Notes

THE LEGAL STATUS OF ARTIFICIAL INSEMINATION: A NEED FOR POLICY FORMULATION

INTRODUCTION

The courts in the modern legal system are faced with perplexing problems to which easy answers are not available when the sciences are continually discovering new methods and techniques. The problem is based primarily on a legal system which draws from rules and regulations formulated at a time when future developments in the sciences were not and could not be foreseen. As a result, inconsistencies arise in court decisions which attempt to fit scientific achievements into a legal framework based on precedent. If the legal system is to respond to the current needs of a society surrounded by these new technological advances, the courts and legislatures must re-evaluate outmoded rules and definitions so as to fit these into the current framework of society. Such a re-evaluation is presented in the area of artificial insemination. Certainly public sentiment has a lot to do with any attempt to formulate a policy pertaining to artificial insemination. In all likelihood the legislature will have the burden of sifting through the varying attitudes of today's society so as to arrive at a policy statement on this perplexing problem. Little guidance is available from the court decisions since these have produced nothing but a broad spectrum of inconsistent results. Therefore, the purpose of this Note will be to investigate the problems presented by artificial insemination with which the legislative bodies and the courts will some day be faced. No easy answer is possible but through the use of the few court decisions, legal and medical commentaries, and the limited legislation to date, a foundation can be established upon which answers may be developed.

I. GENERAL BACKGROUND

Artificial insemination of humans (hereinafter A.I.) is a technique whereby semen is introduced in the vagina, cervical canal, or uterus of a wife by mechanical means for the purpose of inducing pregnancy.[1] There are three types of A.I. which are differentiated according to the source of the semen: (1) Homologous Artificial Insemination or Artificial Insemination Husband (hereinafter A.I.H.) uses the husband's semen; (2) Herterologous Artificial Insemination or Artificial Insemination Donor (hereinafter A.I.D.) uses the sperm of a man other than that of the husband *i.e.* third party donor; and (3)

[1] Dienes, *Artificial Donor Insemination: Perspectives on Legal and Social Change*, 54 IOWA L. REV. 253, 254 (1968) [hereinafter cited as Dienes]; Note, *Social and Legal Aspects of Human Artificial Insemination*, 1965 WIS. L. REV. 859 n.4.

Combination Artificial Insemination (hereinafter C.A.I.) uses the sperm from both the husband and a donor.[2]

A. *History*

The practice of A.I. in animals is not new. The earliest reported efforts of A.I. were by the Arabs breeding mares in the fourteenth century.[3] The scientific experimentation with animals continued through the eighteenth and nineteenth centuries but no practical significance was attributed to these discoveries until the physiologist Iwanoff published a work in 1907 based on his experimentation, concluding that there were real advantages in large scale use of A.I. in animal husbandry.[4]

A.I. was first reportedly used in humans by the English surgeon John Hunter who had supervised a successful A.I.H. in 1799, but this report received little attention in the medical circles.[5] In 1865 the first work on A.I. was published by De Haut; however, due to great public indignation, De Haut discontinued his experimentation.[6] In 1909 the first account of A.I.D. appeared, but again there was immediate public reaction.[7] However, though public sentiment against A.I.D. temporarily put it to rest, the medical profession began to take on interest.[8] As a result, twenty-four articles had been written on the subject in the United States by 1938.[9] By 1941 it was reported that of the doctors questioned, 9,489 pregnancies had occurred through A.I., including 3,510 by A.I.D.[10] Continuous interest and discussion has survived and increased to the present.

B. *Present*

Effective use of A.I. on a large scale has developed only within the last thirty years.[11] Currently it is a medical practice which occurs quite frequently. However, the extent to which it is used remains unknown due to the secrecy insisted on by the parties and carried out by the medical profession. Thus, only estimates can be used as to the number of people born through A.I. Authorities estimate that from 5,000 to 20,000 births occur annually in the United States as a result of A.I.D.[12] As to the total number of people born and

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2 Note, *Artificial Insemination*, 23 ARK. L. REV. 81 (1969).

3 Note, *Parent and Child: Legal Effect of Artificial Insemination*, 19 OKLA. L. REV. 448 (1966).

4 Note, *Social and Legal Aspects of Human Artificial Insemination*, 1965 WIS. L. REV. 859, 860 [hereinafter cited as *Social and Legal Aspects*].

5 *Id.*; *See also* Rubin, *Psychological Aspects of Human Artificial Insemination*, 13 ARCHIVES OF GENERAL PSYCHIATRY 2 (1965).

6 Rubin, *supra* note 5, at 2; *Social and Legal Aspects*, *supra* note 4, at 861.

7 *Social and Legal Aspects*, *supra* note 4, at 861.

8 *Id.*

9 *Id.*

10 Seymour & Koerner, *Artificial Insemination, Present Status in the U.S.A. as Shown by a Recent Survey*, 116 A.M.A.J. 2747 (1941).

11 Dienes, *supra* note 1, at 254.

12 *Id.* at 255; Guttmacher, *The Role of Artificial Insemination in the Treatment of Sterility*, 13 OBST. & GYNE. J. SURVEY 767, 769 (1960).

living through A.I., figures range from 50,000 to 250,000.[13] Although the practice of A.I. is not yet widespread and is generally limited to the better educated and higher income couples,[14] and though the numbers may be small, these factors do not mean that the problem is negligible. By examining the reasons for seeking A.I. and other dependent factors, the future of A.I. may hold in store an increase in its practice, an increase in the yearly birth rate of A.I. children, and an increase in the legal and social problems already existing in this area.

C. *Future*

If any policy is to be formulated on A.I., the question will depend on whether A.I. is likely to increase, remain stable, or decrease.[15] Consequently, two variables are involved and the questions they pose must be answered: (1) why do people use A.I. and (2) how many people are likely to be affected by the reasons for using A.I.[16] Generally, people use A.I. because of an inability or unwillingness to have a child normally and inability or unwillingness to use adoption.[17]

Inability to have children refers to sterility (defective or absence of sperm or ovum), impotency (inability to have intercourse), or physical defects preventing conception. Where impotency or a physical defect is present in either the husband or the wife, then A.I.H. (use of husband's sperm) is utilized, provided both the husband and wife are sufficiently fertile.[18] However, these problems are infrequent and A.I.H. has been only moderately successful.[19] Consequently, A.I.H. will probably remain relatively insignificant since the above are the only circumstances in which it may arise.

A.I. is no help to the sterile woman. When the husband is sterile, A.I.D. (use of donor's sperm) is the only form of A.I. available. A.I.D. is indicated when there is complete absence of live sperm in the husband or when there is a poor sperm count coupled with a long history of failure to conceive.[20]

A.I.D. is also indicated when there is an *unwillingness* to procreate naturally. This occurs when the husband's medical history shows a serious hereditary disease which may result in the death of any children naturally conceived with the husband's sperm, where there is RH-factor incompatibility between the husband and wife with repeated still-births, and where there is a

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[13] W. FINEGOLD, ARTIFICIAL INSEMINATION 58 (1964); Levisohn, *Dilemma in Parenthood: Socio-Legal Aspects of Human Aritficial Insemination*, 36 CHI.-KENT L. REV. 1, 3 (1959).

[14] Dienes, *supra* note 1, at 255.

[15] *Social and Legal Aspects*, *supra* note 4, at 862.

[16] *Id.*

[17] Note, *Human Artificial Insemination: An Analysis and Proposal for Florida*, 22 U. MIAMI L. REV. 952, 954 (1968) [hereinafter cited as *Human A.I.*].

[18] *Social and Legal Aspects*, *supra* note 4, at 863.

[19] *Id.*

[20] Warner, *Artificial Donor Insemination (An analysis of 100 Cases)*, 13 HUMAN FERTILITY 37 (1948).

definite history of insanity in the husband's family.[21] However, male sterility is the most prevalent condition resulting in the inability to have children which prompts A.I.D., with approximately ninety percent of the inseminations by A.I.D. being due to the husband's sterility.[22] Probably the small percentage of instances in which A.I.D. is used due to the unwillingness to procreate naturally can be attributed to the difficulty in predicting with certainty whether the husband's defect will be transmitted to the child.

It is estimated that ten to fifteen percent of today's married couples in the United States are childless.[23] This fact accounts for the belief that A.I.D. will increase in usage.[24] However, no reliable data is available to determine how many of these childless marriages are attributable to male sterility, but estimates range from ten to fifty percent.[25] As one writer graphically figures the implications of this, if there are 20,000,000 couples at child bearing age, the number of the couples that may possibly turn to A.I.D. due to male sterility is between 200,000 and 1,500,000.[26]

One important variable that will affect the future use of A.I.D. is adoption. Certainly, an unwilligness to adopt may prompt a turn to A.I.D. Therefore, the reasons as to why couples currently do not use adoption should be investigated and compared with the procedures involved in A.I.D.

The medical profession follows certain practices when dealing with A.I.D.: (1) complete anonymity between donor and recipient should be maintained; (2) a stable marriage between the couple should exist; (3) a physician should discourage A.I.D. and not perform it unless the couple has great enthusiasm; (4) no records on procedure should be kept; (5) the physician who inseminates should also deliver (this gives a bond of trust between physician and woman) and should accord paternity to the husband even though he knows he is not the biological father; and (6) professional charges should be kept at a minimum.[27] The donor is selected by the physician by matching the husband's physical and mental characteristics and blood type with that of the donor, who is usually a hospital intern.[28]

There are similarities between A.I.D. and adoption which should be noted: choosing is similar in that the husband and wife in both cases are evaluated for worthiness; a child is chosen in adoption while a third party donor is chosen for the insemination; there is an attempt to match the child to adoptive parents and in A.I.D. there is a selection of a donor with the characteristics of the husband; and there is inability to adopt or use the results of A.I.D. when the

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21 Weisman, *Symposium on Artificial Insemination—The Medical Viewpoint*, 7 SYRACUSE L. REV. 97 (1957).

22 *Id.*; *Social and Legal Aspects*, *supra* note 4, at 863.

23 Hager, *Artificial Insemination—Practical Considerations for Effective Counseling*, 39 N.C.L. REV. 217 (1961); *Social and Legal Aspects*, *supra* note 4, at 864.

24 *Human A.I.*, *supra* note 17, at 955.

25 *Social and Legal Aspects*, *supra* note 4, at 864.

26 *Id.*

27 Guttmacher, *Artificial Insemination*, 97 ANNALS. N.Y. ACAD. SCIENCES 623 (1962).

28 G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 110, 133 (1957).

prospective parents are unworthy or because a child or donor cannot be found.[29] However, these similarities are of no help in determining whether or not adoption will increase the use of A.I.D. in the future. This can be pointed out by showing the differences between adoption and A.I.D.

Many of the reasons for not using adoption cannot be known but some dislikes can be explained by showing the differences between A.I.D. and adoption. These differences are based primarily on the way the couples are evaluated and by the availability of adoptive children and donors. An unwillingness to adopt may be due to a dislike by the couple of the inquisitorial approach of the case worker, the formalities and extended proceedings such as the probationary period during which the child may be taken away, and the undesirable local publicity attending adoption.[30] Since adoption is highly institutionalized with established criteria applied by trained social workers and the agencies being extremely selective, A.I.D. is seen as a way of avoiding these dislikes for adoptive proceedings: in A.I.D. the choice of a donor is in the physician's discretion thus avoiding extended personal interviews; for guidance the doctor turns to the opinions of other medical men rather than social workers or psychologists; the availability of donors is not limiting, thus those denied adoption due to lack of proper children could turn to A.I.D.[31] A.I.D. offers other positive attractions besides avoiding the administrative flaws of adoption: A.I.D. satisfies the wife's maternal urge; the hereditary characteristics of the child are a product of the wife and a donor rather than of an unknown couple; and secrecy can be maintained thus allowing the husband to appear to be the virile father of the child.[32]

It is impossible to predict the impact of adoption on the future of A.I.D. but it can safely be said that the number of couples using A.I.D. will be reduced by the number of couples choosing adoption when they could also qualify for A.I.D. One major factor that may increase the use of adoption with the resultant effect of lessening the probability of any rapid increase in A.I.D. is the growth in the number of illegitimate children.[33] There would be more children available for adoption thus allowing a relaxation in the objectionable standards associated with adoption procedures.

If lack of knowledge is a major obstacle to the spread of A.I.D., this will be overcome only gradually.[34] However, as public awareness increases, the attitude towards A.I.D., shaped by public opinion, will become a most persuasive factor for the future of A.I.D.[35] Public attitude is currently in the formulative and developmental stage as is evidenced by the divergence of opinion on A.I.D. Hopefully a formulation will come from the expressions of

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29 *Social and Legal Aspects, supra* note 4, at 864.
30 *Human A.I., supra* note 17, at 954; *Social and Legal Aspects, supra* note 4, at 865.
31 *Social and Legal Aspects, supra* note 4, at 864-65.
32 *Human A.I., supra* note 17, at 954.
33 *Social and Legal Aspects, supra* note 4, at 865.
34 *Id.*
35 *Id.*

religious leaders, court decisions, legislatures, known personalities, studies, and the mass media.[36] Nevertheless, any dramatic increase in the use of A.I.D. does not appear likely, but the *potential* extent of its practice is substantial.

II. Psychological Aspects

Since the major problems inherent in A.I. pertain to utilization of A.I.D., the discussion hereinafter will be centered primarily upon A.I.D.

To determine attitudes towards A.I.D., the psychological aspects as they pertain to the couples utilizing the procedure must be taken into consideration. There is little direct evidence on the psychological aspects;[37] however, doctors emphasize the benefits which result from the use of A.I.D.: the unique emotional experience of motherhood with the joy of the couple at the child's birth, and the couples demonstrate satisfaction when they return for additional A.I.D. procedures.[38] Lack of litigation is said to show further proof that A.I.D. does not result in emotional disaster.[39] Some say that a child conceived by A.I.D. provides the necessary element for a stable marriage and that the lack of any biological relation between the husband and child is an insignificant factor.[40]

There are certain emotional risks which caution the use of A.I.D. The husband's emotional response to the knowledge of his sterility may result in a sense of guilt over his inadequacy, and the child may serve as a constant reminder of this fact which he cannot rationalize away.[41] The child may also remind the wife that she has given birth to a stranger's child and thus she may develop a sense of guilt or longing for the donor, while the husband may secretly harbor jealousy of the donor.[42] There are other possible problems which relate to the child's personality: the husband may blame his wife for any problems in the child's personality or characteristics, or the wife may claim exclusive credit for the positive aspects of the child's behavior or personality.[43] If the behavior of the child, the husband, or the wife leads to a family crisis, the child's status may be revealed and further problems could then arise.

There are potential problems for the child due to the possibility that he may discover his origin. If the child doubts his parentage, the couple could not alleviate these fears honestly and the child could possibly develop insecurity.[44] The child's welfare might be jeopardized if the husband and wife have a conflict due to A.I.D. which is serious enough for divorce. However, it must be

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[36] *Id.* at 865-66.

[37] Gerstel, *A Psychological View of Artificial Donor Insemination*, 17 Am. J. Psychotherapy 64 (1963).

[38] Weisman, *Symposium on Artificial Insemination: The Medical Viewpoint*, 7 Syracuse L. Rev. 96, 98-99 (1965); *Social and Legal Aspects, supra* note 4, at 866.

[39] *Human A.I., supra* note 17, at 955; *Social and Legal Aspects, supra* note 4, at 866.

[40] Comment, *Artificial Insemination: Confusion Compounded*, 3 Wayne L. Rev. 35, 42 (1956); *Social and Legal Aspects, supra* note 4, at 866.

[41] Bohn, *Artificial Insemination: Psychologic and Psychiatric Evaluation*, 34 U. Det. L.J. 397, 400 (1957).

[42] *Id.*

[43] *Human A.I., supra* note 17, at 956; *Social and Legal Aspects, supra* note 4, at 867.

[44] *Human A.I., supra* note 17, at 956.

remembered that the A.I.D. child is usually a wanted child who is the result of much planning and personal decision by the couple. There is nothing to indicate that the child does not become a loved member of the family.[45]

None of the above conflicting views are factually verified, but since A.I.D. is practiced and there is lack of evidence that A.I.D. results in psychological instability, this would infer that A.I.D. is not psychologically harmful. However, all prospective users of A.I.D. should be fully informed by competent counselors. A.I.D. is unlikely to correct emotional flaws and is probably indicated only when the marriage is stable enough to withstand the stresses which A.I.D. may cause. Because of its worthy aspects psychologically, A.I.D. should not be summarily dismissed.

III. Sociological Aspects

The sociological aspect deals with society's concern for the integrity of the family unit. The lack of empirical evidence makes it extremely difficult to determine whether the use of A.I.D. results in harmony of the family. However, lack of evidence on discord tends to confirm the belief that A.I.D. does not destroy the family.[46]

The problems which society must face when A.I.D. is used are: (1) A.I.D. introduces the new familial relationship of mother, husband, child, and donor; and (2) this new familial unit when created is normally concealed.[47] One major criticism of this new familial unit is that it introduces the possibility of incest because there may eventually develop a marriage between the A.I.D. child and another child of the biological father, but the statistical probability is too infinitesimal for this marriage to ever occur. Also, the same possibility of consanguineous marriage exists for some adopted children, however, such is not a product of the adoptive process since the natural parents have their names recorded.[48]

The reason for secrecy is that it is vital to create a family like other families. Disclosure would defeat the attainment of this goal. The donor and mother may become attracted to each other, the donor could become the object of the husband's jealousy, and the child's loyalties might then become divided.[49] To develop a normal family life would then be difficult. Since currently the A.I.D. child's status is uncertain, today's culture makes the couple avoid even limited disclosure of the child's origin.

The most important part of secrecy involves the legal status of the child since, in the absence of legislation, the A.I.D. child could probably be called illegitimate.[50] Consequently, though A.I.D. has its advantages, most couples

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45 *Social and Legal Aspects, supra* note 4, at 867.
46 *Human A.I., supra* note 17, at 956.
47 *Social and Legal Aspects, supra* note 4, at 868.
48 *Human A.I., supra* note 17, at 957.
49 *Id.* at 957-58.
50 *See* text accompanying notes 96-127 *infra.*

are unwilling to expose their child to the social stigma associated with illegitimacy.[51] The couple also desires to avoid the social stigma associated with male sterility and enjoy the recognition which usually accompanies childbirth.[52] There are further ramifications produced by secrecy. Anyone relying on the A.I.D. child as having characteristics of its apparent father are likely to be misled, such as medical histories for diagnosis, prediction or research.[53] Birth certificates are inaccurate. Along these same lines, concealing the A.I.D. child's biological father may cause deception not only on others but also on the child. Possibly, children rarely rely on the genetic characteristics of their parents in any specific sense, but the problem could become acute if the child believed himself to have a genetic defect of the husband which may have prompted the couple to use A.I.D.[54]

Secrecy and the arguments for concealment have a greater weight of persuasion since the dangers affiliated with secrecy are seemingly too remote to justify a threat to the A.I.D. child and the family welfare. However, secrecy will have its effect on public attitude and, as long as there is secrecy, society will probably regard A.I.D. with suspicion and dislike.

IV. Legal Status of Artificial Insemination

The primary and potential problems pertaining to A.I. deal with A.I.D. (donor). Therefore, the discussion will be focused primarily on A.I.D. with only brief comments on the legal ramifications of A.I.H. (husband).

A. *Issues Involved*

Numerous and varied issues arise under A.I.D. which to date have received confused and varied answers from both the courts and scholarly commentaries. However, these issues must be pinpointed if any workable solution is to receive a rational answer. It must be remembered that the basic premise to the problems engendered by A.I.D. revolves around five parties: the wife, husband, child, doctor and donor. With this in mind the following questions to A.I.D. can be formulated: is the woman who has produced an A.I.D. child an adulteress?; is the A.I.D. child legitimate for purposes of inheritance, support, custody and visitation rights?; what is the effect of the husband's consent?; does the doctor in placing the husband's name on the birth certificate as the natural father commit a fraud?; is the act of the doctor in performing A.I.D. a criminal act?; does a married donor commit adultery if the wife is an adulteress?; are there further liabilities placed upon the doctor and donor? These questions are not exhaustive but only indicative of further issues which may arise under A.I.D. Certainly, the marriage relationship between the husband and wife is put on tenuous grounds if conflict should later occur. As a result,

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51 *Human A.I., supra* note 17, at 958.
52 *Social and Legal Aspects, supra* note 4, at 870.
53 *Id.* at 869.
54 *Id.*

questions will arise as to whether divorce or annulment will come into play if the dissention reaches the breaking point.

B. *The Marital Relationship*

1. *Annulment of the Marriage*

In Iowa a marriage can be terminated by annulment.[55] The statute provides that if either party at the time of marriage was impotent, then the marriage may be annulled.[56] Impotency has been generally defined as inability to consummate the marriage through sexual intercourse, and does not necessarily include sterility.[57] Since an impotent husband can father a child by A.I.H., the question is whether or not the wife can subsequently annul the marriage after A.I.H. has been utilized. The English case of *L. v. L.* answered in the affirmative.[58] In that case the marriage was never consummated due to the husband's impotency, and thus the couple utilized A.I.H. upon which the wife became pregnant. The wife petitioned for a declaration of nullity and the husband defended that annulment should not be granted because the wife had approbated the marriage by use of A.I.H. The court held that the wife's conduct in using A.I.H. showed a determination and dominant intention to establish a normal relationship rather than an acquiescence or approbation of an abnormal marriage. Since there was no consummation of the marriage the court allowed annulment for the wife. However, it must be understood when dealing with the words impotency, annulment, and consummation that the courts and legislatures when defining and using these words never contemplated that a wife could conceive a child by her husband without having intercourse with him. Effective approbation of the marriage should be the result when the husband and wife mutually decide to utilize A.I.H.

Two cases have dealt with A.I.D. and annulment. In both the wife obtained an annulment for failure of the husband to consummate the marriage. In *Slater v. Slater*,[59] A.I.D. was used but no child was conceived. The English court based its decision primarily on the fact that had the wife known that prior to the use of A.I.D. the marriage could have been annulled due to her husband's impotence, such conduct would have amounted to approbation of the marriage. In *Gursky v. Gursky*,[60] the wife was allowed an annulment based on the ground that the marriage was not consummated even though she had given birth to a child conceived by A.I.D. with the husband's consent. Again it must be pointed out that these courts were dealing with traditional standards formulated when A.I. was not contemplated.

One further ramification on the problem of annulment is the effect of

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55 Iowa Code § 598.19 (1966).
56 *Id.* § 598.19(2).
57 Payne v. Payne, 46 Minn. 467, 49 N.W. 230 (1891); Donati v. Church, 13 N.J. Super. 454, 80 A.2d 633 (App. Div. 1951).
58 [1949] 1 All E.R. 141 (1949).
59 [1953] 1 All E.R. 246 (1953).
60 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

A.I. on the *husband's* attempt to annul the marriage. There are no reported cases on this type of action but by analogy to *L. v. L.* if the husband does not consent to A.I. or if he consents only in an attempt to remedy the effect of his wife's impotency, continued impotency would still be grounds to annul.[61] If such consent is found to constitute acquiescence, on the other hand, to the wife's impotency, the husband might be held to have waived his right to bring an action for annulment.[62]

Since the circumstances for annulment are infrequent, the importance of A.I. in divorce presents a more significant problem.

2. *Grounds for Divorce*

a. *Adultery.* Adultery is grounds for divorce in Iowa.[63] Although there is no Iowa statute defining adultery, case law has defined it as the "voluntary sexual intercourse of a married person with one not the husband or wife."[64] Sexual intercourse means sexual or carnal connection involving penetration of the female organ by the male organ.[65] If such penetration were held to be the sole criterion, then A.I.D. would not be adultery. However, since these statutes and definitions were formulated at a time when A.I.D. was not contemplated, the historic rationale for the prohibition of adultery should be explained and understood.

Adultery was condemned at common law because of the possibility of introducing into the family spurious heirs and thus adulterating the issue of an innocent husband by turning the inheritance away from his bloodline to that of a stranger.[66] However, a Canadian court in *Orford v. Orford*[67] considered the question of A.I.D. as adultery in its dictum, combining the physiological definition of adultery with the spurious heir concept:

> [T]he essence of the offense 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 those powers to the service or enjoyment of any person other than the husband or the wife comes within the definition of "adultery."
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> Sexual intercourse . . . 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.[68]

This statement ignores and is at variance with the common law definition which requires physical connection. Also, pregnancy is usually not the

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61 *Social and Legal Aspects, supra* note 4, at 874.
62 *Id.*
63 IOWA CODE §§ 598.8(1) and .9 (1966).
64 Aitchison v. Aitchison, 99 Iowa 93, 95, 68 N.W. 573, 574 (1896). *See also* State v. Anderson, 140 Iowa 445, 448, 118 N.W. 772, 774 (1908).
65 State v. McCall, 245 Iowa 991, 995, 63 N.W.2d 874, 876 (1954). *See generally* 24 AM. JUR. 2d *Divorce and Separation* § 24 (1966).
66 State v. Hasty, 121 Iowa 507, 509-10, 96 N.W. 1115, 1115-16 (1903).
67 49 Ont. L. 15, 58 D.L.R. 251 (1921).
68 *Id.* at 22, 58 D.L.R. at 258.

reason for committing adultery. It is committed for sexual gratification acquired by physical contact and by consummation of the act itself.[69] In A.I.D. this physical gratification is absent and the donor and recipient never consciously see one another.

A.I.D. invariably occurs with the active or written consent of the husband. As a result, there would be no invasion of the husband's sacred rights to have a chaste and faithful wife, and if this was considered an invasion it would be with his consent.[70] Also, to call A.I.D. adultery because it introduces a false strain of blood into the husband's family, something which the husband is to regard as shocking, is untenable reasoning since he has agreed by his consent that this be done.[71] In adoption the husband consents to have a new line of blood introduced into his family. In neither A.I.D. with his consent nor in adoption is the husband deceived.

There are four cases, three American and one Scottish, which have dealt with A.I.D. as adultery since the dictum of *Orford v. Orford*. In *Hoch v. Hoch*,[72] the husband alleged adultery and the wife responded that she had utilized A.I.D. Although the court found that the wife in fact had illicit intercourse, it stated that had she proved A.I.D. there would have been no adultery. However, nine years later the court in *Doornbos v. Doornbos*,[73] although being in the same county as the court which decided *Hoch*, stated that while A.I.H. is acceptable A.I.D. is adultery by the wife regardless of whether the husband consents.

In the Scottish case of *MacLennan v. MacLennan*,[74] decided in 1958, Lord Wheatley found that A.I.D. did not constitute adultery even when the husband did not consent:

> [T]his problem . . . must be decided by an objective standard of legal principles as these have been developed and must be confined to the narrow issue of whether this form of insemination constitutes adultery in the eyes of the law . . . .
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> The idea that a woman is committing adultery when alone in the privacy of her bedroom she injects into her ovum by means of a syringe the seed of a man she does not know and has never seen is one which I am afraid I cannot accept.[75]

Lord Wheatley's reasoning is logical and follows the modern definition of adultery which includes voluntary sexual intercourse and penetration. There must be two parties physically present and engaging in a sexual act with some degree

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[69] Biskind, *Legitimacy of Children Born by Artificial Insemination*, 5 J. FAMILY LAW 39, 46 (1965).

[70] *Id.* at 47.

[71] *Id.*

[72] [Unreported] No. 44-C-9307 (Cir. Ct., Cook County, Ill. 1945), as reported in TIME, Feb. 26, 1945, at 58.

[73] [Unreported] No. 54-S-14981 (Super. Ct., Cook County, Ill. 1954), as reported in 23 U.S.L.W. 2308 (1954), and discussed in Gursky v. Gursky, 39 Misc. 2d 1083, 1088, 242 N.Y.S.2d 406, 411 (Sup. Ct. 1963).

[74] [1958] Sess. Cas. 105, (Scot.), 1958 Scots L.T.R. 12.

[75] *Id.* at 108, 114, 1958 Scots L.T.R. at 14, 17.

of penetration. A.I.D. does not fulfill these requirements and thus there should be no adultery, with or without the husband's consent. There can be no destruction of faith in chastity or loyalty of one's spouse since there is no act of sexual intercourse to destroy this chastity.[76]

This rationale has been continued by the 1968 California decision of *People v. Sorensen*,[77] a case which dealt with a husband's obligation to support a child conceived by A.I.D. with the husband's consent. The court stated that in the absence of legislation prohibiting A.I.D., a child so conceived is not the result of an adulterous affair since adultery is, by California statute, defined as voluntary sexual intercourse of a married person with one not a husband or wife. The court criticized the suggestion that the doctor and wife may commit adultery as "patently absurd" since the doctor may be a woman or the husband himself may make the injection. It is also absurd, the court said, to consider the donor as committing adultery since he may, at the time of the injection of his semen, be miles away or even dead.

Sorensen is the only case to date decided by a state's highest court. It is a decision which uses language and reasoning on the problem of adultery that other courts should in the future follow. In Iowa, even though there is no statute defining adultery, there is case law defining this term in the same language as the statute interpreted in *Sorensen*.[78] The semantical ruberics which have plagued the few courts in the past in dealing with these definitions appear to be rather academic and not very practical. The simplicity of the answer is seemingly too difficult to comprehend due to lost logic. *Sorensen* and *MacLennan* hopefully will clear the way should the question of adultery by A.I.D. arise in the future.

As was pointed out in *Sorensen* it is absurd to consider the doctor or donor as participating adulterers. If the doctor is a woman how can any consistent definition of adultery include one woman committing adultery with another woman? If the doctor is a man the semen is not his own but that of a donor. The donor could not be considered a party to the adultery if he has no knowledge of the recipient's identity or whether his semen was actually used. No spurious issue is introduced into the doctor's or donor's family. Also, the donor may be dead at the time the A.I.D. is performed. These considerations must be encountered by any court which attempts to fit A.I.D. into the category of adultery by using common law rationale. Consistency in definition under this reasoning will not be achieved, only confusion will be engendered. A court faced with these dilemmas may, however, find an answer in a different ground for divorce.

b. *Cruel and Inhuman Treatment.* The few cases which have dealt with A.I.D. as grounds for divorce have considered only adultery and not cruel and

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[76] *Human A.I., supra* note 17, at 960.

[77] People v. Sorensen, 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968).

[78] State v. McCall, 245 Iowa 991, 995, 63 N.W.2d 874, 876 (1954); State v. Anderson, 140 Iowa 445, 448, 118 N.W. 772, 774 (1908); Aitchison v. Aitchison, 99 Iowa 93, 95, 68 N.W. 573, 574 (1896).

inhuman treatment. Inhuman treatment as grounds for divorce based on A.I.D. offers certain advantages over adultery: avoidance of attaching the social stigma of adultery on the wife; avoidance of determining with whom and how the adultery was committed; and avoidance of deciding whether the wife of either the doctor or donor has grounds for divorce based on adultery.[79] With these problems eliminated, a divorce action based on cruel and inhuman treatment would introduce a flexibility by dealing with each case individually.[80] The court could also give effect to the religious and moral beliefs of the couple without imposing one religious or moral belief on all people.[81]

In Iowa, inhuman treatment is grounds for divorce.[82] Two elements must be proven: (1) inhuman treatment and (2) danger to life.[83] Life can be endangered by impairment of health without any physical violence.[84] Danger to life is sufficient when the danger is reasonably apprehended.[85] "Any mistreatment which deprives a spouse of needed rest, peace of mind, and affects the nervous system so that health is undermined, may endanger life . . . ."[86] When determining whether or not A.I.D. is sufficient to constitute inhuman treatment so as to endanger life the court could consider whether the husband consented to A.I.D., the existing family situation, the individual personalties, and the religious and personal beliefs. For example, the birth of a child through A.I.D. may create in the husband strong feelings of inferiority. If he did *not* consent, feelings of impotence and inferiority may be aggravated to the point where he is deprived of his peace of mind and emotional stability. Since he has no knowledge of the child's origin (assuming he was sterile or impotent or had no access), he may feel that the child is not his own and that his wife has violated her marriage vows.[87] In Iowa evidence of various acts of adultery by the wife which cause the mental worry of the husband affects his health so as to amount to cruel and inhuman treatment.[88] Certainly, in A.I.D. where the husband has not consented and he knows that at the time the child was probably conceived he was impotent, sterile, or had no access to his wife, it would be reasonable for him to worry and feel that his wife had violated their marriage vows.

The example above deals with the situation where the husband has not consented to A.I.D., but this does not mean that cruel and inhuman treatment cannot be shown where he has given consent. It is entirely possible that his wife may take the credit for the production of the child or have a sense of longing for the donor. The child may be a constant reminder to the husband

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79 *Social and Legal Aspects*, *supra* note 4, at 876-77.
80 *Id.* at 877.
81 *Id.*
82 IOWA CODE § 598.8(5) (1966).
83 *Id.*; Beno v. Beno, 260 Iowa 442, 149 N.W.2d 778 (1967).
84 Rasmussen v. Rasmussen, 252 Iowa 414, 420, 107 N.W.2d 114, 118 (1961).
85 Beno v. Beno, 260 Iowa 442, 445, 149 N.W.2d 778, 780 (1967).
86 *Id.*
87 *Human A.I.*, *supra* note 17, at 961.
88 Schnor v. Schnor, 235 Iowa 720, 17 N.W.2d 375 (1945).

that he is impotent or sterile and the wife may at the same time compound this feeling of inferiority by turning her entire affections to the child. These possibilities, when combined, may result in a mental inhuman treatment directed towards the husband. Though these are only possibilities and will depend on the individuals and the particular facts of each case, certainly this ground for divorce should be considered.

c. *Defenses and Procedures.* If the husband sues for divorce on the ground of adultery and he gave his consent to A.I.D., the wife could plead the defenses of connivance and condonation. Connivance has been generally defined as "consent by one spouse that the other shall commit adultery."[89] If the wife can prove that her husband consented to A.I.D. and A.I.D. is recognized as adultery, the husband may be held to have connived in the adultery, with the result that the divorce action would fail. Condonation, on the other hand, means "forgiveness, express or implied, by one spouse of another for a breach of marital duty, with an implied condition the offense will not be repeated."[90] Thus, condonation applies only to conduct subsequent to the event, in this case the performance of A.I.D. With the husband giving consent and his continued recognition of his consent, condonation may be proved. However, this is on the premise that A.I.D. is a valid ground for divorce. It might be added that "[*f*]*ull knowledge* of the matrimonial offense is an essential element of condonation and, to revive the original offense by subsequent misconduct of a different nature, it is not essential that the misconduct be such as, in itself, would justify a divorce."[91] This would mean that if the husband had not given consent to A.I.D., there could be no condonation by his continued cohabitation since he did not have full knowledge. This would also mean that if the original offense of A.I.D. as adultery, assuming that it is such, was followed by conduct which approximated but was not sufficient to establish cruel and inhuman treatment, and the husband had consented to A.I.D., there would be no condonation of adultery since this was revived by the wife's subsequent conduct toward the husband.

The certain defenses that might be available deal directly with certain procedural problems that would be encountered. Adultery is usually proven by circumstantial evidence which evidence is sufficient "when the circumstances proven lead naturally and fairly to the conclusion of guilt, and are inconsistent with any rational theory of innocence."[92] It is not necessary that adultery be proven by direct facts, but it may be shown through inference of the circumstances.[93] The husband who has not given his consent to A.I.D. and knows that he cannot father a child would probably attempt to prove this fact. However, he would be faced with certain evidentiary rules on proving the child

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[89] Giddings v. Giddings, 167 Ore. 504, 114 P.2d 1009 (1941). *See generally* 17 AM. JUR. 2d *Divorce and Separation* § 193 (1966).
[90] Erickson v. Erickson, 154 N.W.2d 106, 111 (Iowa 1967).
[91] Fritz v. Fritz, 260 Iowa 409, 414, 148 N.W.2d 392, 395 (1967).
[92] Aitchison v. Aitchison, 99 Iowa 93, 96, 68 N.W. 573, 574 (1896).
[93] *Id.*

illegitimate when it is born in lawful wedlock. These problems will be considered in the following section but assuming he can prove that he could not be the natural father, then the wife would attempt to overcome this inference that adultery took place by waiving her physician-patient privilege[94] and having the physician testify that A.I.D. was performed. But if A.I.D. as such is considered adultery then certainly proof of A.I.D. would be of no aid to the wife. If the husband did give his consent to A.I.D. and wishes to prove A.I.D. as adultery, he would run into problems concerning the physician-patient privilege and also the exclusionary rule of communications between husband and wife.[95] Many of these exclusionary rules and the problems in procedures can be answered by looking at the questions which revolve around the legal status of the child.

C. *Legal Status and Rights of the Child*

1. *Legitimacy*

The difficulty in determining the legal status of a child conceived by A.I. is establishing the fact that the child is or is not the natural offspring of the spouses. The test of legitimacy, universally and in Iowa, seems to be whether the biological father is married to the mother.[96] Consequently, since in A.I.H. the child is the natural of the husband and wife, it should be declared the legitimate child of the husband who contributes his semen. However, the child could be declared illegitimate in Iowa on the ground that the husband's impotency, which prompted the use of A.I.H., rendered the marriage a nullity from the beginning. Section 598.22 of the 1966 Code of Iowa provides in part: "[I]f because of the impotency of the husband, any issue of the wife shall be illegitimate." The child would presumably be legitimate as long as neither spouse attempted to annul the marriage due to the husband's impotency.[97] A.I.H. presents little problem in regard to legal status of the child so conceived, except for the possible provision referred to above. The real problems on legal status are engendered by A.I.D.

"Most authorities agree that the A.I.D. child is illegitimate solely because the natural parents are not married to each other."[98] Before this conclusion can be reached, certain evidentiary protections that are afforded the child must be coped with. Universally, a child which is born in lawful wedlock is presumed legitimate.[99] The Supreme Court of Iowa has stated that "every reasonable presumption will be admitted in favor of legitimacy and the burden of

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94 IOWA CODE § 622.10 (1966) *as amended* ch. 407, § 1, [1967] Iowa Acts 797.
95 *Id.* § 622.9.
96 *Id.* §§ 144.13 (birth certificate), 675.14 (paternity proceedings), 675.6 (liability of putative father's estate for child support), 595.18 (subsequently marries mother); Parker v. Nothomb, 65 Neb. 315, 318, 93 N.W. 851, 852 (1903).
97 IOWA CODE § 598.19 (1966) (A marriage in Iowa may be annulled where either party was impotent at the time of the marriage.).
98 Note, *A Legislative Approach to Artificial Insemination*, 53 CORNELL L. REV. 497, 503 (1968).
99 9 J. WIGMORE, EVIDENCE § 2527 (3d ed. 1940); Dienes, *supra* note 1, at 279.

proof is upon the person alleging the contrary. Every child born in lawful wedlock is presumed to be legitimate—a rule founded upon decency, morality, and public policy, sacredness, and peace and harmony of the family relationship."[100] This presumption is one of the strongest in the law, the main reason being to protect an innocent child from the stigma associated with bastardy. However, since a husband is not usually required to support a child not of his offspring (excluding adoption), the presumption of legitimacy is rebuttable, but the "[p]roof of illegitimacy must be clear, strong and satisfactory."[101] Paternity need not be established beyond a reasonable doubt, but rather only a "preponderance of the evidence is required."[102] In order to effectuate this presumption and diminish its rebuttal, the procedures in A.I.D. offer certain safeguards: no public records of A.I.D. are maintained; the semen of the husband, if he has any, can be mixed with that of the donor (C.A.I.); the blood types of the donor and the husband may be matched.[103] As a result, the child's origin is difficult to prove thus rendering the presumption nearly conclusive.[104] On the other hand, if there is proof of A.I.D. plus the impossibility of natural conception between the spouses, the child would probably be held illegitimate.[105]

The presumption of legitimacy can be rebutted by showing sterility, impotency, or nonaccess. If sterility is claimed, it must be shown to have existed at the approximate time when conception or A.I.D. took place.[106] If the medical evidence refers to a test made some time prior or subsequent to the time of conception, such evidence is accorded little weight, because sterility is not a permanent condition in many cases.[107] It seems that proof of sterility alone is not sufficient to overcome the presumption of legitimacy and its proof at most will be evidence considered with all other evidence.[108] However, the evidence must be clear and convincing. Merely proving that the husband is unlikely to be the natural father while failing to prove that it was impossible for him to be the father (as when C.A.I. is used) would not suffice, especially when the husband and wife had intercourse during the time of conception. As a result, the presumption of legitimacy would stand.

Generally, the principles pertaining to proof of sterility apply with equal force to impotency, in that the condition must be shown to have existed at the time of conception or when A.I.D. was performed. Iowa recognizes not only

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100 Bowers v. Bailey, 237 Iowa 295, 297-98, 21 N.W.2d 773, 775 (1946).
101 Kuhns v. Olson, 258 Iowa 1274, 1276, 141 N.W.2d 925, 926 (1966).
102 *Id.* at 1276-77, 141 N.W.2d at 926-27.
103 Note, *A Legislative Approach to Artificial Insemination*, 53 CORNELL L. REV. 497, 503 (1968).
104 *Id.* at 504.
105 *Id.*
106 Biskind, *Legitimacy of Children Born by Artificial Insemination*, 5 J. FAMILY LAW 39, 40 (1965).
107 *Id.*
108 Parker v. State, 189 Md. 244, 55 A.2d 784 (1947); State v. Klostermeier, 161 Neb. 247, 72 N.W.2d 848 (1955); Houston v. Houston, 199 Misc. 469, 99 N.Y.S.2d 199 (Dom. Rel. Ct. 1950); People v. Guiseppe, 97 N.Y.S.2d 486 (Child. Ct. 1949).

impotency to rebut the presumption of legitimacy, but also nonaccess: the husband was entirely absent so as to have no access to his wife; the husband was entirely absent at a period during which the child must have been conceived; or the husband was present only under circumstances which afford clear and satisfactory proof that there was no sexual relationship between the spouses.[109] However, there is a presumption that when the husband and wife are living together there was sexual intercourse between the couple because of marital access.[110] Thus, if the presumption of intercourse is to be overcome, nonaccess must be shown by clear, satisfactory and convincing evidence. If nonaccess is shown, then it will bear directly upon rebutting the presumption of legitimacy.

At this point an evidentiary problem is encountered. Based on societal interest and "common decency," testimony or declarations of either spouse are inadmissible on access or nonaccess as bearing on the inquiry whether the couple had sexual intercourse during the period in controversy where such testimony or declarations by either spouse would prove the illegitimacy of a child begotten and born during marriage.[111] This rule was used in the A.I.D. case of *People ex rel. Abajian v. Dennett*,[112] where the court refused to hear the wife's claim that her two children were born by A.I.D.:

> [T]o stigmatize them as children of an unknown father by means of artificial insemination of the mother is no more . . . than an attempt to make these innocents out as children of bastardy. And where a parent attempts such means, the law will still the lips of such a parent. This . . . will be done even where artificial insemination is lawful, for, on the last turn, it is the children who, when so revealed, must go through life in such obfuscation.[113]

The premise of this reasoning is that a child which is not the natural offspring of the husband and wife is illegitimate (excluding adoption). The reasoning in *Abajian* is sound in that it affords the protection to the child which is intended by the principle that neither husband or wife can give testimony which would bastardize the child.

The presumption of legitimacy might also be rebutted by the results of a blood-grouping test. Most courts admit such tests as proof of nonpaternity either by statute or court decision, but there is disagreement as to the effect of such evidence.[114] Some courts give the results of such tests the same weight as other evidence, but the results, standing alone, will not outweigh the strong presumption of legitimacy.[115] Other courts give such evidence great weight and the results are sufficient to overcome the presumption of legitimacy, while a third view, as embodied in the Uniform Act of Blood Tests to Determine Pa-

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109 Craven v. Selway, 216 Iowa 505, 509, 246 N.W. 821, 823 (1933). *See also* Bowers v. Bailey, 237 Iowa 295, 21 N.W.2d 773 (1946).
110 Craven v. Selway, 216 Iowa 505, 510, 246 N.W. 821, 823 (1933).
111 *Id.* at 510, 246 N.W. at 824; Niles v. Sprague, 13 Iowa 198 (1862).
112 15 Misc. 2d 260, 184 N.Y.S.2d 178 (Sup. Ct. 1958).
113 *Id.* at 264, 184 N.Y.S.2d at 183.
114 Dienes, *supra* note 1, at 280.
115 Langel v. Langel, 17 Ohio Op. 2d 63, 175 N.E.2d 312 (Ct. App. 1960).

ternity,[116] is that such evidence conclusively shows the alleged father not to be the father, provided the tests are not defective.[117] In Iowa, one case has indicated that if the value of blood-grouping tests is shown to be generally recognized by the sciences, then the court will take judicial notice of the results.[118] This case was decided in 1949 and since then the accuracy and reliability of such tests have been given definite and unanimous confirmation by expert scientific opinion.[119] At any rate, such blood tests should be at least weighed with other evidence in attempting to rebut the presumption of legitimacy.

The cases in the United States which have squarely met the issue as to the A.I.D. child's legal status have generally held the child illegitimate although some cases have treated the child legitimate in order to determine his rights and obligations. In *Strnad v. Strnad*,[120] the parties sought custody of an A.I.D. child born with the consent of the husband. The court said that the child was legitimate by analogizing to the situation where a child is born out of wedlock and is legitimized upon the marriage of the interested parties. The court also stated that the child is considered potentially or semi-adopted by the husband. The husband is entitled to the rights of a foster parent who formally adopts and acquires the rights of a natural parent. The result of this decision is meritorious for it protects the property and inheritance rights of the child. However, the reasoning is somewhat nebulous in that it stretches legal reasoning to the breaking point. To legitimize a child by the marriage of the interested parties is a statutory or common law rule which deals with a marriage that is subsequent to the birth of the child. In Iowa such children are legitimized by statute when their parents subsequently marry one another.[121] The statute states that "illegitimate children become legitimate."[122] Thus, the child is first illegitimate and then becomes legitimate by a subsequent marriage. In *Strnad* there was no subsequent marriage and the court infers that the child was never illegitimate. This reasoning is certainly tenuous. On the second point in *Strnad*, potential or semi-adoption is superfluous reasoning mainly because adoption is a statutory procedure which must be complied with. Certainly, in essence there are similarities with adoption, but legally adoption has not taken place. Clearly, the court in *Strnad* knew the answer it desired, and attempted to find reasoning that would achieve this end. *Strnad* as authority is very questionable and should not be pursued legally.

The court in *Gursky v. Gursky*[123] arrived at an opposite conclusion to

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116 9 UNIFORM L. ANN. 102 (1957).
117 Commonwealth v. D'Avella, 339 Mass. 642, 162 N.E.2d 19 (1959); Houghton v. Houghton, 179 Neb. 275, 137 N.W.2d 861 (1965); Anonymous v. Anonymous, 1 App. Div. 2d 312, 150 N.Y.S.2d 344 (Sup. Ct. 1956).
118 Dale v. Buckingham, 241 Iowa 40, 40 N.W.2d 45 (1949).
119 Houghton v. Houghton, 179 Neb. 275, 137 N.W.2d 861 (1965).
120 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948).
121 IOWA CODE § 595.18 (1966).
122 *Id.*
123 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

that of *Strnad*. Here the A.I.D. child was held illegitimate even though the husband had an obligation to support the child. The court said the view that a child conceived by A.I.D. is legitimate, as stated in *Strnad*, is not supported by legal precedent, since historically the concept is deeply rooted in the law that a child begotten by a father not the mother's husband is deemed illegitimate. Because the legislature has continually failed to render such children legitimate, while modifying illegitimacy in other areas, the court said this must be deemed a manifestation of disinclination of the legislature to modify the logical results of illegitimacy in such cases. Also rejected in *Gursky* was the theory that this situation is similar to that of a foster parent who formally adopts the child, since adoption proceedings are governed by specific statutes. *Gursky* points out the shortcomings of *Strnad* and arrives at a result which is logical in its utilization of common law precedent and statute. It can be seen as a pronouncement that as long as the legislature remains silent, this court has no alternative but to arrive at the conclusion that an A.I.D. child, under similar facts, is illegitimate.

Other cases have arrived at varying conclusions on the legal status of the A.I.D. child,[124] but the recent case of *People v. Sorensen*[125] may offer new insights for future decisions. The Supreme Court of California limited its holding to a determination of the husband's criminal responsibility for not supporting a child conceived by A.I.D. with his consent, however the court stated that public policy favors legitimation and no public purpose would be served by stigmatizing such a child as illegitimate. The court was not persuaded by the concept that legitimacy requires a determination that the child is illegitimate if the semen of someone other than the husband is used, because legitimacy is a legal status which can exist despite the fact that the husband is not the natural father of the child. This language used by the California court on the determination of the A.I.D. child's legal status enforces the underlying policy of legitimacy. The policy stems from the Christian concept of monogamous marriage, its concern for a stable marriage, and its aversion to illicit sex.[126] The legislation as a result shows a protection of the husband and the family from claims of extra-marital offspring. These policies are not violated by the birth of an A.I.D. since such a child is usually born after thorough planning by the spouses, as distinguished from the lack of foresight resulting in the births of most illegitimate children.[127] It is illogical to subject an A.I.D. child so pro-

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124 Doornbos v. Doornbos, [Unreported] No. 54-S-14981 (Super. Ct., Cook County, Ill. 1954), as reported in 23 U.S.L.W. 2308 (1954), held a child born by the use of A.I.D. is illegitimate, even though the husband may or may not give his consent, since the child is born out of wedlock. Ohlsen v. Ohlsen, [Unreported] (Super. Ct., Cook County, Ill. 1954) ruled that the presumption of legitimacy was not rebutted where there was conflicting evidence as to whether a child was actually conceived by A.I.D. Anonymous v. Anonymous, 41 Misc. 2d 886, 246 N.Y.S.2d 835 (Sup. Ct. 1964), held that the husband who consents to A.I.D. has a duty to support the child.

125 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968).

126 Note, *A Legislative Approach to Artificial Insemination*, 53 CORNELL L. REV. 497, 504 (1968).

127 *Id.*

duced after the planning that takes place (spouses undergo examination to determine psychological fitness, physician selects donor, husband consents) to the social stigma of an illegitimate who is unwanted, unplanned and born out of wedlock. This reasoning may not be valid if the husband does not consent, however, as a practical matter the medical profession requires that such consent be obtained.

The determination of the legal status of a child conceived by A.I.D. bears directly upon what rights the child has with regard to inheritance and support. Again, attempting to deal with legal standards set up when A.I.D. was not contemplated can result in confused guidelines and applications. But until there is some clarification of the legality of A.I.D., these principles will have to be utilized.

2. *Rights of Inheritance*

If A.I.D. can be proven and the child is deemed illegitimate, the rights of the child must be considered. No court has decided the inheritance rights of an A.I.D. child, therefore state inheritance statutes and decisions must be applied.

Inheritance problems are lessened if the husband leaves a will. However, if testator bequeaths property to his "children" or "issue," then the illegitimate may be incapable of taking, since these terms do not include illegitimates unless the will reveals a clear intention to use the generic term "children" so as to include an illegitimate child, or it is impossible under the circumstances that a legitimate child could take.[128] If testator has full knowledge that some or all of his children are illegitimate and his intention is not clearly expressed in the will, then the words "children" or "issue" create an ambiguity allowing the intention of the testator to be determined not only from the provisions of the will but also from the circumstances surrounding the execution of the will.[129] Thus, if the husband had consented to A.I.D. before or condoned the procedure after the child's conception or birth, the court could find that the husband intended the A.I.D. child to be included in the provisions of the will. Consent to A.I.D. may also constitute an acknowledgment by the husband as the father of the child if the husband does so in a general or notorious way, or does so in writing.[130] Acknowledgment as the child's father would allow inheritance when the husband includes in his will "children" or "issue," and the only children he can possibly refer to are those conceived by A.I.D. Since the husband cannot conceive his own children and he consents to A.I.D., this would be the logical interpretation of terms "children" and "issue," with the possible exception of the case where he has also adopted children not conceived by A.I.D.

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128 *In re* Estate of Ellis, 225 Iowa 1279, 282 N.W. 758 (1938).
129 *Id.*
130 IOWA CODE § 633.222 (1966).

When the husband dies intestate, certain definitions in the Iowa Probate Code come into play. The intestate provisions speak in terms of "decedent's children" and "issue."[131] "Child" is defined in the Probate Code to include an adopted child but does not include an illegitimate child unless he has been recognized by the father as his child.[132] The term "issue" includes all lawful lineal descendants whether natural or adopted.[133] As a result it would appear that intestacy is designed for the natural offspring of the intestate except when adoption is effectuated or illegitimates are recognized by the father. If it is assumed that the A.I.D. child is excluded by the descent statute, then the other methods open for the child to inherit must be examined.

The Iowa Probate Code states that an illegitimate child may inherit from his natural father if paternity is proven during the father's lifetime, or when the child has been recognized by the father as his child, such recognition being general and notorious, or else in writing.[134] It would appear this statute refers entirely to the natural father *i.e.* the procreator. However, since in the usual A.I.D. case the natural father is not known, it is desirable to allow the husband who has consented to A.I.D. to acknowledge himself as the father within the scope of this statute. The wording of the statute would not disallow such an interpretation.

An effective method for allowing the A.I.D. child to inherit is for the husband to adopt the child. The problem is that the procedures and records associated with adoption would result in undesirable notoriety to the child's origin. Also, the husband may die before the child's birth or before the adoption is completed, and, in addition, adoption is a legal formality which, as a practical matter, would rarely be used by a husband who has not drawn his will.[135] However, if adoption is utilized, upon entering such decree in Iowa the right of inheritance between the adopting parents and the child will be the same as between parents and children born in lawful wedlock.[136] In this instance the husband who adopts the A.I.D. child would be treated as the natural father for inheritance.

Secrecy would appear to preclude the A.I.D. child from attempting to gain inheritance from the donor. But if secrecy was not maintained and the donor was known, then through a paternity action while the donor was alive the child might be able to inherit from the donor who is the natural father.[137] However, if the husband adopts the A.I.D. child then under the Iowa Probate Code the child could not inherit from and through the donor as the natural father unless the child had attained his majority age at the time the husband adopted him or unless the donor himself adopted the child.[138] Thus, only under

131 *Id.* § 633.219.
132 *Id.* § 633.3(5).
133 *Id.* § 633.3(23).
134 *Id.* § 633.222.
135 *Social and Legal Aspects, supra* note 4, at 878-79.
136 IOWA CODE §§ 600.6, 633.223 (1966).
137 *Id.* § 633.222.
138 *Id.* § 633.223 *as amended* ch. 294, § 7, [1969] Iowa Acts 472-73.

limited situations could the A.I.D. child inherit from the donor and these would appear to be highly unlikely due to the secrecy which surrounds A.I.D.

The shortcomings of these solutions to inheritance boil down to a question of statutory construction. Many areas of the law define a child in terms of its social rather than biological relationship with its parents. For example, although the burden of support is normally attributed to the natural parents, a person standing *in loco parentis* can assume the rights and obligations incident to the parent-child relationship, thus, a distinction which is based solely on blood may be arbitrary and against public policy.[139]

If the husband consents to A.I.D., his purpose is to cause a child to enter the existing family unit. This is exactly the same intent present in the situation where the spouses consent to adoption. Because the legislature declares that the adoptive child will be able to inherit from the adoptive parents, certainly the same policy should be followed by the court in an A.I.D. case. It could also be argued that these statutes were not formulated with A.I.D. in mind and that there is no indication the legislators did or did not intend to exclude A.I.D. children from inheritance. Therefore, considering the child's welfare as the primary factor plus the respect for the intention of the husband and wife, the court could interpret the descent statutes to include a child born by A.I.D. with the husband's consent.[140]

3. *Rights of Support*

Generally a husband is not liable to support a child born to his wife but not procreated by him.[141] In Iowa the parents of a child born out of wedlock and not legitimized are liable for the support, maintenance and education of such a child.[142] If an A.I.D. child is considered illegitimate then the donor, not the husband, is responsible for support. The paternity of the child is proven by first charging the defendant as the father of the child[143] and then judicially establishing paternity during the alleged father's lifetime, or, in the alternative, showing that the alleged father acknowledged the child in writing or by part performance of his obligations.[144] The donor would probably be saved from liability by the secrecy surrounding A.I.D. since the physician is not required to keep records matching the donors with the recipients. It might possibly be argued that the husband could be called the father under the above statute since, by his consent, he acknowledges the child as his own and also assumes performance of the obligations of a natural parent. On the other hand, these statutes deal with paternity and seemingly a natural parent, and not the husband who does not father the child with or without his consent to A.I.D.

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139 *Social and Legal Aspects, supra* note 4, at 879-80.
140 *Id.* at 879.
141 *Id.* at 880; Annot., 90 A.L.R.2d 583 (1963).
142 IOWA CODE § 675.1 (1966).
143 *Id.* § 675.14.
144 *Id.* § 675.6.

Apparently the Uniform Support of Dependents Law[145] does not cover the A.I.D. situation in any attempt to hold the husband liable for support since the statute refers to children as being stepchildren, foster or legally adopted children, and, in general, children to which the husband has a legal obligation *i.e.* naturals.[146]

The statutes being of little express aid to the A.I.D. situation, certain arguments can be made for incorporating support obligations into the statutes if the husband consents even though the A.I.D. child may be considered illegitimate. If the inheritance statutes could be construed to include A.I.D. children born with husband's consent, the same incorporation could be done for the support statutes. In the event this construction is not allowed, certain nonstatutory arguments can be advanced. Two New York cases have advanced an implied contract theory to hold the consenting husband liable for support. In *Gursky v. Gursky*,[147] the husband agreed to A.I.D. and promised to pay all expenses. The court ruled that though the child was illegitimate, the husband's declarations and conduct implied a promise on his part to furnish support for the child and that he should be required to pay support upon granting the wife annulment. The court pointed out that the document signed by the husband in giving his consent constituted more than mere acquiescence but was in terms a request to the physician to perform A.I.D. for the express purpose of providing a child for the mutual happiness of the parties. Thus, it was reasonable to presume that the wife was induced to act or change her position to her detriment in reliance upon the husband's express wishes. Liability was based not only on the above implied contract, but also on the alternative ground of equitable estoppel.[148] *Anonymous v. Anonymous*[149] quoted and followed the lead of *Gursky* with respect to the implied promise theory of support, and ordered the husband to pay temporary support to sustain his wife and the two children conceived by A.I.D. with his consent.[150]

This reasoning embodies the Restatement of Contracts doctrines of promissory estoppel, where one does something to induce another to change his position to his prejudice, and implied contract: "A promise which the promisor should reasonably expect to induce action or forebearance on the part of the promisee or a third person and which does induce such action or forebearance is binding if injustice can be avoided only by enforcement of the promise."[151] The courts could reasonably hold the consent of the husband to A.I.D. constituted an implied promise that the child would become a part of his family and be supported by him, and, in addition, by the wife's reliance and action on this promise the husband would then be estopped from refusing to support

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145 *Id.* § 252A.
146 *Id.* § 252A.2.
147 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).
148 *Id.* at 1091, 242 N.Y.S.2d at 411.
149 41 Misc. 2d 886, 246 N.Y.S.2d 835 (Sup. Ct. 1964).
150 *Id.* at 887, 246 N.Y.S.2d at 836.
151 RESTATEMENT (SECOND) OF CONTRACTS § 90 (1965).

the child.[152]

The husband could be required to support the A.I.D. child by being considered to stand *in loco parentis* to the child. A husband who accepts his wife's illegitimate child into his family under facts which give rise to a presumption that he intends to assume responsibility for the child's support will be held to stand *in loco parentis* and be compelled to fulfill the duties of support as a natural parent.[153] The husband who consents to A.I.D. could reasonably be presumed to assume liability for the child's support, and taking into consideration the wife's reliance, the integrity of the family, and the child's welfare, such a result would seem preferable.[154]

Probably the best culminator of these statutory and nonstatutory considerations on A.I.D. with the husband's consent is seen in the recent case of *People v. Sorensen*.[155] The Supreme Court of California held that the husband who gives his consent to A.I.D. is guilty of the crime of failing to support a child so conceived within the meaning of the penal statute imposing on a father the legal obligation of support. The court reasoned that the husband was the lawful father of a child so conceived because the A.I.D. child does not have a natural father as the term is generally understood. The decisive factor is whether the legal relationship of father and child exists. The court added that a reasonable man who, because of his sterile condition, consents to A.I.D. should know that his behavior carries with it legal responsibilities for nonsupport. Without the husband's active participation and consent, the child would not have been conceived. Affirming the husband's conviction, the court concluded that the consenting husband cannot create a temporary relation to be assumed at will, but rather the arrangement must be of such character as to impose on him the obligation of supporting those for whose existence he is directly responsible.

No court has imposed liability for support of an A.I.D. child on a husband who does not consent, however, since the husband is not the natural father and has in no way induced any reliance by the wife prior to conception, such liability should not arise.[156] If the husband who does not consent is to be held liable for support, such a finding would have to be based on the husband's actions subsequent to conception or birth. The husband may be held liable if subsequent to conception he contracts with the wife for support or makes representations of paternity and induces reliance.[157] Also, when the husband continues to support the child after he is aware that A.I.D. took place, these

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152 *Social and Legal Aspects, supra* note 4, at 880.

153 State v. Shoemaker, 62 Iowa 343, 344, 17 N.W. 589, 589-90 (1883). *See generally* Annot., 90 A.L.R.2d 583, 586 (1963).

154 Comment, *Custody of Children in Artificial Insemination Cases*, 15 Mo. L. Rev. 153, 157 (1950); *Social and Legal Aspects, supra* note 4, at 880-81.

155 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968).

156 Note, *A Legislative Approach to Artificial Insemination*, 53 Cornell L. Rev. 497, 506 (1968). *See also* Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

157 Note, *A Legislative Approach to Artificial Insemination*, 53 Cornell L. Rev. 497, 506-07 (1968).

actions might estop him. Such actions by the husband may give rise to the presumption that he intends to stand *in loco parentis* to the child. However, in view of the policy against encouraging A.I.D. without the husband's consent, it would appear undesirable to force a nonconsenting husband to support the child unless he approves of the A.I.D.[158] As a result it would be logical to impose liability on the donor when the husband does not consent. This could possibly reduce the need for community support of such a child and deter A.I.D. without consent.[159] The problems with such responsibility is the secrecy of A.I.D. and also, if records are available, the donor may attempt to find the recipient so as to secure the husband's consent, be assured that the couple will support, and confirm that he will be legally protected from subsequent litigation.[160] To resolve these possibilities, it has been suggested that legislation could place liability on the physician or other person who performs the insemination without the husband's consent.[161] Consequently, secrecy could be maintained and the child would be assured of support, plus the fact that A.I.D. without consent would be discouraged.

4. *Visitation Privilege*

In *Strnad v. Strnad*,[162] the husband was permitted visitation rights with respect to a child born by A.I.D. with the husband's consent. The court denied the wife's motion to revoke visitation rights which were granted to the husband in a separation decree. It said the child was potentially adopted or semi-adopted by the husband and that in any event, the husband was entitled to the same rights as those of a foster parent who has formally adopted, if not the same rights as those to which the natural parent would be entitled under the circumstances. Consequently, where the husband has not been shown to be an unfit guardian, and where the best interests of the child indicate that he should be permitted visitation, the facts surrounding the child's conception should not be regarded as precluding the husband's right to visitation.

If the husband is required to support the A.I.D. child as a natural father, then he should also have the corresponding privileges of a natural father. Where the husband is the noncustodial parent, the privilege of visitation should be decided by those guidelines applicable to a natural father.[163]

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158 *Social and Legal Aspects*, *supra* note 4, at 881.

159 Note, *A Legislative Approach to Artificial Insemination*, 53 CORNELL L. REV. 497, 507 (1968).

160 *Id.*

161 *Id.*

162 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948).

163 *Human A.I.*, *supra* note 17, at 967. The case of People *ex rel.* Abajian v. Dennet, 15 Misc. 2d 260, 184 N.Y.S.2d 178 (Sup. Ct. 1958), involved a habeas corpus proceeding by the husband for child custody. The wife was estopped from asserting for the first time that her children were conceived by A.I.D. and that her husband should not have custody or visitation. The court said the wife's subsequent conduct in giving recognition to her husband's right as parent of the children furnished a sufficient legal basis to estop such an assertion. The court found it unnecessary to rule on the merits of the issue whether visitation rights were affected by the fact of A.I.D.

D. *Other Legal Problems*

1. *Responsibility of Physician*

Obviously the doctor can be liable for ordinary negligence but if an abnormal child were to be the result of A.I.D. it would be impossible to find ordinary negligence since proof of causation, due to genetic uncertainties, would be next to impossible.[164] Usually the doctor will insist that the husband and wife release him from responsibility by their signing the consent form.[165] However, the doctor may find himself subject to a malpractice action if he negligently inseminates a white woman with a Negro donor's sperm, or a Negro wife with an Oriental donor's sperm, or vice versa.[166] This would raise the question of whether or not there is any warranty attached to the sperm selected by the doctor.

If the doctor performed A.I.D. without the husband's consent, he might be liable for "interference with the marital relation by enticing the wife away from home, by adultery or 'criminal conversation' with her, or by mere alienation of her affections."[167] This does not mean that the doctor in A.I.D. is an adulterer or enticer since it is absurd to have a doctor as an adulterer when the doctor may be a woman, but rather the doctor's actions without the husband's consent could result in alienation of the wife. In Iowa there are three essential requirements to this action: (1) wrongful conduct of the defendant, (2) loss of affection or consortium, and (3) a causal connection between such conduct and loss.[168] Performing A.I.D. without the husband's consent could be considered a wrongful act on the doctor's part since the proper procedure in the medical profession is to gain the consent of the spouses plus the fact that the decision to have children either naturally, by adoption or by A.I.D., is an important decision between the husband and wife. With the advent of such a child loss of affection may take place with the wife centering her affections toward the child. The cause is that this centering of affection towards the child would not have happened if the doctor had not performed A.I.D.

If the attending physician at birth is the same physician who performed A.I.D., or the doctor knows the child was conceived by A.I.D., he is legally obligated to place on the birth certificate information pertaining to the father.[169] If the child is illegitimate, the name of the putative father is inserted if he consents or he has been judicially declared the child's father, but if the doctor cannot obtain consent because he does not know who the natural father is, then he must place "unknown" on the certificate.[170] He must also

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164 *Human A.I., supra* note 17, at 968; *Social and Legal Aspects, supra* note 4, at 881.
165 *Human A.I., supra* note 17, at 968.
166 Note, *Artificial Insemination*, 23 ARK. L. REV. 81, 91 (1969).
167 W. PROSSER, LAW OF TORTS § 103, at 682 (2d ed. 1955). *See also id.* § 118 (3d ed. 1964).
168 Castner v. Wright, 256 Iowa 638, 643, 127 N.W.2d 583, 586 (1964).
169 IOWA CODE § 144.13 (1966).
170 *Id.* § 144.13(7), (9)-(12).

place on the certificate whether or not the child is legitimate.[171] If the doctor puts the husband's name on the certificate, knowing the husband is not the child's father, and also inserts the legitimacy of the child then he is probably guilty of falsifying public records.[172] Since the doctors in A.I.D. usually insert the husband's name as the father and the child as legitimate, while knowing that the husband is not the natural father and that the child may or may not be legitimate, the physician upon the second offense may lose his licence to practice medicine and pay a fine up to $200 and/or spend time in jail.[173] These penal sanctions are indeed harsh when applied to the A.I.D. situation since the doctor is placed on the horns of a dilemma: on the one hand he must ethically follow the standard procedures of his profession which in A.I.D. is secrecy, while on the other hand he must follow the mandates of the law pertaining to correct recordation of the birth certificate. A practical solution is for the doctor who performs A.I.D. to advise the wife to go to another doctor for delivery and keep the delivering doctor ignorant as to the manner of conception. This procedure may also raise questions of professional ethics. However, as long as the A.I.D. remains secret, it is unlikely prosecution will result.

2. *Liability of Donor*

The areas where the donor may be involved have already been discussed: adultery, inheritance, and support. However, if it is found that the donor is liable in only one of these areas, the ramifications of his responsibility would be immense since the collection of his sperm in one sample may be used to inseminate many more recipients. Therefore, another reason for the secrecy of A.I.D. is that it will avoid blackmail which may be exercised on the known donor.[174]

3. *Fraud by Spouses*

Possibly, the husband and wife may perpetrate fraud in regard to statutes referring to false swearing, perjury, forgery, and fraudulent writing if they attempt to conceal the true origin of the child and hold the husband out as the natural father, and the same may be true of the child if he is aware of his actual paternity.[175] The wife could be guilty of a fraud on the husband if she collaborates with the physician to produce a child without the husband's consent.[176] However, as a practical matter the probability of prosecution and suit for such frauds is slight because of the anonymity involved.

4. *Criminal Adultery*

Adultery by statute is criminal if one of the complainants is the husband

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171 *Id.* § 144.13(5).
172 *Id.* § 144.53-.54.
173 *Id.*
174 Note, *Artificial Insemination*, 23 ARK. L. REV. 81, 91 (1969).
175 *Social and Legal Aspects*, *supra* note 4, at 881.
176 Note, *Legal and Social Implications of Artificial Insemination*, 34 IOWA L. REV. 658, 663 (1949).

or wife.[177] However, the Iowa statute does not define adultery. In the absence of a statutory definition which specifically includes A.I.D. or its procedures, it is highly unlikely that a criminal prosecution will be based on A.I.D. Even so the definition of adultery employed by case law includes sexual intercourse and carnal connection or penetration.[178] A.I.D. does not involve penetration by the donor or doctor. Thus, nonstatutorily it would appear to be difficult to include A.I.D. into a definition of criminal adultery.

5. *Incest*

This problem was referred to earlier but it is worth noting that the ramifications of incest cannot be determined due to the secrecy of A.I.D. However, later generations of children conceived by A.I.D. will run the risk of marrying a near blood relative. The donor could be the father of an untold number of children. The potential of such a problem is entirely dependent upon the future use of A.I.D. Solutions could be to limit the number of donations which one donor could make, or limit the number of times a donor's semen could be utilized.[179]

V. Formulation of Public Policy

The courts which have dealt with A.I. in one way or another have been unable to arrive at any consistent policy statement. This apparent confusion will probably continue when future A.I. cases face the courts. The answers to these perplexing problems will come from utilizing statutes and judicial concepts formulated when A.I. was not contemplated. This will result in misapplication of the law and inconsistent results. However, it is still possible that these confusions can be avoided and the courts saved from the embarrassing position they may be placed in. Since the state legislature is usually armed with a myriad of fact-finding capabilities which are not available to the courts, and, as a result, is better able to digest and evaluate public attitudes in a comprehensive way, it could clarify and formulate a policy statement on whether or not A.I. is an acceptable practice.

A. *Legislative Inaction*

Attempting to answer why the legislatures have been hesitant to pass or even consider legislation is no easy task. Certainly it is due to many reasons which may or may not have merit. The lack of A.I. litigation may indicate that the need for such a statute is not sufficient to warrant the hazards which may result from popular indignation following introduction of such a bill.[180] Lack of public knowledge that problems exist in this area of the law may

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177 Iowa Code § 702.1 (1966).

178 State v. McCall, 245 Iowa 991, 995, 1000, 63 N.W.2d 874, 876, 879 (1954); State v. Anderson, 140 Iowa 445, 448, 118 N.W. 772, 774 (1908).

179 Note, *Artificial Insemination*, 23 Ark. L. Rev. 81, 90 (1969).

180 Note, *A Legislative Approach to Artificial Insemination*, 53 Cornell L. Rev. 497, 511 (1968).

encourage legislative inaction as may moral beliefs and sociological predictions on A.I.D.[181] But if the legislature is to remain passive and unresponsive to this problem, this will only compound the confusion. Litigation will increase as more A.I.D. children are born, grow older and they or their parents die. The potential problems engendered by the future of A.I. is most certainly compounded by the legislature, through its nonaction, of delegating its policy-making function to the courts.

B. *Legislative Action to Date*

The actual legislation to date has been minimal, however there are three pieces of legislation currently in force. In 1947, New York City added to its Health Code a set of controls regulating the procedures of A.I.D.[182] The Code provides that "[n]o person other than a licensed physician shall perform an artificial insemination or collect, offer for sale, sell or give away human seminal fluid for the purpose of causing artificial insemination."[183] The Code deals with the procedures for selection of a proper donor, emphasizing the safety from disease or hereditary malfunctions. It also makes provision for record keeping, requiring the physician to record the name of the physician, donor (with his address), recipient (with address), results of tests administered on donor and recipient, and date of A.I. The Code concludes by stating that these records will be kept in strictest confidence and will not be open to public inspection. However, no where does the Code deal with the status of a child so conceived or the marital relations involved. The enactment is interpreted to be a limited measure dealing with a specific problem and in no way clears up the legal issues involved in A.I.D.[184]

Georgia in 1964 became the first state to enact a statute dealing specifically with the legal issues presented by A.I.D.: "(a) All children born within wedlock, or within the usual period of gestation thereafter, who have been conceived by means of artificial insemination, are irrebuttably presumed legitimate if both husband and wife consent in writing to the use and administration of artificial insemination."[185] Only licensed doctors are authorized to perform A.I. and if any other person administers A.I. he will be guilty of a felony.[186] The physician who performs A.I. with the written consent of the parties is relieved of any civil liability to them or to any child so conceived, although the physician is not relieved from civil liability arising from his or her own negligent performance of artificial insemination.[187] This statute clears the air of many problems relative to legitimacy, adultery, support, inheritance, fraud and doctor's liability. A.I.D. is a legal procedure when done with the written con-

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181 *Id.*
182 N.Y.C. HEALTH CODE art. 21 (1959).
183 *Id.* § 21.01.
184 Gursky v. Gursky, 39 Misc. 2d 1083, 1087, 242 N.Y.S.2d 406, 410 (Sup. Ct. 1963).
185 GA. CODE ANN. § 74-101.1 (1964).
186 *Id.* § 74-101.1(b).
187 *Id.* § 74-101.1(c).

sent of the spouses. Presumably, if written consent is not obtained from either party, the same problems are still in existence and A.I.D. would result in illegitimacy of the child.

Oklahoma in 1967 became the second state to legalize A.I.D. by providing that "heterologous artificial insemination may be performed in this State by persons duly authorized to practice medicine at the request and with the consent in writing of the husband and wife . . . ."[188] The child so conceived is considered "at law in all respects the same as a naturally conceived legitimate child of the husband and wife . . . consenting to . . . such technique."[189] No person can perform A.I.D. unless he is a licensed physician who has the written consent of the spouses.[190] The written consent is to be acknowledged by the spouses, the physician, and the judge having jurisdiction over adoption, and this will be filed under the rules applicable to filing adoption papers.[191] Comparing this statute with Georgia's it can be seen that both declare the child legitimate and that only duly licensed physicians can perform the insemination with the written consent of the spouses. Oklahoma, however, does not declare the civil and criminal liabilities of those who perform A.I. in violation of the statute, as does Georgia. On the other hand, Georgia does not make provision for the concealment of records, while Oklahoma expressly renders the rules of adoption filing applicable to A.I.D. Neither of the statutes refer specifically to the procedures of selecting donors, as is prevalent in the New York City Health Code. Apparently these omissions and differences can be rationalized by the fact that A.I.D. is now declared a legal procedure when the statute is followed and that the medical profession can determine how to choose the proper donor as they have previously. In Georgia the medical profession will probably be expected to maintain its procedures of keeping the records concealed. In Oklahoma, while no criminal sanctions are incorporated, certainly civil liabilities can be imposed for violating the statute. In the end, both states clear up many problems which would face the courts if there was no statute covering A.I.D. plus declaring a policy statement that children so conceived and their family must be protected. In other words, it is not wrong to conceive or be conceived by A.I.D. if the statutes are complied with.

C. *Proposals and Considerations*

With these two statutes other states may feel less hesitant to consider the issues involved in A.I.D. Childless couples may be less reluctant to utilize A.I.D. if the child's legitimacy is assured. Of course, these statutes will not affect A.I.D. without the consent of the spouses and the status of a child conceived thereby. Thus, the question becomes how legislation is to be formulated to take care of the problems associated with A.I.

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188 OKLA. ST. ANN. tit. 10, § 551 (1967).
189 *Id.* § 552.
190 *Id.* § 553.
191 *Id.*

The suggested proposals can be grouped into three categories: (1) proscription of A.I.D., (2) limited legislation geared to specific problems, and (3) comprehensive regulation.[192] Two state legislatures have considered, without success, the possibility of making A.I.D. criminal.[193] It was believed that by eliminating A.I.D. all troubles would be abolished, and that making it a criminal practice would serve to show society's disapproval. However, such proscription would disallow voluntary individual choice and would eliminate our society's respect for minority views. Such a statute should not be declared unless there is a harm to the general health and morals of society which outweighs an interference with individual freedoms. A.I.D. does not constitute so serious a threat to society. One writer has suggested that legislation banning A.I.D. may possibly violate the fourteenth amendment which, pursuant to *Griswold v. Connecticut*,[194] protects a couple's right to privacy and to bear children.[195] As a result, such a statute would be attacked as an unreasonable exercise of police power which has no reasonable connection between the regulation and activity affecting public morality.[196]

Comprehensive legislation would have a state agency handle the policy decisions now made by the individual doctors.[197] There would also be a centralized recording facility, and hopefully all the legal issues could be resolved by the statute prescribing all the rights and duties.[198] This type of statute is, nevertheless, disproportionate to the size of the problem and would probably create more problems than solve, such as how to sanction and enforce deviations from the norm established by the statute.[199]

Probably the best type of legislation would be the limited legislation with a general statute. This would leave the choice of A.I.D. with the individual, and government action would only be called for on practical problems.[200] This would protect the welfare of a child so born. In this type of legislation many things could be included, but the essentials would be to declare A.I.D. a lawful practice, define the procedures to establish the legality of the participation by the husband, wife and donor, and to declare the child so born legitimate. The specific procedures to A.I.D. should be left with the medical profession.

Further considerations could be incorporated into such a statute but the terms should remain general. By declaring the child legitimate and not speaking in terms of inheritance, there would be an elimination of the potential harm to the child by revealing his status in a contest over his inheritance or support rights. All that need be said is that people conceived by A.I.D. with

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192 *Social and Legal Aspects*, *supra* note 4, at 883.
193 Minnesota House Bill 1090 (1949); Ohio Senate Bill 93 (1955).
194 381 U.S. 479 (1965).
195 *Human A.I.*, *supra* note 17, at 969-70.
196 *Id.*
197 *Id.* at 970.
198 *Social and Legal Aspects*, *supra* note 4, at 884.
199 *Id.*
200 *Id.*

the consent of the husband and wife shall be treated in all respects as a naturally conceived legitimate child.[201]

The law should not countenance A.I.D. without consent. Possibly the status of a child born without the consent of the husband should be declared plus any civil or criminal liabilities of the wife and doctor. The consents that are obtained, including that of the donor's wife, should be required to be secretly recorded or the doctor should personally keep the records with disclosure to only those having a proper legal interest.

To prevent alienated spouses from claiming consential A.I.D. constitutes civil adultery, it might be advisable to incorporate into the divorce statute the definition of sexual intercourse. Annulment should be specifically disallowed for impotency if children are conceived by A.I.H. or A.I.D. If the child was produced without the consent of the husband, the proper remedy would be a divorce based on cruel and inhuman treatment.[202]

These considerations are not exhaustive but only indicative of the primary areas for legislative change. Certainly additional problems as to the retroactivity of the statute or the number of donations made by a donor can be considered and worked out by the state legislature. The job will not be easy but the end result will undoubtedly clear the air of confusion and uncertainty.

VI. Conclusion

The following statement best summarizes the path which A.I. should take in the future:

> Something will have to be done in order to fit this medical innovation into our social structure so that justice is done to all and no one will be hurt or made to suffer as the result of its use. The medical profession has developed a technique and now the legal profession must try to adjust it for the welfare of society.[203]

David A. Sergeant

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[201] Note, *A Legislative Approach to Artificial Insemination*, 53 Cornell L. Rev. 497, 512-13 (1968).

[202] *Social and Legal Aspects*, *supra* note 4, at 884.

[203] Holloway, *Artificial Insemination: An Examination of the Legal Aspects*, 43 A.B.A.J. 1089, 1090 (1957).