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Artificial Insemination: The Law's Illegitimate Child

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COMMENTS

ARTIFICIAL INSEMINATION: THE LAW'S ILLEGITIMATE CHILD?

I.

THE PROBLEMS CREATED BY ARTIFICIAL INSEMINATION

A recent decision by the Supreme Court of Kings County, New York[1] has brought into the open a highly controversial and legally obscure area of activity. Artificial insemination (AI), a somewhat ancient method of breeding,[2] has reappeared on the modern scene bringing with it confusion and indecision. This method of conception was first attempted on a human being in the year 1799 by the English physician Dr. John Hunter,[3] and the practice spread to the United States in 1866 when Dr. J. Marion Sims of North Carolina conducted a series of fifty-five inseminations with varying degrees of success.[4]

There are two methods of artificial insemination: Artificial Insemination Husband (A.I.H.) and Artificial Insemination Donor (A.I.D.). The former, utilized by Doctors Hunter and Sims, involves the use of the husband's semen while in the latter the semen of a third party donor is used.

AI gained acceptance and popularity in Central and Western Europe sometime between 1890 and 1910.[5] By 1941, in the United States alone, AI resulted in ten thousand successful pregnancies.[6] At the present time responsible estimates indicate more than triple this amount[7] at the rate of one thousand to twelve hundred births per year,[8] although higher estimates are offered.[9] A.I.H. is of small legal significance.[10] While no definitive surveys are available, it is estimated that

1. Gursky v. Gursky, N.Y.L.J., Aug. 5, 1963, p. 6, col. 4.
2. Artificial insemination was first used successfully by the Arabs on mares as early as 1322. Rutherford & Banks, *Semination Techniques and Results*, 5 FERTILITY & STERILITY 271 (1954).
3. GLOVER, ARTIFICIAL INSEMINATION AMONG HUMAN BEINGS 4-5 (1948).
4. *Ibid.*
5. VAN DE VELDE, FERTILITY & STERILITY IN MARRIAGE (Brown transl. 1951).
6. Seymour & Koerner, *Artificial Insemination*, 116 A.M.A.J. 2747 (1941).
7. Weinberger, *A Partial Solution to Legitimacy Problems Arising from the Use of Artificial Insemination*, 35 IND. L.J. 143 (1960).
8. Lang, *Artificial Insemination—Legitimacy or Illegitimacy*, McCalls, May, 1955, p. 60.
9. One author places the number at five to seven thousand or more. Guttmacher, *Artificial Insemination*, 97 ANN. NEW YORK ACAD. SCIENCES 623 (1962).
10. Doornbos v. Doornbos, No. 54 S. 14981, Super. Ct., Cook County, Ill. (1954).

from 1/3 to 2/3 of AI attempts are performed with the sperm of a donor.[11] It is this potential majority of A.I.D. inseminations that underscores the importance of the legal considerations. The legal and social problems of A.I.D. are many and unresolved. A court of final jurisdiction has yet to be confronted with the subject, and legislatures have thus far ignored it. A.I.D. raises basic problems of adultery and illegitimacy, and no two courts in the same jurisdiction have resolved the questions consistently.

The earliest case on record dealing with A.I.D. is *Orford v. Orford*,[12] decided in Canada. In this case a woman sued for support, and her husband defended on the ground that his wife was an adulteress. The wife then claimed that the child was conceived by A.I.D. during a period of separation from her husband. The court held that the wife had committed adultery by having sexual intercourse in the natural manner, and that A.I.D. had not taken place. Justice Orde went on to say by way of dictum that A.I.D. would constitute adultery where the husband's consent had not been obtained. In 1924, three years later, an English court maintained that consent was immaterial and that A.I.D. was unquestionably an adulterous act.[13] This English case involved a suit for divorce. As in *Orford*[14] the wife conceived during a period of non-access and claimed the birth resulted from A.I.D. The husband was granted the divorce, the court holding that the wife had committed natural adultery. Here it was Lord Dunedin who deviated from the issue and declared A.I.D. an adulterous act. The English and Canadian cases have similar factual situations, and the reason for the discrepancy in the dicta on the issue of consent is not apparent.

The United States tribunals have proffered a few solutions of their own to the problems raised by A.I.D. The first case in this country, *Hoch v. Hoch*,[15] was brought before the Circuit Court of Cook County, Illinois. Again the husband was suing for divorce on the grounds of adultery. The wife defended averring that she had submitted to A.I.D. The court granted the divorce on the grounds of natural adultery. This court also digressed and stated that A.I.D. without the consent of the husband would not be adultery. There is no attempt to reconcile this view with the dictum in the *Orford* case, and the reasons for the contradiction were not discussed.

Six years later the Superior Court of Cook County, Illinois was confronted with an identical situation in *Doornbos v. Doornbos*.[16] This time the issue of A.I.D. directly confronted the court. A husband

11. Weinberger, *supra* note 7.
12. 49 Ont. L.R. 15, 58 D.L.R. 251 (1921).
13. Russell v. Russell, [1924] A.C. 687. The English courts have more recently held that sexual intimacies short of sexual intercourse amounted to adultery. See Sapsford v. Sapsford, [1954] 2 All E.R. 373 (Hampshire Assizes).
14. 49 Ont. L.R. 15, 58 D.L.R. 251 (1921).
15. Unreported, Cir. Ct., Cook County, Ill. (1948); see Chicago Sun, Feb. 10, 1945, p. 13, col. 3; Time, Feb. 26, 1945, p. 58.
16. Doornbos v. Doornbos, No. 54 S. 14981, Super. Ct., Cook County, Ill. (1954).

sought a divorce on the grounds of adultery. The wife had submitted to A.I.D. with the express consent of her husband, yet the court held that the wife had committed adultery, and the child born thereby was illegitimate. The divorce was granted. This decision directly overruled the dicta expounded in the *Hoch* case yet the facts are indistinguishable.

The conflict regarding A.I.D. is not confined to England, Canada and the United States. Italy and Scotland have also added to existing confusion. A Roman civil court held A.I.D. constituted adultery in 1956[17] while the High Court of Sessions in Scotland declared just the opposite in 1958.[18] The Scottish Court, in defense of their position, pointed out that Lord Dunedin's view in *Russell v. Russell* was dictum.

In addition to adultery, courts are plagued by the problem of what legal status to apply to children resulting from A.I.D. Generally those courts holding A.I.D. to be adulterous also deem the children produced to be illegitimate and vice versa.[19] New York entered the melee in 1948 with the *Strnad v. Strnad* decision.[20] The contest here centered around a husband's visitation rights to a child born to his wife as a result of A.I.D. The court held that the written consent of the husband to the insemination constituted a quasi-adoption or semi-adoption giving him the right to visit the child. The court, by way of dictum, determined that the legal status of the child was the same as that of a child born out of wedlock who by law is made legitimate by the subsequent marriage of its parents.[21] In keeping with the procedure set forth by the Illinois courts in *Hoch*[22] and *Doornbos,*[23] however, the Supreme Court of Kings County, New York departed from the *Strnad* position in August of 1963 in the case of *Gursky v. Gursky.*[24] Here an action was brought by a husband for annulment and separation. When the annulment was denied for failure to prove that consummation never took place the wife amended her answer to include a counterclaim for annulment which was granted. During the marriage a child was born to the wife through A.I.D. with the written consent of the husband who also assumed all responsibility for costs and medical bills. Justice Constantino dismissed *Strnad* as dictum and followed strict common law principles regarding children born outside of the marriage. Since the father of the child was not the husband of the mother the child was illegitimate.[25] Here the court alluded to the *Doornbos* decision in support of its verdict. However, Judge Constantino decided that the

17. Hahlo, *Some Legal Aspects of Artificial Insemination,* 74 S.A.L.J. 167 (1957).
18. MacLennan v. MacLennan, [1958] Sess. Cas. 105 (Scot.).
19. See, Doornbos v. Doornbos, No. 54 S. 14981, Super. Ct., Cook County, Ill. (1954); Russell v. Russell, [1924] A.C. 687.
20. 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948).
21. *Id.,* 78 N.Y.S.2d at 392.
22. Unreported, Cir. Ct., Cook County, Ill. (1948).
23. No. 54 S. 14981, Super. Ct., Cook County, Ill. (1954).
24. N.Y.L.J. Aug. 5, 1963, p. 6, col. 4.
25. *Id.* at col. 6.

consent of the husband to A.I.D. amounted to a semi-adoption and held him liable for the support of the child. At least on the adoption theory, the New York cases concur. To support its adoption theory, the court used equitable estoppel; the written consent of the husband induced the wife to change her position to her detriment by taking on a financial burden that should be borne by the husband.[26]

What will happen to these cases if and when they reach an appellate court is left to conjecture, but it has been suggested that the view that the child is illegitimate taken in the *Gursky* and *Doornbos* cases will not be upheld.[27] To understand the possible impact of A.I.D., factors must be considered other than the lack of judicial consistency and the sharp increase in births since 1941. One out of every ten couples married today will be unable to have children.[28] There are currently eleven families waiting for every child available for adoption.[29] As high as forty per cent of sterility in marriage is attributable to the husband.[30] The legal world, now in a boundless quandary, is left to digest all the foregoing considerations and arrive at a satisfactory solution. There are possible alternatives: do nothing and maintain the status quo, outlaw A.I.D. completely, or control A.I.D. by statutory regulation.

To remain passive would only allow a confused situation to continue and possibly worsen. If each jurisdiction is left free to solve the problems created by A.I.D. for itself on a case by case basis, the present trend of reversal, conflict and dictum is likely to continue. For example, although adultery is now generally governed by legislation, the interpretation of the legislation is left largely to the courts, thus creating diverse views as to what actually constituted adultery.[31] Today the laws of the different states uniformly agree as to when a child is illegitimate, but still differ widely as to the rights and status of such a child.[32] With the current practice of A.I.D. widespread and increasing, a passive approach is in all respects undesirable.

On the other hand, affirmative action in the form of legislative prohibition of A.I.D. could eliminate the problem completely. This would resolve all doubt and conflict—in theory at least. Such a prohibition would have to be based on the states' police power, that is, the power vested in the legislature to establish reasonable laws, regulations and statutes for the good of the commonwealth and the welfare

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26. *Ibid.*

27. Hager, *Artificial Insemination: Some Practical Considerations for Effective Counseling,* 39 N.C.L. REV. 230, 233-34 (1961).

28. Warner, *Problems and Treatment of the Infertile Couple,* 57 MEDICAL WOMAN'S JOURNAL 13 (1950).

29. Pommerenke, *Artificial Insemination: Genetic and Legal Implications,* 9 OBST. & GYNEC. 189 (1957).

30. *Ibid.*

31. Pollard v. Lyon, 91 U.S. 225 (1876); Richey v. State, 172 Ind. 134, 87 N.E. 1032 (1909); Territory v. Whitcomb, 1 Mont. 359 (1871).

32. *E.g.,* Lund v. Lund, 26 Cal.2d 472, 159 P.2d 643 (1945); Mund v. Rehaume, 51 Colo. 129, 117 Pac. 159 (1911).

of its people.[33] The police power can be exercised to establish rules of good manners and good neighborhoods[34] by regulating the individual for the good of the common welfare.[35] This power unquestionably, extends to legislation in the areas of health, preservation of good order and public morals.[36] The exercise of the police power must be reasonable under the circumstances presented, cannot unreasonably limit the rights of individuals, and must be reasonably designed to accomplish its purpose.[37]

A problem arises in drafting a statute outlawing A.I.D. within the above definition of the proper function of the police power. There is no evidence that A.I.D. has adverse effects on the mental or physical health of the parties involved. To warrant legislation in the area there must be some evil existing affecting the public health and welfare.[38]

Public morals legislation[39] must show a reasonable connection between the regulation and the activity affecting public morality.[40] The strongest argument to be advanced in favor of regulation is that A.I.D. constitutes adultery and as such is deleterious to the morals of the general public. There can be no question that the reasonable exercise of the states' police power extends to outlawing adulterous activity.[41] However, legal authority declaring A.I.D. adulterous is meager and insubstantial,[42] and furthermore, the common law required sexual intercourse as a requisite for adultery.[43] Although state courts have to some extent liberalized their definitions of adultery, actual penetration is still required.[44]

A further complication raised by any statute seeking to outlaw A.I.D. is the possibility that child-bearing is a liberty or right protected by the Fourteenth Amendment. This contention has never been formally asserted, but could certainly be advanced to attack the statute as an unreasonable exercise of the police power. The United States Supreme Court in deciding *Poe v. Ullman*[45] was faced with a situation

33. Sweet v. Rechel, 159 U.S. 380, 16 S.Ct. 43 (1895).
34. Territory v. O'Connor, 5 Dak. 397, 41 N.W. 746 (1889).
35. People v. Dehn, 190 Mich. 122, 155 N.W. 744 (1916).
36. Walton v. Atlanta, 89 F. Supp. 309 (N.D. Ga. 1949).
37. Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925).
38. First Nat'l Beneficial Soc'y v. Garrison, 58 F. Supp. 972 (S.D. Cal. 1945); Hornor's Estate v. Commissioner, 130 F.2d 649 (3d Cir. 1942); Parish Council v. Louisiana Highway & Heavy Branch of Associated Gen. Contractors, 131 So. 2d 272 (La. 1961); State Board of Health v. Village of St. Johnsbury, 82 Vt. 276, 73 Atl. 581 (1909).
39. Coppage v. Kansas, 236 U.S. 1, 35 S.Ct. 240 (1915).
40. State v. Nelson, 126 Conn. 412, 11 A.2d 856 (1940); Eccles v. Stone, 134 Fla. 113, 183 So. 628 (1938); Parkes v. Bartlett, 236 Mich. 460, 210 N.W. 492 (1926).
41. Crane v. People, 168 Ill. 395, 48 N.E. 54 (1897).
42. See text accompanying notes 12, 13, 14, 15, 16 and 18, *supra.*
43. Warner v. State, 202 Ind. 479, 175 N.E. 661 (1931).
44. People v. Salmon, 148 Cal. 303, 83 Pac. 42 (1905); Bashford v. Wells, 78 Kan. 295, 96 Pac. 663 (1908); Commonwealth v. Moon, 151 Pa. Super. 555, 30 A.2d 704 (1943); McCullough v. State, 107 Tex. Crim. 258, 296 S.W. 530 (1927); Ermis v. Ermis, 255 Wis. 339, 38 N.W.2d 485 (1949). *But see,* Sapsford v. Sapsford, [1954] 2 All E.R. 373 (Hampshire Assizes). Therefore, it is possible for a wife to have a bastard child yet not commit adultery.
45. 367 U.S. 497, 81 S.Ct. 1752 (1961).

not far removed from the A.I.D. controversy. The appellants were a woman, her husband and their physician. The woman had given birth to several children, all of whom were abnormal and died shortly after birth. The physical and psychological strain on the husband and wife were extreme and appellant Dr. Buxton suggested that the safest course of action for the couple would be treatment and medical advice as to methods of preventing conception. However, this was impossible because of a Connecticut law prohibiting the use of contraceptives for any reason. The plaintiffs sought a declaratory ruling in a Connecticut court that the law was unconstitutional in that it deprived them of life and liberty without due process of law. The case was dismissed upon demurrer on the grounds that the State Supreme Court had already decided the question against the plaintiffs' position. The appellants came to the Supreme Court on a writ of error. The case was dismissed by the High Court for lack of a justiciable controversy. However, the dissenting opinions of Mr. Justice Harlan,[46] Mr. Justice Douglas[47] and Mr. Justice Stewart[48] strongly argued that the use of contraceptives in marriage was a constitutionally protected right, the deprivation of which would result in a violation of the fourteenth amendment. If these dissents can be taken as an indication of reluctance on the part of some members of the Supreme Court to judicially interfere in the reproductive process, any statute outlawing A.I.D. may run the risk of violating the Constitution.

It must be remembered that we are dealing in an area largely concerned with the rights and position of children. There is a strong presumption of legitimacy where a child is born to parents who are lawfully married,[49] and courts are not wont to endow a child with the legal and social stigma accompanying illegitimacy.[50] In addition we are involved in a highly personal area of psychological and emotional import. The experience of child-bearing should be denied only with extreme caution.[51]

In view of the foregoing considerations, a proposed statute totally outlawing A.I.D. would have little chance of ever becoming law, although from the standpoint of some religions, outlawing A.I.D. would be the only satisfactory solution. The Catholic Church spoke out against artificial insemination as early as 1897.[52] The view is adamant and unequivocal in denouncing any form of AI for whatever reason. The Catholic position was renewed with even greater vigor in 1949 when Pope Pius XII, addressing the Fourth International Congress of Catholic Doctors in Rome, declared such practices to be immoral and

46. *Id.* at 522, 81 S.Ct. 1752, 1766.
47. *Id.* at 509, 81 S.Ct. 1752, 1759.
48. *Id.* at 555, 81 S.Ct. 1752, 1783.
49. MADDEN, THE LAW OF PERSONS AND DOMESTIC RELATIONS 338-39 (1931).
50. *Ibid.* Hale v. State, 217 Ala. 403, 116 So. 369 (1928).
51. Puxon, *Without Father Bred,* 102 SOL. J. 95 (1958).
52. Rice, *A.I.D.—An Heir of Controversy,* 34 NOTRE DAME LAW. 510 (1959).

worthy of outright condemnation.[53] This strong resentment is likewise shared by the Church of England. The Archbishop of Canterbury has declared AI contrary to Christian principles.[54]

If we should not remain passive to the existence of A.I.D. and cannot remove it, we must try to regulate it keeping in mind its immense problems and consequences. It is necessary, therefore, that any regulation introduced must be detailed and comprehensive, covering each phase of the process from the donation of the sperm to the birth of the child. The act must regulate not only donors, physicians, mothers and husbands, but also any institution or company distributing, storing, or receiving seminal fluid. An act failing to provide safeguards in any of these areas would be wholly defective.

To illustrate the problems to be encountered and the detail necessary for their solutions a Model Artificial Insemination Statute has been drafted and appears in full in the appendix.

II.

A PROPOSED STATUTE

A. *Definitions*

Article I of the act gives all the names and terms used in the act their every day meaning and usage. This article prevents definitional controversies regarding dual meanings of words and titles relating to persons as used in the act.

B. *Filing Requirements*

1. *Applications*

Article II, Section 2 of the act requires the donor to apply to a Public Board of Artificial Insemination before donating sperm. Article IV, Section 1 also requires the application of the prospective mother. These sections of the act are for the purposes of maintaining records of donations and inseminations in order to identify the parties in case any liability established by the act should arise, to enable the authorities enforcing the act to acquire knowledge of possible inseminations, and to be sure that each procedural requirement under the act for a lawful insemination is performed.

Articles II, III and IV each have provisions (sections 4, 1 and 1 respectively) for the filing of consent by the spouses of the donor, if married, and the mother. These sections must be complied with before any party is eligible for either donation or insemination. Under these

53. *Ibid.*

54. N.Y. Times, Mar. 17, 1949, p. 13, col. 2.

provisions the problems presented in the *Orford*,[55] *Hoch*[56] and *Russell*[57] cases dealing with the consent of the husband are removed. Here the husband's knowledge of his wife's activity is evidenced in writing and responsibility for the child is imposed. Article II resolves any question regarding the donor relative to a possible claim of infidelity by his wife resulting from the donation of sperm.

2. Physical Examinations

Article II, Section 3 and Article IV, Section 2 require the donor and mother to undergo a physical examination for the purpose of discovering any venereal disease that could affect the health of the mother or child. Similar requirements are found in most statutes dealing with marriage licenses.[58] In addition, any other physical infirmity or nervous disorder that could possibly be transmitted to a child during pregnancy would be discovered. These sections also require mental examinations since there is little doubt that certain mental defects are inheritable.[59] The results of these examinations must be filed along with the consents and applications of the parties, though not in any specific order.

3. Place of Filing

Article VIII, Section 1 provides for the establishment of a Public Board of Artificial Insemination under the auspices of the State Bureau of Health and Welfare for the purposes of compiling records, filing all appropriate data and issuing proofs of eligibility allowing the parties to donate or receive spermatozoa in the artificial insemination process. If effective regulation is to be maintained, there must be a public agency in charge of its enforcement. The Board of Artificial Insemination is to be comprised of a physician, a psychiatrist and a lawyer. The physician and psychiatrist are provided to determine the physical and mental health of the donor, mother and child, while the lawyer is available to enforce the procedural requirements and sanctions provided for in the act. This Board would function in much the same manner as any governmental agency, with its own tribunals to hear grievances and provide remedies under the act. The Board's decisions are final without the right of appeal to the courts of law.

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55. 49 Ont. L.R. 15, 58 D.L.R. 251 (1921).

56. Unreported, Cir. Ct., Cook County, Ill. (1948).

57. [1924] A.C. 687.

58. CAL. CIV. CODE § 79.01; COLO. REV. STAT. § 90-1-4 (1953); ILL. ANN. STAT. Ch. 89 §§ 6-6A (Smith-Hurd 1956); N.Y. DOM. REL. 13A; PA. STAT. ANN. tit. 48 §§ 1-4 (1936); WIS. STAT. ANN. § 245.10 (1957).

59. MOTTRAM, THE PHYSICAL BASIS OF PERSONALITY (1944); HARRIS, HUMAN BIOCHEMICAL GENETICS (1959); GODDARD, THE KALLIKAK FAMILY (1927).

C. *Proof of Eligibility*

Sections 2 and 5 of Article VIII deal with the procedure for issuing proof of eligibility for participation as donor or recipient. This is to make certain that all provisions of the act have been followed. In this way the health of the parties is protected, the liability of the parties is set, and the status of the child is established. There would be little sense in requiring applications, consents or examinations unless proof of eligibility or some similar device need be shown in order for persons to qualify for artificial insemination. Licensing statutes are perfect examples of such regulatory methods. Article V, Section 2 requiring any physician to examine the proof of eligibility before he may extract or administer the sperm is an example of the function of these proofs in relation to the enforcement of the act.

D. *The Child*

To eliminate the legitimacy problems brought to light in the *Gursky*,[60] *Strnad*[61] and *Doornbos*[62] decisions, the act contains certain limitations and imposes certain duties on the parties which, if performed, will not only qualify the mother for insemination, but will also render the child so conceived legitimate. Article VI deals directly with the child. Section 1 renders the child born in conformity with the act legitimate to the mother and her husband and makes him the lawful heir of both. To erase any doubt regarding the status of the child, Section 2 of Article VI delineates the circumstances under which the child will be illegitimate. Only when the consent of the husband is not forthcoming or where the mother violates the section dealing with the selection of the sperm will the child be declared illegitimate. Since the main purpose of the act is to establish the position and status of the child, both sections of this article are vital.

E. *The Physician*

Article V, Section 1 imposes and defines the duties of the physician extracting or administering sperm. The duty is the ordinary standard of care required by the profession of medical practitioners practicing in the area where A.I.D. is performed. To impose a greater duty would be overly burdensome for this is not an area requiring special training or knowledge beyond that of the ordinary practitioner. As has been pointed out in sub-section C, Section 2 of this article requires that proof of eligibility be shown before any of the processes of artificial insemination may be performed.

60. N.Y.L.J. Aug. 5, 1963, p. 6, col. 4.
61. 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948).
62. No. 54 S. 14981, Super. Ct., Cook County, Ill. (1954).

F. *Spermatozoa*

Perhaps all sections of the act would be entirely useless if provisions are not made for the classification, identification, care, handling and selection of the sperm to be used in the insemination process. Article VII is designed for the express purpose of closing any possible loopholes left by other articles of the statute. Section 1 of this article provides, "Any institution whether publicly or privately owned or operated, housing, storing or distributing sperm for the purposes of artificial insemination shall mark each container with the name, address, age and physical characteristics of the donor including race, color and educational background." The purpose of this section is to separate, segregate and classify the sperm according to the above characteristics for the purpose of permitting the couple submitting to artificial insemination to select the qualities their child will acquire. It is important to note that an attack of this act as an unreasonable exercise of the police power will no doubt center around this section. Under the equal protection clause of the Constitution classification according to physical characteristics has been upheld, even though discriminatory in respect to certain qualities of individuals, where a proper relationship between the discrimination and the purpose of classification was achieved.[63] The purpose served by classification in the model statute is merely for the purpose of identification, and nowhere in the act is the couple selecting the sperm required to select or limited to the selection of sperm of a specific class or color. The equal protection clause was *not* meant to limit[64] or affect[65] the proper exercise of the police power.

The due process clause of the Fourteenth Amendment permits classification so long as it is not arbitrary and capricious[66] and if the classification is permitted by the equal protection clause, it is equally permitted by the Fourteenth Amendment.[67] Certainly no one can deny that color of eyes, hair and skin or even the shape of a nose or ear are inherited from the parent. Also it has been shown that mental characteristics, including degree of intelligence, are largely inherited.[68] In view of these inheritable qualities, a classification such as that provided by the act is necessary and valid. Because of the importance of the selection of the sperm to the physical and mental makeup of the child, Article IV Section 5 requires that the mother and her husband select the sperm together, and Article VI Section 2 renders the child illegitimate should this section be violated. Article IX Section 5 makes such a violation a marital offense sufficient to form the grounds for a

63. Muller v. Oregon, 208 U.S. 412, 28 S.Ct. 324 (1908).
64. *Supra* note 50.
65. Hartford Steam Boiler Insp. & Ins. Co. v. Harrison, 301 U.S. 459, 57 S.Ct. 38 (1937).
66. Harbison v. Knoxville Iron Co., 103 Tenn. 421, 53 S.W. 955 (1899).
67. Barbier v. Connolly, 113 U.S. 27, 5 S.Ct. 357 (1884).
68. *Supra* note 59.

civil divorce. This last section eliminates solving the adultery problem encountered in *Doornbos*. In effect it adopts the court's view that in A.I.D. where consent of the husband to the insemination or selection of the sperm is lacking, the wife is adulterous and the child, illegitimate.

G. *Sanctions*

In any statute regulating human conduct there must be provisions for discouraging would-be violators. Article IX was drafted for this purpose and to provide monetary relief to those wronged by violation of the act. These sections impose liability for negligent and deliberate violations. Sanctions include fine, incarceration, and provisions for divorce. It may be desirable to impose greater sanctions for violations of the act; however, the sanctions provided represent the minimum required to insure compliance with the statute.

H. *Miscellaneous Provisions*

Article VIII, Section 5 provides that proof of eligibility shall be valid for only a period of six months. This time limit serves a two-fold purpose: it will prevent a donor from making donations many months after he qualifies for eligibility thereby protecting against any physical or mental disability acquired over six months after qualification; the time limit will prevent fraud against a husband who retracts his consent to further AI treatments after the birth of a child.

Article VII, Sections 2 and 3 impose certain liabilities upon companies and institutions handling and distributing sperm to be used in artificial insemination. This will insure to some extent the quality of the sperm from the time of donation to its injection.

Article IV, Section 4 requires a waiting period of thirty days from the time of filing all necessary statements and other data before the husband and his wife may be qualified to receive the insemination. Since all the filing required of the prospective parents can be done in a matter of minutes it is conceivable that such application can be made without due thought. A certain period of time should be provided to allow thorough consideration of a step so serious as that of permitting a new strain of blood to enter the family.[69]

III.

CONCLUSION

As a practical matter would an Artificial Insemination Statute of the nature presented ever be enacted? One can readily see that shades of George Orwell's *1984*[70] permeate each section. With each legislative

69. Compare PA. STAT. ANN. tit. 48 §§ 1-4 (1936).
70. ORWELL, 1984 (Signet ed. 1952).

limitation we come closer and closer to the governmentally supervised society so grotesquely described by Orwell. We are classifying, controlling and licensing birth. We shall only use the sperm of the strong and deposit it only within the womb of the strong.[71] Yet our arguments support greater detail and more expansive control in our regulation rather than less, although the medical profession may take an opposite view.[72] Failure to regulate effectively each phase of the process is failure to effectively regulate the whole. The outgrowth of such a law could wreak havoc on the very society we are trying to protect. State control could eventually extend to every phase of human activity. If we can determine who will give birth and by what method, why not decide who may think or speak. Indeed, the same arguments used to defeat a statute outlawing A.I.D. can be used to defeat this encompassing piece of regulatory legislation. This conclusion may not be the most desirable, but it is legally inescapable. We can not completely

71. HOLMES, *Ideals and Doubts,* in COLLECTED LEGAL PAPERS 306 (1921): "I believe that the wholesale social regeneration which so many now seem to expect, if it can be helped by conscious, coordinated human effort, cannot be affected appreciably by tinkering with the institution of property, but only by taking in hand life and trying to build a race."

72. See Guttmacher, *Artificial Insemination,* 97 ANN. NEW YORK ACAD. SCIENCES 623 (1962). Dr. Guttmacher in this article expresses a medical viewpoint that would disagree with the purposes and provisions of the Model Artificial Insemination Statute appearing in the text. Dr. Guttmacher thinks that in practicing A.I.D. six rules should be followed. The first is complete anonymity regarding the donor and the recipient of his sperm. This factor, according to Dr. Guttmacher, is absolutely essential. Second, the physician should know the couple considerating the insemination. It is important to know the physical and emotional stability of the couple as well as the quality of the marriage, since the ultimate result is to bring a child into the family. The third precept is that the physician should never encourage artificial insemination, in fact he should discourage it because unless the couple has great enthusiam, shared equally between the husband and wife, the experiment is doomed to failure. Dr. Guttmacher's fourth rule eliminates the signing of records and other papers. With the mutual confidence the couple and physician place in each other the need for such records is removed. In addition records only work as a constant reminder to the couple that their child was not conceived naturally. Fifth, the physician supervising the insemination should also deliver the child. Since the patient and physician have reached a position of mutual trust and confidence by this time, the mother will be more relaxed and feel she is in friendly hands. Dr. Guttmacher, in this respect, is perfectly willing to carry out the "white lie" of according paternity to the legal father regardless of the biological parentage. The final maximum is to keep medical fees as low as possible. If artificial insemination brings a high premium, it would be all too human for physicians to administer to couples ill-suited for it.

Dr. Guttmacher acknowledges the extreme importance of the proper selection of the donors. This should be done by the physician only. The author feels the best qualified donors are physicians and medical students who themselves have fathered normal children. The reasons are that this class of donors will freely discuss their family trees allowing the physician to eliminate those who have a likelihood of transmitting cacogenic factors, and one can be sure these donors are free of venereal disease since if they have any suspicion of such difficulty, they would rule themselves out as donors.

In making his selection of a donor, Dr. Guttmacher, does not attempt to match all the traits of the legal husband. He matches only the RH factor and the general physical characteristics.

The final paragraph of the Doctor's article reiterates his position as follows: "The procedure should be known to only three people: the doctor, the husband, and the wife, so that to all intents and purposes the child is the biological as well as the legal child of the couple. Unless we can achieve this attitude and result, it seems to me that the procedure has little merit."

outlaw the practice of A.I.D. because this would be an unreasonable exercise of the police power. Yet we cannot effectively regulate the activity because this too may violate the Constitution as an unreasonable exercise of the police power. The dilemma is clear.

Thus, as the child created through A.I.D. is in search of a defined status in the community, the courts themselves are engaged in the same search. But whereas the child can hope that the "authority" of the court will suffice to fix his status, the courts have yet to find the appropriate authorities upon which to formulate an answer to the problem they are asked to decide. Even should the courts be able to decide particularized questions relative to legitimacy, it remains to be seen whether courts can fashion *ad hoc* the breadth of regulation required to settle the problems in this area. Illustrative perhaps of the strain put on the judiciary when the legislature in a pluralistic society is unable to arrive at a common social denominator, the problem may pose an interesting test to see whether the courts can reach a case method solution to a problem more attuned to legislative resolution.

Albert P. Massey, Jr.

APPENDIX

A PROPOSED ARTIFICIAL INSEMINATION STATUTE

Statement of Purpose

The express purpose of this statute is to regulate the human activity known as artificial insemination by the sperm of a third party donor (A.I.D.). This statute is drawn to correct the problems and confusion now existing regarding the legal status of children born by the use of this method of conception, the legal status and responsibility of the donor of sperm, the marital status of the mother of such child and the legal status and responsibility of her husband, whether or not consenting thereto. This statute is drafted in view of the dangers to health that may exist if A.I.D. remains unregulated and to establish a method of conduct for those persons in any way participating in A.I.D.

Article I. *Definitions*

Sec. 1. The Donor: Any male, twenty-one years of age or over, being of sound mind and body may be qualified as a donor of sperm for the purposes of artificial insemination.

Sec. 2. The Husband: Under this act the husband is the lawful spouse of any woman applying for artificial insemination.

Sec. 3. The Mother: The mother is the lawful spouse of the husband defined in Section 2 and the applicant for artificial insemination.

Sec. 4. The Physician: The physician referred to in this act must be a licensed medical practitioner. A person is acting as a physician within the meaning of this act when such person is examining the parties, extracting or administering sperm for the purposes of artificial insemination.

Sec. 5. The Child: The child under this act is the offspring produced through artificial insemination.

Article II. *The Donor*

Sec. 1. Any male donating sperm for the purposes of artificial insemination must do so willingly, without coercion or pressure from any source and in compliance with all the sections of this Article.

Sec. 2. Any donor must file an application, as required under Article VIII of this act, containing his name, address, age, race, color and marital status.

Sec. 3. To be eligible each donor must complete a physical examination by a physician as defined under this act finding him free of syphilis and other venereal desease as well as any physical or mental defect transmittable through the reproduction process. A copy of the results of such examination shall be made, dated and signed by the examining physician and filed with the Board of Artificial Insemination as required under Article VIII of this act.

Sec. 4. Each donor must complete, sign and file a form stating that he is giving freely and of his own accord, that all sections of this article have been fully and adequately performed, that the donor has no knowledge of any physical or mental defect not discovered upon physical examination, and that the donor understands that should conception and birth take place donor, and his wife, should he have one, has no claim or relationship whatsoever to the child or its mother, now and forever. The wife as a donor shall complete a form which shall contain a statement that she is fully aware of the donation and gives her consent thereto willingly and knowingly, that she is unaware of any physical or mental defect not discovered upon physical examination which would render the donor ineligible for donation and that she and donor shall have no claim or relationship to the child and its mother, now and forever. This form must be signed by the donor, his wife, and one witness.

Sec. 5. A donor may become eligible only as provided in Article VIII, and may not donate without the proof of eligibility.

Sec. 6. Any donor not complying with all the sections of this article shall be deemed in violation of this act.

Article III. *The Husband*

Sec. 1. Before the wife of any husband within the meaning of this act can become qualified for artificial insemination said husband must submit for filing a written, dated and signed consent conforming to the provisions set forth in Section 2 of this Article and Section 1 of Article IV.

Sec. 2. The written consent of the husband must contain statements evidencing voluntary consent on his part, knowledge of the procedure involved and the method of administration, assumption of all risks regarding the health and possible infirmities of the child except as provided in Section 2 of Article VI, knowledge that any child born as a result of artificial insemination conforming with this act shall be his legitimate child and lawful heir with all rights, privileges and duties owing thereto as are owing to any child by his natural father, and that artificial insemination under this act is not a marital offense except as provided in Article IX, and all duties owing to the mother are as if the child were the natural offspring of them both.

Article IV. *The Mother*

Sec. 1. A mother shall apply for artificial insemination by filing an application stating her name, the name of her husband, her address, age and reasons for so applying. Such application must be accompanied by the written consent of the husband as required in Article III.

Sec. 2. To be qualified the mother must submit to a physical examination by a physician as provided in this act finding her free of syphilis and other venereal desease as well as any physical or mental defect transmittable through the reproduction process. A copy of the results of such examination shall be carefully made, dated and signed by the examining physician and filed with the Board of Artificial Insemination as required under Article VIII of this act.

Sec. 3. The mother shall complete a form stating that she is submitting willingly and of her own accord, that all Sections of Article III and IV have been fully performed, that she and her husband have no knowledge of any physical or mental defects not discovered upon her examination, that she and her husband have knowledge and agree that any child produced shall be their legitimate child and lawful heir, now and forever. This form shall be signed by the mother, her husband and one witness prior to filing.

Sec. 4. From the date of filing of the statement described in Section 3 there will be a waiting period of thirty (30) days before a proof of eligibility can be issued. Such proof shall be then issued according to Article VIII.

Sec. 5. After issuance of proof as provided in Article VIII, the mother and husband together shall select the sperm to be used in the insemination.

Sec. 6. Any mother failing to meet all the provisions of this article shall be in violation of this act.

Article V. *The Physician*

Sec. 1. Any physician within the meaning of this act shall be held to the ordinary standard of care required of medical practitioners engaged in this type of activity and is not held to otherwise guarantee or warrant the quality of the sperm, success of the insemination, or health of the child.

Sec. 2. No physician is qualified to extract or administer sperm, unless a proof of eligibility can be exhibited by the relevant parties.

Sec. 3. Failure by a physician to comply with all the sections of this article and all sections of this act dealing with physical examinations shall be a violation of this act.

Article VI. *The Child*

Sec. 1. Any child born in conformity with this act shall be deemed the legitimate child of the mother and husband and the lawful heir of both.

Sec. 2. Under this act a child shall be illegitimate only when the mother violates those sections of this act pertaining to the consent of her husband and the selection of the sperm.

Article VII. *Classification of Sperm*

Sec. 1. Any institution whether publicly or privately owned or operated, housing, storing or distributing sperm for the purposes of artificial insemination shall mark each container with the name, address, age and physical characteristics of the donor including race, color and educational background.

Sec. 2. Each such institution shall guarantee and warrant that the sperm is as healthy and of as high quality as when received by it and that it has exercised the ordinary standard of care required in housing, storing, and distributing a product of this nature.

Sec. 3. No institution shall receive or distribute sperm without the exhibition of a proof of eligibility by the party donating or requesting sperm.

Sec. 4. Each institution shall keep and file complete records of all its transactions and shall surrender them only upon issuance of a court order.

Sec. 5. Failure to conform to all the sections of this article is a violation of this act.

Article VIII. *Filing and Recording*

Sec. 1. This article provides for the establishment of a Public Board of Artificial Insemination to function under the auspices of the State Bureau of Health and Welfare for the purposes of filing, recording and issuing proofs of eligibility in conformance with all the sections of this article. Such Board shall consist of a physician, a psychiatrist and a lawyer.

Sec. 2. All statements and records required to be filed as a requisite to eligibility shall be filed only by the Board and copies thereof issued only through a court order.

Sec. 3. The Board shall issue proof of eligibility only when all statements are in order and on file.

Sec. 4. Each proof of eligibility shall contain the name, address and age of the applicant and his (her) physical characteristics, including race and color, for the purpose of identification.

Sec. 5. Each proof shall be dated and shall be valid for a period of six (6) months.

Article IX. *Sanctions*

Sec. 1. Any donor violating this act through his own negligence shall be liable for all the necessary and forseeable consequences to the mother and child resulting therefrom.

Sec. 2. Any donor knowingly violating this act except as provided in Section 3 of this article shall be liable for all consequences to the mother and child resulting therefrom, subject to $1,000 fine, up to one (1) year imprisonment or both.

Sec. 3. Any donor failing to acquire the consent of his wife as provided in Article II shall be guilty of a marital offense sufficient to constitute grounds for a civil divorce.

Sec. 4. Any mother failing to comply with the sections of this act dealing with her physical examination shall be barred from recovering from any person(s) in violation of this act except where such violation in no way contributed to the injury to her or to her child.

Sec. 5. Any mother failing to comply with the sections of this act pertaining to the consent of her husband and selection of the sperm shall render the child illegitimate and be guilty of a marital offense sufficient to constitute grounds for a civil divorce and subject her to a $1,000 fine, up to one (1) year imprisonment or both.

Sec. 6. Any husband aware of or aiding in the violation of any section of this act, except those sections pertaining to procedural requirements and the consent of the wife of the donor, shall be barred from recovering under this act and from enforcing Section 5 of this Article and shall be deemed the lawful father of the child as if no violation occurred.

Sec. 7. Any physician failing to meet the standard of care required under Section 1 of Article V shall be guilty of malpractice.

Sec. 8. Any physician extracting or administering sperm without requiring proof of eligibility or while knowing of any violation of this act shall be liable for all consequences to the mother and child resulting from such violation, subject to a $1,000 fine, up to one (1) year imprisonment or both.

Sec. 9. Any institution under Article VII violating its standard of care shall be liable for the necessary and forseeable consequences to the mother and child resulting therefrom.

Sec. 10. Any institution knowingly violating any Section of this act or knowing of any violation of this act shall be liable for all consequences to the mother and child resulting therefrom and subject to fines up to $50,000.

Sec. 11. All persons within this act shall be liable jointly and severally.