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DILEMMA IN PARENTHOOD: SOCIO-LEGAL ASPECTS OF HUMAN ARTIFICIAL INSEMINATION

Arthur A. Levisohn *

HUMAN ARTIFICIAL INSEMINATION is used today more frequently than is commonly known; and just for this reason it is being heatedly discussed in its various implications in medical, religious, legal and social circles. The emotional intensity which all too often characterizes these discussions has contributed little to truly clarifying the various issues. In this paper, however, an attempt is made to analyze the problem *sine ira* and thus promote an objective view of this paramount question.

I have long felt that the socio-medical advance which has been made in the matter of human artificial insemination has been scientifically possible as an additional facet to the already recognized pattern of family disorganization which is so characteristic of society today. As such, it must be received with an eye toward creating new concepts toward the family as an institution, despite the ideals and aspirations, one might even say traditions, which form stumbling blocks to an unbiased study of family situations.

* LL.B., Chicago-Kent College of Law; M.D., Chicago Medical School; Professor of Medical Jurisprudence, Chicago Medical School. Member, Chicago, Illinois and American Bar Associations; The American Board of Legal Medicine; Chicago, Illinois and American Medical Associations. This paper is substantially the same as one appearing in, and is reprinted with permission granted by, The Journal of Forensic Medicine. See 4 J. Forensic Med. 147-72 (1957).

Ernest Mowrer, the sociologist, once defined and described the phenomenon of family disorganization, and accounted for the resistance to change within the family, by saying:

Most of our knowledge of the contemporary family is highly tentative, if not speculative, as is true also of our information of many other social institutions in modern life. And yet in a sense research in the modern family has lagged behind social research in general, owing to the emotional attachment to the family experience. Ideals and aspirations have got in the way of seeing family relations without bias. Much more pleasing results have been obtained by wishful thinking. This, however, has only thwarted human desires by making projection and control impossible, or, what is often worse, encouraged endless controversy, which has impeded, rather than facilitated, adjustment to modern conditions.¹

Conservative theologians and others who try desperately to maintain established or traditional ways of thinking and believing, consequently, deplore most vocally the acceptance of artificial insemination on moral and religious grounds. But the tide cannot be stemmed.

It will, then, become necessary for people to re-orient themselves to new horizons for the family as a social institution, but it is not my purpose to go into this wide field further than to point out that artificial insemination, both heterologous² and homologous,³ will be viewed against the general background of family disintegration and re-organization. While resistance to change is to be expected and is part of the institutionalizing process, the social forces which cause change defy permanent resistance.

¹ Mowrer, *The Family, Its Organization and Disorganization* (University of Chicago Press, 1939), p. 280.

² Hereinafter referred to as AID, being artificial insemination by a donor's semen.

³ Hereinafter referred to as AIH, meaning artificial insemination by semen of the husband.

Artificial insemination is not new and it is here to stay. One case is recorded in the eighteenth century, the physician being the English practitioner Dr. John Hunter.⁴ Dr. J. Marion Sims performed artificial insemination in the United States in 1866, but subsequently came to the conclusion that the practice was immoral and abandoned it.⁵ The practice may be said to have lain dormant, at least officially, for almost a century; but it has grown unofficially to such proportions that it can no longer be ignored by legal authorities.

What is new about artificial insemination is first, an increasing prevalence in its use, and second, the fact that a body of opinion is emerging which approves of it, at least to a major degree, and even encourages it. It has been estimated that at least 50,000 "test tube" babies have been born in the United States. All statistics are mere estimates, of course, because officially no records are kept except in the City of New York.⁶ However, according to Professor Ritchie Davis' estimate, the actual number may be anywhere from 50,000 to 200,000, while a quarter of a century ago there were fewer than 200 recorded cases in the entire world.

This increasing resort to the practice of artificial insemination has come about partly because of the large number of infertile husbands, of whom there are at least a million in the United States. Most married couples desire to have children. The demand for orphans whom childless couples may adopt generally exceeds the supply,⁷ but even if there were enough orphans to go around, many couples desire children of their own creation. For such couples, artificial insemination would be a preferable recourse although, of course, where the wife is infertile, artificial insemination would offer no remedy.

⁴ See biographical article on Dr. Hunter in 11 *Encyclo. Brit.* 919, and note in 1950 *Wis. L. Rev.* 136.

⁵ A biographical article on Dr. Sims appears in 25 *Encyclo. Amer.* 29.

⁶ The New York City ordinance is discussed below at note 65, post.

⁷ See report of Special Committee on Adoption Law, 26 *Chicago Bar Rec.* 359 (1945), particularly pp. 361-3.

When the infertility of the husband is the sole cause of the absence of children in families where they are strongly desired, heterologous artificial insemination is recommended by many doctors. However, as already stated, the opposition that exists rests chiefly on religious grounds for, when medical men express opposition they do so because they are influenced by factors other than those which are purely medical or biological. Dr. J. P. Greenhill, practicing in Chicago, on the other hand, states:

All of my patients were highly selected as to intelligence, health and youth . . . Nearly all of them have been among the most grateful patients I have . . . From my discussions with patients and their husbands, the children have turned out very well and perhaps better than average . . . All in all, I firmly believe that AID is a most useful contribution and should be continued. In the cases where religion is opposed to AID, it should not be performed.⁸

Lawyers too are mainly impressed by the paucity, or more correctly the almost total absence, of legal precedents on the point. This fact has given rise to questions, sometimes rather far-fetched, and raises hypothetical difficulties. As ecclesiastical authorities also dwell on these same hypothetical difficulties because they wish to discourage the practice, attention should first be given to the views expressed by men of religion.

I. RELIGIOUS VIEWS ON INSEMINATION

A. THE ROMAN CATHOLIC ATTITUDE

All the Roman Catholic authorities whose pronouncements have come to my attention⁹ have condemned AID although some of them have said nothing at all about AIH. His Holiness Pope Pius XII discussed both AID and AIH in three separate allocutions. These pronouncements, while not technically *ex cathedra*, are of such weight that no Roman Catholic authority would ques-

⁸ Letter to author under date of December 19, 1956.

⁹ I am indebted to the Chancery Office of the Roman Catholic Archdiocese of Chicago for referring me to Catholic citations.

tion them. The first, delivered to the Fourth International Congress of Catholic Doctors on September 29th, 1943, makes it clear that artificial insemination outside of marriage, *i. e.*, when unmarried women resort to it to obtain children of their own without undertaking the obligations of marriage, is purely and simply immoral, and the children are illegitimate.¹⁰ While extra-marital artificial insemination is not unknown on the continent of Europe, I have never heard of a case of this type in the United States nor have I found an American writer advocating it, hence further comment would appear to be unnecessary.

This first Papal pronouncement also goes on to condemn AID as practiced in America, that is the resort to artificial insemination in marriage but produced with the active element taken from a third party, saying this conduct was "equally immoral, and as such is to be condemned without recourse." The most important points in support of this position are repeated in the Pope's own words, to-wit:

Whoever gives life to a little human being, receives from nature herself, in virtue of that very relationship, the responsibility for its conservation and education. But between the lawful husband and the child who is the fruit of an active element derived from a third party (even should the husband consent) there is no link of origin, no moral and juridical bond of conjugal procreation . . . It would be false to think that the possibility of resorting to this means might render valid a marriage between persons who are unfit to contract it by reason of the impediment of impotence.¹¹

It is not for me to interpret this language, but the door does not seem to be left open very wide, if at all, even for AIH, for the allocation concludes as follows:

Although one cannot *a priori* exclude new methods because they are new, yet, as far as artificial fecundation is con-

¹⁰ *Acta Apostolicae Sedis*, Vol. 41, p. 577, translated in Bouscaren, Canon Law Digest, Vol. 3, pp. 432-4.

¹¹ *Ibid.*

cerned, not only does it call for extreme reserve, it is absolutely to be rejected. To say this is not necessarily to proscribe the use of certain artificial means designed only to facilitate the natural act, done in the normal way, to attain this end.

Considering this language carefully, one possibly might conclude that the highest authority in the Roman Catholic Church might not condemn unreservedly some means which might be devised, perhaps in cases of hypospadias, *e. g.*, for helping the seed of the husband to find its way to the *os* of the *cervix*, or even of actual intra-uterine or intracervical insemination. This aid is all that is necessary in the opinion of Dr. Stuart Abel of Chicago and of other authorities.¹² There may, perhaps, be some distinction between this and AIH, though to my non-clerical mind the line of demarcation is not clear. It would seem to me, however, that this language has led most Catholic authorities to devote themselves chiefly to the condemnation of AID, while seeming to adopt a somewhat non-committal attitude about AIH.

But, even if Pope Pius left the door open a little for AIH in the allocution quoted, it would seem that he closed it beyond all hope in a second one. On October 29th, 1951, when addressing a gathering of Italian Catholic midwives, the Pope said: "To reduce the cohabitation of married persons and the conjugal act to a mere organic function for the transmission of the germ of life would be to convert the domestic hearth, sanctuary of the family, into nothing more than a biological laboratory."¹³ Then, after referring to the earlier statement given to the Catholic Doctors, His Holiness continued:

We formerly excluded artificial insemination from marriage. The conjugal act in its natural structure is a personal action, a simultaneous and immediate co-operation of the parties which, by the very nature of the actors and the peculiar

¹² A Symposium on Medico-Legal Problems, Chicago Bar Association, 1948.

¹³ *Acta Apostolicae Sedis*, Vol. 43, p. 835, translated in Bouscaren, Canon Law Digest, Vol. 3, p. 835.

character of the act, is the expression of that mutual self-governing which, in the words of holy scripture, effects a union "in one flesh." This is much more than the union of two life germs, which can be effected also artificially, that is, without the natural action of the spouses. The conjugal act, as it is ordained and willed by nature, is a personal co-operation, the right to which the parties have mutually conferred upon each other in contracting marriage. Hence, when the performance of this function in its natural form is, from the beginning, permanently impossible, the object of the matrimonial contract is affected by an essential defect.¹⁴

This language would seem to rule out AIH as well as AID.

Even more recently, Pope Pius XII again expressed himself on the same subject, this time in an allocution to the Second World Congress on Fertility and Sterility, the text of which is now available in English. His Holiness then said:

Artificial insemination is not within the rights acquired by a couple by virtue of the marriage contract, nor is the right to its use derived from the right to offspring as a primary objective of matrimony. The marriage contract does not confer the right because its aim is not "progeny" but "natural acts" capable of generating a new life. Therefore, artificial insemination violates the natural law and is contrary to what is right and moral.¹⁵

This latest statement, so far as I can see, does not modify or add anything to the earlier statements. However, notwithstanding this very definite language, the Pope did add: "This does not mean that one must necessarily condemn the use of certain artificial means, with the view of either facilitating the conjugal act or attaining the objective of the normal act."¹⁶

¹⁴ Ibid.

¹⁵ The English translation may be found in the May 25, 1956, issue of *New World* (Archdiocesan Journal of Chicago), at p. 1.

¹⁶ Ibid.

While, in a papal decree of Pope Leo XIII issued in 1897, artificial insemination had been pronounced illicit,¹⁷ some Catholic writers would appear to think that the door has not been absolutely closed.¹⁸ I leave the reconciliation of these statements to Roman Catholic authorities, but I point out that they do not support the position of the few legal decisions which pronounce AIH to be lawful, while denouncing AID as being adulterous.¹⁹

B. THE ANGLICAN POSITION

In December, 1945, the Archbishop of Canterbury appointed a commission of thirteen members to consider human artificial insemination. The report of this commission, first published in 1948 and then reprinted in 1952, is perhaps the most thorough study on the subject which has yet appeared.²⁰ It summarized, both powerfully and fairly, the arguments in favor of AIH and AID as well as those against them, but with the final conclusion being against AID,²¹ much emphasis being placed on the secrecy attending upon it and the deceit which would be inherent in the falsification of birth registers. As to the latter, the report took a position similar to that of the Roman Catholic Church, condemning AID and recommending the passage of legislation designed to make it a criminal offense.

The report stressed the need for taking such legal action because of the declining birth rate in England and the increas-

¹⁷ Special reference was made therein to masturbation, *coitus interruptus*, and the use of the condom.

¹⁸ In an article in *Ecclesiastical Review*, Vol. 101, at p. 109, Reverend Gerald Kelly, S.J., lists some thirteen Catholic authors who have written on the subject, of whom six consider AIH to be illicit and seven think it probably licit.

¹⁹ Roman Catholic writers who have expressed themselves since the allocation of Pope Pius XII include Rev. Anthony F. LoGatto, "Artificial Insemination: Legal Aspects," 1 *Cath. Lawyer* 172-84 (1955), and Edmund H. Caddy, "Artificial Human Insemination," 12 *N. Y. Co. Lawyers Bar Bull.* 193 (1955). Earlier writings may be found listed in Glover, *Artificial Insemination Among Human Beings* (Catholic University of America, Washington, 1948). For contrast thereto, see Williams, *The Sanctity of Life and the Criminal Law* (Alfred A. Knopf, New York, 1957), and Holloway, "Artificial Insemination: An Examination of the Legal Aspects," 43 *Am. Bar Ass'n Journ.* 1089 (1957).

²⁰ Information with respect thereto was graciously supplied by Dean Howard S. Kennedy, St. James Episcopal Cathedral, Chicago.

²¹ The position was less conclusive as to AIH.

ing incidence of sterility. These factors were said to point to the danger of public acceptance of artificial insemination as a future hazard to society. It declared that as the organization of the family had largely disintegrated as an economic unit, with its moral authority being invaded and its cultural functions being absorbed by other agencies, all that remained to unite its members was physical kinship and, with artificial insemination, even that quality would be lost.

It should be noted, however, that there was no absolute unanimity in the report prepared by this commission. On one point and one point only were all thirteen members in agreement and that was that "assisted insemination by the husband was justifiable." Reverend R. C. Mortimer, an Oxford theological professor, refused to agree that "where assisted insemination was inapplicable, other methods of artificial insemination may be justifiably employed."

Dr. W. R. Matthews, Dean of St. Paul's, declined to sign the report and, in an independent note, criticized the commission as being too eager to reach a final and absolute judgment in a matter as yet very imperfectly understood. "After all," he said, "one should be cautious in adding to the list of deadly sins." While stating his strong repugnance to the whole idea, as being degrading to the conception of personality, he admitted that we have "often to overcome instinctive repugnancies for the sake of a higher good," hence he considered the psychological and sociological objections as being almost entirely conjectural.

The striking point made by Dr. Matthews was that he did not believe Christian theology to be immutable. "Theology," he said, "has changed and is changing. It is the Christian ethic of love which is eternal."²² He therefore condemned, as crassly materialistic, the legal conclusion that AID, when carried out at the request of the husband and with due precaution against injustice to others, is adulterous; this because the "spiritual ele-

²² He did not find that Jesus deduced His ethical teaching from a theological system, but rather that it came from His conviction that God is love.

ments which constitute the sin of adultery are absent." He also added that all the lay people to whom he had mentioned the fact that some theologians regarded AID as equivalent to adultery had received the information "with incredulity."

Finally, he criticized the theological section of the report because it assumed a "static view of nature and of man which was natural enough in the Middle Ages . . . It might have been written by men who had never heard of evolution." In his opinion, the report took a static view of society and of the family, while he believed that "Christians ought not identify their religion with things as they are, even in the case of the family."

The point of view of Dean Matthews is singularly important to me. It reflects present sociological conclusions with regard to the nature of our *mores* and to the changing aspects of our attitudes toward the family in particular. It forms the basis, in my opinion, for a general acceptance of artificial insemination and for the removal of all bias with respect to it; bias being a factor that only impedes progress.

To regress, it is not probable that Britain will enact legislation condemning artificial insemination. In March, 1956, the Royal Commission on Divorce Law did recommend a widening of the grounds for divorce to include the artificial insemination of a wife without her husband's consent, but this is all that this commission has effected to date.²³

C. THE LUTHERAN ATTITUDE

The Lutheran denomination, according to information supplied me by the Reverend Otto Paul Kretzman, President of Valparaiso University in Indiana, has never taken an official position on either AID or AIH, hence there is no authoritative statement which can be used in this connection. This does not mean that no consideration has been given to the topic for some

²³ [Editor's note: Time Magazine, Vol. LXXII, No. 10, at p. 74, notes that among the 131 resolutions published by the Anglican Commission at its recent Lambeth Conference of bishops was one which endorsed artificial insemination only if the husband is the donor, *i.e.*, AIH.]

Lutheran authorities have examined into the matter and feel that there is no basis for objection provided the usual precautions, both biological and moral, are observed.²⁴ Further study is now being given to the subject by the Lutheran denominations but the result thereof is not yet available. This rather non-committal viewpoint would also seem to be characteristic of the more liberal Protestant churches generally.

D. THE JEWISH POSITION

As is true with the Roman Catholic faith, the orthodox, as well as the conservative, Jewish authorities base their position on the proposition that there is a "natural" moral law which is immutable; that this moral law was laid down by ancient Jewish law-givers; that it has not changed; and that it never can be changed. It is, of course, freely admitted that these law-givers had never heard of a planned artificial insemination of a human being but it is asserted as being obvious that, had they heard of it, they would have condemned it. Nevertheless, the Jewish attitude varies in ways which may be said to correspond roughly with those of the several Christian groups, so separate discussion thereof is necessary.

1. The Jewish Orthodox Attitude

All Jewish authorities²⁵ are influenced by the didactic teaching of the Torah that man should be fruitful and multiply. For this reason, it is considered obligatory for each Jewish couple to bear a boy and a girl. Most orthodox Jewish authorities seem to agree that AIH is not permissible except in cases where no children have been born after ten years of marriage and where it is impossible to have children by any other means. Further-

²⁴ Appreciation is expressed to Dr. O. P. Kretzmann, President of Valparaiso University, Indiana, for the statement concerning the Lutheran attitude.

²⁵ Acknowledgment is gratefully made for the assistance of Mr. Isaac Sender of Chicago, who prepared a careful abstract of the orthodox Jewish authorities; to Dr. David Graubert, Presiding Rabbi of the Chicago Council of the United Synagogue of America, for a communication stating his views as a Conservative Rabbi; and to Dr. Solomon B. Freehof, D.D., Rodef Sholom Temple, Pittsburgh, for notes on **the position** of Liberal Rabbis.

more, this fact must be established by the expert opinion of two doctors and two rabbis.

A son born in this way would not have exactly the same standing as if born as the result of procreation in the usual way. He is legitimate, but if no other children are born of the marriage, a widow must receive *chalitza*, that is ceremonial permission from the nearest relative of the deceased husband, before re-marriage, just as if no children had been born at all. It is doubted, therefore, whether the obligation to be fruitful is fulfilled by the production of AIH children.

The orthodox Jewish attitude in relation to AID, however, seems paradoxical to the lay mind. AID children are considered legitimate, but the practice of AID is nevertheless forbidden. The husband whose wife gives birth to an AID child, whether with his permission or not, may sue for divorce, but is not required to do so.

Among the writers on the subject, it could be said that Rabbi Isiah Gerelitz of Chicago, known as the *Chayzan Ish*, a very much respected authority, is entirely opposed to artificial insemination. A similar view is expressed by the unknown author of the *Responsa of Divrei Malgial*. By contrast, Rabbi Sholom Mordecai Ha-Cohen Shabron, Chief Rabbi of Berzen, Poland, would allow the operation with the restrictions stated above, and similar views have been expressed by Rabbi Ovadajah Joseph²⁶ and by Rabbi Jacob Braisl, Chief Rabbi of Zurich, Switzerland.

By way of explanation, some religious authorities, especially the Jewish ones, base their objection to AIH on the ancient Jewish rule against masturbation.²⁷ So far as AID is concerned, some of the difficulty appears to be generated by the Talmudic account of the accidental insemination of his own daughter by the prophet

²⁶ See *Responsa Yabi Omer*, Vol. 2.

²⁷ Some appear to think that this objection could be overcome by testicular aspiration. This method of obtaining semen without masturbation, while not absolutely impossible in theory, is not supported, so far as I know, by any medical authority. All the references I have found in medical literature have declared it impractical.

Jeremiah.²⁸ Orthodox rabbis treat this account as being literally true while more liberal reformed Jewish scholars consider the story as no more than a hypothetical case for discussion. However that may be, the conclusion seems inescapable that, where there is no guilty intent, there is no sin.²⁹

2. *The Conservative Position*

The Conservative Jewish viewpoint represents a middle ground between the orthodox and the liberal groups. Dr. David Graubert, Presiding Rabbi of the Chicago Council of the United States of America, states that the theory regarding artificial insemination in traditional Judaism is, much of it, conjectural and mythical. On the other hand, conservative Judaism has not formulated its position. While that position does not differ definitely from traditional Judaism, a more precise statement cannot be made until the Law Commission of the Rabbinical Assembly of America has issued a decision.

3. *The Liberal Viewpoint*

In his *Responsa* to the question whether artificial insemination is permitted by Jewish law, Dr. Solomon Freehof, of Rodef Sholem Temple, Pittsburgh, Pennsylvania, makes a number of points. It is best, therefore, to reproduce the *Responsa* in full before adding any comment. Dr. Freehof writes:

1. Even though the technique of artificial insemination is new, most of the questions raised by it are not new in the Law, since the legal literature has already discussed them with regard to analogous circumstances, such as, for example, if a woman is impregnated in a bath from seed that has been emitted there. (Cf. b. *Chagiga* 15 a top, *Ibra b' Ambeti*).

²⁸ According to the Talmud, the prophet's daughter took a bath in the same water in which her father had bathed. Evidently, he had had an emission of semen in the water, and she gave birth to a son, Ben Sirah, in consequence. But there was no sexual intercourse and no intention to procreate; therefore, as even the strictest of orthodox rabbis declare, there was no sin. The rabbis also hold that the same principle would apply if a woman occupied a bed after a man had had an emission and she became accidentally impregnated by semen from the sheets.

²⁹ For a full discussion from the orthodox Jewish point of view, see Dr. J. Jakobovits, "Artificial Insemination, Birth Control and Abortion," 2 *Harofé Havri* (The Hebrew Medical Journal), p. 183.

2. Joel Sirkes ('Bach' 1561-1640) to *Tur Yore Deah* 195 (quoting Semak) says that the child is absolutely *kosher* (i.e., not a *mamzer*), since there has been no actual forbidden intercourse (Ayn Kan bias issur).
3. Judah Rosanes (died in Constantinople, 1727) in his *Mishneh L'melech* to Maimonides, *Hiechos Ishus* XV, 4, declares that the woman is not immoral and is, therefore, not forbidden to live with her husband.
4. But whose son is it? Samuel B. Uri Phoebus (17th Century) in his commentary *Bays Shemuel* to *Shulchan Aruch Even Hozer* 1, note 10, says that it is the son of the donor; otherwise, we would not be concerned lest the child later marry his own blood sister.
5. Since the development of the technique of artificial insemination, the subject has been discussed by Chayim Fischel Epstein in his *Teshuva Shelema* (Even Hozer—4), and by Ben Zion Uziel of Tel Aviv, the Chief Sephardic Rabbi of Palestine, in his *Mishp 'te Uziel*, Part II, *Even Hozer*, Section 19.

It is Dr. Freehof's own opinion that the possibility that the child may marry his own close blood kin is far-fetched, but that, since the wife has committed no sin and the child is *kosher*, artificial insemination should be permitted.

Professor Alexander Guttmann, H.U.C., of Cincinnati, in his *Responsa* to the same question, also discusses the authorities at length, and concludes that artificial insemination, as understood today, is not mentioned in Rabbinic source literature.³⁰ While he says indications strongly point to a negative answer, particularly if the seed of a stranger is to be used, he does not see sufficient evidence for recommending the issuance of a prohibition against artificial insemination. He cautions, however, against a hasty

³⁰ He found the same references to accidental insemination mentioned in note 28, ante. It is hardly possible, however, to draw safe conclusions from the theoretical accidental insemination reported in the Jewish sources in relation to the present practice.

permit, for which he finds no significant agreement in Jewish teachings.³¹

II. COMMENTARY ON RELIGIOUS VIEWS

Clearly, anyone who advocates heterologous artificial insemination must have some answer to the arguments of the more conservative theologians. The writers previously referred to assert that moral laws do not change with changing circumstances. We may admit that fundamental moral laws do not change, but they must be applied, as all laws must, to new situations. The question is which laws are fundamental, and which are merely adaptations to particular situations? The ancient law-givers forbade adultery, but permitted polygamy and concubinage. These customs now would be considered immoral, since they are not in accordance with the ethical standards of our own society.

There are many departures from ancient law. Divorce was permitted in ancient Jewish law,³² as well as in other legal systems, but was later prohibited.³³ The ancient Jewish law relating to the levirate provided that should brothers dwell together and one of them die and leave no son, the surviving brother must take the widow as his wife, and the first son whom she bears must succeed to the name of the deceased brother. If he refused to take his brother's wife, he was subjected to a humiliating penalty.³⁴ This practice ceased with the abolition of polygamy. Likewise, this custom is not, of course, in accordance with the present practice of Christians or Jews, although it is discussed by Jesus without any indication that he had any objection to it.³⁵ Clearly, then, these laws relating to the family were not of immutable character and have changed with changing concepts. Are not other family doctrines open to the same influence?

³¹ Consult the Central Conference of American Rabbis, Yearbook 1953, Vol. 62, pp. 123 et seq.

³² Deut., xxiv, v. 1-4.

³³ Matt., v. 31-2; Mark, x, v. 2-12.

³⁴ Deut., xxv, v. 5-10.

³⁵ Mark, xii, v. 19-25.

It is true that the Roman Catholic Church, and a few other religious bodies, believes unreservedly not only in the immutability of the moral or "natural" law but also that the Church has infallible authority to interpret it.³⁶ For those who so believe, of course, the conclusions of the Church are final. But even they cannot dispose of the question when it concerns persons not of the same religious persuasion, notwithstanding such statements as that of Albert S. Johnson, III, who writes that "the quantitative weight of authority represents the view that artificial insemination is adultery and produces an illegitimate child" and who asks the question whether society can be said "to evolve moral principles?"³⁷ Citing from Glover to the effect that, because the principles concerning marriage and the sexual act have long been given to man, "there can be no doubt whatever that heterologous artificial insemination is an immoral practice and an attack upon the unity of the marriage bond,"³⁸ Johnson concludes:

The legal solution lies not in a complex statute declaring this undesirable and unnatural practice *legal* and providing for all of its complicated legal ramifications, but rather in the passing of a simple law declaring it *illegal*, as against public policy and good morals. This is the only possible natural law solution to the problem.³⁹

It is with this last paragraph that one has to take issue. Even from a Catholic point of view, it is no solution. Respect for the views of others is the very foundation of democracy. A practice followed by thousands of people and supported by the leading members of the medical profession should not be declared illegal because it conflicts with the views of a certain segment of society, even if that segment constituted a majority of the population. To attempt to suppress the practice would create more problems than it would solve. A better case could be made out for the suppression of alcoholic drinking than for the suppression of

³⁶ See Encyclo. Social Sciences, Vol. 11, for article by Clemens Bauer on the title "Papacy," particularly pp. 567-8, discussing this point.

³⁷ Comment in 5 Cath. U. Amer. L. Rev. 189, at p. 191.

³⁸ Glover, *op. cit.*, note 19, *ante*.

³⁹ 5 Cath. U. Amer. L. Rev. 189, at p. 191.

artificial insemination. The latter produces no helpless alcoholics, nor has it been known to ruin anybody. But we have learned by experience that to forbid alcoholic drinking by law produces more evils than it cures.

If AID were to be declared illegal in some parts of the United States, I believe the medical profession would certainly refuse to practice it there, whatever might be the private opinions of individual practitioners. Artificial insemination would then be driven underground. If AID were driven underground, many couples would go to the nearest jurisdiction where it could be legally performed. We would have medical Renos for those who could afford to travel thither. Some would try to inseminate themselves. Some would seek the aid of illicit practitioners. There would be bootleg babies. Whatever evils may exist where the practice is legalized would be increased enormously were it to be declared illegal. It may be doubted whether the legal prohibition of artificial insemination would prevent any couple who really desired it and believed in it from having an AID or AIH baby. In the interests of the baby, such married persons should be allowed to have children by such means under the best possible conditions, both medically and legally. Even those who believe the practice to be morally wrong must admit the necessity of recognizing its existence and of regulating it, just as they do divorce, of which they also may disapprove.

But AID and AIH have not been declared illegal by any court of last resort which had jurisdiction to decide the question. We have some dicta on each side of the question, but we have no decisions, and the dicta we have reflect the private views of individual judges only. They are not based on legal precedents because there are no precedents.

III. THE LEGAL ASPECTS

It is admitted, at the outset, that both the common law rules and all existing statutes dealing with marriage, divorce and adultery are silent on the point of artificial insemination, principally because existing legal principles were laid down by judges

or legislators who did not have the practice in mind and, in the vast majority of instances, did not know that such a procedure was possible.

There is now no law, common or statutory, either permitting or denying the right to resort to artificial insemination. This is true of every new discovery. Nobody ever thinks in advance of seeking legal authorization for practices or customs about which the law is not only silent but also ignorant. Nobody ever thought of seeking legal authority for riding on trains or in automobiles or for sailing on steamships or, at the present time, for the use of space ships. Certainly, all such innovations raised new legal problems and often moral ones as well. The older generations among us can remember when it was thought wrong, or at least unlady-like, for women to ride bicycles, and it is said that at least one bishop in Canada forbade his clergy to make use of them. Some among us, as youths, heard automobiles denounced as devices of the Evil One, especially intended by him to induce people to go pleasure-riding on Sunday instead of attending church; and there can be no denying that the use of the automobile has tended to reduce church-going. Such also seems to be the case with artificial insemination but, leaving pure speculation aside, let us examine the few case illustrations that do exist on the point.

The Canadian case of *Orford v. Orford*⁴⁰ gave rise to much controversy. The action was one for alimony by a wife, who alleged she had given birth to a child by means of artificial insemination from a donor, with the husband defending and refusing to receive the plaintiff as his wife on the ground that she had committed adultery. It was contended for the plaintiff that heterologous artificial insemination (AID) did not constitute adultery; that to constitute adultery, there must be actual normal sexual intercourse outside of marriage. A distinction was attempted to be drawn between the act of adultery, or sexual intercourse outside of marriage, and insemination or pregnancy, which

⁴⁰ 49 Ont. L. R. 15, 58 D. L. R. 251 (1921).

might merely be the result of it. Certainly none would contend that sexual intercourse which did not produce pregnancy was not adultery. If pregnancy was obtained without such intercourse, it should, therefore, not be considered to be adultery.

Having found as a fact that adultery had occurred in the ordinary way, the court then turned to answer the plaintiff's argument in detail. The term "adultery," it said, had never had an exact meaning, nor had its meaning been the same in all countries and under all systems of law, but that all definitions did use the term "sexual intercourse," or some synonymous expression, to describe one of the necessary ingredients of adultery. As plaintiff's counsel had argued that, without sexual intercourse, there would be no adultery, the court felt obliged to extend itself to show up the fallacy of relying upon the precise terms of a definition without regard for the branch of law of which it formed an element. In that connection, the court said:

It is admitted that there is no direct authority upon the exact point. . . . The sin or offence of adultery, as affecting the marriage, . . . may be traced from the Mosaic Law down through the canon or ecclesiastical law to the present date. . . . In its essence, adultery was an invasion of the marital rights of the husband and wife. The marriage tie had for its primary object the perpetuation of the human race. The Church of England's marriage service—the voice of the Ecclesiastical Courts of England—gives as the first of the causes for which matrimony was ordained, that of the procreation of the human race. Can anyone read the Mosaic Law . . . without being convinced that had such a thing as artificial insemination entered the mind of the law-giver, it would have been regarded with the utmost horror as an invasion of the most sacred rights of husband and wife, and have been the subject of the severest penalties? . . . The essence of the offence of adultery consists . . . in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person. Sexual intercourse is adulterous because in the case of the woman it involves the possibility of intro-

ducing into the family of the husband a false strain of blood. Any act of the wife which does that would, therefore, be adulterous.⁴¹

It then added that, if it were necessary to do so, it would hold that "the introduction into the wife's body of seed of a man other than her husband," would, for this purpose, be considered as "sexual intercourse."

This statement is, however, a clear *obiter dictum* since the court had expressed complete disbelief in the wife's statement that she had been artificially inseminated and had decided the case on the assumption that adultery had been committed in the ordinary way. True, the judge made a lengthy and careful statement as to what his decision would have been had he believed that AID had actually taken place and, as indicated by the foregoing excerpts, a holding would have been achieved upon the basis of Mosaic Law as interpreted by the Ecclesiastical Courts of England. But the fact remains, the conclusion reached was an elaborate dictum and no more.

In this respect, the court was merely following the beaten track of jurisprudence in those areas where the English common law prevails. There can be no denying the correctness of the method from the strictly legal point of view, whether or not we agree with the conclusion attained. But may not one be permitted to express a doubt whether the rule so announced would conform to the wishes of the vast majority of American citizens or be in accord with the spirit underlying the Constitution of the United States.

The English common law has, of course, been greatly altered by statute, including all the legislation which affects divorce and matrimonial causes, but on any point not so affected, courts still tend to rely on the old ecclesiastical law of that country. This is still more anomalous when it is remembered that the First Amendment, with the tacit reference thereto in the Fourteenth Amend-

⁴¹ 49 Ont. L. R. 15 at 21-2, 58 D. L. R. 251 at 257-8.

ment, forbids the passage of laws "respecting an establishment of religion, or prohibiting the free exercise thereof." The point may be raised whether the subjection of the most intimate relations of life to ecclesiastical law, regardless of the religious convictions of those most concerned, is not really a very substantial breach of this principle.

While there has been quite a substantial departure from the English ecclesiastical law⁴² in regard to divorce, legitimacy,⁴³ and other family matters, all these departures have been accomplished by statutory change for there is, generally, no other way by which change in the common law can be effected. This fact would, similarly, indicate the desirability of, if not the necessity for, legislation to regulate artificial insemination instead of leaving to the courts the impossible task of twisting older principles in a vain endeavor to make them cover a question which was never in the minds of the ancient law givers. Also, since a considerable number of citizens do not consider artificial insemination to be repugnant to their religious convictions, is it not a flagrant breach of their fundamental constitutional principles to fabricate a judge-made rule designed to forbid them from participating in the practice because it might contravene the religious views of some other group? Might we not just as logically forbid divorce?

A very different view from that of the Orford case was expressed, in 1948, in the New York case of *Strand v. Strand*.⁴⁴ There, a husband who had been legally separated from his wife claimed the right of visitation with respect to a child born to his wife. The child was admittedly born by heterologous artificial

⁴² It would seem pertinent here to point out that the system of ecclesiastical law prevalent in England, being the law of the Anglican Church, was a part of the law of that country only because that church was a church "by law established." Whatever may have been the precise implication of the last-quoted phrase, it would seem that not only the establishment of a church but also the imposition of a body of church law on the American public would be contrary to American constitutional principles.

⁴³ Strict adherence to the ecclesiastical views expressed in the Orford case would, of course, result in making all AID children, and perhaps also the AIH children, illegitimate. The bastardization of any child is repugnant to the modern mind as well as to the trend of both the statutory law and to judicial decisions of the recent past: Vernier, *American Family Laws* (Stanford University Press, California, 1936), Vol. 4, § 242 et seq.

⁴⁴ 190 Misc. 786, 78 N. Y. S. (2d) 396 (1948).

insemination, which latter was assumed to have been effected by the husband's consent. The wife resisted, but the court held the child to be legitimate with the husband being entitled to a right of visitation, such visitation being said to be in the best interests of the child. Although the court expressly refrained from passing on property rights and as to the propriety of artificial insemination, said to be a matter resting in the fields of sociology, morality and religion rather than in law, it treated the child as if it had been potentially adopted, with the husband being entitled to the rights of a foster parent if not those of a natural parent.⁴⁵ The situation was held to be no different, in effect, from that of a child born out of wedlock and subsequently legitimized by the marriage of the parents. Noteworthy as the outcome of the case might be, it resolved nothing with respect to the point under consideration for it turned on the cardinal principle utilized in all custody and similar suits, to-wit: the interests of the child take precedence over all other considerations.

In much the same way the English case designated *L. v. L.*⁴⁶ arrived at a somewhat regrettable result. The wife there concerned sued to have the marriage annulled on the ground of her husband's psychological impotence.⁴⁷ It seemed that the husband had so strong an objection to normal intercourse that he could not take part in it. The wife, in the hope, as the court found, of bringing about a change in his attitude and making the marriage a normal one, artificially inseminated herself with her husband's semen, and produced a child. This did not change the husband's attitude, and annulment was granted, with the consequent result that the child was pronounced illegitimate.⁴⁸

⁴⁵ It is understood that the wife subsequently moved to Oklahoma and that a court in that state denied the husband's right of visitation.

⁴⁶ *R. E. L. (Otherwise R.) v. E. L.*, [1949] Probate Div. 211, [1949] 1 All Eng. L. R. 141.

⁴⁷ Although, in Illinois, the condition must, according to Ill. Rev. Stat. 1957, Vol. 1, Ch. 40, § 1, be a physical one, the doctrine of psychological impotence is recognized by some courts. Compare *Griffeth v. Griffeth*, 162 Ill. 368, 44 N. E. 820 (1896), with *Tompkins v. Tompkins*, 92 N. J. Eq. 113, 111 A. 599 (1920).

⁴⁸ The holding in the case produced a statutory change in the law of England, one designed to legitimize children despite the annulment of the marriage existing between the parents: Law Reform Act, 1949, 12, 13 & 14 Geo. VI, c. 100.

Again, the case has no direct bearing on the question whether artificial insemination is, or should be considered to be, lawful. The court expressly based its decision on the wife's desire to render normal an abnormal marriage; and the opinion does not indicate whether she was really justified in "calling in the unnatural aid of science" for that laudable purpose. The ultimate solution for problems such as these would seem to lie in the general feeling of tolerance which is fast increasing. Indeed, it may well be doubted whether there would ever be any prejudice against artificial insemination, or against the ensuing children, were it not for the existing propaganda against it.

So far as the law of Illinois is concerned, mention should be made of three *nisi prius* cases, each of which arose in Cook County. In the first of them, that of *Hoch v. Hoch*,⁴⁹ it was a defense contention that, although the child borne by the wife was an AID child, this fact did not constitute adultery on the part of the wife. Considerable attention was drawn to the case by the remarks of the late Judge Michael Feinberg, running counter to the dictum in the Orford case,⁵⁰ but the divorce was eventually granted on other grounds so no determination on the point under consideration was ever reached therein.

Some nine years later, in *Doornbos v. Doornbos*,⁵¹ a wife sought, and eventually obtained, a divorce on the ground of her husband's habitual drunkenness. There was a child which, according to the uncontradicted testimony of the petitioner,⁵² was an AID child produced with the defendant-husband's consent. During the pendency of the case, the wife petitioned the court for a declaratory judgment concerning the status of the child, seeking to ascertain whether artificial insemination constituted adultery, whether such practice was contrary to public policy, and whether a child so produced was legitimate as to both partners to the

⁴⁹ No. 44-C-9307, Circuit Court of Cook County.

⁵⁰ See note 40, ante.

⁵¹ No. 54-S-14981, Superior Court of Cook County.

⁵² The testimony in the case showed that the husband had been tested for sterility; that AID had been performed by a qualified medical practitioner of unquestioned repute; and that both husband and wife had consented.

marriage or was the child of the mother only. The trial judge in the case, the Hon. Gibson E. Gorman, in response to this petition, appears to have been the first to make a direct judicial pronouncement on the subject. He declared that heterologous artificial insemination, with or without the consent of the husband, was "contrary to public policy and good morals, and constitutes adultery on the part of the mother." It followed therefrom that a child so conceived would not be a child born in wedlock and would, therefore, be illegitimate. Being such, it would be the child of the mother only and the other spouse would have neither right nor interest in such child.⁵³

The wife in the case mentioned, notwithstanding the effect of the decree on the legitimacy of her child, obtained her long-awaited divorce with sole custodial rights, so she did not appeal. The husband, of course, was relieved of all duty of support and the like, hence had no ground for appeal on that score.⁵⁴ The matter would have stopped there, but the trial judge had asked the local state's attorney to intervene on behalf of the State of Illinois as *parens patriae*, and that official had done so. He had urged that a decree putting the stigma of illegitimacy on the child would deprive the child of the right to support and of inheritance from the defendant. In addition to pointing out that the burden of support would fall on the state if the mother failed to provide for the child, the state's attorney invoked the presumption that a child born to the parties to a valid marriage is presumed to be legitimate,⁵⁵ a presumption which yields only where there is clear and irrefragable proof of illegitimacy.⁵⁶ As a corollary, the

⁵³ Judge Gibson E. Gorman, by way of dictum, also said that homologous artificial insemination, wherein the specimen of semen used is obtained from the husband of the woman, is "not contrary to public policy and good morals, and does not present any difficulty from the legal point of law."

⁵⁴ The record discloses that the husband sought to have the child declared legitimate as he desired the right of visitation, but visitation was denied to him. He might have appealed from this aspect of the decision, but did not.

⁵⁵ The presumption stems from the holding of Lord Mansfield in the case of *Goodright ex dem. Stevens v. Moss*, 2 Cowp. 591, 98 Eng. Rep. 1257 (1777).

⁵⁶ Evidence in the case did tend to show that natural intercourse took place within the time of possible conception and that, while the husband had been treated for sterility, there was no proof to establish the absolute impossibility of conception through him. The attending gynecologist, Dr. Joseph F. Angell, testified that

state's attorney invoked the statutory provision which declares that divorce should not affect the legitimacy of the children of a valid marriage⁵⁷ and the rule which forbids either spouse from testifying as to access or non-access in cases concerning the legitimacy of children.

Following upon the denial of a petition to vacate that portion of the decree relating to the husband's non-responsibility for the support of the child, the state appealed. The appeal was dismissed by the Appellate Court for the First District on purely procedural grounds with that court expressly stating that it did not rule on the question of the legitimacy of children conceived in the manner described.⁵⁸ Time for further appeal having expired, the decision of Judge Gorman stands as the law between the parties to the case and, presumably, the law in the state until such time as the question can be brought properly to the attention of a reviewing tribunal or until some legislative action is taken. If this ruling should stand, however, it would leave little room for further legal controversy, at least in Illinois.⁵⁹

Before leaving the subject, it is proper to make mention of the fact that, in the third nisi prius determination in Illinois, that attained in the case of *Ohlson v. Ohlson*,⁶⁰ a wife was denied the right to testify that her child was the result of heterologous artificial insemination (AID). The evidence was excluded on the ground that neither spouse may be permitted to testify to access or non-access during a valid marriage when the effect of such

sterility, plus impotency, was necessary to negate the possibility of conception through natural intercourse. In the circumstances, he could not definitely state whether this child was conceived as a result of artificial insemination or natural intercourse. It also appeared that pregnancy had resulted after the first injection, which is not usual.

⁵⁷ Ill. Rev. Stat. 1957, Vol. 1, Ch. 40, § 4.

⁵⁸ 12 Ill. App. (2d) 473, 139 N. E. (2d) 844 (1956), abst. opin.

⁵⁹ The author of a note on the Doornbos case in 43 Georgetown L. J. 517 argues that present definitions of adultery, "not having been formulated with artificial insemination in mind, are inadequate, and that a more comprehensive definition is necessary." The same commentator, referring to the many medical and sociological problems involved, concludes that the cases "already decided clearly indicate the inadequacy of the existing law to do justice in a situation which the framers of that law never conceived." I wish strongly to express my agreement with this conclusion.

⁶⁰ No. 53-S-1410, Superior Court of Cook County.

testimony would be to bastardize a child whose legitimacy had once been acknowledged. A holding of this character would tend to indicate that almost all AID children, as well as those by AIH, would have to be regarded as legitimate simply because of the practical impossibility of proving non-access. It would seem that, in cases where the husband's semen has been mixed with that of a donor, there could be no possibility whatever of proof that the husband was not the biological father, so such children would certainly be legitimate. But, under the Doornbos ruling and in AID cases, the children, while technically illegitimate, would have to pass as legitimate for all practical purposes because of the want of adequate independent testimony. It is more than doubtful that reputable physicians, faced with this dilemma, would be willing to perform AID in the future. In that event, the evil of "bootleg" babies would be upon us. Truly the case for legislative action for the protection of children, if not for their parents, grows stronger every step of the way.

IV. RECOGNITION OF AID

Basically, the question is one as to whether or not AID, as well as AIH, should be legally recognized and regulated or should be pronounced illegal. Either end could be achieved only by statutory enactment for it is perfectly clear that the few decisions handed down to date are either nothing but pure dicta or are irreconcilable and totally without support in precedent.

Before proceeding to a discussion of that question, it might be well to resolve a few subordinate points. It has been claimed that progressive medical science should aim rather at finding remedies for infertility rather than aid in the promotion of artificial insemination. Even if it were certain that all infertility would eventually be overcome, which is more than doubtful, the short answer to this suggestion is that society is faced with a very pressing problem currently in relation to the many childless couples who ardently desire to have children now. It is no solution to their profound disappointment to suggest that, perhaps at some future date, medical science may find a remedy. Their diffi-

culty is now, and AID, if not AIH, is the present remedy in thousands of these cases.

It has also been suggested that, even under the present unsatisfactory state of the law, all difficulties could be overcome if the husband of the woman who resorted to AID would adopt the child. Doubtless, all legal difficulties would be resolved if an adoption should take place. But what if the husband, after having so agreed, should refuse to petition for adoption? If the consideration for the agreement to adopt rested on the promise that AID should take place, and if AID is illegal, because opposed to public policy, then would not the promise to adopt be unenforceable?⁶¹ Dr. J. P. Greenhill adds another thought when he suggests that the seeming solution to be found in an adoption proceeding is offset by the possibility of undesirable publicity.⁶²

Still another argument advances the possibility that AID babies may exhibit deformities, leading to socially undesirable possibilities. By way of answer, Dr. Greenhill stated that, in his experience,⁶³ he had found none and he expressed the belief that the incidence of deformity would be no higher than in the case of ordinary conceptions, which he put at 1%, quoting Seymour and Koerner who had also found the figure to be low.⁶⁴ But in-

⁶¹ As to the effect of illegality with respect to consideration in promises based on adoption and the like, see the case of *Wiley v. Lawton*, 8 Ill. App. (2d) 344, 132 N. E. (2d) 34 (1956).

⁶² See 116 J. Am. Med. Ass'n 2747. The author thereof, like most physicians who have expressed themselves is, on the whole, in favor of AID practice. He thinks adoption is unnecessary because the husband and wife alike usually want the manner of conception kept secret. He indicates that, in his experience, not one woman even told her parents. As to the publicity argument, it might be said that adoption proceedings seldom attract attention provided there is no contest. If it should be thought desirable to resolve all problems in this fashion, the legislature could direct that the adoption should be deemed to have occurred at the time the husband consented to AID, if a child was thereby produced, and could also take steps to reduce, or eliminate, publicity in relation to adoption matters. See Ill. Rev. Stat. 1957, Vol. 1, Ch. 4, § 4—3, and Vol. 2, Ch. 111½, § 48a, et seq., in relation to the change which can be made in the matter of the birth registration of an adopted child, and Vol. 1, Ch. 4, § 6—2, concerning the impounding of adoption papers and records.

⁶³ In a symposium on the subject, Dr. Greenhill did state that he had delivered fewer than 100 "test-tube" babies.

⁶⁴ No use has been made herein of the statistics published by Seymour and Koerner, which have been criticized for their alleged inaccuracy. See Folsome, 45 Am. Jour. of Obstetrics and Gynecology 924 (1943), and Abel, 85 Int. Abst. of Surgery, Gynecology and Obstetrics 528 (1947). While I express no opinion about these statistical conclusions, I do believe these writers have made a real contribution to the discussion.

stead of concentrating on every possible untoward result of AID, as if no unhappy consequences ever followed in other circumstances, some attention should be paid to the successes which have resulted. One unidentified participant in the Chicago Bar Association Symposium of AID stated that he knew of one family where the three children each had a different biological father yet the husband was as proud of the offspring as he could be. The children were said to be smarter and better than average because, in the words of the speaker, "We usually get a very intelligent mother to start with, and our donors are not the scum of the earth. They are the highest type of men, both physically and mentally, that we can pick."

Nevertheless, some medical men believe the physician must consider the ethical, legal and religious aspects as well as the purely medical ones. Of course, no honorable professional man would do anything he considered to be morally wrong or contrary to his religion, whether it was legally permissible or not. On the other hand, once the practice is legalized, while some physicians may refuse to perform it, there will be others who would consider they were doing a humanitarian act by so practicing, one well in the interest of children and parents alike. It is difficult to understand why so many people, typically those belonging to the three professions here primarily concerned, *i.e.*, law, medicine and theology, should think it necessary to take more precautions in the case of AID than they would in other situations.

For instance, Dr. Koerner thinks it very essential for the physician to discover whether or not the prospective parents are capable of supporting the child in a proper manner. But why is that the doctor's business? And why does nobody think it is his business, or that of the clergy, to inquire into such matters when a couple wants to get married, and to forbid the marriage of irresponsible or physically unfit people? Wisely, we leave that to the judgment of the parties concerned, not always with the happiest results. It is recognized that interference would cause more evils than it would cure. A married couple may produce as many children as nature permits, and no one has a right to

interfere. Why should it be otherwhen when a sterile husband and a fertile wife decide to resort to AID? When it is suggested that an unstable husband might withdraw his approval after his wife is inseminated, might he not just as well repent that he ever got married? Or that he ever procreated in the ordinary way?

Leaving these arguments aside, it would be appropriate to comment on the fact that, to date, no legislation on the point has been passed in any American state. While it is true that the City of New York may be said to have acknowledged that AID is not illegal, by passing an ordinance designed to regulate the practice,⁶⁵ the state legislature of New York has declined to pass a bill making AID practice legal. The same thing is true also in the states of Virginia, Indiana, Wisconsin and Minnesota, except that the Minnesota bill, while it would have made artificial insemination unlawful, would have legitimized the children. In Ohio, on the other hand, it was proposed to prohibit AID under penal sanctions and also to declare the children illegitimate. This measure also failed to pass.

But AID is knocking at the door. The American Society for the Study of Sterility, offering an opinion which represents the view of approximately five hundred specialists in the field, has approved artificial insemination as being a "completely ethical, moral and desirable form of medical therapy,"⁶⁶ provided it is done pursuant to the following conditions: (1) the urgent desire of the married couple to have this solution of their infertility problem; (2) the careful selection, by the physician, of a biologically and genetically satisfactory donor; and (3) the opinion of the physician, after thorough study, that the married couple

⁶⁵ Under this ordinance, only a duly licensed physician "shall collect, offer for sale, sell or give away human seminal fluid for the purpose of causing artificial insemination . . ." New York City Sanitary Code (1947), §112. The regulations also provide for physical examination of donors to ascertain their freedom from certain diseases and from hereditary defects, for blood tests, and for the keeping of records, which are to be confidential and open only to authorized persons.

⁶⁶ See report of a meeting of that society, held at Atlantic City in 1955, appearing in the New York Times under date of June 5, 1955. Dr. John O. Haman, of San Francisco, the retiring president, said the Society was comprised of an overwhelming majority of doctors who practice this type of medicine.

would make desirable parents. The resolution in question goes on to say:

Those physicians who have carried out donor inseminations for several decades can attest that in many cases it is a more desirable procedure than adoption. One great advantage of donor insemination is that it provides the opportunity for the husband to share the months of his wife's pregnancy and her childbirth. From observation over many years, the membership is impressed by the almost universal good results achieved in respect to children and the entire family unit. The fact that, in some instances, parents have returned for as many as four children by donor insemination, is further proof of the happiness it bestows.⁶⁷

Under these conditions, the characteristics of the husband, so far as possible, are to be matched in making a selection of the donor. The donor must, for example, have similar hair and eyes, and should be of the same race. If the wife's blood is RH negative, so must that of the donor be. As selection techniques become more developed, donors will be selected with a blood type similar to that of the husband. Gone are the days when almost any donor not obviously unsuitable was used, though even then mental disease, if known, defective eyes or hearing, diabetes, venereal disease and inheritable defects were unacceptable traits in the donor.

One objection to artificial insemination which seems, on its face, to have more merit is the possibility that a donor who is a near relative may inseminate a wife, both parties being in ignorance of the relationship.⁶⁸ Here again, one is bound to remark

⁶⁷ *Ibid.* Dr. Alan F. Guttmacher, head of the Department of Gynecology and Obstetrics of Mount Sinai Hospital, New York, says: "These children mean more to families than children conceived in the normal manner. But for artificial insemination, motherhood would be denied the wife. The husband knows that at least half the child's inheritance is good—it comes from his own wife, and he has his physician's assurance that the other half is of the best. Babies conceived in this manner are wanted children. They are welcomed into families with love. I know of not a single case where things have worked out badly." See 19 *Bull. N. Y. Acad. of Medicine* 576 (1943).

⁶⁸ The point is suggested in Barton, Walker and Weisner, "Artificial Insemination," 1945 *Brit. Med. Journ.* 40:3.

that, in view of the secrecy usually present in relation to adoptions, it is possible that a marriage within the prohibited degrees could happen to adopted children or indeed to any two people who, from any cause, may be ignorant of their ancestry. Yet no one seems to have worried about that possibility. Granted that the chances would be greater if an AID donor were to sire a tremendous number of offspring, still the danger is exceedingly remote and, if it happened in an isolated case, there would, in all probability, be little or no biological harm done. In any event, American donors are generally limited to one hundred instances and it is not uncommon, now that sperm banks can be transmitted over great distances, for the donor to be a resident of a distant part of the country. In any case, the physician who selects the donor should, and would, always make inquiry about ancestry and would not knowingly choose anyone within the prohibited degrees of kinship.⁶⁹

The existence of a sperm bank, analogous to the blood bank, appears to be an objectionable aspect of the practice which seems to be particularly obnoxious to some. One Catholic writer remarked ominously that a sperm bank was "just around the corner."⁷⁰ As a matter of fact, several such banks exist, both in the United States as well as abroad.⁷¹ But the objection is one at the semantic level rather than one of substance. Much the same thing is true as to the one voiced by the late Cardinal Griffin who spoke of artificial insemination as the "stud breeding of human beings" and of the donor as being reduced to the "status of a stallion." The condemnation is singularly inept. Animals and human beings alike, when left to their own devices, procreate in the ordinary "natural" way. When humans do that, they are doing what all

⁶⁹ For purpose of this discussion, suppose a rare case of consanguinous marriage should occur between two AID children. In such a case, incest would be present if the parties were cognizant of the fact but not if, as undoubtedly would be the case, they lacked knowledge on the point. Being ignorant, they could not be incestuous by intent. Where there would be no crime, there would be no sin.

⁷⁰ Caddy, "Artificial Human Insemination," 12 N. Y. Co. Lawyers Bar Bull. 193 (1955).

⁷¹ Human semen can now be frozen and preserved. It is reported that several women have recently been successfully so impregnated at the University of Iowa.

animals do of their own accord. There is nothing especially animal about human beings who resort to scientific aid when nature fails them. Rather, the contrary applies.

V. SUMMARY AND CONCLUSIONS

It is not necessary here to comment on some possible extreme applications which could be found for the principles of AID,⁷² other than to say that whatever is found to produce the finest type of human being will eventually come to be recognized and practiced. Those communities which refuse to adopt whatever points in that direction will eventually be left behind by more progressive communities. What is needed, then, is a full and frank discussion of artificial insemination in all of its phases.

It is not enough, indeed it is not possible, either to dismiss it or to pronounce it illegal just because some people insist that human conduct must be ruled by immutable laws laid down by ancient law givers. Such persons have no right, in a free and democratic society, to force their views on others. It is necessary to remind them that no one is proposing, or could conceivably propose, to force artificial insemination, AIH or AID, on any woman who does not desire it. Those who do not desire it, or who think it is wrong, need not resort to it. That much must be freely conceded. Therefore, so far as such persons are concerned, the authorities have spoken and the controversy is at an end. The question at issue concerns only those who believe in progress and in the continuous adaption of human conduct to changing conditions. And if freedom means anything at all, surely it must mean that people should be allowed to decide their own course of conduct, so long as it does not interfere with that of others.

This does not mean moral anarchy, any more than religious freedom means moral anarchy. It does not mean that people will

⁷² The startling suggestion has been made that, if wars continue to deplete the manpower of the world, so that some countries, as is the case now in Germany, end up with a large female surplus, all virtuous unmarried women, unable to find husbands but who desire to have children, should be permitted to resort to AID and be enabled to raise legal offspring. I offer no comment other than to say that such things are already happening in Europe.

be without any guidance in matters concerning sex and family. It does mean that everybody, and in this connection especially every woman, shall, under the advice of moral and medical experts of his or her own choosing, have the final say regarding his or her own sexual and reproduction functions.

This may raise questions for which, at present, the law has no answers. But answers must be found, for the influence of religion on law constitutes a major stumbling block in the path of progress in scientific and social thought as well as the reason for much of the cultural lag in the changing aspects of the modern family. Not until the attitudes of the total adult population have been scientifically determined by statistical and other sociological methods, perhaps, could the just status of artificial insemination be defined or the degree of "obsoleteness" in current views be revealed. A small-scale investigation points toward a trend of thought.⁷³ Is not now the time to secure and to publicize the results of a mass survey? If one were to be taken, the belief is that it would reveal an acceptance of artificial insemination as being an integral part in a revised concept of the family when viewed as a modern social institution.

⁷³ See the results obtained from a brief pilot investigation conducted by the author, reported in *J. Forensic Medicine* 147-72 (1957), particularly pp. 169-71.