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George P. Smith II

*The Catholic University of America, Columbus School of Law*

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# For Unto Us a Child Is Born—Legally

**By George P. Smith II**

Both courts and legislatures have been loath to establish law in the field of human artificial insemination. As a result, the danger of criminal prosecution and the uncertainties of a legal vacuum face couples who must turn to artificial insemination to create a family. But the dark corner may have been turned, for one court decision and recent statutes in two states offer hope.

ACCORDING to several authorities, the number of children born in the United States through means of artificial insemination was approximately 100,000 in 1950. Yet today the estimate is that more than 250,000 such children live in the United States and perhaps another 100,000 in the other regions of the world.[1]

These figures are for children born of heterologous insemination or A.I.D. —which means, simply, they were born as the direct result of semen being secured from a third-party donor and subsequently injected through a syringe into their mother's reproductive tract. This procedure is necessitated primarily because the married woman's spouse is sterile. In some instances, however, it is employed because of physiological (genital) impediments, the desire to avoid the transmission of undesirable inheritable characteristics or the danger of improperly matched Rh blood factors.

The New York City Health Code and regulations of the city's board of health set rigid health standards that any prospective donor must meet. The donor is required to receive a complete physical examination as well as a venereal disease test before he is accepted. It even has been suggested that a geneticist, as well as a physician, examine the donor to assure that no genetic or other medical problem will arise. Only a licensed medical doctor may legally administer artificial insemination. No provisions legitimize the offspring.

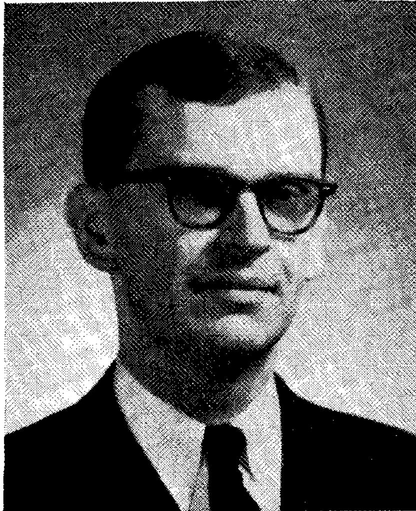
The opposite procedure to heterologous insemination is homologous insemination or A.I.H. Here, a husband's semen is taken and injected—by the same process—into his wife's reproductive organs. This is required most often because of physiological or genital obstructions that prevent the husband from completing the act of procreation. It is only with A.I.D. that legal questions arise.

## Public Polled About the "New" Biology

A recent Louis Harris opinion survey of the attitudes of 1,600 adults throughout the country to multiple aspects of the "new" biology (*i.e.*, artificial insemination) was both revealing and startling. Nineteen per cent of those interviewed approved of A.I.D., while 56 per cent disapproved of the process. Where heterologous insemination (A.I.D.) was the only method for a married couple to conceive a family, 35 per cent of those interviewed approved. Forty-nine per cent of the men interviewed agreed in principle with homologous insemination (A.I.H.), and 62 per cent of the women in the poll stated their approval of allowing their husband's semen to be used—through artificial injection—to inseminate them.[2]

Whether a child born as a result of artificial insemination is legitimate depends on whether his mother's impregnation did in fact constitute adultery. If so, then the child is held to be illegitimate; but, if not, the offspring's legitimacy cannot be legally questioned. So, adultery and illegitimacy are interre-

1. FINEGOLD, ARTIFICIAL INSEMINATION 58 (1964). See generally, Cowan, *Moral Creativity in Science and the Law*, 22 RUTGERS L. REV. 446 (1968). But see, Burger, *Reflections on Law and Experimental Medicine*, 15 U.C.L.A. L. REV. 436 (1968), where it is maintained that "it is not the role and function of the law to keep fully in pace with science".
2. LIFE, June 13, 1969, at 52 *et seq.* See generally, Smith, *Through a Test Tube Darkly: Artificial Insemination and the Law*, 67 MICH. L. REV. 127 (1968); Symposium, *Reflections on the New Biology*, 15 U.C.L.A. L. REV. 267 (1968).



George P. Smith II is an associate professor of law at the University of Arkansas School of Law. He earned his B.S. (1961) and J.D. (1964) degrees at Indiana University, and he taught law there and at the University of Michigan and the State University of New York before joining the Arkansas faculty.

lated issues which go to form a single question: Does a female who consents to artificial insemination commit adultery?

The California Supreme Court recently answered this question in the negative in *California* v. *Sorensen*, 66 Cal. Rptr. 7, 437 P. 2d 495 (1968). The court was considering a section of the California Penal Code that provides aid to needy children but imposes a criminal sanction on a "father" for failure to support a child. The child in issue was born through heterologous artificial insemination (A.I.D.), and the mother named her husband (Sorensen, the defendant in the support case) as the father on the birth certificate. For approximately four years prior to the couple's separation, the defendant represented to his friends that he was the child's father.

When they separated, Mrs. Sorensen told the defendant that she wanted no support for the child. Later, when the divorce was granted, the court retained jurisdiction on the issue of support for the minor. When a subsequent illness of Mrs. Sorensen necessitated public assistance for the minor child, the district attorney instituted this criminal action alleging the defendant's guilt for failure to support the child.

The court unanimously held that the term "father" must be construed broadly for purposes of the particular statute under which the present action was entertained; that the defendant was the lawful father of the child born to his former wife; that the child was conceived by an artificial insemination to which the defendant consented after fifteen years of marriage and a medical determination of his sterility; and that his acceptance of the child carried with it an obligation of support under pertinent California law.

The paternal role, the court observed, could not be limited to a biological or natural father as those terms generally are understood. Rather, in analyzing such a role, emphasis should be placed on the discovery of whether a legal relationship of father and child exists. Paternity, the court concluded, is established beyond a reasonable doubt when it is shown that a husband, unable to accomplish his parental objective of creating a child, purchases semen from a donor and proceeds to use it to inseminate his wife.

No valid public purpose, the court held, was to be served by stigmatizing an artifically conceived child as an illegitimate. This classification does not resolve the issue of the legal consequences that flow from the acts of the husband and wife. "Under our statute, both legitimate and illegitimate minors have a right to support from their parents."

## The Wisdom of Solomon

On the issue of adultery, the court spoke with the wisdom of Solomon when it held: "Since the doctor may be a woman, or the husband himself may administer the insemination by a syringe this is patently absurd; to consider it an act of adultery with the donor who at the time of insemination may be a thousand miles away or may even be dead is equally absurd."

The California court was careful to emphasize in its decision that it was merely construing a provision in a state statute and that the broad questions of legitimacy and succession should be answered by the legislature.[3] Limited though this decision may be, it is nonetheless a significant breakthrough in judicial reasoning.

Prior to the California Supreme Court's decision in *Sorensen*, a plethora of cases were uniform in their holdings that artificial insemination, homologous[4] or heterologous,[5] was unnatural (bad) and adulterous. Historically, adultery was condemned because it tended to introduce spurious heirs into a family, but more recently courts have found that a necessary element of adultery is the physical act of penetration by a male.[6] Section 255.17 of the New York Penal Law simply states that "A person is guilty of adultery when he engages in sexual intercourse with another person at a time when he has a living spouse, or the other person has a living spouse." If penetration is in fact the sole criterion of adultery, then artificial insemination by a donor

3. As to the complicated problems of inheritance, see Schuyler, *The New Biology and the Rule Against Perpetuities*, 15 U.C.L.A. L. Rev. 420 (1968).
The words of Justice Frankfurter, concurring in *May* v. *Anderson*, 345 U. S. 528, 536 (1952), are approriate to recall: "Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children."
Chief Judge Cardozo of the New York Court of Appeals wrote on the issue of legitimacy: "If husband and wife are living together in the conjugal relation, legitimacy will be presumed, though the wife has harbored an adulterer. . . .It may even be presumed though the spouses are living apart if there is a fair basis for the belief that at times they may have come together." *In re Findlay*, 253 N. Y. 1, 8, 170 N. E. 471, 473 (1930). See also, *Segure* v. *Culley*, 329 Ill. 458, 160 N. E. 847 (1928); *Moore's Case*, 294 Mass. 577, 3 N. E. 2d 5 (1936); Wigmore, Evidence § 2527 (2d ed. 1940).

4. *L.* v. *L.*, 1 All E. R. 141 (1949). The statute of 14 Geo. VI c. 25, § 9 (1951), abrogated the effect of this decision.

5. *Orford* v. *Orford*, 49 Ont. L. R. 15, 58 D.L.R. 251 (1921); *Doornbos* v. *Doornbos*, 23 Law Week 2308 (Superior Court, Cook County, Illinois, 1954); *Hoch* v. *Hoch*, Time, February 26, 1945, at 58 (case not officially reported); *Gurksy* v. *Gursky*, 39 Misc. 2d 1083, 242 N.Y.S. 2d 406 (Sup. Ct. 1948).

6. See *Wisconsin* v. *Roberts*, 169 Wis. 570, 173 N. W. 310 (1919); *Iowa* v. *Hasty*, 121 Iowa 507, 96 N. W. 1115 (1903); Note, *Social and Legal Aspects of Human Artificial Insemination*, 1965 Wis. L. Rev. 859.

cannot logically be held an act of adultery.

The judicial attitude toward artificial insemination has been tied to a rigid adherence to the principles of *stare decisis* and an exceedingly narrow frame of reference. This has been buttressed by the further belief that this is an area more properly to be considered by the legislature than the courts. For instance, in the *Gursky* case, 39 Misc. 2d 1083, 242 N.Y.S. 2d 406 (Sup. Ct. 1948), the New York court stated that this area was one into which the legislature should have entered, and since no statutory action had been taken to legitimize A.I.D. children, the court was unwilling to take the initiative. But in *Strnad* v. *Strnad*, 190 Misc. 786, 78 N.Y.S. 2d 390 (Sup. Ct. 1948), a New York court held that a child born as a result of A.I.D. was legitimate. In *Strnad*, however, it should be noted that the court was confronted with separation proceedings involving custody of a child conceived by means of A.I.D. The defendant-husband had consented to allow his wife to become inseminated, and the court accordingly found the defendant entitled to the same rights of visitation as those acquired by foster parents—arguing that, in essence, the defendant has adopted the child in question.

## Law and Science Should March Together

Instead of allowing law and science to march boldly forward together,[7] the courts and state legislative bodies have responded by remaining passively aloof, content to let the other act first. The result has been a vacuum.

Oklahoma has answered the call for sensible creativity and recently became the first state to assume a definitive position by authorizing the use of A.I.D. within the state and legitimizing children born as a result of the consensual use of this process.[8] It appears from the statute that an inseminated wife is protected against subsequent allegations of adultery that her consenting husband might raise under this law. No protection is afforded such a wife who—on her own initiative—submits to heterologous insemination without the consent of her husband.

Arkansas recently met the Oklahoma pace half way by adopting a bold provision in its inheritance laws that provides that any issue resulting from an act of artificial insemination performed on a married woman with the consent of her husband will be treated as the child of both spouses, with the consent of the husband being presumed unless clear and convincing evidence shows a contrary intent.[9]

Attempts to legislate in this area at the state level have failed consistently[10]—save the notable successes achieved in Oklahoma and Arkansas. With the progressive actions of a state judiciary and two state legislative bodies thus far, it can be hoped that a significant beginning has been made and that other states will become sensitive to the legal problems raised by artificial insemination and move to meet and resolve them. If others do not join in the work to be done, definite progress will never be achieved within this century, which beckons to a brave and noble new world.

The testing agents for resolving this area of critical legal dubitation are common sense and moral decency.

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7. But see Chief Justice Burger's caveat cited in note 1, *supra*.
8. Okla. Stat. Ann. tit. 10, §§ 551-553 (Supp. 1967).
9. Ark. Stat. Ann. § 61-103(b) (Supp. 1969). See generally Wright, *The New Arkansas Inheritance Laws: A Step into the Present with an Eye Toward the Future*, 23 Ark. L. Rev. 313 (1969).
10. See, *e.g.*, N.Y. Senate Bill 745 (1948); Virginia Senate Bill 199 (1948); Wisconsin Assembly Bill 407 (1949); N.Y. Senate Bill 778 (1949); Indiana House Bill 350 (1949); N.Y. Senate Bill 493 (1951). All of these bills sought to legitimize A.I.D. children born with the consent of the impregnated woman's husband, and all were defeated. In the 1969 session of the New York Assembly, this writer tried—unsuccessfully—to introduce similar legislation.


## American Bar Endowment Memorial Fund

The American Bar Endowment will periodically publish a list of those persons recently memorialized through the Memorial Fund. Those memorialized in the period September 1 through November 30 are as follows:

| | |
|---|---|
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| John J. Flynn | Thurman Arnold |
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