Medicolegal Considerations in Artificial Insemination

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From time immemorial man's power of reproduction has been one of the subjects of his most intense speculation and greatest concern. In olden times when fertility failed it was ascribed to the will of the Gods. It was not until comparatively modern times that it occurred to anyone that the intractable way of Nature could be moderated. Today, therefore, when nature's processes do not initiate a desired pregnancy, investigation is in order.

Authoritative studies indicate that at least one in every ten married couples fails to procreate and that this number is increasing. After deductions for those who voluntarily deny themselves parenthood we still have left a piteous portion of the population who are involuntarily sterile. Such appears to be the situation not only in America but all over the world.

Consequently, whatever can be done to alleviate this enforced sterility must be considered not only highly desirable but also highly commendable. Medical and surgical treatment will doubtlessly help many threatened with generative impairment. Yet for a sizeable number no appreciable improvement will follow. In many of these cases the doctor will be of great service if he will mechanically place sperm within the female generative passages. Such attempts at initiating a pregnancy are called artificial insemination, whether the sperm used be that of the husband or of a donor.

The practitioner of artificial insemination must combine all the best therapy of his confreres concurrently with the procedures in which he specializes. A more judicious selection of cases, greater public and professional confidence in the procedure, improvement in testing for such factors as ovulation, and refinements in technique will permit greater success with artificial insemination and will expand the practitioner's general sphere of usefulness.

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The indications for the use of artificial insemination to combat male sterility, both temporary and permanent, in war and in peace, have become well established. There are a great number of psychological problems to be met in the field of sterility, and they present a striking picture. It is common experience that a marriage about to be torn asunder by the lack of a family frequently is cemented together again by the birth of a child. The offspring puts an end to the longing and disappointment of the wife while the husband can, not only make reparation to his wife for the children he could not beget himself, but can sublimate his own frustration as he showers all his love and care on this representative of all his future hopes and aspirations.

There are many instances in which dysgenic elements in the husband's genealogy make it inadvisable for him to procreate. Is it not such dysgenic elements which finally result in a genetic pattern that explains the birth of many of the sex-offenders, the pathological criminals, the chronic alcoholics, the feeble-minded, and the insane, not to speak of the victims of strange pathologic processes? Preventing such dygenesis would save the community and the world-at-large untold suffering and expenditure of wealth. Who knows but that in this way we might even be able to prevent another Hitler or some similar aberration of the genes. Is this not one of the easiest and most direct ways of improving offspring and promoting a life of less personal heartbreak and of greater happiness and progress for the entire human race?

Recently a number of far-seeing and enlightened individuals voluntarily denied themselves paternity on this score. Such an action doubtlessly requires a very high degree of moral courage and eugenic awareness. In many instances the physician may be the first to discover dysgenic genealogical male factors in the course

2. Some Causes of Male Sterility in War; Exhibit by National Research Foundation for Eugenic Alleviation of Sterility, Inc., at Annual Meeting, New York State Medical Society (May, 1944).
6. Seymour, Eugenics in Practice; Cross Artificial Insemination; Marriage Hygiene (Bombay, 1936).
of an examination. It then becomes not only his privilege but his
duty to counsel\textsuperscript{7} abnegation on the part of the husband. In such
cases, if circumstances warrant, a donor, eugenically selected, may
be employed.

Not so long ago Landsteiner and his co-workers discovered in
the Rh blood factor the cause of erythroblastosis and fetal death.
This has made it necessary that additional caution be used in fer-
tility studies. So now no husband or donor is employed whose Rh
factor is incompatible with that of the recipient wife.

One of the strongest urges to alleviate sterility arises when acute
population\textsuperscript{8} problems press for solution. Such occasions are apt to
occur after epidemics, wars or giant upheavals of nature. The choice
that presents itself then lies between prostitution, adultery, or adop-
tion on the one hand, and artificial insemination on the other.
Little, if any, justification can be accorded to the first two. Regarding adoption\textsuperscript{9} it has been pointed out frequently that one of the
chief drawbacks is that there is no possibility here of transmitting
any of the genes of the married couple. In artificial insemination,
on the other hand, at least those of the mother are represented in
the offspring.

Our British cousins envision such donor activity that they arbi-
trarily restricted each donor to one hundred offspring\textsuperscript{10} (though
nothing like it has been attained). Whether any figure requiring
limitation of a given donor will be reached in the near future only
the stress of demographic needs will answer.

A recent correspondent\textsuperscript{11} to the British Medical Journal urges
that the best genetic stock is limiting its own procreation and that
what is left is experiencing further reduction in the battles of World
War II. Adopting Churchill's recommendation that the average
British couple have four children, the writer points out that they
must therefore plan for six to eight. Artificial insemination, of
course, is the most immediate and most intelligent way to rebuild
such a male-depleted country in a rapid yet orderly and eugenic
manner.

\textsuperscript{7} Koerner, Artificial Insemination Eugenically Applied, read before Int'l

\textsuperscript{8} Forbes, Medico-Legal Aspects of Artificial Insemination (1944) 12 Medico-
Legal and Criminological Review 138.

\textsuperscript{9} See note 5, supra.

\textsuperscript{10} Barton, Walker and Wiesner, Correspondence (January 13, 1945) British
Medical Journal.

\textsuperscript{11} Carter, Correspondence (January 27, 1945) British Medical Journal 130.
The history of artificial insemination is said to have begun with the first successful breeding of mares by the Arabs in 1322. Don Ponchom followed with successful experiences with fish in 1420. Leewenhoek and Ham's discovery that sperm were motile was followed by Ludwig Jacobi's successful revival of the work with fish in 1742. Then followed epochal experiences on many sides from which the names of Malpighi and Rossi, Spallanzani, Heape, Marshall, Albrecht, Plönnis and Sir Everett Millais stand out in bold relief. Iwanow and the Russian school brought about the grand scale use of artificial insemination in animal breeding and since that time many other countries have scored similar successes.

About the middle of the sixteenth century Eustachius is said to have had the first successful human case. In the last decade of the eighteenth century John Hunter had his celebrated experience using the vaginal route of insemination. Lesueur and others, including Nicholas of Nancy, succeeded in the same manner. In America, Marion Sims successfully employed intra-uterine insemination in 1866. A long list of French investigators including Gigon, Girault and Gerard reported multiple successes.

The modern work in this field began with Rohleder who reported in 1904 the first pregnancy from material recovered by testicular puncture, although Dickinson had reported two cases of heterologous artificial insemination at an International Congress in London the year before. Several series of successes were subsequently reported including the one of Abbett in which there were eleven pregnancies out of thirty-seven cases, Schorohowa with twenty-two successes out of fifty, Warner with six pregnancies out of nine and Seguy's second series of nine cases reported in 1935. The first application of eugenics to the practice of artificial insemination must be credited to Seymour in 1936. It was not until 1943 that the first report of a successful use of sperm transported by airplane is to be found in the literature. About the same time Seymour

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16. See note 6, supra.
pointed out the possibilities of employing artificial insemination in the solution of population problems.\textsuperscript{18}

It has been asked what are the ethical and moral considerations in this field. Ethics and morals generally are the concretions of folkways. Their constant employment imposes upon us a duty to respect their usage. Though they change very slowly, they doubtlessly do change. Many things considered immoral centuries ago are quite proper today, and vice versa.

In artificial insemination the best interests of all involved demands that the principal concern should be for the sterile couple.\textsuperscript{19} Once they have decided that the process meets their moral code, who can take exception to it? It must be remembered that this procedure is never employed without the full consent of the parties. It is not infrequently their last desperate effort to prevent the marriage from breaking down entirely.

The two types of insemination that are available are variously regarded. Many believe that homologous insemination (using sperm of the husband) is entirely acceptable since it requires coitus\textsuperscript{20} but that the heterologous type (requiring a donor) is morally wrong because it may require masturbation.\textsuperscript{21} Obviously active cooperation by the donor's wife removes this objection entirely. As one of the writers\textsuperscript{22} pointed out, moreover, there is a tremendous distinction between masturbation as a sex habit and manual manipulation as a means of obtaining a specimen for artificial insemination.

Since responsibility for and care of the offspring is the backbone of marriage, and since divorce is granted in some jurisdictions simply by proving sterility, that physician would indeed be, not only immoral and inhumane, but medically unethical who would deny to a barren couple on the grounds of his own subjective reactions the benefits of a procedure that might be of help to them. Serious students\textsuperscript{23} feel that the physician owes it to his patients to acquaint them with the possibilities of utilizing artificial insemination in proper cases, and that at no time may he substitute his own

\textsuperscript{18} Seymour, Hereditary Patterns of Use in Population Problems, read before Division for Education in Heredity and Eugenics (September, 1943).
\textsuperscript{19} Rohleder, Test Tube Babies (New York, 1934).
\textsuperscript{20} Strange, Correspondence (October 28, 1944) British Medical Journal.
\textsuperscript{21} Newsholme, Correspondence (November 11, 1944) British Medical Journal.
\textsuperscript{22} Ladell, Correspondence (November 25, 1944) British Medical Journal.
\textsuperscript{23} Malleson, Correspondence (November 25, 1944) British Medical Journal.
moral judgment for those of the patients whom he is called upon to treat.

Even judges, picked primarily not only for their expertness in the law but also for their intimate knowledge of human nature, sometimes go adrift in this treacherous current. In a Bordeaux verdict\(^2\) the court said that such artificial means run counter to natural law. This serves to clothe subjectivism with a Grotian authority but adds very little else to the proper understanding of the problem.

In 1877 the religious aspect of artificial insemination was ruled upon by a Papal Encyclical\(^2\) which condemned the practice as immoral and prohibited its consideration. Mantegazza,\(^2\) an outstanding student of sexual problems, ten years previously had exhaustively studied the New Testament and the Canonic Books from a strictly Catholic standpoint and had concluded that artificial insemination was directly in accord with the Bible, book of Genesis, and had recommended it warmly. He pointed out that, if to help the uterus to conceive by artificial means is a sin, it must also be a sin to help digestion with pepsin or aid a paralytic foot by the use of an electric current.

In Protestant countries it is maintained that irrespective of religious views, the doctor must ask himself only whether it is the medically correct thing to do. If the answer is yes, then it is his duty\(^2\) to perform the procedure.\(^2\)

To help us better to isolate the applicable legal principles, the psychological factors involved must be reviewed carefully. That sterility will play havoc with the best oriented mind seems obvious. Rohleder cites the instances of men who would rather have their wives accept the services of a paramour than consider adoption, feeling that in the former instance the child would at least be half theirs. Artificial insemination, on the other hand, offers the sterile husband an acceptable and conventional way to transfer his emotions from his own brooding self to the new offspring, and at the same time to satisfy his wife’s craving for motherhood.\(^9\) Führbringer cites the case of the physician—a man of excellent character

\(^2\) See note 19, supra.
\(^2\) Ibid.
\(^2\) Ibid.
\(^2\) See note 8, supra.
\(^9\) See note 6, supra.
and standing in his community—who in the desperation of sterility inseminated his own wife with the semen of a donor.

In her poem, "Childless," and in the tragedy, "Manole," Elizabeth, Queen of Rumania (Carmen Sylva), sings of motherhood and the intense joy of caring for children which is felt by every woman—even a queen.

Roubaud reported the remarkable case of a young Frenchwoman, married to an English lord against the wishes of his father, who had willed his large fortune to the grandchildren he was sure he would have. As the union had remained sterile the wife simulated confinement to prevent the fortune from going to the nieces and nephews by default. She arranged for a midwife, a child, witnesses and all the other essentials. At the last minute the police got wind of the scheme and it failed. In like vein is the case of the Polish Countess, Kwilecki, who was found guilty of kidnapping a child and passing it off as her own. Potentially fertile women should certainly never be forced to such extremities by the heartless blocking of their chances for motherhood through artificial impregnation.

As has been pointed out, the mother's relationship to the physician in artificial insemination is one of the utmost confidence and sympathy. She relies on him to shield the entire procedure from curious eyes and to keep it in total confidence until such time as she should wish to make it public. She has implicit trust in his judgment regarding the choice of the donor. Unless the husband joins his wife voluntarily, the consideration of artificial insemination should be abandoned. If and when he does so, however, his attitude toward the physician will of necessity become the same as his wife's.

A father could condone stupidity in his own child; it might even arouse his protective instinct. Transmissible characters which give rise to physical differences such as the color of the eye, the texture of the skin, the hair, general facial characteristics, or incompatibilities of temperament and mentality cropping up from heterologous insemination, however, would serve only to form a permanent split between parent and child. Consequently the donor should be selected from those whose physical as well as other character-

31. See note 19, supra.
32. See note 4, supra.  
33. See note 6, supra.
istics, temperament, racial background and fundamental origin are the same as that of the husband.

What is the effect of the birth of a child by artificial insemination on the relationship between husband and wife? Not only does the mother feel relieved from her past limitations but she is deeply appreciative of the fierce internal struggle that her husband had before he could give his consent to the use of a donor. She realizes the tremendous love he must have borne her to permit so vehement a pronouncement to be made on his procreative life. On her part the wife can do much to show this appreciation by making every effort to raise the child in the image of her husband.

Warnings against the choice of a relative as a donor should be remembered. The idea may seem attractive so as to insure that the child look like the husband. Genetically, of course, there is no guarantee of this. Psychologically it might lead to catastrophe should the mother at a later time transfer her affections to the relative donor. Even if presently unaware of the facts the wife might find out later and suffer extreme mental shock. As to the relative donor, what if he decided to try to obtain legal possession of the child as his own, or if his wife—even though originally she had joined in the consent—attempted such a move?

The tastes and mental level of the family group into which the artificially inseminated child is to come must be carefully considered. It would be disastrous to place an artistically inclined child into the home of a hard-headed businessman. Controlling one-half of the genes, the physician or surgeon must choose the donor for the mental qualities most likely to be salutary to the group. The I.Q. of the donor should be high so that he may bring to the family group mental qualities of a high order. As has been said so often the donor should be a man who has demonstrated the effects of a favorable genealogy, salutary environment and superior mental capacity. Mens sana in corpore sano.

Until legal pronouncement is made on this subject, the suggestion that an obstetrician other than the inseminating physician be chosen still seems best. This prevents doubt creeping into the mind of the doctor which might defeat all the care and solicitude of the immediate family group.

34. See note 4, supra.
35. Ibid.
36. See note 6, supra.
37. Ibid.
The medical view of the legal aspects of artificial insemination has received considerable attention. Mantegazza considered heterologous insemination without the knowledge of the recipient as a crime, apparently on the part of both the husband and the physician. Modern legal definition excludes that possibility. Tort responsibility, if any, might be spelled out and would then probably sound in fraud.

Following the harsh and provincial verdict of the Bordeaux Court in 1883 to punish Dr. Lajatre for performing artificial insemination, seemingly based entirely on his unfavorable personality, and the pronouncement that the procedure was unworthy of a physician, the Medicolegal Society of France appointed a commission to study the subject. It reported that artificial fecundation "as a last chance of inducing procreation was a correct operation involving no responsibility, but the physician himself must not be the one to suggest it." This tactful piece of fence-sitting was obviously honored more in the breach than in the performance as demonstrated in 1885 when the Medical Faculty of the University of Paris rejected Gerard's treatise on the subject. The progressive physicians of Paris, however, continued to perform the procedure—and with considerable success.

One of the earliest juridical evaluations of the subject was made by the famous jurist, Von Liszt, who considered it a perfectly proper procedure in the case of a married couple. Then followed a most thorough consideration of the entire subject by Dr. Wilhelm of Strassbourg, one of the most profound students of medicolegal matters at that age. He concluded that the operation is legally permissible, whether homologous or heterologous, and that it is an entirely ethical act and a recognized therapeutic measure from the viewpoint of the public law.

In 1905 a court at Coblenz was asked to consider the case of a woman, who, without her husband's knowledge had scooped up some fresh semen ejaculated by him on to the bedclothes and had introduced it into her genital tract causing a pregnancy which resulted in the birth of a baby girl. The court decided that this artificial insemination was entirely legal. On appeal to a higher court at Cologne the decision was affirmed, although the husband had neither desired, known of, nor consented to the procedure.

38. See note 19, supra.
39. Ibid.
40. Ibid.
Rohleder cites a German decision\textsuperscript{41} of 1908 which held that cohabitation was not an indispensable condition for the legality of a child and at the same time recognized artificial insemination as a legitimate procedure.

In the Western Hemisphere the earliest opinion is contained in an Ontario report\textsuperscript{42} in which the court dismissed an action for alimony brought by the plaintiff who alleged that because of dyspareunia she had to be inseminated heterologously in England at a time when her defendant husband was still in Canada. That decision, however, rests on very sandy ground. As a matter of fact the court found that the plaintiff wife had been guilty of actual sexual intercourse performed in the ordinary manner with one Hodgkinson. After deciding the case against the plaintiff on this score, the court proceeded to consider the general subject of artificial insemination and also the question of such insemination without the husband's consent, although both were no longer material. Obviously everything that the court said about the subject, therefore, must be considered dicta and in no way pertinent or controlling.

Soon thereafter there followed the celebrated English case of \textit{Russell v. Russell}.\textsuperscript{43} Among the points for which this decision is cited is the proposition that the law is not interested in the exact process preceding the institution of a pregnancy, provided that the husband is the biological father of the child. Therein Lord Birkenhead laid down the rule that evidence between husband and wife regarding access is not admissible for any purpose whatever and that this rule covers every type of case. Lord Finlay expressed the view that "fecundation ab extra" is adultery.

At a meeting of the Medico-Legal Society of London, England, Judge Earengey\textsuperscript{44} remarked that as soon as Lord Dunedin in the \textit{Russell} case accepted the proposition that a child could not be conceived and born to a woman without previous intercourse with a man, he was forced to conclude that the act (intercourse) resulting in such a conception would be adultery. It was obvious, continued Judge Earengey, that this had no relevancy to artificial insemination.

\textsuperscript{41} Ibid.
\textsuperscript{42} Orford v. Orford, 49 Ont. Law Rep. 15 (1921).
\textsuperscript{43} [1924] 13 British Ruling Cases 246 (H. L. App. Cas.).
\textsuperscript{44} See note 8, supra.
It is clear furthermore that artificial insemination must always be distinguished from coitus; and while prohibition against promiscuous intercourse can be applied to the latter it is meaningless as applied to the former. Extra-marital relationships were proscribed from the earliest time in order to protect the right of inheritance, the integrity of the blood and the pride of ancestry. This served to cement family life and to keep inviolate all the events occurring during marriage. Extra-conjugal congress is adultery under the law of the day; extra-coital activity, on the other hand, was never anticipated and never ruled upon. Moreover even if artificial insemination was to be held adultery there could be no escape from the finding of condonation if the husband knew and assented beforehand.

Thus, homologous insemination is generally agreed upon as being morally and legally sound. As we have said objection has been raised against the heterologous form. That such a view is untenable has, we believe, been demonstrated in the analysis of Orford v. Orford and Russell v. Russell.

In 1945, Hoch v. Hoch came before the circuit court in Chicago, the husband asking for divorce on the grounds of adultery and alleging that the child born to his wife was not his. The court found that the wife had insisted upon having a baby and had procured it through artificial insemination. Judge Fineberg held that no definition of adultery included artificial insemination.

Among the safeguards advised for workers in this field are fingerprints and written consents of the recipient and her husband together with photographs of the husband. If the sterile husband were to sue for divorce or to institute a proceeding in nullity, he would be estopped by this written consent. We believe the same result would follow, were he to attempt to bastardize the child. As already pointed out, the entire procedure in bastardy built up

45. Artificial Insemination under the Law (1939 Year Book of Obs. & Gyn.) 404.
47. See note 28, supra.
48. See note 46, supra.
49. See note 45, supra.
50. Chicago Sun, February 10, 1945; also personal communication from Judge Michael Fineberg.
51. See note 8, supra.
52. Wright, Chicago Symposium of Medicine and the Bar (October 16, 1945).
on the essentiality of property rights, thus implicitly denying the value of the human rights involved, was formulated long before artificial insemination was contemplated by the law, so fortunately has no application to it. Useful forms covering some of the above situations will be found below.

The most rigid requirement for granting divorce is adultery. In one judicial decision adultery has been defined as the voluntary surrender of the reproductive function of a married woman to one other than her husband. It is plain that this conception follows the traditional precept which did not distinguish between potentia coeundi and fertility. Obviously then, the surrender of the reproductive function and not coitus is the deciding feature. Consequently where the wife is suffering from temporary or permanent sterility and therefore has no reproductive function to surrender she cannot be guilty of adultery. Fortunately modern judicial thought, encompassing the entire field, recognizes that no definition of adultery is broad enough to include artificial insemination. Conversely therefore artificial insemination cannot be considered adultery without a relapse into the realm of feudalistic reasoning that preferred property to the far grander human values that actuate us today.

That a patient may expressly assume obligations impliedly imposed on the physician is well recognized. But certain vexing problems will require solution. For instance, the courts will soon have to rule to what extent the eugenesis of the donor, a fact within the peculiar knowledge of the physician, may be chargeable to the recipient and her husband through express agreement. Careful medical practice doubtlessly will do much to make frequent consideration of this and similar matters unnecessary.

Since the well-being of the child itself should be the prime concern of our medicolegal inquiry, there must be a complete avoidance of all psychological trauma such as might occur should the child through some careless remark discover the circumstances of its biological origin. This might set up an irretrievable inferiority complex which would permanently destroy the child's orientation to its environment. It is felt that it is the duty of the physician to prevent the possibility of such an event, and therefore it has been

54. See note 42, supra.
55. See note 50, supra.
56. See note 8, supra.
57. See note 4, supra.
urged, as previously mentioned, that an obstetrician other than the physician who did the insemination be chosen so as to obviate the possibility of questions arising concerning the reproduction.

The presumption of legitimacy is said to hang like a protective mantle over a child born in wedlock. Yet that presumption is not conclusive; it is open to attack. In most civilized countries, even frank illegitimacy is regarded tenderly; therefore legitimization is authorized through the subsequent marriage of the parents.

British students feel that the husband in heterologous insemination should register as the father. It has been advised, therefore, by others that going through a formal legal adoption is perhaps the best procedure. The objection to this, of course, is the publicity, the very thing which those seeking artificial insemination assiduously wish to avoid. Some may feel that there is danger of an attack upon the capacity of the child to inherit from the husband. To forestall this possibility the husband can give this child his patrimony during life, either in fee or in trust. Some other situations are mentioned below.

As already stated the property rights of man have seemed so important that the joys of inheritance have sometimes been blighted by the scheming of knaves. Regulations concerning decedent's estates are such that certain prescribed persons divide the estate of the departed where no legal heirs of the body have survived him. Ordinarily a will can be so drawn in favor of a distributee as to discourage grasping relatives from having any designs on the inheritance. It is evident that legislation will be required to protect the artificially inseminated offspring in order that the morally weak may not be tempted to scheme to defeat the wishes of either testator or intestate. This will insure that the child have legal capacity to take property or rights that may devolve upon it.

In countries where titles of nobility, et cetera, are involved the method of their passage is strictly reviewed. It has been held in the past that such earthly glories cannot be entrusted to any but direct biological heirs. If it should appear desirable to change this, it could only be done through appropriate legislation.

58. See note 6, supra.
60. See note 10, supra.
61. See note 11, supra.
62. See note 8, supra.
It has previously been pointed out that the donor must be protected against blackmail. Some of the precautions advised are that the sperm be delivered to the doctor at a time other than when the patient is present and that the donor be admitted through an entrance not used by the patients. His recognition on the premises is of course not equivalent to proof that he was there as a donor or that he was the donor for a particular recipient. To prevent other possible unpleasantness, it has been advised that the donor be a married man and that both his and his wife’s consent be obtained in writing, properly acknowledged before a notary. That seems sound. Specimen forms for the purpose will be found below.

An interesting example of the misuse of artificial insemination occurred in Freeport, Illinois, where a lady was accused of wooing a soldier by mail through a Lonely-Hearts Club. After a while she attempted to convince the soldier that she had borne him two children by artificial insemination, both of whom had died. In a suit for using the mails to defraud, it was decided that artificial insemination was a figment of the lady’s imagination and simply seemed to her to provide a ready way of mulcting the uninitiated.

It may not be amiss to mention that certain gynecologists have cautioned against making the procedure of artificial insemination a mass-production method. Those who specialize in the field, however, feel that each case is given the same careful attention as that received by the patients of a brain surgeon or any other practitioner undertaking the most delicate procedure. In short, in careful hands no medical practice, no matter what its simplicity or intricacy, will be abused.

In contrast to the medical views respecting the legality of this operation we now move on to review the pronouncements of jurists and lawyers.

Though Russell v. Russell appears to hold that the law is not interested in the exact process preceding the institution of a pregnancy, where the husband is the biological father, other legal

63. See note 4, supra.
64. See note 8, supra.
65. See note 59, supra.
66. See note 45, supra.
68. Greenhill, Chicago Symposium of Medicine and the Bar (October 16, 1945).
69. [1924] 13 British Ruling Cases 246 (H. L. App. Cas.).
70. See note 8, supra.
opinion insists that consideration of the method is vital. The latter
go so far as to maintain that a medical practitioner is guilty of
adultery if he performs artificial insemination on a woman without
her husband’s consent. They argue that the mechanical introduc-
tion of semen constitutes adultery on the part of the practitioner.
Theoretically we cannot help but feel that their conclusions are
forced and that their attempted rationalization falls far short of
being convincing. Practically, however, we advise the physician to
refuse all cases of this kind.

A very interesting question arose at a discussion of the entire
subject amongst a group composed jointly of lawyers and physicians.
The question was raised as to whether a man suing his wife for
divorce on grounds of adultery would himself have to reveal to the
court that he had at one time acted as a donor in artificial insemina-
tion. What, too, was the position of his attorney? As an officer
of the court, was it his duty to disclose the facts which came to his
knowledge regarding his client, or is he estopped from so doing
because it was a confidential communication between client and
attorney? Obviously, only where the practitioner has failed to get
the consent of the donor’s wife can this question arise. This poser
emphasizes the need for such a consent.

If artificial insemination as a procedure be considered illegal
in its entirety, no form of consent is of any value, whether signed
by the patient and her husband or the donor and his wife. Recent
trends indicate that, feeling itself called upon for help, public
opinion would hasten to the aid of the parties, especially the new-
born child. This intervention would give a saving meaning to the
signed consents and would free the practitioner from the threat
of charges of misconduct in undertaking the operation.

At a recent symposium on the subject a prominent Chicago
attorney disapproved of artificial insemination. He entertained
some interesting questions asking whether the state would have to
support an artificially inseminated child disowned by the husband
and what would happen if the husband rejected his wife’s request
that such a child be legally adopted. He further wanted to know
whether a family would not be disrupted if the husband turned
against an artificially inseminated child born prior to a second-one,
naturally conceived.

71. Ibid.
72. Ibid.
73. See note 52, supra.
Regarding the question of state support, benign public opinion would again be called upon to aid the child, pending legislation to that effect. In respect to the question of adoption raised above, the situation cannot be differentiated from the case where one of a childless couple which does not contemplate artificial insemination is at loggerheads with the other regarding a proposed adoption. The best advice for the doctor to give to such people is for them to decide before artificial insemination is resorted to whether this procedure satisfies the thinking of all parties; once the pregnancy has ensued the husband should then abide by his prior decision. It is almost as if one were asked what about the case where the husband, resenting a natural pregnancy of which he is the father, decided that his wife is to have a criminal operation to destroy it. Perhaps there is a time to repent in such cases, but certainly the law as generally conceived states that the time is beforehand and not afterwards. Much the same reasoning answers the third question presented by the learned counsel. There is as yet no way known to man to prevent a father from showing a preference for one child over another, even though both be his own.

It might be well at this point to reproduce some of the consents and other forms that currently are used for this purpose.

CONSENT FOR ARTIFICIAL INSEMINATION

I, __________________________, residing at __________________________,
__________________________, of my own free will and volition have requested
Dr. __________________________ to inseminate my wife artificially
with the sperm of a male selected by Dr. __________________________ This request has been made with the full knowledge and consent of my wife, whose authorization is hereto annexed. I am making this request because it is not possible for me to procreate and because both my wife and I are extremely anxious to have a child and because our mutual happiness and the well-being of my wife will be best served by this artificial insemination.

___________________________  L. S.

On this ______ day of ________________, 19____, before me came
______________________________, to me known and known to me

74. See note 4, supra.
to be the person described herein and who acknowledged to me that he executed the foregoing consent.

______________________________
Notary

I, ____________________________, join in my husband's request above stated and hereby authorize Dr. ____________________________ to inseminate me artificially with the sperm of a male selected by Dr. ____________________________.

______________________________
L. S.

On this __________ day of ____________________________, 19______, before me came ____________________________, to me known and known to me to be the person described herein and who acknowledged to me that she executed the foregoing consent.

______________________________
Notary

Fingerprints of each of the parties should go next to the line where they have placed their signatures.

In England they suggested that a nurse be present when a patient is inseminated and that she add her signature to the document indicating that she knows what transpired. They also ask for a written statement by the husband and wife that, if the wife should give birth to a child, it would not defeat claims of the persons who would benefit in default of issue. That is certainly putting the cart before the horse. Providing for relatives, sometimes so distant as practically to be strangers, before you are permitted to provide for the thing dearest to your wife and yourself—her child—is a fantastically strange state of affairs. As it now stands it is therefore apparent that the British statute, laden down with concern for its titled and patrician classes, is no better for the child than the American, and that legislation is sorely needed to correct its incongruities.

If we hark back to the reason which actuated British legislators in promulgating the Statute of Wills in 1540 we note it was their purpose to permit a holder of property to pass it on after death to

75. See note 8, supra.
76. 32 Henry VIII, c. 1.
those whom he selected while living. If the property-holder had been indifferent to the prevailing conditions, the nobles and commoners would have been able to spare themselves a bitter struggle and could have permitted the passage of property to continue as it then was. Since the enfeoffed and not the heirs was the main concern of the lawmakers, and brought about the eventual passage of the statute, it seems clear that, short of creating a burden upon the state, we should continue to consider only his desires and wishes in shaping our laws. Legislation, therefore, must always center on that thought and must seek to give effect to the wishes of the couple and must aim to protect and guard the interests of their projected offspring. In this way the caution of the British workers would become entirely unnecessary.

A rather knotty problem which doubtlessly would require legislation is the question of the inheritance of the child from the donor, who after all is the biological father. Since no adoptive procedure can be considered in such circumstances many courts will probably not give the child any right of inheritance from this source. Yet, as has been mentioned before, a great many jurisdictions recognize the right of frankly illegitimate offspring, generally. This is principally due, no doubt, to a desire to avoid a possible public burden. Perhaps prolonged study would indicate that it is best from a practical standpoint to hold that no hereditary rights flow from the donor to the child. This would remove all mental reservations harbored by a prospective donor and his family so that he would then feel free to offer his services as required. In order to clear up the entire matter and to keep the child from being stigmatized, either directly or by implication of law, a clear-cut regulation could be enacted to outline the procedure in such cases.

As has been stated before, heterologous insemination without the husband’s consent should be strictly avoided. It would not only be fraught with danger to all the parties but it would be a more or less certain way of ruining the life of the child.

In view of the present status of the British law, some English workers in this field have suggested that the facts regarding a child born by artificial insemination be disclosed freely through some kind of a private registration whereby the information would be made available, not through the registrar of births, deaths and

77. See note 45, supra.
marriages, but through the department of registration of wills⁷⁸ so as to defeat any false claim that might thereafter be made in the matter.

We have previously referred to operations for sterility. The surgeon will frankly have to inform the applicants as to their chance of success. In many that chance will be slight. Suppose one, who has been told that his chance for success through surgical intervention was slight, should decide to forego surgery and apply for artificial insemination. What should the doctor’s course be? Should he accept the patient’s choice or should he refuse under the circumstances?

The answer would probably depend on the extent of the operation, its chance for failure and its risks. If the operation is not serious nor dangerous and offers a fair chance for future pregnancy, artificial insemination must be postponed. A contra, operative procedure should be abandoned if the patient refuses to undertake the risk involved, as for example, in the case of a cardiac or diabetic, et cetera, or if the chances for future pregnancy through surgery seem remote.

Conclusions

In conclusion, while artificial insemination is held not to be adultery,⁷⁹ the practice is still beset with pitfalls for the principals.

Homologous insemination is comparatively free of problems.

Heterologous insemination should be done only with the written consent of the recipient, her husband, the donor and his wife.

Donors should be eugenically selected. Their physical and mental characteristics should resemble the husband as closely as possible. The child should be raised as closely under the supervision of the husband as is possible in order to create the best of feelings in that direction.

Psychological trauma to the child through discovering its biological origin is laid bare. Avoidance of this unpleasant situation is advised.⁸⁰

⁷⁹. See note 50, supra.
⁸⁰. See note 4, supra.
In the present state of the law it is inadvisable to reveal the donor to the artificially inseminated child or to any of the principals or vice versa.

The best interests of all would seem to dictate the rule that no rights of inheritance should flow from the donor to an artificially inseminated child.

Post-mortem contests challenging the rights and capacity of the artificially inseminated child to inherit\textsuperscript{81} property from the husband of the mother may arise. Legislation is due to permit in evidence the intestate's action during life in order to prove that he wished the estate to go to the artificially inseminated child and not to relatives distant in his affections.

To permit the artificially inseminated child to succeed to titles\textsuperscript{82} and other special privileges express legislation must be enacted in those countries where the problem is likely to arise.

Exceptional legislation providing for state support would be needed for the exceptional case wherein the husband seeks to withdraw his consent after birth of the child and refuses to support it.

The fact that a birth occurred through insemination can be revealed freely as soon as protective legislation is enacted to cover the preceding situations and all others that might arise.

Until then such a child needs and deserves the benefit of every doubt and the favor of every legal presumption as well as the kindly support of a provident and benignant public opinion.

\textsuperscript{81} See note 11, supra.
\textsuperscript{82} See note 8, supra.