THE REPORT OF THE FEVERSHAM COMMITTEE — A STERILE SOLUTION

" We know of no spectacle so ridiculous as the British public in one of its periodical fits of morality" (Macaulay).

When in 1957 Mr. Maclennan sought a divorce on the ground of his wife's adultery and Mrs. Maclennan alleged that the child to which she had given birth had been conceived as a result of A.I.D., and when Lord Wheatley held that whatever else Mrs. Maclennan may have done she had not committed adultery so far as the law of Scotland was concerned, the problem of artificial insemination finally registered in the public consciousness.[1] The problem had, of course, been there for years. Thousands of articles and several books on the subject had already been published; [2] two enquiries had already been held — one by the Archbishop of Canterbury,[3] and one by the Public Morality Council,[4] and on at least three occasions the problem had arisen before the English courts.[5] It is to Mr. and Mrs. Maclennan, however, that the credit goes for finally having hammered home to the general public the fact that the problem existed.[6] Almost immediately it became a matter of national concern: questions were asked in the House. The government reacted as all good governments do by appointing a committee to enquire: [7]

> into the existing practice of human artificial insemination and its legal consequences and to consider whether, taking account of the interests of individuals involved and of society as a whole, any change in the law is necessary or desirable.

1. *Maclennan* v. *Maclennan,* 1958 S.L.T. 7.
2. See Schellan, *Artificial Human Insemination in the Human* (1957); Glover, *Artificial Insemination in Human Beings* (1948); both of which contain extensive bibliographies.
3. The Report, entitled *Artificial Human Insemination,* was published in 1948 by S.P.C.K.
4. The proceedings, entitled *Artificial Human Insemination,* were published in 1947 by Heineman.
5. *R.E.L.* v. *E.L.* [1949] P. 211; *Anon, The Times* newspaper, 4 July 1951; *Slater v. Slater* [1953] P. 252; all of which involved the issue of consummation.
6. Some of the credit should, however, be awarded to Lord Blackford who initiated the debate in the House of Lords on 26 February 1958 as a result of which the committee was appointed. This was the third occasion on which the matter had been before their lordships: see House of Lords debates, 28 July 1943 and 16 March 1949.
7. The members of the committee were The Earl of Feversham, D.S.O. (chairman); Dr. Priscilla FitzGibbon; Mrs. Peggy Jay; Dr. S. R. Matthew (*vice* Dr. D. McDonald who died during the course of the proceedings); Mr. Ralph Risk, C.B.E., M.C.; Mr. John Ross, C.B.; The Hon. Mr. Justice Stevenson; Professor R. E. Tunbridge, O.B.E., F.R.C.P.; and Mrs. H. Whitley.

It is with the report of this committee that we are here concerned, and the first point to call for comment is that the evidence before the committee displays what appears to be a quite disastrous lack of balance. Thirty public and professional bodies gave both written and oral evidence. Of these fourteen were religious bodies; [8] six were medical and scientific [9] and three represented the law (of these three two represented Scotland and one England).[10] Nineteen such bodies submitted written evidence only, and of these four were religious bodies, [11] six were medical and scientific [12] and five were legal (and of these all five represented Scotland, four being the four Scottish law faculties, the other being the Scottish Law Agent's Society). [13] This displays a rather heavy overloading in favour of the views of religious organisations, and an under-representation of the views of the legal profession, especially that of England which was represented only by the Law Society.

If we consider the individuals who gave evidence we find that of the twenty-two persons who gave both oral and written evidence eighteen represented medical and scientific and four represented religious, points of view.[14] Nobody represented the views of the legal profession in this category. Of the eight individuals who gave only oral evidence seven represented the medical profession, the eight being the lone legal voice of Professor T. B. Smith, Q.C.

8. These were the Baptist Union of Great Britain and Ireland; Baptist Union of Scotland; Catholic Body in England and Wales; Church in Wales; Church of England; Church of Scotland; Congregational Union of England and Wales; Congregational Union of Scotland; Free Church of Scotland; Methodist Church; Modern Churchman's Union; Scottish Committee of the Catholic Union of Great Britain; Scottish Episcopalian Church; and the United Free Church of Scotland.

9. These were the British Medical Association; British Paediatric Association; Royal College of Obstetricians and Gynaecologists; Royal College of Physicians; Royal College of Surgeons of Edinburgh; and the A.I.D. Investigation Council.

10. The Scottish bodies were the Faculty of Advocates and the Law Society of Scotland. The English body was the Law Society. The other seven public and professional bodies submitting evidence were the Association of Children's Officers; Association of Psychiatric Social Workers; Medical Defence Union; the Mothers' Union; College of Arms; and the Scottish and National Marriage Guidance Councils.

11. These were the Free Presbyterian Church of Scotland; General Assembly of Unitarian and Free Churches; Presbyterian Church of Wales; and the Salvation Army.

12. These were the Faculties of Medicine of Aberdeen, Birmingham and Edinburgh Universities; Medical Women's Federation; Society of Apothecaries; and the Society of Medical Officers of Health.

13. Other bodies were the Marriage Law Reform Society; the National and Scottish Councils for the Unmarried Mother and her Child; and the Public Morality Council.

14. Of the four representing a religious point of view three were Jewish Rabbis, the fourth being the Archbishop of Canterbury.

The report finally lists a few names from whom, amongst others, written memoranda were received, and here at last we find a few familiar legal names: Lord Keith of Avonholm, Mr. Justice Karminski, Professors Hanbury, Plucknett and Ryder and Drs. T. E. James and Glanville Williams.

This gives food for thought. To a committee set up to "consider whether .... any change in the law is necessary or desirable" the views of the English legal profession are represented by the oral and written evidence of the Law Society, and by written memoranda submitted by one High Court judge and some half-dozen English law teachers. The Scottish legal profession were better represented with seven public and professional bodies submitting evidence, one law teacher giving oral evidence and one law lord submitting a written memorandum. Even this pales into insignificance, however, beside the eighteen religious bodies with thirty-nine official representatives and four individuals who gave oral and written evidence and the twelve medical and scientific bodies with sixteen representatives and twenty-three individuals who gave evidence. One is justified in enquiring into how it comes about that a committee which is set up to consider changes in the law has such unrepresentative legal evidence before it.[15] One would have thought that the views of the legal profession as to any changes in the law were as relevant as those of the various religious denominations. In considering the recommendations made by the committee, however, it is worth while to bear in mind the nature of the evidence which was before it.

The report itself is divided into two parts. First, "The Existing Practice and its Legal Consequences;" and second, "The Committee's Views." The first part is presumably intended to provide the necessary factual background, but it cannot be said that the provision of factual material is adequate. For some reason the committee chose to ignore the fact that there is an extensive literature on the subject; practically none of it is, at all events, cited in the report. This omission, coupled with the fact that the evidence submitted to them is apparently not to be published,[16] renders the first part of the report virtually useless for it

15. It is perhaps worth noting that the evidence before the Wolfenden Committee included, besides the Law Society, the General Council of the Bar and the Society of Labour Lawyers, whilst among the individual witnesses were the Lord Chief Justice, two High Court judges, three metropolitan magistrates and the Director of Public Prosecutions.

16. At p. 2. Some of the evidence has been published independently. That submitted by the Archbishop of Canterbury has been published by the Church Information Office. Professor C. D. Darlington, F.R.S., reviewing this pamphlet in the *Eugenics Review* (1960), 52 at p. 117, comments: "clearly the consequences of artificial insemination are too far reaching to be discussed in twenty-four pages. The Church will have to think again." Professor T. B. Smith, Q.C., has published what presumably represents the substance of his evidence in 1959 S.L.T. 245, which is the text of a lecture entitled "Law, Professional Ethics and the Human Body."

becomes simply a series of dogmatic statements which, in the absence of any documentation, cannot be assessed. One has no means of knowing whether their conclusions are reasonable or not. This applies particularly to the committee's estimates as to the incidence of the practice of A.I.D. They state (p. 4) that "from information received it appears that over 10,000 A.I.D. children may have been born in the U.S.A. since the practice began." Since they do not state what their information was it is impossible to assess the accuracy of this estimate. One can only note that other estimates, which are also published without any evidence to back them, are a good deal higher.[17] The publication, by the committee, of yet another unsupported estimate, adds nothing to our knowledge of the extent of the practice.

This statistical superficiality vitiates their discussion of the possible future scope of A.I.D. Their conclusion (pp. 16-17) is that about 1,000 cases per year in England would qualify for A.I.D. within the limits of the currently accepted medical indications. The argument, however, by which they reach this figure leaves a good deal to be desired. They commence with the statement that between 7-9% of all English marriages are childless because either husband or wife or both are infertile. They do not state the basis of this estimate beyond noting (p. 17) that " this figure was accepted by most of our medical witnesses." It is curious, however, to note that they also refer to an estimate published by Professor Glass, one of the witnesses before the committee, who prefers a figure of 6-7% but they give no reasons for raising Professor Glass's estimate. It may however be added that other published estimates are as high as 17%.[18] The estimate accepted by the committee without the evidence upon which it was based is a totally inadequate premise from which to assess the future scope of A.I.D. However, having reached this figure the next stage in the committee's argument involves the proposition (p. 17) that "A.I.D. could of course only be considered in those cases where the infertility was entirely due to the husband." This is an assumption that may be questioned. The committee are proceeding on the basis that it is individuals rather than marriages that are infertile. The view that those cases in which the infertility is entirely due to the husband can be isolated appears to imply an ability to divide the responsibility for childlessness which does not seem to command universal respect in the

17. See Ploscowe, *Sex and the Law* (1951), at p. 113; Lo Gatto: "Artificial Insemination" (1955) 1 *Cath. Law* 172. The committee's assessment of the incidence in the United Kingdom is equally unsatisfactory. They estimate that the total is not "greatly in excess of 1,150." The *News Chronicle,* 4 February 1958, estimated that the total was about 10,000. See the discussion of this point by Lord Blackford in House of Lords Debates, 26 February 1958.

18. See *Postgraduate Obstetrics and Gynaecology,* 2nd ed. (1955). The real problem in making these estimates is that of distinguishing between voluntary and involuntary childlessness.

medical profession.[19] On the basis of this assumption, however, and with the aid of an unsupported estimate (p. 17) that "it appears to be accepted in medical circles that the husband may be solely responsible in about 30% of infertile marriages" the committee reduce the possible future scope of A.I.D. to about 9,000 – 10,000 cases per year. The final stage in their argument is based on the assumption that azoospermia is the only acceptable indication for A.I.D. On this assumption and with the aid of another unestablished estimate as to the incidence of azoospermia, namely that it only occurs in about 10% of the cases in which the husband is responsible for the infertility, they reach the final figure of 1,000 cases per year which could qualify for treatment by A.I.D. Having thus laboriously computed their estimate of the possible future scope of A.I.D. the committee continue (p. 18) by stating: "It would be misleading, however, to suggest that 1,000 cases a year represents the possible scope for A.I.D." Without pausing to enquire why it was therefore thought necessary to calculate such a figure we need merely note that the committee's reasons for regarding their own calculations as misleading are that firstly, A.I.D. may be used where the husband is not azoospermic but merely sub-fertile (although they state that they have no evidence that this is in fact the case) and secondly, that A.I.D. may be psychologically contra-indicated even in those cases where medically indicated.

The committee's discussion of the possible future scope of A.I.D. is thus utterly inconclusive and quite valueless. It is an extraordinary situation in which a departmental committee goes to the trouble of making estimates which it then proceeds to characterise as misleading.

Another curious feature of the report is its apparent tendency constantly to play down and minimise all aspects of the practice of artificial insemination. One example will be sufficient to illustrate this point. The committee state (p. 20):

> At present human semen cannot be stored at room temperature for more than a few hours. There have been reports that children have been born in the United States as a result of artificial insemination with husband's semen which has been frozen for several weeks, but we understand that no method has so far been found of preserving human semen even at low temperature without impairing its fertilizing power.

Not one of the sentences in the above passage can be regarded as inaccurate but the overall impression that it gives appears to be most misleading. The facts are that as early as 1949 Dr. Parkes — one of the witnesses before the committee — succeeded in recovering live spermatozoa from semen which had been frozen with glycerol. This method has subsequently been used in conjunction with the "split-ejaculate" method and at least seven children have been conceived as a result of semen treated in this way. The committee's reference to the fact that dry

19. See Meaker, "Gynaecologic Aspects of Human Sterility" (1936) 107 *J.A.M.A.* 1960.

freezing impairs the fertilizing power of the semen is presumably a reference to the fact that after thawing out the percentage of motile spermatozoa found is usually lower than the percentage found before dry freezing. This fact, however, is not significant provided that the percentage of motile spermatozoa is sufficiently high before dry freezing or where the technique is used in conjunction with the split-ejaculate method which deliberately increases the concentration of spermatozoa.

The impression that the committee give is that the use of frozen semen is a thing of the future, whilst the impression given by the literature is that the problem is very much with us now. It may of course be that the committee's assessment of the position is more accurate than that to be obtained from the literature, but in the absence of any documentation by the committee one must perforce prefer the literature which appears to be more securely based than the dogmatic statements of the committee, and if the literature is in fact accurate then the committee are simply ignoring current aspects of the practice on the pretence that it is only something that may occur in the future.

We turn, therefore, to consider the committee's discussion of the legal consequences of artificial insemination and find that their treatment is hardly more satisfactory. They state that artificial insemination cannot amount to consummation of marriage, but they do not state why. They appear to be content to rely upon the decision in *R.E.L.* v. *E.L.*[20] They set out the various cases in which the question of approbation has been raised — including the recent case of *Q.* v. *V.*[21] (which the committee's report cites as *Q.* v. *Q.)* — but they make no attempt to assess the present position relating to approbation.

In their discussion of the problem of adultery they continue to cite *Russell* v. *Russell*[22] although they admit that no question of artificial insemination was raised in that case. They merely state (p. 22): "it is argued that there can be no difference in this respect between fertilisation from outside (fecundatio ab extra) and A.I.D." They do not indicate whether they accept this argument. The fact that they cite *Russell* v. *Russell* without any further comment would seem to indicate that they do, for if they do not the decision in *Russell* v. *Russell* is irrelevant, but on the other hand their conclusion that A.I.D. is not adultery suggests that they do not. Their attitude to *Russell* v. *Russell* remains therefore inconclusive.

20. [1949] P. 211.

21. *The Times* newspaper, 12 May, 1960. The committee do not cite the decision of Mr. Commissioner Blanco White, K.C., in *Anon.*, *The Times* newspaper, 4 July, 1951, [1951] *C.L.Y.* 1041, in which the basis of the learned Commissioner's decision was similar to that in *Slater* v. *Slater* [1953] P. 252.

22. [1924] A.C. 687.

The committee do not appear to be aware that the views expressed in *Orford* v. *Orford* [23] were rejected by the Court of Appeal in *Dennis* v. *Dennis,*[24] or that the view expressed by Mr. Justice Vaisey and Sir Henry Willink, Q.C., in the report of the Archbishop's committee are inconsistent with both *Sapsford* v. *Sapsford* [25] and *Dennis* v. *Dennis.* They refer to the views which Lord Merriman expressed in the House of Lords debate on the subject but not to those of Lord Denning. In general they are content to follow the reasoning of Lord Wheatley in *Maclennan* v. *Maclennan,* adding (p. 23): "it seems likely that this is the view which would prevail if the question arose for decision by an English court." Whilst we would agree with the committee's conclusion on this point we cannot accept that the arguments that they have used are adequate to sustain it.

The committee (p. 24) accept the view that an A.I.D. child is illegitimate apparently on the ground that "there is no doubt" on the matter. They thus unfortunately ignore the interesting argument put forward by Mr. Middleton in the *Juridical Review.*[26] We would accept the committee's conclusion on this point but once again we would have difficulty in accepting that their arguments are adequate to sustain it.

The committee's treatment of the problem whether A.I.D. is a criminal offence is even more unsatisfactory. They discuss the question whether resort to A.I.D. amounts to conspiracy to produce an illegitimate child, and they refer to a number of seventeenth and eighteenth century cases, which support the proposition that it is an indictable conspiracy to attempt to saddle an innocent person with the maintenance of a child not his own.[27] The committee (p. 29) had "no reason to doubt that it is still the law." The committee are therefore presumably of the view that it is an indictable conspiracy for a woman to agree with somebody else to inseminate her with the intent that any child thus conceived should be passed off as the legitimate child of her husband. In relation to other cases (p. 29) they are, as usual, inconclusive:

> Even if the husband consents, the production of an illegitimate child, whether through A.I.D. or adultery, is, on one view an unlawful act. But we are extremely doubtful whether in practice the parties to A.I.D. . . . would ever be charged with committing a criminal conspiracy, or whether, if charged they would be convicted.

The committee do not however indicate whether they accept the argument that the production of an A.I.D. child is an unlawful act sufficient for the

23. (1921) 58 D.L.R. 251.

24. [1955] P. 153.

25. [1954] P. 394.

26. "Artificial Insemination and Legitimacy" (1959) 4 *Jur. Rev.* 82.

27. *R.* v. *Armstrong* (1677) 1 Vent. 304; *R.* v. *Timberley* (1662) 1 Sid. 63; *R.* v. *Best* (1705) 1 Salk. 174; *R.* v. *Kinnersley* (1719) 1 Stra. 193.

purposes of the law relating to conspiracy. It is curious to find the committee asking themselves the question "Whether A.I.D. is a Criminal Offence?" and then leaving the answer inconclusive, for whatever may be the committee's views on what is likely to happen in practice these views do not provide an answer to the question which they asked themselves. The mere fact, however, that they felt it necessary to state their views on possible future practice suggests that the committee took the view that A.I.D. does in fact constitute an indictable conspiracy, for otherwise it would be irrelevant to set out their views on whether prosecutions would be likely. One final point which may be made is that it is a little difficult to reconcile the committee's views on the point regarding whether prosecutions would be brought with their views on A.I.D. as a whole. The committee miss no opportunity to stress that they regard A.I.D. as an "offence against society," but if this is so why should not the parties be prosecuted? If A.I.D. is as undesirable a practice as the committee make out it seems rather inconsistent to hold that persons should not be prosecuted for agreeing to do what is so very undesirable.[28]

So far as English law is concerned the committee only discuss the possibility of A.I.D. constituting criminal conspiracy. This point, however, hardly exhausts the possibilities, for the opinion of Denning L.J. (as he then was) in *Bravery* v. *Bravery* [29] suggests at least one other possibility. On the basis of the argument used by Denning L.J. in that case it could easily be suggested that A.I.D. (or even A.I.H. for that matter) constituted a surgical operation for which there was no just cause or excuse so that it would constitute an assault to which the consent of the woman would afford no defence to the doctor. This aspect of the matter was not investigated by the committee although it would seem to have at least as much merit as the argument that A.I.D. could constitute an indictable conspiracy.

The committee discuss, solely in connection with Scottish law, the possibility of the High Court of Justiciary acting as *custos morum* and holding that A.I.D. is a criminal offence even though not coming within any of the established categories of crime. They seem to imply, therefore, that the English courts have no such power. It must be admitted that there have been a number of recent pronouncements which would seem to support the view that the English courts have in fact no such power,[30] but it is questionable whether these conclude the issue. Must they necessarily be taken as deciding that a power which has been claimed

28. The committee appear to be aware of this difficulty for they take the trouble (at p.81, n.1) to deny that there is any inconsistency, but their denial is unsupported by either reason or argument.

29. [1954] 3 All E.R. 59.

30. See, for example, *R.* v. *Newland* [1954] 1 Q.B. 158; *Joshua* v. *R.* [1955] A.C. 121.

and exercised by the English courts for so long has been finally lost?[31] It is disappointing that the committee did not feel it necessary to discuss these questions: it is presumably a reflection of the inadequacy of the legal evidence before them.

Apart from the matters mentioned above the only other legal consequences discussed by the committee are maintenance and registration of birth. It is surprising to find that the committee do not feel that the contractual or tortious aspects of the problem needed any discussion. How, for example, are concepts of professional negligence to be applied to artificial insemination? Is a contract under which a doctor undertakes A.I.D. one on which he would be entitled to sue for his fees? None of these matters are even discussed by the committee, a fact which further underlines the inadequacy of their legal analysis of the problem.

The first part of the committee's report is therefore a disappointingly inadequate assessment of the situation. It contains a good deal less than could have been obtained by a reasonably competent survey of the literature. It adds nothing to our understanding or our knowledge of the problems involved and forms a totally inadequate basis for recommendations as to necessary or desirable changes in the law.

We turn, therefore, to consider the second part of the report in which the committee set out their views and recommendations. They commence with a discussion of A.I.H. and reject the suggestion that this form of artificial insemination should be prohibited by law on the ground that "we feel sure that it would be in accord with the wishes and with the interests of society as a whole that those who desire to administer and receive A.I.H. should be free to do so without interference by the law."

Having reached this conclusion the committee turn to consider whether resort to A.I.H. should bar subsequent proceedings for nullity on the ground that it constitutes approbation of the marriage. The Royal Commission on Marriage and Divorce had already recommended that it should.[32] This recommendation the committee modifies to the extent of only recommending (p. 32) that nullity proceedings should be barred "if a live child has been born as a result of artificial insemination." In reaching this conclusion the committee disagree with the royal commission's argument that resort to A.I.H. was consent to an act "which is likely to produce a child" and was therefore "so fundamental a step that it must be taken to mean that the parties acquiesce in the marriage." The committee's objections (p. 33) were twofold:

> First the proportion of cases where A.I.H. is undertaken without success is so large that it is misleading to describe it as "an act which is likely to produce a

31. Recent examples of the exercise of this power are *R.* v. *Leese* (1936) 82 L.J. Newsp. 310 and *R.* v. *Hudson* [1956] 2 Q.B. 252.

32. Cmd. 9678, para. 287.

> child." Secondly, there are other forms of medical treatment by which it is hoped that pregnancy will be achieved, and which are as likely, or more likely, to be successful than A.I.H. On the Royal Commission's argument, agreement to undergo these other forms of treatment should also constitute approbation of the marriage.

This is strange reasoning. First, it is a misinterpretation of the views of the royal commission to suggest that their reference to an act which is likely to produce a child was a reference to the possibility of success. It must be borne in mind that the issue here is simply one of approbation of an unconsummated marriage which bears no necessary relationship to the question whether the parties' action is likely to produce the effect for which they hope. The question is simply whether the parties must be deemed, by their actions, to have acquiesced in the marriage despite the fact that it is unconsummated. It was, therefore, not unreasonable for the royal commission to hold that resort to artificial insemination, where the marriage is unconsummated, is approbation of the marriage. It may be worth remarking that sexual intercourse amounts to consummation of the marriage irrespective of the chances of a pregnancy resulting and it is therefore reasonable to argue that the legal effect of resort to artificial insemination should equally be independent of the chance of success.

The committee's second argument is rather inconclusive since they do not specify what forms of medical treatment they have in mind. They seem, however, to be confused between medical treatment designed to make consummation possible and resort to artificial insemination which is designed to produce offspring despite the non-consummation, for they continue by stating (p. 33):

> It would, however, be difficult to justify debarring the parties by statute in all cases from seeking a decree of nullity on the grounds of non-consummation merely because treatment to make consummation possible had been tried without success.

The committee are here again overlooking the fact that treatment to render consummation possible has no necessary relationship to treatment designed to produce offspring. The issue is solely one which concerns a marriage which has in fact not been consummated and in which the parties resort to treatment which bears no relation to the possibility of consummation, but is directed solely towards the production of progeny. The royal commission's recommendations would not therefore involve the proposition that resort to treatment to make consummation possible would necessarily amount to approbation of the marriage.

The committee's modification of the royal commission's recommendation therefore does not appear to rest upon any sound argument. It appears in fact to rest upon a confusion between the possibility of the production of progeny and the possibility of consummation. It is therefore submitted that their recommendation cannot be sustained.

The committee turn to consider A.I.D. and first discuss the question of the insemination of single women, in which term they include both widows and married women living apart from their husbands. They take the view that "in no circumstances" should a single woman be artificially inseminated. The reason for this is apparently (p. 34) that:

> The importance and possible difficulties of A.I.D. are such that it should never be undertaken if there is not in the home a husband who is prepared to exercise the responsibilities of fatherhood from the beginning. It is manifestly unfair to the child to impose on him the additional handicap of having no one to look to as his father.

They further point out (p. 34) that:

> The usual argument put forward in favour of A.I.D. is that a woman is married to a man who is physically incapable of giving her a child in the normal way, and this, ex hypothesi, cannot apply to an unmarried woman.

It may first be commented that the mere fact that the plight of fertile women bound by a childless marriage is the case which receives the most attention is no reason to suppose that it is the only argument by which artificial insemination can be justified, nor the only problem against which artificial insemination can relieve. It is superficial to assume, as the committee seem to, that the mere fact that the same justification cannot be adduced in respect of single women as may be adduced in respect of married women, implies that there can be no justification in the former case. In the case of single women a case can be made justifying their entitlement to A.I.D. on the ground of the numerically greater number of women, many of whom will be unable to marry simply because of the shortage of men.[33]

The argument that there should be a father in the home is possibly a more reasonable argument, but it proves too much, for the same argument would apply equally well against fornication. This raises a difficulty for although the committee are of opinion that in no circumstances should a single woman be artificially inseminated they later reject the suggestion that A.I.D. should be either prohibited or regulated. How then are we to interpret their recommendation that no single woman should be artificially inseminated? The committee, as we have seen, left in an ambiguous state the question whether A.I.D. can constitute criminal conspiracy. Is this to be taken as meaning that where a single woman has herself artificially inseminated it should be regarded as a case for the imposition of such criminal sanctions as the law at present imposes? On the other hand, is the committee's recommendation to be taken as meaning that the artificial insemination of single women is to be treated as analogous to fornication? — something which is widely deplored, but

33. This is a factor of decreasing significance since falling mortality has postponed the age group at which excess of male births is counter-balanced by excess male mortality. In 1911 the age group by which excess male births were thus counter-balanced was 5-9: by 1957 it was 30-34.

against which the law takes no direct action. All this is left completely vague and inconclusive so that it is impossible to determine just what it is that the committee intended on this point.

The committee are also of opinion (p. 35) that A.I.D. should not take place without the written consent of both husband and wife:

> While we appreciate that for one of the parties to a marriage to know that he or the other party is incapable of begetting a child may have unfortunate effects on the marriage relationship, we cannot but feel that to permit either of them on that account without consulting the other, to induce a doctor to introduce the seed of a third person into the marriage is a fraud which might have even more unfortunate effects not only on the relationship between the spouses but also on any child which might be conceived in this way.

The type of argument used here is one which runs throughout the report. It consists of references to vague and unspecified "unfortunate effects." Unless these are specified it is impossible to assess the reasonableness of the committee's conclusions. In the absence of further and better particulars it is impossible to assess the committee's conclusion that the unfortunate effects which they think might result from knowledge of one's spouse's sterility are less than those resulting from knowledge that the child has been conceived as a result of A.I.D. The committee merely state that they "feel" that the effects would be more unfortunate. The committee's feelings are, however, irrelevant: what is needed are a few facts.

Again, however, the committee are inconclusive on the point as to what are the legal consequences of a resort to A.I.D. without the necessary consent. The only point which they discuss in this connection is that of adultery and here they adopt, without modification this time, the recommendation of the royal commission that it should constitute a new and additional ground of divorce.[34] What they do not indicate is whether this is the sole legal consequence. On their own view of the law, however, it would seem that a married woman who has herself inseminated without her husband's consent with the intention of passing off the child as that of her husband, would be guilty with the doctor — at least assuming he knew of the facts — of criminal conspiracy. Again, therefore, the committee's assessment of the position is strangely inadequate.

Having thus, somewhat inconclusively, discussed the cases of the single woman and the married woman who is inseminated without the consent of one of the spouses, the committee turn to consider the problem of A.I.D. of married women where both spouses consent; a problem in relation to which the committee (p. 36) apparently found it "far from easy" to determine their attitude. This is painfully apparent from their rather confused discussion of the problems involved. They commence by discussing the problem in purely general terms rather than in relation

34. Cmd. 9678, para. 90.

to specific issues and this lends to their discussion a diffuse and nebulous air. The first point they consider is whether A.I.D. is analogous to adultery. They do not indicate the purpose of this discussion and it is difficult to see what they hope to gain from it. They reject the argument, put forward by the representatives of religious bodies, that A.I.D. is a "violation of the exclusive physical union of man and wife to which both pledged themselves at the time of their marriage" on the ground (p. 36) that:

> The whole history of the institution of marriage whether it be regarded as a religious or a social institution shows that the main threat to the physical side of the union has always been adultery and that the undertaking given at marriage to "forsake all other" is primarily an undertaking to refrain from adultery.

They characterise the argument put forward by the religious bodies as "misleading." This is mere superficiality. The committee themselves point out that until the development of artificial insemination the only way in which the physically exclusive nature of the marriage could be violated was by adultery. It is therefore merely to state the obvious to say that the vow "to forsake all other" is a vow to refrain from adultery. This, however, cannot prevent the churches from holding in relation to a new and unprecedented technique, that its use, from their point of view, violates the physically exclusive nature of the union. This is a matter of theology, for it relates to the interpretation of the vows taken at the time of their marriage by those who marry in church, and this is a matter for the churches and not the committee.

In pursuing their examination of the relationship between A.I.D. and adultery the committee commit themselves to a number of rather questionable propositions. They stress that adultery, since it involves sexual intercourse, has "emotional implications" which they consider to be absent from A.I.D. This may possess a degree of truth, but it is hardly universally true. Adultery may be committed by intercourse with prostitutes and in that situation one would hardly refer to "emotional implications" although, of course, much depends on what the committee mean by "emotional implications." The committee further state (p. 37):

> Furthermore we understand that when a woman receives A.I.D. she continues to have normal marital relations with her husband; adultery, although by no means incompatible with their continuance very often means that normal relations between the spouses cease or are interrupted.

Here again the committee are generalising without any adequate evidence. It is simply not wholly true to say that A.I.D. implies continuance of normal intercourse. This may be true in those cases in which such relations are possible, but it is not true where such relations are not possible. The committee stress that their medical evidence was that impotence was usually regarded as a contra-indication for A.I.D.: the fact remains that the only three cases to come before the English courts were cases in which A.I.D. had been used where the husband was impotent.

The committee finally stress the difference in motive between A.I.D. and adultery, but even this point can be over-stressed for adultery does not depend upon the motive with which it is committed. This whole section of the committee's discussion is of doubtful relevance. A.I.D. is not adultery in law because it does not involve penetration and it is hardly necessary to say anything else regarding the relationship between the two forms of activity.

The committee turn to discuss the possible dangers of A.I.D. to the relationship of husband and wife and here again we find them indulging in that form of intuitive reasoning which is so common when subjects such as artificial insemination are under discussion. Their discussion of this point is, of course, as inconclusive as ever. They find it "difficult to say with any confidence whether the fact that the husband has been unable to play his part in procreation and recourse has been had to A.I.D. is or is not likely to have a disturbing effect on the marriage relationship" (p. 38). They escape this difficulty by stating that they think that in some cases it may and in some cases it may not. From the point of view of the wife they likewise feel that in some cases it may have a disturbing effect and in some cases it may not. The committee do not feel it necessary, at this point, to stress that such limited evidence as is available seems to suggest that marriages in which A.I.D. has been used are more stable than the general run of marriages. This greater stability may or may not be due to A.I.D. but the fact remains that the dangers envisaged by the committee do not appear to materialise very frequently. The committee content themselves with stressing the fact that the doctors who administer A.I.D. bear a very heavy responsibility in avoiding A.I.D. in those cases in which the procedure is likely to affect the marital relationship. This has, of course, never been questioned. The evidence mentioned above, however, suggests that the medical profession bears its responsibility quite adequately.

The committee then turn to consider the argument that a woman whose desire for a child is so great that she is prepared to resort to A.I.D. is exactly the sort of woman who is not suitable for insemination. The committee merely conclude that some of them may be; some of them may be not. They again content themselves with stressing the difficulty of distinguishing between the two types of cases. They do not point out that the apparently high rate of success of A.I.D. suggests that doctors are able to distinguish between the two fairly adequately. The momentous conclusion which emerges (p. 39) after this discussion of the possible dangers of A.I.D. is that:

> in some cases A.I.D. may have certain advantages for a husband and wife in their relationship with each other, while in other cases it may not.

The committee then turn to discuss the suggestion that "if the fertile wife of an infertile husband may have recourse to a donor, it should be accepted that the fertile husband of a barren wife should have the right

to beget a child through the agency of another woman." They admit that this does not come within their terms of reference but discuss it nevertheless without indicating whether they accept the argument that acceptance of A.I.D. should involve acceptance of an analogous right of the fertile husband. Presumably they do accept the argument otherwise there would be no point in discussing it. Their consideration of this issue relates to the transplantation of ovaries and ova regarding which they state: [35] "In this way an infertile wife might be enabled to bear what would in effect be another woman's child." This is a purely emotive use of words. To what extent is a child conceived as a result of the fertilisation of an ovum which has been transplanted before fertilisation "the other woman's child?" The committee's purpose in referring (p. 40) to these developments is to:

> suggest the sort of remedies to which medical science may be driven if it is held that the sterility of one partner should not debar the other from the procreation of children.

This section of the report thus appears to be *in terrorem;* the assumption being apparently that these developments are so horrific that all right thinking persons would reject them out of hand. The committee, however, do nothing to justify their assumption that the transplantation of ovaries or ova is necessarily objectionable.

The committee then turn to consider the suggestion that sterility should be a ground of nullity. They reject this suggestion on two grounds. First, because it would be difficult to obtain satisfactory evidence of sterility. This was the argument which impressed the Royal Commission on Marriage and Divorce, but it is not regarded by the committee as decisive on the ground that the difficulties would not be any greater than those involved in obtaining evidence of impotence. Their primary objection to the suggestion appears (p. 41), however, from the following passage:

> A more fundamental objection is that the proposal appears to assume that the procreation of children is the principal object of marriage. While it is no doubt an important object it cannot be regarded in itself as the main object of marriage.

This is a quite incredible argument. The committee's authority for the proposition that the procreation of children is not the principal object of marriage is the decision in *Weatherley* v. *Weatherley.*[36] The committee, however, overlook the fact that the Lord Chancellor's dictum in that case was condemned by the Archbishop of Canterbury as heresy. [37] What are

35. At p. 40. It is significant that the only references the committee make to the literature on this subject are to Glanville Williams, *Sanctity of Life and the Criminal Law* and Schellan, *op. cit.* We would suggest, with respect to both authors, that a reference to the original literature on the point would have been desirable.

36. [1947] A.C. 628.

37. *The Times,* Feb. 6, 1948.

to be regarded as the objects of marriage is a purely theological question. The law as such lays down no objects for matrimony: it merely attaches certain consequences. The view of the anglican church, as enunciated by the Archbishop of Canterbury, despite the view of the committee, remains that the principal object of matrimony is the procreation of children. This, however, is not a proposition of law; it is a theological proposition as to the position of that church. Equally, however, the proposition that the procreation of children is not the principal object of matrimony is not a proposition of law; it is also a theological proposition, but one that does not appear to represent the position of any known religious denomination. It appears to be personal to the committee. It is true, of course, that the intimate historical relationship between English matrimonial law and the Church of England means that many of the rules and principles of matrimonial law find their ultimate historical justification in the theological views of the anglican church — although decisions such as *Weatherley* v. *Weatherley* indicate that this relationship has broken down — but this cannot be taken as meaning that the law itself prescribes the objects of matrimony, and the mere fact that the Lord Chancellor enunciated heretical views on this subject can hardly be accepted as a very good reason for rejecting the suggestion that sterility should be a ground of nullity. This is a suggestion which must be assessed on its own merits. Finally the committee point out (p. 42) that: "to make sterility a ground for nullity of marriage would be unlikely to eliminate the demand for A.I.D. or even to reduce it significantly." This seems to imply that if it could have been established that it would eliminate the demand for A.I.D. the committee would have been more favourably disposed towards the suggestion. However, the mere fact that the operation of one ground of nullity does not affect other forms of behaviour is no reason in itself for rejecting that ground of nullity. We can only conclude that the arguments adduced by the committee are quite inadequate to sustain their rejection of the suggestion that sterility should not be a ground of nullity.

Having disposed of the problems of A.I.D., so far as they affect husband and wife, the committee turn their attention to the child conceived thereby. They commence (p. 42) by stating:

> If husband and wife agree to the procedure beforehand, it may be said that they have only themselves to blame if, so far as the two of them are concerned, it does not work out as happily as they could have wished. But the child, by the very nature of the procedure, cannot be consulted beforehand.

The committee therefore proceed to consider the "consequences" to the child. The rather trite observation that the child cannot be consulted before is not, however, peculiar to the procedure of artificial insemination. It would seem to be inherent in all methods so far devised for the conception of children. If non-consultation of the child is a relevant factor in assessing whether A.I.D. may be regarded as acceptable, then it ought to be considered in relation to whether normal sexual intercourse

should be allowed, for the hard fact is that not one of us was consulted before our conception. However, the committee proceed to consider possible dangers to the child, without really considering whether these dangers are not the same as those to which all children are liable, whether the method of their conception be old-fashioned or new-fangled.

In this section of their report the committee return to the intuitive mode of reasoning, and references to vague and unspecified "unfortunate effects" abound. The first point they discuss is that persons who are unsuitable to become parents may resort to A.I.D. The fact that many more people who are equally unsuitable to become parents resort to sexual intercourse does not appear to impress the committee. The committee thus stress the fact that where a woman wishes for a child so desperately that she is prepared to resort to A.I.D., she may become overpossessive when the child duly arrives. They state (p. 43):

> This situation sometimes occurs where children are conceived naturally, but we think that with A.I.D. the fact that the couple have been seeking for a child for a long time may accentuate these difficulties when he finally arrives.

The proposition that a mother "sometimes" becomes over-possessive with naturally conceived children is a massive under-statement: over-possessiveness is very frequent. The committee, of course, adduced no evidence to support their assertion. Nor do they even bother to state why they think that conception by A.I.D. would accentuate the unspecified difficulties that they envisage. If the committee think something it is not too much to expect them to say why they think so.

The committee, apparently undeterred by such considerations, continue (p. 43) as follows :

> It has been put to us that since an A.I.D. child is very much a wanted child he is likely to be particularly welcome and well cared for. As one of our witnesses remarked the child will be "glad to have been born". It seemed to us, however, that this might be a rather short-sighted attitude. While it may be true that such a child would have a happy infancy and childhood, we think that in the long run the circumstances of his conception must be accounted a handicap rather than an advantage.

Here again the committee state what they think, but not the grounds upon which they think it. The whole argument is couched in vague meaningless generalities. This sort of recommendation by intuition gets a little irritating after a while: one has a right to expect something a little more solid from a departmental committee — this is reasoning on the level of a mothers' meeting.

Following this, however, the committee embark (p. 43) upon a couple of paragraphs which reflect a positively pre-scientific mode of thought:

> The fact that the husband of an A.I.D. child's mother is not his father means in the first place that the child inherits something of the personality of the donor.

What on earth do the committee mean by "personality" here? And to what extent has it been established that personality, in any sense of the

term, is a genetically determined quality? It is, of course, perfectly true, as the committee point out, that if the child is unsatisfactory the mother and her husband may blame the donor and accept no responsibility themselves. If a child is unsatisfactory, however, parents will rarely blame themselves, whatever the mode of conception. Is there any evidence to support the view that parents will blame other persons than themselves more in A.I.D. than in normal conception? The only effect of A.I.D. would seem to be that the mother and her husband will have a more convenient scapegoat at hand on whom the blame which they will not accept themselves can be pinned, but this does not necessarily mean that they will pin the blame elsewhere more often with A.I.D. than in other cases.

Another statement made by the committee (p. 43) is that:

> The position of the husband as the child's supposed father may be difficult. His fatherhood depends upon no blood relationship between the child and himself. So far as his side of the family is concerned he cannot look to the child for any inherited characteristics.

This is again a passage which appears to embody some dangerously oversimplified genetics. The child's genetic constitution depends upon the mutual interaction of the genes supplied by the maternal side and those supplied by the paternal side. The final result does not bear any necessary relationship to either parent: a haemophiliac child will not necessarily have a haemophiliac father. This section of the report would have been improved by a little sound genetic advice. The committee stress, later in their report, that any doctor administering A.I.D. should possess a sound knowledge of human genetics. It seems a pity that the committee did not take their own advice here, for there seems to be no justification for assuming that members of committees dealing with A.I.D. are any less under an obligation to acquaint themselves with the fundamentals of genetics. There is really no justification in the middle of the twentieth century to find a departmental committee talking in terms of blood relationship and the inheritance of personality: this only takes us back to the mothers' meeting level.

It was pointed out to the committee that the biological aspect of paternity is very much less important than that of maternity; to which the committee reply (p. 44):

> We can well believe that, in the main, fatherhood consists not so much in the original act of intercourse which made conception possible as in the affection and interest which are displayed towards the growing child by the mother's husband. But if the husband has reason to believe that he is unlikely to be the biological father we feel that he is likely to have a sense that something is lacking in the relationship between him and the child.

Their reason for rejecting this point is that they "feel" that "something" would be lacking. Why do they feel this? What do they think is lacking? No further and better particulars are forthcoming. An intelligent

suggestion which has considerable physiological and psychological evidence to support it is dismissed by the committee because they "feel" that "something" would nevertheless be lacking!

The committee then turn to consider the various ramifications of the problem of secrecy with which it is usually assumed that A.I.D. must be surrounded. The committee retain their usual vagueness over the question whether the child should be told the facts relating to his conception. They note the medical evidence to the effect that current medical practice is to tell the parents not to tell the child; they then refer to other evidence which suggested that the child should be told and then continue their discussion on the assumption that the child should be told. The committee do not, however, appear to have any views of their own on this matter, but they stress, at considerable length, the effect on a couple who have to "live a lie," and on a child on being informed of the circumstances of his origin. All this, of course, is in the realm of guess work, for the committee, as appears to be their usual practice, make no reference to such evidence as is available on the manner in which A.I.D. has worked in practice. Nor do they make any reference to the valuable evidence that could have been obtained respecting the operation of adoption. Adoption is not, of course, A.I.D. but the problem "to tell or not to tell" and the effect on the child when and if he discovers that he is adopted would have been a guide to the problems as they arise in A.I.D.

After this long and inconclusive discussion of possible dangers to the child the committee finally get down to discussing a specific problem, namely, whether resort to A.I.D. should be a bar to subsequent nullity proceedings. They modify the royal commission's recommendation on this point in the same way and on the same grounds as they did in respect of A.I.H. Their reasoning, however, appears to be as fallacious when applied to A.I.D. as to A.I.H. so that we can only submit again that the committee have failed to substantiate their recommendation on this point.[38]

Leaving aside the committee's recommendations respecting the maintenance of A.I.D. children we move on to consider their recommendation that the law should not be modified so that an A.I.D. child may be considered as legitimate. This recommendation is based on four reasons which even failed to convince two members of the committee.[39] The first of these is that:

> While the proposal would relieve the child of the stigma of illegitimacy it would not give him complete security since he would still be liable to discover that he was probably not, biologically, the child of his supposed father.

38. The committee seem to overlook the fact that the principal argument by which they justified their modification of the royal commission's recommendation in connection with A.I.H., namely the small chance of success, has little application to A.I.D., where the chances of success are very good.

39. The four reasons are summarised on page 52. For the minority view see page 84.

The reasoning here is clearly based on the assumption that half a loaf is not in fact better than no bread at all. The same argument would, of course, have equally applied against the proposal that a child born before the marriage of his parents should be legitimated by their subsequent marriage, since mere legitimation would not prevent him from discovering the dreadful facts surrounding his origin. The committee are guilty of confusing the issue here by vague references to the child's "security." They do not make it clear exactly what they mean by this term : although it would appear to refer to the fact that the child could still discover the facts relating to his origin; but the committee provide no justification for their apparent assumption that the possibility of the discovery of the facts relating to birth has any necessary relationship to the conferment of the status of legitimacy.

The committee's second argument is that although:

> it would bring the child certain material advantages ... it might be a serious encroachment on the rights of other members of the husband's family and would interfere with the principle of hereditary succession which is at the basis of our society.

This argument assumes, of course, that hereditary succession is in fact at the basis of English society, and also that, in so far as it is, it should not be interfered with. Neither of these highly questionable assumptions do the committee justify. It is also a non sequitur to argue that A.I.D. would encroach on the rights of other members of the husband's family. The birth of a legitimate child is not an encroachment on the rights of other members of the husband's family, and if an A.I.D. child were legitimate there would therefore be no encroachment. Since it is the question of legitimacy that is under consideration the committee are hardly justified in using as an argument against conferring legitimacy a consequence which could only materialise if the status were not conferred.

The committee's third argument is that:

> it would constitute a degree of official recognition of A.I.D. and the consequent birth of children exposed to dangers to which children should not be exposed,

This argument, of course, assumes that it is right and proper that the sins of the parents should be visited on the children. The withholding of the status of legitimacy is thus in the nature of a penal provision: *i.e.*, because conferment of the status would encourage A.I.D., which in the committee's view is undesirable, therefore the status must be withheld from those children who are so conceived so as to discourage the practice.

The committee's final argument against conferring the status of legitimacy frankly borders on the fatuous. It is none other than that "it would involve an unprecedented change in the concept of legitimacy." We thus have the spectacle of a committee set up to enquire whether any change in the law is either necessary or desirable recommending against a change on the ground that it would involve a change. The committee

admit that the Legitimacy Acts of 1926 and 1959 made changes in the law relating to legitimacy, but these changes they do not consider (p. 51) were tremendously significant, they merely:

> made it possible for children born to a man and a woman who were not at the time of the child's birth married to each other and who later married, or whose marriage was void, to become legitimate or legitimated children of that man and woman.

The fact is, however, that prior to 1926 legitimacy in English law depended upon birth or conception in lawful wedlock: after 1926 it did not. It is simply playing with words to contend that this change was not a radical departure but that legislation to make A.I.D. children legitimate would be.

The committee finally point out that: [40]

> we have no reason to suppose that opinion in Parliament or in the country would, in general, be in favour of so far reaching a change in the concept of legitimacy.

The committee, however, were not appointed to enquire into what they thought Parliament or the country as a whole would "in general" favour. They were appointed to report on what they, having heard expert evidence on the matter, thought about it.

We pass over the committee's recommendations regarding the adoption by the mother and her husband of an A.I.D. child, and turn to consider the committee's view on the donor. The committee obviously had very great difficulty in understanding how a person could possibly be prepared to act as a donor, in doubtless much the same way as many tribes would have difficulty in understanding how anyone could possibly donate blood for use by another person. The committee were obviously impressed by the evidence submitted by a "leading psychiatrist" to the effect that donation would be likely to be an activity which would tend to attract more than the usual proportion of psychopaths. They state (p. 59): "If such men were to be accepted as donors the dangers to the A.I.D. children so conceived are obvious." The committee seem to be assuming that the mere fact that a donor is a psychopath (whatever that very much overworked term may mean in this context) implies that there is a danger that the children conceived with the aid of his donated semen will themselves be psychopaths. This implies that the committee think that psychopathic conditions are inherited. They do not, however, substantiate this assumption, and we know of no evidence to support it. Once again the committee could have done with some sound genetic advice.

The only specific problem which the committee discuss in connection with the donor is whether his wife should have a ground for divorce if

40. At p. 51. The minority members decline to comment on this "speculation".

he donates without her consent. The committee reject the suggestion that the wife should have a ground of divorce for two reasons. The first is (p. 60) that "we doubt whether public opinion would regard the husband's conduct as sufficiently serious to justify its being made a new ground for divorce." They do not state the sources of their doubt; and this quite apart from the fact that they were not appointed to enquire into the state of public opinion. They do however take refuge in the fact that if the husband persisted in donation contrary to his wife's wishes, she may, if her health is affected thereby seek a divorce on the ground of cruelty. This argument would apply equally well to the situation in which a wife has herself inseminated without her husband's consent. The committee do not explain why they recommend that the husband should have a ground of divorce in that case, whilst the wife of a donor should be left to her remedy on the ground of cruelty. Why should not the husband be equally left to a remedy on the ground of cruelty? It is hardly a sufficient argument to regard the one case as a "grievous marital offence" and the other as "not sufficiently serious" for this only raises the question as to what criteria the committee are applying to differentiate between the two forms of activity.

The second reason adduced by the committee (p. 60) for rejecting the right of a donor's wife to a divorce if he donates without her consent is that "difficulties might arise in defining the new ground for divorce." The difficulties envisaged by the committee are, first, that it would be necessary to consider the degree of consent which would prevent a wife from taking proceedings. But this is a difficulty which the law has faced for centuries. This argument would equally justify a refusal to make rape an offence. Another difficulty the committee envisage (p. 60) is that of determining the number of donations that would be necessary before the wife would be entitled to a remedy:

> It would seem manifestly unfair to allow a divorce to be granted in respect of one donation only for which consent had not been obtained.

What is manifestly unfair about it? A single act of adultery gives the wife a remedy, why not a single act of donation? The committee's reasoning is, as usual, vague and inconclusive, and certainly does not sustain the conclusion they reach.

We pass over the committee's discussion of the problems of the doctor who engages in A.I.D. and turn to consider their discussion of "A.I.D. and Society." In this chapter generalisation runs rampant. We are told that "A.I.D. goes against what has hitherto been regarded as the essential nature of marriage;" that it violates the "principle of monogamy" — a proposition which even the minority members fail to

understand; that any increase in the practice would lead to "a general disregard of the obligations of marriage." There is little point in attempting to comment upon such propositions: they represent attitudes rather than rationally held views.

We turn, therefore, to consider the last section of the report; that which discusses whether A.I.D. should be prohibited or regulated. The committee clearly take the view that A.I.D. should decrease or cease altogether, and in theory they would like to see it prohibited, but pragmatic caution leads them to the view that prohibition would be unlikely to be effective, and this, coupled with the views on the relationship between morality and the criminal law which are now familiar from the Wolfenden Report leads them to the conclusion that A.I.D. should not be prohibited by law.

The committee state (p. 69) that:

> We think that the question whether A.I.D. should in all circumstances be a criminal offence must depend on (1) whether the practice could be effectively prohibited and (2) whether its extent and social consequences are such as to justify the creation of such an offence.

Under the first head they discuss two issues: (a) whether the creation of such an offence would effectively deter persons from practising A.I.D., and (b) whether those who were not deterred could be detected and convicted. On the question of deterrence the committee conclude that it is impossible to say whether the creation of a criminal offence would act as a deterrent or not. They are more positive, however, that detection would be extremely difficult. Their conclusion on this part of their analysis (p. 70) is that:

> We therefore consider that while the prohibition of A.I.D. by law would deter some of those who now engage in the practice it would be extremely difficult to detect those who were not deterred, and in so far as the practice fell into the hands of unscrupulous persons its consequences could be more dangerous than if it had not been prohibited.

The committee, however, do not regard the argument as to effectiveness as decisive for they continue (p. 71):

> If does not, however, necessarily follow that because A.I.D. probably could not be completely or effectively prohibited, it is undesirable to make it a criminal offence. There are some actions which, however difficult to prove, ought to remain criminal offences.

The committee therefore turn to consider whether the social consequences are such as to justify prohibition. At this point they invoke the reasoning of the Wolfenden Committee on the subject of private morality and hold

that in effect A.I.D. comes within this category and therefore should not be prohibited by the criminal law.

One is conscious of a certain sense of unreality in this section of the report which stems from the fact that the committee left inconclusive the problem whether A.I.D. is already a criminal offence. Since on their own reasoning a good case can be made for the proposition that A.I.D. amounts to a criminal conspiracy, it is curious to find the committee solemnly recommending that it should not be made a criminal offence.

As regards regulation the committee reject the suggestion that A.I.D. should be regulated by law, mainly on the ground that it would be impracticable. They also add, however, that regulation would imply an undesirable degree of official recognition.

In their Final Conclusions the committee attempt to summarise their attitude and in so doing they demonstrate the horns of the dilemma upon which they are impaled. On the one hand they are opposed to A.I.D. under all circumstances, on the other hand they recognise that to press disapproval too far would merely drive the practice underground, which they appreciate would be even more disastrous, and it is this which gives to their whole report a curiously ambivalent air. All their recommendations are grounded in the premise that A.I.D. is undesirable and whether their recommendations are positive or negative they are all geared to the overriding desire to eradicate A.I.D. The children must remain illegitimate because to make them legitimate would encourage A.I.D.; the practice must not even be controlled for the same reason. The report presents a spectacle of a committee who quite clearly regard A.I.D. as so undesirable that they have considerable difficulty in even understanding arguments which run counter to their preconceptions. They try hard, but not very successfully, to be objective, and when faced with arguments which they are unable to counter on rational grounds they take refuge in vague assertions of "difficulties" and "unfortunate effects." In the last resort they rely on their feelings in the matter. The most extraordinary thing about the whole report is the incredible amount of guessing that goes on. Their recommendations are not based on fact but on intuition. Towards the end of their report (p. 64) the committee admit that:

> there is no doubt that all discussion of the practice is at present greatly handicapped by lack of information about what has happened subsequently to the families of those women who have received A.I.D.

and they stress the need for more research. One may applaud their stress on this point, but one cannot help feeling that the sensible thing

for the committee to have done would have been to point out that the time was not yet ripe for any positive recommendations to be made at all and to have contented themselves with recommending that steps be taken to ensure that the necessary research be undertaken, upon the results of which recommendations may be made in the future.

The committee's analysis of the situation can only be regarded as superficial and totally inadequate. However one thing that emerges from the inadequacy is that a further enquiry will have to be held at which the evidence submitted will have to be more representative, and the factual background provided will have to be more comprehensive. The report of the Feversham Committee has added nothing but further confusion to the issue of artificial insemination.

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