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A PARTIAL SOLUTION TO LEGITIMACY PROBLEMS ARISING FROM THE USE OF ARTIFICIAL INSEMINATION*

ANDREW D. WEINBERGER†

GENERAL BACKGROUND

One out of ten married couples in the United States cannot have children in the usual manner.¹ Many of these two million families² would like to adopt children, but the privilege is available only to a selected few. In 40 per cent of the reported cases of infertility, the fault is the husband's sterility.³ In the United States, some 100,000 families, it is estimated, have had children through the medical procedure of artificial insemination (AI). While there have been no definitive surveys, it is estimated that in from 33-1/3 per cent to 66-2/3 per cent of the attempted procedures, the semen used is that of the husband (AIH).⁴ In the majority of the remaining cases, the semen is that of an anonymous donor (AID).⁵ In a small minority of artificial insemination cases, the semen of the donor is mixed with that of the husband.⁶

The technique of AI is an old one. In the late 18th century, Dr. John Hunter, in England, reported the artificial insemination of a wife with the semen of her husband who could not impregnate her by the usual means because of hypospadias (the urethral opening occurring on the underside of the penis). In 1866, Dr. J. Marion Sims, in the United States, with indifferent success effected a series of 55 inseminations with the husband's semen; he later repudiated his work as immoral. Insemination by the use of a donor's semen achieved recognizable status with the work of Dr. Robert L. Dickinson commencing in 1890. He established the practice and secured for it the acceptance it now has from

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1. Warner, *Problems and Treatment of The Infertile Couple*, 57 MEDICAL WOMAN'S JOURNAL 13 (1950).

2. STATISTICAL ABSTRACT OF THE UNITED STATES—1959, Table 39.

3. Warner, *Artificial Insemination*, 51 MEDICAL WOMAN'S JOURNAL 17 (1944).

4. Artificial insemination homologous. But conception occurs in very few, perhaps 6%, of these cases.

5. Artificial insemination heterologous.

6. Guttmacher, *Test-Tube Paternity*, *The Nation*, Mar. 29, 1958, p. 269.

the medical profession.⁷ While these are the first reports of the use of artificial insemination among human beings,⁸ there is a third century Talmudic document discussing hypothetically the status of a woman who had become impregnated by unknowingly bathing in water in which semen had been deposited. The Rabbi held that the woman was blameless,⁹ and as there is no illegitimacy of children under Hebraic law unless the mother is guilty of either adultery or incest, the status of the child was not questioned.

The number of cases in which artificial insemination is used as contrasted to the number of childless families is not a proper index of society's need or desire for the procedure. There is a limitation on the use of AI, for while AIH poses no legal problems, courts throughout the world have variously held that AID, both with and without the husband's consent, is adultery and is not adultery, that the child is illegitimate and legitimate in a qualified way, and in at least one jurisdiction illegitimate even as to the wife,¹⁰ that it is and is not grounds for divorce as adultery, and that the right of the husband as to custody or visitation is questionable.

The Roman Catholic Church has vigorously condemned AID as an unnatural and illicit act outside of the marital obligation. This was first declared by the Sacred Congregation of the Holy Office in 1897, and affirmed by Pius XII in 1949 in an address to the Fourth International Convention of Catholic Physicians¹¹ and again in 1956 in addressing the Second World Congress on Fertility and Sterility.¹² It has since been reiterated by numerous Catholic scholars.¹³ The Church has condemned

7. See, Kleegman, *Therapeutic Donor Insemination*, 5 FERTILITY AND STERILITY 7 (1954); Guttmacher, *The Role of Artificial Insemination in the Treatment of Sterility*, 120 A.M.A.J. 442 (1942).

8. Artificial breeding of animals was reported as early as 1322 when an enemy Arabic tribe secretly inseminated a pure strain of valuable Arab mares with semen from inferior stallions. The Russians employed AI with sheep and cattle, and the Danes and English employed it extensively with dairy cattle. Yet, in 1938 when the New Jersey Artificial Breeders Cooperative was established, artificial insemination of dairy cattle in the United States amounted to only a 100-cow experiment. In the year 1957, six and a half million, or one-third of the cows milked in the United States, were artificially bred. Parenthetically it may be noted that it has helped to bring a 20% increase in milk production from 22% fewer cows. N.Y. Times, Mar. 16, 1958, p. 1. Also see MILK MARKETING BOARD OF ENG., BREEDING 10,000,000 CATTLE (1959).

9. *Supra* note 7.

10. In New York a woman's illegitimate children cannot inherit in case of intestacy when she also leaves legitimate children. Also, the child cannot inherit from the putative father nor can the latter inherit from the child. N.Y. DECED. EST. LAW § 83, subsect. 13.

11. Kelly, *AI—Theological and Natural Law Aspects*, 33 U. DET. L.J. 135 (1956).

12. N.Y. Times, May 20, 1956, p. 14.

13. See particularly, Hassett, *Freedom and Order Before God: A Catholic View*, 31 N.Y.U.L. REV. 1170, 1178 (1956). For a complete discussion of the legal effect and

AIH also, when illicit means, such as masturbation, are used to obtain the husband's semen. Where, however, mechanical means, as the use of a cervical spoon, are employed to transfer the husband's semen from the vagina to the uterus, the procedure is permissible. It is also allowed where the husband's semen is collected without ejaculation or in a perforated condom used in sexual intercourse.¹⁴

The Anglican Church¹⁵ and the German Evangelical Church¹⁶ have strongly condemned AID but neither has opposed AIH. The Swedish Church has also condemned AID,¹⁷ and in 1958 the Moslem Indonesian Council advised the Health Ministry of Indonesia that AID must be forbidden.¹⁸ While there is no official Jewish or Protestant position, leading spokesmen for both groups have said that it is an individual matter resting solely with each person's conscience.¹⁹ As one Protestant minister put it: "AID is a far more responsible decision than ordinary adultery and if some people want to make it a part of their marriage, I do not believe the law should prevent them."²⁰ Were it not for the uncertain and drastic legal consequences and for the prohibitions of both AIH and AID by the Catholic Church and of AID by the Anglican Church, undoubtedly the use of AI would be more general.

Adultery has always been defined as the voluntary sexual intercourse of a married person with someone other than the offender's wife or husband.²¹ In some jurisdictions, in a criminal proceeding, the paramour is also guilty of adultery even though unmarried.²² No one contends that AIH is adultery. It would seem equally clear that AID could not constitute adultery as the necessary element of sexual intercourse is lacking. But the courts have not proceeded on any such simple reasoning.²³

social consequences of AI in Catholic Latin America and Spain see Flores, *La Inseminacion en la Especie Humana*, XXI CRIMINALIA 343 (Mexico, D.F. 1955).

14. Kelly, *supra* note 11 at 139; See Hassett, *supra* note 13.

15. Manchester Guardian, Feb. 27, 1958, p. 6.

16. Fromm, *Artifizielle Insemination*, 44 ARZTLICHE MITTEILUNGEN 989 (1959).

17. Kleegman, *supra* note 7.

18. N.Y. Post, Oct. 4, 1958, p. 23.

19. Parman, *Morality in Medico Legal Problems: A Jewish View*, 31 N.Y.U.L. REV. 1205, 1208 (1956); Ramsey, *Freedom and Responsibility in Medical and Sex Ethics—A Protestant View*, 31 N.Y.U.L. REV. 1189, 1197 (1956).

20. Ramsey, *supra* note 19.

21. BLACK, LAW DICTIONARY (4th ed. 1951); BOUVIER, LAW DICTIONARY (cent. ed. 1948).

22. MASS. ANN. LAWS ch. 272, § 14 (1956).

23. For an excellent discussion of the reasons underlying the requirement that sexual connection be a necessary element of adultery, see, Note, *The Socio-Legal Problems of Artificial Insemination*, 28 IND. L.J. 620 (1952), in which the writer's thesis is that AID with the husband's consent will be deemed adultery by those to whom the introduction of a foreign genetic inheritance seems more reprehensible than promiscuity. And, he says, it is not adultery in the concept of those to whom adulterous conduct is a greater social wrong than the introduction of an outside strain in the husband's de-

In only two cases in the United States has the question of adultery through AID been squarely raised. Even though both cases were in the same jurisdiction, Illinois, the courts reached opposite conclusions. One can only speculate as to the courts' rationale since the decisions are not reported. In *Doornbus v. Doornbus*,²⁴ the Superior Court of Cook County, in granting a divorce, held that a child conceived by AID *with the husband's consent* was illegitimate, that the husband was not entitled to any visitation rights, and that the wife was guilty of adultery. This conclusion was reached despite the condonation of the wife's action by the husband's consent. But in *Hoch v. Hoch*,²⁵ the Circuit Court of Cook County held that AID *without the husband's consent* was not adultery constituting grounds for a divorce. This is a sound decision for the simple reason that while there was no consent, there also was no sexual intercourse. There is no reconciling *Doornbus* with *Hoch*.

In 1958 the High Court of Sessions of Scotland in *MacLennan v. MacLennan* held that a wife who had a child by AID without her husband's consent had not committed adultery.²⁶ This brought about a debate in the House of Lords on a motion that AID was tantamount to adultery.²⁷ No action resulted from the debate as had none upon the 1953 report of The Royal Commission on Divorce. Finding that the use of AID with or without consent was not adultery under the law, the Commission recommended legislation that it be declared adultery when the husband had not consented.²⁸ In 1959, an Italian appellate court ruled that AID without the husband's consent was adultery within the purview of the criminal statutes. This was the first such prosecution in an Italian court and is now on appeal to the Corte di Cassazione, Italy's supreme court.²⁹

A Canadian court in *Orford v. Orford*,³⁰ in a lengthy dictum, as-

scendants. See, Holloway, *Artificial Insemination: An Examination of the Legal Aspects*, 43 A.B.A.J. 1089 (1957); Comment, *Artificial Insemination: A Parvenu Intrudes on Ancient Law*, 58 YALE L.J. 457 (1949); Koerner, *Medicolegal Considerations in AI*, 8 LA. L. REV. 484 (1948).

24. 23 U.S.L. WEEK 2308 (1954).

25. Time, Feb. 26, 1945, p. 58.

26. [1958] Sess. Cas. 105. Lord Wheatley, the trial judge, holding that artificial insemination was not adultery because adultery implies sexual intercourse, granted the defendant wife an adjournment to produce proof of the time and place of the artificial insemination. Puxon, *Without Father Bred*, 102 SOL. J. 95 (1958); 166 A.M.A.J. 1350 (1958); N.Y. Herald Tribune, Jan. 11, 1958, p. 3. She declined to do so and her husband secured a divorce by default. N.Y. Post, Jan. 29, 1958, p. 3.

27. N.Y. Times, Feb. 27, 1958, p. 31; Manchester Guardian, Feb. 27, 1958, p. 6. Also see Manchester Guardian, Feb. 26, 1958, p. 6.

28. Puxon, *supra* note 26.

29. In re Carla Casarotti Faedda, N.Y. Times, Feb. 17, 1959, p. 8. Also see II Tempo (Rome), January 15, 1960, p. 9.

30. 49 ONT. L.R. 15, 58 D.L.R. 251 (1921).

served that AID without the husband's consent was adultery. The wife had contended that the child she delivered during a separation from her husband was conceived through artificial means. The court found that there had been no artificial insemination and that she had in fact had adulterous intercourse. While nothing further was required for a determination of the case, the court said:

[T]he essence of the offence of adultery consists, not in the moral turpitude of the act of sexual intercourse, but in 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 the wife comes within the definition of "adultery. . . ." Sexual intercourse is adulterous because in the case of the woman it involves the possibility of introducing into the family of the husband a false strain of blood. Any act on the part of the wife which does that would, therefore, be adulterous.³¹

This definition of adultery is completely at variance with the well-recognized common law definition, and it contains contradictions within itself.

There appears to be a tendency in recent years for English courts to find adultery even where there is no sexual intercourse. In *Russell v. Russell*,³² one of the appellate judges stated in dictum that the wife, who had been impregnated by a paramour (not AI), had committed adultery even if there had been no sexual connection as she claimed. And in 1954, another English court found that where the sexual intimacies between the plaintiff's wife and a third person had not extended to sexual intercourse, adultery was nevertheless committed.³³ These English decisions equate adultery with aggravated sexual infidelity, even if not accompanied by sexual connection. This may well be the result of the pressure on reason and credulity created by the existence of rigid divorce laws.

In many jurisdictions, adultery is a criminal offense and the spouse's condonation is no defense to a prosecution. If the definition of adultery proposed in *Orford* is accepted, prosecuting attorneys will be faced with a host of new problems arising out of the utilization of AID. Certainly the wife as well as the donor will be guilty of adultery. But what

31. *Id.* at 22, 58 D.L.R. 258.

32. [1924] A.C. 689, 720.

33. *Sapford v. Sapford*, [1954] 2 All E.R. 373.

of the administering physician who was, one might say, the catalyzing agent? And if the offense consists of the surrender of the reproductive powers or faculties, might not a married donor be liable even before his semen is utilized?³⁴

Allied to the question of whether submission to AID is adulterous behavior is whether the resultant child is legitimate. Assuming that the presumption of legitimacy, which is later discussed, is overcome because the husband is absolutely sterile or there is proof of lack of access because of either separation or the husband's impotence, the child would not under common law rules be legitimate, his natural parents not being married. Nor can advantage be taken of the legitimization statutes of the various jurisdictions, as these usually presuppose a post-natal marriage of the natural parents. Adoption procedures by the mother and her husband ordinarily cannot be employed since they generally provide for adoption by persons other than the parents or by a spouse to whom one of the parents was married after the birth of the child.

Only two courts in the United States have met this problem. In the first case, prior to the judicial separation of the parents, a child had been born after AID with the husband's consent. A New York court granted custody to the child's mother but held that her husband had rights of visitation on the ground that he had "potentially adopted or semi-adopted" the child. The court also said by way of dictum that the child was not illegitimate but that it was not passing on property rights or the propriety of AI.³⁵ In *Doornbus*, discussed above, the court's holding was to the contrary. Despite the husband's consent to AID, the child was declared illegitimate and the husband was denied visitation rights.³⁶

The husband's consent to AID therapy is a *de facto*, if not a *de jure*, adoption by conduct. The argument has been raised by some that per-

34. *Orford v. Orford*, *supra* note 30, raised the proposition that the physician could be guilty of rape or assault. But it would be a strange crime if committed upon a female of lawful age and sound mind who had given her consent.

35. *Strnad v. Strnad*, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948). Mrs. Strnad later established a domicile in Oklahoma, where in an undefended action the court granted her a divorce and sole custody of the child, with no rights of visitation to the husband. In no sense is this a determination of the legal effects of AI as the complaint was based not on the fact that the child was conceived by AID but on the husband's neglect and cruelty towards the wife. District Court, Oklahoma County, No. 62414-D, 1949, without opinion; 166 A.M.A.J. 645, 648 (1958); Note, 1950 Wis. L. Rev. 136.

36. *Doornbus v. Doornbus*, *supra* note 24. The Attorney General of Illinois intervened and appealed from so much of the decree as found the child illegitimate, but the appeal was denied on procedural grounds. 12 Ill. App.2d 473, 139 N.E.2d 844 (1956). In *Hoch*, *supra* note 25, since the court found that the AID was not adultery even though the husband had not consented, there was no determination as to the legitimacy of the child.

mitting the husband to appear on the birth certificate as the child's natural father creates fraud and raises the possibility of a marriage of half brothers and sisters.³⁷ This is no more likely than it is in cases of adoption in those jurisdictions which expunge a child's birth certificate and issue a new one in the names of the adoptive parents. Since society has accepted this risk rather than outlaw adoptions, it is not unreasonable for it to similarly recognize AID where the parents are selected not at random but with painstaking genetic care.

In some jurisdictions, even though a marriage is annulled, children of the marriage are legitimate and the court may require the husband to provide for their support and also for that of the wife.³⁸ But in those jurisdictions where an annulment voids a marriage as of its inception, there is created an additional question of the legitimacy of both AIH and AID children. In *R.E.L. v. E.L.*, an English court granted an annulment after five years of marriage on the grounds of the husband's impotence. The wife had been inseminated with the husband's sperm and had delivered a child. The court in granting the annulment said that it was not unaware that the decree may illegitimize the child.³⁹

One need not look further than the standards and evaluations of the adoption agencies to establish the preliminary requirements for a couple to be considered suitable for AI. The prospective parents should be mature, well-adjusted, and have a successful marriage. Under no circumstances should AI be allowed unless both the wife and the husband fully and equally desire it. As in adoption, AI should not be used to indulge the belief of the husband or wife that it would be "good for our marriage" or make one of the couple "a better wife" or "a better husband." The desire for possessing a child to love must be the sole motivation of the couple. After meeting these minimum requirements, a further evaluation may be made by the physician, a psychiatrist, or a qualified marriage counselor.⁴⁰

37. *Orford v. Orford*, *supra* note 30.

38. N.Y. CIV. PRAC. ACT §§ 1135, 1140.

39. [1949] P. 211, reported as *L. v. L.*, [1949] 1 All E.R. 141. In *Slater v. Slater*, [1953] 1 All E.R. 246, an English court granted an annulment for impotence after the parties had adopted a child following seven unsuccessful AID procedures. The court said that neither adoption nor AI waived the wife's right to an annulment. See Comment, 225 L.T. 69 (1958).

40. The literature is replete with discussions of the physician's responsibility in determining whether the prospective parents are emotionally adjusted to the husband's physical condition and to the prospect of conceiving a child through AID. See Kleegman, *supra* note 7 at 12, 14. Manchester Guardian Weekly, Feb. 13, 1958, p. 5; Guttmacher, *Test-Tube Paternity*, *The Nation*, Mar. 29, 1958, p. 269, 271; Guttmacher, *The Role of Artificial Insemination in The Treatment of Sterility*, 120 A.M.A.J. 442, 445 (1942).

AIH is medically indicated when the husband has live spermatozoa of adequate motility, but for one of a number of possible reasons cannot deposit it so that conception may occur. Principally these are paraplegia (a paralysis resulting from an injury to the spinal column)⁴¹ or hypospadias (the urethral opening occurring on the underside of the penis),⁴² and in rare cases ejaculation, not through the penis, but by a reflux of the sperm into the bladder.⁴³ In the instance of psychological impotence, generally it is believed that AID is contraindicated, that there would be psychological harm in its use, and that psychotherapeutic procedures should be followed.⁴⁴

AID is medically indicated when there is a complete absence of live spermatozoa and also when there is clinical sterility, as with a poor sperm count, coupled with a long history of failure to conceive. Though the use of AI is increasing, there is no general acceptance by the medical profession, who are aware of the moral and legal implications.⁴⁵ AID is also indicated in some marriages for genetic reasons such as a history of serious hereditary disease in the husband's family and in some instances of RH incompatibility between the wife and the husband.⁴⁶

AN AID PROCEDURE TO CONFORM TO THE PRESENT RULE OF LAW

In a great many of the cases in which AID is medically indicated,

41. See Warner, *Problems and Treatment of The Infertile Couple*, 57 MEDICAL WOMAN'S JOURNAL 13, 16, 22 (1950).

42. *Ibid.*

43. Hotchkiss, Pinto and Kleegman, *Artificial Insemination with Semen Recovered from the Bladder*, 6 FERTILITY AND STERILITY 37, 38 (1955).

44. Manchester Guardian Weekly, Feb. 13, 1958, p. 5.

45. But the only organized opposition that the present writer has found in the medical profession of any country is in Germany. Dr. Ernst Fromm, Präsident der Bundesärztekammer und des Deutschen Ärztetages, at the 1959 national conference of medical societies (62nd Deutschen Ärztetages) read reports from the Psychiatric and Neurological Association, the Gynecological Association, the Society of Legal and Social Medicine, the Society for Psychotherapy and Psychiatry and the Women's Medical Association, as well as statements from regional medical societies. Without exception, they called for the prohibition of AID with or without the husband's consent. The conference unanimously adopted a resolution condemning AID as violating the orderliness of marriage and as having medical, legal, psychological and ethical consequences which the physician could not anticipate but for which he was responsible. It also said that AIH was proper if both the husband and the wife consented and the procedure was performed by a physician. Fromm, *Artefizielle Insemination*, 44 ÄRZTLICHE MITTEILUNGEN 989 (1959). The resolutions of many of the medical societies and the discussion by Dr. Fromm made repeated reference to the immorality of artificial insemination of a woman without her consent and the impropriety of the therapy being administered by a layman. These concepts are so inconceivable that one can explain the necessity of their rejection in Germany (and nowhere else in the world) only because the procedures were seriously considered and perhaps even used during the Hitler era.

46. Warner, *Artificial Donor Inseminations (an Analysis of 100 Cases)*, 13 HUMAN FERTILITY 37 (1948); Guttmacher, *Test-Tube Paternity*, The Nation, Mar. 29, 1958, p. 269, 270.

the husband is clinically and not absolutely sterile. But the physicians practicing in the field of fertility and sterility have long recognized that their determinations regarding use of AID cannot be limited by medical considerations alone. A great deal of concern has been expressed about the legal status of the child and the legal dangers to the mother, her husband, the donor, and the physician. This legal confusion is the result of the law not having advanced to encompass the comparatively new medical and social practice of AI. Bills have been introduced in recent years in six States, Virginia, Indiana, Minnesota, New York, Wisconsin and Illinois, but none of them have come to a floor vote even when reintroduced in more recent legislatures.⁴⁷ The only statutory recognition that AI even exists is in the Sanitary Code of New York City (Section 112) adopted in 1947, which requires a comprehensive medical examination of the donor.⁴⁸

Absent new legislation, in the AID cases in which there is neither absolute sterility of the husband nor genetic fault in his spermatozoa, the following procedures⁴⁹ would obviate the possibility of illegitimacy:⁵⁰

47. Radler, *Legal Problems of Artificial Insemination*, 39 MARQ. L. REV. 146 n.3 (1955); GUTTMACHER, *BABIES BY CHOICE OR BY CHANCE* 273, 274 (1959).

48. Denmark, Finland, Norway and Sweden agreed in committee to recommend laws approving AID when the husband consents, and establishing the child as legitimate. (The report of the Danish committee received a mixed reception as it proposed laws governing the insemination of unmarried women). Innstilling fra Inseminasjonslovkomiteén, (Oslo, 1953). See 154 A.M.A.J. 779 (1954). Despite the recommendation, general support by the legal and medical professions, and the passage of seven years, no laws have been passed and none are pending.

49. In no medical procedure other than AI is the word "artificial" used. In all others, the procedure is referred to as "therapeutic," as in therapeutic abortion, physical therapy, psychotherapy, and drug therapy. AI is no more artificial and is as therapeutic as any of these procedures. This unfortunate phrase and its vulgarization to "test-tube babies" (nowhere in the procedure is a test tube ever used) has not been without its significance in both the general and the judicial reaction to AI. Very likely the word "artificial" came into use as the earliest AI procedures were with animals for eugenic reasons and not for therapy. It is recommended that AIH be known as therapeutic insemination (TI), that AID be known as therapeutic insemination donor (TID), and that where the procedure of fortification with the husband's semen is used, it be known as therapeutic insemination husband fortification (TIHF). There is some history for this as there are a number of instances in the literature of the use by physicians of the phrase "therapeutic insemination."

Very interesting is the work of Dr. Samuel Rozin of the Hadassah University Hospital in Israel, who published a preliminary report in XVII ACTA MEDICA ORIENTALIA, No. 1-2 (1958). He concludes that when a husband's spermatozoa of low motility from oligospermic (low count) semen were resuspended in a donor's spermatozoa free plasma (centrifuged from normal semen) they showed an increase in motility, and when used in therapeutic insemination, it produced pregnancy in two out of five cases. This research is being continued, and if the final determination accords with the preliminary findings, it will be a happy solution for many of the situations in which presently AID is medically indicated.

50. *Contra*, Tallin, *Artificial Insemination*, 34 CAN. B. REV. 1 (1951).

1. A determination that the husband is clinically and not absolutely sterile should be documented in the physician's file by the signed report of a well-qualified and recognized pathologist. It should fully state not only the laboratory findings but the conclusion that while conception by natural means or AIH is unlikely, it is possible. Consideration should be given to the advisability of having the report signed by two or even three pathologists. There is precedent for this in the common requirement that the consent of several physicians is required for therapeutic abortion or commitment to a mental institution.

2. The semen of the husband should be added to the donor's semen. The physician's file should show that this fortified semen was used in each of the inseminations if there was more than one. In addition, there may be statements in the file signed by the husband and the wife that they had intercourse within a specified short period following each artificial insemination.

3. The written consent of the husband and wife to AID now in common use should include clear reference to the above.

4. All the present practices should be followed as to anonymity of the donor, his compatibility as to physical attributes (including race but not necessarily nationality or religion), emotional and intellectual capacity, recognizable blood types, RH factor, and family medical history.⁵¹

This procedure first serves the psychological purpose of giving the husband a part in the child producing process. It is to be expected that the husband's emotional response to the child will at least equal that of one who becomes a father by adopting a child and in whose birth neither he nor his wife had a part.⁵² But most important is that the procedure brings into play the legal presumption of legitimacy with such force that it cannot be overcome. Under the old English common law rule, if the husband was within the four seas, a child born during coverture was legitimate even though the wife lived in open adultery apart from the husband. The presumption could be overcome only by proving the husband's impotency. While the Four Seas Rule was modified in 1732,⁵³ it is still the rule that the child is legitimate unless it is proven that the husband

51. Pommerenke, *Artificial Insemination: Genetic and Legal Implications*, 9 OBSTETRICS AND GYNECOLOGY 189 (1957).

52. There would be value in a comprehensive study of the emotional reactions of the parties to AI by a team composed of a psychiatrist, a gynecologist experienced in the field of sterility, and a psychologist with statistical training.

53. *Pendrell v. Pendrell*, 2 Strange 925 (1732).

had no access to the wife. It is immaterial that the wife committed adultery if the husband and the wife were together. Were it conclusively proven that the wife lived in open adultery for the normal 280-day period of gestation and for an additional long period before and after, and that the child's birth was registered by the mother and her paramour as theirs, nevertheless, if for one scant fraction of a day at approximately the calculated time of conception the husband had access to the wife, then the child is unquestionably legitimate. Cardozo, then Chief Judge of the New York Court of Appeals, stated the rule very simply:

If husband and wife are living together in the conjugal relation, legitimacy will be presumed, though the wife has harbored an adulterer. . . . It may even be presumed though the spouses are living apart if there is a fair basis for the belief that at times they may have come together.⁵⁴

CONCLUSION

AIH creates no legal disabilities for the child, the mother or the father. It is not adultery. The child is legitimate and the physician has not violated any statute. AID as ordinarily practiced today may result in the commission of adultery by the wife and even by the physician and donor, illegitimacy of the child, and a denial of parental rights to the husband. But where the husband is clinically though not absolutely sterile and his semen is mixed with that of a donor, by force of the presumption of legitimacy the child is that of the wife and husband. Yet there is a remote possibility that the participation of the physician and the donor may be held to be adultery and that the wife may be liable to criminal prosecution for adultery, though the charge would be ineffective in a divorce action because of the husband's consent. Legislation should be adopted by all modern states declaring AID a lawful, therapeutic practice, defining the procedures, and establishing the participation of the wife, the husband, and the donor as lawful, and the child as legitimate.

54. *Matter of Findlay*, 253 N.Y. 1, 8, 170 N.E. 471, 473 (1930); Also see WIGMORE ON EVIDENCE, § 2527 (3d ed. 1940); *Segrue v. Crilley*, 329 Ill. 458, 160 N.E. 847 (1928); *Moore's Case*, 294 Mass. 577, 3 N.E.2d 5 (1936).

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