Cornell Law Review

Volume 53
Issue 3 *February 1968*

Article 6

Legislative Approach to Artificial Insemination

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NOTES

A LEGISLATIVE APPROACH TO ARTIFICIAL INSEMINATION

Although the technique of heterologous artificial insemination (AID)[1] has been practiced in the United States for more than fifty years[2] and has resulted in the birth of a significant number of children,[3] there has been little litigation and virtually no legislation on the legal issues involved. The failure of lawmakers to resolve the legal problems surrounding AID has left all parties involved unsure of their rights and liabilities.[4] For example, husbands, wives, physicians, and donors must question whether AID itself violates public policy, whether adultery has been committed, whether birth records have been falsified within the meaning of criminal statutes, and whether liability for support of the child has been incurred. The children produced remain doubtful of their legitimacy and inheritance rights.[5]

Legislative bills concerning AID have been introduced in at least seven states since World War II.[6] The first successful enactment oc-

1 Heterologous artificial insemination (AID) is the technique by which the semen of a third-party donor is introduced into the reproductive system of a woman (recipient) by mechanical means in an attempt to induce conception and pregnancy. In homologous artificial insemination (AIH) the semen of the husband is utilized. When the husband has normal semen but for some reason cannot effectuate pregnancy through sexual intercourse, AIH may be employed. AID is utilized when the wife is fertile but the husband is sterile or impotent, or suffers from a hereditary disease which should not be transmitted to his children, or when there is a serious Rh factor incompatability.

2 For the history of artificial insemination, see W. GLOVER, ARTIFICIAL INSEMINATION AMONG HUMAN BEINGS (1948); Verkauf, *Artificial Insemination: Progress, Polemics, and Confusion—An Appraisal of Current Medico-Legal Status*, 3 HOUSTON L. REV. 277 (1966); Note, *Social and Legal Aspects of Human Artificial Insemination*, 1965 WIS. L. REV. 859.

3 The total number of births resulting from artificial insemination in the United States has been estimated at from 50,000 to 200,000. Levisohn, *Dilemma in Parenthood—Socio-Legal Aspects of Human Artificial Insemination*, 4 J. FORENSIC MED. 147, 148 (1957). More recent estimates place the number of annual AID conceptions in the United States at from 5,000 to 20,000. *See* Guttmacher, *Artificial Insemination*, 97 ANNALS N.Y. ACAD. SCI. 623, 624 (1962).

4 For discussion of the various legal issues raised by AID, see Holloway, *Artificial Insemination: An Examination of the Legal Aspects*, 43 A.B.A.J. 1089 (1957); LoGatto, *Artificial Insemination: I. Legal Aspects*, 1 CATHOLIC LAWYER 172 (1955); Rice, *A.I.D.—An Heir of Controversy*, 34 NOTRE DAME LAWYER 510 (1959); Verkauf, *supra* note 2; Note, *The Socio-Legal Problems of Artificial Insemination*, 28 IND. L.J. 620 (1953); Note, *supra* note 2.

5 The danger of incestuous marriages among children produced by AID has also been raised by those opposing legitimization of such children. Petz, *Artificial Insemination—Legal Aspects*, 34 U. DET. L.J. 404, 417 (1957); Rice, *supra* note 4, at 528. *See* pp. 511-12 *infra*.

6 Indiana, Minnesota, New York, Ohio, Oklahoma, Virginia, and Wisconsin. For iden-

curred in 1967, when the Oklahoma legislature legalized the practice of AID and legitimized the children so conceived.[7] The statute also establishes minimal procedural controls over the practice of AID. The Oklahoma enactment provides an effective vehicle for evaluating various solutions to the legal problems of AID and for further defining the questions that remain unanswered.[8] The Oklahoma statute provides:

> § 551. Authorization
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> The technique of 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 desiring the utilization of such technique for the purpose of conceiving a child or children.
>
> § 552. Status of child
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> Any child or children born as the result thereof shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife so requesting and consenting to the use of such technique.
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> § 553. Persons authorized—Consent
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> No person shall perform the technique of heterologous artificial insemination unless currently licensed to practice medicine in this State, and then only at the request and with the written consent of the husband and wife desiring the utilization of such technique. The said consent shall be executed and acknowledged by both the husband and wife and the person who is to perform the technique, and the judge having jurisdiction over adoption of children, and an original thereof shall be filed under the same rules as adoption papers. The written consent so filed shall not be open to the general public, and the information contained therein may be released only to the persons executing such consent, or to persons having a legitimate interest therein as evidenced by a specific court order.[9]

I

THE LEGALITY OF AID

No legislative body has ever declared AID illegal, though bills to prohibit the technique have been introduced in at least two states.[10] Two judges have condemned AID as contrary to public policy and good

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tification of bill numbers, years, and positions of all of these bills except Oklahoma's, see Note, *supra* note 2, at 882.

7 OKLA. STAT. ANN. tit. 10, §§ 551-53 (Supp. 1967).

8 For discussion of the theological, sociological, and moral aspects of AID, see W. GLOVER, *supra* note 2; LoGatto, *Artificial Insemination: II. Ethical and Sociological Aspects*, 1 CATHOLIC LAWYER 267 (1955); Verkauf, *supra* note 2; Note, *supra* note 2.

9 OKLA. STAT. ANN. tit. 10, §§ 551-53 (Supp. 1967).

10 *See* Note, *supra* note 2, at 882, indicating that such bills were introduced in Minnesota in 1949 and in Ohio in 1955.

morals.[11] Several commentators have recommended that it be prohibited,[12] and one has urged that it be made a criminal offense for both physician and donor.[13] By expressly authorizing AID and providing a procedure that must be followed by participants, the Oklahoma legislature has made it clear that the practice of AID is legal in that state.

The only other present indication of governmental approval of AID is found in the New York City Health Code.[14] That code does not authorize AID in terms as positive and clear as those of the Oklahoma

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11 Doornbos v. Doornbos, 23 U.S.L.W. 2308 (Super. Ct., Cook County, Ill., Dec. 13, 1954), *appeal dismissed on procedural grounds*, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956); Orford v. Orford, 58 D.L.R. 251, 259 (1921).

12 161 PARL. DEB., H.L. (5th ser.) 386, 403 (1949); Comment, *Natural Law and Artificial Insemination*, 5 CATHOLIC U.L. REV. 189, 191 (1955); Comment, *Legal Problems of Artificial Insemination*, 39 MARQ. L. REV. 146, 152 (1955); Note, *Artificial Insemination Versus Adoption*, 34 VA. L. REV. 822, 829 (1948).

13 Rice, *supra* note 4, at 528. Others have argued that to make AID a criminal offense would only drive the practice underground and beyond the control of responsible medical practitioners. G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 112 (1957); 161 PARL. DEB., H.L. (5th ser.) 386, 422 (1949); Pollard, *Report on the Departmental Committee on Human Artificial Insemination*, 24 MODERN L. REV. 158, 163 (1961); Note, *Nullity—Artificial Insemination*, 12 MODERN L. REV. 384, 387 (1949). *See also* Verkauf, *supra* note 2, at 299.

14 NEW YORK, N.Y., HEALTH CODE art. 21 (1959) (formerly NEW YORK, N.Y., SANITARY CODE § 112) provides in pertinent part:

§ 21.01 Physician to perform artificial insemination and collect seminal fluid

No 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.

§ 21.03 Examination of donor and recipient

(a) A proposed donor of seminal fluid shall have a standard serological test for syphilis and a smear and culture for gonorrhea within one week before his seminal fluid is taken and, immediately prior to taking his seminal fluid, he shall be given a complete medical examination with particular attention to his genitalia.

(b) A proposed donor and a proposed recipient of seminal fluid shall each have a blood test to establish their respective Rh factors before artificial insemination is attempted. Such test shall be made by a laboratory operated pursuant to Article 13 and classified for hematology, including blood grouping and Rh typing. If the proposed recipient is negative for the Rh factor, only seminal fluid from a donor who is also negative for the Rh factor shall be used.

§ 21.05 Disqualification of donors

A person who is affected with a venereal disease, tuberculosis, brucellosis or who has any congenital disease or defect shall not be used as a donor of seminal fluid for artificial insemination.

§ 21.07 Records; contents and confidentiality

(a) A physician who performs an artificial insemination shall keep a record of (1) the names and addresses of the physician, donor and recipient, (2) the results of the medical examination and serological and all other tests, and (3) the date of the artificial insemination.

(b) Records kept by a physician pursuant to this section shall not be subject to inspection by persons other than authorized personnel of the Department. A person who has access to these records shall not divulge any part thereof so as to disclose the identity of the persons to whom they relate.

statute, but approval of the techinque seems implicit in the controls placed on its practice.

A. *Adultery by the Recipient*

In the absence of a statutory definition of adultery that specifically includes AID or the processes by which it is performed,[15] it is doubtful that a criminal prosecution based on the practice of AID would be instituted. In several civil actions for divorce, however, courts have faced the question whether the practice of AID can constitute adultery, and have reached conflicting decisions. The confusion results from attempts to apply traditional concepts of adultery to a scientific innovation that early common law jurists never had occasion to consider.

The earliest case equating AID with adultery is *Orford v. Orford.*[16] The court found that pregnancy had occurred as the result of sexual intercourse with a man other than the husband and that the wife's contention that she was impregnated through AID was not to be believed. In a famous dictum that has since plagued proponents of AID, Justice Orde stated:

> In my judgement, the essence of the offence of adultery consists, not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person; and any submission of those powers to the service or enjoyment of any person other than the husband or the wife comes within the definition of "adultery."[17]

In *Hoch v. Hoch,*[18] a soldier sued for divorce after returning from military duty to find his wife pregnant. While the wife's allegation that conception had been achieved through AID was rejected, the court suggested that AID would be insufficient for divorce on the ground of adultery. But nine years later another Illinois court stated in a declaratory judgment that "[h]eterologous artificial insemination . . . with or

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15 Adultery is generally defined as the voluntary sexual intercourse of a married person with an individual other than the offender's husband or wife. For discussion of various definitions of adultery, see MacLennan v. MacLennan, 1958 Sess. Cas. 105, 108, 1958 Scots. L.T.R. 12, 14; Orford v. Orford, 58 D.L.R. 251, 256 (1921); Moore, *The Diverse Definitions of Criminal Adultery*, 30 U. KAN. CITY L. REV. 219 (1962). Glanville Williams has commented, with reference to the New York City Health Code: "If donor insemination is adultery in the law of New York, it is the only form of adultery for which the procedure has been put into legislative form." G. WILLIAMS, *supra* note 13, at 125.

16 58 D.L.R. 251 (1921).

17 *Id.* at 258.

18 Unreported, Cir. Ct., Cook County, Ill. (1945); *see* TIME, Feb. 26, 1945, at 58.

without the consent of husband, is contrary to public policy and good morals, and constitutes adultery on the part of the mother."[19]

In the case of *MacLennan v. MacLennan*,[20] the court carefully analyzed the English law on adultery and arrived at a different conclusion. Lord Wheatley found that adultery required two parties physically present and engaging in the sexual act at the same time, with some degree of penetration of the female organ by the male organ.[21] Noting that these requirements are not fulfilled by AID, he held that the practice does not constitute adultery, whether the husband consents or not.[22] He added:

> If it be that science has created a *casus improvisus*, the remedy is not to be found in fitting such a case into one of the existing grounds of divorce on arguments which cannot logically or physiologically be supported.[23]

The Oklahoma statute appears to protect the wife inseminated by AID from her consenting husband's subsequent allegations of adultery, regardless of how the offense is defined. The various reasons supporting public condemnation of adultery, such as the introduction of a false strain of blood[24] or an unwanted heir[25] into the family, disruption of the family system,[26] alienation of the wife's affections,[27] and the burdening of the husband with the support of an unwanted child biologically foreign to him,[28] are rendered inapposite by the husband's consent to AID.[29] Indeed, divorce based on adultery might be barred by construing the husband's consent as connivance.[30]

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19 Doornbos v. Doornbos, 23 U.S.L.W. 2308 (Super. Ct., Cook County, Ill., Dec. 13, 1954), *appeal dismissed on procedural grounds*, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956).

20 1958 Sess. Cas. 105, 1958 Scots L.T.R. 12.

21 *Id.* at 113, 1958 Scots L.T.R. at 17.

22 *Id.* at 114, 1958 Scots L.T.R. at 18.

23 *Id.* at 115, 1958 Scots L.T.R. at 18.

24 *See* Orford v. Orford, 58 D.L.R. 251, 258 (1921).

25 *See* Hager, *Artificial Insemination: Some Practical Considerations for Effective Counseling*, 39 N.C.L. REV. 219, 234 (1961).

26 *See* Petz, *supra* note 5, at 413.

27 *See id.*; Note, *The Socio-Legal Problems of Artificial Insemination*, 28 IND. L.J. 620, 626 (1953).

28 *See* Tallin, *Artificial Insemination*, 34 CAN. B. REV. 1, 18 (1956); Note, *supra* note 27, at 625.

29 *See* 35 CORNELL L.Q. 183 (1949).

30 *See* Lang, *Does Artificial Insemination Constitute Adultery?*, 2 MANITOBA L.J. 87, 96 (1966); Note, *supra* note 2, at 876. N.Y. DOM. REL. LAW § 171 (McKinney 1964) provides that the plaintiff is not entitled to a divorce, although the adultery is established (*1*) where the offense was committed by the procurement or with the connivance of the plaintiff, or (*2*) where the offense has been forgiven by the plaintiff.

The Oklahoma statute offers no protection, however, to a wife who is impregnated through AID without her husband's consent. The birth of a child so conceived might be as objectionable to the husband as one resulting from adulterous sexual intercourse. When such a situation is presented in a divorce action, courts now face the difficult task of either burdening the husband with an unwanted child and an untrustworthy wife or finding adultery by the wife where there has been neither the sexual intercourse required by the usual definition of that offense nor the moral turpitude implicit in it. A third alternative available in most states is to find that resort to AID without consent constitutes extreme cruelty to the husband and thus justifies divorce.[31] If a legislature determines that an AID conception without consent of the husband is itself sufficient grounds for divorce, it should so specify and thereby give guidance to the courts.[32]

B. *Adultery by the Donor*

Whereas the *Orford* characterization of adultery—a surrender of the reproductive faculties[33]—may have some validity in the case of a wife inseminated without her husband's consent, it might seem unreasonable to apply it to a donor accused of that offense by his wife. Although his reproductive powers are utilized by another, no spurious heir is introduced into his family, nor is the moral turpitude of sexual intercourse outside of the marital relationship present. Such a line of reasoning, however, ignores other interests of the donor's wife. The donor's siring children by other women may be repugnant to his wife regardless of the method used. To protect all parties concerned, an AID statute should require the consent of the donor's wife as well as the consent of the recipient's husband.[34] This would serve to prevent any friction that might arise as a result of the AID procedure. There is, however, no reason to require that either the donor or the recipient be informed of the identity of the other.[35]

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31 *See* Lang, *supra* note 30, at 97; Note, *Artificial Insemination—Its Socio-Legal Aspects*, 33 MINN. L. REV. 145, 152 (1949).

32 That AID without the husband's consent should be made a separate ground for divorce, was recommended by the Royal Commission on Marriage and Divorce and by the Departmental Committee on Human Artificial Insemination. *See* Pollard, *supra* note 13, at 159. Such legislation has been enacted in New Zealand. *See* Matrimonial Proceedings Act of 1963, No. 71, § 21(1)(b) (N.Z.).

33 Orford v. Orford, 58 D.L.R. 251, 258 (1921); *see* p. 500 *supra*.

34 The AMA has recognized the desirability of obtaining the consent of the donor's wife. AMA, MEDICOLEGAL FORMS 43 (1961).

35 Proponents of AID uniformly advocate complete anonymity of donors and recipients. This prevents problems that might otherwise arise, such as transfer of the wife's affections from her husband to the biological father of her child and the possible opportunity

II

THE AID CHILD

A. *Legal Status*

Most authorities agree that the AID child is illegitimate solely because his natural parents are not married to each other.[36] In a 1963 annulment action, *Gursky v. Gursky*,[37] a New York court held an AID child illegitimate, stating that the disinclination of the legislature to legitimize AID children indicated its unwillingness to disturb the application of the historical concept of illegitimacy to such individuals.[38] Yet, in *Strnad v. Strnad*,[39] a 1948 New York decision, the court rejected a wife's contention that her AID offspring was illegitimate and granted visitation privileges to the husband. Consider the confusion in the minds of AID parents who had relied on the *Strnad* decision when the *Gursky* holding was announced fifteen years later.

Some protection is afforded the AID child by the presumption of legitimacy extended to children born of married women.[40] To give full effect to this presumption, some writers recommend that no records of AID be maintained[41] or that semen of the husband be mixed with that of the donor prior to insemination.[42] Others recommend that blood types of donor and husband be matched.[43] The aim of such deception is

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for blackmail by the donor. *See* Guttmacher, *supra* note 3, at 627; Guttmacher, *The Role of Artificial Insemination in the Treatment of Sterility*, 15 OBST. & GYNEC. SURV. 767, 775 (1960); LoGatto, *supra* note 8, at 272; Seymour & Koerner, *Medico-Legal Aspects of Artificial Insemination*, 107 J.A.M.A. 1531 (1936); Tallin, *supra* note 28, at 8.

36 Doornbos v. Doornbos, 23 U.S.L.W. 2308 (Super. Ct., Cook County, Ill., Dec. 13, 1954), *appeal dismissed on procedural grounds*, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956); Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963); G. WILLIAMS, *supra* note 13, at 118; Weinberger, *A Partial Solution to Legitimacy Problems Arising from the Use of Artificial Insemination*, 35 IND. L.J. 143, 148 (1960).

37 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

38 *Id.* at 1087, 242 N.Y.S.2d at 410.

39 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948).

40 *See, e.g., In re* Findlay, 253 N.Y. 1, 7, 170 N.E. 471, 472 (1930) (Cardozo, J.); 9 J. WIGMORE, EVIDENCE § 2527 (3d ed. 1940). "That a child born of a married woman during wedlock is presumed to be the child of her then husband is uniformly conceded." *Id.* § 2527, at 448. The strength of the presumption, however, varies among jurisdictions.

"Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is conclusively presumed to be legitimate." CAL. EVID. CODE § 621 (West 1966); *cf.* N.Y. DOM. REL. LAW § 175 (McKinney 1964). For judicial interpretation of the California presumptiou, see Jackson v. Jackson, 67 Cal. 2d 241, 430 P.2d 289, 60 Cal. Rptr. 649 (1967).

41 *E.g.*, Guttmacher, *supra* note 3, at 627; Guttmacher, *The Role of Artificial Insemination in the Treatment of Sterility*, *supra* note 35, at 775.

42 *E.g.*, Weinberger, *supra* note 36, at 152.

43 *E.g., id.*; Seymour & Koerner, *supra* note 35; Verkauf, *supra* note 2, at 284; Note,

to make proof of the child's AID origin difficult or impossible and thereby to render the presumption of legitimacy virtually conclusive. When proof of AID and of the impossibility of natural conception are properly before a court, however, the child will probably be held illegitimate.[44] Disregarding the obvious injustice to the child, such a result appears inconsistent with the policies underlying the legitimacy classification of individuals as dependent upon the marital relationship of their parents. The basic reason for the social distinction probably rests in the Christian religion's concept of the monogamous marriage,[45] its concern for stability of the family, and its aversion to illicit sex.[46] Legislative discrimination against illegitimates can be traced in large part to the self-interest of male legislators who wished to insulate themselves and their families from claims by accidental, extra-marital offspring.[47] These policies do not appear to be violated in the case of the AID child who was brought into the world only after extremely thorough planning, in contrast to the lack of foresight that results in the birth of most illegitimate children. Under common AID practice, the husband and wife undergo extensive examinations to determine the cause of their childless condition, and the physician evaluates their psychological fitness to receive an AID child.[48] The physician selects a donor whose mental and physical characteristics resemble those of the husband. In addition, the husband expressly consents to the addition of the child to his family. It is illogical to subject the individual produced through such positive efforts to the same stigma of illegitimacy as the unwanted, unplanned child conceived and born out of wedlock.

The Oklahoma AID statute declares that the child "shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife . . . ."[49] The legislature has thus corrected the principal defect of most of the existing case law, which declared such children illegitimate whether or not such a declaration

supra note 27, at 639. The value of blood tests as a means of proving non-paternity is now widely accepted. *See* Jackson v. Jackson, 67 Cal. 2d 241, 430 P.2d 289, 60 Cal. Rptr. 649 (1967); Oliver v. England, 48 Misc. 2d 335, 264 N.Y.S.2d 999 (Fam. Ct. 1965); CAL. EVID. CODE §§ 892, 895 (West 1966); ILL. ANN. STAT. ch. 106¾, § 1 (Smith-Hurd Supp. 1966); N.Y. FAMILY CT. ACT § 532 (McKinney 1963); C. MCCORMICK, EVIDENCE §§ 177-78 (1954); Ross, *The Value of Blood Tests As Evidence in Paternity Cases*, 71 HARV. L. REV. 466 (1958).

44 *See* note 36 *supra*.

45 *See* W. FRIEDMANN, LAW IN A CHANGING SOCIETY 251 (1959).

46 *See* Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 498-99 (1967).

47 *Id.* at 498.

48 *See* Guttmacher, *supra* note 3, at 629; Guttmacher, *The Role of Artificial Insemination in the Treatment of Sterility*, *supra* note 35, at 775; Verkauf, *supra* note 2, at 283.

49 OKLA. STAT. ANN. tit. 10, § 552 (Supp. 1967).

was necessary to the decision at hand. The inclusion of similar legitimizing sections in all bills introduced in support of AID[50] demonstrates the concern of sponsoring legislators for the inequity of applying the illegitimacy concept in the AID situation.

This section of the statute could have important effects on the development of AID. Other states may now feel less reluctant to consider the issue seriously, since one has already taken the step. Childless couples may be less hesitant to use the technique if the child's legitimacy is assured.[51] The statute may also eliminate litigation of the child's legitimacy. All parties will thus be spared the embarrassment that results from publicity of the legitimacy determination. The statute will probably have no effect, however, upon the use of AID without the husband's consent or upon the status of children so conceived.

The question of the statute's retroactivity remains. Should AID children already born acquire the status of legitimacy as the result of the 1967 enactment? To effectuate state policy and to relieve living AID children of uncertainty and of the possible burden of illegitimacy, the statute should be retroactive. Where the husband and wife have consented in writing to the practice of AID, a present filing of the written consent may satisfy the statutory requirements. Alternatively, the writing may be admissible as evidence in future litigation.[52] Where there is no written proof of consent, but other evidence exists, the court should rely upon the probable intent of the parties at the time of insemination. Though the parties may have been unsure of the child's status at that time, it is improbable that AID was requested on the assumption that the illegitimacy of the resulting children would avoid some future obligation. The court could, on public policy grounds, hold the party estopped to make such an assertion. By invoking the legislative intent in passing the new statute, a court could properly legitimize such AID children.

B. *Support Obligations of Husband and Donor*

Two New York courts have held consenting husbands liable for

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50 *See* Note, *supra* note 2, at 882.

51 One questionnaire survey of 200 women produced 82 replies. Of those responding, 62% would resort to AID if their husband were sterile; 77% would not utilize AID if the children were held by the courts to be illegitimate; but 84% would prefer AID to adoption if the children were held to be legitimate. A vast majority believed there should be no distinction in the legal status of children born by AID and those conceived naturally, and also favored legislation legitimizing AID children if the courts were to hold them illegitimate otherwise. Levisohn, *supra* note 3, at 170. *See also* Verkauf, *supra* note 2, at 291.

52 *See* Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963); People v. Sorenson, 254 Cal. App. 2d 869, 62 Cal. Rptr. 462 (1967).

support payments despite the child's illegitimacy. In *Gursky v. Gursky*,[53] the court found in the husband's express consent, followed by the wife's concurrence and submission to AID, an implied contract to support the child. Liability was also based on the alternative ground of equitable estoppel. The second case also relied on the implied contract theory to impose liability for support.[54]

By equating the AID child with a naturally conceived, legitimate child, the Oklahoma statute effectively imposes on the husband and wife the obligation to support that child. The statute's effect is thus similar to that of a final decree of adoption, whereby all rights, duties, and other legal consequences of the natural relation of child and parent are established between the child and the adopting parents.[55]

Apparently no court has imposed liability for support of an AID child on a nonconsenting husband. Since this husband is not the natural father of the child and has not induced any reliance on the part of his wife prior to conception, no such obligation should arise. Because the Oklahoma statute does not affect the status of AID children conceived without the husband's consent, courts can still find them illegitimate and thereby relieve the husband of the burden of support. On the other hand, the husband probably could be held liable if, subsequent to the child's conception, he contracts with his wife for support of the child,[56] or if he makes representations of paternity to the AID child and

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53 39 Misc. 2d 1083, 1089, 242 N.Y.S.2d 406, 412 (Sup. Ct. 1963).

54 Anonymous v. Anonymous, 41 Misc. 2d 886, 246 N.Y.S.2d 835 (Sup. Ct. 1964).

55 *E.g.*, OKLA. STAT. ANN. tit. 10, § 60.16 (1966):

> (1) After the final decree of adoptiou is entered, the relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between such adopted child and the adoptive parents adopting such child and the kindred of the adoptive parents. From the date of the final decree of adoption, the child shall be entitled to inherit real and personal property from and through the adoptive parents in accordance with the statutes of descent and distribution, and the adoptive parents shall be entitled to inherit real and personal property from and through the child in accordance with said statutes.
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> (2) After a final decree of adoption is entered, the natural parents of the adopted child, unless they are the adoptive parents or the spouse of an adoptive parent, shall be relieved of all parental responsibilities for said child and have no rights over such adopted child or to his property by descent and distribution.

Both adoption and AID statutes establish a legal relationship between the child and the couple into whose home he is being accepted. The adoption decree also severs the child's legal relationship with his natural parents. It may be argued, by analogy, that the AID statute should sever any such bond between the donor and his AID child. Unless such an approach is taken, the AID child is in the peculiar position of having two men being treated by law as his natural father.

56 Clevenger v. Clevenger, 189 Cal. App. 2d 658, 667, 11 Cal. Rptr. 707, 712 (1961):

> [W]e see no theoretical reason why a contract for the support of an illegitimate child during its minority between the mother and the mother's husband would not

induces reliance on them.[57]

If the husband is liable for support when he has consented to AID, it might seem logical to impose liability on the donor when the husband has not consented. Imposition of this obligation would reduce the need for community support of AID children and would deter insemination without the husband's consent. But such donor liability poses special problems. Because of the secrecy normally maintained in AID, the wife has no knowledge of the identity of the donor. The physician may have kept no records matching donors with recipients. The threat of support liability would compel the donor to ascertain the identity of the recipient in order to assure himself that the husband had consented, that the recipient and her husband would adequately support the child, and that he would be legally protected in subsequent proceedings.[58] Disclosure of the donor's and recipient's identities might lead to such problems as transfer of the wife's affections from husband to donor and increased feelings of inferiority on the part of the husband.[59] As a compromise solution a legislature should consider placing some degree of liability for support upon the physician or other person performing an insemination without the husband's consent. In this way, the secrecy of identities would be maintained and the child would still have a source of support. Moreover, such a provision would effectively discourage the practice of AID without the husband's consent, since few practitioners would subject themselves to the potential support liability.

C. *Inheritance Rights*

Apparently no court has determined the inheritance rights of an AID child. In the *Gursky* and *Strnad* cases the courts expressly declined

be enforceable. The husband receives as consideration the custody and control of the child as well as the right to its earnings. [Footnotes omitted.]

[57] *Id.* at 671, 11 Cal. Rptr. at 714:

> If the facts should show, however, that the husband represented to the boy that he was his father, that the husband intended that his representation be accepted and acted upon by the child, that the child relied upon the representation and treated the husband as his father and gave his love and affection to him, that the child was ignorant of the true facts, we would have the foundation of the elements of estoppel.

[58] Imposing support obligations on the donor has been suggested as a means of eliminating AID, since the number of willing donors would be substantially reduced by such a liability. Rice, *supra* note 4, at 521; Petz, *supra* note 5, at 423; *cf.* Richardson, *Artificial Insemination*, 30 AUSTL. L.J. 125 (1956), where it is suggested that the donor and doctor be relieved from all rights and liabilities in any way connected with the matter.

The Arizona legitimacy statute states: "Every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock . . . ." ARIZ. REV. STAT. ANN. § 14-206 (1956). This statute may have the unexpected result of making the donor liable for support of his AID children.

[59] *See* note 35 *supra*.

to consider the question. In *Doornbos v. Doornbos*,[60] the court's statement that the husband has no right or interest in the AID child suggests that the child may have no right or interest in the estate of the husband. Whether an illegitimate person may inherit from his natural father under state intestacy laws[61] is not the issue in considering the AID husband's estate, since it is conceded that the husband is not the child's biological father.

The key phrase in the Oklahoma statute is found in section 552. The declaration of legitimacy raises the presumption that the normal pattern of inheritance will operate within the family. The statute secures the child's right to share in the husband's estate as well as in estates devised to the husband's issue or children. Although some writers have indicated that such a result may be contrary to the intent of the original testator,[62] a comparable right of inheritance has been granted by statute to the adopted child in order to equate his status to that of the natural child.[63] To hold that the AID child does not have the same right as an adopted child seems contrary to the legislative objectives underlying the AID statute.

What are the rights of child and donor with respect to inheritance from each other? Where the husband has consented to AID, the statute should sever all rights and responsibilities between the child and its natural father. Such is the effect of an adoption decree.[64] But if the husband has not consented to AID and if the child is held illegitimate, then the child might arguably be entitled to share in the donor's estate to the same extent that other illegitimate children are allowed by statute to share in the estates of their natural fathers.[65] The objections to hold-

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60 23 U.S.L.W. 2308 (Super. Ct., Cook County, Ill., Dec. 13, 1954), *appeal dismissed on procedural grounds*, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956).

61 *E.g.*, ARIZ. REV. STAT. ANN. § 14-206 (1956), provides: "Every child shall inherit from its natural parents and from their kindred heir, lineal and collateral, in the same manner as children born in lawful wedlock." *See* G. WILLIAMS, *supra* note 13, at 121; Schwab, *Artificial Insemination and the Law*, 1963 ABA SECTION OF FAMILY LAW, PROCEEDINGS 104, 112.

62 *E.g.*, Petz, *supra* note 5, at 421. Williams has suggested that the descent of titles of honor and entailed interests might have to be treated differently because of the public's emotional interest in the "blood" of the holder. G. WILLIAMS, *supra* note 13, at 144. *See also* Verkauf, *supra* note 2, at 304.

63 *E.g.*, CAL. CIV. CODE § 228 (West 1954); N.Y. DOM. REL. LAW § 117 (McKinney 1964); OKLA. STAT. ANN. tit. 10, § 60.16 (1966). For the relevant portions of the text of the Oklahoma statute, see note 55 *supra*.

64 *E.g.*, OKLA. STAT. ANN. tit. 10, § 60.16 (1966); *see* note 55 *supra*.

65 *E.g.*, ARIZ. REV. STAT. ANN. § 14-206 (1956); CAL. PROB. CODE § 255 (West Supp. 1966); N.Y. EST., POW. & TRUSTS LAW § 4-1.2 (McKinney 1967).

ing the donor liable in these circumstances parallel the arguments against his liability for support of the child.[66]

III

Statutory Controls

The procedural controls specified by the Oklahoma statute are minimal in comparison with others that have been proposed.[67] The only conditions placed on use of AID are that the insemination be performed by a qualified physician and that consent forms sigued by the husband, wife, and physician be filed in an appropriate court. Such requirements seem designed primarily to produce reliable evidence of the event and of the husband's consent. Also, the inconvenience involved in filing may preclude hasty decisions to use the technique. In contrast to the Oklahoma approach, the New York City Health Code places emphasis upon technological aspects by requiring serum, semen, and general physical examinations of the donor.[68]

The Oklahoma statute can be criticized for leaving with the physicians too much responsibility for selecting donors and evaluating couples. It has been suggested that the selection procedure be conducted by a team comprised of a physician, a psychiatrist, and a social worker or lawyer in a manner somewhat similar to that followed in adoption proceedings.[69] On the other hand, many writers feel that subjecting the participants to such investigations is too reminiscent of the controlled societies described in *Brave New World* and *1984*.[70] Moreover, it has been argued that AID applicants should not be subjected to such rigors prior to conception, since fertile couples are not required to undergo similar investigations to determine their fitness for parenthood.[71]

Both the Oklahoma statute and the New York City Health Code provide for restricted availability of records to the public. The relative secrecy of AID and the desire to conceal infertility are factors often important to couples preferring AID to adoption.[72] The secrecy provided by the statute is further enhanced by the usual practice of listing husband and wife as parents on the child's birth certificate.[73]

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66 *See* pp. 505-07 *supra*.

67 *See* Tallin, *Artificial Insemination*, 34 CAN. B. REV. 166, 183-86 (1956); Comment, *Artificial Insemination: The Law's Illegitimate Child?*, 9 VILL. L. REV. 77, 83 (1963).

68 For text of Article 21 of the New York City Health Code, see note 14 *supra*.

69 *See* Richardson, *supra* note 58, at 126; Comment, *supra* note 67, at 84.

70 *E.g.*, Comment, *supra* note 67, at 87.

71 Verkauf, *supra* note 2, at 293.

72 *Id.* at 291.

73 *See* Guttmacher, *supra* note 3, at 629; Guttmacher, *The Role of Artificial Insemina-*

Listing the husband and wife as natural parents of AID children has raised the issue of falsification of public records, which may lead to criminal prosecution.[74] The undermining of reliability of public records has been advanced as a further argument against AID.[75] However, legislatures have accepted that possibility in the case of the adopted child. There is no reason to infer that Oklahoma intended a contrary procedure in the case of AID, especially in light of the established practice of concealing the donor's identity.[76]

IV

LEGISLATIVE INACTION

Because of the paucity of legislative materials, one can only speculate as to the reasons for the apparent reluctance of states to act on the AID problem. In 1948 the New York County Lawyer's Association recommended disapproval of a bill legitimizing AID children on the ground that the strong presumption of legitimacy[77] vitiated the need for the bill.[78] It was also feared that nonconsenting husbands might fashion an argument, based on their exclusion from the coverage of the bill, to rebut the presumption of legitimacy as applied to AID children of their wives. Since that report it has become apparent that when proof of AID origin appears in the records the courts will declare such children illegitimate.[79] In 1964 the same New York group recommended passage of a similar bill to legitimize the children, emphasizing the bill's requirement for the husband's consent.[80] Had that bill been enacted, the AID child would have been accorded the same status as one naturally conceived.

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tion in the Treatment of Sterility, supra note 35, at 775; Rice, *supra* note 4, at 519. Although the Oklahoma AID statute does not specify such a procedure, continued adherence to it may be anticipated since it is the present practice and since a similar procedure is followed after issuance of an adoption decree, which establishes an analogous legal relationship between parent and child. *See* note 55 *supra;* CAL. HEALTH & SAFETY CODE § 10433 (West 1964); N.Y. PUB. HEALTH LAW § 4138 (McKinney Supp. 1967); OKLA. STAT. ANN. tit. 63, § 1-316 (1964).

74 *See* G. WILLIAMS, *supra* note 13, at 127; Holloway, *supra* note 4, at 1090.

75 *See* LoGatto, *supra* note 8, at 269; Rice, *supra* note 4, at 519.

76 *See* G. WILLIAMS, *supra* note 13, at 120.

77 *See* N.Y. DOM. REL. LAW § 175 (McKinney 1964).

78 N.Y. County Lawyers Ass'n Comm. on State Legislation, Rep. No. 114, March 8, 1948, recommending disapproval of (1948) Sen. Int. No. 745, Pr. No. 2042 (Mr. Friedman).

79 Doornbos v. Doornbos, 23 U.S.L.W. 2308 (Super. Ct., Cook County, Ill., Dec. 13, 1954), *appeal dismissed on procedural grounds*, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956); Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

80 N.Y. County Lawyers Ass'n Comm. on State Legislation, Rep. No. 179, Feb. 25, 1964, recommending approval of (1964) Sen. Int. No. 1882, Pr. No. 1922 (Mr. Liebowitz).

In 1957 the Michigan State Bar Committee on Domestic Relations Law noted that most legal difficulties accredited to AID were "more fanciful than real."[81] Relying upon the apparent lack of AID litigation, the committee advised that the need for a legitimizing statute was not sufficient to warrant the risks involved in overcoming the opposition certain to follow the introduction of such a bill. The 1949 experience in Minnesota involving legislative hearings on AID indicates the emotional nature of the public response to discussions of such proposals.[82] Also, the actual consideration and rejection of a bill legalizing AID might result in an even greater state of uncertainty than presently exists.[83]

Legislative inaction is further encouraged by lack of public awareness that a problem exists, by religious taboos, and by predictions of dire sociological consequences of AID. There is hope, however, that this social apathy will be overcome. An increasing incidence of AID litigation may stimulate intelligent public discussion of the issues. Also the reluctance of legislators to study the problem may diminish with the passage of time and with increasing public recognition of the problem, as demonstrated currently by the relatively open consideration of revisions in abortion laws.[84]

One undesirable sociological consequence of AID is the increased possibility of incestuous marriages.[85] To date there are no fignres available to support the suggestion of AID opponents that this may develop into a serious problem. A proper evaluation of the probability of incestuous marriages among AID offspring would entail a statistical analysis of such factors as population fignres, social strata of donors and recipients, mobility of society, age differences, use of semen banks across the country, possible use of semen frozen for several years, and other social

81 Report of Subcomm. on Artificial Insemination, Mich. State Bar Comm. on Dom. Rel. Law, *reprinted in* Note, *Artificial Insemination on the Michigan Scene*, 34 U. DET. L.J. 473 (1957).

82 *See* Note, *Artificial Insemination—Legal and Related Problems*, 8 U. FLA. L. REV. 304, 315 (1955), which quotes a letter from the sponsor of the Minnesota AID bills indicating the vicious abuse to which he and his family were subjected during hearings on the bills.

83 *See* Report of Subcomm. on Artificial Insemination, *supra* note 81, at 475.

84 *See, e.g.*, Leavy & Kummer, *Abortion and the Population Crisis: Therapeutic Abortion and the Law; Some New Approaches*, 27 OHIO ST. L.J. 647 (1966); *Symposium: Abortion and the Law*, 17 W. RES. L. REV. 369 (1965); Comment, *The Law of Therapeutic Abortion: A Social Commentary on Proposed Reform*, 15 J. PUB. L. 386 (1966); NEW REPUBLIC, Nov. 26, 1966, at 38; NEWSWEEK, July 3, 1967, at 51; TIME, Oct. 13, 1967, at 32.

85 *E.g.*, G. WILLIAMS, *supra* note 13, at 144; LoGatto, *supra* note 8, at 270; Rice, *supra* note 4, at 528; Comment, *Legal Problems of Artificial Insemination*, 39 MARQ. L. REV. 146, 153 (1955).

factors that might bias an estimate. Such a marriage would appear extremely unlikely.[86] There may be an even greater likelihood of incestuous marriages between adopted or illegitimate children of the same father. Any risk of incest between AID children could be minimized still further by limiting the number of inseminations by the same donor.[87]

CONCLUSION

The Oklahoma statute resolves the most pressing legal questions concerning AID by legalizing use of the technique and by legitimizing the children so produced providing the husband has consented. Legitimization eradicates the different treatment of AID children and naturally conceived legitimate children with respect to inheritance and support. The statute does not purport to affect the AID child conceived without the husband's consent, nor does it condone such practice.

In order more fully to resolve the problems associated with AID, legislatures should carefully analyze the probable sociological effects of the practice and should pay less attention to hypothetical problems. If a legislature decides to legalize AID without losing control of the practice and to legitimize the offspring, the following provisions should be considered in addition to those of the Oklahoma statute:

(*1*) Physicians should maintain records indicating the name and address of the donor(s) utilized for each recipient.

(*2*) Physicians should maintain records of the written consent of the donor's wife, if any. Such consent should be renewed annually.

(*3*) A physician or other person performing an artificial insemination without the husband's written consent, properly filed, should be liable for support of the child produced thereby if the husband is subsequently declared not liable for such support.

(*4*) The semen from an individual donor may not be used to produce more than twenty AID children.[88]

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86 *See* Levisohn, *Dilemma in Parenthood: Socio-Legal Aspects of Human Artificial Insemination*, 36 CHI.-KENT L. REV. 1, 31 (1959); Verkauf, *supra* note 2, at 292.

87 G. WILLIAMS, *supra* note 13, at 145. The British medical profession apparently limits its donors to 100 inseminations, though it is not clear whether this figure represents actual impregnations or merely inseminations. *Compare* G. WILLIAMS, *supra* note 13, at 140, *with* 161 PARL. DEB., H.L. (5th ser.) 418 (1949), *and* LoGatto, *supra* note 8, at 270. *See also* Note, *Artificial Insemination*, 30 BROOKLYN L. REV. 302, 321 (1964).

88 This number assumes that the apparent British limit of 100 inseminations is a sound figure. If the woman were inseminated three times per month and a 100% conception rate were achieved during the first month, each donor could theoretically father only 33 children. Dr. Guttmacher has analyzed the results of 690 cases of AID published by seven clinicians and has found an average conception rate of about 69% after several months of inseminations. Guttmacher, *supra* note 3, at 629; Guttmacher, *The Role of Artificial Insemi-*

(5) An AID child accepted into the family for more than one year by a husband who has knowledge of its origin, but who did not consent to the use of AID, should be treated in all respects the same as a naturally conceived legitimate child of the husband and wife.

(6) All living persons conceived through AID with the husband's consent should be treated in all respects the same as a naturally conceived legitimate child of the husband and wife.

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nation in the Treatment of Sterility, supra note 35, at 779; *see* Verkauf, *supra* note 2, at 288. Such a success rate during the first month of insemination would produce somewhat less than 23 pregnancies per 100 inseminations on the above schedule. The figure ultimately used by a legislature would have to be based on sound medical advice refining these estimates and critically evaluating the risks involved in allowing increased prolificacy.