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Artificial Insemination and the Law

I. Introduction

The legal problems presented by the artificial termination of pregnancies have been litigated to a great extent and are the subject of some legislation in all states. However, the legal problems accompanying the artificial induction of pregnancies have received comparatively little attention. As a background for exploring the legal consequences of artificial insemination[1] this Comment will outline the medical procedure and history of artificial insemination as well as the attention that the practice has so far received in the courts and legislatures. Then three major legal issues that arise in the use of artificial insemination with humans will be discussed: adultery, illegitimacy, and compensation for the surrogate mother. It is concluded that artificial insemination of a woman with donor semen without her husband's consent can be adultery; children resulting from artificial insemination with donor semen are born illegitimate; and surrogate mothers should not be compensated for giving up custody of the children they bear.

II. Medical Procedure and History

A. *The Procedure*

Artificial insemination is the "introduction of semen into the vagina or cervix by artificial means."[2] When the semen do-

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1. This Comment considers only artificial insemination. In addition to artificial insemination there are other methods by which offspring can be created artificially: *in vitro* fertilization, cloning, and parthenogenesis. *See, e.g.*, Flannery, Weisman, Lipsett & Braverman, *Test Tube Babies: Legal Issues Raised by* In Vitro *Fertilization*, 67 Geo. L.J. 1295 (1979); Kinney, *Legal issues of the new reproductive technologies*, 52 Cal. St. B.J. 514, 516-19 (1977); Comment, *Artificial Human Reproduction: Legal Problems Presented by the Test Tube Baby*, 28 Emory L.J. 1045 (1979); Note, *The "Brave New Baby" and the Law: Fashioning Remedies for the Victims of* In Vitro *Fertilization*, 4 Am. J.L. & Med. 319 (1978); Note, *Asexual Reproduction and Genetic Engineering: A Constitutional Assessment of the Technology of Cloning*, 47 S. Cal. L. Rev. 476 (1974).

Methods of artificially producing offspring are also a favorite topic of science fiction writers. *E.g.*, P. Anderson, Virgin Planet (1960) (parthenogenesis); R. Cowper, Clone (1972) (cloning); R. Heinlen, I Will Fear No Evil (1970) (artificial insemination).

2. Dorland's Illustrated Medical Dictionary 669 (26th ed. 1981). The semen used in artificial insemination can be obtained by five methods: (1) masturbation by the donor, (2) collection from the vagina of a woman with whom the donor has just had

nor and the woman being inseminated are husband and wife the process is called homologous artificial insemination (AIH). Artificial insemination using semen from a donor other than the woman's husband is called heterologous artificial insemination, commonly referred to as artificial insemination, donor (AID).[3]

AIH is used where the husband's sperm count is too low to allow him to father a child in the normal manner (oligospermia);[4] the husband suffers from an organic abnormality of the penis (e.g., hypospadias[5]); the husband is unable to achieve an erection; the husband has retrograde ejaculation;[6] there is faulty reception of the sperm in the vagina; or the cervical mucous secretions are hostile to the sperm.[7] No major legal problems arise with AIH because the "donor" is married to the woman being inseminated.[8] AIH merely allows a couple to do

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coitus, (3) testicular puncture, (4) rectal massage of the prostate gland and seminal vesicles with pressure on the ampulla of the *vas deferens* and (5) condomistic intercourse. Tallin, *Aritificial Insemination,* 34 CAN. B. REV. 1, 7 (1956).

3. There is a third type of artificial insemination in which the semen of the husband is mixed with the semen of the donor (AIM). The mixing of semen from different individuals, however, appears to inhibit the vitality of the sperm and thus reduce the chances of the artificial insemination resulting in a pregnancy. Quinlivan, *Theraputic Donor Insemination: Results And Causes Of Nonfertilization,* 32 FERTILITY & STERILITY 157 (1979); Quinlivan & Sullivan, *Spermatozoal Antibodies In Human Seminal Plasma As A Cause Of Failed Artificial Donor Insemination,* 28 FERTILITY & STERILITY 1082 (1977). *Contra* Friedman, *Artificial Insemination With Donor Semen Mixed With Semen Of The Infertile Husband,* 33 FERTILITY & STERILITY 125 (1980) (study failed to show any difference in pregnancy rates between AIM and AID, but lack of correlation could have been due to the particularly small quantity of abnormal semen used).

4. The normal human ejaculate consists of three milliliters of semen containing three hundred million to four hundred million sperm. It takes fifty million sperms per milliliter of semen to make conception likely. J. MCCLINTIC, BASIC ANATOMY AND PHYSIOLOGY OF THE HUMAN BODY 519, 521 (1975). Ninety-five percent of AID practitioners report that husband infertility is the primary reason for using AID. Annas, *Fathers Anonymous: Beyond the Best Interests of the Sperm Donor,* 14 FAM. L.Q. 1, 5 (1980).

5. Hypospadias is "a developmental anomaly in the male in which the urethra [the urinary outlet] opens on the underside of the penis." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 643 (26th ed. 1981). Fertilization is not possible because the ejaculate cannot enter the female. This is the "deformity of the urethra" suffered by the man whose wife was the subject of the first reported use of artificial insemination. TIME, Feb. 26, 1945, at 58; Guttmacher, *The Role of Artificial Insemination In The Treatment Of Sterility,* 15 OBSTETRICAL & GYNECOLOGICAL SURV. 767, 767 (1960).

6. In retrograde ejaculation, although the male retains the sensation of ejaculation, the semen passes into the urinary bladder instead of passing out through the penis. W. FINEGOLD, ARTIFICIAL INSEMINATION 17 (1964). The semen can, however, be salvaged and used for artificial insemination. Fuselier, Schneider & Ochsner, *Successful Artificial Insemination Following Retrograde Ejaculation,* 27 FERTILITY & STERILITY 1214 (1976).

7. W. FINEGOLD, *supra* note 6, at 17.

8. *See* Kinney, *supra* note 1, at 514 for a discussion of a few minor legal problems presented by AIH.

artificially what, if they were physically able, they could do naturally without adverse legal consequences. Therefore, this Comment focuses on the legal problems of AID.

AID is most commonly used in six situations. Five of these involve the insemination of the wife: the husband has complete azoospermia (produces no sperm at all); the husband has severe oligozoospermia (few motile sperm); the husband suffers from a genetic condition that could result in the death of the children; the husband and wife have an Rh incompatibility resulting in still births; or there is a definite history of insanity in the husband's family.[9] The sixth situation in which AID is used is where the wife is unable or unwilling to conceive. In this situation the husband's semen is used to inseminate another woman who has agreed to bear a child for the couple.

B. *The History*

Although artificial insemination technology has recently made great advances, the process itself is by no means a new concept. As early as 300 B.C. Talmudic scholars contemplated the possibility that a woman might conceive a child without any direct physical contact with a man.[10] One thousand years later, in 1322, an Arab sheik is reported to have used cotton soaked in the semen of weak, inferior stallions to breed the mares of his enemy's pure-strain herd of horses.[11] In 1420 Don Ponchom suc-

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9. Weisman, *The Medical Viewpoint*, 7 SYRACUSE L. REV. 96, 97 (1955). Of these five reasons for using AID, the most common is the permanent sterility of the husband. Guttmacher, *supra* note 5, at 774.

10. Ben Zoma was [further] asked: May a high priest marry a maiden who has become pregnant? Do we [in such a case] take into consideration Samuel's statement, for Samuel said, [*15a*] I can have repeated sexual connections without [causing] bleeding; or is perhaps the case of Samuel rare? He replied: the case of Samuel is rare, but we do consider [the possibility] that she may have conceived in a bath.

BABYLONIAN TALMUD, Mo'ed, *Hagigah*, Gemara, 92 (I. Epstein ed. 1938) (footnotes omitted). *See* W. FINEGOLD, *supra* note 6, at 5; Gallin & Newmann, *Whose Child is This?*, HUM. RTS., Summer 1979, at 14.

It is interesting to note that some commentators have supported their views on AID by reference to the Jewish scriptures, particularly *Genesis* 30:1-13 and *Deuteronomy* 25:5-6. *See, e.g.*, Annas, *supra* note 4, at 4. Such persons fail to realize two simple points: there was nothing artificial about these conceptions and the "donor" in each case was the woman's husband. *Genesis* 30:1-13; *Deuteronomy* 25:5-6; 1 R. DE VAUX, ANCIENT ISRAEL 37-38, 51, 53-54 (1965).

11. W. FINEGOLD, *supra* note 6, at 5; Guttmacher, *supra* note 5, at 767; Smith, *Through A Test Tube Darkly: Artificial Insemination And The Law*, 67 MICH. L. REV. 127, 128 (1968).

cessfully used artificial insemination with fish.[12] Although Jan Swammerdam was unsuccessful in duplicating Ponchom's work in 1680, Ludwig Jacobi successfully revived this work with fish in 1742.[13] In 1785 the Italian physiologist Lazzaro Spallanzani succeeded in artificially inseminating an insect, an amphibian, and a mammal.[14]

While there is some evidence of artificial insemination of humans in the middle of the sixteenth century,[15] the first recorded use of artificial insemination with humans occurred in 1799 when the Scottish surgeon Dr. John Hunter successfully inseminated a woman with the semen of her husband.[16] In the United States artificial insemination was first used successfully with human beings in 1866 when Dr. J. Marion Sims inseminated six women with semen taken from their respective husbands.[17] The modern work in artificial insemination began in 1904 when Rohleder first used testicular puncture as a method of obtaining the semen necessary for the insemination.[18]

It has been estimated that in the United States 10,000 children were conceived by artificial insemination before 1941 and that 1,000 to 1,200 children were conceived by artificial insemination each year between 1941 and 1963.[19] Today it is estimated that 20,000 children are born each year as a result of AID.[20]

III. Case Law History

Despite its long medical history and the great number of children conceived by the process, artificial insemination has

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12. Koerner, *Medicolegal Considerations in Artificial Insemination,* 8 La. L. Rev. 484, 487 (1948).

13. W. Finegold, *supra* note 6, at 6; Guttmacher, *supra* note 5, at 767; Koerner, *supra* note 12, at 487.

14. Guttmacher, *supra* note 5, at 767; Smith, *supra* note 11, at 128. Artificial insemination is now commonly used in animal husbandry. W. Finegold, *supra* note 6, at 9-11; Guttmacher, *supra* note 5, at 767-69.

15. Koerner, *supra* note 12, at 487.

16. W. Finegold, *supra* note 6, at 6; Smith, *supra* note 11, at 128-29; Tallin, *supra* note 2, at 10.

17. Smith, *supra* note 11, at 129, n.14. Sims performed fifty-five separate inseminations on these six women. Only one of the six finally became pregnant. *Id.* Sims later proclaimed artificial insemination to be immoral and abandoned it. W. Finegold, *supra* note 6, at 6; Guttmacher, *supra* note 5, at 767.

18. Koerner, *supra* note 12, at 487.

19. Smith, *supra* note 11, at 129; Comment, *Artificial Insemination: The Law's Illegitimate Child?,* 9 Vill. L. Rev. 77, 77 (1963).

20. Griffin, *Womb for Rent,* Student Law., April 1981, at 28, 29.

been mentioned in relatively few judicial decisions. Nearly all the known cases dealing with artificial insemination are briefly outlined below.

A. *Civil Law Cases*

1. *France*

The first recorded judicial reference to artificial insemination occurred in France in 1883. A French doctor had performed AIH for a couple, but no pregnancy resulted. When the couple refused to pay, the doctor brought an action against them for 1,500 francs due him for professional services rendered. The Tribunal of Bordeaux denied the doctor's claim and reprimanded him for a breach of professional confidence because he had employed conceptive means "contrary to the natural law and ones which could constitute a veritable social danger."[21] The *Société de mêdicine lêgale de France* appointed a commission to review the decision. Although the commission affirmed the tribunal's conclusion that the doctor had violated the professional relationship, it disapproved of the tribunal's conclusion that artificial insemination was contrary to natural law and a danger to society. The commission found that artificial insemination may be "the last chance to obtain procreation by a correct operation involving not a single responsibility."[22]

2. *Germany*

In 1905 a German contested the legitimacy of a child born to his wife in 1904 and sued his wife for adultery. The husband alleged that despite several futile attempts, he and his wife had never had sexual relations. Therefore, he reasoned, the child born to his wife could not be his.[23] The wife alleged that the child was the result of semen ejaculated by her husband onto the bed sheets during a nocturnal emission. She said she had scooped up the semen and placed it in her vagina.[24] After the husband was examined by a medical expert, the court declared

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21. LoGatto, *Artificial Insemination: 1 Legal Aspects,* 1 CATH. LAW. 172, 174 (1955); W. FINEGOLD, *supra* note 6, at 69.

22. LoGatto, *supra* note 21, at 174.

23. W. FINEGOLD, *supra* note 6, at 69-70; LoGatto, *supra* note 21, at 174.

24. W. FINEGOLD, *supra* note 6, at 70; Verkauf, *Artificial Insemination: Progress, Polemics, and Confusion—An Appraisal Of Current Medico-legal Status,* 3 HOUS. L. REV. 277, 294 (1966).

the child to be legitimate.

When the case was appealed, a second expert testified that artificial insemination was medically impossible. But the appellate court affirmed the trial court's decision despite the second expert's testimony. In 1908 the German Supreme Court affirmed the appellate court and held that children conceived by artificial insemination using the semen of the husband are legitimate.[25]

3. *Italy*

In 1958 Carlo Faedda filed a complaint alleging adultery against his wife. They had been living apart since 1956, but she had given birth to a daughter in 1957. The wife alleged that the child had been conceived as the result of an experiment in artificial insemination conducted by a Milanese gynecologist whose name she had promised not to reveal. Although the public attorney spoke sympathetically of the wife's virtues in seeking the discoveries of modern science instead of the sins of an extramarital relationship to relieve her disability, he demanded that Mrs. Faedda be found to be an adulteress because she had violated matrimonial fidelity by being artificially inseminated. The local praetor acquitted her for lack of evidence.[26]

On appeal the Tribunal of Padua reversed, saying that "artificial insemination of a married woman by sperma other than that of the husband constitutes adultery."[27] The wife appealed to Italy's highest court, which also held that artificial insemination constitutes the crime of adultery.[28]

B. Commonwealth Cases

1. Orford v. Orford

The first North American case to consider artificial insemination and the first case to consider AID was the 1921 Canadian case of *Orford v. Orford.*[29] After marrying in Canada, a couple departed for England to honeymoon. Their marriage was not consummated because the wife experienced great pain when intercourse was attempted. She learned later that she had a retro-

25. LoGatto, *supra* note 21, at 174.

26. Battaglini, *Artificial Insemination and Adultery in a Recent Italian trial*, 1961 CRIM. L. REV. 765, 766.

27. *Id.* at 771.

28. *Id.* at 772.

29. 58 D.L.R. 251 (Ont. 1921).

flexed uterus.[30] By the couple's mutual consent the wife remained in England to seek a cure for her disability. She returned to Canada six years later and sued her husband for alimony when he refused to take her back as his wife. During the pendency of this action the defendant learned that his wife had borne a child while in England. He investigated and brought a countercharge against his wife for adultery. The wife alleged that she had sought medical help while in England but that the doctor had refused to operate without her husband's consent. She said the doctor had told her "that the only thing to do was to bear a child, and that it might be done artificially."[31] She alleged that this was successfully accomplished on the second attempt.[32]

The Ontario Supreme Court held that the wife had committed adultery in the ordinary way. But because of the unusual character of the wife's plea, the court proceeded to consider the legal aspects of artificial insemination. The court reasoned that the wife's admission of having borne a child not of her husband was sufficient to convict her of adultery unless she could prove either that her husband had consented to the conception or that the child had been conceived by artificial insemination and that such a method of wilfully bearing the child of another man without her husband's consent was not itself adultery. Counsel for the wife argued that ordinary sexual intercourse was essential to a finding of adultery since no act short of actual coitus could constitute adultery. Moral turpitude was the essential element of adultery in the wife's view. The court disagreed, noting that the essence of "adultery [has] always [been] regarded as an invasion of the marital rights of the husband or the wife."[33] The court identified this invasion of marital rights as "the voluntary surrender to another person of the reproductive powers or facilities of the guilty person."[34] In the court's opinion the fact that no act short of coitus could constitute adultery only strengthened the argument that it was not the moral turpitude of the act but the invasion of the reproductive facilities that constituted

30. Retroflexion of the uterus is "the bending backward of the body of the uterus toward the cervix, resulting in a sharp angle at the point of bending." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1149 (26th ed. 1981).

31. 58 D.L.R. at 253.

32. *Id.* at 254.

33. *Id.* at 257.

34. *Id.* at 258.

adultery. Extramarital sexual intercourse was adulterous because it could result in the introduction of a false strain of blood into the family. The court was prepared to hold, if necessary, that artificial insemination itself was sexual intercourse within the definition of adultery.[35]

2. Russel v. Russel

Three years after *Orford* the English case of *Russel v. Russel*[36] was decided by the House of Lords. Although this case did not deal with artificial insemination, it is important because of Lord Dunedin's comments on the act necessary for adultery.[37] A wife had given birth to a child on October 5, 1921. Her husband petitioned for the dissolution of the marriage on the ground of adultery. Over the wife's objection the husband was allowed to introduce evidence at the trial that they had not had sexual intercourse at any time when the child could have been conceived.[38] After considering all the evidence, the trial judge concluded that the wife had conceived through "fecundation ab extra"[39] by an unknown man. In the words of Lord Dunedin she had "conceived and had [borne] a child [not her husband's] without penetration having ever been effected by any man."[40] Lord Dunedin declared that "fecundation ab extra is, I doubt not, adultery."[41]

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35. The court also postulated that artificial insemination performed against the will of a woman might constitute rape. *Id. Cf.* Olivia N. v. NBC, 74 Cal. App. 3d 383, 141 Cal. Rptr. 511 (1977) (girl "artificially raped" with a bottle), *cert. denied,* 435 U.S. 1000 (1978).

36. 1924 A.C. 687.

37. Commentators who have misread the case have assumed that some sort of artificial insemination was involved. *See, e.g.,* Weinstock, *Artificial Insemination—The Problem and the Solution,* 5 FAM. L.Q. 369, 380 (1971).

38. 1924 A.C. at 688.

39. The term *fecundation ab extra* means literally "fertilization from outside." It refers to the rare occurence when a woman conceives a child without her sexual organ having been penetrated by the sexual organ of a male. This is possible when the male has an emission of semen outside the woman's vagina but the sperm emitted are nonetheless able to enter the vagina. Fecundation ab extra and artificial insemination are similar in that neither involves penetration of the female by the male and each can result in conception. They are different in that only fecundation ab extra requires the physical presence of the male.

40. 1924 A.C. at 721.

41. *Id.*

3. L. v. L.

In 1948 the High Court of Justice in England decided the case of *L. v. L.*[42] The parties had married in 1942. They did not consummate their marriage because of the husband's psychological attitude toward sex. The wife, anxious to have a child, repeatedly attempted artificial insemination with her husband's semen in 1946 and 1947. At the end of January 1948 she left her husband. Unknown to either party she was at that time pregnant because of the artificial insemination. In September 1948 she gave birth to a child and soon thereafter brought a petition to nullify the marriage due to the husband's failure to consummate the marriage.

The court granted the nullity petition because it found that the marriage had not been consummated and that the conception of the child through artificial insemination did not constitute approval by the wife of an abnormal marriage relationship. The court regretted that such a holding would make the child illegitimate, but felt that separation of the parents was in the child's best interest and that the stigmas of bastardy were less then than they once had been.[43]

4. MacLennan v. MacLennan

Early in 1958 the Court of Session of Scotland decided *MacLennan v. MacLennan.*[44] Over a year after a couple had ceased to live together, the wife gave birth. The husband sought a divorce on the ground of adultery. The wife's defense was that the child had resulted from AID, albeit without the husband's consent.

After a lengthy discussion of the definition of adultery, the Scottish court found that according to the applicable law, (1) adultery required the physical presence of two parties engaging in the sexual act at the same time; (2) the sexual act required some degree of penetration of the female organ by the male or-

42. [1949] 1 All E.R. 141 (P. 1948).

43. Less than two years after *L. v. L.* Parliament enacted the Matrimonial Causes Act, 1950, 14 Geo. 6, ch. 25, § 9. This section declares that

> [w]here a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if it had been dissolved, instead of being annulled, at the date of the decree shall be deemed to be their legitimate child notwithstanding the annulment.

Id.

44. 1958 Sess. Cas. 105 (Scot.).

gan; (3) there was no requirement of emission; and (4) the placing of semen in the female by some method other than by the sexual act did not constitute sexual intercourse.[45] The court noted that although the second criterion had been contradicted by Lord Dunedin in *Russel,* it nonetheless felt that the essential ingredient of the sexual act was the close proximity of the male and female sexual organs. Therefore, the court held that under these four criteria artificial insemination, even without the consent of the husband, could not be adultery. The court attempted to strengthen its holding by noting certain problems a contrary holding would raise. Would the donor be an adulterer even if he were dead? Would a person administering AID be an adulterer even if she were a woman? Would AID still be adultery if it were self-administered?

C. *United States Cases*

1. Hoch v. Hoch

The first American case discussing artificial insemination was decided in 1945. In *Hoch v. Hoch*[46] a husband returned from World War II to find his wife two months pregnant. He sued for divorce on the ground of adultery. His wife alleged that her pregnancy was the result of artificial insemination. The Illinois Circuit Court granted the divorce on the basis of evidence other than artificial insemination, including testimony that Mrs. Hoch had many male friends.[47] In dictum the court noted that artificial insemination is not adultery and would not be a sufficient ground for divorce.

2. Strnad v. Strnad

Three years after *Hoch* a New York court faced the issue of artificial insemination in *Strnad v. Strnad.*[48] A husband had consented to his wife's artificial insemination. The couple separated after the insemination and the wife sued to fix the husband's visitation rights to the child born of AID. The New York Supreme Court affirmed the granting of visitation rights, noting that the husband had not been shown to be an unfit guardian

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45. *Id.* at 113.

46. The Chicago Sun, Feb. 10, 1945, at 13, col. 3 (Ill. Cir. Ct. 1945); TIME, Feb. 26, 1945, at 58 (Ill. Cir. Ct. 1945).

47. The Chicago Sun, Feb. 10, 1945, at 13, col. 3 (Ill. Cir. Ct. 1945).

48. 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948).

and that such visits would be in the child's best interest. The court said that the husband had "potentially adopted or semi-adopted"[49] the child and was at least entitled to the same rights acquired by a foster parent through formal adoption if not the rights of a natural parent. In dictum the court also noted that because the artificial insemination had taken place with the husband's consent the child was not illegitimate. In the court's view, the child was legitimate in the same sense that a child born out of wedlock is made legitimate when its parents later marry.[50]

3. Ohlson v. Ohlson

In *Ohlson v. Ohlson*[51] a wife sued her husband for divorce in an Illinois court. She asked that her husband not be granted visitation rights and offered evidence that the child, born during their marriage, was the result of AID. The gynecologist who performed the AID testified that it was unlikely, but not impossible, that the husband had fathered the child.[52] The court found that the evidence introduced was not sufficient to overcome the legal presumption of legitimacy. The court made no findings concerning artificial insemination.[53]

4. Doornbos v. Doornbos

The first United States case to present a *holding* on artificial insemination was the Illinois case of *Doornbos v. Doornbos*.[54] A sterile husband had consented to the artificial in-

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49. *Id.* at 787, 78 N.Y.S.2d at 391. New York law, also in effect in 1948, provides that "[n]o person shall hereafter be adopted except in pursuance of this article." N.Y. DOM. REL. LAW § 110 (McKinney 1977). The terms "potential adoption" and "semi-adopted" do not appear in the New York adoption article.

50. This case is complicated by two subsequent events. First, the plaintiff moved to Oklahoma soon after the New York court granted the defendant visitation rights. The New York Supreme Court found the plaintiff's conduct in removing the child from New York "contumacious and in the light of her past performances [not to] be ascribed to ignorance or lack of understanding" and, therefore found her to be in contempt of court. Strnad v. Strnad, 194 Misc. 743, 744, 83 N.Y.S.2d 391, 392 (Sup. Ct. 1948). Second, an Oklahoma court later denied the defendant visitation rights because he was not the child's natural father. Logatto, *supra* note 21, at 179; Rice, *A.I.D.—An Heir of Controversy*, 34 NOTRE DAME LAW. 510, 517 (1956).

51. *Medicolegal Aspects of Artificial Insemination: A Current Appraisal*, 157 J. AM. MED. A. 1638, 1639 (1955) (Cook County Sup. Ct. Nov. 1954).

52. Verkauf, *supra* note 24, at 296; Note, *People v. Sorensen: Artificial Insemination Gives Birth to Real Legal Problems in California*, 4 CAL. W.L. REV. 177, 181 (1968).

53. 157 J. AM. MED. A. at 1639.

54. No. 54-S-14981 (Ill. Super. Ct. Dec. 13, 1954) (23 U.S.L.W. 2308 (Jan. 4, 1955) contains an extract), *appeal dismissed*, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956) (not

semination of his wife with donor semen. After she gave birth to a son the wife obtained a divorce based on the husband's drunkenness. The husband sought visitation rights. During the divorce action the wife requested a declaratory judgment that AID is not contrary to public policy, that it is not adultery, and—in order to deny the husband's visitation rights—that the child born of AID is the legitimate child of only the mother.[55]

Contrary to the wife's request the court held that AID is contrary to public policy, with or without the husband's consent; that AID is adultery; and that a child born of AID is illegitimate because it is not born in wedlock. The court also held, however, that because the child is the child of only the mother the husband has no visitation rights. In dictum the court noted that AIH would not be contrary to public policy.[56]

5. People ex. rel. Abajian v. Dennett

Late in 1958 New York faced its second case concerning artificial insemination. In *People ex. rel. Abajian v. Dennett*[57] a husband sought continuance of the custody and visitation rights granted him by a Nevada divorce decree. The wife alleged that he should have no visitation rights because the two children born during the couple's eleven-year marriage had been conceived by AID and therefore were not his children.

The court held that the wife was estopped from asserting that the children were not those of her former husband because she had by her prior conduct already recognized his rights as a parent of the children. The court noted that it was contrary to the children's best interest for their mother to offer evidence that would stigmatize them as bastards. Furthermore, to allow the wife to litigate the petitioner's fatherhood of the children would destroy the Nevada divorce decree, which was entitled to full faith and credit as the valid decree of a sister state.

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published in full); Note, *supra* note 52, at 182 & n.26.

55. Note, *supra* note 52, at 182.

56. Because neither party appealed the decision, the court requested the state's intervention. Stressing the presumption of legitimacy, the state argued that labelling the child as illegitimate would deprive it of its rights to support and to inherit from the husband and that the burden of support would fall on the state if the wife failed to support the child. There was evidence that the Doornboses had had intercourse within the possible time of conception. A gynecologist testified that he could not definitely say whether the child had been conceived by natural or artificial means. The case was dismissed on procedural grounds. Note, *supra* note 52, at 182.

57. 15 Misc. 2d 260, 184 N.Y.S.2d 178 (Sup. Ct. 1958).

6. Gursky v. Gursky

Five years after *Abajian* the New York Supreme Court decided *Gursky v. Gursky*,[58] a case in which the husband brought an action for separation and the wife counterclaimed for annulment. Both parties admitted that the marriage had not been consummated. At trial the evidence showed that because of the husband's infirmity the wife had been artificially inseminated with donor semen. The husband and the wife had both signed an AID consent form, and the husband had agreed to pay expenses. The child's birth certificate listed the husband as the father. The husband nevertheless alleged that there had been no issue of the marriage and that he was therefore not liable for support of the child.

The trial court granted the wife's counterclaim for annulment and held the husband liable for support of the child. By giving his consent to the AID, the husband was estopped from denying liability. But even though the husband was liable for the child's support, the court held that the child was illegitimate. Since the legislature had not modified the principle that a child begotten by a man other than the mother's husband is illegitimate, the facts of this case could "logically result only in a determination adverse to the legitimacy of a child begotten by a father other than the husband of the mother."[59] The court noted that although this was contrary to the *Strnad* case, the holding in *Strnad* dealt only with the question of visitation rights, not legitimacy, and the *Strnad* dicta on legitimacy were supported by no legal precedent. Furthermore, the reference to adoption in *Strnad* could only mean that even the *Strnad* court had recognized the illegitimacy of an AID child. Finally, the court referred to the *Doornbos* case which had held that an AID child is illegitimate. The *Gursky* court therefore held that "the offspring of artificial insemination by a third-party donor with the consent of the mother's husband is not the legitimate issue of the husband."[60]

7. Anonymous v. Anonymous

Anonymous v. Anonymous,[61] decided the following year on

58. 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).
59. *Id.* at 1087, 242 N.Y.S.2d at 410.
60. *Id.* at 1088, 242 N.Y.S.2d at 411.
61. 41 Misc. 2d 886, 246 N.Y.S.2d 835 (Sup. Ct. 1964).

a fact situation nearly identical to *Gursky*, followed the *Gursky* holding. The court concluded that although the AID child is not the legitimate offspring of a sterile husband, if the husband has given his specific consent to the AID procedure and the wife has submitted to AID in reliance on that consent, the husband is estopped from using the child's illegitimacy to deny his own liability for support.

8. People v. Sorensen

Like *Gursky* and *Anonymous* the California case *People v. Sorensen*[62] dealt with the question of support. A husband and wife signed an agreement consenting to the insemination of the wife by AID. The wife was inseminated and bore a son. Four years later she and her husband divorced. At first the wife declined any support from her former husband. The court nevertheless retained jurisdiction over the issue. Later the wife became ill and went on public assistance. When the district attorney demanded support payments, the former husband alleged that the child was not his and that he could not be liable for its support. Nonetheless, he was convicted of nonsupport.

On appeal the California Supreme Court held that the term "father" used in the state's support statute could not be limited to the biological father, but must include also the "lawful" father of the child. The court therefore held the husband liable for the support of the AID child. Contrary to the *Gursky* court's holding, the *Sorensen* court said in dicta that absent legislation making artificial insemination illegal, an AID child was a lawfully begotten child because it was not the result of an illicit or adulterous relationship. The court was not persuaded that the child was illegitimate merely because the mother was impregnated by the semen of some man other than the mother's husband. Despite the fact that its parents were not married when the child was conceived a child could be legitimated if the parents subsequently married or the father acknowledged the child. Like the *MacLennan* court, the *Sorensen* court reasoned that artificial insemination could not be adultery since the doctor might be a woman, the husband might administer the insemination, or the donor might be far away or dead.[63]

62. 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968).
63. *Id.* at 289, 437 P.2d at 501, 66 Cal. Rptr. at 13.

9. In re Adoption of Anonymous

In 1973 a New York court decided *In re Adoption of Anonymous,*[64] in which a former husband refused to consent to the current husband's adoption of a woman's fourteen-year-old child. The child had been born of consensual AID, the birth certificate listing the husband as the child's father. The couple later divorced and the husband was granted visitation rights. When the woman remarried, her second husband wanted to adopt the child, but the first husband refused to consent. The wife petitioned to have it determined that the first husband was not the child's "parent" under the adoption statute because the child had been conceived by AID. She argued that since the first husband was not the child's "parent," his consent was not essential to the adoption.

The court found that a child born of consensual AID is legitimate and entitled to all the rights of naturally conceived children. The husband was thus the child's "parent" and his consent to adoption was essential. Rejecting *Gursky,* the court reasoned as follows: AID children are not "begotten" by a man other than the mother's husband; the donor is anonymous; there is no sexual intercourse or adultery with the donor; and any "begetting" is done by the doctor, who might be a woman. The court further noted that the husband's consent to AID vitiated any idea of marital infidelity and that the child was not born "out of wedlock" but in and during wedlock.

10. C.M. v. C.C.

C.M. v. C.C.[65] presented New Jersey with a new issue in artificial insemination. C.C., an unmarried female, and C.M., an unmarried male, had been contemplating marriage. C.C. wanted C.M. to be the father of her child before they married, but did not want to have sexual relations with C.M. until after they were married. They consulted a doctor, but he refused to inseminate C.C. C.C. and C.M. then attempted artificial insemination on their own. The insemination was successful, but when C.C. was three months pregnant the couple's relationship ended. After the child was born, C.M. sued for visitation rights. C.C. opposed the granting of such rights.

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64. 74 Misc. 2d 99, 345 N.Y.S.2d 430 (Sup. Ct. 1973).
65. 152 N.J. Super. 160, 377 A.2d 821 (Juv. & Dom. Rel. Ct. 1977).

The issue framed by the New Jersey Superior Court was whether a man who has provided the semen for the conception of a child is any less the child's father because he provided the semen in a manner different from that normally used. The New Jersey court reviewed several of the cases outlined above, but concluded that the instant situation was quite different because the couple was not married nor was the donor anonymous. The situation was actually more analogous to AIH than to AID because there were only two participants, as in AIH, rather than the three parties requisite for AID. If C.C. and C.M. had been married, the insemination would have been AIH. The court concluded that the lack of marriage did not prevent C.M. from being the child's father any more than the lack of marriage would have prevented his being the child's father if the child had been conceived in the normal manner. The law, according to the *C.M.* court, favors the concept that all children have both a father and a mother and demands that there be no distinction as to visitation rights between children conceived naturally and those conceived artificially. Because C.M. was willing to take upon himself the responsibility of being the child's father, the court decided not to deny him the privileges of fatherhood. C.M. was held to be the natural father with responsibility for support and maintenance of the child.[66]

11. Doe v. Kelley

In 1980 a Michigan court decided the first case in the United States involving a surrogate mother, *Doe v. Kelley*.[67] A wife had undergone a tubal ligation rendering her incapable of bearing children. Therefore the couple John and Jane Doe contracted with Mary Roe[68] that Mary would conceive a child by John through artificial insemination and give up the child to the Does upon its birth. The specific terms of the agreement were

(a) That JANE DOE and JOHN DOE will pay MARY ROE a

66. Subsequent to this case C.M. brought an action to have his name added to the child's birth certificate. After resolving the jurisdictional problems, the court concluded that "[p]laintiff's motivation as set forth above is laudable and is clearly in the child's present and future best interest." C.M. v. C.C., 170 N.J. Super. 586, 407 A.2d 849, 852 (Juv. & Dom. Rel. Ct. 1979). The court therefore ordered C.C. to cooperate with C.M. in executing the needed documents to effect the change. *Id.*, 407 A.2d at 842.

67. 1979-1981 Rep. Hum. Reproduction & L. (Legal-Med. Stud.) II-B-15 (Mich. Cir. Ct. 1980), *aff'd*, 106 Mich. App. 169, 307 N.W.2d 438 (1981).

68. These are pseudonyms used by the court.

> sum of money in consideration for her promise to bear and deliver JOHN DOE's child by means of artificial insemination.
> (b) That a licensed physician will conduct the artificial insemination process.
> (c) That prior to the delivery of said child, JOHN DOE will file a notice of intent to claim paternity.
> (d) That at the time the child is born, JOHN DOE will formally acknowledge the paternity of said child.
> (e) That MARY ROE will acknowledge that JOHN DOE is the father of said child.
> (f) That MARY ROE will consent to the adoption of said child by JOHN DOE and JANE DOE.[69]

The Does, joined by Mary Roe, sought a declaratory judgment holding unconstitutional two Michigan statutes that made it a misdemeanor to "offer, give, or recieve any money or other consideration or thing of value in connection with" the placing of a child for adoption or any related proceedings.[70] The plaintiffs alleged that the statutes were void for vagueness and an unconstitutional invasion of their "right of privacy."

The trial court disagreed. On the issue of vagueness it held that the statutes were as specific as necessary to give fair notice to persons of reasonable intelligence of what consideration could not legally be given in connection with an adoption. As to the right of privacy the court held that the right to adopt a child for a $5,000 payment is not a fundamental right and that reasonable regulation of the adoption process is not constitutionally prohibited. That parents may not barter or sell their child, (or demand money for consenting to adoption) is so fundamental that citation to authority was unnecessary in the view of the Michigan court. Mary Roe had said she was acting out of good will. The court felt, however, that if the surrogate mother were truly acting out of altruistic motives no illegal payment to her would be necessary; even the challenged statutes permit the payment of reasonable medical expenses. Thus, the $5,000 could only be an inducement to the surrogate to loan her body to the Does for nine months and ultimately to give up her parental rights in the resulting child, acts she would not otherwise have done.

On appeal the Michigan Court of Appeals affirmed.[71] Agreeing that the decision whether to bear or beget a child was pro-

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69. 106 Mich. App. 169, 307 N.W.2d 438, 440 (1981).
70. MICH. COMP. LAWS ANN. §§ 710.54, .69 (West Supp. 1981-1982).
71. 106 Mich. App. 169, 307 N.W.2d 438 (1981).

tected by the constitutional right of privacy, the court nevertheless did "not view this right as a valid prohibition to state interference in the plaintiff's contractual arrangement."[72] The appeals court also noted that the statutes in question did not prevent the plaintiffs from carrying out their plan to have a child; the statutes merely prevented the plaintiffs from paying any consideration in relation to the adoption procedures.

IV. The Statutes

Twenty states have passed artificial insemination laws.[73] Section 5 of the Uniform Parentage Act (UPA)[74] specifically covers artificial insemination, but only six of the twenty states have enacted that section,[75] and four of the six states have made changes in it.[76] The statutes of the fourteen non-UPA states

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72. *Id.*, 307 N.W.2d at 441.

73. Alaska Stat. § 20.20.010 (1982); Ark. Stat. Ann. § 61-141(c) (1971); Cal. Civ. Code § 7005 (West Supp. 1981); Colo. Rev. Stat. § 19-6-106 (1978); Conn. Gen. Stat. §§ 45-69f to -69n (1977); Fla. Stat. § 742.11 (Supp. 1981); Ga. Code § 74-101.1 (1981); Kan. Stat. Ann. §§ 23-128 to -130 (1981); La. Civ. Code Ann. art. 188 (West Supp. 1981); Md. Est. & Trusts Code Ann. § 1-206(b) (1974); Minn. Stat. Ann. § 257.56 (West Supp. 1981); Mont. Code Ann. § 40-6-106 (1981); N.Y. Dom. Rel. Law § 73 (McKinney 1977); N.C. Gen. Stat. § 49A-1 (1976); Okla. Stat. Ann. tit. 10, §§ 551-553 (West Supp. 1981); Or. Rev. Stat. §§ 109.239-.247 (1981); Tex. Fam. Code Ann. tit. 2, § 12.03 (Vernon 1975); Va. Code § 64.1-7.1 (1980); Wash. Rev. Code Ann. § 26.26.050 (Supp. 1981); Wyo. Stat. § 14-2-103 (1977).

74. 9A U.L.A. 579 (1979).

75. Section 5 of the UPA has been adopted by California, Colorado, Minnesota, Montana, Washington and Wyoming. It reads as follows:

5. [Artificial Insemination.]

> (a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.
>
> (b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

Id. § 5.

76. California, Colorado, Washington and Wyoming have eliminated the word "married" from subsection (b) of UPA § 5. California has also eliminated the requirement that the written consent be filed with the state and has substituted a requirement that

vary widely in their treatment of artificial insemination.

Subsection (a) of section 5 of the UPA governs the legal relationship between the husband and the AID child. Under subsection (a) the husband is treated in law as if he were the natural father of the AID child if a licensed physician supervises the artificial insemination, the husband consents in writing, and both the husband and wife sign the writing. In addition, the physician must certify the couple's signatures and the date of the insemination on the consent form and file the form with the appropriate state agency in a confidential, sealed file. However, subsection (a) provides that the physician's failure to carry out any of these additional requirements cannot affect the legal relationship between the husband and the child. Subsection (b) provides that the semen donor will not be treated in law as the child's natural father if the semen is provided to a licensed physician for the insemination of a married[77] woman other than the donor's own wife.

The artificial insemination statutes of the fourteen non-UPA states vary widely.[78] The simplest of these statutes is Loui-

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the doctor performing the insemination keep a copy of the consent as part of the medical records. Washington has provided that the woman and the donor can agree in writing that the donor be treated as the child's father. This writing must be filed in the same manner as the husband's consent in subsection (a). Washington has also added to the requirement that a court order is necessary to open the records that the opening of the records be limited to "exceptional cases."

77. If subsection (b) of UPA § 5 is read literally to apply only to *married* women, the donor of semen used to inseminate an *unmarried* woman *can* be treated as the child's natural father. By eliminating the word "married" from subsection (b) of the statute California, Colorado, Washington, and Wyoming have apparently intended that the semen donor not be treated as the child's natural father regardless of the marital status of the recipient. However, the statute as amended by these states now seems to authorize the insemination of unmarried females. Because the requirements of subsection (a) apply only to married couples who seek artificial insemination, the statute gives no guidance as to what requirements, if any, are applicable to single females who desire to be inseminated. Such requirements will become increasingly necessary, however, if the number of single women conceiving children by artificial insemination continues to rise. Already the first sperm bank in the nation run by women has opened with one of its purposes to serve the unmarried woman who desires to become a mother without sexual intercourse. The (Provo, Utah) Daily Herald, Oct. 10, 1982 at 39, col. 5. Despite the lack of legislative or judicially imposed requirements, at the very least "the ethical physician must be sure that [the single woman] understands the legal, sociological, and psychological problems for her and for her child which flow from illegitimacy." A. HOLDER, MEDICAL MALPRACTICE LAW 250 (2d ed. 1978).

78. ALASKA STAT. § 20.20.010 (1975); ARK. STAT. ANN. § 61-141(c) (1971); CONN. GEN. STAT. §§ 45-69f to -69n (1971); FLA. STAT. § 742.11 (Supp. 1981); GA. CODE § 74-101.1 (1981); KAN. STAT. ANN. § 23-128 to -130 (1981); LA. CIV. CODE ANN. art. 188 (West Supp. 1981); MD. EST. & TRUSTS CODE ANN. § 1-206(b) (1974); N.Y. DOM. REL. LAW § 73 (Mc-

siana's which merely provides that a husband cannot disavow paternity of a child conceived by artificial insemination if he consented to the insemination.[79] In contrast, Connecticut has the most complicated statute. The Connecticut statute provides for all the following: the AID must be performed by a licensed physician; both the husband and the wife must consent to the procedure in writing; this consent must be placed in a closed file; the child is legitimate; the child can inherit from the husband and the wife and they both can inherit from the child; and the donor has no rights in the child.[80] The statutes of the other states lie somewhere between these extremes. A majority of these fourteen states agree that the woman must be married (13),[81] the child is legitimate (13),[82] there must be a written consent by the husband (10)[83] and the wife (9),[84] and the child may inherit from or leave its estate to the husband and the wife (10).[85] Four other states require that the husband consent, but

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Kinney 1977); N.C. GEN. STAT. § 49A-1(1976); OKLA. STAT. ANN. tit. 10, §§ 551-553 (West Supp. 1981); OR. REV. STAT. §§ 109-239-.247 (1981); TEX. FAM. CODE ANN. tit. 2, § 12.03 (Vernon 1975); VA. CODE § 64.1-7.1 (1980).

79. LA. CIV. CODE ANN. art. 188 (West Supp. 1981).

80. CONN. GEN. STAT. §§ 45-69f to -69n (1981).

81. ALASKA STAT. § 20.20.010 (1975); ARK. STAT. ANN. § 61-141(c) (1971); CONN. GEN. STAT. § 45-69g(b) (1981); FLA. STAT. § 742.11 (Supp. 1981); GA. CODE § 74-101.1(a) (1981); KAN. STAT. ANN. § 23-128 to -129 (1981); LA. CIV. CODE ANN. art. 188 (West Supp. 1981); MD. EST. & TRUSTS CODE ANN. § 1-206(b) (1974); N.Y. DOM. REL. LAW § 73(1) (McKinney 1977); N.C. GEN. STAT. § 49A-1 (1976); OKLA. STAT. ANN. tit. 10, §§ 551-553 (West Supp. 1981); TEX. FAM. CODE ANN. tit. 2, § 12.03(a) (Vernon 1975); VA. CODE § 64.1-7.1 (1980).

82. ALASKA STAT. § 20.20.010 (1975); CONN. GEN. STAT. § 45-69i (1981); FLA. STAT. § 742.11 (Supp. 1981); GA. CODE § 74-101.1(a) (1981); KAN. STAT. ANN. § 23-129 (1981); LA. CIV. CODE ANN. art. 188 (West Supp. 1981); MD. EST. & TRUSTS CODE ANN. § 1-206(b) (1974); N.Y. DOM. REL. LAW § 73(1) (McKinney 1977); N.C. GEN. STAT. § 49A-1 (1976); OKLA. STAT. ANN. tit. 10, § 552 (West Supp. 1981); OR. REV. STAT. § 109.243 (1981); TEX. FAM. CODE ANN. tit. 2, § 12.03(a) (Vernon 1975); VA. CODE § 64.1-7.1 (1980).

83. ALASKA STAT. § 20.20.010 (1975); CONN. GEN. STAT. § 45-69g(b) (1981); FLA. STAT. § 742.11 (Supp. 1981); GA. CODE § 74-101.1(a) (1981); KAN. STAT. ANN. § 23-128 (1981); N.Y. DOM. REL. LAW § 73 (McKinney 1977); N.C. GEN. STAT. § 49A-1 (1976); OKLA STAT. ANN. tit. 10, § 551 (West Supp. 1981); TEX. FAM. CODE ANN. tit. 2, § 12.03(a) (Vernon 1975); VA. CODE § 64.1-7.1 (1980).

84. ALASKA STAT. § 20.20.010 (1975); CONN. GEN. STAT. § 45-69g(b) (1981); FLA. STAT. § 742.11 (Supp. 1981); GA. CODE § 74-101.1(a) (1981); KAN. STAT. ANN. § 23-128 (1981); N.Y. DOM. REL. LAW § 73 (McKinney 1977); N.C. GEN. STAT. § 49A-1 (1976); OKLA. STAT. ANN. tit. 10, § 551 (West Supp. 1981); VA. CODE § 64.1-7.1 (1980).

85. ALASKA STAT. § 20.20.010 (1975); ARK. STAT. ANN. § 61-141(c) (1971); CONN. GEN. STAT. § 45-69*l* (1981); KAN. STAT. ANN. § 23-129 (1981); MD. EST. & TRUSTS CODE ANN. § 1-206(b) (1974); N.Y. DOM. REL. LAW § 73(1) (McKinney 1977); N.C. GEN. STAT. § 49A-1 (1976); OKLA. STAT. ANN. tit. 10, § 552 (West Supp. 1981); OR. REV. STAT. § 109.243 (1981); VA. CODE § 64.1-7.1 (1980).

do not specifically require a writing.[86] Only six of the fourteen states require that the artificial insemination be performed either by a licensed physician or some other authorized person.[87]

In summary, a majority of the twenty state artificial insemination statutes agree on five points: (1) all twenty states require that the husband consent[88] with sixteen requiring that his consent be in writing;[89] (2) nineteen states either explicitly declare the child to be legitimate or declare the husband to be the child's natural father;[90] (3) fifteen states require that the wife give her written consent;[91] (4) twelve states require that the artificial insemination be performed by an authorized or licensed person;[92] and (5) eleven states specifically limit the scope of the

86. Ark. Stat. Ann. § 61-141(c) (1971); La. Civ. Code Ann. art. 188 (West Supp. 1981); Md. Est. & Trusts Ann. § 1-206(b) (1974); Or. Rev. Stat. § 109.243 (1981).

87. Alaska Stat. § 20.20.010 (1975); Conn. Gen. Stat. § 45-69g(a) (1981); Ga. Code § 74-101.1(b) (1981); N.Y. Dom. Rel. Law § 73 (McKinney 1977); Okla. Stat. Ann. tit. 10, § 553 (West Supp. 1981); Va. Code § 64.1-7.1 (1980).

88. *See supra* note 73.

89. Alaska Stat. § 20.20.010 (1975); Cal. Civ. Code § 7005(a) (West Supp. 1981); Colo. Rev. Stat. § 19-6-106(1) (1978); Conn. Gen. Stat. § 45-69g(b) (1981); Fla. Stat. § 742.11 (Supp. 1981); Ga. Code § 74-101.1(a) (1981); Kan. Stat. Ann. § 23-128 (1974); Minn. Stat. Ann. § 257.56(1) (West Supp. 1981); Mont. Code Ann. § 40-6-106(1) (1981); N.Y. Dom. Rel. Law. § 73 (McKinney 1977); N.C. Gen. Stat. § 49A-1 (1976); Okla. Stat. Ann. tit. 10, § 551 (West Supp. 1981); Tex. Fam. Code Ann. tit. 2, 12.03(a) (Vernon 1975); Va. Code § 64.1-7.1 (1980); Wash. Rev. Code Ann. § 26.26.050(1) (Supp. 1981); Wyo. Stat. § 14-2-103(a) (1977).

90. Alaska Stat. § 20.20.010 (1975); Cal. Civ. Code § 7005(b) (West Supp. 1981); Colo. Rev. Stat. § 19-6-106(1) (1978); Conn. Gen. Stat. § 45-69i (1981); Fla. Stat. § 742.11 (Supp. 1981); Ga. Code § 74.101.1(a) (1981); Kan. Stat. Ann. § 23-129 (1981); La. Civ. Code Ann. art. 188 (West Supp. 1981); Minn. Stat. Ann. § 257.56(1) (West Supp. 1981); Mont. Code Ann. § 40-6-106(1) (1981); N.Y. Dom. Rel. Law § 73(1) (McKinney 1977); N.C. Gen. Stat. § 49A-1 (1976); Okla. Stat. Ann. tit. 10, § 552 (West Supp. 1981); Or. Rev. Stat. § 109.243 (1981); Tex. Fam. Code Ann. tit. 2, § 12.03(a) (Vernon 1975); Va. Code § 74.1-7.1 (1980); Wash. Rev. Code Ann. § 26.26.050(1) (Supp. 1981); Wyo. Stat. § 14-2-103(a) (1977).

91. Alaska Stat. § 20.20.010 (1975); Cal. Civ. Code § 7005(a) (West Supp. 1981); Colo. Rev. Stat. § 19-6-106(a) (1978); Conn. Gen. Stat. § 45-69g(b) (1981); Fla. Stat. § 742.11 (Supp. 1981); Ga. Code § 74.101.1(a) (1981); Kan. Stat. Ann. § 23-128 (1981); Minn. Stat. Ann. § 257.56(a) (West Supp. 1981); Mont. Code Ann. § 40-6-106(1) (1981); N.Y. Dom. Rel. Law § 73(1) (McKinney 1977); Okla. Stat. Ann. tit. 10, § 551 (West Supp. 1981); Va. Code § 64.1-7.1 (1980); Wash. Rev. Code Ann. § 26.26.050(1) (Supp. 1981); Wyo. Stat. § 14-2-103 (1977).

92. Alaska Stat. § 20.20.010 (1975); Cal. Civ. Code § 7005(a) (West Supp. 1981); Colo. Rev. Stat. § 19-6-106(1) (1978); Conn. Gen. Stat. § 45-69g(a) (1981); Ga. Code § 74-101.1(b) (1981); Minn. Stat. Ann. § 257.56(a) (West Supp. 1981); Mont. Code Ann. § 40-6-106 (1981); N.Y. Dom. Rel. Law § 73 (McKinney 1977); Okla. Stat. Ann. tit. 10, § 551 (West Supp. 1981); Va. Code § 64.1-7.1 (1980); Wash. Rev. Code Ann. § 26.26.050(1) (Supp. 1981); Wyo. Stat. § 14-2-103 (1977).

statute to AID.[93] A significant number of states agree on three other points: (1) nine states require the person performing the insemination to certify the consent form;[94] (2) eight states require that this certified consent be placed in a closed file;[95] and (3) nine states provide either that the donor is not the natural father of the child or that the donor has no rights to the child.[96]

V. Legal Issues Raised by Artificial Insemination

A. *Adultery*

To address properly the issue of whether AID is adultery it is first necessary to review briefly the historical background that explains why adultery is an offense.[97] It is in light of this review and in light of the treatment of AID as adultery in United States case law that the issue will be analyzed. The conclusion reached is that nonconsensual AID can be adultery.

1. *History and Definition of Adultery*

"The reasons behind the prohibition of adultery are as numerous and ancient as the races of man."[98] It has been prohibited as a violation of the community's sense of morality, as a source of bastardization of the family line, as a violation of the

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93. Cal. Civ. Code § 7005(a) (West Supp. 1981); Colo. Rev. Stat. § 19-6-106 (1978); Conn. Gen. Stat. § 45-69f(b) (1981); Kan. Stat. Ann. § 23-128 (1981); Minn. Stat. Ann. § 257.56(1) (West Supp. 1981); Mont. Code Ann. § 40-6-106 (1981); N.C. Gen. Stat. § 49A-1 (1976); Okla. Stat. Ann. tit. 10, § 551 (West Supp. 1981); Or. Rev. Stat. § 109.239 (1981); Wash. Rev. Code Ann. § 26.26.050(1) (Supp. 1981); Wyo. Stat. § 14-2-103(a) (1977).

94. Cal. Civ. Code § 7005(a) (West Supp. 1981); Colo. Rev. Stat. § 19-6-106(1) (1978); Kan. Stat. Ann. § 23-130 (1981); Minn. Stat. Ann. § 257.56(1) (West Supp. 1981); Mont. Code Ann. § 40-6-106(1) (1981); N.Y. Dom. Rel. Law § 73(2) (McKinney 1977); Okla. Stat. Ann. tit. 10, § 553 (West Supp. 1981); Wash. Rev. Code Ann. § 26.26.050(1) (Supp. 1981); Wyo. Stat. § 14-2-103(a) (1977).

95. Cal. Civ. Code § 7005(a) (West Supp. 1981); Colo Rev. Stat. § 19-6-106(1) (1978); Kan. Stat. Ann. § 23-130 (1981); Minn. Stat. Ann. § 257.56(1) (West Supp. 1981); Mont. Code Ann. § 40-6-106(1) (1981); Okla. Stat. Ann. tit. 10, § 553 (West Supp. 1981); Wash. Rev. Code Ann. § 26.26.050(1) (Supp. 1981); Wyo. Stat. § 14-2-103(a) (1977).

96. Cal. Civ. Code § 7005(b) (West Supp. 1981); Colo. Rev. Stat. § 19-6-106(2) (1978); Conn. Gen. Stat. § 45-69j (1981); Minn. Stat. Ann. § 257.56(2) (West Supp. 1981); Mont. Code Ann. § 40-6-106(2) (1981); Or. Rev. Stat. § 109.239 (1981); Tex. Fam. Code Ann. tit. 2, § 12.03(b) (Supp. 1981); Wash. Rev. Code Ann. § 26.26.050(2) (Supp. 1981); Wyo. Stat. § 14-2-103(b) (1977).

97. *See* Note, *The Socio-Legal Problems of Artificial Insemination*, 28 Ind. L.J. 620, 622-23 (1953).

98. Murray, *Ancient Laws on Adultery—A Synopsis*, 1 J. Fam. L. 89, 89 (1961).

man's property rights in his wife's body, and as a blow to the man's pride.[99] Anciently, adulterers were largely punished by the injured party, although society sometimes assessed monetary damages to replace the potentially bloody self-help remedy.[100] During the time of Caesar's campaigns in Britain it appears that the Britons had no rules at all against adultery.[101] The first recorded English laws concerning adultery were issued by King Aethelberht I between 597 and 616 A.D. These laws required the adulterer to pay the husband the wergeld[102] and to provide the husband with a new wife purchased with the adulterer's own funds.[103] Later, in 892-93 A.D., Alfred the Great issued laws that provided for a graduated scale of compensation to the husband depending on the husband's wergeld. These laws allowed the husband to kill the other man without fear of vendetta from the other man's relatives.[104]

From about the Middle Ages to the eighteenth century, the ecclesiastical courts assumed jurisdiction over adultery and punished those they found guilty.[105] Under the canon law adultery was defined as sexual relations between a married person of either sex and a person not the married person's spouse.[106] The canon law was concerned with "the unhappiness and demoralization in the family by breach of the marriage vows and [it] extended the meaning of adultery to [include] sexual connection by a man and a woman, one of whom [was] married to a third person."[107] Later the civil authority in England reasserted its ju-

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99. *Id.*

100. *Id.* at 89-90.

101. *Id.* at 97.

102. The "wergeld" (also spelled "weregild," "wergild" and "wergelt") means literally "man value" and is "the price of. . . . [an] atrocious personal offense, paid partly to the king for the loss of a subject, partly to the lord for the loss of a vassal, and partly to the next of kin of the injured person." The amount of wergeld varied with the rank of the injured party. BLACK'S LAW DICTIONARY 1766 (rev. 4th ed. 1968).

103. Murray, *supra* note 98, at 97-98.

104. *Id.* at 98-99. Later such killings were considered manslaughter, but of the lowest degree "because there could not be a greater provocation." 4 W. BLACKSTONE, COMMENTARIES 191-92 (1783 & photo. reprint 1978). *Cf.* TEX. PENAL CODE ANN. app. art. 1220 (Vernon 1974) (homicide by husband justifiable if upon one taken in the act of adultery with the wife), *repealed by*, 1973 Tex. Gen. Laws ch. 399.

105. Moore, *The Diverse Definitions of Criminal Adultery*, 30 U. KAN. CITY L. REV. 219-20 (1962); Murray, *supra* note 98, at 103.

106. Moore, *supra* note 105, at 220. Under the canon law the husband and the wife were equally guilty of adultery if their partners were single. *Id.* In contrast, under the common law, if the partner were single only the wife could be guilty of adultery; the husband was guilty only of fornication. *See* note 111, *infra*.

107. State v. Holland, 162 Mo. App. 678, 145 S.W. 522, 523 (1912). Nevertheless, a

risdiction over adultery and instituted numerous penalties for its commission.[108]

Under the common law adultery was not a crime.[109] It was, however, a civil offense.[110] The common law defined adultery as sexual relations between a married woman and a man not her husband. It made no difference whether the man was married or single.[111] The common law sought to protect the husband from the consequences of his wife's extramarital sexual conduct: adulteration[112] of his bloodline by the introduction of spurious heirs, the forced maintenance of these children, and the risk that these children might some day inherit his property.[113]

The English adultery laws were later adopted in the United States. During the colonial period of the United States some jurisdictions adopted the common-law definition of adultery, some adopted the canon law definition, and some adopted a combination of the two.[114] After the Revolutionary War a majority of the

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dual standard developed whereby the adulteress was excommunicated, but the adulterer was merely required to undergo penance. Murray, *supra* note 98, at 103.

108. Murray, *supra* note 98, at 103.

109. State v. Hasty, 121 Iowa 507, 509, 96 N.W. 1115, 1115 (1903); 4 W. BLACKSTONE, COMMENTARIES 65 (1783 & photo. reprint 1978); R. PERKINS, CRIMINAL LAW 377 (1969); 2 C.J.S. *Adultery* § 2b (1972).

110. 121 Iowa at 509, 96 N.W. at 1115; 3 W. BLACKSTONE, COMMENTARIES 139-40 (1783 & photo. reprint 1978); 2 C.J.S. *Adultery* § 2b (1972).

111. Moore, *supra* note 105, at 219. The wife and the man, whether or not he was married, were both guilty of adultery. However, if the woman were single they each were guilty only of fornication, regardless of the man's marital status. *Id.* at 219-20. The reason for this distinction is that it was only when the woman was married that the bloodline could be adulterated by the introduction of spurious heirs. State v. Lash, 16 N.J.L. 380, 384 (Sup. Ct. 1837); R. PERKINS, *supra* note 109, at 377.

112. The English word "adultery" comes from the Latin infinitive *adulterare,* which means "to falsify" or "to corrupt." LANGENSCHEIDT'S SHORTER LATIN DICTIONARY 28 (1966). Illicit sexual intercourse was mere fornication "unless it was calculated to adulterate the blood." R. PERKINS, *supra* note 109, at 377. When a wife introduced into the family children not fathered by her husband she falsified or corrupted the bloodline. She was, therefore, an "adulteress" in the literal sense. *See* State v. Holland, 162 Mo. App. 678, 145 S.W. 522, 523 (1912); State v. Lash, 16 N.J.L. 380, 384 (Sup. Ct. 1837); R. PERKINS, *supra* note 109, at 377.

113. Murray, *supra* note 98, at 89. *See* Tinker v. Colwell, 193 U.S. 473, 481, 484 (1904); State v. Hasty, 121 Iowa 507, 509, 96 N.W. 1115, 1115 (1903); State v. Wheatherby, 43 Me. 248, 261 (1857); State v. Armstrong, 4 Minn. 251, 256-57 (1860) (originally 4 Minn. 335); State v. Lash, 16 N.J.L. 380, 384 (Sup. Ct. 1837); State v. Roberts, 169 Wis. 570, 572, 173 N.W. 310, 311 (1919). Blackstone lists as one of the factors to be considered in awarding damages for adultery "the husband's obligation . . . to provide for those children, which he cannot but suspect to be spurious." 3 W. BLACKSTONE, COMMENTARIES 140 (1783 & photo. reprint 1978).

114. Moore, *supra* note 105, at 221. Under the combined definition both parties are guilty of adultery if either of them is married to a third party. *Id.*

states adopted the canon law definition, placing more emphasis on the violation of the marriage vows than on the introduction of spurious heirs into the family.[115] The United States Supreme Court has nevertheless recognized the injury done a husband when there is an invasion of his exclusive right to marital intercourse with his wife and, therefore, to beget his own children: "This is a right of the highest kind, upon the thorough maintenance of which the whole social order rests. . . ."[116]

2. *Analysis of AID as Adultery*

a. *United States case law analysis of AID as adultery.* Five United States artificial insemination cases have mentioned adultery: *Hoch, Doornbos, Gursky, Sorensen,* and *In re Adoption of Anonymous. Doornbos* is the only one of these cases to hold that AID is adultery. *Doornbos* is also the only case whose *holding* concerns adultery. *Gursky's* only reference to adultery is in a quotation from *Doornbos* so *Gursky* will not be separately discussed below. In the other cases, all remarks on adultery are unpersuasive dicta.

In *Hoch,* when the husband sued his wife for divorce on the ground of adultery, she answered that her pregnancy was the result of AID. Judge Feinberg granted the divorce decree based on "other incriminating evidence," merely noting that "[a]rtificial insemination . . . is legally insufficient for a divorce on grounds of adultery."[117] Such unsupported dictum is not a solid base upon which to rest future decisions.

In re Adoption of Anonymous contains only one statement linking AID with adultery: in AID "the wife does not have sexual intercourse or commit adultery with [the donor]."[118] There is, unfortunately, no analysis. Because the case focused on adoption rather than the issue of adultery, the bald dictum is, by itself, unpersuasive.

The highest court in the United States to mention AID in connection with adultery is the California Supreme Court in *People v. Sorensen.*[119] Discussing the former husband's obligation to support the AID child, the *Sorensen* court said that the

115. *Id.* at 222.
116. Tinker v. Colwell, 193 U.S. 473, 484 (1904).
117. TIME, Feb. 26, 1945, at 58.
118. 74 Misc. 2d at 104, 345 N.Y.S.2d at 434.
119. 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968).

idea that AID could be adultery is "patently absurd" because the procedure might be administered by a female doctor, or by the husband, or the donor might be far away or dead.[120] Not only was this statement irrelevant to the husband's support obligation, but it also presumed a definition of adultery that the court had not established.[121] Although it is clear that AID administered by the husband could not be adultery, further analysis of the roles of female doctors and dead or absent donors is necessary.

That the doctor performing the artificial insemination might be female is a valid objection to AID as adultery only if adultery is defined to require coitus. If, on the other hand, adultery is viewed either as adulteration of the bloodline under the common law, or as the violation of the marriage vow of sexual fidelity under the canon law, the gender of the doctor has no bearing on whether AID can be adultery.

Even if a person is not the principal of an act that person can be as guilty as a principal if the person aids in the commission of the act. For example, a man can be guilty of raping his wife if he assists another man in having sexual intercourse with her contrary to her will.[122] A woman likewise can be guilty of rape if she aids in committing the act.[123] Therefore, it is certainly possible for a female doctor to be guilty of adultery with another woman if she aids in performing an act that would otherwise be adultery.

Furthermore, it is not patently absurd to characterize sexual acts between persons of the same sex as adultery.[124] In *Adams v. Adams*[125] the Louisiana Court of Appeals recognized the exis-

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120. *Id.* at 289, 437 P.2d at 501, 66 Cal. Rptr. at 13.

121. Some commentators have praised the dictum as the "wisdom of Solomon." Lee, *The Changing American Law Relating to Illegitimate Children*, 11 WAKE FOREST L. REV. 415, 421 (1975); Smith, *Unto Us a Child Is Born—Legally*, 56 A.B.A.J. 143, 144 (1970). But such praise is no more carefully reasoned than was the original statement.

122. People v. Meli, 193 N.Y.S. 365 (Sup. Ct. 1922); State v. Digman, 121 W. Va. 499, 5 S.E.2d 113 (1939); Annot. 84 A.L.R.2d 1017 (1962).

123. Grace v. State, 369 So. 2d 318 (Ala. Crim. App. 1979) (woman guilty of rape of twelve-year-old female); State v. Reilly, 85 Misc. 2d 702, 708-09, 381 N.Y.S.2d 732, 739 (1976) (female may be guilty of rape).

124. Cohen v. Cohen, 200 Misc. 19, 103 N.Y.S.2d 426 (Sup. Ct. 1951), often cited for the proposition that homosexual acts cannot be adultery, *e.g.*, W. v. W., 94 N.J. Super. 121, 124, 226 A.2d 860, 862 (1967), was overruled by N.Y. DOM. REL. LAW § 170(4) (McKinney 1977) (adultery includes acts of fellatio, sodomy, and cunnilingus and can be committed not only with a member of the same sex but also with corpses and animals).

125. 357 So. 2d 881 (La. Ct. App. 1978).

tence of "homosexual adultery." That court held that "[l]ike heterosexual adultery, the commission of acts of homosexual adultery, alleged as a ground for separation (or divorce), may be established by indirect or circumstantial evidence" and that "the same degree of proof is necessary in the case where one party to a marriage is accused of having a homosexual relationship with someone other than his or her spouse," as is necessary in the case of heterosexual adultery.[126] The following year the Florida Court of Appeals noted in *Patin v. Patin*[127] that there is "no substantial distinction [between heterosexual adultery and homosexual activity], because both involve extramarital sex and therefore marital misconduct."[128] Early in 1981 the Georgia Supreme Court explicitly held in *Owens v. Owens* that "both extramarital homosexual, as well as heterosexual, relations constitute adultery."[129] In response to a due process challenge the *Owens* court reasoned that this "construction which [the court] place[d] on the term 'adultery' [was] more rational than the construction urged by the appellant, and it [was], therefore, fully consonant with the due process clause."[130]

The courts have thus recognized that sexual activity between members of the same sex can be adultery. Therefore, if adultery is defined either as an unlawful adulteration of the husband's bloodline or as a violation of the marriage vow of sexual fidelity rather than as coitus, it is not patently absurd to find that non-consensual AID may be adultery, even though the doctor performing the insemination is a woman.

By allowing his sperm to be used for AID, the donor sets in motion a chain of events which can result in a woman becoming pregnant with his child. AID can occur when the donor is far away or dead because medical technology preserves the sperm for later use. But even if the donor is not liable for adultery, the wife could still be an adulteress. It is not essential to a finding of adultery on the part of one person that some other person also be liable for adultery.[131] For example, if a married man commits

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126. *Id.* at 882 (footnote omitted). The court noted that this gender-neutral language, once unnecessary, was required by the sexually nondiscriminating terms of the legislation, which the court said also sanctioned marriage between persons of the same sex. *Id.* at 882 n.1.

127. 371 So. 2d 682 (Fla. Dist. Ct. App. 1979).

128. *Id.* at 683.

129. Owens v. Owens, 247 Ga. 139, 140, 274 S.E.2d 484, 485-86 (1981).

130. *Id.* at 140, 274 S.E.2d at 486.

131. *E.g.*, People v. Hopkins, 38 Misc. 2d 459, 466, 238 N.Y.S.2d 485, 493 (Sup. Ct.

rape he may have also committed adultery, but his victim is not guilty of adultery.[132] Therefore, that the donor may, for whatever reason, not necessarily be liable for adultery does not preclude adultery on the part of the wife. Thus the *Sorensen* dictum is ultimately unpersuasive.

Unlike the above cases, *Doornbos* gave a direct holding on AID as adultery. The *Doornbos* court held that "[h]eterologous artificial insemination . . . with or without the consent of the husband, is contrary to public policy and good morals, and constitutes adultery on the part of the mother."[133] Although this unreported case gives no supporting reasons, there are reasons for holding nonconsensual AID to be adultery.

b. *Conclusions on nonconsensual AID as adultery.* No state statute treats AID as adultery, but all twenty states that have legislation on artificial insemination require that the husband consent to the insemination.[134] Even in states without AID legislation, the husband's consent to a sexual act by his wife bars him from later using that act against her as the basis for a charge of adultery. Accordingly, the following analysis is limited to whether nonconsensual AID can be adultery under the common law.

The best argument against holding nonconsensual AID to be adultery has been mentioned by only one United States court. In *In re Adoption of Anonymous* the court mentioned that in AID "the wife does not have sexual intercourse . . . with [the donor]."[135] However, the term sexual intercourse in a strictly literal sense is any sort of communication, dealings or exchange of thoughts or feelings that pertain to sex. One form of sexual intercourse is coitus, for which the term sexual intercourse is a common euphemism. Nevertheless, courts and legislatures have explicitly recognized the existence of other acts of

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Crim. Term. 1963) (defendants' guilt for adultery determined by defendant's own conduct, not by other person's innocence).

132. State v. Henderson, 84 Iowa 161, 165-66, 50 N.W. 758, 760 (1891); Commonwealth v. Bakeman, 131 Mass. 577, 578 (1881). In at least one state it is not even essential that the other person be alive for the first person to have committed adultery. N.Y. DOM. REL. LAW § 170(4) (McKinney 1977) (adultery includes necrophilia).

133. No. 54-S-14981 (Ill. Super. Ct. Dec. 13, 1954) (23 U.S.L.W. 2308 (Jan. 4, 1955) contains an extract).

134. Arkansas and Maryland presume the husband's consent; all other states require an affirmative consent. *See supra* note 89, for specific statutes.

135. 74 Misc. 2d at 104, 345 N.Y.S.2d at 434.

sexual intercourse that do not amount to coitus.[136] Other acts of sexual intercourse have been held sufficient to support a finding of adultery.[137] These holdings apply the canon law's recognition of the harm that any form of sexual infidelity can do the marriage relationship.[138] Therefore, it is accurate to say that the wife does not have "sexual intercourse" with the donor only if the term is used exclusively to mean coitus.[139] The essential question therefore is whether adultery requires coitus.

The definition of adultery that requires actual coitus is advocated best in the Scottish case of *MacLennan v. MacLennan*.[140] The *MacLennan* court quoted a number of authorities who attempted to define adultery. Relying on these definitions the court held that adultery requires the parties to be physically present and to engage in the sexual act—some degree of penetration of the female sexual organ by the male sexual organ.[141] Under this definition the court found that AID could not be adultery: the donor is seldom, if ever, present, and penetration is accomplished not by the male organ, but by a syringe. However, the *MacLennan* definition of adultery does not follow necessarily from the authorities on which it purports to rely. "[L]ike so

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136. *E.g.*, Commonwealth v. Bucaulis, 6 Mass. App. Ct. 59, 373 N.E.2d 221, 226 ("The term 'sexual intercourse' has commonly been employed to describe a variety of sexual conduct including the act of fellatio."), *cert. denied*, 439 U.S. 827 (1978); WASH. REV. CODE ANN. § 9.979.140(1) (1977) (sexual intercourse defined as having "its ordinary meaning, . . . any penetration of the vagina or anus . . . by an object, when committed on one person by another" regardless of gender (except for medical procedures) and "sexual contact between persons involving the sex organs of one person and the mouth or anus of another" regardless of gender).

137. Patin v. Patin, 371 So. 2d 682 (Fla. Dist. Ct. App. 1979) (homosexual activity is marital misconduct amounting to adultery); Owens v. Owens, 247 Ga. 139, 274 S.E.2d 484 (1981) (homosexual activity is adultery); Adams v. Adams, 357 So. 2d 881 (La. Ct. App. 1978) (homosexual activity is adultery); Sapsford v. Sapsford, [1954] 2 All E. R. 373, 375 (P.) (even if penetration was not achieved some lesser act of sexual intercourse was performed and amounts to adultery in law); Thompson v. Thompson, 1938 P. 162, 170, 173 ("mutual intercourse amounting to adultery in law" found despite medical evidence that hymen was intact); Russel v. Russel, 1924 A.C. 687, 721 (H.L.) ("fecundation ab extra is . . . adultery"); Rutherford v. Richardson, 1923 A.C. 1, 11 (decree based upon adultery can issue upon proof of lesser act of sexual gratification inconsistent with penetration); Orford v. Orford, 58 D.L.R. 251 (Ont. 1921) (artificial insemination can be adultery); N.Y. DOM. REL. LAW § 170(4) (McKinney 1977) (adultery includes acts of fellatio, sodomy, cunnilingus, bestiality and necrophilia); Battaglini, *supra* note 26, (in Italy artificial insemination is adultery).

138. *See supra* text accompanying note 107.

139. In L.M.S. v. S.L.S., 105 Wis. 2d 118, 312 N.W.2d 853 (Ct. App. 1981) the wife and the "donor" did engage in coitus.

140. 1958 Sess. Cas. 105 (Scot.).

141. *Id.* at 113.

many other superficially satisfactory legal definitions [it does] not decide the hard cases."[142]

AID is one of the "hard cases." No definition of adultery should be applied to AID without careful examination of the policy behind the definition. A closer look at the *MacLennan* decision will help illustrate this point. Before it quoted the various definitions of adultery the *MacLennan* court noted that great legal writers of the past had not sought to define adultery but only to describe it; in those days people knew what adultery was. There was no need for a legally precise definition. The possibility that a woman could commit adultery by artificially inseminating herself with a syringe never could have crossed their minds.[143]

After reviewing the then-extant definitions of adultery the *MacLennan* court concluded that the common element in the definitions was the requirement of carnal knowledge.[144] The court also concluded that impregnation is not the test for adultery because the adulterous act is evidenced by the degree of familiarity occasioned by the "mutual surrender of the bodies" which "is a complete transgression and violation of the contract of marriage."[145] It was not important whether such familiarity was established by evidence of penetration or by something less, as contemplated by Lord Dunedin in *Russel*. The court noted, however, that the English courts had insisted on some degree of penetration merely because there must be a defining line between adultery and other acts of gross indecency.

There are gaps in the reasoning that led the *MacLennan* court from "mutual surrender of the bodies" to a requirement of coitus for a finding of adultery. If adultery consists in the violation of the marriage contract by a mutual surrender of the bodies, it is difficult to see any less a violation of the marriage contract when one of the spouses engages in fellatio, cunnilingus, sodomy or any other similar act. Why then do the courts insist on coitus for a finding of adultery? Is it merely to provide a convenient defining line as *MacLennan* suggested? Why does Lord Dunedin nevertheless find adultery in fecundation *ab extra* when there is no penetration?

142. H. Clark, The Law of Domestic Relations in the United States § 12.2, at 328 (1968).

143. 1958 Sess. Cas. at 108.

144. *Id.* at 109.

145. *Id.* at 111.

The answer lies in the common law. As the *MacLennan* court acknowledged, but failed to take into account in its reasoning, sexual infidelity by the wife "may impose a spurious offspring" on the husband.[146] Although the husband's acts of sexual infidelity do not impose spurious heirs upon the wife, these acts do constitute adultery under the canon law, which did not permit a double standard for chastity. However, a comprehensive definition of adultery must consider not only the canon law's concern for the integrity of the marriage, but also the common law's concern for the integrity of the bloodline. Indeed, the literal meaning of the term *adultery* is to corrupt or to falsify, as by the introduction of adulterating heirs.[147] Thus, adultery encompasses not only acts that violate the marriage agreement, as recognized by the canon law, but also any acts that can adulterate the bloodline by introducing spurious heirs into the family, as recognized by the common law. Under this dual concept, nonconsensual AID can be adultery. When the wife is inseminated without her husband's consent and she produces a spurious child she thereby commits adultery under the common law. Despite the lack of coitus, nonconsensual AID can also be considered a violation of the marital agreement,[148] equivalent to adultery under the canon law, because the decision whether to have children should be reached by a mutual agreement between the husband and the wife, not by a unilateral decision of one of the spouses. "If either partner is to enjoy one of the primary purposes of marriage, the bringing forth and nurturing of children . . . each partner must cooperate in matters of child birth."[149]

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146. *Id.* at 109.

147. The *MacLennan* court tried to rationalize the meaning of adultery relative to the introduction of a foreign element into the marriage by saying that the foreign element is unlawful physical contact with a sex organ. 1958 Sess. Cas. at 114. This argument fails to take into account other sexual acts that also require unlawful contact with a sex organ, none of which the court characterized as adultery. Mere unlawful physical contact with a sex organ is not the foreign element introduced into the family by adultery. *See supra* note 112.

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

149. Scheinberg v. Smith, 659 F.2d 476, 485 (5th Cir. 1981) (citation omitted). If refusal to consummate the marriage is actionable, Kreyling v. Kreyling, 20 N.J. Misc. 52, 23 A.2d 800 (Ch. 1942); L. v. L., [1949] 1 All E. R. 141, then for one spouse to conceive a child not agreed to by the other should be actionable. This follows not only from the fact that the partners should cooperate in such decisions but also because there is no absolute right of either partner to have children. Poe v. Gerstein, 517 F.2d 787, 796-97 (5th Cir. 1975) (no guarantee of reproductive opportunity in marriage), *aff'd mem.*, 428 U.S. 901 (1976); Murray v. Vandevander, 522 P.2d 302 (Okla. Ct. App. 1974) (husband does not

Therefore, under either the common-law or the canon-law definition, AID can be adultery.

B. *Illegitimacy*

A second legal issue raised by artificial insemination is whether the AID child is legitimate. A review of the history of illegitimacy and of the case law analyzing illegitimacy in the context of AID suggests that, absent legislation to the contrary, the AID child is born illegitimate.

1. *Definition of Illegitimacy*

Illegitimacy is more easily defined than adultery. "Illegitimacy is a status. This status is determined, not by the legal status of the mother (if she is married) and her husband; but by the legal status of the mother with reference to . . . the child's actual father, to whom she is not married."[150] "A bastard is . . . one who is not only begotten, but born, out of lawful wedlock."[151] "[A]lso children born during wedlock may in some circumstances be bastards. As if the husband be out of [the country] . . . for above nine months, so that no access to his wife can be presumed, her issue during that period should be bastards."[152] All other children are legitimate. Thus, stated simply, a child is illegitimate unless its mother is married to its father at the time of its conception or birth.

The concept of legitimation is not recognized under the common law. A child conceived before the parents marry will be legitimate if the parents marry before its birth. However, nothing the natural parents can do after the birth of their illegiti-

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have right to produce child by his wife). Skinner v. Oklahoma, 316 U.S. 535 (1942) is not to the contrary. "Despite language characterizing the fundamental nature of procreation as 'one of the basic civil rights of man,' the *Skinner* court neither denied the state's right to sterilize nor established a constitutional right to procreate." Comment, *Artificial Human Reproduction: Legal Problems Presented by the Test Tube Baby,* 28 EMORY L.J. 1045, 1056 (1979) (footnotes omitted). *Skinner* established only that one has a right to procreate *without state interference that violates the equal protection clause.* Maher v. Roe, 432 U.S. 464, 472 n.7 (1977); Poe v. Gerstein, 517 F.2d 787, 797 (5th Cir. 1975), *aff'd mem.* 428 U.S. 901 (1976). Nevertheless, "[t]he marital relationship is the *only* legitimate vehicle . . . for realizing . . . [such] procreative rights." 659 F.2d at 485.

150. 1 S. SCHATKIN, DISPUTED PATERNITY PROCEEDINGS § 1.01 (rev. 4th ed. 1980). *See* H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 10 (1971).

151. Ng Suey Hi v. Weedin, 21 F.2d 801, 802 (9th Cir. 1927). *See* Warren v. State, 26 Ala. App. 284, 158 So. 770, 770 (Ct. App. 1935); 1 W. BLACKSTONE, COMMENTARIES 454 (1783 & photo. reprint 1978).

152. 1 W. BLACKSTONE, *supra* note 151, at 457. *See* 10 C.J.S. *Bastards* § 1 (1938).

mate child can legitimate the child under the common law. A child born illegitimate can become legitimate only by statutory provision.[153]

Probably to ameliorate the strictness of the common-law definition of illegitimacy and the impossibility of legitimation, the common law raises a strong presumption that a child born during marriage, or within a certain time afterwards, is legitimate. At one time the presumption of legitimacy was so strong that if the husband was within the four seas of England a court would refuse to hear evidence that would bastardize the child.[154] Later this rule was abandoned because of its complete absurdity. Since that time the presumption has been rebuttable. Nevertheless, the presumption is still strong enough so that as long as the husband and wife live together, legitimacy will be presumed "unless common sense and reason are outraged by a holding that it abides."[155] Although in one instance the presumption prevailed "though the wife had harbored an adulterer," in another like circumstance the presumption did not hold.[156] Thus, the common-law presumption of legitimacy is not conclusive but is subject to the sway of reason.[157]

Although the presumption of legitimacy is now rebuttable, the evidence currently allowed to rebut the presumption is subject to limitations. In particular, some states attempt to bar testimony by the husband and wife concerning nonaccess. "[I]n the beginning there clearly was no rule at all against using the testimony of a husband or a wife, to prove the nonaccess of the husband as evidence of the child's bastardy."[158] Later, sometime in the early 1700's, support orders in filiation cases could not be based solely on the uncorroborated testimony of the child's mother. However, the concept that the parents could not testify at all as to the illegitimacy of their putative offspring was not

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153. 10 C.J.S. *Bastards* § 9 (1938); 1 W. BLACKSTONE, *supra* note 151, at 446, 454-56.

154. *In re* Findley, 253 N.Y. 1, 170 N.E. 471 (1930) (Justice Cardozo summarizes the history of the presumption).

155. *Id.* at 8, 170 N.E. at 473. Some courts have nevertheless held that the presumption abides even though it outrages both common sense and reason. *See, e.g.*, Hess v. Whitsitt, 257 Cal. App. 2d 552, 65 Cal. Rptr. 45 (1967) (black child born to white woman conclusively presumed to be the legitimate child of woman's white husband).

156. 253 N.Y. at 8, 9, 170 N.E. at 473.

157. The usual burden of proof to establish illegitimacy is "clear, convincing, and satisfactory proof." C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 343, at 810 (1972).

158. 7 J. WIGMORE, EVIDENCE IN TRIALS AT THE COMMON LAW § 2063, at 469 (rev. ed. 1978).

originally a part of the common law. Then in 1777, Lord Mansfield "conjured . . . up from thin air"[159] the rule that the law of England, as well as decency, morality and public policy, prohibited the husband and the wife from testifying that they had not had sexual relations at any time during which the child could have been conceived.[160] Although there was no legal or historical support for such a prohibition,[161] Lord Mansfield's rule was followed in England for the next 172 years until Parliament abrogated it by statute.[162] The American rule on nonaccess testimony was originally in accord with the pre-Mansfield rule of England.[163] Unfortunately, Lord Mansfield's rule eventually crept into the laws of many of the American states.[164]

2. *Analysis of the AID child's status*

a. United States case law analysis of the AID child's status. Eight opinions of United States courts mention the legitimacy of the AID child: *Strnad, Ohlson, Doornbos, Abajian, Gursky, Anonymous, Sorensen,* and *In re Adoption of Anonymous.*[165] Only two of these cases gave holdings on the issue: *Doornbos* and *Gursky.* Both hold the AID child to be illegitimate. While the other six courts note in dictum that they think the AID child is legitimate, none of these decisions is persuasive.

In *Strnad,* the court held that the child had been "potentially adopted or semi-adopted" by the husband who was seeking visitation rights to the child.[166] In dicta the court expressed its belief that the AID child is not illegitimate because AID presents a situation logically and realistically no different from that of a child conceived out of wedlock who is made legitimate upon the marriage of its parents before its birth. However, the court's reasoning has been criticized as both illogical and unreal-

159. H. Clark, The Law of Domestic Relations in the United States § 13.7, at 398 (1968).

160. Goodright v. Moss, 98 Eng. Rep. 1257, 1258 (K.B. 1777).

161. 7 J. Wigmore, *supra* note 158, at 471-72. Lord Mansfield seems to have had a predeliction for inventing rules. *Id.* at 472 n.5.

162. Law Reform (Miscellaneous Provisions) Act, 1949, 12, 13 & 14 Geo. 6, ch. 100, § 7, *replaced by* Matrimonial Causes Act, 1950, 14 Geo. 6, ch. 25, § 32.

163. 7 J. Wigmore, *supra* note 158, at 474-75.

164. *Id.* at 475 & n.14.

165. *See supra* text accompanying notes 48, 51, 54, 56, 58, 61-62, 64.

166. 190 Misc. at 787, 78 N.Y.S.2d at 391. This holding is contrary to the statutory law of New York. N.Y. Dom. Rel. Law § 110 (McKinney 1977). Even commentators who agree with the court's reasoning find its choice of language to be unfortunate. Shaman, *Legal Aspects of Artificial Insemination,* 18 J. Fam. L. 331, 335 (1979-80).

istic.[167] The situations are actually quite different. In legitimation by subsequent marriage it is the marriage of the child's biological parents prior to the child's birth that legitimates the child. By contrast, in AID the biological parents never marry. Furthermore, the common law, which recognizes that a child will be legitimate if its parents marry before it is born, has never recognized that a child will be legitimate if its mother marries a man other than the child's father before its birth.[168]

In *Ohlson,* an unreported action for divorce, the court relied on the presumption of legitimacy and said that the evidence presented to establish AID did not overcome that presumption. Because the case is unreported there is no way to evaluate the evidence presented to establish artificial insemination. The court did not reach the question of whether artificial insemination, if proved, would lead to a finding of illegitimacy.[169]

In *Abajian,* the court's only remark concerning legitimacy was that the wife's attempt to stigmatize the children as being fathered by means of AID was no more than an attempt to make the children bastards. The court also mentioned the Lord Mansfield rule. However, neither the language on bastardy nor the Lord Mansfield rule was the basis for the court's holding that the husband's visitation rights should continue under the Nevada divorce decree. The court could not permit the wife to litigate the children's legitimacy because that would destroy the very essence of the Nevada decree, which should be upheld under the full faith and credit clause of the Constitution.[170] Any issue of the AID children's legitimacy should therefore be referred to Nevada courts. Thus, the court's remarks on legitimacy were dicta and not a solid basis for future cases.

The *Sorensen* decision also gives only dicta on the AID child's legitimacy. Although recognizing that an illegitimate child is one born to parents not married to each other, the court was not persuaded that legitimacy requires the child to be the actual offspring of the husband and the wife. The court noted that in California the legislature had provided that a child born before wedlock can be legitimated by the subsequent marriage of the parents or by an acknowledgement of the child by its fa-

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167. *See* Tallin, *supra* note 2, at 169-71; Verkauf, *supra* note 24, at 303; Rice, *A.I.D.—An Heir of Controversy,* 34 NOTRE DAME LAW. 510, 517 (1959).

168. Tallin, *supra* note 2, at 170-71.

169. *Medicolegal Aspects of Artificial Insemination, supra* note 51, at 1639.

170. 15 Misc. 2d at 264, 265, 184 N.Y.S.2d at 183, 184.

ther.[171] Thus, the legal status of legitimacy can exist even if the husband is not the natural father of the child.

The *Sorensen* reasoning is entirely dependent on legislative solutions. Only statutes that legitimate an otherwise illegitimate child can confer the status of legitimacy when the mother's husband is not the natural father of the child. Furthermore, the court contradicted itself in citing the acknowledgement statute because the court had concluded earlier in its opinion that the AID child does not have a natural father.[172] A child can be acknowledged only by its natural father, not by a man who lives with its mother but is not the biological father.[173] Therefore, the AID child cannot be acknowledged by the husband. Nor, under the *Sorensen* court's logic, can it be acknowledged by the nonexistent natural father. Thus, the *Sorensen* dictum on legitimacy is unpersuasive.

Doornbos is an unreported decision, but unlike the above cases it gives a firm holding on the AID child's status. In response to a request for a declaratory judgment the court held that a child conceived by AID is illegitimate because it is not born in wedlock. The court merely applied the common-law definition of illegitimacy to AID. A child conceived by AID, by definition, must have been conceived by a father other than the woman's husband. A child conceived by a father other than its mother's husband is, again by simple definition, illegitimate.

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171. 68 Cal. 2d at 289, 437 P.2d at 501, 66 Cal. Rptr. at 13.

172. 68 Cal. 2d at 284, 437 P.2d at 498, 66 Cal. Rptr. at 10. The court contradicted its citation of the acknowledgement statute when it reasoned that the "anonymous donor of the sperm cannot be considered the 'natural father,' as he is no more responsible for the use made of his sperm than is the donor of blood or a kidney." *Id.*, 437 P.2d at 498, 66 Cal. Rptr. at 10. This line of reasoning is absurd. Whether the semen donor is the AID child's natural father is not in any way dependent on whether he is responsible for the use made of his semen. Dr. Christian Barnard, the famous transplant surgeon, once explained to a patient who desired a testicle transplant that if the transplant were successfully performed the patient would not be the father of any children thereby produced. Dr. Barnard explained that the testicle donor, not the recipient of the testicle, would be the natural father of any children thereby produced. R. SCOTT, THE BODY AS PROPERTY 223 (1981). Therefore, although the testicle donor is not responsible for the use made of his organ, he is, as Dr. Barnard points out, nevertheless the natural father of any children produced as a result of the transplant. Thus, if the testicle donor, not the recipient of the testicle, is the natural father of any children thereby produced, then *a fortiori* the semen donor must be the AID child's natural father. *Cf.* C.M. v. C.C., 152 N.J. Super. 160, 377 A.2d 821 (Juv. & Dom. Rel. Ct. 1977) (semen donor is natural father of AID child). Note, *People v. Sorensen: Artificial Insemination Gives Birth to Real Problems in California*, 4 CAL. W.L. REV. 177, 193 (1968) (points to another contradiction in the *Sorensen* court's opinion).

173. Mace v. Webb, 614 P.2d 647, 649 (Utah 1980).

Gursky is the only reported decision giving a holding on the status of an AID child. Following settled concepts of the common law and interpreting New York's statutory enactments, the court held that the AID child was not the husband's legitimate issue. Nevertheless, the court applied the doctrine of equitable estoppel to make the husband liable for the support of the child because he had consented to the insemination. The *Gursky* court's reasons for its holding are persuasive. As the court noted, there was no statute in New York at that time changing the common-law concept of illegitimacy. In its statute New York had merely defined an illegitimate child as "a child born out of wedlock,"[174] and in turn had defined "a child born out of wedlock" as one born "out of lawful matrimony." The court said that reason and logic compelled the conclusion that these phrases also include children born to married women who bear children fathered by men other than their husbands. The *Gursky* court further noted that *Strnad,* the New York precedent which held the AID child legitimate, was totally without a basis in either case law or statute. The *Gursky* court, therefore, without persuasive case law to rely on, applied the common law and held that since the child was admittedly not sired by the wife's husband it was illegitimate.

The next New York case to mention the AID child's status, *In re Adoption of Anonymous,* rejected *Gursky* for three reasons: *Gursky* had been criticized; the child had not been "begotten" by a father other than the wife's husband; and the child had not been born "out of wedlock."[175] However, the criticism of *Gursky* cited by the *Adoption* court does not pertain to the law the *Gursky* court applied but rather to the commentator's personal views on policy. In fact, the commentator acknowledges that because "it is unreasonable to consider the husband as its natural father, a child conceived through AID would appear to come within the meaning" of the traditional definition of illegitimacy,[176] just as the *Gursky* court held. Because the *Gursky* court was applying the common law as the legislature had left it, the critic's personal feelings on policy are best addressed to the legislature, whose domain it is to make policy decisions, such as whether the AID child ought to be legitimate, and are not ger-

174. Gursky v. Gursky, 39 Misc. 2d 1083, 1086, 242 N.Y.S.2d 406, 409 (Sup. Ct. 1968) (quoting N.Y. GEN. CONSTR. LAW § 59 (McKinney 1951 (repealed 1962))).

175. 345 N.Y.S.2d at 434-35.

176. Note, *Artificial Insemination and the Law,* 1968 U. ILL. L.F. 203, 208.

mane to whether the AID child is legitimate.

To say that an AID child is not "begotten" by a father not the husband of the wife and that any begetting actually is done by the doctor who administers the procedure at best demonstrates the court's ignorance of the English language. "Beget" means "To procreate, to generate: usually said of the father, but sometimes of both parents,"[177] and "to procreate as the father; SIRE."[178] Reason, logic and science insist that the one procreating and siring is not the doctor but the donor, who is the child's natural father.[179] To say otherwise is to say that a female doctor who administers AID thereby sires children, but a male donor who provides the semen does not sire the children that result from the fertilization accomplished by his sperm. Such a statement is not logical and ignores the laws of nature, the one set of rules over which lawmakers have no authority.[180]

Finally, the term *out of wedlock* does not mean merely that the child is born to an unmarried woman as the *Adoption* court supposed. It means also that the mother and the father of the child are not married to each other, regardless of the mother's marital status.[181] Therefore, the *Adoption* court's conclusion

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177. OXFORD ENGLISH DICTIONARY at 766.

178. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 198.

179. *See supra* note 172.

180. Chuck v. Alves, 124 Cal. App. 2d 144, 146, 268 P.2d 94, 95 (1954); Anderson v. Joseph, 136 Cal. App. 2d 382, 288 P.2d 524, 526 (1955); Butticci v. Schindel Furniture Co., 152 Cal. App. 2d 165, 313 P.2d 62, 64 (1957); Chapman v. Redwine, 149 Colo. 515, 370 P.2d 147, 149-50 (1962); D. OAKS, UNRULY LAWS FOR LAWMAKERS 11 (1978) ("social legislation cannot repeal physical laws").

In Michael M. v. Superior Ct., 25 Cal. 3d 608, 601 P.2d 572, 159 Cal. Rptr. 340 (1979), *aff'd,* 450 U.S. 464 (1981) the California Supreme Court noted that it is a "changeless physical law" that "it is the female exclusively who can become pregnant," and males "are the *only* persons who may physiologically cause [pregnancy]." 25 Cal. 3d at 611-12, 601 P.2d at 574-75, 159 Cal. Rptr. at 342-43 (emphasis original). The court also noted that females are subject to greater risks in childbearing than males. "To hold otherwise defies not only common sense and reality, but the fundamental laws of biology." 25 Cal. 3d at 613, 601 P.2d at 576, 159 Cal. Rptr. at 344. The United States Supreme Court affirmed noting that "[o]nly women may become pregnant." 450 U.S. at 471. Thus these courts have recognized that there exist certain laws of reproduction that the courts are not free to ignore.

Therefore, if the testicle donor is the natural father of any children produced as a result of the testicle transplant even though the recipient performs all the normal acts of fatherhood, *a fortiori* although the doctor performs the act of insemination, the donor is the "begetter." Thus, the *Adoption* court's statement that the AID child is not begotten by a father not the wife's husband and that it is the doctor who does the begetting "defies not only common sense and reality, but the fundamental laws of biology." 25 Cal. 3d at 613, 601 P.2d at 576, 159 Cal. Rptr. at 344.

181. Williams v. Estate of Long, 338 So. 2d 563, 567 (Fla. Dist. Ct. App. 1976); Pur-

that the AID child is not born "out of wedlock" is without support in the common law. Thus, the *Adoption* court's reasons for finding the *Gursky* decision unpersuasive are based on incorrect interpretations of the law.

b. Conclusions on the status of the AID child. AID results in the birth of a child that is not the natural child of the woman's husband. Commentators are in general agreement that under the common law such a child is illegitimate.[182] None argues that the AID child is born legitimate. Instead they propose ways, short of legislation, by which the AID child can be made legitimate. Among these proposals are the husband's consent,[183] presumption of legitimacy[184] (aided by the matching of blood-types,[185] the falsifying of records,[186] and the Lord Mansfield rule[187]), estoppel,[188] the prerequisite of a finding of adultery to a finding of illegitimacy,[189] and public policy.[190]

Many commentators have limited their proposals to legitimate AID children to requiring consensual AID without realizing that the consent of the husband is irrelevant to the status of the child. They argue that the AID child should not be illegitimate if the husband freely consented to the procedure. However, unlike adultery, which is an act, legitimacy is a status. Although the husband can be prevented from raising a charge of adultery against his wife based on acts to which he consented, he cannot, by his mere consent, alter the legal status of the child, because consent is not and never has been an element in the finding of the status of legitimacy. Under common law, legitimacy is deter-

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sley v. Hisch, 119 Ind. App. 232, 85 N.E.2d 270 (1949); State v. Coliton, 73 N.D. 582, 17 N.W.2d 546 (1945); Commissioner of Public Welfare v. Koehler, 284 N.Y. 260, 30 N.E.2d 587 (1940); Fitzsimmons v. DeCicco, 44 Misc. 2d 307, 253 N.Y.S.2d 603, 605-06 (Fam. Ct. 1964); 1 S. SCHATKIN, DISPUTED PATERNITY PROCEEDINGS § 1.02 (1980).

182. *E.g.*, H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 5.1, at 157 (1968); R. SNOWDEN & G. MITCHELL, THE ARTIFICIAL FAMILY 17, 36 (1981).

183. Biskind, *Legitimacy of Children Born by Artificial Insemination*, 5 J. FAM. L. 39, 44 (1965); Kinney, *supra* note 1, at 515; Comment, *supra* note 1, at 1075-76.

184. Kinney, *supra* note 1, at 515; Shaman, *Legal Aspects of Artificial Insemination*, 18 J. FAM. L. 331, 334-35 (1980); Verkauf, *supra* note 24, at 302-03; Comment, *supra* note 149, at 1075.

185. Kinney, *supra* note 1, at 515; Comment, *supra* note 1, at 1076.

186. W. FINEGOLD, *supra* note 6, at 75; Guttmacher, *supra* note 5, at 775; Comment, *supra* note 1, at 1076.

187. LoGatto, *supra* note 21, at 1080; Comment, *supra* note 1, at 1076.

188. Comment, *supra* note 1, at 1076.

189. Smith, *supra* note 121, at 143.

190. Comment, *supra* note 149, at 1076; Shaman, *supra* note 184, at 336.

mined entirely by the marital status of the child's parents,[191] not by whether the mother's husband consented to the child's conception.

The presumption that a child born to a married woman is legitimate is the most often cited proposition for legitimating AID children. However, in the instance of AID this presumption is not as useful as its proponents might hope. The presumption can be rebutted by showing that the husband is impotent, no intercourse between the husband and wife took place, the child is of a different race, blood tests positively exclude the husband as the father, the husband was not present at the time of the conception, or the husband is sterile.[192] Because by definition AID always means conception without use of the husband's sperm and is most commonly used because of the husband's sterility as established by competent medical evidence,[193] it should not be difficult to rebut the presumption that the husband fathered the child by reference to the evidence establishing that AID was used.

The use of AIM, a process by which the husband's semen is combined with the donor's semen, will not significantly strengthen the presumption. Even if AIM should be used—despite an agglutination problem—and should conception occur, one commentator has pointed out that only a person with a "cerebral weakness" could presume that the husband's sperm, whose ineffectiveness resulted in the couple's use of AIM, could overcome the competition of the donor's sperm and be that which caused fertilization.[194] This is emphasized by the fact that only a very small amount of the husband's sperm is even used in AIM due to the agglutination problem.[195]

Matching bloodtypes will not strengthen the presumption either. Recent advances in bloodtyping make it exceedingly un-

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191. *E.g.*, H. CLARK, *supra* note 182, § 5.1, at 156. Because legitimacy of the AID child does not depend on the husband's consent, agreements such as that used by George Washington University's Department of Obstetrics and Gynecology, which provides that AID children are the husband's legitimate "heirs of his body" if he consents to the procedure, D. SHARPE, S. FISCINA & M. HEAD, CASES AND MATERIALS ON LAW AND MEDICINE 864-65 (1978), may be to this extent invalid.

192. Warren v. State, 26 Ala. App. 284, 158 So. 770 (1935); Biskind, *Legitimacy of Children Born by Artificial Insemination*, 5 J. FAM. L. 39, 39 (1965); Verkauf, *supra* note 24, at 303.

193. *See supra* note 9.

194. Tallin, *supra* note 2, at 7.

195. *See supra* note 3.

likely that a donor could be found with a bloodtype sufficiently similar to that of the husband to avoid the conclusive exclusion of the husband's paternity of the child by bloodtyping. The new bloodtype tests can exclude the possibility that the husband is the father of the AID child with up to 99.9% accuracy.[196]

The suggestion that the presumption of legitimacy can be strengthened by listing the husband as the father of the AID child on the child's birth certificate is an invitation to commit an unlawful act.[197] It has nevertheless been suggested by one writer that although "it is dishonest and illegal for [the doctor] to claim the husband as the father on the birth certificate," this is merely a "white lie," "a kindly, humane act," "the type of offense in which the good accomplished completely neutralizes the infraction of a law."[198] Such proposals should not be taken seriously. Lawyers who advocate such action violate the ethics of the legal profession.[199]

It should also not be overlooked that the presumption of legitimacy is never more than a presumption. It is a rule of evidence, not a substantive law or a sacred truth. Indeed, the presumption is often wrong, as are many assumptions made without benefit of all the available facts. English courts have recognized that "[t]here is nothing more shocking than that injustice should be done on the basis of a legal presumption when justice can be done on the basis of fact."[200] The United States Supreme Court

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196. Beautyman, *Paternity Actions—A Matter of Opinion or a Trial of the Blood?* 4 J. LEGAL MED., April 1976, at 17, 19-20. There are no less than 62 immunologic and biochemical systems that can be tested to determine paternity. *Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 FAM. L.Q. 247, 252 (1976). If only 50 of these systems are tested there are at least 2.469922957 x 10^{31} possible genotypes that can be distinguished. S. SCHATKIN, *supra* note 150, § 8.04, at 8-5. There are, however, less than 5.0 x 10^{9} human beings living today representing something less than 1.0 x 10^{-21} of the possible genotypes. Therefore, the possibility that the husband and the donor will have sufficiently similar bloodtypes so that none of the 50 tests will exclude the husband as the father is essentially nonexistent.

Despite the joint AMA-ABA recommendation and the "high" reliability of these tests, State v. Meacham, 93 Wash. 2d 735, 737-38, 612 P.2d 795, 797 (1980), courts are not rapidly adopting these tests to determine paternity either because their state statutes at present prohibit positive proof of paternity through bloodtyping, J.B. v. A.F., 92 Wis. 2d 696, 285 N.W.2d 880 (1979), or they are not convinced that the tests are entirely reliable at present, Phillips v. Jackson, 615 P.2d 1228 (Utah 1980).

197. *E.g.*, UTAH CODE ANN. § 26-23-5 (Supp. 1981).

198. W. FINEGOLD, *supra* note 6, at 75.

199. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(2), (3), (4), 7-102(A)(7) (1978). *See id.* DR 7-102(B) and MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(b) (Final Draft 1981).

200. H. v. H., [1966] 1 All E.R. 356, 357.

has also recognized that "[t]he need to develop *all* relevant facts in the adversary system is both fundamental and comprehensive."[201] "[P]resumptions as to facts should be only a reasonable substitute for definite proof; in other words, they should point to probabilities."[202] To ignore relevant facts when they are available in favor of an unproven assumption, as is done by resorting to the presumption of legitimacy in the face of AID, violates this principle.

It is for this reason also that many courts have rejected the Lord Mansfield rule, the only purpose of which is to prevent the persons who have the best and most accurate knowledge of the facts from testifying as to those facts.[203] Nevertheless, some courts cling to the rule. They continue to suggest that the rule is based on decency, morality and public policy. However, as Wigmore indicates, there is no truth in this suggestion.[204] The Lord Mansfield rule applies only to prohibit testimony concerning the specific fact of nonaccess. Testimony concerning other facts that would also establish illegitimacy are admissible. Certainly decency is not enhanced by prohibiting testimony of nonaccess when parents may bastardize their children by testifying to other indecent acts. No court has ever explained why it is decent for a man to testify in graphic detail concerning his spouse's specific acts of sexual immorality but indecent for him to testify to his prolonged absence from the state.[205]

Nor have courts explained why it is moral for parents to bastardize their children by testifying that they were never married or that one of them was already married to someone else, yet immoral to accomplish the same end by testimony of nonaccess.

> The truth is that these high-sounding "decencies" and "immoralities" are mere pharisaical afterthoughts invented to explain a rule otherwise incomprehensible, and lacking support

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201. United States v. Nixon, 418 U.S. 683, 709 (1974).

202. United States *ex rel.* Exarchou v. Murff, 265 F.2d 504, 506-07 (2d Cir. 1959).

203. Wake County *ex rel.* Manning v. Green, 279 S.E.2d 901, 904-05 (N.C. App. 1981); Maxwell v. Maxwell, 15 Mich. App. 607, 613-14 nn.11, 14 & 15, 167 N.W.2d 114, 117-18 nn.11, 14 & 15 (1969) (lists of jurisdictions not following the rule); Annot. 49 A.L.R.3d 212, 258-64 (1973).

204. 7 J. Wigmore, *supra* note 158, § 2064(b).

205. Annot., 49 A.L.R.3d 212, 231 & n.12 (1973). *See also* Lopes v. Lopes, 30 Utah 2d 393, 396-98, 518 P.2d 687, 690-91 (1974) (Ellett, J., concurring and dissenting). Justice Ellett's cogent concurring and dissenting opinion adequately discredits the majority's reasons for adopting the rule. *Id.*

> in the established facts and policies of our law. There never was any true precedent for the rule; there is just as little reason of policy to maintain it.[206]

Furthermore, one court has pointed out that courts which uphold the rule do so without any concern for the "undoubted right of a husband to disown a child begotten of the wife during wedlock of which he is not the father."[207] Because the husband knows best where he was when the child was conceived, to prevent his testimony on his whereabouts unjustly deprives him of possibly the only and certainly the best facts at his disposal to prevent himself with being saddled with the support of a child he did not father nor agree to have conceived. Thus, the Lord Mansfield rule is baseless and should not be employed in the AID context.

The doctrine of estoppel will make a consenting husband responsible for the support of an AID child,[208] but will not render such a child legitimate. Estoppel is an equitable remedy used to prevent injustices, not to declare the consequences of the law void. Thus in the *Gursky* case, despite a holding that the child was not the husband's legitimate issue, the court imposed upon the husband the support of the child to whose conception he had agreed.

There is no merit in the suggestion that there must be a finding of adultery before there can be a finding of illegitimacy. Single women can give birth to illegitimate children even though they have not committed adultery. Similarly, if a husband consents to his wife's act there can be no adultery, but his consent will not change the child's status.

Finally, if public policy nevertheless demands that the AID child be born legitimate it is for legislatures, not courts, to change the law.

There seems to be no doubt that the common law will find the AID child to be illegitimate. The proposals advanced to make the AID child legitimate, short of legislation, are weak, illogical, or not based on the law. Nineteen of the twenty states to enact AID statutes have either declared the AID child to be le-

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206. 7 J. WIGMORE, *supra* note 158, § 2064, at 483.

207. Moore v. Smith, 178 Miss. 383, 392, 172 So. 317, 320 (1937).

208. L.M.S. v. S.L.S., 105 Wis. 2d 118, 312 N.W.2d 853 (Ct. App. 1981); People v. Sorensen, 68 Cal. 2d 280, 437 P.2d 495, 501, 66 Cal. Rptr. 7, 12-13 (1968); Gursky v. Gursky, 39 Misc. 2d 1083, 1088, 242 N.Y.S.2d 406, 411 (1963); Note, *Artificial Insemination—Upon Whom Shall the Duty to Support Rest?*, 17 DEPAUL L. REV. 575 (1968).

gitimate or the husband to be the child's natural father. The only appropriate way around common-law illegitimacy is for the other thirty-one state legislatures to follow this lead.

C. *Contracts for Surrogates*

Nearly twenty percent of the couples in the United States are incapable of having children; sixty percent of these couples are childless because the wife cannot conceive.[209] While in years past such couples were usually able to adopt children, adoption has become more and more difficult. Fewer children are available for adoption because of the increased use of contraceptives and abortion, and the decreased stigma of raising an illegitimate child.[210] Today a couple may wait up to eight years to adopt one of the few children that is put up for adoption.[211] Because of these difficulties, an alternative for an increasing number of couples has been to find a surrogate mother to bear a child for them.

A surrogate mother is a fertile woman who agrees to be inseminated with the sperm of a man whose wife is unable or unwilling to conceive and bear a child herself. The surrogate mother agrees to carry the baby to term and upon its birth to surrender to the infertile couple all parental rights to the child. The husband then announces his paternity of the child and he and his wife petition a court to allow the wife to adopt the child. Surrogate mother agreements typically include provisions for the payment of the surrogate's medical expenses by the adopting couple. In addition to the payment of medical expenses, a substantial compensation is usually paid to the surrogate.[212]

It is the additional compensation paid to the surrogate

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209. Griffin, *Womb for Rent*, STUDENT LAW., April 1982, at 28, 29.

210. Turano, *Black-Market Adoptions*, 22 CATH. LAW. 48, 48-59 (1976).

211. Griffin, *supra* note 209, at 29; Note, *Surrogate Mothering: Medical Reality in a Legal Vacuum*, 8 J. LEGIS. 140, 141 (1981).

212. Black, *Legal Problems of Surrogate Motherhood*, 16 NEW ENG. L. REV. 373, 374 (1981). Noel Keane, counsel for the plaintiffs in *Doe v. Kelley*, has published a nearly identical article. Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U.L.J. 147. Mr. Keane's version of the article does not include the sentence on substantial compensation. Mr. Keane does, however, admit in his recent book that money is one of the reasons women choose to become surrogate mothers. N. KEANE & D. BREAO, THE SURROGATE MOTHER 16, 18-19 (1981). A survey made by Dr. Phillip Parker, a psychiatrist at Wayne State University in Detroit, shows that 80% of those who apply to be surrogate mothers require some type of fee. "They [see] surrogate motherhood as a chance to earn income for their families while rediscovering their joy in being pregnant." Sobel, *Surrogate Mothers: Why Women Volunteer*, N.Y. Times, June 29, 1981, at B5, col. 2.

mother that is the real problem in contracts for surrogate motherhood, as is clearly shown by the only reported case to date that deals with a surrogate mother contract—*Doe v. Kelley*.[213] As set forth above, Mary Roe agreed for $5,000 to be inseminated with John Doe's sperm, to carry and deliver John's baby for the Does, to acknowledge John as the child's father, and to consent to the adoption of the child by the Does. The Does and Mary brought suit to declare Michigan statutes prohibiting payment beyond court-approved expenses for child adoption to be void for vagueness and invalid as violative of their constitutional right of privacy. The trial court found that the statue was sufficiently clear to give notice to those to whom it was directed and that contracts for the placing of children for adoption for a valuable consideration are not within the protection of the right of privacy. The Michigan Court of Appeals affirmed the decision.[214]

Despite the holding in *Doe v. Kelley*, proponents of the surrogate mother contract continue to maintain that the surrogate mother deserves pay for her acts.[215] However, the reasons advanced to sustain the need for payment to the surrogate mother do not withstand scrutiny. Contracts that provide for a surrogate mother to receive compensation for putting her child up for adoption should be void and unenforceable as violative of both law and public policy.

1. Constitutional Rights

a. The fundamental right argument. Proponents of the surrogate mother contract argue that the right to hire or be a surrogate mother is guaranteed by the constitutional right of privacy, which includes the right to freedom of choice in child bearing,[216] and that therefore statutes which forbid the paying of compensation above the medical expenses of surrogates are unconstitu-

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213. 1979-81 Rep. Hum. Reproduction & L. (Legal-Med. Stud.) II-B-15 (Mich. Cir. Ct. 1980) (No. 78 815 531 CZ), *aff'd*, 106 Mich. App. 169, 307 N.W.2d 438 (1981). *See supra* notes 67-72 and accompanying text.

214. 106 Mich. App. 169, 307 N.W.2d 438 (1981).

215. Black, *supra* note 212, at 389; Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U.L.J. 147.

216. The Supreme Court has held that this right includes several particular rights: Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) (no state interference with right to purchase contraceptives); Roe v. Wade, 410 U.S. 113 (1973) (limits state interference with right to abortion); Skinner v. Oklahoma, 316 U.S. 535 (1942) (no state interference in violation of equal protection with ability to reproduce).

tional.[217] This conclusion is based primarily on the assumption that such statutes in effect prevent couples from exercising their fundamental right to procreate. However, the right of privacy relative to procreation as guaranteed by the Constitution is the right of the individual to be free from state interference with the decision whether to bear or beget a child.[218] It is not a guarantee of state assistance in exercising that fundamental right.[219] The state statutes in question do not prevent a childless couple from bearing or begetting a child. These statutes merely control the means by which a couple denied children by nature may obtain a child that is not their own by limiting payment to those who would give up their children. It is nature, and not the state, which frustrates an infertile couple's desire to bear or beget a child. Because there is no positive right to a child,[220] but only a negative right to be free from state intervention in the exercise of one's own right to procreate, the state violates no provision of the Constitution by prohibiting payment for the surrender of parental rights in a surrogate mother contract.

Furthermore, adoption is purely a statutorily created privilege unknown at common law.[221] Denying the surrogate mother compensation for adoption does not deprive the couple of a constitutionally protected right they otherwise would have enjoyed. Moreover, in the surrogate mother situation compensation is given not for the exercise of a constitutionally protected right to bear a child, but for the unprotected action of giving up a human baby into the care of someone else.

Any fundamental rights in the surrogate mother situation are held mainly by the surrogate mother. It is she who procreates, and who is therefore protected from interference by the state with her personal right to bear a child. That one may have a certain fundamental right, however, does not mean that one has a concomitant right to demand compensation in connection with the exercise of that right. For example, one's right to vote is not impinged by the state if the state conditions that right upon nonacceptance of payment for its exercise. Any argu-

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217. Black, *supra* note 212, at 387-92; Keane, *supra* note 215, at 161-66.

218. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

219. *E.g.*, Harris v. McRae, 448 U.S. 297 (1980) (no right to have government pay for abortion).

220. Poe v. Gerstein, 417 F.2d 787, 796-97 (5th Cir. 1975) (no guarantee of reproductive opportunity); Murray v. Vandevander, 522 P.2d 302 (Okla. Ct. App. 1974) (husband has no right to fertile wife).

221. Anguis v. Superior Court, 6 Ariz. App. 68, 429 P.2d 702, 706 (1967).

ment that state denial of payment for adoption somehow interferes with the surrogate's exercise of her rights is therefore misplaced. The state does not interfere with her decision to be a mother—to conceive and bear a child—it merely prevents her from profiting from the sale of her children. Because the Constitution does not guarantee a right to sell one's children, the state does not violate the surrogate mother's constitutional rights.

b. The equal protection and due process arguments. It is also argued that there is a denial of equal protection and due process under the Constitution in the state's denial of compensation to the surrogate mother. This argument rests on two grounds: the surrogate mother should not be treated differently than the surrogate father[222] and states cannot impose unequal conditions for the exercise of state-created rights.[223]

Those who advance the argument that surrogate mothers must be allowed compensation because "surrogate fathers" are allowed compensation misperceive the facts. Surrogate mothers and surrogate fathers perform fundamentally different acts. The surrogate father is a sperm donor, who does no more than give up a few milliliters of seminal fluid.[224] The surrogate mother, under present technology, conceives, bears, and surrenders a living child resulting from the union of her own ovum and the husband's sperm. The true analog to the sperm donor is the ova donor, a woman who gives up her ova to be carried to term by another woman.[225] Were men capable of bearing children and allowed compensation for doing so while women were denied compensation for the same act, then there would be a denial of equal protection. Or were women giving up their ova denied compensation while men giving up their sperm were allowed compensation, there would also be a denial of equal protection. But an argument based on an analogy between the sperm donor and the surrogate mother is invalid because it compares acts that are not

222. Black, *supra* note 212, at 392; Griffin, *supra* note 209, at 31; Keane, *supra* note 215, at 166.

223. Black, *supra* note 212, at 391; Keane, *supra* note 215, at 165.

224. In L.M.S. v. S.L.S., 105 Wis. 2d 118, 312 N.W.2d 853 (Ct. App. 1981) the "sperm donor" did more than simply donate sperm; under the direction of the husband he had actual intercourse with the wife.

225. Ova donation is not currently being used. *See* Note, *supra* note 211, at 141-42 & nn. 14-16. It should be noted that in reproduction men perform a single function, production of sperm, but women perform two distinct functions, production of ova and incubation of the fertilized ova. An ova donor would perform only the first of these functions. The ova donated would be incubated by another woman, the wife.

analogous. A surrogate mother is not a mere "ovum donor."[226] She is a "baby donor." Thus, the equal protection argument fails for improper analogy.

A related argument is that it is inconsistent to allow payment to a doctor for medical services and to donors for blood or body organs while prohibiting payment to a surrogate mother.[227] This argument, however, is not logical. Doctors are paid to perform medical functions under the supervision and permission of state regulation. Surrogate mothers do not perform any such acts under the direction of the state. They merely perform the same acts for which other mothers are neither regulated nor paid. In addition, the state does not allow doctors to traffic in human beings any more than it allows surrogate mothers to traffic in human beings. Babies are not mere body organs.[228] They are live, autonomous human beings. Unlike mere organs, they are not objects which can be bought and sold.[229]

The second equal protection argument maintains that states unequally impose conditions for exercising state created rights by prohibiting payment in connection with an adoption. It is maintained that since the state monopolizes the means of adop-

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226. Keane and Black refer to the surrogate mother as a mere "ovum donor" but misuse the term. Black, *supra* note 212, at 380; Keane, *supra* note 215, at 153; N. KEANE & D. BREAO, *supra* note 212, at 21-22, 136-37 (1981). *See supra* note 225.

227. Griffin, *supra* note 209, at 31.

228. For a good exposition of the issues surrounding the treatment of the human body and its contents as items of commerce see R. SCOTT, THE BODY AS PROPERTY (1981).

Not all countries are as liberal as the United States in permitting commerce of body parts. "[T]he prevailing climate of official European opinion is one that flatly opposes commerce. In its model rules of both 1978 and 1979, the Council of Europe recommended outlawing profit-making activities concerned with removal, use, and transport of human tissues." *Id.* at 180. The Council of Europe's model codes regulating tissue removal do not extend to reproductive tissues, however. *Id.* at 74. Instead, the Council has proposed to separate recommendations for artificial insemination and related activities. *Id.* at 206. Despite the fact that semen donors everywhere are being paid, *id.* at 211, among the Council's recommendations is that semen donors not be paid. *Id.* at 206, 211. Even in the United States commerce of body parts is not totally accepted nor is it without its critics. *Id.* at 181-82.

229. Furthermore, although the United States permits the sale of blood and body organs, *id.* at 179-97, reproductive tissues and fluids present special considerations.

> The implications of artificial insemination . . . are of a separate kind from [dominion over body material] because they refer to the status of people who will be brought into existence by unusual and unprecedented methods . . . . Artificial insemination . . . and all other uses to which eggs and donated sperm can be put for reproductive purposes should be the focus of separate guidelines.

Id. at 252-53. *See* R. SNOWDEN & G. MITCHELL, THE ARTIFICIAL FAMILY 71 (1981). It may, therefore, be incorrect to apply the same guidelines to the use of reproductive tissues and fluids as are applied to the use of other tissues and organs.

tion, a purely statutory right,[230] it is a denial of due process and equal protection not to allow surrogate mothers to be compensated in connection with an adoption.

This argument, like the others, rests on a fundamental misperception. It ignores the fact that there could be a denial of equal protection only if there were no countervailing state interest of sufficient import.[231] The state's interest in preventing possible harms and abuses in selling children certainly is an important countervailing state interest.[232] Furthermore, no one is deprived of due process or equal protection by the state's prohibition of payment for an adoption. To require payment for the exercise of certain state created rights may violate equal protection,[233] but to disallow payment is no violation. Conditioning the exercise of a right on the payment of a fee discriminates between the rich and the poor. Conditioning the exercise of a right upon nonpayment does not so discriminate because rich and poor alike are prohibited from receiving pay when exercising the state-created right. Such a prohibition's only effect on the surrogate mother arrangement is to deny the surrogate compensation. If the number of surrogates is thereby decreased it will be only because surrogates act out of economic motives. If the exercise of a right is conditioned on nonpayment, one may be less inclined to exercise that right, but one is not thereby foreclosed from exercising it.[234]

c. *The vagueness argument*. It is argued that denial of compensation for an adoption is unconstitutional because the statutes fail to specify exactly what things are forbidden as payment in connection with an adoption. This argument was answered by

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230. "Adoption . . . was unknown at common law and exists as a creature of statute which must be strictly construed." Anguis v. Superior Ct., 6 Ariz. App. 68, 429 P.2d 702, 706 (1967).

231. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 258-59 (1974); Dunn v. Blumstein, 405 U.S. 330, 335 (1972); Boddie v. Connecticut, 401 U.S. 371, 377, 380-81 (1971).

232. Turano, *supra* note 210, at 56-58.

233. *E.g.*, Boddie v. Connecticut, 401 U.S. 371 (1970) (fee required for access to courts for divorce stricken); Griffin v. Illinois, 351 U.S. 12 (1956) (fee for trial transcript for state guaranteed appeal stricken for indigents).

234. *C.f.* Harris v. McRae, 448 U.S. 297 (1980). In *Harris* the Supreme Court decided that although a woman has a fundamental right to obtain an abortion, she does not have a right to compel the state to give her the funds to pay for her exercise of that right. Similarly, although the surrogate mother may have a fundamental right to procreate, she does not necessarily have the right to demand payment in connection with the exercise of that right.

the court in *Doe v. Kelley*. The statute in question was held sufficiently clear to warn a person of normal intelligence what things were forbidden. Quoting the United States Supreme Court in *American Communications Association v. Douds*,[235] the *Kelley* court stated that an overactive imagination can always conjure up arguments in which the meanings of words will be put into question. "The applicable standard, however, is not one of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed."[236] Thus it is not necessary that the statute give detailed lists of allowed and disallowed compensation for an adoption, but only that there be fair notice to persons of normal intelligence that beyond certain court-approved expenses no payment will be allowed. Therefore, the vagueness argument attempts to circumvent the obvious intent of the law—to prevent the commercialization of the transfer of custody of human beings.

2. *Are Surrogate Mothers Selling Babies or Services?*

It is also argued that surrogate mothers are not really selling babies.[237] Proponents of this argument reason that the policies underlying denial of payment for adoption are inapplicable to the circumstances of surrogate motherhood because surrogate motherhood promotes rather than hinders the main objective of the general rule against the sale of children—the promotion and protection of the family unit. This argument maintains that the surrogate mother is not selling her child but is merely providing a valuable service.

a. In support of families. Surrogate motherhood for pay is said to support the family and therefore to differ from baby buying. In the dramatized baby-buying situation an involuntarily unwed mother, under the direction of mercenaries and compelled by poverty, gives up her illegitimate child to biologically unrelated adoptive parents whose fitness as parents has not been ascertained, thereby disrupting the potential parent-child relationship contrary to the mother's wishes. In contrast surrogate motherhood for pay is supposed to have few of these evils.[238] It

235. 339 U.S. 382 (1950).

236. *Id.* at 412.

237. Black, *supra* note 212, at 380; Keane, *supra* note 215, at 154.

238. Black, *supra* note 212, at 384; Keane, *supra* note 215, at 158.

is said that the adoptive couple gets a child as biologically related as possible, produced by conscious prearrangement. Presumably the surrogate willingly gives up the child to a home prepared for it. Thus, it is maintained, the family is strengthened.

This argument ignores reality. The evils of baby-buying outlined above are that the child is illegitimate, the child's mother was involuntarily pregnant and economically motivated to give up the child, the adoptive parents are biologically unrelated to the child, the child is removed from its real mother, the adoptive parent's fitness is unascertained, and the mother feels guilt and pain in giving up the child. The question is how many of these evils are present in the surrogate mother situation. As explained above, in the absence of a statute to the contrary, the surrogate AID child is born illegitimate. The child is not biologically related to the adoptive mother. Even proponents of payment for surrogate motherhood admit the surrogate mother's mercenary motives.[239] The child is removed from its biological mother. No one ascertains the adoptive parents' fitness beyond the fact that they can afford the surrogate's fee.[240] The surrogate mother often feels guilt and pain in giving up her child.[241] Thus, although it is maintained that few of the baby-buying evils are present in the surrogate situation the truth is that few are *not* present. It follows that the laws and policies prohibiting the sale of babies should apply equally to the surrogate mother situation.

b. Providing services or babies? An extension of the family-promoting argument is that the surrogate mother is paid not for her consent to the adoption of her child but for her prior services in producing the child. Thus, because it is not illegal to become pregnant and carry a baby to term, the surrogate mother is arguably performing a valuable and legal service. The fact is, however, that the contracting childless couples do not pay the surrogate merely to become pregnant. A couple contracts with a surrogate mother in order to get legal custody of the child the surrogate mother produces. Thus the "services" the surrogate mother provides and for which she is paid include giving up the child after its birth. She is being paid to consent to the adoption of her child no matter how the transaction is structured.

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239. Black, *supra* note 212, at 380, 382, 386; Keane, *supra* note 215, at 153, 156, 160.

240. Turano, *supra* note 210, at 51.

241. A survey by Dr. Phillip Parker convinced him that surrogate mothers need professional counseling to deal with their feelings of loss after giving up the children they bear. Sobel, *supra* note 212, at B5, col. 5.

3. *Is There Adoption for Pay within Families?*

a. Family contracts for adoption. It is argued in favor of pay for surrogate mothers that adoptions by a family member in exchange for valuable consideration have been upheld as not violative of public policy. However, such cases are easily distinguishable from the surrogate mother contract.

One of the earliest cases relied on is *Enders v. Enders*.[242] In that case an estranged wife agreed to allow the paternal grandfather of her two-year-old son to take the child and educate him—the boy to live with the grandfather until he was of age, the mother to visit him and have him in her home at any time. The grandfather also agreed to pay the mother $20,000 and the boy $10,000 when he was of age. The child lived with his grandfather and there were frequent visits with his mother. Then the grandfather died suddenly without paying either the mother or the grandson. The mother brought suit to obtain the promised funds. The Supreme Court of Pennsylvania held that "the tendency of such contracts, between grandparents of good character and ample estate, and parents in reduced circumstances, where parental solicitude and affection are not extinguished, and where the welfare of the child is intended to be promoted, is neither to the injury of the public nor to good morals."[243] Furthermore, the court held that the payment was not contrary to public policy "because it contemplated no severance of the parental relation . . . and was wholly for the welfare of the child."[244] In contrast, the surrogate mother contract contemplates the severance of the parental relation and is motivated by the surrogate's economic needs and the adoptive couple's personal desires, not the child's welfare. Indeed, before the contract is negotiated there is no child for whose welfare the contract can provide. It is only the couple's desire and the surrogate's economic interest that bring the child into being.

In *Clark v. Clark*[245] a divorced mother contracted to give her daughter into the paternal grandfather's care in exchange for his promise to educate and care for the daughter and to provide financially for the mother. When the grandfather later refused any further payments to the mother she brought suit on

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242. 164 Pa. 266, 30 A. 129 (1894).
243. *Id.* at 273, 30 A. at 130.
244. *Id.* at 374, 30 A. at 131.
245. 122 Md. 114, 89 A. 405 (1913).

the contract. The Court of Appeals of Maryland relied on *Enders* to uphold the contract, noting that the court in that case had said that "the contract of a parent, by which he bargains away for a consideration the custody of his child to a stranger, . . . is void as against public policy. Such a contract would be the mere sale of a child for money. But this was a family compact."[246] Applying the *Enders* family compact concept to "the special facts of the case" the *Clark* court upheld the contract. Although it can be argued that the contract between the surrogate mother and the husband sperm donor is a "family compact,"[247] it is not the type of compact to which the *Enders* and *Clark* courts made reference: the husband and the surrogate mother are not a "family."

Perhaps the leading case on contracts for custody rights is *Reimiche v. First National Bank of Nevada.*[248] In a two to one decision the Ninth Circuit Court of Appeals held that it was not contrary to public policy "to enforce an agreement to provide for the mother of an illegitimate child in the putative father's will, incidental to an agreement to permit the adoption of the child by its father, where the adoption was in the best interests of the child and pecuniary gain was not the motivating factor on the mother's part."[249] In addition to *Enders* and *Clark* the *Reimiche* court relied on *In re Shirk's Estate.*[250] The *Shirk* court had "distinguished the case in which the child was surrendered for adoption to a stranger, holding that the 'instant case involves a family compact.' "[251] In *Shirk* the mother had given up her daughter to her mother, the child's grandmother, in exchange for a promise to care for the child and to make the child a one-third heir to the grandmother's estate. As the *Shirk* court noted, "by consenting to the adoption [the mother] reduced her share as a daughter and heir at law from one-half to one-third."[252] Thus, in neither *Reimiche* nor *Shirk* was pecuniary gain a motivating factor in the parent's decision to give up the child. In contrast, as the proponents of pay for surrogates admit, pecuniary gain is one of the motivating forces, if not the primary moti-

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246. *Id.* at 119, 89 A. at 407 (quoting 164 Pa. at 222-23, 30 A. at 130).
247. Black, *supra* note 212, at 385-87; Keane, *supra* note 215, at 159-61.
248. 512 F.2d 187 (9th Cir. 1975).
249. *Id.* at 189.
250. 186 Kan. 311, 350 P.2d 1 (1960).
251. 512 F.2d at 189 (quoting 186 Kan. at 324, 350 P.2d at 12).
252. 186 Kan. at 326, 350 P.2d at 13.

vating force, behind the surrogate mother's action.[253] *Reimiche* and *Shirk* do not stand for the broad proposition that payment for giving up custodial rights does not violate public policy. Indeed, each case specifically states that such payment is contrary to public policy, making a special exception only for close family compacts in the child's best interest, either without payment to the parent or when payment was not a motivating factor.

b. In the child's best interest. The above cases all mention that the court's true concern was for the child's best interest. "[T]he matter should not be viewed as if the child were a chattel, and . . . no one, not even a parent, has a proprietary right in the custody of a child. . . . [E]ven as between parents, the polestar is the best welfare of the child."[254] The *Restatement of Contracts* adopted this view for custody contracts.[255] The general rule announced by the *Restatement* is that "a bargain by one entitled to the custody of a minor child to transfer the custody to another person . . . is illegal unless authorized by statute."[256] The only exception to this rule is that "[a] bargain by one parent to transfer the custody of a minor child to the other parent . . . is not illegal, if . . . the bargain is for the welfare of the child."[257] Because custody of the child is not a property right

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253. Black, *supra* note 212, at 380, 382, 386; Keane, *supra* note 212, at 153, 156, 160.

254. Knight v. Deavers, 259 Ark. 45, 52, 531 S.W.2d 252, 256 (1976) (citations omitted).

255. Section 583 of the Restatement reads:

> Bargain for Custody of Minor Children.
>
> (1) Except as stated in Subsection (2) a bargain by one entitled to the custody of a minor child to transfer the custody to another person, or not to reclaim custody already transferred to such child, is illegal unless authorized by statute.
>
> (2) A bargain by one parent to transfer the custody of a minor child to the other parent or not to reclaim such custody is not illegal if the performance of the bargain is for the welfare of the child.

RESTATEMENT OF CONTRACTS § 583 (1932).

256. *Id.* § 583(1).

257. *Id.* § 583(2). The rule announced in the first restatement is continued in the drafts of the RESTATEMENT (SECOND) OF CONTRACTS. "A promise affecting the right of custody of a minor child is unenforceable on grounds of public policy unless the disposition as to custody is consistent with the best interest of the child." RESTATEMENT (SECOND) OF CONTRACTS § 333 (Tent. Draft No. 14, 1978). The only substantive change is that "[t]he requirement of the former [restatement] that the transfer of custody be from one parent to another [was] dropped in favor of a general requirement that the transfer be consistent with the best interest of the child." *Id.* Reporter's note. The official comment notes: "the fact that the person to whom the custody is transferred is a parent is an important, although not controlling, factor in showing that the transfer is in the interest of the child." Nevertheless, "the disposition is still subject to the plenary supervision of the court." *Id.* Comment.

which can be sold,[258] courts will not enforce the bargain if money, instead of the child's welfare, is the motivation behind the deal.

It is difficult to see the logic of the claim that the child's interest can best be served by allowing compensation to the sur-

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Two cases cited by the RESTATEMENT (SECOND) illustrate the court's evaluation of the child's best interest in custody transfer contracts. In Catholic Charities v. Harper, 161 Tex. 21, 336 S.W.2d 111 (1960), a child-placing agency accepted from a young mother an instrument surrendering her custodial authority over her two young children. The mother agreed also to the adoption of her children if the agency could place them. A month later the mother remarried. The following month the agency was able to place the children with a foster family. A month thereafter the mother withdrew her consent for the transfer of custody and adoption. The agency refused to return the children. The Supreme Court of Texas upheld the agency's refusal. The court noted that "the Legislature in enacting the adoption procedure . . . had uppermost in mind the safety, education, care and protection of the children . . . and not primarily the contentment or welfare of either the natural or the adoptive parents." *Id.* at 27, 337 S.W.2d at 114. The court then held that parents who have surrendered their children to a state licensed agency to place the children for adoption cannot revoke that consent except for fraud, misrepresentation, overreaching, or the like. The court said that to hold otherwise would be severely upsetting to the child, who would be bounced between families, never sure of where he would live or who would take care of him. Thus, the court concluded the best interests of the children required that they stay with the adoptive parents. *Id.* at 27-28, 337 S.W.2d at 114-15.

In Nelson v. Wilson, 97 S.W.2d 287 (Tex. Civ. App. 1936), a widower took two of his five children to his sister-in-law to be cared for when they contracted pneumonia. When another of the children became ill he also left that child with the sister-in-law. At that time he was cultivating his crop which made it difficult for him to look after the children by himself, so he asked his sister-in-law to take care of the other children also. In return for her promise to take care of all the children he gave her seventy-one acres of land. Many years later a Mr. Nelson, who claimed the same seventy-one acres under a subsequent deed from the father, sued to have the earlier conveyance set aside as violative of public policy. In upholding the earlier conveyance to the sister-in-law the Texas Court of Appeals noted that a "father has no property interest in his child, and that [a] contract transferring its permanent custody in consideration for property in return is against public policy and may not be enforced." *Id.* at 291. However, the court went on, such were not the facts of this case nor was the principle applicable here because it was the father who was giving the property and not the sister-in-law. The father "did what appears to have been to the best interest of his children, and is to be commended for that, but the law [would] not release him from his obligation" to his sister-in-law for the support of the children. *Id.*

Neither of these two cases adds support to the argument that surrogate mothers should be paid. Both are easily distinguishable. *Catholic Charities* did not involve any consideration to the parent for her consent to the transfer of custody and the adoption of her children was accomplished by the state licensed agency. Surrogate mothers on the other hand insist on payment and are not regulated by the state. In *Nelson* the consideration was given by the parent in giving up the child, not by the one receiving the child. In both cases the courts felt that it was in the child's best interest that custody be transferred.

258. Caruso v. Superior Ct., 2 Ariz. App. 134, 406 P.2d 852, 858 (1965); 15 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1744A (W. Jaeger 3d ed. 1972).

rogate mother because the child is not yet in existence when the surrogate mother contract is negotiated. Further, the object of the contract is not to provide for the welfare of some nonexistent[259] child but to provide for compensation to the surrogate for producing a child and surrendering it to the adoptive couple. However worded, the substance of the agreement is not to provide for the child's best interest but to provide the surrogate mother with some extra income and the adoptive couple with something for which they would otherwise have to wait years.[260] No one of the surrogate mother's acts would ever be contracted for without the last act of giving up the child. In essence all these acts constitute a single act, the ultimate goal of which is to turn the child over to the adoptive couple. The child itself becomes in reality an object of barter. Logic insists that it is not in the child's best interest to be the object of such a transaction. Because public policy demands that contracts for the transfer of custody only be upheld when they are in the child's best interest, surrogate mother contracts that allow for compensation to the surrogate mother beyond reasonable medical expenses should not be valid.

VI. Conclusion

AID raises significant legal issues. Applying the law as it stands today, nonconsensual AID by the wife may be the basis for a charge of adultery, the AID child is born illegitimate except in those states that have statutes specifically making the AID child legitimate, and contracts whereby a surrogate mother agrees to give up her child to an adoptive couple for compensation are contrary to public policy and void.

Brent J. Jensen

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259. "The issues of personal and social responsibility surrounding the care of people who already exist are very different from those surrounding the planned creation of a new individual." R. Snowden & G. Mitchell, The Artificial Family 71 (1981).

260. *Id.* at 78-79.