ARTIFICIAL INSEMINATION: A REPLY TO DEAN TALLIN

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The article contributed by G. P. R. Tallin, Q.C., Dean of the Manitoba Law School, to the January and February 1956 issues of the Canadian Bar Review[1] raises many questions of very great importance. In the January issue he considers the relation of artificial insemination to adultery, and the position he has taken on this question leaves me uncomfortably apprehensive. That part of his article contained in the February issue does not in any way alter or modify the assertions he makes in the first instalment of his article, but deals almost entirely with certain legal aspects of artificial insemination which do not depend on a finding that heterologous artificial insemination is adultery.[2]

I agree with Dean Tallin's view that a child born as a result of the heterologous artificial insemination of its mother during the subsistence of her marriage is illegitimate and that its illegitimacy does not depend on its having been conceived as the result of adulterous conduct.[3] I offer no criticism of the statements made in the second instalment of his article; but, although I am in perfect sympathy and agreement with the author's attitude of condemnation towards this abhorrent practice, I must strongly object to most of the propositions he postulates, and one he appears to imply, in reaching the conclusion that heterologous artificial insemination of a married woman is adultery.

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[1] (1956), 34 Can. Bar Rev. 1 and 166.

[2] However, at page 180 of his article Dean Tallin refers to the criminal liability of a physician under section 408(1)(c) of the Criminal Code. This section makes it a crime to induce a woman by false pretences, false representations or other fraudulent means to commit adultery or fornication. As the reader will presently see, I must disagree with Dean Tallin as to the application of this section to artificial insemination. In connection with the arguments I have raised in these pages it should be noted that the Criminal Code is, unlike many other statutes, always strictly construed.

[3] See page 166 of his article.

I have taken the liberty of stating in seven propositions the position Dean Tallin has assumed on this subject. This division is made because it appears to cover fully the principles he postulates in the first instalment of his article, and I have arranged them in the following order because the validity of all but the last depends upon the validity of the proposition immediately preceding (the last proposition is in the nature of a corollary):

(1) Adultery is sexual intercourse by a married person with a person of the opposite sex not his or her spouse.

(2) Sexual intercourse need not "(a) induce pregnancy; (b) be intended or even tend to induce pregnancy; (c) involve penetration; (d) involve a knowledge of the identity of the parties; (e) result in the gratification of pleasure; or (f) even be motivated by the expectation of pleasure."

(3) Artificial insemination is a species of sexual intercourse.

(4) The essential characteristics of adultery are threefold: "First, it must involve two persons of opposite sexes, one of whom must be married.[4] Secondly, there must be contact by at least one of the actors with the primary sexual organs of the other for purposes other than a *bona fide* medical examination, treatment for a pathological condition or sick-room care. Thirdly, the person against whom adultery is alleged must have voluntarily made or submitted to such a contact."

(5) Heterologous artificial insemination of a married woman is adultery.

(6) Heterologous artificial insemination as adultery is, or should be, a ground for divorce, having regard to the status of our divorce laws.

(7) There is no rational basis or justification for rendering divorce more accessible to husbands than to wives: that is to say, the grounds for divorce available to husbands and wives should be coextensive.

The first proposition is a basic premise the truth of which would at one time hardly have been questioned. Dean Tallin points out at page 16 of the first instalment of his article that Lord Merriman insisted upon the truth of this proposition in the House of Lords on March 16th, 1949. At page 23 of his article Dean Tallin states that heterologous artificial insemination of a married woman is adultery *even if* Lord Merriman's definition is adopted. Thus, Dean Tallin accepts this proposition, at least con-

[4] The omission of some such qualifying words in this sentence as "married to a third person" is an obvious oversight.

ditionally, as the foundation of his reasoning. I would therefore submit some criticism of the remaining six propositions, in the order in which I have arranged them, followed by some remarks concerning what would seem to be an alternative basis for Dean Tallin's conclusion that heterologous artificial insemination of a married woman is adultery, namely, that an act of sexual intercourse is unnecessary to the commission of adultery, the surrender of the reproductive faculty to another than one's spouse being sufficient to render the conduct under consideration adulterous. Heterologous artificial insemination and homologous artificial insemination will be referred to at times by the abbreviations A.I.D. and A.I.H., respectively, as has been done by Dean Tallin in his article.

Sexual intercourse need not "*(a) induce pregnancy; (b) be intended or even tend to induce pregnancy; (c) involve penetration; (d) involve a knowledge of the identity of the parties; (e) result in the gratification of pleasure; or (f) even be motivated by the expectation of pleasure*".[5] Since sexual intercourse is that act which when performed in certain circumstances, namely, one of the parties to the act being married to a third person, constitutes adultery, Dean Tallin necessarily considers the essence of sexual intercourse. Not until he propounds the fourth proposition does he define sexual intercourse.[6] (The fourth proposition is his definition of adultery, of which the second and third characteristics define sexual intercourse.) In this second proposition he excludes the necessity of certain elements from the concept of sexual intercourse.

Sexual intercourse considered in itself, that is, as an act, is the only natural act which is *per se* apt to induce pregnancy. Circumstances may prevent that act from inducing pregnancy in a particular instance; but this does not alter the *per se* nature of the act. Artificial insemination is an unnatural method of inducing pregnancy, but it also is *from its nature apt* to induce pregnancy, although it may not do so in a particular case. The exclusion of this element is not necessary to Dean Tallin's general thesis, but it is incorrect and could lead to false conclusions from its misapplication.

Sexual intercourse means more than erotic play; it has always meant at least penetration in the common acceptance of the term. To hold that erotic play without penetration is sexual intercourse

[5] Page 25 of Dean Tallin's article (the italics are mine).
[6] Quoted *ante* from page 25 of Dean Tallin's article.

is an unreasonable extension of the term. It seems, however, that the courts may be willing to extend its meaning to such conduct for the purpose of freeing a spouse from a no-longer-desirable union.[7]

If by "knowledge of the identity" Dean Tallin means simply knowledge of each other's *names*, there can scarcely be any disagreement with the exclusion of this element. However, for an act to be referable to an object the agent must have knowledge of the identity of that object in the sense that it is *this* object (or *this* woman or *this* man). The donor of semen has not had actual sexual intercourse with the recipient of his seed and neither has he had sexual intercourse with her in the order of intention because there is not present any identification of the object in his will.

Now there is one element which Dean Tallin neither excludes nor mentions and it might be well to discuss it under this proposition. The legal consequences of an act cannot be considered independently of the doing of the act. In order for the legal and moral guilt flowing from the performance of sexual intercourse in certain circumstances to be imputable to the actors it must, of course, be shown that the act of sexual intercourse was accomplished. There is a condition precedent to the act of sexual intercourse, the absence of which indicates that the act cannot have been accomplished, and consequently the moral or legal character imputable to that act cannot be attached to what was in fact done. That condition precedent is the stimulation (by whatever means) of the sexual appetite of the male actor. It would seem physically impossible for a man to "introduce his sex organs into hers [a woman's]" while his mind and will and senses are absolutely free from that knowledge and anticipatory desire which must precede the sexual appetite, and is required by it, before it can stimulate his sex organ to the extent that it becomes instrumentally capable of complying with his purely sexually-disinterested intention.

No one would suggest that carnal stimulation is immoral *in se;* on the contrary, it is ontologically good and becomes immoral only when enjoyed in corruptive circumstances. It is common to lawful and unlawful sexual unions, whether the union progresses beyond the incipient stage or is there frustrated intentionally or otherwise.[8] The object of a faculty is that which causes it to function or operate; a faculty only functions when vis-à-vis its object.

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[7] *Sapsford* v. *Sapsford and Furtado*, [1954] P. 394, [1954] 2 All E.R. 373.
[8] As in *Sapsford* v. *Sapsford and Furtado*, *ibid.*

The eye cannot see in total darkness; light is the object which alone bids it function (see). The object which stimulates a man's sexual or reproductive faculty into functioning is not the knowledge in his intellect that he is in a position to father a child,[9] but it is the presence of an object, usually human and most frequently female, which can, may, will or is about to satisfy his sexual appetite.

The purpose of a faculty should not be confused with the object which activates it. The object of the eye is light, but the purpose is sensory knowledge and ultimately intellectual knowledge, and is designed for the protection and well-being of the animal as a whole, human or brute.[10] The objects of the tactile sense or faculty are contact, pressure, movement, temperature and pain; the purpose is again the protection and preservation of the animal as a whole. The nervous system is not meant to plague us with unbearable pains or supply us with pleasurable sensations for the sake of pain and pleasure in themselves, but to warn us of conditions we must guard against and to entice us into acts of self-preservation. The purpose of the sexual or reproductive faculty is race preservation and is common to all animals without help or hindrance by thoughts of parenthood.

It may be, because her part in sexual intercourse may perhaps be merely passive, that a woman is capable of performing the act, or of merely permitting it, with neither the anticipation nor the realization of the *object* of her sexual appetite. However, if sexual intercourse, as commonly understood, is not performed with the intention of satisfying the carnal appetites, or is accomplished without the sexual stimulation, of the actors jointly, it is done to satisfy the carnality, or it is accomplished by the stimulation of the carnal appetite, of one of them. The actors contribute mutually to the act of sexual intercourse and that act derives its character from both of them. The carnality of one of the actors is sufficient to render the act carnal; if sexual stimulation is required by one of the actors, the act requires sexual stimulation.

I have been unable to find a case in which divorce was granted

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[9] A man may have sexual intercourse and lack the knowledge that that act is designed to reproduce his species. The use of a contraceptive is for the express purpose of allaying his fear that he may become a father, but it does not render him incapable of attaining the object of his sexual instinct.

[10] Whether a brute has an intellect is, of course, a question which does not affect my statement. I happen to subscribe to the theory that brutes do not have rationality.

on the ground of adultery and in which the element of carnal stimulation was absent, apart from American decisions which have held A.I.D. to be adultery.[11] There have been cases in which conduct falling short of penetration has been held to be adulterous, but in those cases there were both physical intimacy and sexual stimulation.[12]

Artificial insemination is a species of sexual intercourse. The truth of this third proposition depends to a certain extent on the truth of the second. It is evident that if all or some of the elements excluded from the essence of sexual intercourse in that proposition are in fact necessary to the act, then artificial insemination is not sexual intercourse. Hence my submissions as to the invalidity of the second proposition are applicable in a negative manner to show the invalidity of this third proposition.

I have made the assertion that sexual stimulation is a necessary concomitant of sexual intercourse. If this be so, then it would follow that until sexual stimulation can be demonstrated to be unnecessary to what has hitherto been deemed to be sexual intercourse, artificial insemination cannot be said to come within the meaning of sexual intercourse.

But it is necessary to show positively that carnality is not present in artificial insemination in order to establish that for that reason it is not sexual intercourse. Dean Tallin, at page 7 of his article, outlined the methods of obtaining the semen:

> There are at least five possible methods of collection: first, by masturbation by the donor; secondly, from the genital organs of a woman with whom the donor has just had intercourse; thirdly, by puncturing a testicle of the donor; fourthly, rectal massage of the prostate gland and seminal vesicles with pressure on the ampulla of the *vas deferens;* and lastly by condomistic intercourse.

If the semen is obtained by masturbation the object of the donor's act—that which stimulates him sexually—is in his imagination and his carnality is predicable only of his act of masturbation. If it is retrieved from the genital organs of a woman with whom he has just had intercourse, then she was the object of his carnality, and it is predicable only of his coitus with her. In no case can the carnality in the method of obtention be predicated of the act of artificially inseminating the recipient.

Apart from the question of what can be excluded from the

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[11] *Doornbos* v. *Doornbos*, which seems to be unreported. This case is commented upon in (1955), 41 A.B.A.J. 263, and, of course, by Dean Tallin.

[12] *Rutherford* v. *Richardson*, [1923] A.C. 1, 92 L.J.P. 1, 128 L.J. 399; *Sapsford* v. *Sapsford and Furtado*, [1954] P. 394, [1954] 2 All E.R. 373.

essence of sexual intercourse, and of whether penetration, identity and sexual stimulation are found in artificial insemination, it is necessary to make a positive examination of the meaning of sexual intercourse and its relation to artificial insemination.

The Book of Deuteronomy[13] affords an ancient and useful illustration in this regard:

> 20. But if what he charged her with be true, and virginity be not found in the damsel: 21. They shall cast her out of the doors of her father's house, and she shall die: because she hath done a wicked thing in Israel, to play the whore in her father's house: and thou shalt take away the evil out of the midst of thee.

The charge made against the woman was (verse 14), "I took this woman to wife, and going in to her, I found her not a virgin". The woman was to be stoned to death because "she had played the whore". This was surely sexual intercourse in its unextended interpretation. The loss of her virginity ("and virginity be not found in the damsel") was taken to be evidence that she had "played the whore", or had had sexual intercourse. Presumably the inference of sexual intercourse drawn from the absence of the *evidence* of virginity, that is the hymen having been ruptured, would be rebutted by evidence showing a different cause for the hymen's rupture, such as violent and frequent exercise.[14] In *Russell* v. *Russell*[15] a wife was fecundated *ab extra* from contact of so intimate a nature that spermatozoa found access to her organs without penetration. There was actual physical contact effected between the parties involved but they alleged that there had been no penetration. The fact that the woman was impregnated was not the conduct alleged against her, but evidence of intimate sexual connection approximating sexual intercourse (in the opinion of the court). Fecundation *ab extra* can be shown not to have resulted from intimate sexual connection (whether falling short of penetration or not) but from artificial insemination, and this should rebut the inference of an act of sexual intercourse having been the cause of the pregnancy. Thus, in so far as it might be relied upon for the purpose of supporting the contention that artificial insemination is sexual intercourse, the obiter in the *Russell* case can be distinguished.

The absence of virginity was held to be evidence of sexual intercourse in the passage quoted from Deuteronomy. A woman's

[13] Douay Version, Chap. 22, verses 20 and 21.

[14] In such a case the woman would still be a virgin; a ruptured hymen is not loss of virginity but simply inconclusive evidence of loss of virginity. Women have been known to have had sexual intercourse without the hymen having been broken (which is the opposite of my illustration).

[15] [1924] A.C. 689.

initiation to the act of sexual intercourse deprives her of her virginity. Can a woman who has not experienced sexual intercourse be said to have been deprived of her virginity by reason of having been artificially inseminated? Virginity is a factual condition. A fact cannot be legislated out of or into existence. Law may *deem* something to be what it is not (although what the law is actually doing is treating one thing *as if* it were another). There is no need to refer to instances of deeming clauses; anyone who has read the Income Tax Act is familiar with them.

The word "virgin" is susceptible of several interpretations depending on the context in which it is employed. By "virginity" I here mean that condition in a woman or a man of being completely innocent of carnal knowledge of a person of the opposite sex. This is apparently a *petitio principii*, but on closer examination it will be seen not to prejudice *in that way* Dean Tallin's assertion that artificial insemination is sexual intercourse. If artificial insemination is sexual intercourse it is *ipso facto* "carnal knowledge"; hence, artificial insemination would, if it be sexual intercourse, deprive a woman of her virginity (if she had not already lost it). But no matter how virginity be defined it must connote a factual condition found objectively in persons of whom that term is predicable. Virginity cannot depend upon a variable. From the Christian point of view the definition of virginity I have given would appear to be the correct definition: mere conception without carnal knowledge does not deprive a woman of her virginity.

Whether artificial insemination, or any medical treatment, is bona fide[16] depends, for one thing, on its legality. The legislature might declare artificial insemination to be illegal tomorrow; it might then, as a matter of public policy, re-assess its evaluation of the practice in the light of changing public opinion and declare it to be legal the day after tomorrow. Thus, it might be considered not to be a bona fide medical practice tomorrow, but a bona fide medical practice the day following. A virgin who submitted to that practice tomorrow would lose her virginity, whereas, had she been patient and waited until the day after tomorrow, she could have her baby and her virginity too. Manifestly, if artificial insemination is to derive its character of "sexual intercourse" from what is con-

[16] See the next proposition. Since the only difference between sexual intercourse and adultery is that in adultery one of the parties must be married to a third party, it follows that the second and third characteristics of adultery set forth in that proposition constitute sexual intercourse. Thus, artificial insemination is sexual intercourse only if it is not a bona fide medical practice.

sidered to be or not to be a bona fide medical practice, it can have no effect whatsoever on the fact of virginity or non-virginity (or, indeed, on the fact of the commission of adultery; the treatment of adultery may be changed by the legislature, but the legislature cannot change either the concept of adultery or the *fact* of the commission of adultery). The extension of Dean Tallin's definition of sexual intercourse is dependent upon the caprices of legislatures, party politics and public sentiment.

The act of sexual intercourse requires the mutual co-operation of a man and a woman acting together at the same time. Their mutual activity constitutes a single act of intercourse. An act must be localized in time. The act of sexual intercourse requires two actors (or an agent and a patient if the woman's part can be perfectly passive) but, as is a kiss, it is one act and must occur at some time. When can the act of "sexual intercourse" be said to have occurred in artificial insemination? At the time the semen was obtained? At the time the semen was inseminated? Surely not sometime between the two! Does it commence with the obtention of the semen and continue until the semen is used for its reproductive purpose? The act of transporting the semen can hardly be part of the act of "sexual intercourse" as constituted by artificial insemination.[17] The act of "sexual intercourse" cannot rationally be said to have commenced with the ejaculation of the semen and subsisted *qua act* until the insemination took place. This would not be one act but two separate acts. The donor and the ultimate recipient of his seed cannot be said to have acted together at the same time in their act of "sexual intercourse". (The act of which she is the patient is the act of the physician.) If the activity is discontinued the act ceases. In artificial insemination the act of obtaining the seed is quite distinct from the act of artificial insemination. If a man manufactures a bullet knowing that it will be fired into something, he cannot be said to have pulled the trigger of the weapon and fired the bullet home simply because but for him there would be no bullet. He may be anathematized; he may deserve severe punishment; he may be said to have a causal connection with the resultant effect of the firing of the bullet; but he surely did not fire the bullet home.

[17] If the act of "sexual intercourse" as constituted by artificial insemination lasts from the time the donor commences to produce the semen until the time the semen is used, the carrier of the semen (even if he is not the donor) would, logically, be participating in that act if he knows and assents to what he is doing and, on Dean Tallin's showing, may be committing adultery.

If the act of "sexual intercourse" did not commence with the obtention and conclude with the insertion of the semen—and, as I have suggested, this is not possible having regard to the intrinsic unity of an act—when did the act of "sexual intercourse" occur? If it occurred at the time the semen was obtained, it must conclude with the obtention of the semen because the sexual intercourse cannot continue as an act with the conclusion of activity by one of the actors. It would follow that sexual intercourse would be accomplished whether the semen was actually used or, perhaps, lost in transit. Manifestly this "act of sexual intercourse" cannot be localized in time as having occurred with the obtention of the seed. If it occurred at the time the woman was inseminated (that is, if this act of "sexual intercourse" does not involve anything other than the act of artificially inseminating the woman), then it must have begun when the insemination commenced. The donor may perhaps be dead at this time and yet he must be held to have commenced and accomplished sexual intercourse after his spirit had departed this world and his corpse had mouldered in the grave. If it be insisted that the act of sexual intercourse commenced with the obtention of the semen and concluded with the insemination of the woman, the act of sexual intercourse alleged could have been commenced by the donor while living and completed by him long after his death.

The essential characteristics of adultery are threefold: "First, it must involve two persons of opposite sexes, one of whom must be married [to a third party]. Secondly, there must be contact by at least one of the actors with the primary sexual organs of the other for purposes other than a bona fide medical examination, treatment for a pathological condition or sick-room care. Thirdly, the person against whom adultery is alleged must have voluntarily made or submitted to such a contact." There can be no quarrel with the first and third characteristics as outlined, but I cannot accept the proposition as a whole. Obviously, the second characteristic is objectionable if my remarks thus far have been valid. This definition is so broad as to make what have hitherto been common notes or characteristics of adultery (which I have suggested are essential to the act) unnecessary and to bring within the extension of adultery conduct which cannot rationally be deemed to be adultery in the light of past definitions of that term. I have dealt to a certain extent in my preceding remarks with Dean Tallin's exclusion of these elements from the concept of adultery. By way of illustrations intended to show its unreasonable extension, I turn now to his positive definition of adultery.

Not only would an illegal operation upon the primary sexual organs themselves of one person by another person of the opposite sex, one of whom is married to a third party, be adultery, but if the operation be illegal, or not bona fide, and the contact is only incidental to the operation, it would still come within these essential characteristics of adultery. Thus an abortionist might commit adultery by reason of the abortion he procures. The tying-off of the Fallopian tubes with the consent of the woman, but not of the husband, would be contact for a purpose other than a bona fide medical examination or treatment and would be adultery. Who is to determine what a bona fide medical examination or treatment is? Even now some persons argue that artificial insemination can be a bona fide act on the part of the physician.

A multitude of illustrations will come immediately to mind without further distasteful, but necessary, suggestions. That the logical application of this proposition produces startling results cannot be denied.

I turn now to an examination of the *idea* "adultery", not as that *term* is etymologically predicable of all impurities, whether of the moral order or otherwise, but as the *idea* expressed by the *term* "adultery" is predicable of sexual behaviour. Before men had any inkling that a woman could be artificially inseminated they had observed the promiscuous, illicit or extra-marital sexual behaviour of spouses and had by abstraction formed the *idea* to which they affixed the *term* or *label* "adultery". One of the characteristic notes of the *idea* adultery is the union of flesh and flesh. The Book of Deuteronomy says: "If a man lie with another man's wife, they shall both die, that is to say, the adulterer and the adulteress".[18] St. Paul stated that a man becomes one with the flesh of a harlot.[19] Bodily union is the constitution, the very essence of sexual intercourse. That conduct the observance of which by abstraction gave rise to the idea of adultery was clearly, in biblical texts, the actual physical contact sexually of a man and a woman one of whom was married to a third person. In the biblical sense the act was considered so intimate that to indulge in it was "to know" the woman. What intimacy or knowledge is present when the semen is secured at one time and place and inserted clinically at another time and place and the parties have no idea of each other's very existence?

In the endeavour to define the *term* or *label* which man had

[18] Douay Version, Chap. 22, verse 22.
[19] I Corinthians 6: 15 and 16 (Douay Version).

attached to the *idea* adultery, an unfortunate use of words (or the use of explicative words whose meanings were not contemplated to extend to facts not then in the cognizance of men) has resulted in increasing the extension of the *term* "adultery" so that, if artificial insemination be sexual intercourse, it no longer is a true label of the original idea. But an idea is immutable; its comprehension and extension cannot vary with the whims of men or with what is conceived to be expedient or in the interests of public policy, no matter with what temporal authority it is sought to do so. When a *term* has thus exceeded in extension and diminished in comprehension from the *idea* it was originally meant to signify, a new term must be found or a qualifying term permanently attached to the old term in order to distinguish the original *idea* and its distorted *term*.

However, the difference between artificial insemination and sexual intercourse is not merely a difference of quality, but an essential difference. The original idea of sexual intercourse is not generic to artificial insemination. The generic relation of these two different acts is that they are instrumental causes of reproduction. It is obvious that there are elements common to sexual intercourse and artificial insemination. Sexual intercourse (by which we generally name heterosexual intercourse of humans, as distinguished from sodomy, bestiality and so forth) is generic to adultery and fornication,[20] the difference being that in adultery one agent at least is married to a third party and in fornication both are unmarried. "Means of conception", "causes of conception" or "methods of reproduction" is generic to sexual intercourse (adultery, fornication or lawful intercourse) and artificial insemination (and also to parthenogenetic conception, which may become possible with the advance of science). But the difference between the methods of reproduction is essential or specific, and the specific difference is this: one is natural and the other unnatural and artificial; one may be immoral *per accidens* and the other *is* immoral *per se*; one is the contact of the flesh of a man with the flesh of a woman in sexual embrace and the other is not; one is designed by the Creator to consummate the union of a man and a woman in lawful wedlock as one in flesh, the other is designed by man in a misguided effort to cure neuroses, psychoses and other frustrations. The syringe, as an instrument in effecting insemination, is unrelated to the purpose of marriage, whether the artificial insemination be heterologous or homologous.

[20] It is generic to lawful sexual intercourse as well.

If the penalties heretofore reserved for conduct which fell within the extension and comprehension of the idea "adultery" are to be meted out to conduct which would not, but for usage and the limitations of language, be construed to come within the definition of the term "adultery", there truly exists a tyranny of words.

Heterologous artificial insemination of a woman is adultery. This fifth proposition will fall with its immediate predecessor. But, if my observations thus far do not avail against the propositions with which they have dealt, it is still doubtful if A.I.D. comes within the scope or extension of this extremely broad definition of adultery.

The statement made by Orde J. in *Orford* v. *Orford*[21] that "If such a thing [artificial insemination] has never before been declared to be adultery, then on grounds of public policy, the Court should now declare it so" is, of course, obiter. Public policy is hardly a rational basis upon which to decide that that which is not is. Dean Tallin and Orde J. have both shown by their language the abhorrence with which they view this practice. My natural aversion to the practice is, I dare say, as strong as theirs; but that is beside the point. When society has to make up its collective mind whether the practice be made permissible it will effect a change in the law commensurate with its wants. If public policy should require the condemnation of artificial insemination, let it be damned for what it is, not what it is not. If society thinks it should be a ground for divorce, let society so legislate.[22] Neither the law nor reason itself should be warped and twisted so that a reviled act can be encompassed in the extension of a specifically different act which happens to carry a sanction, for fear that the former act will go unpunished. We have the means of rendering it punishable.

The learned judge says, "had such a thing as 'artificial insemination' entered the mind of the lawgiver, it would have been regarded with the utmost horror and detestation as an invasion of the most sacred of marital rights of husband and wife, and have been the subject of the severest penalties".[23] Further along in his judg-

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[21] (1921), 49 O.L.R. 15.

[22] My remarks taken altogether are intended, inter alia, to show the folly in making artificial insemination a ground for divorce.

[23] Is not the tying-off of the Fallopian tubes (without the consent of the husband, to make the illustration stronger) so as to prevent childbirth an invasion of the most sacred marital rights and duties? Has the physician committed adultery? He has *prevented* the fulfilment of the primary purpose of marriage in his invasion of the reproductive organs.

ment he says, "Mr. White was driven, as a result of his argument, to contend that it would not be adultery for a woman living with her husband to produce by artificial insemination a child of which some other man than her husband was the father! A monstrous conclusion surely."[24] With all respect to the learned judge, I must say that it appears that his honest indignation and sense of a duty to vilify an abnormal and detestable practice have led him to the conclusion that it is adultery.

Dean Tallin says, at pages 3 and 4 of the first instalment of his article:

> But if, as those who advocate or condone the practice profess to believe, it does not constitute adultery in the case of a married woman, then there is no logical reason why it should not be extended to unmarried women desiring to become mothers, to married women who have already borne defective children, or indeed to enable any man, married or unmarried, to have a child of his own blood through some woman artificially inseminated with his seed; and if it does not constitute adultery in the case of a married woman, and is condoned in her case, there is no reason why it should not also be condoned in the case of an unmarried woman or a man.

If the practice is *advocated* or *condoned* in the case of a married woman I agree that logically (apart from the fact that the children so produced other than by a married woman may not be given the family life and care they need and may become a charge upon the state—a very sound reason not to extend the practice) it should be extended to all persons of both sexes because it is advocated as something good and it would not then be thought immoral. But Dean Tallin seems to assume that if the practice does not constitute adultery it is not immoral. Surely, adultery is not the only immoral conduct predicable of married women? It is perfectly consistent, in my opinion, to find the practice unnatural, perverse, immoral and abhorrent, and yet not adultery. Certainly, if it is immoral it should not be made available to *any* woman.

The learned judge in *Orford* v. *Orford*[25] did not give any consideration to the element of carnal stimulation that always precedes acts of sexual intercourse in the traditional sense of that act and which, if absent, is a clear indication that the act was not performed. If the essence of adultery is simply "the voluntary sur-

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The damage he has done is more permanent to the marriage than is artificial insemination.

[24] Even should Mr. White be wrong in arguing that heterologous artificial insemination is not adultery, why should it be a "monstrous" conclusion so long as Mr. White would have conceded that it is an immoral practice?

[25] (1921), 49 O.L.R. 15.

render to another person of the reproductive powers or faculties of the guilty person", and if, "so long as nothing takes place which can by any possibility affect that function, there can be no adultery", then, as I have suggested, it is only logical that where the reproductive power is absent or that function is no longer possible, as in the case of a woman who has undergone a total hysterectomy, the possibility of adulterous conduct is negatived. I do not think the courts would so hold: total hysterectomy cannot, manifestly, be raised as an absolute defence to a petition for divorce based on the adultery of the wife. And, logically, the use of a contraceptive in an otherwise adulterous embrace would rule out adultery because the reproductive *powers* would not have been voluntarily surrendered.

If a woman who has undergone a total hysterectomy commits adultery with her husband's knowledge in order to furnish the grounds for divorce, there is connivance and a divorce will not be granted; but it will not be denied that she committed adultery.[26] If she were artificially inseminated for the same purpose, the divorce would be refused, but that act would be adultery according to Orde J.'s dictum. Or, would the learned judge rule that, since she had had a total hysterectomy and could not possibly conceive as a result of artificial insemination, she had not, therefore, committed adultery? It would be the sole act of intercourse that required, essentially, fertility of the woman. How can fertility be said to be essential to sexual intercourse? Clearly, the act of sexual intercourse, which is adultery in certain circumstances, is only an act which may or may not initiate reproduction, the natural act albeit, and artificial insemination is another *kind* of act which may or may not initiate reproduction.

The immediately preceding proposition was Dean Tallin's definition of adultery. Let us now consider the application of this definition to A.I.D. In the second of the three characteristics which constitute his definition of adultery will be found two important elements. Firstly, there must be contact by one person with the primary sexual organs of the other and, secondly, that

[26] In any petition for divorce on the ground of adultery (at least in Ontario) the general rule is that the court will not grant a divorce where there has been connivance or the petitioning spouse has condoned the act of adultery of which he or she now complains: *Pearl* v. *Pearl*, [1943] O.R. 720. A reading of the cases will show that the principles of connivance and condonation presuppose the commission of the offence complained of, but disentitle the petitioner from relief because of the application of the maxim *volenti non fit injuria*. Thus, the court recognizes the commission of adultery even in situations where it will grant no relief.

contact must not be for a bona fide medical purpose if it is to be adulterous. I have dealt at some length with this second element when considering the definition and my observations in that regard apply to the proposition that A.I.D. is adultery. If Dean Tallin's definition is correct, consider the anomalous situation to which it could lead when it is applied to A.I.D. If A.I.D. *with the husband's consent* were sanctioned by law, as it very well might be, then, unlike adultery as hitherto understood,[27] this type of adultery would depend purely and wholly on the absence of the husband's consent. If she first obtain her husband's consent, a woman has not committed adultery by reason of having been artificially inseminated by the seed of another man; without his consent she is an adulteress.

At page 27 of his article, Dean Tallin states that artificial insemination does not involve direct contact. Since he considers A.I.D. to be adultery, the contact contemplated in his definition of adultery must include indirect contact. If it does include indirect contact, where is the line to be drawn? Can it be said that a man whose semen has been preserved for a century before it is used to impregnate a woman has had indirect contact with that woman? (As well might it be said that in drinking a glass of milk one has indirect contact with a cow.) Or, will the line be drawn such that if the donor dies before insemination is effected there will be considered to have been no contact? What would be the rational basis for imposing what can only be an arbitrary distinction in the kinds of contact which are to be considered adulterous?

If a patient in a hospital has a sample of blood withdrawn from his veins, or a specimen of urine taken, to be examined by a laboratory technician, and it comes into contact with that technician (or anyone else), has indirect contact been effected with the patient? Obviously not! Does the semen of a man once ejaculated continue to be that man? Surely the semen has a separate existence, an immanent life of its own. It is capable of impregnating a woman entirely independently of the donor's will once he has dissociated himself from it. I submit that there is no contact, direct or indirect, between the donor and the woman artificially inseminated, any more than a man indirectly commits incest with his daughter-in-law by reason of the consummation of her marriage.

It is my suggestion that the cases do not support the contention that sexual intercourse can be accomplished by indirect con-

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[27] See footnote 26 *ante*.

tact[28] (and, I should think, especially if that contact requires the intervention of a third party) and that in any case there is no contact, direct or indirect, between the donor of the seed and the primary sexual organs of the inseminated woman.

Heterologous artificial insemination as adultery is, or should be, a ground for divorce having regard to the status of our divorce laws. If it be assumed that A.I.D. of a married woman is adultery, what would be the logical consequences? Not only would A.I.D. involve the donor and the recipient of his seed in an act of adultery, but the physician, being a *causa sine qua non*, is equally a participant in that identical act of adultery. Dean Tallin, at page 25, says that "It [heterologous artificial insemination] also constitutes adultery between the woman and the third person, if a male". How can the author assert this in view of his statement that the first essential characteristic of adultery is that it involve two persons of opposite sexes, one of whom is married to a third party? Perhaps his definition does not exclude the possibility of more than two persons committing one and the same act of adultery simultaneously. If this be the case, it might have been clearer to have said "involve *at least* two persons". Is he wrong concerning this characteristic? Or does the insemination involve two separate acts by the donor and the physician? Whether the physician has indulged in adultery because he has been in direct contact with the primary sexual organs of a woman with her consent for purposes other than a bona fide medical examination or treatment or because his part in the act amounts to "contributory" adultery is a further distinction that may have to be made.

The donor may be divorced by his wife, the inseminated woman by her husband, and the physician by his wife, all arising out of a single act called artificial insemination which is said to amount to an act of adultery. The woman ran absolutely no risk of introducing into her husband's family a spurious offspring by the physician. Must her husband name both the donor and the physician as co-respondents in his petition for divorce? These problems, which arise by necessity from the proposition being dealt with, are manifestly not within the scope of our divorce laws in their present form.

But, if artificial insemination is adultery, it would surely be hypocrisy to say that only the woman commits adultery as a re-

[28] The *Sapsford* case, footnotes 7, 8 and 12 *ante*, would appear to have gone furthest in holding that penetration is not necessary to adultery, but in that case there was direct contact.

sult of A.I.D.; the donor and the physician would be equally adulterers with her. And at present in Canada there is no double standard in the granting of divorces on the ground of adultery. Yet there is no proportion whatever between masturbation and donation of semen or the clinical injection of the semen and the sanction of "risk of divorce" which must be said to follow. I strongly submit that the law should not deem A.I.D. to be adultery. It is contrary to the facts; it would lead to either the most irrational consequences ever conceived to affect the conduct of spouses or a hypocritical treatment of artificial insemination as adultery; it is entirely unnecessary to *deem* that practice to be something other than what it is, because society can express its reaction to the question through its legislature.

In any event, the definition Dean Tallin has formulated as a rational basis for encompassing A.I.D. within the extension of the idea of adultery would appear to have denuded that idea to the extent that conduct which no reasonable person would call adulterous must be so found. A male criminal abortionist and a male physician who ties off the Fallopian tubes without the consent of his patient's husband have both had contact with the primary sexual organs of a woman with her consent for a purpose other than a bona fide medical treatment. The abortionist and his "victim" have committed adultery by definition and their spouses should be able to obtain divorces. And the same risk would be taken by the physician who tied off the Fallopian tubes and the woman who submitted to this operation. A further illustration is afforded by an operation performed more frequently in Denmark than elsewhere, as I understand: if a physician operated on the primary sexual organs of a person of the opposite sex to accommodate him or her in his or her sexual delusion or perversion, either one being married to a third party, and if that operation were not bona fide, then the operation would amount to adultery and a petition for divorce on the ground of adultery could be brought by the third party.

The complexities and absurdities which arise logically from deeming that A.I.D. of a married woman is adultery must surely show the folly of so doing; and it is absolutely unnecessary to do so since society has it in its power to create temporal sanctions for such conduct. It would appear presumptuous for the courts to decide what it must surely be within the jurisdiction of the legislature to decide. The great diversity of opinion concerning artificial insemination points to the ultimate necessity of a pro-

nouncement on the problem in all its aspects by the legislature. I submit that the common law is not developed to the extent necessary to give consideration to these problems and that the courts should not treat artificial insemination as a ground for divorce by perverting the meaning of adultery to that end, but should wait until society through its legislature has made its needs and wants known. There is but one reasonable premise upon which divorce as a remedy for A.I.D. can be founded and that is that the legislature has declared it to be so. The wilful distortion of objective reality is not made reasonable simply because it might seem to be expedient at the moment.

There is no rational basis or justification for rendering divorce more accessible to husbands than to wives: that is to say, the grounds for divorce available to husbands and wives should be coextensive. Dean Tallin, at pages 20 and 21 of his article, refers to the Matrimonial Causes Act of 1857, which permitted a husband to obtain a divorce on the sole ground of his wife's adultery, but required a wife to prove some additional serious offence on the part of her husband before becoming entitled to a dissolution of marriage. As a further illustration of the disparity in the treatment of husbands and wives in matters of this kind the author quotes Horowitz, *The Spirit of Jewish Law* (1953) p. 204: "Only sexual connection of a married woman with a man other than her husband constituted the offence of adultery. Mere infidelity by a husband never was, nor now is, the capital offence of adultery." At page 26 the author draws his readers' attention to yet another instance of this kind of discrimination. Article 187 of the Civil Code of Quebec allows a husband a separation by reason of his wife's adultery; article 188, before its amendment in December 1954, allowed a wife a separation upon the same complaint only if her husband kept his concubine in their common habitation.

The author's comment on this discrimination is that it lacks justification, apart from the one fact that "adultery by a wife may result in the introduction of spurious offspring into the family, whereas that of a husband does not". Perhaps this is an admission that there is one rational basis for the discrimination referred to, but the implication plainly is that it is insufficient.

I venture to suggest that there is a sufficient basis for treating the infidelity of a wife with more severity than the infidelity of a husband. The legal treatment of individuals in respect of similar acts they have performed should differ only if there exists in objective reality a real distinction between the individuals, affecting

the nature of those acts and their social effects, upon which the disparity in their treatment may be founded. We know objective reality only as the result of a process of intellection. Therefore, if a real distinction is postulated and supported by reasoned demonstrations, then the proponent of the distinction can claim a rational basis for his proposition. There should be a proper proportion between the real distinction postulated and its effect upon the treatment accorded to the acts under consideration before there can be a rational foundation for such treatment.

The predominant view in the course of the history of Western society, as well as at the present day, has been that polygamy is incompatible with the purposes of marriage. The essential characteristics of a Christian marriage were that it be monogamous and indissoluble. (The extension of the word Christianity now embraces sects which no longer believe in the indissolubility of marriage, but there is common accord on the question of monogamy.) Our laws reveal the impact of Western society's thought on monogamy and polygamy. An examination of this thought is of great importance in the treatment of marital infidelity.

The purposes of marriage are twofold. The primary purpose of marriage is the procreation and education of children. The secondary purpose is the pleasure and comfort the parties to the marriage derive from their relationship. Both species of polygamy, namely, polygyny and polyandry, are incompatible with these purposes. Polygyny, the marriage of one man with more than one woman, tends to impede or defeat the secondary purpose of marriage. Polyandry, the marriage of one woman with more than one man, tends to defeat or impede both the primary and secondary purposes of marriage.

In a polyandrous marriage the husbands do not know which of them is the father of a child born in the marriage. There is not the sense of duty which arises with knowledge of paternity. Each husband might refuse to educate the child or in any way look after any of his wife's children on the supposition that the child is not his. Parental responsibility is destroyed by such a union; it strikes at the primary purpose of marriage. A polygynous marriage, on the other hand, gives rise to no such dilemma. The husband is the only legitimate father and the wives obviously know when they have played a part in the birth of a child.

Since the distinction in the evaluation of polygyny and polyandry is based upon logical argumentation and is the traditional attitude recognized by Christian thinkers and, indeed, evidenced in

the conduct of all nations (as is shown by the relative rarity of polyandry), I submit that the distinction must be considered to be founded upon a rational basis.

There would appear to be a clear analogy between *polygyny* and *adultery on the part of a husband*, and between *polyandry* and *adultery on the part of a wife*. The adverse effect upon the fulfilment of the purposes of marriage is similar. It follows logically then that there is a real distinction in social effects between the adultery of a husband and the adultery of a wife.

Whether this distinction will support discriminatory treatment of adultery by a husband and adultery by a wife depends, as I have suggested, upon the proportion between the disparity in the treatment and the distinction giving rise to it. Conduct which tends to defeat or impede the primary purpose of marriage is more damaging than conduct which tends to defeat or impede only the secondary purpose of marriage. Thus, the adultery of a wife is more damaging to a marriage than is the adultery of a husband. The effect upon society of a wife's adultery is greater not only because it is more damaging to the marriage as a vocation to be fulfilled (and society must be concerned with a marriage *qua* vocation) but because society must concern itself with assuring the fulfilment of the primary purpose of marriage, since that purpose affects the propagation of the race and the continued existence of society; and because one of the social effects in a failure in the primary purpose of a marriage is the imposition upon the state of the care and education of the children of the marriage.

Thus it would appear that there is a proper proportion between the greater damage caused to marriage by a wife's infidelity and the sterner legal consequences which some societies have seen fit to attach to her adulterous conduct.[29]

There appears to be confirmation of this point of view in the *Orford* case:[30]

> In its essence, adultery was always regarded as an invasion of the marital rights of the husband or the wife. When the incontinence was that of the wife, the offence which she had committed rested upon deeper and more vital ground than that she had merely committed an act of moral turpitude, or had even seen fit to give to another man something to which her husband alone was entitled. The marriage-tie had for its primary object the perpetuation of the human race.

[29] But these distinctions are applicable only to adulterous conduct. If a husband be permitted a divorce even though his wife's conduct has not been adulterous, then the grounds of divorce have been extended beyond conduct affecting the primary purpose of marriage, and a wife should logically be permitted a divorce upon the same grounds as a husband.

[30] (1921), 49 O.L.R. 15.

This distinction, no doubt, is the historical explanation of the discrimination against women which, as Dean Tallin points out, has appeared from time to time. The case of *Babineau* v. *Babineau*[31] stated that the Matrimonial Causes Act of 1857 did not enlarge or change the canon- or ecclesiastical-law definition of adultery, which was sexual connection between a man and a woman, of whom one was married to a third party. Questions affecting marital status were originally dealt with by ecclesiastical courts applying canon law, which in turn was developed from the moral tenets of the church. The distinction between polygyny and polyandry thus found its way from the ethics of the church into the common law.

But this real distinction between a wife's adultery and a husband's adultery does not, simply because it affords a rational basis for so doing, *ex necessitate* render discriminatory treatment of their conduct mandatory.

In view of the incongruous consequences of artificial insemination *qua* adultery it is my suggestion that if it is going to be held to be adultery in spite of the distortion of concepts and all the evils that distortion entails, discriminatory treatment is not only rational but necessary in the interests of public policy.

I offer now a resumé of the positive view inherent in my criticism of the position taken by Dean Tallin on this aspect of artificial insemination.

(1) Sexual intercourse is by its nature apt to induce pregnancy. Penetration is physiologically necessary to the performance of that act and is essential to the moral character of *sexual intercourse.* Knowledge of the identity of one partner is required by the other inasmuch as the object of the act must be particularized. Sexual stimulation is a physiological prerequisite of sexual intercourse, the absence of which is an indication of the non-performance of the act.

(2) Artificial insemination is not a species of sexual intercourse because it lacks the essential characteristics of sexual intercourse just mentioned, as well as for the following reasons: sexual intercourse as an act is a factor in depriving a woman of virginity; mere conception (especially from the Christian viewpoint) is not such a factor (although conception from the seed of a man other than her husband by sexual intercourse, and from the seed of *any* man by artificial means, is immoral, being neither natural nor supernatural, but unnatural); artificial insemination cannot deprive a woman of her virginity. Sexual intercourse as an act can and must be localized

[31] [1924] A.C. 687, at p. 721; 93 L.J.P. 97.

in time; artificial insemination cannot *qua sexual intercourse* be located in time. Sexual intercourse requires two actors acting together; artificial insemination is not accomplished by the actors acting together—in fact, if not accomplished entirely by the physician, as I have submitted, then it is concluded by him acting as an intermediary, and could possibly be concluded a great number of years after the donor's death.

(3) Voluntary "contact by one of the actors with the primary sexual organs of the other for purposes other than a bona fide medical examination, treatment for a pathological condition or sick-room care" is too wide a definition of sexual intercourse: as an element of adultery it extends the meaning of "adultery" to any such voluntary contact whatsoever and renders it dependent upon a variable, namely, the bona fides of the contact. This definition is repugnant to the very idea of adultery.

(4) Even if Dean Tallin's definition of sexual intercourse be accepted, A.I.D. does not constitute sexual intercourse or, therefore, come within the extension of adultery, because in A.I.D. there is neither direct nor indirect contact between the donor and the recipient of his seed.

(5) I submit that A.I.D. of a married woman is not a ground for divorce having regard to the status of our divorce laws (unless, in Nova Scotia, where cruelty is a ground of divorce, A.I.D. is found to be a species of cruelty). Further, in view of the incongruous consequences and undesirable effects of distorting concepts, such conduct should not be *deemed* to be adultery.

(6) If A.I.D. of a married woman *be* deemed to be adultery, then there is a rational basis and a practical necessity for applying discriminatory treatment to such conduct, and the "risk of divorce" should flow only from the inseminated woman's part in this deemed-to-be-adulterous conduct.

The second, third and fourth propositions postulated by Dean Tallin are not necessary to the conclusion he has reached if his first proposition is incorrect. It is my submission that sexual intercourse is necessary to the commission of adultery. Dean Tallin says:

> With all the respect due to Lord Merriman's opinion, it would seem that A.I.D. does constitute adultery and it would do so even if the 'risk of pregnancy test' is rejected and the definition approved by Lord Merriman adopted. That definition is, 'voluntary sexual intercourse between a married person and a person of the opposite sex [not his or her spouse] during the subsistence of the marriage'. [page 23]

Thus Dean Tallin has attempted to demonstrate that A.I.D. is

adultery because it amounts to sexual intercourse in circumstances which render that act adulterous. I have endeavoured to show the fallacy of this argument. It is suggested by Dean Tallin and others whose opinions merit great consideration, however, that the essence of adultery is the surrender by a married person of his or her reproductive power or faculty to a person of the opposite sex not his or her spouse. What is here propounded as the essence of the act is, of course, unnecessary to the commission of adultery, because adultery may be committed by a person who does not have a reproductive faculty. The problem then is whether there are two acts which, though different, are each acts of adultery.

Dean Tallin's approach seems to be this. He answers the implied question "What is reprehensible in adultery?" by saying that it is the surrender by a married person to a third party of his or her reproductive powers. Where he finds this same moral element present in another act he concludes that the acts are essentially the same. This is defining an act in terms of its moral character. In answering Dean Tallin's argument, then, it would appear to be consistent to consider the moral aspect of the problem.

There is a vast divergence of opinion among peoples the world over on particular moral questions. There is disagreement not only as to the nature but as to the very existence of a standard of morality. It is not my intention to attempt a refutation or evaluation of the various systems of morality, nor do I intend to assess the relative wickedness or malice found in adultery and A.I.D. Those who profess a conviction that some human acts are good and others are bad will readily admit that they adhere to some criterion by which they judge those acts. Some of them will agree or disagree with the conclusion I reach on the moral issue in the problem of artificial insemination because, or in spite, of that standard of morality to which they personally adhere. I believe my methodology is equally applicable, however, to any criterion and the main point of contention will lie in the validity of certain basic premises.

The morality of an act is, perhaps, better left undiscussed in a treatise on the legal effects of that act. I would stress, therefore, that my criticism of Dean Tallin's position on this subject does not depend upon moral considerations.

The morality of an act is the relationship between that act and a standard of morality. Any relationship is objectively one and only a *logical* "breakdown" into component parts, or a distinction as to elements, can be made when considering the essence of that relationship: the relationship itself is intrinsically indivisible.

Some human acts when considered in themselves have no relationship to the standard, but acquire a relationship from the circumstances in which they are performed; the relationship of other acts to the standard is inherent in those acts themselves. Now, since the morality of an act depends on the performance of that act (without which there can be no relationship), it would seem eminently reasonable that where acts *qua* acts are essentially different their relationship to a standard of morality must be essentially different. If I have been correct in my assertion that artificial insemination is essentially different from adultery *as an act*, it follows that the morality of those acts can never be the same, no matter in what similar circumstances they are accomplished.

The argument that because the malice found in adultery is found in A.I.D. then A.I.D. must be adultery is an *a posteriori* argument. My argument is, of course, *a priori*. I submit that a more precise examination of the problem is required when the conclusions arrived at by these two forms of reasoning conflict.

By the marriage contract the parties to the marriage give to each other the exclusive right to perform together that natural act which is *per se* apt to induce pregnancy; and, consequently,[32] the exclusive right to the use of the reproductive faculty itself. There is no doubt that even if the reproductive power or faculty is absent the performance of the act of sexual intercourse by a married person with a third party is adultery.[33] The point of contention is, therefore, whether the surrender of the reproductive faculty without the performance of that natural act bears the same relationship to the norm of morality (or whatever criterion one professes) as does adultery.

I would lay stress on the nature of a relationship between an act and a standard: that relationship is one and indivisible. The malice of an act may be increased by qualitative circumstances, but it is not essentially changed. Thus, if *A* steals $10.00 from *B* it is less malicious but has the same essential moral character as if he had stolen $20.00. But if *B* were in possession of a medicine necessary to sustain his life and *A*, knowing this and intending the

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[32] I have placed the right to the performance of sexual intercourse before the right to the use of the reproductive faculty for this reason: the absence of the ability to perform sexual intercourse (at the time the marriage is contracted) renders the marriage void ab initio; the absence of the reproductive power does not affect the marriage status of the parties.

[33] Thus, the presence of that faculty is not necessary for adultery. Those who maintain that A.I.D. is adultery are basing their contention on the presence of an element not necessary to the moral character of what has hitherto been understood as adultery.

consequences, deprived *B* of his medicine, we could make a *logical* distinction and say that *A* committed murder and theft. But, unlike killing *B* and then appropriating his possession, *A* has done only *one act* and its relation to the norm is objectively indivisible.

Now there are elements which are common to the moral character of some specifically different acts which evidently do not bear the same relation to any standard of conduct. Lust is common to masturbation and fornication, but no one would say that the moral characters of these acts are essentially the same. Their relationship to any criterion is essentially different.[34]

As a principle it can be said that the fact that the moral characters of two acts have something in common (in the logical order) is not at all conclusive that they have essentially similar moral characters. Because of the indivisible nature of a relationship a further principle is necessarily postulated, namely, if an element found essentially in the moral character of one act is not found in the moral character of another act the acts in questions are essentially different in moral character.

There are elements common to the moral character of *some* acts of adultery (that is, where the reproductive faculty is present in both actors) and the moral character of A.I.D. If it can be shown that the moral character of either includes essentially something not found in the other, then it follows that adultery and A.I.D. have essentially different moral characters. The common moral element is the *wrongful* surrender of the reproductive faculty by or to a married person, that is, the surrender of such power by a married person to a person not ordered to its use.[35]

Artificial insemination is a perversion of the natural order; it is immoral *per se*. Sexual intercourse is immoral *per accidens*. The *per se* immorality of artificial insemination is an essential integral element in the objectively indivisible relation of artificial insemination to the standard of morality. That which renders artificial insemination immoral is present in A.I.H. as well as A.I.D; A.I.H.

[34] Masturbation is a sin against the virtue of purity; fornication is a sin against the virtue of chastity and falls under temperance.

[35] Whether injustice is a *logical* component of the objectively indivisible and essential moral character of adultery is a moot question. It certainly is not necessary in law. The law recognizes that adultery is adultery whether or not there has been connivance; but it will not grant a divorce where there has been connivance. The maxim *volenti non fit injuria* would seem to apply and injustice cannot be complained of by the petitioner. Moral theologians, however, are divided on the question. Some profess that the exclusive right of spouses to the performance together of sexual intercourse (and, hence, the use of the reproductive powers) is an inalienable right; others profess that there is no such thing as an inalienable right.

and A.I.D. bear different relations to the standard of morality, but that which renders A.I.H. immoral is present essentially in A.I.D. A.I.H. is obviously not adultery since it is neither extra-marital intercourse nor the surrender of the reproductive faculty to a person other than one's spouse. Since the relationship of A.I.D. to the standard cannot be objectively divided into parts, and since that relationship essentially includes something not found in adultery, then A.I.D. is essentially different from adultery in the order of morality.

To recapitulate: (1) *A priori* argument: The morality of an act is its relationship to a standard, and depends upon the nature of the act itself. Acts which are essentially different *qua* acts must therefore have essentially different moral characters. But adultery and A.I.D. are essentially different *qua* acts; therefore, they have essentially different moral characters.

(2) *A posteriori* argument: If an act is *per se* immoral it has an essential moral element independent of circumstances. Artificial insemination is immoral *per se*. Therefore, artificial insemination has an essential moral element independent of circumstances. A.I.D. and A.I.H. are both artificial insemination. Therefore, A.I.D. and A.I.H. have a common essential moral element. But A.I.H. is not adultery. Therefore A.I.D. has an essential moral element not found in adultery. But the morality of an act is objectively indivisible. Therefore, A.I.D. is essentially different morally from adultery.

Now, if A.I.D. is not adultery biologically or ontologically and has not even the moral character of adultery, it would seem folly for the law to deem it to be adultery. It is in my opinion more heinous than adultery. It is cold, calculated and scientific. It is never accompanied by any element, such as antecedent concupiscence, which mitigates to a certain extent the guilt imputable to an agent. How society will eventually treat A.I.D. is in the realm of speculation. Perhaps it will be made a ground for divorce on its own "merits"; perhaps it will be made a crime; perhaps it will come to rank in merit and dignity with other modern scientific achievements; but it is not adultery.[36]

[36] The problems arising from artificial insemination have invoked considerable comment in legal periodicals during recent months and I should refer the reader to the following, not all of which are available to me I might add: LoGatto, Artificial Insemination (1955), 1 Catholic Lawyer 172 and 267; Weisman, Ryan, Noble, Friedman, Mangin and Goldfarb, Symposium on Artificial Insemination (1955), 7 Syracuse L. Rev. 96; Kelly, Artificial Insemination (1955), 33 U. of Detroit L. J. 135; Comment, Artificial Insemination and the Problem of Legitimation and Adultery, [1955] U. of Illinois L. Forum 759.