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of insanity is offered by the law, not as a sword, but as a shield to every man accused of crime. The allowance of a doctor-patient privilege to exist between a Government Psychiatrist and an involuntary ward of the state, is to convert this shield into a weapon of oppression.

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Natural Law and Artificial Insemination

In a divorce action involving the custody of a child born of artificial insemination by donor,¹ the Cook County Illinois Superior Court, Gorman, J., ruled that the child thus conceived is illegitimate. Judge Gorman also held that the practice of heterologous 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. Homologous artificial insemination,² on the other hand, wherein the semen of the husband is used rather than that of a third party donor, is not contrary to public policy and good morals and presents no legal problems.³

That this condemnation by Judge Gorman would not be condoned by all is evidenced by the following statement of one of the country's leading medical practitioners:

Physicians to the human race are, in comparison with physicians to dumb brutes, leagues behind in both scientific investigation and the successful practice of artificial insemination. To be sure, we are trammled by conventions, moral codes and frailties of human character, which never hinder the stockbreeder.⁴

Others are asking for a clarification of the legal position of the new procedure:

Artificial insemination is a modern procedure and it is time that society take a modern stand on the problem even though it may finally define it as illegal, to be considered in the same category as criminal abortion. At least any stand would constitute a bit of terra firma in a sea of uncertainty. However, it is unlikely that the procedure will be considered illegal in later years.⁵

Still other writers on the medical point of view declare that the need for heterologous artificial insemination is steadily diminishing. For example, Dr. Folsome puts it this way:

¹ Heterologous; usually abbreviated A.I.D.

² Homologous; usually abbreviated A.I.H.

³ *Doornbos v. Doornbos*, 23 U.S.L. WEEK 2308 (Dec. 13, 1954); *appeal pending*.

⁴ Guttmacher, *The Role of Artificial Insemination in the Treatment of Human Sterility*, 19 BULLETIN OF THE NEW YORK ACADEMY OF MEDICINE 576 (1943).

⁵ Abel, *The Present Status of Artificial Insemination*, 85 SURGERY GYNECOLOGY AND OBSTETRICS 528 (1947).

Let it be reiterated—if we, as physicians, were to spend as much time seeking more causes of relative infertility, as some do in seeking suitable donors, there would be much less necessity to utilize heterologous artificial insemination. As doctors, our function to our sterile patients is more correctly prevention and reparation, not substitution and temporization.⁶

The first case to present the problem of heterologous artificial insemination to the courts was *Orford v. Orford*.⁷ In its opinion, the court refused to accept the artificial nature of the insemination which had been pleaded by a wife charged with adultery in a divorce action in Canada. The court nevertheless went on to say that even if the wife's statement had been true, she would still be guilty of adultery. The essence of the offense, in the words of the court, is the "voluntary surrender by the guilty person of the reproductive power or faculties to one other than the husband or wife." (Emphasis added.) The court said that any act on the part of the wife which would introduce into the family of the husband a false stream of blood would be adulterous. Although this was obiter dicta it is quite interesting to note that the Canadian court was willing to go this far in defining artificial insemination by donor at such an early date.

The problem was first treated by a court in this country in 1945 when the *Hoch* divorce proceeding was presented before the Cook County Illinois Circuit Court.⁸ Here again the divorce plea was based on adultery by artificial insemination, but in this case the Illinois Circuit Court, Feinberg, J., ruled that artificial insemination was not a sufficient ground for divorce on the basis of adultery. The proceeding brought to light adulterous sexual relations in the ordinary sense, however, and the divorce was granted.

Early in 1948 the Supreme Court of New York County considered a separation suit which involved the question of custody of a child born of heterologous artificial insemination. The court, Greenberg, J., granted visitation rights to the defendant husband, saying that the evidence failed to show him to be an unfit guardian: "on the contrary, the evidence convinces me that the best interests of the child call for these modest visitations" (the husband was awarded visitation rights of five hours each Sunday). The court went on to say that the defendant should have the same rights of visitation as "a foster parent who has formally adopted a child," . . . and further: "this child is not an illegitimate child, . . . the situation is no different than that pertaining in the case of a child born out of wedlock who by law is made legitimate upon the marriage of the interested parties."⁹

Later in 1948 the English Probate Court was called upon to consider a

⁶ Folsome, *Status of Artificial Insemination: Critical Review*. 45 AMERICAN JOURNAL OF OBSTETRICS AND GYNECOLOGY 924 (1943).

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

⁸ *Hoch v. Hoch*, not reported; but see Chicago Sun, Feb. 10, 1945, Time, Feb. 26, 1945, p. 58, col. 2.

⁹ *Srnad v. Srnad*, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup.Ct. 1948).

similar problem as the one mentioned in the preceding paragraph. In *R. E. L. v. E. L.*¹⁰ the court granted the plaintiff-wife a decree *nisi* on the ground of her husband's incapacity to consummate marriage despite the fact that she had had a child by homologous artificial insemination. Here the court, Pearce, J., ruled that a decree of nullity would be had even though the result would be to bastardize the child.¹¹

A comparison of the foregoing cases indicates that the quantitative weight of authority represents the view that artificial insemination is adultery and produces an illegitimate child. But generally speaking those in the medical profession who have expressed their views in this regard prefer to wait for society to evolve an opinion as to the morality of the procedure. Can society properly be said to evolve moral principles? A look at Glover, *Artificial Insemination Among Human Beings*¹² would reveal otherwise:

For the members of the Christian Religion, no matter what may be their sect, morality is established by the Commandments of God, the teachings of Christ and the very nature of man as a rational creature. Society does not establish the moral code, it merely applies that code to particular cases and times. The principles concerning marriage and the sexual act have long since been given to man and by these principles and according to the teaching contained in them there can be no doubt whatever that hererologous artificial insemination is an immoral practice and an attack upon the unity of the marriage bond.

Conclusion

With the sparse amount of case and common law available to guide Judge Gorman, he has issued a fine decision in the *Doornbos* case. It should be recorded in the annals of our times as an excellent reflection of the natural law on a touchy and morally involved question—a question which encompasses legal, medical, moral, psychological, and social problems. We have described the pertinent case law that provided the historical background for this decision. And although bills dealing with artificial insemination and the legitimacy of the children born of this practice have been introduced in the legislatures of six states,¹³ none as yet has been passed.

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

ALBERT SIDNEY JOHNSTON, III

¹⁰ [1949] P. 211.

¹¹ *Id.* at 219.

¹² Glover, *ARTIFICIAL INSEMINATION AMONG HUMAN BEINGS* 60 (1948).

¹³ Indiana, Minnesota, New York, Ohio, Virginia and Wisconsin.