

INSTITUTE OF LAW RESEARCH AND REFORM

ARTIFICIAL INSEMINATION

AND

ILLEGITIMACY

Malcolm Pritchard

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## Artificial Insemination and Illegitimacy

The information supplied by two gynecologists in Alberta indicates that artificial insemination employing a donor has become to some couples a desirable means of overcoming childlessness (see Appendix). In 1964 Dr. W. J. Finegold stated that 20,000 artificially inseminated babies were born each year and that several hundred thousand A.I.D. children were living in the United States (Finegold, W. J., Artificial Insemination, 1964, Charles C. Thomas). If one accepts the usual estimate that 10 per cent of couples of childbearing age are infertile and that, of these, in half of the cases the husband is at fault, the possibilities of artificial insemination become apparent. Yet, we have no legislation recognizing the procedure. The increasing demand for A.I.D. indicates that the need for statutory clarification of the complicated issues involved in artificial insemination. The purpose of this memorandum is to consider one of these issues in particular; namely the legal status of consensual A.I.D. children of a married couple.

First, it is necessary to set out the terms which will be used throughout this paper. Artificial insemination by a third party donor (A.I.D.) is a voluntary medical technique used to achieve human conception. It is used to overcome problems of male infertility and communicability of hereditary defects. Technically known as heterologous insemination, the process involves placing the spermatozoa of a usually anonymous donor into the reproductive organs of the female where it can then fertilize the ovum. (Kindregan, State Power over Human Fertility and Individual Liberty, 23 Hastings L. J. 1401, 1409 (1972)). If the spermatozoa of the husband is used the procedure is called homologous

insemination (A.I.H.). This involves no legal questions since the child is considered the natural offspring of the couple (In re Adoption of Anonymous, 74 Misc. 2d 99, 100; 345 N.Y.S. 2d 430, 431 (Sur. Ct. 1973)). There is also a variation of the technique in which semen from the husband is added to the semen of the donor so that if conception occurs it cannot be said conclusively that the resulting child is not biologically a product of the couple. Therefore, only the position of children conceived by means of the injection of semen from an anonymous donor and with the husband's consent will be considered. Since there are no reported Alberta decisions involving artificial insemination, the answer to the legitimacy question is a matter of pure speculation, and the courts could rule either way in the absence of controlling legislation.

As long as the couple accept and continue to accept the child it will be considered to be "theirs" due to the fact that secrecy is a very important element in the procedure and because the parents are reluctant to publicize their actions. Thus, only the couple and their doctor will know the true situation. As the Departmental Committee on Human Insemination intimated in its Report (Cmd. 1105), there are relatively few cases involving A.I.D. children, and such children might continue to be registered at birth as the legitimate offspring of both parents and society and the law would never be the wiser. However, the child's status at law remains the same whether or not it is ever officially established. Leaving the aside the question of whether or not such an action (registration of A.I.D. child as your own) constitutes a fraud on society, the law will have to face this question of legitimacy as the potential grounds for attacking the status of a child are numerous; the most likely being divorce, custody, or support proceedings where

one parent seeks to prove that the husband is not in fact the father of the child in order to gain the benefit of or avoid some legal obligation, or adoption proceedings where the mother wants to avoid the father's consent, or in an attack on the A.I.D. child's inheritance rights by collateral heirs who would stand to gain by having the child displaced from the distribution scheme of the husband's estate.

In determining the status of an A.I.D. child the court will have relatively few cases to consider in which legitimacy is the primary issue, although some courts have considered this issue in obiter dicta (these will be discussed subsequently in this paper). As a result, in attempting to solve this issue the courts may resort to established rules which have developed from entirely different considerations. Professor Dienes has stated that courts have generally relied on traditional legal definitions in categories, and have struggled

"to fit...new conditions into these pigeon-holes, clearly not constructed to encompass the situation. The natural result is a hodge-podge of decisions with little consistency, a strained logic at best and language reflecting emotional reactions of the judge rather than creative policy-formation. Such an evaluation would seem directly applicable to the judicial response to A.I.E."1

(Diens, Artificial Donor Insemination: Perspectives on Legal and Social Change, 1968 54 Iowa L. Rev. 253, 285).

The cases which have considered this status issue are implicitly grounded on the doctrine of the presumption of legitimacy. So, it is not unlikely that an Alberta Court will attempt to solve the legitimacy problem by resorting to the already established common law rules, as modified by

statute, concerning legitimacy.

I have resort to the Institute's paper on Legitimacy to summarize the approach the Alberta Courts have taken with respect to applying the rules of legitimacy.

- " Simply put, a child born or conceived in lawful wedlock is legitimate. Legitimacy is therefore a function of validity of marriage...

The fact that a child is born or conceived of a lawfully married woman does not foreclose the question of legitimacy, although this child is prima facie legitimate if the husband has had opportunity for access. Rebuttal of this presumption of legitimacy, a presumption of fact is difficult--so much so that the adulterine bastard was almost unknown at common law...

The presumption can be rebutted by evidence which excludes all doubt that the husband could not be the father. It may be (1) factual evidence showing that sexual intercourse did not take place between the husband and wife during the possible period (non-access), or (2) scientific evidence proving that in spite of access the child could not have been fathered by the husband (e.g., blood tests).

The doctrine of the four seas applied until 1811. In that year, the Banbury Peerage case ruled as admissible in proof of non-access evidence satisfying the court that sexual intercourse did not take place. At common law neither husband nor wife could give evidence of non-access to bastardize the child (Russell v. Russell, [1924] A.C. 687), but the rule has been reversed by statute in Alberta (The Evidence Act, R.S.A. 1970, c.127, s.2). Every kind of evidence is now admissible including evidence of, for example the conduct of husband and wife, the husband's impotence at the time of conception, admissions of husband and wife prior to the action, and testimony by the

wife's paramour (although he is not a compellable witness, The Evidence Act, R.S.A. 1970, c.127, s.8 (1)).

The onus of disproving the presumption of legitimacy is on the person calling the legitimacy into question."2

In applying the presumption of legitimacy the courts are faced with two opposing policy considerations. On the one hand, social stability and the integrity of the family unit favour application of the presumption; on the other hand, there is the imposition of legal obligations upon a person who is not the biological father of the child.

Pursuant to a strict application of the foregoing rules the A.I.D. child will probably be held to be illegitimate. The court will apply the presumption of legitimacy on the grounds that the child is born of a lawfully married woman and the husband has had the opportunity for access. However, the court will allow evidence to be led to show that the husband is not the biological father. Evidence that A.I.D. was performed would probably be insufficient to render the child illegitimate if it was not also shown that procreation by the husband was impossible. (Two important issues in this area are: (1) what is meant by impossibility? (a) complete absence of live sperm; (b) sperm count below a certain minimum level; (c) psychological impossibility. (2) The standard of proof which would be required.) It is likely that the husband agreed to the wife's insemination because of the existence of factors--impotency, sterility, RH blood factor--that would constitute sufficient evidence to rebut the legitimacy presumption. Under this approach whether or not the husband consented to the act is immaterial. The closest analogy would be the situation in which a husband consents to his wife's adultery. (By this analogy I am not suggesting that

A.I.D. constitutes adultery.) Even though the husband has consented to the act the court will hold the child illegitimate because the biological father is not the husband of the lawfully wed mother.

The cases that have arisen deal with other legal problems and questions of public policy surrounding the use of artificial insemination and the status of the child has only been dealt with in obiter dicta. Although all the decisions have been implicitly grounded on the presumption of legitimacy they indicate alternative approaches an Alberta court will have to consider.

The Ontario Supreme Court appears to have been the first court to deal with the question of the status of the child conceived through A.I.D. In Orford v. Orford [1921] 58 D.L.R. 251, 40 O.L.R. 15 a woman sued her husband for support. He defended on the ground of adultery. The wife claimed that the child was conceived by A.I.D. without the husband's consent during a period in which she was separated from her husband. The court held that the wife had committed conventional adultery and that A.I.D. had not taken place. By way of dictum, Justice Orde stated that A.I.D. would constitute adultery where the husband's consent had not been obtained. He said:

" 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 facilities of the guilty persons; and any submission of those powers or facilities to the service or enjoyment of any person other than the husband and wife comes within the definition of 'adultery'."3

The judge admitted that A.I.D. was a new procedure which had never been considered by the courts and stated that even if it had never been previously declared to be adultery, then on grounds of public policy the courts should proceed to do so.

In 1924, an English court maintained that whether or not the husband consented was immaterial and that A.I.D. was unquestionably an adulterous act. (Russell v. Russell [1924] Appeal Cases 687.) This was a divorce case in which the wife, as in Orford, conceived during a period of non-access and claimed the birth resulted from A.I.D. The husband was granted the divorce, the court holding that the wife had committed conventional adultery. Lord Dunedin, obiter, declared A.I.D. to be an adulterous act, with or without the consent of the other spouse. Russell differs from Orford in that the latter case stated that the husband's consent would offset the adultery charge against the wife for conceiving through A.I.D. (The Russell case was followed in Sapford v. Sapford (1954) 2 All E.R. 373.)

The first case in the United States was Hosch v. Hosch (Unreported Cir. Ct., Cook County, Ill, (1948)). Again the husband was suing for divorce on the grounds of adultery. The wife defended by declaring that she had submitted to A.I.D. The court granted the divorce on the grounds of conventional adultery. The court digressed and declared that A.I.D. without the consent of the husband would not be adultery. (Note: There is not attempt to reconcile this view with the dictum in the Orford case, and the reasons for the contradiction were not discussed.) In 1954 the Superior Court of Cook County, Illinois was faced with an identical situation (Doornbos v. Doornbos, No. 54 S.14981, Super. Ct., Cook County, Ill, (1954)). The husband sought a divorce on the grounds of adultery. The wife had submitted to A.I.D.



with the express consent of her husband, yet the court held that the wife had committed adultery and the child was illegitimate on the grounds that regardless of whether or not the husband consented, A.I.D. was contrary to public policy and good morals.

" Heterologous artificial insemination (when the specimen semen is obtained from a third party or donor) with or without the consent of husband is contrary to public policy and good morals, and constitutes adultery on the part of the mother. A child so conceived is not a child born in wedlock and therefore illegitimate. As such it is the child of the mother and the father has no right or interest born in said child.

Homologous artificial insemination (when 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 view."<sup>4</sup>

(Note: This case contradicts Hosch v. Hosch.)

There have also been cases in which the status of A.I.D. has been considered where the primary issue is not adultery. In 1948 a lower court in New York dealt with an A.I.D. child which had been conceived with the consent of the husband (Strnad v. Strnad 190 Misc. 786, 78 N.Y.S. 2d 390 (Super. Ct. 1948)). The husband was seeking visitation rights and the wife attempted to deny the husband such rights on the ground that he was not the biological father because the child had been conceived through consensual A.I.D. The court held the child was legitimate since the husband consented. The Court declared his consent to be tantamount to "potential adoption" or "semi-adoption" of the child; thus, the husband was granted rights at least comparable to those of a foster parent and perhaps even the rights of a natural parent.

However, the Supreme Court of Kings County, New York, departed from the Strnad position in Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S. 2d 406 (Supr. Ct. 1963). Here an action brought by a husband for annulment and separation. During the marriage a child was born to the wife through A.I.D. with the written consent of the husband who also assumed all responsibility for costs and medical bills. The Judge dismissed Strnad as dictum and followed strict common law principles regarding children born outside of the marriage. Since the father of the child was not the husband of the mother the child was illegitimate. Here the court alluded to the Doornbos decision in support of its verdict. The Court declared that there was a "deeply imbedded" legal concept that a child whose father is not the husband of his mother is illegitimate and noted the disinclination of the legislature to legitimate A.I.D. children and its unwillingness the application of the historical concept of illegitimacy. The Court appears to have found the husband liable either on the basis of an implied contract whereby Mrs. Gursky's submission to the insemination was induced by his express permission, or whether the husband's consent created a form of equitable estoppel to his denial of a duty to support the child. The semi-adoption theory in Strnad was rejected on the ground that it was an attempt to contravene the existing adoption statute. The following year, Gursky was cited with approval in Anonymous v. Anonymous, 41 Misc. 2d 886, 246 N.Y.S. 2d 835 (Super. Ct. 1964).

In 1968 the California Supreme Court held that the husband was the lawful father of a dependant child born of consensual A.I.D. and that the term "father" as used in the penal statute was not limited to a biological or natural father (People v. Sorenson 437 P. 2d 495. 66 Cal. Rptr. 7 (1968)). The defendant husband had, by a written agreement,

consented to the artificial insemination of his wife by a third party donor after fifteen years of childless marriage and he was named on the birth certificate as the father. After a subsequent divorce the wife became ill and unable to work and the District Attorney demanded child support payments from the defendant who pleaded that he was not the father of the child. In the dictum portion of the decision, the Court said about artificial insemination in general:

" It has been suggested the doctor and wife committed adultery by the process of artificial insemination. Since the doctor may be a woman, or the husband himself may administer the insemination by a syringe, this is patently absurd; to consider it an act of adultery, with the donor, who at the time of insemination may be a thousand miles away or may even be dead, is equally absurd." 5

The Court stated that the public policy of California favours legitimation and no public purpose would be served by stigmatizing such a consensual child as illegitimate. In holding that a consensual A.I.D. child is legitimate the Court stated that legitimacy is a status which may exist despite the fact that the husband is not the natural father of the child. This case also sets forth the doctrine of equitable estoppel--that a man who participates in his wife's decision to undergo artificial insemination in the hope that a child will be born--a child whom he expects to nurture as his own--is estopped from disclaiming responsibility toward that child.

"[A] reasonable man who, because of his inability to procreate, actively participates and consents to his wife's artificial insemination in the hope that a child will be produced whom they will treat as their own, knows that such

behaviour carries with it the legal responsibilities of fatherhood and criminal responsibility for non-support."<sup>6</sup>

This doctrine was stated with approval In re Adoption of Anonymous, 74 Misc. 2d 99, 345 N.Y.S. 2d 430 (Supr. Ct. 1973). Here it was held that a child born of consensual A.I.D. during a valid marriage is a legitimate child entitled to the rights and privileges of a naturally conceived child of the same marriage. The father of such a child is therefore the "parent" whose consent is a prerequisite to the adoption of such child by another. The Court with approval from Sorenson:

" Nor are we persuaded that the concept of legitimacy demands that the child be the actual offspring of the husband of the mother and if semen of some other male is utilized the resulting child is illegitimate. (P. 103.)"<sup>7</sup>

The Court in In re Adoption of Anonymous relied principally upon Sorenson to reach its holding of legitimacy, not only because it was the most recent decision but also because it is the only reported decision of an appellate court. It rejected Gursky as not persuasive and as "the only published decision which flatly holds that A.I.D. children are illegitimate."

These cases indicate the gradual change in the law's response to artificial insemination. With respect to the issue of whether or not consensual A.I.D. constitutes adultery the present position appears to be contrary to that of Orford; Russell; and more in line with Sorenson. Black's Dictionary, fourth edition, defines adultery as "voluntary sexual intercourse of a married person with a

person other than the offender's husband or wife." This is the normal usage of the word employed by most matrimonial statutes and connotes physical proximity and penetration of the female sexual organ by the male sexual organ. With regard to the legitimacy question the trend appears to be in favour of legitimizing the child. Strnad and Gursky indicate similar approaches in that they hold that a consenting husband was allowed (Strnad) and was liable (Gursky) for the responsibilities of a natural parent. However, these two cases did agree as to the status of the child. In Sorenson the Court looked for the "lawful father" and held that for the purpose of the support statute in question the consenting husband was the legal father of the child. In re Adoption of Anonymous case is similar in that the A.I.D. child was declared to be legitimate and the consenting husband was the "parent" whose consent was needed for the adoption proceedings. California and New York, as well as a few other states have reached the same decision on the status of the A.I.D. child by statute. (see Appendix). At the present time there have been no cases concerning A.I.D. children in which these statutes have fallen under consideration. (This might indicate that the legal problems involved in A.I.D. can be solved through an appropriate statute.)

In 1960 the Departmental Committee on Human Artificial Insemination completed its Report (commonly known as the Feversham Report). This Report analyzes the problems, both legal and otherwise, in the area of artificial insemination. The Report concluded that A.I.D. children were illegitimate. The object of A.I.D. is to produce a child and the Committee felt that to give such a child the status of legitimacy would amount to official encouragement to the practise of A.I.D. The Committee concluded that it was not in the interest of the child to be conceived in such a manner and consequently

would not support a proposal or that might encourage the practice. In reaching this conclusion the Committee reasoned:

" We recognize that the law on legitimacy has during the last thirty-five years twice been modified to be legitimated who would otherwise be illegitimate. But the changes brought about by the Legitimacy Acts of 1926 and 1959 merely made it possible for children to be born to a man and woman who were not at the time of birth married to each other and who later married, or whose marriage was void, to become the...legitimated children of that man and woman. To make A.I.D. children legitimate would be an entirely new departure. They would be the only class of legitimate children not related in blood to the mother's husband. It is true they would have become legitimate if a proposed new clause had been added to the Legitimacy Bill of 1959, whereby 'any child born to a married woman, and accepted as one of the family by her husband', would have been deemed to be a child of the marriage. But this clause was withdrawn after a short debate and we have no reason to suppose that opinion in Parliament or in the country would in general, be in favour of so far reaching a change in the concept of legitimacy. Nor do we ourselves consider that such a change would be justified in the interests of A.I.D. children alone...The simple question of principle is whether a child may become the legitimate issue of those who are not his natural parents...It would be the introduction of a new concept which alters the meaning of parentage. Rights may be given to adopted or A.I.D. children but that cannot make them the offspring of the mother's marriage. The words may be altered, but the facts cannot be. What is suggested is a new meaning of the term legitimate. Hitherto extensions of the meaning have still left intact the requirement that a legitimate child is a child born of parents who were or who have become married or who have gone through a ceremony of marriage. There are two requirements, parentage and marriage. The change

proposed (to legitimate A.I.D. children) is one which would alter not only the status of the A.I.D. child, but also that of all children now described as legitimate, since the marriage of their father and mother would no longer be necessary for the status they now enjoy."<sup>8</sup>

It is difficult to predict the decision of an Alberta Court on the status of an A.I.D. child. Artificial insemination is a subject that touches upon ethical, sociological, religious, and psychological values thereby causing varied reactions. Past cases are of little aid in predicting a court's decision except to the extent that they indicate alternative approaches. The absence of legislation in the area (only six states) results in no guidelines to which a judge can refer in arriving at a decision and opens the way for a judgment based on the personal belief of the individual.

If the manner in which the law has previously met developments in science is any indication, the child will be held to be illegitimate. In 1953 a lawyer addressed the First World Congress on Fertility and Sterility held in New York City. He stated that:

"...the experience of the ages has shown that the law declines to be precipitated or even hastened into what it fears may be a premature decision."<sup>9</sup>

He continued by indicating that as in all other scientific achievements, the law's response to artificial insemination has been and will be "Perfect horror; skepticism; curiosity; and then acceptance." It must be remembered that practically speaking A.I.D. has not been judicially considered in Canada. It is submitted that Orford v. Orford is of doubtful authority because:

(1) the remarks on artificial insemination are obiter dicta; (2) the case was decided in 1921 and since then society's social and moral values have undoubtedly changed; (3) statements made by the judge are based on a definition of adultery that is open to criticism. It is respectfully submitted that have initially having no common law case authority; and having United States case authority which shows a trend of reversal, conflict, and dicta; and, the fact that the legislature has not seen fit to legislate with respect to A.I.D. children or to modify the application of the presumption of legitimacy; an Alberta Court, faced with the decision concerning the status of an A.I.D. child will attempt to proceed under the rules of legitimacy. Therefore, it will employ the strict common law principle (as modified by statute) to decide an issue which the common law could never envision. On this basis the Court will apply the presumption of legitimacy. However, the child would be declared illegitimate after evidence had been successfully introduced to prove that artifical insemination had been utilized and that the child involved was not in fact the child of its mother's husband.

On the other hand, the Court might sustain the presumption of legitimacy by advocating its policy of protecting innocent children and stabilizing family relationships (Strnad; Sorenson; In re Adoption of Anonymous). If the Court were to adopt this attitude the consent of the husband would become more significant. In most of the cases which acted on a strict application of the rules of legitimacy the Courts felt that the consent of the husband was immaterial (Doornbos v. Doornbos; in Gursky the consent of the husband was important with respect to the husband's liability, not with respect to the child's status). The cases in which the Court held the child to be legitimate have focused on the husband's



consent. The latest approach appears to be that the husband's consent constitutes an equitable estoppel, People v. Sorenson; In re Adoption of Anonymous (this is different from Strnad in which the husband's consent constituted "potential adoption" or "semi-adoption"). Here the Court would apply the presumption of legitimacy and would not allow the husband to rebut the presumption on the basis that he is estopped from denying that the child is not his.

" When a husband consents to the artificial insemination of his wife because of his own physical or psychological inadequacies but permits his name to be listed on the birth certificate as the father, it would seem that a presumption of legitimacy born of the recognition that it is necessary to remove from children the stigma of illegitimacy, should operate as an estoppel against both a wife and husband contravening or contradicting his parenthood."<sup>10</sup>

(Biskind, Legitimacy of A Child Born by Artificial Insemination, S. J. Family L., 39, 43 (1965)).

It should be noted that it is doubtful that a decision going one way or another on the status of an A.I.D. child would establish an across-the-board rule of law that all A.I.D. children are illegitimate since so many variables (for example whether the donor and husband's blood types were matched) are present in each case. Probably the presumption of legitimacy will control in each case until the child's legitimacy were challenged, and this issue would then be resolved on a case-by-case basis.

ISSUES TO BE CONSIDERED WHEN  
FORMULATING A POLICY ON A.I.D.

From the cases which have considered A.I.D. it is obvious that the trend of conflict, reversal and dicta should end and as some courts have stated the policies to be followed in this area should come from the legislature. Therefore, the purpose of this section of the memorandum is to set out some of the numerous issues which must be considered when formulating such a policy.

Issue: What are the problems resulting from the present,  
uncertain position of the law with regard to A.I.D.?

- (a) Uncertainty over whether the resulting child is legitimate or illegitimate.
- (b) Secrecy is an important element in the practice.

I. The secrecy element prevents the gathering and reporting and scientific study of the basic information necessary for a proper judgment upon the extent and consequences of the practice.

II. Research interests and social interests require that public records be reliable; example most genetic counseling is conducted on the assumption that reputed parents and grandparents are genetic parents and grandparents; if that assumption cannot safely be made, prediction becomes the more uncertain and the consequences of erroneous prediction could be serious.

III. Because of secrecy the actual relationship is unknown. Therefore studies of genetics, lineage, anthropology,

and related fields are subjected to the possibility of serious error due to inaccuracies caused by falsification of official documents relating to birth, medical history, and death of the A.I.D. child and his "father".

IV. Secrecy means that the practitioner, husband and wife, and the donor conspire together to deceive the child and society as to the child's true parentage and his genetic identity.

- (c) Places pressure on the family unit--husband and wife not sure of the legal position of the child and afraid that their "secret" will be discovered.
- (d) Uncertainty over the doctor's position. It is unlikely that the act constitutes adultery, but if a Court were to disapprove of A.I.D. the practitioner may be penalized; and, even if the courts were to accept A.I.D. the courts may still find the doctor liable for failing to carry out certain responsibilities (what would constitute negligence?).
- (e) When the doctor signs the birth certificate does he commit perjury or any other offense by attributing paternity to the husband.
- (f) If the biological father becomes known to the child, can the child go against his estate?

- (g) Can the biological father, if he discovers the identity of the child, sue for custody of this child?
- (h) Possibility of incestuous marriages because of falsification of records in actual family relationships.

Conclusion: The legislature should establish a policy on artificial insemination by a third party.donor.

Issue: Should A.I.D. be accepted or outlawed?

#### Objections to Aid

- (a) Society has always been against the extra-marital birth of a child. There could be a similar reaction to A.I.D.
- (b) Religious views: The Catholic Church is definitely against A.I.D. The Protestants and Jews have no one authoritative body which espouses the official attitude as does the Catholic Church. Therefore, various sects in both the Protestant and Jewish religions have both accepted and rejected A.I.D. (see Appendix).
- (c) Population explosion--given the present population crises and given the existence of homeless children, to accept a technique which allows otherwise childless couples to bring children into the world is a practice which should be discouraged (to determine the strength of this argument one would have to

determine if there is any correlation between existing A.I.D. statutes and their influence upon birth rates in the six states that inacted legislation).

- (d) Affect on Adoption--A.I.D. is an alternative to adoption, thus decreasing the potential adoptive parents. (it should be noted that available statistics on problems with adoption include children who are hard to place because of race, age, or physical defects. Such children are difficult to place regardless of the availability of A.I.D. as an alternative to adoption. Also, there should be a check on the statistics of the percentage of couples who are childless as a result of physical disabilities attributable to the wife).
- (e) Biological consequences of A.I.D.--possibility that the children born might be in some way defective.
- (f) So far as breeding for desired characteristics goes against that degree of randomness and diversification which the evolutionary process itself requires, it would call for rejection on genetic grounds as well. Medawar, P. B. (1969) The Genetic Improvement of Man, Australasian Annals of Medicine 4, 317-320.
- (g) Ancestral tradition and pride are important to many families.
- (h) Falsification of birth registration.
- (i) Psychological effect on the family:

- (i) Psychological effect on the family:
  - (i) Husband may feel inferiority if the child is superior to him either physically or mentally.
  - (ii) Husband may adapt himself badly to his adoptive fatherhood as the constant presence of the child may prove as reminder of his sexual incompetence.
  - (iii) a natural attachment to the donor by the wife may effect the wife to the extent that she may turn away from her husband.
  - (iv) a superior child may be a constant reminder to the wife of her husband's inadequacies.
  - (v) the husband may feel outside of the family because of the special relationship between the child, wife and donor; the husband may feel he didn't participate.
  - (vi) should the infant exhibit physical or mental deformities the wife may blame her husband because it was his infertility that obliged her to seek an anonymous donor.
  - (vii) the psychological and emotional makeup of people may change (a comparison may be made here of people who undertake a vasectomy operation and then experience psychological and emotional difficulties after the operation).

Reasons for Acceptance of A.I.D.

- (a) Divorce rate is higher in barren marriages. Allowing A.I.D. might decrease the divorce rate. (Finegold, page 88.)
- (b) Some studies have shown that couples with offspring live longer and are physically and mentally better off. (Finegold, page 88.)
- (c) It is argued that A.I.D. is therapeutic because it is "cure" for childlessness; it brings happiness to the marriage.
- (d) The couples who ask for A.I.D. have thought very carefully. They will be responsible parents; probably much more so than many of the couples who have a high percentage of unplanned and unwanted pregnancies (page 32 of Law and Ethics).
- (e) It has been shown that the changes in development in the human female as a result of pregnancy and birth have a hormonal and thus a physiological basis. The desire for such conditions and development therefore cannot be said to be a merely a socially conditioned desire for something good--this may lead to a more adequate mother-child attachment and thus is the basis for a network of far-ranging social links. Such a fulfillment of human female nature is a valid objective for social effort, because given its basic quality it might be considered as a claim to basic human fulfillment like the claims to education, decent housing, health care, etc. (page 32, Law and Ethics).

- (f) A.I.D. children show no increase in neo-natal mortality or in congenital defects. Few follow-up studies of later development have been done, perhaps because doctors do not want to risk revealing that the children have not been conceived normally. However, one such study found that the physical and mental development was in no way inferior to a similar control series; indeed, in I.Q. which is strongly affected by the family environment, they significantly exceeded the control level. (Iizuka, R., Sawada, Y., Nishina, N. and Ohi, M. (1968). The Physical and Mental Development of Children Born Following Artificial Insemination, International Journal of Fertility 13, 24-32.)
- (g) Some effort should be made to improve the quality of the human race by the use of A.I.D. (Muller, H. J. (1963) Genetical Progress by Voluntarily Conducted Germinal Choice in Man and His Future (Ciba Foundation Symposium) (Wolstenholme, G., edition), Churchill, London.)
- (h) A.I.D. is preferable over adoption for the following reasons:
- (i) about two thirds of adopted babies are born to unmarried mothers and about one third are from families where the child is not wanted. It is believed that the genetic background of these children is generally bad.
  - (ii) the A.I.D. child is biologically 50per cent the couple's own.



(iii) adoption involves complicated legal machinery involving social workers, lawyers and doctors. In A.I.D. the process is a secret between the couple and the physician.

(iv) the husband's infertility is a secret in artificial insemination. To his friends, the husband has finally impregnated his wife. This is a remarkable "lift" to an impotent or sterile male.

(v) in artificial insemination the child is never told. In adoption, however, the child must be informed. The emotional shock to many of these children is too well-known.

(vi) the husband and wife are part of the conception, the prenatal period, the delivery and the baby's early days. In adoption, the family usually is not granted the infant until he is several months old although this is now changing.

(vii) scarcity of adoptable children has created a black market in babies. Notwithstanding warnings by reliable agencies and physicians, couples pay excessive prices in order to "buy" infants whose backgrounds are poorly investigated.

(viii) in artificial insemination the child's physical appearance matches that of the family. This is not always the case in adoption.

(ix) no matter how legal the proceedings, the adopting parents subconsciously fear the sudden appearance of the natural mother.

(x) in artificial insemination since the material is the same, there is some resemblance of homogeneity among the several offspring. In adoption, the various children may be dissimilar physically and emotionally.

(xi) in artificial insemination the craving for "carrying-with-child" is satisfied. This, of course, is not true in the case of adoption.

- (i) Concealment of husband's infertility.
- (j) Outlawing A.I.D. will merely drive it underground.

General Policy Considerations:

- (a) Because you are a woman and married---does that give you an automatic right to a baby?
- (b) Is having a baby a right or liberty which can be taken away by statute?
- (c) Exactly what are the benefits provided to both individual and society by the experience of motherhood?
- (d) Will psychological or emotional problems occur afterwards as had occurred with some vasectomies?
- (e) To prohibit A.I.D. you would have to make it a criminal offence.
  - (i) the doctor would have to be liable.

(ii) the woman's husband if he consented and any persons who assisted the person carrying out the insemination could be charged as accessories.

(f) Could A.I.D. be effectively prohibited?

(i) deterrents--would prohibition merely drive the practice underground? Unscrupulous persons and even doctors who firmly believe in the practice might still try to satisfy the demand. (Note: an analogy might be drawn with the attempt to prohibit abortion, however, the analogy is weak because the motives behind the two acts are quite different--an unwanted child is more urgent for A.I.D. (continuation of childlessness); also there is probably more to be made by criminal abortion because of greater need and because the desired result can be achieved in one operation. However, the analogy with abortion is appropriate in the difficulty of detecting an offence).

(ii) detection of offences--if a criminal offense the practice would be more carefully concealed; also, there are no medical complications to give it away like in abortion.

(g) Is it a function of the government to impose a uniform morality by means of the criminal law? --A.I.D. requires the cooperation of a donor and usually of a doctor as well as the husband and wife but whatever society's reaction may be to the practice it is not in any particular case offensive of public order or decency.

- (h) If A.I.D. is accepted where do you draw the line with respect to what is and what isn't accepted? It would also be necessary to look at embryo transfers and cloning.
- (i) Is enough known about the physiological effects on the husband and wife, child and donor to justify the practice, or are we in the position now that we are interfering with the natural process, the consequences of which are unknown and could be very harmful.
- (j) Should sterility be a ground for divorce? (If yes --does this assume that procreation of children is the principle object of a marriage?)--if this were a ground for divorce would this eliminate the demand for A.I.D. or reduce it significantly?
  - (i) in many cases the wife wants the husband to be the father.
  - (ii) if the wife wanted to leave the husband there are means of obtaining a desired divorce.

Conclusion: To attempt to use the law to prohibit a practice which is:

- (a) very difficult to detect;
- (b) which could be beneficial both to the community and the individual if properly controlled;
- (c) and which, if prohibited might be continued by less-scrupulous persons or offer scope for blackmail, could be more dangerous than if it had not been prohibited.

Issue: What must be considered if A.I.D. is to be accepted?

1. Who should be able to receive A.I.D.?

- (a) Single women (this includes unmarried, widows, and married women living apart from their husbands).

(i) Objections--A.I.D. is important and there can be difficulties--there should be a husband who is prepared to exercise the responsibilities of fatherhood. Here you would also have to look at the position of a couple living common law.

- is the interest in A.I.D. by unmarried woman indicative of psychological distress (Finegold page 98).

- the usual argument for A.I.D. is the infertility of the husband; this would not apply to the single woman.

(ii) Arguments in favour

- single woman may now obtain an adoption order (however, it is questionable whether these are comparable circumstances: with adoption the child is already in this world; the unmarried woman may be his mother who is the most suitable to give him a good home).

- it could be argued that because a single girl can obtain a child through natural conception she should be allowed to have A.I.D. However, it is doubtful that you can compare the two situations for normal sexual relations require just two people whereas with A.I.D. the group is widened to include the

doctor and a donor, the responsibilities and liabilities of which should be set out. With the wider group the case for controls on the situation becomes stronger.

(b) Married Women without Consent of Husband

(i) Arguments for:

- A.I.D. without the knowledge of the husband is justified on the ground that the wife would not like her husband to know that he is sterile; also A.I.D. may even be undertaken without the knowledge of the wife (under the pretext of a gynecological examination) because the husband does not want the wife to know that he is sterile.

(ii) Objections

-if allow A.I.D. for the reasons mentioned above it would constitute a fraud on the "handicapped" spouse as well as on society.

- to allow the husband or wife to keep such a secret would create problems; the knowledgeable spouse could be worried about the possibility of the other spouse discovering the truth; the effect on the "handicapped" spouse if the truth is discovered; when the truth is discovered the effect it might have on the overall family relationship (spouse-child; spouse-spouse).

- how would the courts handle the question of the legitimacy of the child? If the child was to be considered legitimate the husband would be responsible.

This would seem to be morally wrong and that the husband had no say in the matter. However, if the couple have been attempting to have a child it can be argued that he had a say in the matter. The desired result occurs but through a different procedure.

Conclusion: Married women who do not have the consent of their husbands should not be permitted to receive A.I.D. To allow otherwise, on the basis that one spouse is attempting to prevent the other spouse from learning about his or her handicap, is not a commendable policy when weighed in the light of the effect the later acquired knowledge of A.I.D. could have on the family relationship.

Problem - What if a married woman is able to obtain A.I.D. without consent of her husband? The possibility of this occurring is small since the normal A.I.D. procedure is to have interviews with and obtain consents from both spouses. However it should be considered whether or not the status of the child should depend on the consent of the husband. This question will be looked at subsequently under section c.

(c) Married Women with Consent of Husband

(i) Arguments for:

- these points were discussed previously in this memorandum under the heading Reasons for Accepting A.I.D.

(ii) Objections:

- these points were discussed previously in this memorandum under the heading Objections to A.I.D.

Issue: If allow consensual A.I.D. of married woman

(i) What constitutes consent?

- must it be oral, written, or apparent.

(ii) What if the husband didn't consent?

- could he obtain a divorce under the present Divorce Act for mental cruelty?

- adultery? (it is unlikely that A.I.D. without consent of the husband would constitute adultery. In order to constitute adultery there must be two parties physically present and engaging in the sexual act at the same time; for sexual intercourse there must be penetration; the motives are different--a woman wants A.I.D. for a child; this is usually not the reason for adultery where the reason is usually for emotional and physical pleasure.)

(iii) Should the status of the child depend on whether or not the husband consents? The issue here concerns who is going to be "penalized".

Two considerations are involved:

-imposing obligations on a husband who is not the biological father; and

-imposing on the A.I.D. child to whom the father has not consented the stigma of illegitimacy.

In the final analysis the policy in this area must be based on a consideration of the statement:

"There are no illegitimate children but only illegitimate parents" and a value judgment on whether or not the child should be penalized with illegitimacy or whether the husband should support a child to whom he didn't consent and of whom he is not the biological father. (Embryo transfer, page 100).



It is not logical that a child who had no "say" in how he is conceived should be burdened with the stigma of illegitimacy. It can be argued that today the stigma is not so great but still there are legal consequences which naturally follow from the status of legitimacy (inheritance rights) which indicate that we are penalizing the child.

If it is accepted that the child should not be penalized what changes could or should be made to carry out this policy:

- should the distinction between legitimacy and illegitimacy be abolished? Even if the A.I.D. child is declared legitimate, the statutory intestacy laws, which are often couched in terms "issue" and "lineal descendants" might still exclude the child. Therefore, there must be changes in such acts.

- the alternatives in this area range from holding the child legitimate for all purposes regardless of whether or not the husband consented to a policy of absolute illegitimacy regardless of consent. There is also the alternative of giving the child a "quasi-legitimate) status. i.e. The husband would be obliged to support the child but the child would be prohibited from being an intestate successor to the father's estate.

- it could be argued that marriage should take on a more "serious meaning". In line with the "for better or worse" aspect of the institution of marriage the husband should be responsible for all children of the marriage regardless of whether or not he is the biological father. This would hold

for both a child conceived through adultery or A.I.D. without the consent of the husband. The husband should be allowed to obtain a desired divorce under these circumstances however he would be obliged to support the child.

- what if the wife is able to obtain the husband's semen and inseminates herself without his consent?

- should this be a ground for divorce?

- what if the doctor performs A.I.D. without the husband's consent; should he be penalized?

(iv) Who will set up the regulations and requirements for A.I.D.; the legislature or the medical society?

-- the medical society is more experienced and more knowledgeable in the area.

- the legislature can treat the problem with greater objectivity and unity of effort, and legislation establishing state control would seem to be the only means of effective implementation of standards.

(v) Who should make the actual decision as to who should be able to receive A.I.D.?; one specially licensed doctor; or, a specially constituted board.

- are doctors competent to select most of the desirable genetic qualities for the prospective A.I.D. child as well as to be able to psychoanalyze

the couples and advise as to the sociological and religious aspects of the procedure? If the secrecy element is still desired it would be better to have one doctor.

(vi) Should any married couple which can't conceive a child be able to received A.I.D.?

- should A.I.D. only be allowed if the husband is unable to conceive a child or should it be available to any married couple who so desires?

- if A.I.D. is considered to be "therapeutic" in that it is a "cure" for childlessness the availability of the practice should be limited.

-there are no restrictions on a married couple having a child so if society is ready to accept consensual A.I.D. why should it be limited? In A.I.D. is being provided by a person other than the husband resulting in many psychological and emotional problems. We should and control the practice in order to reduce the number of problems which might occur.

- the present practice appears to be to initially limit A.I.D. to those couples who are unable to conceive a child because of impotency or sterility; or are reluctant to conceive a child because of the possibility of a hereditary disease.

(vii) Just because you are married and are unable to conceive a child for one of the reasons (v) does that give you an automatic right to a child or should there be a further limitation on the basis

of such factors as:

- stability of marriage relationship;
- education of parents;
- economic status;
- psychological and sociological screening.

(viii) How are suitable donors selected?

- advertise?
- obtain donors from medical classes?
- should there be a payment for the donor's services?

There have been demonstrations of the medical and economic inferiority of a transfusion service in which donations of blood are paid for: the financial reward encourages the indigent to conceal relevant facts in medical history, and so increases the supply of infected blood. Payments of donors of semen, with no evidence of genetic suitability other than unverified assurances about parenthood and medical record, suggests the taking of highly unethical risks from which the patient to be inseminated, her husband and the child to be conceived might prove the victims. (Titmuss, R. M. (1971) The Gift Relationship, Allen and Unwin, London.)

- the need for adequate control and regulation of suppliers of human semen.
- the need for specific standards for matching donors and husbands.

(ix) Must consider the availability of a remedy for a wife or A.I.D. child who sustains negligent injury as a result of A.I.D.

(x) Should set up a system which will satisfy the need for limited, confidential recordation that would preclude incestuous relationship and unwarranted compromise of donor's anonymity.

(xi) Should there be a qualified ad hoc governmental committee to continually review standards and ensure that those genetic traits being promoted are in accordance with accepted and recognized eugenics.

(xii) Have to change registration of birth procedure.

(xiii) Should A.I.D. children be told about their conception?

(xiv) Should there be a procedure through which A.I.D. children can find out who their father is? - should such a procedure depend on whether or not the donor agrees?

(xv) Should a consent be obtained from the donor's wife if married; or fiancée, if engaged?

Conclusion and Recommendations: Due to the increasing number of births through A.I.D. and the impossibility of effectively outlawing the practice, A.I.D. should be accepted and a policy should be established for its regulation.

I indicated previously in this paper that the courts have given great weight to the presumption of legitimacy and are reluctant to punish an innocent child. However, as the law now stands, this presumption can be rebutted. It is recommended that if a married couple consents in writing to A.I.D. and a specially licensed doctor or board certifies the procedure, the child should be deemed legitimate for all purposes by having an irrebuttable presumption of legitimacy.

When it comes to registration of such a child, only one change need be made. It must be remembered that maternity is a question of fact, but paternity is only an inference. No one can prove paternity, whereas maternity can be proved by the evidence of witnesses. Therefore, the decision about what goes into the register in the "father" column is in that sense always a matter of opinion. It is recommended that either:

- the term "father" should be extended to include not only the biological father, but also a husband who has accepted the responsibilities of raising a child conceived through A.I.D.
- that the heading of one of the columns on the register be changed so that children are registered in the name of "father or accepting husband".

## Artificial Insemination and Religion

### The Catholic View

The Catholic Church is strongly opposed to the use of artificial insemination (A.I.D. and A.I.H.) in producing children. However, some Roman Catholics do not object to a procedure known as "assisted insemination", whereby, after intercourse semen is projected from the vagina into the cervix by mechanical means. The opposition to artificial insemination stems from two facts: (1) artificial insemination involves the evil of masturbation and in the case of A.I.D. the added evil of adultery. (2) According to Roman Catholic theology marriage does not give a husband and wife an absolute right to the conception of children, but merely a right to perform together natural acts of sexual intercourse which are of themselves conducive to conception.

To the question, "What is the Catholic Viewpoint of Artificial Insemination?" the Assistant Chancellor of the Diocese of Pittsburgh answered as follows:

Any Catholic opinion on artificial insemination must be considered in the framework of the Catholic attitude towards the use of the sexual function. Since the primary (but not essential) purpose of the sexual function is reproductive, any thwarting of its purpose is a violation of God's plan for human sexuality. We must also remember that marriage is by nature monogamous and is a stable union between one man and one woman. At the time of the marriage contract the parties mutually give and receive the rights to one another's body to perform those sexual actions which logically lead to conception. Once this right has been transferred in marriage it is irrevocable and gives rise to a concept known as the "marriage debt" whereby refusal to indulge in proper sexual activity when reasonably requested is a grave sin. Any unnatural use of the sexual faculties outside of marriage or with someone other than one's own spouse is also a grave de-ordination of the Divine plan.

Artificial insemination in a very broad sense, which would consist of facilitating further penetration of semen already deposited in the vagina, would be permitted. This would merely assist natural intercourse and would facilitate entry into the cervix by a syringe or other method.

Artificial insemination which would insert the husband's sperm obtained through unnatural means without intercourse would be strictly forbidden since the logical climax of sexual activity is natural intercourse. In addition to the unnaturalness of the act itself, further objections to the procedure are due to the illicit means usually used to obtain the sperm, such as masturbation, withdrawal, or the use of a condom.

Donor insemination, using sperm from someone other than the husband, violates the natural law since the marital rights to sexual activity must be exercised personally. This method is specifically condemned by Pope Pius XII speaking to the Fourth International Congress of Doctors in Rome, September 29, 1949. The following points from the Holy Father's talk list clearly and concisely our attitude:

"--- We cannot allow the present opportunity to pass without indicating, briefly and in broad outline, the judgment of morality on this matter [artificial insemination]:

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

"2. Artificial insemination, outside marriage, is to be condemned purely and simply as immoral.

"The Natural Law and the Divine Positive Law lay down that the procreation of new life may be the fruit of marriage only ---.

"3. Artificial insemination in marriage, but produced by the active element of a third person, is equally immoral, and, as such, to be condemned outright.

"The husband and the wife have alone a reciprocal right over their bodies in order to engender new life ---.

"4. As to the lawfulness of artificial insemination in marriage, let it suffice for the moment that we recall to your minds these principles of the Natural Law: the mere fact that the result envisaged is attained by this means, does not justify the use of the means itself, nor is the desire of the husband and wife to have a child—in itself a very legitimate desire—sufficient to prove the legitimacy of having recourse to artificial insemination, which would fulfill this desire. It would be wrong to hold that the possibility of having recourse to this means would render valid the marriage between persons incapable of contracting it because of *impedimentum impotentiae*.



"On the other hand, there is no need to point out that the active element can never lawfully be procured by acts contrary to nature.

"Although one cannot exclude new methods "apriori" simply because they are new, nevertheless, as regards artificial insemination, not only is extreme caution called for, but the matter must be absolutely dismissed. In speaking thus, we do not imply that the use of certain artificial means solely destined either to facilitate the natural act or to cause the natural act normally accomplished to attain its end, are necessarily forbidden.

"Let it not be forgotten that the procreation of new life according to the will and plan of the Creator, alone brings with it, and to an astonishing degree of perfection, the realization of the ends pursued."

Donor insemination would be considered adultery if one or both parties were married and fornication if both were single. Even though no physical pleasure were obtained such actions are contrary to nature and consequently are forbidden. The Holy Father has also forbidden any attempts to unite sperm and ovum in vitro.

(page 77 of Finegold). The Catholic view is based on the divine and natural law, on the law of God, and is not apt to be changed. In sum, the Roman Catholic Church rejects any substitute for the naturally conjugal act: in this respect there is no diversity of opinion among informed Roman Catholics. But, there is no official teaching of the Roman Catholic Church as to whether and how the natural conjugal act may be helped to achieve conception. (With respect to "assisted insemination" some Roman Catholics object to the withdrawal of the semen from the vagina before projection, while others do not--Departmental Committee on Human Insemination, page 31.)

### The Protestant View

Unlike the Catholic faith there has been no official pronouncement regarding the practice of artificial insemination and an additional problem is that the Protestant

Church is divided into different dominations.

The Catholic Church emphasizes the moral and ethical aspects of the practice. On the other hand, the Protestant Church seems to emphasize the more practical features, such as the fulfillment a child may bring to a family. The Presbyterian attitude toward A.I.D. was indicated in 1962, when the 174th General Assembly of the United Presbyterian Church approved of A.I.D. They said that "to discover in(A.I.D.)...an act of adultery is certainly to give the word a meaning it does not have in the New Testament." The Assembly cautioned physicians to ensure was intelligent and emotionally stable before proceeding with A.I.D. while also encouraging the enactment of uniform state laws and the protection of rights of A.I.D. children.

The Anglican Church of England has made an attempt to make an official pronouncement regarding artificial insemination. In 1945, the Archbishop of Canterbury appointed a commission to study the problem. All phases of the implications of artificial insemination were to be analyzed, with the appointees concentrating on the legal, psychological, social, moral and ecclesiastic phases. In its final report the Commission was inconclusive in its stand regarding insemination when the husband's spermatazoa is used, the declaration about donor impregnation was quite definite. Of the 13 members of the Commission, 12 strongly rejected artificial insemination. The Commission decreed that the marriage contract binds the husband and wife into an exclusive union. Each possesses mutual rights over the other. A third person such as a donor must not be permitted to become party of that union. The Commission considered artificial insemination adulterous and that a child born of this procedure was to be considered illegitimate.

the child is not deemed to be the child of the donor but of the woman, and therefore belongs to her family. The liberal decisions favoring artificial insemination are based upon these fundamental attitudes of the law. Thus the Central Conference of American Rabbis has accepted a report of its Response Committee permitting the injection. These decisions of the Conference are not meant, of course, to govern the members and their congregations (in any legal sense) but are intended as guidance and counsel.

In general, the liberal attitudes on this subject are not affected by the negative mood of recent Orthodox opinion, but are based upon what is deemed to be the fundamental principles of the law and tradition. Artificial insemination is therefore favored if both husband and wife wish it. It is preferable, of course, for the seed to be taken from the husband, but even if a stranger is the donor there is no objection.

Nor is the insemination objectionable even if the donor is not Jewish. Actually, there may be some advantage in that fact. For while legally the resulting child is not deemed to be the child of the donor but of its mother, nevertheless there would be some biological, hereditary kinship between that child and the children of the donor in his own marriage. In that case, if the donor is Gentile, the likelihood is far less that the child born of the insemination might some day marry one of his own blood kin. - - -

Although he gives no evidence to support his statements Finegold states that even though the Orthodox Jewish rabbis do not accept artificial insemination officially, their stand is less absolute than that of the Roman Catholics and the Reform Jewish Temples are more liberal toward artificial insemination and present no definite expression against it.

In his book, Finegold mentions other declarations by Protestant ministers which reject A.I.D. on the grounds that introducing a third party to the exclusive marriage relationships splits the marriage despite the intention of the husband and wife (Finegold, W. J. Artificial Insemination).

### The Jewish View

The situation which exists in the Protestant religion is the same in the Jewish religion--there is no religious leader whose beliefs represent the official thinking of that religion. Also, the religion is practiced in several forms--Orthodox, Conservative and Reform. Jewish Law is based entirely on ancient authority and precedence. Since artificial insemination is a new subject, the clergy has been employing the rabbinic method of applying old principles to new circumstances.

In his Reform Responsa (Hebrew Union College Press) Dr. S. Solomon B. Freehof states the position of the Orthodox Jews:

As for the Orthodox point of view on the question, it is veering increasingly toward disapproval. The chief element in this negative attitude is not the status of the woman or of the child, but the process of obtaining the seed. Most of the more recent discussions consider the taking of the seed to be a sinful act, and the fact that some of the seed is bound to be wasted is also sinful.

However, even in the Orthodox attitude there are some basic ideas which, in their implication, easily lead to a more affirmative decision. The Orthodox scholars generally admit that the injection of the seed of a stranger is not an adulterous act, and therefore the woman's relationship to her husband is not thereby impaired. If the act were considered a species of adultery, her husband would then be obliged to divorce her.

Since the operation is not deemed to be adulterous, the child that is born of it is not illegitimate. Furthermore, even if the seed is not taken from the husband but from some donor,