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## A.I.D. — AN HEIR OF CONTROVERSY

Charles E. Rice\*

### Introduction

All children were to be begotten by artificial insemination ("artsem", it was called in Newspeak) and brought up in public institutions.

George Orwell, 1984<sup>1</sup>

What is this thing called artificial insemination? Is it a menace to society? Or is it a fantasy of little moment beyond the precincts of 1984 and the "Brave New World"? Or does the fact lie somewhere in between? Whatever your view, you can readily bolster your position by citing respectable authority. For example, a respected advocate declaims that, "Nothing in modern times has so seriously challenged the basic concept of our society founded as it is on the biological tripod of father, mother and child which we call the family unit."<sup>2</sup> Oppositely, a competent man of medicine notes that, because of medical advancements against the scourge of sterility, "artificial insemination in the United States is not a widespread or growing practice; on the contrary, it is being used less and less as time goes on."<sup>3</sup>

On the practicality and morality of the matter, an equally discordant clash of opinions will be found, ranging from the lyrical praise of utopian eugenists ("Who knows but that in this way we might even be able to prevent another Hitler or some similar aberration of the genes. Is this not one of the easiest and most direct ways of improving offspring and promoting a life of less personal heartbreak and of greater happiness for the entire human race?"),<sup>4</sup> to the scathing denunciation by an "eminent Jewish scholar" ("Such human stud-farming exposes society to the gravest dangers which can never be outweighed by the benefits that may accrue in individual cases.")<sup>5</sup> On the factual question of the extent of the practice, and its posture of ebb or flow, the fair appraisal probably lies between the extremes, that is, between regarding it as a genetic wave of the future or, on the other hand, as a receding eddy of novelty, wholly outmoded by the progress of science. However, the religious and social problems attendant upon artificial insemination are not so readily dismissed. Their resolution is a matter properly beyond the competence of this article. But, because no analysis of the legal implications of

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<sup>1</sup> ORWELL, 1984 at 52 (Signet edition, 1952).

<sup>2</sup> Caddy, *Artificial Human Insemination*, 12 N. Y. COUNTY LAW. ASSN. BAR BULL. 191, 195 (1955).

<sup>3</sup> Weisman, *Artificial Insemination: The Medical Viewpoint*, 7 SYRACUSE L. REV. 96, 97 (1956).

<sup>4</sup> Koerner, *Medicolegal Considerations in Artificial Insemination*, 8 LA. L. REV. 484, 485 (1948).

<sup>5</sup> JAKOBOVITS, PROBLEMS OF JEWISH FAMILY LIFE 14 quoted in Kelly, *Artificial Insemination: Theological and Natural Law Aspects*, 33 U. DET. L. J. 135 (1955).

artificial insemination would be complete without some canvass of the deeper issues inextricably involved, this survey of the cases and comments will conclude with a selection of religious, ethical and social pronouncements on the subject.

## I. HISTORY

The history of artificial insemination shows it to be a fitful starter and a late comer. Artificial insemination is of two types, one (homologous artificial insemination) where the seminal fluid of a husband is injected by mechanical means into his wife so as to induce conception, and the other (heterologous artificial insemination) where the seed is that of a "donor", other than the husband. For convenience, we will refer to the former as AIH, to the latter as AID, and to artificial insemination in general as AI. The first recorded AI was performed on a dog in the eighteenth century by the Italian physiologist, Lazzaro Spallanzani (1729-1799).<sup>6</sup> AIH was first practiced on a human by the English physician, Dr. John Hunter, in 1799.<sup>7</sup> The first recorded successful AIH in the United States was accomplished in 1866 by Dr. J. Marion Sims, of South Carolina, who later abandoned the technique as immoral.<sup>8</sup> In the United States, AID appears to have been practiced first in the 1890s,<sup>9</sup> but others place its beginning in this country in the first decade of the twentieth century.<sup>10</sup> From the 1890s, the practice of AI gained an increasing acceptance in Europe, and records reveal its use from that time in France, Germany, Switzerland and Spain.<sup>11</sup> Certain it is, though, that the sharp upward curve of its growth did not begin anywhere until the present century.<sup>12</sup>

Artificial Insemination has been described as "indigenous to western culture."<sup>13</sup> It has been said, on the contrary, that AI is probably no more common in the United States than in other countries, although its incidence in this country and in Great Britain is probably greater, owing to religious influences, than in Latin America and other Catholic countries.<sup>14</sup> It must be remembered that generalities and statistics are here of even less than usual efficacy, owing to the normal atmosphere of secrecy enshrouding an artificial insemination, and to the deliberate falsification of records encouraged by it. However, the tentative statistical conclusions advanced by competent researches into this social phenomenon can be of definite, though tentative,

<sup>6</sup> Holloway, *Artificial Insemination: An examination of the Legal Aspects*, 43 A. B. A. J. 1089 (1957).

<sup>7</sup> GLOVER, *ARTIFICIAL INSEMINATION AMONG HUMAN BEINGS* 4-5 (1948); cf. SIEGLER, *FERTILITY IN WOMEN* (1944).

<sup>8</sup> Greenhill, *Artificial Insemination: Its Medicolegal Implications*, SYMPOSIUM ON MEDICOLEGAL PROBLEMS 45 (1948); cf. HARRIS AND BROWIN, *WOMAN'S SURGEON: THE LIFE STORY OF J. MARION SIMS* (1950); GLOVER, *op. cit. supra* note 7.

<sup>9</sup> Folsome, *The Status of Artificial Insemination: A Critical Review*, 45 AM. J. OBST. AND GYNECOL. 915 (1943).

<sup>10</sup> See GLOVER, *op. cit. supra* note 7.

<sup>11</sup> Cf. VAN DE VELDE, *FERTILITY AND STERILITY IN MARRIAGE* (Browne's translation, 1951).

<sup>12</sup> Cf. Folsome, *op. cit. supra* note 9.

<sup>13</sup> Mangin, *Artificial Insemination: The Sociological and Anthropological Viewpoint*, 7 SYRACUSE L. REV. 106 (1956).

<sup>14</sup> Weisman, *op. cit. supra* note 3.

assistance to our evaluation. Estimates tell us that there are about two million childless couples in the United States, that 10 to 16 per cent of all marriages in this country are sterile, and that the husband is the sterile factor in 35-40% of these.<sup>15</sup> For many of these who actually want children, adoption is not a wholly satisfactory form of relief, principally because of the long delays,<sup>16</sup> and also because of the lack of fulfillment of the maternal urge and the absence of the inheritable characteristics of either spouse in the adopted child.<sup>17</sup> Artificial insemination, both AIH and AID has been used in such cases with a substantial degree of mechanical success and no unusual danger of infection or miscarriage.<sup>18</sup>

It has been estimated that 1,000 to 1,200 babies are conceived by artificial insemination each year in the United States, compared with approximately 4,000,000 children normally conceived.<sup>19</sup> There are probably 50,000 to 100,000 artificially inseminated individuals alive in the United States today.<sup>20</sup> Further, it is a captivating footnote to our modern age that, to the onetime personal and mystical preserve of the generative process the wonders of science lately have added the blessings of mass-production and the deep-freeze, with the establishment of institutions quaintly described as sperm banks.<sup>21</sup> In short, although it is difficult to gauge with accuracy the extent of artificial insemination, the conclusion may safely be drawn that "it has certainly increased enormously in the last twenty years" both in this country and in England.<sup>22</sup> This practical certainty compels a searching scrutiny of the position and future of this practice. It may be that "modern research in the physiology of human reproduction indicates that resort to it [artificial insemination] will become less and less necessary."<sup>23</sup> However, the legal consequences of AI, particularly those touching upon inheritance rights, are necessarily long delayed and, even were the practice wholly stopped immediately, there would remain a challenging legal problem of great potential complexity.<sup>24</sup>

15 Warner, *Artificial Insemination in Cases of Incurable Sterility*, PAPERS DELIVERED BEFORE THE SOCIETY OF MEDICAL JURISPRUDENCE 200, 201 (1954); cf. Davis, *The Problem of Sterility Today*, 1 AMERICAN PRACTITIONER 1 (1946); Cone, *Survey of Present Status and Problems of Sterility*, 37 TEX. J. MED. 20 (1941); Stone, *Fertility Services in Planned Parenthood Programs*, 10 HUMAN FERTILITY 9 (1945); FISHBEIN AND BURGESS, *SUCCESSFUL MARRIAGE* 80 (1955); PLOSCOWE, *SEX AND THE LAW* 113 (1951); 5 CURRENT MED. 33 (1958); Note, 3 WAYNE L. REV. 35 (1956).

16 See New York Times, April 5, 1952, p. 18, col. 1.

17 See Note, 34 IOWA L. REV. 658 (1949).

18 For example, 80 per cent success in AID attempts is reported in Haman, *Results in Artificial Insemination*, 10 OBSTET. AND GYNEC. SURVEY 306 (1955); and 74 conceptions, with 52 normal full-term deliveries, out of 116 artificial inseminations were achieved in a series of inseminations noted in 5 CURRENT MED. 33 (1958). See also, O'Rahilly, *Artificial Insemination—Medical Aspects*, 34 U. DET. L. J. 383 (1957), stating that most writers estimate a 60 - 80 per cent ratio of success in inducing pregnancy, with infections rare and with no unusual incidence of abortions.

19 Lang, *Artificial Insemination—Legitimate or Illegitimate*, McCalls, May, 1955, p. 60.

20 Prof. Ploscowe of New York University School of Law has estimated the number in 1955 at 50,000 in the United States, with at least 10,000 of them in New York City. New York Post, Mar. 28, 1955, p. 4, p. 18; Seymour and Koerner, *Artificial Insemination*, 116 J. AM. MED. ASSN. 2747 (1941); Note, 8 U. FLA. L. REV. 304 (1955); Israel, *The Scope of Artificial Insemination in the Barren Marriage*, 202 AM. J. MED. SCI. 92 (1941).

21 See, NEW YORK CITY SANITARY CODE § 112, impliedly regulating such banks.

22 PUXON, *Without Father Bred*, 102 SOLICITORS' L. J. 95 (1958).

23 Folsome, *op. cit. supra* note 9.

24 See Note, 8 IND. L. J. 620 (1953).

## II. LEGAL ASPECTS

In our discussion of the legal problems attendant upon AI, our inquiry will be limited practically to AID. AIH is free from virtually all legal difficulties, except, for example, the question of whether AIH is such a consummation of a marriage as to bar an action for annulment by the wife on the grounds of the husband's impotency. (This problem impinges on the subject of the legitimacy of AI offspring, and will be discussed below in that connection.) AID, on the other hand, is a wellspring of real and imaginary legal problems. Primary, of course, are the questions of adultery and legitimacy; of secondary importance are such matters as the liability of the inseminating doctor and the donor, the customary falsification of birth records, and possible subsequent inter-marriage of related offspring of the same donor.

### A) *Adultery*

The problem of adultery has been the most productive of litigation concerning AID. The first case in the world to take a definite stand on this point was *Orford v. Orford*,<sup>25</sup> where Justice Orde of the Ontario Supreme Court labelled AID as "a monstrous act of adultery," since it involved:

. . . the voluntary surrender to another person of the reproductive powers or faculties of the guilty person; and any submission of these powers to the service or enjoyment of any person other than the husband or wife comes within the definition of adultery.<sup>26</sup>

In the court's view, the essence of adultery lies not in any "moral turpitude" or in the actual physical congress, but rather in the fact that:

. . . in the case of the woman, it involves the possibility of introducing into the family of the husband a false strain of blood. Any act on the part of the wife which does that, would, therefore, be adulterous.<sup>27</sup>

It should be noted, however, that this resounding pronouncement was not necessary to the decision of the case. The suit was one brought by the wife for support. The husband's defense in effect asserted that his wife had committed adultery by submitting to AID without his consent and that she therefore was not entitled to support. The court found as a fact that a child had been born to the wife, not through AID, but through quite ordinary adultery. The court could have rested with that finding, but chose to elaborate its view of the law on the novel subject of AID and to assert that, even had there been AID and not common adultery, the wife would have been equally an adulteress.

In the intervening years, the theory of the *Orford* case has not gained a commanding position. A dictum by Lord Dunedin, in the English case of *Russell v. Russell*<sup>28</sup> that the essence of adultery is not intercourse but rather "fecundation ab extra", was seized upon by adherents of the *Orford* decision as a confirmation of their view. However, the question of AID was in no way involved in the *Russell* case; rather the court was discussing a problem arising from actual physical insemination.

<sup>25</sup> 49 Ont. L. R. 15, 58 D.L.R. 251 (1921).

<sup>26</sup> *Id.* at 258.

<sup>27</sup> *Ibid.*

<sup>28</sup> A.C. 687, 721 (1924).

The next significant case, and the first American one, was *Hoch v. Hoch*,<sup>29</sup> where, on facts similar to those in the *Orford* case, Judge Feinberg came to a contrary conclusion. The court granted the husband a divorce because the wife had committed adultery in the usual way; but, the court ventured the opinion that, if the wife had proven her contention that she had submitted to AID, and had not committed ordinary adultery, she could not be divorced, that is, that AID would not be such evidence of adultery as to constitute grounds for divorce.

In 1948, Justice Greenberg of the Supreme Court in New York County, delivered the celebrated dictum that a child born by AID is as legitimate as "a child born out of wedlock who by law is made legitimate upon the marriage of the interested parties."<sup>30</sup> The legitimacy aspects of the case will be treated below. It should be observed here only that the court's equation of an AID child with one "born out of wedlock" implicitly acknowledges that an AID impregnation is extra-marital in nature. If the court's analogy is correct, it is difficult to see why the wife's submission to AID is not adultery, in some non-technical sense of the term.

In 1954, Judge Gorman of the Superior Court of Cook County, Illinois, rendered a ringing declaratory judgment in the case of *Doornbos v. Doornbos*.<sup>31</sup> The court declared that, while AIH is wholly unobjectionable in law, AID is contrary to public policy, is adultery on the part of the wife, and a child so conceived is illegitimate; as an illegitimate, the child is the mother's alone, and the husband can have no interest in the child. An appeal was dismissed by the appellate court without discussion of the question of AI.<sup>32</sup> The *Doornbos* case is the nearest thing we have to an American decision squarely on the adultery and legitimacy aspects of AID.

Later, and on the European scene, in 1956, the Civil Court of Rome is reported to have held AID to be adultery.<sup>33</sup> Even more recently, The Court of Session in Scotland has held squarely to the contrary, that is, that AID is not adultery and that therefore no divorce can be granted solely upon that basis.<sup>34</sup>

In all this confusing welter of decisions, none is a judgment of an authoritative court of final jurisdiction. Without such a definitive determination, the task of forecasting the law becomes less a matter of projection of precedents and more one of analysis of root concepts and policies. Such an analysis will demonstrate that AID, whatever its attendant evils, and whatever the desirability of its restriction, cannot properly be brought within the accepted definitions of adultery.

The position of the *Orford* court, that any surrender of the reproductive faculties is adultery, is at variance with the usual common law and statutory

<sup>29</sup> Unreported, Cir. Ct., Cook County, Ill. (1948); see *Chicago Sun*, Feb. 10, 1945, p. 13, col 3; *Time*, Feb. 26, 1945, p. 58.

<sup>30</sup> *Strnad v. Strnad*, 190 Misc. 786, 78 N.Y.S. 2d 390 (Sup. Ct., 1948).

<sup>31</sup> No. 54 S. 14981, Super. Ct. Cook County, Dec. 13, 1954, 23 U.S. L. WEEK 2308 (1954).

<sup>32</sup> 12 Ill. App. 2d 473 (1955).

<sup>33</sup> *Hahlo, Some Legal Aspects of Human Artificial Insemination*, 74 So. AF. L. J. 167 (1957), citing *Rand* (So. Africa) *Daily Mail*, July 16, 1956.

<sup>34</sup> *MacLennan v. MacLennan*, 1958 S.L.T. 12 (1958).

definitions of adultery, which require physical connection.<sup>35</sup> This element of personal physical connection seems to be necessary, whether the issue arises in a prosecution for adultery,<sup>36</sup> or in a civil matrimonial action.<sup>37</sup>

It is a reflection of the fact that AID generates many of the evils of adultery, particularly as an introduction into the family unit of the child of another man, that many commentators, and leaders outside of the legal profession, have proposed that it should be treated as adultery. For example, the Commission appointed by the Archbishop of Canterbury in its report, *Artificial Human Insemination*<sup>38</sup> states: "It seems to us that adultery involves the surrender of the reproductive powers or the organs of generation, whether capable of actual generation or not."<sup>39</sup> Where the *Orford* decision, in its emphasis upon surrender of the reproductive faculties, would arguably require an ability to procreate before such adultery could be committed, the Commission would slam and bolt the door upon that equivocation and would treat AID as adultery, even if the wife were barren. Similarly, a Catholic priest has proposed a definition of adultery as "any voluntary surrendering to another person of the reproductive powers or faculties of the guilty party for those acts which are apt in themselves for the generation of children."<sup>40</sup> Such attempts to extend the definition of adultery are sober reactions, based upon a well-grounded fear. AID introduces a spurious heir; it is, if disclosed, productive of social stigma; it can unsettle the normal stability of the family unit; and it can lead to a transference of the wife's affections to the anonymous donor.<sup>41</sup> None of these consequences will evaporate simply because the intrusion by the donor is with the husband's consent. These injurious results of the practice are good reasons for its restriction or prohibition. However, they do not warrant, and do not require for their prevention, a novel reconstruction of the settled concept of adultery:

Rather, it should be conceded that AI is a wholly new character in the drama of the law. It should be treated as such. Any attempt to fit AID into the pre-cast mold of adultery is bound to involve us in contradictions and absurdities. For example, if the donor has died before the wife is impregnated with his seed (such can happen where a "sperm bank" is used), the wife would be in the anomalous situation of committing adultery with a dead man, a ludicrous notion; or the impregnation of the wife with a mixture of seed from her husband and from the donor, a common technique, could arguably result in the commission by the wife of adultery with her husband, particularly if the husband were not wholly sterile and if it therefore were

<sup>35</sup> *Commonwealth v. Moon*, 151 Pa. Super. 555, 30 A.2d 704 (1943); *Warner v. State*, 202 Ind. 479, 175 N.E. 661 (1930); in England, see *Dennis v. Dennis* 1955 P. 153; in Canada, see *Badineau v. Badineau*, 4 D.L.R. 951 (1924); see, e.g., N.Y. PENAL LAW § 100, defining adultery as "sexual intercourse of two persons."

<sup>36</sup> See, e.g., *Warner v. State*, *supra* note 35.

<sup>37</sup> *Johnson v. Johnson*, 78 N.J. Eq. 507, 80 Atl. 119 (1911).

<sup>38</sup> Bartholomew, *Legal Implications of Artificial Insemination*, 21 MODERN L. REV. 236 (1958).

<sup>39</sup> For a discussion of the various views on this point in the Netherlands, see Hahlo, *op. cit. supra* note 33.

<sup>40</sup> Petz, *Artificial Insemination—Legal Aspects*, 34 U. DET. L. J. 404, 413 (1957).

<sup>41</sup> See notes, 8 U. FLA. L. R. 304 (1955); and 9 S.C.L.Q. 232 (1956).

possible that his seed could accomplish the actual impregnation.<sup>42</sup> A far better approach would be to by-pass the concept of adultery and to treat AID as what it is, a new genus. Where its treatment as adultery would require the automatic imposition of the sanctions and evidentiary rules associated with adultery, an independent approach to AID would permit a fresh examination into the merits of the question, unfettered by a predetermination of the logically necessary results which would follow upon its definition as adultery. Such a technique would permit a fresh appraisal of the desirability, also, of attaching to AID, where the appropriate circumstances are present, the consequences now attendant upon such actions as fornication, seduction, rape, incest. The merits of various approaches to the problems raised by AI will be discussed below. For the present, suffice it to say that AID should not be included within the definition of adultery. The precision of language ought not to be so freely abused.

### B) *Legitimacy*

The legitimacy or illegitimacy of the offspring of AID is a question productive of much less difficulty than the problem of adultery. The matter of legitimacy in this context does not involve the potential casuistry of exact definition to the extent that that danger is found in the adultery question. Rather, the problem seems to be resolved largely as a deduction from general principles. Where a court approves of the practice of AID, legitimacy follows with little or no indulgence in finely-spun rationalizations. (Where the *Strnad*<sup>43</sup> court attempted the construction of a rationale, the attempt was hardly successful.) Conversely, if a judge is opposed to AID as a social institution, his denial of legitimacy follows practically as a matter of course with little actual reliance upon definition.

The judicial tone regarding AI apparently was set in 1883, when the first court ever to consider the general subject of AI (AIH in that case) condemned it as a practice "contrary to the natural law and which could constitute a veritable social danger." The court, the Tribunal of Bordeaux, in France, rejected in this case the suit of a doctor for a fee for the performance of AIH.<sup>44</sup> Subsequently, however, a Commission appointed by the Societe de Medicine Legale de France to review the matter, disagreed with the court's view of AIH as contrary to the natural law and a menace to society.<sup>45</sup>

In the next judicial pronouncement upon the subject, the German Supreme Court in 1908, employed the same method of reasoning to find AIH not adulterous cohabitation within the meaning of the German Civil Code, and declared an AIH child to be legitimate.<sup>46</sup>

<sup>42</sup> For a good discussion of these and other absurdities resulting from the treatment of AID as adultery, see Hahlo, *op. cit. supra* note 33.

<sup>43</sup> *Strnad v. Strnad*, 190 Misc. 786, 78 N.Y.S. 2d 390 (Sup. Ct., 1948).

<sup>44</sup> Glover, *op. cit. supra* note 7, at 44; see Koerner, *op. cit. supra* note 4.

<sup>45</sup> Glover, *op. cit. supra* note 7, at 44; see LoGatto, *Artificial Insemination, Legal Aspects*, 1 CATHOLIC LAW. 172 (1955).

<sup>46</sup> Bartholomew, *op. cit. supra* note 38, at 238.



These two cases were concerned with AIH and the rule announced by the German Supreme Court is generally accepted today, and properly so. When controversy concerns AID, more variables enter, but the approach is essentially the same process of an almost automatic deduction from an instinctive reaction.

In the much-quoted decision of *Strnad v. Strnad*,<sup>47</sup> the court was deciding a motion to fix the extent of the separated husband's right to visit the child who was in the mother's custody. The court held the defendant husband to be a fit visitor for the child, and stated that he was not deprived of the parental right by the fact that the child was the offspring of a AID consented to by the husband. The court held "that the child has been potentially adopted or semi-adopted by the defendant,"<sup>48</sup> and that the husband "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 circumstances would be entitled."<sup>49</sup> Although this is not, as some commentators have suggested, an equation by definition of AID with adoption, it is an attribution of the same results to each. As such, it would appear to run counter to the spirit of the formal adoption statute<sup>50</sup> which would not permit an implied adoption. In a gratuitous pronouncement upon the question of legitimacy, the court went further afield and stated that "the situation is no different than that pertaining in the case of a child born out of wedlock who by law is made legitimate upon the marriage of the interested parties."<sup>51</sup> To the contrary is the settled rule that the inter-marriage which will legitimize a child born out of wedlock is the inter-marriage of the mother and the natural father (here the donor);<sup>51a</sup> the mother's marriage to her husband would appear to be irrelevant to the automatic legitimation sought by the court. In reality, the court seemed to be essaying a new variation of the general rule, by referring to the marriage, not of a mother and a natural father, but of the "interested parties." This attempted new departure probably sprang from the court's instinctive distrust of, and distaste for, the weird legal and social problems generated by the new problem child of the law, as well as from a natural and laudable concern for the welfare of the innocent AID child.

The *Strnad* decision was eventually frustrated in effect. After the decision, the wife took the AID child to Oklahoma and refused the husband his visitation rights. An Oklahoma court upheld her position and apparently ruled that the child was illegitimate, was the child only of its mother, and that the husband had no visitation rights.<sup>52</sup> Justice Greenberg, in vindication of his earlier decree, thereupon held Mrs. Strnad to be guilty of contempt.<sup>53</sup>

47 *Strnad v. Strnad*, 190 Misc. 786, 78 N.Y.S. 2d 390 (Sup. Ct., 1948).

48 *Id.* at 391.

49 *Ibid.*

50 NEW YORK DOMESTIC RELATIONS LAW (Art. 7), § 110.

51 *Id.* § 24.

51a *Strnad v. Strnad*, 190 Misc. 786, 78 N.Y.S. 2d 390 (Sup. Ct., 1948).

52 Unreported; see 1950 Wis. L. R. 136 (1949), citing *Milwaukee Journal*, Aug. 6, 1949, p. 2, col. 3; Cf. *Caddy*, *op. cit. supra* note 2.

53 *Strnad v. Strnad*, 83 N.Y.S. 2d 391 (Sup Ct., 1948).

An equally decisive, but quite opposite, view was taken by the Superior Court of Cook County in the *Doornbos* case<sup>53a</sup> where Judge Gorman condemned AID, with or without the consent of the husband, as "contrary to public policy and good morals", and branded the offspring of AID as illegitimate. When we add to these, the 1956 judgment of the Civil Court of Rome,<sup>54</sup> holding AID to be adultery and the offspring to be illegitimate, we have virtually completed our canvass of the cases bearing immediately upon the question of legitimacy.

Collaterally, an English case in 1949<sup>55</sup> held that conception and birth of a child by AIH does not necessarily amount to such an approbation of the marriage by the wife as to stop her from seeking an annulment of the marriage on the ground of the husband's impotency.<sup>56</sup> In this case the annulment was granted to the wife, even though the result was that the child in question was made illegitimate. Society's abhorrence of the harsher effects of AI was swiftly demonstrated here by the reaction of Parliament. A statute enacted a few months later provided that any child who would have been legitimate if his parents' marriage were dissolved by divorce shall be legitimate even though the marriage is voidable and annulled.<sup>57</sup>

### C) *Related Problems*

No reported cases have been concerned with the theoretically perplexing problems collateral to the main issues of adultery and illegitimacy. For example, what can be done to, or for, the doctor who conducts the insemination? Would he be liable for malpractice if he were negligent? It is hard to see why he should not be. The Bureau of Legal Medicine and Legislation of the American Medical Association has reported that a doctor who performs an AID does run some risk of an action for malpractice.<sup>58</sup> Would he be liable for breach of warranty if the sperm were of inferior quality? Not only would this be difficult to prove, but one can envision disputes about the genetic "quality" of sperm which would do credit to a debate at a livestock breeders' convention. Would the doctor be subject to criminal prosecution for adultery? In theory, perhaps, but it is difficult enough to get District Attorneys to prosecute conventional adulterers, without using such a legal sledgehammer to liquidate the sociological gad-fly which is AID.<sup>59</sup> Where the AID is performed without the husband's consent, the doctor conceivably could be liable on the theory of interference with family relations and the wife could possibly be guilty of a fraud upon her husband. The procurement by the doctor of releases from the parties would not protect him against criminal prosecution and would prob-

<sup>53a</sup> 23 U.S.L. WEEK 2308 (Super. Ct., Cook County, Dec. 13, 1954).

<sup>54</sup> Hahlo, *op. cit. supra* note 33.

<sup>55</sup> R.E.L. v. E.L. 1949 P. 22; 1 All E.R. 141 (1949).

<sup>56</sup> See *G. v. M.*, 10 A. C. 171 (1885) or the English theory of approbation as a bar to annulment; *Slater v. Slater*, 1 All E.R. 246 (1953); *D. v. A.*, 1 Rob. Ecc. 279.

<sup>57</sup> 14 GEO. VI c. 25, S. 9 (1951); see opinion in *Bartholomew, op. cit. supra* note 38, at 236-237, that nothing in the statutory or common law of England makes AI per se illegal and that therefore AI itself is at the moment lawful in England.

<sup>58</sup> 147 J. AM. MED. ASSN. 250 (1951); see *Lo Gatto, op. cit. supra* note 45.

<sup>59</sup> This point is discussed in Ploscowe, *The Place of Law in Medico-Moral Problems: A Legal View II*, 31 N.Y.U.L. REV. 1238 (1956).

ably not be of much assistance to him in defending a civil action.<sup>60</sup> Finally, although this list is by no means exhaustive of theoretical bases of liability, the doctor could be guilty of fraud or forgery for knowingly registering the husband on the birth certificate as the father of the AID child. This possibility is of real significance, and such falsification presents a genuine threat to the reliability of public records.<sup>61</sup> Some doctors have adopted the practice of referring the case, after insemination, to another physician for actual delivery of the baby; the second physician, unaware of the AID, registers the husband as the father with no conscious falsification.<sup>62</sup> This practice, however, does not eliminate the fraud, but rather seeks to perpetrate it through the pen of an innocent agent.

One result of this falsification of records, and of the general secrecy enveloping AID, could be unwitting intermarriage between off-spring of the same donor. This likelihood has been discounted and ignored by some advocates of AID, but it is a problem of inevitably practical significance. Its solution would seem to require a modification of the confidential nature of the AID process; as a corollary, the imposition of professional and criminal sanctions upon all knowing parties to the fraud could have some deterrent effect. Lest it be thought that this is indulging in a flight of fancy, it should be noted that multiple donations by a single donor are quite common. There is record of at least one donor whose talents for vicarious generation were successfully exerted upon 35 women.<sup>63</sup> The frequency of donations may be accounted for, at least in part, by the indefatigable zeal of medical students, who are a frequent source of supply, and by the more prosaic fact that donors are generally paid.<sup>64</sup>

The donor himself is not entirely free from potential legal embroilments. It could be theoretically argued that he is guilty of adultery, especially if he is married and his own wife did not consent to his donating, but the same practical considerations militate against that in his case as in the case of the doctor. It is questionable whether, even in our frantic modern day, the advantages of remote control should be so extended to invade the traditional notion of adultery. Conceivably, the donor could be held to an obligation to support his offspring. This would appear to be a desirable result in principle, and would tend to reduce the broadcast procreation which can lead to incest and a general disregard for personal responsibilities. However, if the donor supports the child, would he not be entitled to custody of the child? Collateral to this would be the question of the AID child's right to inherit from the donor and the donor's right to inherit from him. Also, if the donor were to make a knowingly or negligently false representation to the doctor about his background and characteristics, he could be liable for the damage caused by

<sup>60</sup> Goldfarb, *Artificial Insemination—The Legal Viewpoint*, 7 SYRACUSE L. REV. 108 (1955).

<sup>61</sup> See Note, 32 WASH. L. REV. 280 (1957); Petz, *op. cit. supra* note 40.

<sup>62</sup> *Ibid.*

<sup>63</sup> Haman, *Results in Artificial Insemination*, 72 J. UROLOGY 557 (1954).

<sup>64</sup> See O'Rahilly, *op. cit. supra* note 18, at 387, commenting that, in this way, "Humanitarian masturbation, as one writer puts it, becomes onanistic prostitution."

his unrevealed defects.<sup>65</sup> In a different vein, there is the possibility that an unscrupulous donor who learned the identities of the recipients of his favor, might resort to blackmail; conversely, a donor could be a likely target himself for blackmail.

Statutes dealing with AI have been notable by their absence. The British statute<sup>66</sup> passed to counteract the *R.E.L. v. E.L.* decision, is one which deals indirectly with the problem. Another is Section 112 of the Sanitary Code of the City of New York,<sup>67</sup> which prescribes certain medical tests for the donor and would-be-mother, and requires the keeping of records. This last ordinance conveys a tacit approval of AID, but the extent of the approval appears less emphatic when we consider the unique provocation which led to its adoption. Dr. Weisman<sup>68</sup> relates that, in 1947, a number of physicians in New York City received this notice from an enterprising individual with a Bachelor of Science degree:

We offer semen drawn from healthy and investigated professional donors. Suitable types for your patients' specifications. Active specimens guaranteed and delivered daily. Confidential service — office hours 5:30 to 7 P.M.

There followed the name and address of the proprietor. As a reaction to this astonishing essay in human husbandry, the amendment to Section 112 was adopted.

Statutes directly dealing with AID have been proposed in at least six states,<sup>68a</sup> but none has been enacted. A fairly typical example of the sort of legislation which has been introduced is the New York Statute proposed in 1949<sup>69</sup> which would declare that a child born of AID with the "express or implied consent" of the husband is the "legitimate, natural child of both the husband and his wife for all purposes." Such a statute would solve the legitimacy problem, but not much else.<sup>70</sup> It is most probable that such statutes as the N.Y. City Criminal Court Act, Sec. 61, which illegitimizes children "begotten at a time when the husband is impotent" would apply to neither variety of AI. The transparent intent of such a statute is directed against the offspring of truly adulterous unions.

A unique Arizona statute<sup>71</sup> may have the apparently unintended effect of making an AID child the legitimate child of the donor, with full rights of inheritance:

A. Every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock, except that he is not entitled to the right to dwell or reside with the family of his father, if the father is married.

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<sup>65</sup> For liability for negligent statements, see *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922).

<sup>66</sup> 14 GEO. VI c. 25, § 9 (1951).

<sup>67</sup> NEW YORK CITY SANITARY CODE § 112.

<sup>68</sup> *Op. cit. supra*, note 3, at 98.

<sup>68a</sup> Indiana, Minnesota, New York, Ohio, Virginia, and Wisconsin.

<sup>69</sup> S. 811, 172nd Sess. (N.Y. 1949).

<sup>70</sup> See also the bill introduced in Virginia, S. 745, G.A. Sess. (1948).

<sup>71</sup> ARIZ. REV. STAT. § 14-206 (1921).

- B. Every child shall inherit from its natural parents and from their kindred heirs, lineal and collateral, in the same manner as children born in lawful wedlock.
- C. This section shall apply although the natural father of such child is married to a woman other than the mother of the child, as well as when he is single.

No reported cases have construed this statute in relation to AI. An unequivocal imposition of responsibility upon the donor, especially the financial responsibility of inheritance, may be the key to a swift, painless abolition of AID.

There are other incidental legal problems and possible developments, but this sampling should demonstrate that AI in general, and AID in particular, present a virtual no-man's-land replete with pitfalls. Any solution, statutory or otherwise, which failed to take into account these subsidiary questions would be seriously defective.

The reader may wonder why, if there are a substantial number of AIs performed each year, there have been so few cases bearing directly on the subject. One reason, of course, is the normal secrecy of the operation. Another is the influence of the rules of evidence. One of the most pertinent of these is the presumption of legitimacy, one of the strongest in the law.<sup>72</sup> Presumably, this would apply to an AID child. The Superior Court of Cook County, Illinois, in *Ohlsen v. Ohlsen*<sup>73</sup> so employed it in holding that conflicting evidence on the issue of whether a child had been born by AID was not sufficient to overcome the presumption. Therefore, the court was constrained to consider the child legitimate and was barred from an exploration of the merits of AID.

There are other inhibiting rules, such as that which forbids testimony by a husband or wife against the other on the issue of adultery in a marital action founded upon an allegation of adultery.<sup>74</sup> Also relevant are the recognized disability of a spouse to testify, without the consent of the other, to confidential communications made during marriage,<sup>75</sup> and the general incompetency of a spouse to testify to non-access during wedlock where the effect would be to show the illegitimacy of the offspring.<sup>76</sup> Through the operation of these adjectival rules, the incidence of litigation in this area is greatly reduced. Indeed, their effect may be so restrictive as to make the contrivance of arguments and solutions a mere academic exercise. However, evidentiary rules governing the marital relation are not uniformly recognized and applied and there are exceptions to them. For example, the pedigree exception to the hearsay rule<sup>77</sup> would seem to permit an AID child to testify to what his deceased relatives told him about his origin. Also, the physician-patient privilege may generally be waived by the patient or his estate, and

<sup>72</sup> *Matter of Matthews' Estate*, 153 N.Y. 443, 447, 47 N.E. 401 (1897); *Commissioner of Pub. Welfare v. Roehler*, 284 N.Y. 260, 30 N.E. 2d 487 (1940).

<sup>73</sup> Unreported, Nov., 1954; see 187 J. AMER. MED. ASSN. 1639 (1955); discussed in Note, 8 U. FLA. L. REV. 304 (1955); 32 WASH. L. REV. 280 (1957).

<sup>74</sup> See, e.g., N.Y. CIVIL PRACTICE ACT, § 349.

<sup>75</sup> *Ibid.*; N.Y. PENAL LAW, § 2445.

<sup>76</sup> *Chamberlain v. People*, 23 N.Y. 85.

<sup>77</sup> *Eisenlord v. Clum*, 126 N.Y. 552, 27 N.E. 1024 (1891).

would therefore not seriously inhibit a patient who desires to testify as to the confidential medical aspects of AI.<sup>78</sup> In short, the fact that the rules of evidence will reduce the amount of litigation concerning AI should not be an excuse to abandon an effort to arrive at a just and equitable solution for the problem. There have been litigated cases, and we can confidently expect more. This alone is enough to justify our inquiry.

### III. SOCIOLOGICAL FACTORS

Its sociological elements are inseparable from the other parts of the AI problem. It requires little exposition to emphasize the tremendous effect, for good or ill, that AID can have upon the heretofore impregnable family unit. AIH, of course, gives rise to practically no difficulty in this area.

The extent of the gulf between the opposite schools of social thought on AID can be readily seen from the statements of proponents of the varying points of view.

For example, the stand of those who approve of AID in a sociological context, is epitomized in the following illustrations.

An emphatic commendation is offered by one doctor in these words:

Only occasionally do problems arise in the home where a baby has been born of artificial insemination; the results are, in the main, excellent. The wife has given birth to her child, thus satisfying her maternal instinct; the husband has "fathered" a child and in the eyes of the world his virility has been established; the child experiences even more love than the ordinary child, since he had been sought eagerly and with much effort. In fact, all three members of the family comprise a happy home. The proof of such a state of contentment is evidenced by the fact that a large percentage of the couples return for a second baby to be conceived by this method.<sup>79</sup>

This opinion touches upon one of the central issues in AID, namely the effect for good or evil on the home into which the child is introduced. Another sociological writer amplifies this view by an averment that illustrations from other societies "indicate that it is possible for a society's family organization to operate in a stable fashion with the reproductive function partly outside."<sup>80</sup>

It can fairly be said that those who approve of AID emphasize, in speaking of its effect upon society, the blessings of unity and fulfillment which are brought to the barren family by the AID child. Naturally, opposite expressions are not lacking and are no less strongly held.

Unfortunately, there is here, in common with most heated controversies, a touch of radical extravagance on the part of some advocates and even practitioners of AID. For example, Dr. Joseph Fletcher, in his book *Morals and Medicine*<sup>81</sup> mentions a physician in England who had been artificially inseminating unmarried women and who justified it on the ground that "it is every woman's heritage to bear a child . . . artificial insemination provides the

<sup>78</sup> See N.Y. CIVIL PRACTICE ACT, § 352.

<sup>79</sup> Weisman, *op. cit. supra* note 3, at 98.

<sup>80</sup> Mangin, *op. cit. supra* note 13.

<sup>81</sup> (1954), at 103-104.

unmarried business woman with a decent and moral method of acquiring the children nature intended her to bear."<sup>82</sup>

A eugenic lament is heard from a medical source. A qualified physician states:

Physicians to the human race are, in comparison with physicians to dumb brutes, leagues behind in both scientific investigation and the successful practice of artificial insemination. To be sure, we are trammled by conventions, moral codes and frailties of human character, which never hinder the stockbreeder.<sup>83</sup>

If this conjures up discomfoting visions of official breeding stations and the like, the following suggestion from a prominent Australian lawyer will give you an uneasy feeling that time does march on and that perhaps 1984 will soon be with us in more ways than one. Mr. Ivor L. M. Richardson, in an article "Artificial Insemination" states:

Again, it is suggested (and Mr. Richardson seems to agree) that a government or government-approved social welfare agency is better fitted to decide whether or not artificial insemination is desirable in the circumstances and to select donors for a particular couple than is the family medical practitioner, though a medical practitioner should perform the actual impregnation.<sup>84</sup>

These examples of opinions supporting AID in its sociological aspects cannot pretend to be a thorough-going canvass. Rather, they appear to exemplify most of the favoring arguments, some patently well-intentioned and born of sober reflection, and others somewhat less temperate and hardly well-considered.

If AID's opponents among social thinkers, are lacking in the flamboyancy of some of their opposite brethren, they are deficient neither in ardor nor even in vehemence. The pragmatic arguments of the advocates of AID, to the effect that AID can cement an otherwise truncated family into an enduring unit, are particular subjects of attack.

The objection is stated in general terms as follows:

Children do not assure success in marriage just as the lack of them does not necessarily preclude it. . . . [I]t becomes evident that indiscriminating attempts to give children to the childless can in many cases produce results detrimental to the welfare of society.<sup>85</sup>

In a more particular vein, it has been stated by one medical authority:

It has been said by Farris and Garrison<sup>86</sup> that one reason why certain married couples seek artificial insemination is to conceal infertility. This indicates immediately that they are already experiencing difficulties in meeting and successfully coping with the realities of life.

<sup>82</sup> Your writer takes refuge in the immortal lines of Edgar Smith, as sung by Marie Dressler, in "Tillie's Nightmare":

"You may tempt the upper classes  
With your villainous demi-tasses,  
But Heaven will protect the Working Girl."

<sup>83</sup> Guttmacher, *The Role of Artificial Insemination in the Treatment of Human Sterility*, 19 BULL. OF THE N.Y. ACADEMY OF MEDICINE 576 (1943).

<sup>84</sup> 30 AUSTRALIAN L. J. 125, 128 (1956).

<sup>85</sup> Lamson, Pinard and Meaker, *Sociological and Psychological Aspects of Artificial Insemination with Donor Semen*, 145 J. AM. MED. ASSN. 1062, 1063 (1954).

<sup>86</sup> Farris and Garrison, *Emotional Impact of Successful Donor Insemination: A Report on 38 Couples*, 3 OBS. AND GYNEC, No. 1 (1954).

If they can not face and accept certain physical inadequacies, how can they expect to meet the additional problems presented by parenthood which presupposes that the individual is expected to have developed full emotional maturity? It suggests that they are avoiding reality and this neuropathic trait is so frequently associated with the psychoneurotic, the pre-psychotic and even the psychotic person. What chance would the resultant child have of obtaining full emotional maturity himself in a basically unstable environment?<sup>87</sup>

To the same effect is the statement by Dr. Ruth W. Berenda, psychoanalyst and former member of the Psychiatric Clinic of New York City's Domestic Relations Court:

When a couple adopt a child, they admit openly that they cannot have one of their own. But when they are the parents of an artificially inseminated child they often conceal the true facts and try to present a front of normality. The result — both a self-deception and a deception to the world — can be harmful to their relationship. . . . And I am not at all certain that most stable men would be willing to act as donors.<sup>88</sup>

A factual rejoinder to the claims of the AID advocates is found in a report in the Rand (So. Africa) Daily Mail of March 15, 1957, that the practice of AID "has been entirely suspended in New South Wales, Victoria and Queensland, because of family breakdowns and the grave religious and legal problems created."<sup>89</sup>

The most violent sociological attacks upon AID have been aimed at its alleged degrading influence on human dignity. For example, "It is hardly in keeping with the dignity of the human race to treat a man as if he were a stallion at stud. . . . It is well arguable that, from a wider point of view, divorce with all its evils is preferable to the saving of a few marriages by this means."<sup>90</sup>

A much vaunted feature of AID, as urged by its stronger advocates is the beneficial effect derived from the scientific selection of a donor of rigidly high moral, intellectual and physical standards. Doctor Guttmacher<sup>91</sup> would test the donor by asking himself: "Is that the kind of man whom I would like my daughter to marry?"<sup>92</sup> A caustic rebuke of professional donors in general is given by Father Kelly in reply:

If I had a daughter, I would not want her to marry a man whose sense of moral values was such that he would calmly enter a doctor's office or laboratory and ejaculate his semen into a glass jar for a sum of money.<sup>93</sup>

Other attacks have centered upon the dangers to society from unsettling public records through falsification of birth certificates<sup>94</sup> and the dangers to

<sup>87</sup> Bohn, *Artificial Insemination: Psychologic and Psychiatric Evaluation*, 34 U. DET. L. J. 397 (1957).

<sup>88</sup> Lang, *Artificial Insemination—Legitimate or Illegitimate?*, McCall's, May, 1955, p. 33, p. 62, cited in LoGatto, *op. cit. supra* note 45.

<sup>89</sup> Hahlo, *op. cit. supra* note 33.

<sup>90</sup> *Id.* at 176.

<sup>91</sup> See note 83 *supra*.

<sup>92</sup> Quoted in Kelly, *op. cit. supra* note 5, at 144.

<sup>93</sup> *Ibid.*

<sup>94</sup> See criticism by Dr. Geoffrey Fisher, Archbishop of Canterbury, N. Y. Times, Mar. 17, 1949, p. 13, col. 2.



the donor who is a father with neither the perquisites nor the responsibilities of parenthood.<sup>95</sup>

#### IV. RELIGIOUS AND ETHICAL ASPECTS

The division of opinion on the legal and sociological aspects of AI have their reflection, if not their basis, in its religious aspect. AIH seems to attract disapproval only from the Catholic Church and from some spokesmen of the Church of England.<sup>96</sup> AID, on the other hand, has given rise to a wide variety of divergent and contradictory views. For the sake of an orderly presentation, we will first glance at some representative Jewish statements on the subject, then examine the Protestant attitude and finally set forth the Catholic position.

Rabbi Benjamin Friedman, in a symposium on AI stated that:

There is no ecclesiastical synod in Judaism that has the power to impose its authority upon all Jews. Only the belief in God's unity, as expressed in "Hear, O Israel, the Lord our God, the Lord is One", has been unanimously accepted as a religious imperative. There is no one official Rabbinical pronouncement concerning the Jewish attitude toward artificial insemination.<sup>97</sup>

In further support of his disavowal of an official Jewish position on the matter, Rabbi Friedman refers to responsa (questions and answers) on the question which were prepared and presented in 1953 by two outstanding rabbinical scholars, Dr. Soleman B. Freehof, Rabbi of Temple Rodef Shalom, Pittsburgh, Pa., and Dr. Alexander Guttman, Professor at the Hebrew Union College, Cincinnati, Ohio. Rabbi Friedman concludes that "The Rabbis do not state authoritatively that the technique of artificial insemination is forbidden or permitted. Each Jew may accept or reject the conclusions tendered by these rabbinical authorities."<sup>98</sup>

However, this is not to say that rabbinical authorities are entirely silent on the subject. Rabbi Emanuel Rackman, President of the New York Board of Rabbis, has stated that<sup>99</sup> according to Jewish law, AID is not adultery and the offspring is legitimate, whether or not the mother is married.<sup>100</sup> But, he indicates that, since the donor is the natural father, and since intermarriage between offspring of the same donor would be incest, "AID has not been encouraged by rabbis."<sup>101</sup> Further, he verifies that, "Jewish criminal and personal status law creates no problems with regard to the alleged adultery of the AID mother or the legitimacy of the issue."<sup>102</sup> And, finally, Rabbi Rackman concludes:

That Jewish law is so much more liberal than Christian law is due to the fact that the two legal systems parted ways centuries ago with regard to their conceptions of illegitimacy. According to Judaism, the

<sup>95</sup> See Bohn, *op. cit. supra* note 87; see also the excellent analysis by Rev. Anthony F. LoGatto, *Artificial Insemination II; Ethical and Sociological Aspects*, 1 CATHOLIC LAW. 267 (1955).

<sup>96</sup> See Bezzant, *Artificial Human Insemination*, The Fort-Nightly, Feb., 1949, p. 78.

<sup>97</sup> 7 SYRACUSE L. REV. 96, 104 (1956).

<sup>98</sup> *Id.* at 105.

<sup>99</sup> *Morality in Medico-Legal Problems: A Jewish View* 31 N.Y.U.L. REV. 1205 (1956).

<sup>100</sup> Citing B. A. Uziel, *Mishpete Uziel, Even ha - 'Ezer*, No. 19.

<sup>101</sup> Rackman, *op. cit. supra* note 98, at 1209.

<sup>102</sup> *Id.* at 1209.

child of an unwed mother is not illegitimate. A child is illegitimate only when it is conclusively established that it was born of an adulterous or incestuous relationship, and since it is virtually impossible ever to prove that any conception is due to adultery or incest — for the husband is always presumed to be the father of his wife's children, even if he proves that he was on another planet for years — illegitimacy is a status that is more a threat than a legal reality.<sup>103</sup>

The Protestant positions on AID can be variously stated. For example, there is the attitude of Dr. Geoffrey Fisher, Archbishop of Canterbury, and official leader of the Anglican Church, who declared in 1949 that AID involves criminal perjury in the universal falsification of birth records which is attendant upon AID, endangers the moral security of the child, the family and society, and is contrary to Christian principles.<sup>104</sup>

A less dogmatic and quite favorable position is that of the Rev. Charles C. Noble who explains the Protestant attitude thus in the following excerpts:<sup>105</sup>

No one can or should speak for all Protestants. There are few, if any official announcements on the subject by the major Protestant denominations. Even if there were, their authority would be distinctly limited. Probably, there are as many opinions on artificial insemination among Protestant Christians as there are Protestants.

Nevertheless, a Protestant attitude can be suggested. We are open-minded toward, concerned about, and hospitable to the constructive possibilities which may be involved in artificial insemination.

This is a delicate field in which we must proceed with great caution and no great body of Churchmen would wish to set their seal of approval upon artificial insemination until a great deal more exploratory work has been done. Nevertheless, it would seem socially frustrating and morally reprehensible arbitrarily to block further efforts to discover the possibilities of this new hope in the lives of many childless couples.

I hazard these generalizations because it seems obvious that the sacredness of human life is not violated in any way by this reverent and careful induction of its beginning; that any couple sincerely desiring and needing to utilize AI will be furthering the expansion of God's love in a widening family circle; that frustrated men and women deeply longing for children will be able in this way to gain a fulfillment otherwise denied them; and that the free and responsible spirit should have an opportunity to utilize the advancements of science for the enrichment of the family of God if he so desires.

In a more cautious, and less laudatory vein, Professor Paul Ramsey of Princeton University, although he disapproves personally of AID as an "infraction of the pledge of ideal marriage," has written that:

AID is a far more responsible decision than ordinary adultery, and if some people want to make it a part of their marriages, I do not believe the law should prevent them. Laws certainly need to be devised for the protection of AID children.<sup>106</sup>

<sup>103</sup> *Id.* at 1210.

<sup>104</sup> *New York Times*, *op. cit. supra*, note 94, discussed in 34 *IOWA L. REV.* 658 (1949).

<sup>105</sup> *Artificial Insemination, The Religious Viewpoints: Protestant*, 7 *SYRACUSE L. REV.* 96, 101, 102, 103 (1956).

<sup>106</sup> *Freedom and Responsibility in Medical and Sex Ethics — A Protestant View*, 31 *N. Y. U. L. REV.* 1189, 1198 (1956).

Finally, let us hear from Dr. Joseph Fletcher, author of the provocative *Morals and Medicine*:

The claim that AID is immoral rests upon the view that marriage is an absolute generative, as well as sexual, monopoly; and that parenthood is an essentially, if not solely physiological partnership. Neither of these ideas is compatible with a morality that welcomes emancipation from natural necessity or with the Christian ethic which raises morality to the level of love (a personal bond) above the determinism of nature and the rigidities of the law as distinguished from love —.<sup>107</sup>

To round out this sampling of the Protestant attitude, mention should be made of another pronouncement of the Archbishop of Canterbury, leader of the Anglican Church, that AID is adultery<sup>108</sup> and also of the judgment of his specially appointed commission which in 1948 condemned AID and said that AID without the husband's consent should be sufficient ground for divorce.<sup>109</sup>

The Catholic position admits of little or no equivocation. The Church has been on record against AI from at least 1897, when the Sacred Congregation of the Holy Office pronounced AI to be illicit.<sup>110</sup> We are fortunate in having a detailed analysis of the problem by the late Pope Pius XII in his Discourse to the Fourth International Congress of Catholic Doctors, conducted at Rome, September 29, 1949:<sup>111</sup>

1. The practice of this artificial insemination, when it concerns a human being, cannot be considered exclusively or even principally, from the biological and medical point of view, while ignoring that of morality and right.

2. Artificial insemination, outside marriage, is to be condemned purely and simply as immoral. The Natural Law and the Divine Positive Law lay down that the creation of a new life may be the fruit of marriage only. Marriage alone safeguards the dignity of the husband and wife (particularly of the wife, in the present case), and their personal welfare. Of itself, it alone provides for the welfare and upbringing of the child. Consequently, there can be no divergence of opinion possible among Catholics about the condemnation of artificial insemination outside marriage. The child conceived in these conditions by that very fact would be illegitimate.

3. Artificial insemination in marriage, but produced by the active element of a third person, is equally immoral, and, as such, to be condemned outright. The husband and wife alone have a reciprocal right over their bodies in order to engender a new life; and this right is exclusive, untransferrable, inalienable. This ought to be so too, from a consideration for the child. Nature imposes on the person, who gives life to a baby, the duty of its conservation and of its education, by very reason of the bond established. But no bond of origin, no moral and juridical bond of conjugal procreation, exists between the legitimate

<sup>107</sup> *Op. cit. supra* note 81, at 139.

<sup>108</sup> See LoGatto, *op. cit. supra* note 85, at 279.

<sup>109</sup> *Ibid.*; see also Note, 8 U. FLA. L. REV. 304 (1955).

<sup>110</sup> See Kelly, *op. cit. supra* note 5, at 136.

<sup>111</sup> As quoted by Rev. Gannon F. Ryan in 7 SYRACUSE L. REV., 99, 100, 101 (1955); see the helpful questions and answers prepared by Father Ryan *supra*; also valuable are the exposition by Kelly, *op. cit. supra* note 5, and the analysis by LoGatto, *op. cit. supra* note 95, at 279.

husband and the child who is the fruit of the active element of a third party — even in the case where the husband has given his consent.

4. As to the lawfulness of artificial insemination in marriage, let it suffice for the moment that We call to your minds these principles of the Natural Law: the mere fact that the result envisaged is attained by these means, does not justify the use of the means itself; nor is the desire of the husband and wife to have a child — in itself a very legitimate desire — sufficient to prove the legitimacy of having recourse to artificial insemination, which would fulfill this desire.

Pope Pius XII reaffirmed this position in a later address:<sup>112</sup>

To reduce the cohabitation of married persons and the conjugal act to a mere organic function for the transmission of the germ of life would be to convert the domestic hearth, sanctuary of the family, into nothing more than a biological laboratory. . . . The conjugal act in its natural structure is a personal action, a simultaneous and immediate cooperation of the spouses which by the very nature of the participants and the special character of the act, is the expression of that mutual self-giving which in the words of Holy Scripture, effects the union "in one flesh."

This is much more than the mere union of two life-germs, which can be brought about also artificially, that is, without the natural act of the spouses. The conjugal act, as it is planned and willed by nature, implies a personal cooperation, the right to which the parties have mutually conferred on each other in contracting marriage.

## V. RECOMMENDATIONS

Here your writer will advance what he believes to be a few prudent suggestions. Novelty or originality can hardly be claimed for them; nor would such a characteristic add anything to their merit. Supporting reasons will be advanced here only sketchily, if at all; otherwise there would follow a mere repetition of the body of this paper.

1. AIH should not be regulated specifically by legislation. The social danger is minimal and existing medical rules would seem to provide sufficient safe-guards for the cleanliness and integrity of the procedure.
2. The performance of AID, with or without the consent of the husband, should be made a criminal offense on the part of the doctor, or other implementing intermediary, and the donor. The certain increase in the likely occurrence of incest would be sufficient reason alone for such a prohibition. Statutory requirements of adequate disclosure and of official registration of the birth are not enough to prevent the secrecy which leads to incest even if they were enforced as strictly as possible; the impulse of privacy is too strong. In fact, even a personal criminal penalty for the act itself may not be an adequate deterrent; however, it is difficult to see what more could be done. If AID were made criminal on the part of the mother and her husband, that would have a harmful effect in inhibiting adoptions in those cases where AID might be performed in violation of the law or in states not prohibiting AID.
3. AID should not be declared to be adultery. Nor should AID without the husband's consent be made a ground for divorce. There is an

<sup>112</sup> Kelly, *op. cit. supra* note 5, at 136-137.

obvious difference between AID, replete though it is with its own dangers, and the clandestine personal relationship which alone, in New York at least, will legally sunder a marriage.

4. AID children should be declared by statute to be illegitimate, whether the AID was with or without the consent of the husband. This rule should have only prospective effect; the tangle which would result from a retrospective decree of the illegitimacy of the thousands of AID children, who are regarded as legitimate by their families and some courts, would be insoluble. A rule of illegitimacy would seem to be dictated by the inherently extra-marital nature of AID, and would bar the possibility of an unwanted, or at most a tolerated, intrusion by an AID child into the husband's inheritance pattern. In most states an illegitimate child can inherit only from its mother and presumably an AID illegitimate child could not inherit from the donor. If the husband wishes to provide for the child, he can do so by will or he can adopt the child. If an AID child were legitimate, there would seem to be no reason why a child born of a common adulterous union would not be legitimate, at least where the husband condoned the adultery. An extension of the concept of legitimacy to cover an AID child would make it wholly inexact.

5. Adoption procedures should be liberalized to permit greater secrecy and dispatch in the adoption of AID children. Even assuming the illegality of AID there should be a mechanism for adopting AID children already born and those who may thereafter be born in violation of the law or in states not prohibiting AID.

6. The falsification of birth records should be strictly prosecuted with criminal sanctions imposed upon all parties knowingly participating in the fraud. A proper birth record entry should be made a prerequisite for adoption of the AID child by the husband. As a practical matter, nothing can be done about the false entries already made, with the possible exception of a privilege to correct partially false entries without criminal liability. But, what if the corrected entries show a present husband and wife to be AID offspring of the same donor? Upon that note, and with a feeling that this is where we came in your writer respectfully throws in the towel.