suggest that a medical practitioner who practices AID is himself guilty of adultery, yet clearly he stands on insecure grounds and close to a number of dangerous pitfalls." According to this view the physician would be marginally free from culpability. Others suggest that the physician may be an accessory during the fact.[19,40]

Accessory

In criminal law, an accessory is one who, with or without being present during the commission of a felony, aids, abets, or in any way assists (actively or passively) in the performance of the criminal act.[1,19] Edwards and Angell[19] and Throckmorton[40] believe that the physician, the donor, the nurse and the husband may conceivably be prosecuted as criminal accessories if AID is found to be adulterous and the wife is guilty of adultery.

An editorial in the American Medical Association Journal[12] discloses: "Better legal thinking supports the view that the procedure (artificial insemination) is not, in the absence of specific statutes forbidding it, a

crime. And it follows, from well-established principles, that a criminal proceeding will not lie against the doctor for performing the procedure." Consequently the practitioner is assured that the act of artificial impregnation is not illegal. However, he is not assured that his act will not be against "public policy."[12]

Criminal Assault

May the physician who performs artificial insemination be found guilty of criminal assault or rape? This possibility is suggested by Friedman.[20] Under the usual set of circumstances, legal action here is unlikely to ensue because assault implies "intent",[1] "apprehension"[31] and so forth by the usual legal definitions. However, should a girl of minor age be artificially fecundated, statutory rape, as defined by each state, may conceivably be charged against the physician. Thus the doctor who embarks on this sea of uncertainty should use great caution in choosing his patients for this procedure.[22]

Fraud

One of the most perplexing and practical considerations facing the practitioner of AID is that of birth registration. When the physician signs the birth certif-

icate attributing paternity to the husband, does he perjure himself, commit an illegal act or a fraud?[12,19,21,30] On the other hand, the corollary question may be a fair one---what are the alternatives? Answers to the first question have been paid lip service but essentially, it is still an open question. It is generally considered that, under existing laws, the physician does indeed falsify the vital statistic records if he inserts the husband's name as the father of the child.[23] The possible consequences of this have not been elucidated by the courts or by the legislatures. In California and other states it is a felony to falsify vital statistic records.[23]

On the other hand if the physician does not insert the husband's name as the father, equally unpleasant results may ensue. To anyone seeing the document, the child and the parents suffer from an obvious illegitimacy.[15] This leaves them open to scorn, ridicule and resultant mental anguish.

Methods of overcoming (or circumventing, if you will) these obstacles have been proposed. Haman[23] notes that in actuality the physician, in signing the birth certificate, certifies only that he was in attendance at the birth and the hour of birth. Haman does not believe

this certification is a verification or warranty as to the paternity.[23] He also notes that a proposed New York statute would keep secret the registration of AID babies as those for adopted babies are now. Some suggest that the physician doing the insemination send the patient to another physician for delivery.[27] The latter, then, can certify that the husband is the father (and the child legitimate) in all good conscience and without knowingly committing an illegal act. This appears to circumvent the law by back-handed methods, but none-the-less protects the interests of the child and his parents. Seymour and Koerner[35] call it "a necessary subterfuge." But may this not defraud other persons and deprive them of property interests, gifts and services which would otherwise be legally theirs---as if the child were not a "legal heir"?[15]

CIVIL LAW AND AID

Illegitimacy

There are two points of view on the issue of the legitimacy of an AID child which are difficult to reconcile.

Illegitimacy is "the condition before the law, or the social status, of a bastard; the state or condition

of one whose parents are not intermarried at the time of his birth."[1] Within the rule of the Doornbos case[2] a child conceived by artificial fecundation is illegitimate. Generally, in those jurisdictions where the mother is considered guilty of adultery, it naturally follows that the resultant child is illegitimate and the normal legal relationship between a father and his child does not arise. The father then does not have visitation rights in the event of divorce and the child does not have inheritance rights from the father as would exist where the child is born in lawful wedlock.[36] All court decisions have not been in agreement with the Doornbos case (see section on "Cases"). In England there seems to be "general agreement that a child produced by AID is illegitimate."[15] Contrary to the question of adultery, accepted legal and popular definitions fit the child into the catagory of a bastard without having to resort to public policy grounds for justification. In fact from a social and public policy viewpoint, it would seem more desirable to make the child legitimate.[23]

Most of the arguments for making AID children illegitimate, however, point out that the procedure should be unlawful and void as against public policy and contrary to nature.[11] It is further pointed out, in favor of the

illegitimate interpretation, that the child is not a "lawful issue of the body" or "heir of the blood" of the husband.[11] They ask: Why should the child inherit from the paternal grand parents?[11,12,14] Does making the child legitimate contravene the "spurious heir" statutes enacted in some states?[12]

There is a strong presumption in law, however, that a child born in wedlock is presumed to be legitimate.[32] In some jurisdictions this presumption is indisputable, by statute, if the wife is cohabiting with her husband,[32] while in others the presumption of legitimacy can be rebutted by clear evidence that the husband is impotent, sterile or did not have access.[40] In California (and other states) children born in wedlock or within ten months after dissolution of the marriage are presumed to be legitimate.[23] Also in California, the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate.[23] Admitted artificial insemination may even be overcome in favor of legitimacy in some states.[40]

In Nebraska,[29] a statute in point reads: "A divorce for the cause of adultery committed by the wife shall not affect the legitimacy of the issue of the marriage, but the legitimacy of such children, if questioned, may be

determined by the court upon the proofs in the case; and in every case the legitimacy of all children begotten before the commencement of the suit shall be presumed until the contrary be shown." From this it would seem the presumption of legitimacy is rebuttable.

Thus it can be seen that the child's legitimacy and his consequential legal status will generally be determined by the courts, without precedents, as the need arises. Haman[23] believes that in California, at least, the child is not without statutory protection in the form of existing statutes that describe the "presumption of legitimacy." If the child falls within the unrebuttable and conclusive presumption category he will have the same rights as regard inheritance, custody, residence and support as would a natural child. Those who would attempt to prove his illegitimacy would have to offer "clear and convincing proof" of either impotency or lack of cohabitation on the part of the husband. The presumption usually holds up in most jurisdictions---especially those who adhere to the principle of Lord Mansfield's Rule: "Decency, morality and policy demand that the testimony of married people to non-access be excluded since parents should not be urged to bastardize their offspring."[23]

Throckmorton[40] points out that in Iowa, a child is

legitimate when a man marries a woman whom he knows to be pregnant by another. The rule is that the husband "ought not to be permitted to disturb the family relations, and bring scandal upon the wife and her child, by establishing its' bastardy, after he has condoned the wife's offense by taking her in marriage." This situation is likened to AID. But it can be seen from this ruling that the husband "knows" and "condones." In like fashion then, the husband's consent to AID, in Iowa at least, would give the presumption of legitimacy added strength. It has been suggested that if the procedure is carried out without the husband's consent, he may have grounds for divorce[16] and the child may be illegitimate.[28] Because of this and because common sense would so dictate, the physician should always have the husband's consent. The husband is bound to support the AID child just as he is when he receives into his family the children of his wife.[40]

In those jurisdictions where the child resulting from heterologous insemination is considered illegitimate, this stigma may be overcome by the husband legally adopting the child.[19] However, adoption proceedings bring the fact of AID into light and this is not always desirable. An adopted child has essentially the same legal

rights and duties as a natural child. One further protection of the child's rights may be granted in the form of a will---in this way he would have some legal protection even if found by the law to be illegitimate.

Negligence and Malpractice

As has already been mentioned, ordinary laws of negligence and malpractice will, under most circumstances, govern the physician who participates in homologous artificial insemination. The child is legitimate and if the physician used due diligence and ordinary knowledge and skill, he probably won't be liable even if the child is defective.[12,14] Due diligence and ordinary knowledge and skill are defined relative to accepted medical practice in that or a similar community.[14]

When practicing heterologous insemination the physician's duties are not so explicit and, though the usual rules of negligence and malpractice will certainly be applicable, an additional problem arises in the selection of a donor.[10,11,12,14] The accepted practice is for the donor and the recipient to remain anonymous to each other. By this procedure a special responsibility confronts the physician in that he has exclusive control over the selection of the donor. The doctor is deemed

qualified to make this selection because of his medical knowledge, his ability to examine the donor, and his acquaintance with the donor and his children, if any, and often with his parents, grandparents and collaterals.[36] Thus the likelihood of good donor qualities and the improbability of bad are fairly well assured. But if the child is deformed, the parents may charge lack of care in this selection and the physician may be liable for civil damages.[19,40] The physician must assume the responsibility for the donor's suitability but the nature and limits of this responsibility are poorly defined.[11] How far is the doctor liable for errors in judgement?[12] Need he go further in evaluating the donor than he would in a premarital examination?[12] What standard of care is to be applied?[20] How far will the courts allow the woman and her husband to assume the risk of a defective donor by contract?[14] These questions are essentially unanswered and so the hazzards to the physician are compounded. However, there is one statute governing the selection of the donor. This will be discussed under "Legislation."

Divorce and Custody

Lombard[27] and others[19,40] note that adultery is grounds for divorce. Consequently if AID is ruled adul-

terous, the husband would have the basis for a suit--- but his consent to the procedure would act as a defense for the wife and bar a successful result.[19,40] Should he sue for divorce on the grounds of adultery he, of course, would have no claim to the bastardized child as regards visitation or custody. The child would be considered to be the mother's child only.

Where the wife later sues for divorce and, to the exclusion of the husband, claims full rights over the child, her success will primarily be determined by the legitimacy of the child or past adoption by the husband. If the child is considered to be legitimate, the husband would have the same rights as in the case of a natural child. But if the child is labeled as a bastard and of the mother only, the husband would have no claim to the child and would probably be denied custody or even visitation rights should the mother so desire. A case in point will be discussed later under "Cases." A strong consideration in any court is the welfare of the child---so the decision may be based on the best interests of the child who is the one primarily affected.[40]

Criminal Conversation

Criminal conversation, by definition, is "adultery,

considered in its aspect of a civil injury to the husband entitling him to damages."[1] In the Handbook series of the Law of Torts, Prosser[31] discusses criminal conversation as a type of interference with family relations for which the husband can recover damages. Thus in tort (civil) law, adultery is called criminal conversation. It has special legal significance in that it is the basis for a civil suit for damages.

Throckmorton[40] believes that if the husband consented to AID, he could not recover damages in a suit for criminal conversation, but if he did not give his consent, "it would seem likely that he could recover damages against the participants, including the physician." So for still another reason, the physician is cautioned to always get the husband's consent.

Incest

Incest is defined by Black's Law Dictionary[1] as "the crime of sexual intercourse or cohabitation between a man and a woman who are related to each other within the degrees wherein marriage is prohibited by law." If a single donor were to sire many children, the chances of an incestuous mating could be appreciable since the common father is anonymous to his offspring.[15,26] This could

lead to serious consequences. Of course, this problem is also conceivable in adopted children, or anyone else ignorant of his ancestry, but in terms of numbers the chance is much less. In the United States, donors are generally limited to one hundred children.[26] Even though an incestuous mating is remotely possible, at best, the chances of any serious biological harm resulting would be unlikely.[26]

This subject has been discussed under the topic of civil law rather than criminal law because there is no element of criminal intent present. The parties come together not by desire but by accident and it is only incidental that they may have common ancestry.

RELATIVE DONOR

Occasionally a couple planning artificial insemination will request that a relative of the husband, usually a brother, be used as the donor so that the child will also be of the husband's family strain. Superficially, this would appear to be a very desirable thing. However, most practitioners in the United States exclude this idea completely and say absolutely that the donor and the recipient should remain forever anonymous to each other. The reasoning for this argument is primarily to eliminate

any transfer of the wife's affection from the husband to the relative donor.[35,36] Also by eliminating the clandestine aspects of the procedure and bringing it under one roof, the public and certainly the child is likely to know what has transpired.[35] Unless extreme care were used in selecting patients, this could no doubt lead to serious domestic complications.

Relative donors have been used in Scandinavian countries, reportedly without significant harm resulting.[36] In those countries, there is a strong feeling that the couple should be allowed to select a relative if that is what they want, but there seems to be a general opinion that selection of a non-relative donor should remain, secretly, in the control of the doctor.[36]

Smith[36] favors the relative-donor idea and believes it should be tried in this country. A child from this union would have a biological background in common with the husband. This would be a child presenting traits and characteristics of the husband's ancestry and the husband would appreciate that genetically, this is a child he himself could have produced. Thus the bond between husband and child would be considerably closer. Smith also argues that by giving the couple desiring a relative donor what they want, one is better able to exclude quackery and

peddlers from the practice of artificial insemination.

CONSENT FORMS AND OTHER SAFEGUARDS

With a very notable exception, there seems to be general agreement among physicians practicing donor insemination that a consent form signed by husband and wife is desirable.[10,20,23,35,40] This consent slip is, in actuality, an express contract. Most of these forms absolve the doctor from liability for poor selection of a donor. As discussed earlier, it is unknown how far the courts will allow the husband and wife to assume the risk for a defective donor when the selection is exclusively in the physician's control. Some doctors go into elaborate detail in such things as having the parties fingerprinted, placing separate consent forms (duplicated, witnessed and notorized) and records in different bank boxes and so forth.[20,35] The other extreme and the exception noted above is that procedure followed by Dr. Guttmacher, who says, "forget signed papers." His reasoning is that contracts and agreements are unnecessary if the parties are carefully selected and such papers merely act as a reminder of something that should be forgotten. He feels that in most instances the pregnancy, psychically at least, becomes a

partnership accomplishment and all tend to forget that it is not physically the husband's baby.

Haman[23] takes the middle road but believes it is mandatory for the husband and wife to sign a consent form giving permission for donor insemination. He believes the consent should contain the following six points:

"(1) Husband and wife state that they are cohabiting and the husband is not impotent.

(2) The husband states that he is sterile (this portion of the consent can be altered to allow for Rh imcompatibility, hereditary mental disease, and those men with severe oligospermia).

(3) The physician is given the authority to select the donor (White, Chinese, Negro, ect.).

(4) The physician does not guarantee pregnancy or a full term pregnancy.

(5) The donor's identification will not be divulged.

(6) The physician will not be responisble for any abnormality of the child."

Here is the form used by Dr. Haman:

Consent Slip

Date:_____

We, _____, being husband and wife, and cohabiting as such, being over the age of twenty-one years and residing at _____ of our own free will and volition do request of Dr. _____ that he inseminate Mrs. _____, one of the undersigned herein, artificially with the sperm of a white male selected, or to be selected, by the same Dr. _____.

We make this request since we realize that Mr. _____ is hopelessly sterile, though not impotent, adequate laboratory tests having been performed, and further, because we are extremely anxious to have a child, and we feel that our mutual happiness and well being will be greatly enhanced by this Artificial Insemination. We understand that more than one attempt at Artificial Insemination may be required and there is no representation on the part of Dr. _____ as to the number of attempts. We fully understand that Dr. _____ does not, or did not, represent or warrant that a pregnancy or a full term pregnancy will result from such Artificial Insemination; further, under no circumstances will we demand that the name of the donor of such sperm be divulged.

We release the said Dr. _____ pf any and all responsibility in the event that the issue that may result from said Artificial Insemination is abnormal in any respect.

Witness _____ _____

_____

One of the primary safeguards afforded the physician is very careful and conscientious selection of a

donor who is of proven high fertility, of the same race and with no venereal or mental disease. The donor ideally should be of the same blood type as the husband, with similar coloring, build and other physical characteristics.[36]

Other suggested legal and moral safeguards include the following:[10,20,35]

(1) Accept married couples only.

(2) Carefully evaluate the marriage from the standpoint of its harmony and permanence and the impact that a (donor-fathered) child will have on it.

(3) Be sure the wife is old enough to preclude a charge of statutory rape.

(4) Fingerprint the husband to avoid the possibility of misrepresentation.

(5) Be sure the husband and wife are clearly advised on all of the moral, legal, social and psychological aspects of donor insemination.

(6) Make certain that both partners are convinced that AID is an acceptable procedure.

(7) Have consent from the donor's wife.

CASES

There are a total of eight cases tried in the courts of the United States, Britain and Canada that deal, directly or indirectly, with this subject. The first case was in 1921, the most recent in 1958. These cases will be discussed individually in the order of their occurrence. There is little connection between them. All cases to date have been decided in trial (lower) courts. None have had the benefit of appeal to higher (appellate) courts whose rulings would be more binding on future decisions.

Orford v. Orford[7] (Canada, 1921)

This was the first case dealing with artificial insemination to find its way into the courts. This was a suit for alimony by the wife against the husband who, in turn, defended on the grounds of adultery. As the story unfolded it seemed the couple had been married in Canada about six years prior to this action. Following their marriage they went to England, the wife's native country, for their honeymoon. The marriage had not been satisfactory sexually, as each attempt at intercourse

caused the wife severe pain due to her having, as she later learned, a retroflexed uterus. The husband returned to Canada, followed six years later by the wife, who, in the interim, had given birth to a child. The husband refused to accept his wife and her child so she filed this suit for alimony claiming at the trial that the child was born as a result of artificial insemination.

The wife testified that following her husband's departure from England, she had rented a flat in London and became acquainted with a man named Hodgkinson; that she told Hodgkinson of her marital problems and explained that she could not have an operation without her husband's consent, but that the doctor told her that a pregnancy (by artificial insemination) would relieve her symptoms; that Hodgkinson agreed to help and brought a doctor to her flat whereupon she undressed, went to bed, was anaesthesized and upon awakening was told by Hodgkinson that she had been inseminated with his semen; that this attempt did not result in pregnancy but that a subsequent attempt was successful.

The husband defended on the grounds of adultery, claiming that the wife had intercourse with Hodgkinson in the usual way, but even if the child was conceived by artificial insemination, that this also constituted

adultery. The court found the facts to be as the husband stated---that the wife was adulterous in the ordinary way. This would have been enough by itself to deny a judgement in favor of the wife but the court went on by way of dictum (ie. an opinion expressed by a judge that is not essential to the decision of a case and not binding on future decisions) to comment on artificial insemination. The court said that sexual intercourse is not a necessary element of adultery, but that the voluntary surrender of the wife's reproductive powers to a man, not her husband, without the husband's consent, constitutes adultery.

Russell v. Russell[8] (England, 1924)

In this case artificial insemination per se was not before the court nor was there a direct consideration of adultery. The primary issue was one on admissibility of evidence as to non access, which was held inadmissible. The husband sued for divorce on the grounds of adultery, claiming that the wife had given birth to a child not sired by him. As regards our problem here the pertinent part of the opinion read: "The jury chose to prefer the evidence of the husband to that of the wife, and therefore come to the conclusion that she had been fecundated

ab extra, by another man unknown, and fecundation ab extra, means adultery."

Hoch v. Hoch[3] (Chicago, 1945)

The Hoch case was the first American case on this subject but again it dealt only indirectly with artificial insemination and the opinion relating to AID was expressed as dictum. Frank Hoch, the plaintiff, sued his wife for divorce on the grounds of adultery. He had been in the army and away from home for two years. Upon returning he found his wife two months pregnant as a result of (according to the wife) artificial insemination. The court granted Mr. Hoch the divorce, but on a different grounds. As dictum the court expressed the view that artificial insemination did not fit the definition of adultery and was insufficient to support a decree of divorce on that ground. This case is interesting in that it runs counter to the dictum in the Orford case. A later American case (Doornbos v. Doornbos) expressed an opinion contrary to the Hoch dictum.

Strnad v. Strnad[9] (New York, 1947) (Oklahoma, 1949)

This case deals with the husband's rights of visitation and control as opposed to those of the mother. It

was tried first in New York in 1947, and later in Oklahoma in 1949, showing the separate views of two jurisdictions on the same question.

Mr. and Mrs. Strnad had a daughter by donor insemination, the husband having consented to the procedure. Later they legally separated (but were not divorced) and the mother contested the right of the husband to visit the child on the grounds that the child was a product of artificial insemination and consequently the separated husband had no rights as a father.

The New York trial court (cf. appellate court) assuming the wife was artificially inseminated with the husband's consent, held: "(1) _____. (2) The court holds that the child has been potentially adopted or semi-adopted by the defendant. In any event, insee far as this defendant is concerned and with particular reference to visitation, he is entitled to the same rights as those acquired by a foster parent who has formally adopted a child, if not the same rights as those to which a natural parent under the circumstance would be entitled. (3) In the opinion of this court, assuming again that the plaintiff was artificially inseminated with the consent of the defendant, the child is not an illegitimate child. Indeed, logically and realistically,

the situation is no different from that of a child born out of wedlock who, by law, is made legitimate on the marriage of the interested parties. (4) The court does not pass on the legal consequences insofar as property rights are concerned---nor does the court express an opinion on the propriety of procreation by the medium of artificial insemination."

In August, 1949, subsequent to the above proceeding in New York, Mrs. Strnad moved to Oklahoma, acquired legal residence and there filed a suit for divorce. (The New York action was for separation.) She ask for exclusive custody of her daughter on the grounds that the husband had no rights to the child. The Oklahoma court awarded her the divorce and exclusive custody.

R.E.L. v. E.L.[4] (England, 1949)

(Note: Initials used in England when the court considers it proper not to name the parties.)[36]

This case is a unique one in which a marriage was annulled on the grounds of impotency of the husband and lack of consummation even though the wife had been artificially inseminated with the husband's semen (AIH) and had become pregnant, giving birth to a baby boy, as a result of this procedure.

The couple had been married for several years prior to this action. The husband was consistently, psychologically impotent, never being able to consummate the marriage, but was not sterile. Several attempts were made at artificial insemination with the husband's semen. About a month following the last, but successful, attempt the wife left her husband not knowing that she was pregnant. Upon discovering her pregnancy, she did not desire to return to him and some time later (after the birth of the child) filed this suit. The court granted the Decree of Nullity even though, pursuant to the common law rule that an annulled marriage is void from its inception, the effect of the decree was to declare the child illegitimate. (This common law rule was changed by statute in 1950, making legitimate any child born of a nullified marriage if such a child would habe been legitimate had the marriage ended in divorce.)[36] The court felt that the wife could "never endure to go back" to her husband and further reasoned that the child's illegitimacy was of little import since anyone knowing this would also know the facts of the case.

There has never been a case similar to this in the United States. Smith[36] believes that the rule of R.E.L. v. E.L. would apply in this country unless there are

statutes to the contrary. In California, New York and several other states,[23] by statute, a nullified marriage does not necessarily affect the legitimacy of the children conceived or born of the marriage.

Ohlson v. Ohlson[6] (Chicago, 1954---Trial court)

Mrs. Ohlson challenged the right of her husband to visit their three year old son, claiming that the child was born of AID. A gynecologist could not state, with certainty, that this was an AID child nor could he rule out Mr. Ohlson as the biological father. This and other evidence presented in this case was not sufficient to establish AID for sure. The court upheld Ohlson's paternal role and enjoined Mrs. Ohlson not to spread more rumors that Ronald was a "test tube baby." The court ruled that "when a child is born within a marriage, by whatever method, there is a legal presumption that both of the marriage partners are its parents."

It can be seen that the court did not rule on the legitimacy of an AID child in this case. However, it follows from this decision that conception by donor insemination must be established with certainty before the courts will rule on that aspect of it.[36]

Doornbos v. Doornbos[2,12] (Illinois, 1955)

This case has received widespread publicity in the national press and in medical and legal journals. The decision is one of a trial court judge and is looked upon as merely an opinion without the effect of law, which would be binding on furture decisions, that an appellate court ruling would have.[23] Judge Gorman's decision has nevertheless been important from the standpoint of stirring thought on a labile and highly controversial issue---receiving high acclaim on the one hand and rousing indignation on the other.

This case is further important because it represents the first case in the United States in which there was testimony by doctors regarding the husband's sterility, the insemination of the wife, and the consent of the husband for the procedure.[14]

Mary Doornbos, the plaintif, was granted a decree of divorce in January, 1955. Before the hearing on the divorce she filed a petition asking for a declaratory judgement as to whether AID constitutes adultery, whether it is contrary to public policy and whether a child of artificial insemination is legitimate or of the mother only.[14] The court concluded:

"(1) Heterologous artificial insemination (when the

donor is a third party) with or without the consent of the husband, is contrary to public policy and good morals, and constitutes adultery on the part of the mother. A child so conceived is not a child born in wedlock and is therefore illegitimate. As such it is the child of the mother and the father has no right or interest in said child.

"(2) Homologous artificial insemination (when the donor is the husband of the woman) is not contrary to public policy and good morals and does not present any difficulty from the legal point of view."

About two months later, the court granted the divorce to Mary Doornbos. In spite of the ruling making her child illegitimate, she did not wish to appeal because she received exclusive custody which is what she desired. The State's attorney filed a petition to intervene and appeal the decision. The petition was granted but the appellate court did not rule on the decision because of procedural irregularities.[36]

MacLennon v. MacLennon[5] (Scotland, 1958)

This is the most recent case involving artificial insemination and is discussed by Smith.[36] Again it is a trial court ruling---in Scotland---and it runs counter to

the Doornbos decision. The husband sued the wife for divorce on the grounds of adultery stating that they had not lived together for fourteen months prior to the birth of a child. To this fact the wife admitted, but defended on the grounds that the child was conceived as a result of donor insemination, although without the husband's consent. Her position was that this did not constitute adultery. She was, however, unable to produce testimony as to the fact of artificial insemination. The evidence then was insufficient to support her defense;the husband was granted the divorce on the grounds of adultery, since the evidence showed only that he was not the father of the child.

Before the trial it was recognized that her pleading would be insufficient. However, counsel for both parties persuaded the court, before requiring her to amend, to pass on the question of whether AID constituted adultery. The judge ruled that while AID without the consent of the husband was a grave breach of marriage, it did not constitute adultery. His reasoning was predicated on the usual definition of adultery as requiring sexual intercourse. Mere "surrender of the reproductive powers" was not enough, in this judge's opinion, to establish adultery. He refuted the decision in the Doornbos case.[36]

The MacLennon and Doornbos cases represent two diametrically opposite views on the subject of AID from two jurisdictions. Neither are appellate courts whose rulings would have binding powers on future decisions. It seems then, that each case that reaches the courts will have to be decided on its individual merits without benefit of precedents.

LEGISLATION

Legislation governing the procedure of artificial insemination is most striking by its paucity. Six states have introduced bills into their legislatures (New York, Virginia, Wisconsin, Indiana, Minnesota and Ohio)---all have failed of enactment. Some bills favor, some oppose AID.

The only legislation enacted into law is that of the Sanitary Code of the City of New York (Sec. 112), which imposes certain restrictions on the use of donors for artificial insemination. It is summarized as follows:[23]

"(1) The donor must have a complete physical examination with special attention to the genitalia, a standard serologic test for syphilis and a smear and culture for gonorrhea, not less than one week before any such seminal fluid is obtained. No one suffering from any venereal disease, tuberculosis, or brucellosis shall be used as a donor. No one having any disease known to be transferable by the genes shall be used as a donor.

"(2) Both donor and recipient shall have their Rh factors tested and only the semen of an Rh negative donor shall be used to inseminate an Rh negative woman.

"(3) The physician performing the artificial insemination must keep records showing the name of the physician, the name and address of the donor and also of the recipient, the results of the physical and blood examinations, and the date of the artificial insemination. These records are confidential and such reports are open only for such persons as may be authorized by law to inspect them."

The Nebraska legislature has neither proposed nor enacted any legislation governing artificial insemination.[38] The State Health Department does not administer any laws concerning this matter.[33]

A New York bill of 1948, contained the following provision (amended in 1950):[12] "A child born to a married woman by means of artificial insemination with the express or implied consent of her husband shall be deemed the legitimate, natural child of both the husband and wife for all purposes, and such husband and wife and child shall have all the rights and be subject to all the duties of that relationship including the rights of inheritance."

The Virginia proposal provided that, given the husband's consent, AID children should be considered the same as legitimate children. Wisconsin and Indiana bills would have had similar effect in providing that a child

conceived by artificial insemination be considered legitimate with full rights of inheritance.[12]

Three pairs of bills were introduced into the two houses of the Minnesota bicameral legislature. The first pair would have made the procedure unlawful but resultant children legitimate; the second would have provided legality if the husband's semen alone were used; the third pair would have made the procedure lawful. The latter pair also set forth certain provisions regulating the performance of artificial insemination.[12]

The Ohio bill, opposing AID, would have provided the following:[12] "No female person shall submit to heterologous artificial insemination nor shall any person or persons perform or assist in the heterologous artificial insemination of any female person, in this state. Any child conceived in violation of this section shall be born out of wedlock and illegitimate. Whoever violates this section shall be fined not more than five hundred dollars and imprisoned not less than one nor more than five years."

In England, the Law Society on Artificial Insemination believes that AID ought to be tolerated with limits and controls. This council feels that making it criminal would make it unenforceable and encourage unqualified

practitioners. In 1959, they recommended legislation governing the various aspects of it. No laws have yet been enacted in Britain.

SEMEN BANKS AND THE FUTURE OF ARTIFICIAL INSEMINATION

Since 1866, it has been known that human spermatozoa could survive freezing.[22] Recent advances using glycerol and other substances as protective agents have enhanced the survival of sperm for longer periods and at lower temperatures.[22,26,36] More progress is expected in this field in the future, but even at the present time women have been impregnated by semen that has been frozen, stored and thawed.[36] The paramount value of this technique in the near future seems to be in the improvement of defective semen for use in AIH. By gathering together several ejaculations, it may be possible to bring together enough good sperm, from the husband, to successfully impregnate the wife.

Smith[36] projects into the future and visualizes other, more astounding uses of stored semen. His predictions primarily revolve around the concept of dysgenic, sterile or even dead husbands, as a result of war or other radiation catastrophe, being able to beget offspring through the utilization of semen banks. In the extreme, the survival of a nation after an all out nuclear holocaust may be assured if sufficient sperm is safely stored

to impregnate selected, fertile females which have been protected, at all costs, through the disaster.

Historically the law has allowed sufficient time after the death of a husband to make any children, conceived during his lifetime, legally his for all purposes. Smith[36] asks, "Should this concept be further extended to cover the husband's children conceived with his sperm after his death, perhaps long after his death, or should these children be illegitimate?" Smith suggests many reasons why a young widow may want to have her husband's child even after the husband's death and he believes there will be sufficient numbers of these individuals in the future to warrant consideration and contemplation of possible legal problems. Posthumous insemination has become not only a possibility, but a probability.

Unmarried women are normally not considered for artificial insemination although some authors suggest it may be acceptable in special cases.[16] One special case may be that situation discussed above---ie. it may become necessary to inseminate single women in the event of atomic war.

SUMMARY

Historically the practice of artificial insemination dates back to the fourteenth century, with the first successful attempt in humans in the late 1700's. Techniques have been perfected but human artificial insemination has not been widely accepted because it presents many serious problems from the religious, legal and medical points of view. There are many questions associated with the procedure that have not been resolved.[13]

AID is used in barren marriage when only the male is sterile, while in AIH both partners must be fertile, but with factors present that prevent impregnation.

Because of its connection to domestic relations and morals, church authorities have expressed varied opinions on the subject. Catholics, Anglicans and Orthodox Jews generally condemn AID, but find some room for acceptance of AIH. Other Protestant Churches have been rather non-committal while the Reform Rabbinate has expressed opinions favorable to both AID and AIH. Church authorities that oppose AID base their judgement on an immutable, 'natural law'.

Obviously, with strong religious feelings on a sub-

ject, there will be minority groups that try to impose their views on the majority in the form of legislation. With an issue which is highly controversial and in which there is room for an honest difference of opinion among the various religious authorities, it seems only fair that the majority should determine the type of legislation enacted. Those that are opposed may certainly abstain from practicing the procedure. This view is only reasonable in a democratic society such as ours.

The paramount problem is the uncertain legal status of the parties involved in artificial insemination. There is a paucity of law---from statute, from common law and from decisions---regulating this procedure. The doctor, the husband, the wife, the donor, the nurse, the donor's wife and above all the resultant child are all faced with a regrettable legal situation.

With AIH there is no problem because the husband's semen fecundates his wife producing a legitimate child. Ordinary laws of negligence and malpractice regulate the doctor. There is little moral chastisement.

When the third party donor enters the picture in AID, the problems are precipitously compounded. The wife may be charged with adultery and her innocent offspring labeled a bastard; the doctor may be charged with access-

ory, assault and/or fraud; the donor may be found guilty of adultery. Divorce and custody proceedings may be complicated by the uncertain status of the involved parties. The usual laws of negligence and malpractice partially apply. The doctor doesn't know how far his liability for a defective donor extends. Various consent forms and other safeguards are suggested, but they have limited value without legal guidance.

The problem of the relative donor is presented. Smith's[36] idea, that this should not be flatly condemned, is well taken because there may be an indication in selected cases.

Eight cases have been presented. All are lower court decisions that represent little more than an expression of the trial judge's opinion on AID without weight of binding authority and with little benefit for future guidance. They do show the wide variance of opinion and degrees of acceptance of AID---thus leaving the door open for greater uncertainty.

Six states have introduced bills into their legislatures, all of which have failed of enactment. Only one bill would have provided absolute rejection of AID. The New York Sanitary Code has a measure governing the regulation of donors---the only piece of passed legisla-

tion on this matter.

Just as there is a difference in religious opinion, judicial and legislative views vary widely on AID. Some declare that the procedure is decidedly immoral and illegal; that the wife is adulterous and the child illegitimate. Those that hold this view do not accept the usual legal definition of adultery and base their judgement on public policy grounds. The majority feel that sexual intercourse is necessary for adultery and that the legal presumption that a child born in wedlock is legitimate should stand.

To most individuals the former view is untenable. Too many good children have been produced by AID to make it bad on the basis of public policy. Passion, lust and coincidental sexual intercourse are necessary elements of the crime of adultery. This is the accepted view and the one that should be followed.

Most authorities agree that AID should be legalized with strict controls so that those desiring children in this manner may have them. The indications should be clear and the requirements rigid. Many do not fully accept the procedure but realize that it does fulfill a need. The great necessity at this time is for legislative action, be it for or against, so that those involved

may have statutory guidance. This matter should have immediate attention.

One author says:[34] "As in all other scientific achievements, the law's response to artificial insemination has been, and will be, perfect horror; skepticism; curiosity; and then acceptance."

CONCLUSION

(1) A brief review of all aspects of artificial insemination has been presented with primary emphasis on the legal unknowns.

(2) All court and legislative action to date has been covered.

(3) The need for legislative guidance has been emphasized.

(4) An attempt was made to tie together the legal, religious and medical aspects of this problem.

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