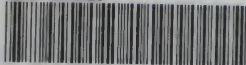
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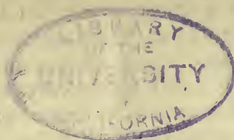
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Is Limitation of the Family Immoral?

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The following Judgment on the right of the public to discuss the expediency and the possibility of preventing over-population by artificial Checks, was delivered by Mr. Justice Windeyer, at the Supreme Court, Sydney, on the 12th December 1888. *Held by the Court, consisting of Darley, C.J., Windeyer, and Stephen, J.J., Darley, C.J., dissenting, that a Pamphlet advocating the use of artificial Checks was not an obscene publication.*

This case comes before us on motion to make absolute a rule *nisi* granted by me, calling upon a stipendiary magistrate to show cause why the conviction of the applicant of selling an obscene pamphlet, under section 2 of the Obscene Publications Prevention Act of 188c, should not be set aside upon the ground that the work in respect of which he had been convicted was not an obscene publication.

The objection taken to the conviction raises a question which involves not only the consideration of a topic difficult of discussion *coram populo*, but the very right of the public discussion of a subject of great importance to civilised society. The difficulty of dealing with the matter is not lessened by the fact that the question involved comes for consideration surrounded by all the prejudices with which centuries of ignorance and thoughtlessness have invested it, accompanied by fear of the world's censure, on points about which all who reverence purity and the ideal life of goodness would least wish to be misunderstood. Apart from the obligation which is cast upon a

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judge to declare the truth as he sees it, only the love of truth and an earnest desire to benefit mankind could compel anyone in the present state of the world's education to pronounce an opinion upon a subject, with reference to which it is so much more easy to win a reputation for sactity by declamatory violence against new ideas as to the essential in morality than by a life of virtue and of that service of man which is the true service of God. A court of law has now to decide for the first time whether it is lawful to argue in a decent way with earnestness of thought and sobriety of language the right of married men and women to limit the number of the children to be begotten by them by such means as medical science says are possible and not injurious to health. Of the enormous importance of this question, not only to persons of limited means in every society and country, but to nations, the population of which have a tendency to increase more rapidly than the means of subsistence, there cannot be the slightest doubt. Since the days when Malthus first announced his views on the subject to be misrepresented and villified, as originators of new ideas usually are by the ignorant and unthinking, the question has not only been pressing itself with increasing intensity of force upon thinkers and social reformers dealing with it in the abstract, but the necessity of practically dealing with the difficulty of over-population has become a topic publicly discussed by statesmen and politicians. It is no longer a question whether it is expedient to prevent the growth of a pauper population, with all its attendant miseries following upon semi-starvation, overcrowding, disease, and an enfeebled national stamina of constitution; but how countries suffering from all these causes of national decay shall avert national disaster by checking the production of children, whose lives must be too often a misery to themselves, a burden to society, and a danger to the State. Public opinion has so far advanced in the consideration of a question that has become of burning importance in the Mother Country by reason of its notoriously increasing over-population, that invectives are no longer hurled against those who, like John Stuart Mill and others, discuss in the abstract the necessity of limiting the growth of population; but they are reserved for those who attempt practically to follow up their teaching and show how such abstract

reasoning should be acted upon. It seems to be conceded by public opinion, and has indeed been admitted in argument before us, that the abstract discussion of the necessity of limiting the number of children brought into the world is a subject fitting for the philosopher and student of sociology. The thinkers of the world have so far succeeded in educating it upon the subject, and public attention is so thoroughly aroused to its importance, that every reader of our English periodical literature knows it to be constantly discussed in magazines and reviews, Statesmen, reviewers, and ecclesiastics join in a common chorus of exhortation against improvident marriages to the working classes, and preach to them the necessity of deferring the ceremony till they have saved the competency necessary to support the truly British family of ten or twelve children. Those, however, who take a practical view of life, will inevitable ask whether the masses, for whose benefit this exhortation is given, can be expected to exercise all the powers of self-denial which compliance with it would involve. To what period of life is marriage to be postponed by the sweater in the East End of London, earning his three or four shillings a day, without any hope of ever being able to educate, decently house, and bring up, eight or ten children. The Protestant world rejects the idea of a celibate clergy as incompatible with purity and the safety of female virtue, though the ecclesiastic is strengthened by all the moral helps of a calling devoted to the noblest of objects, and by every inducement to a holy life. With strange inconsistency the same disbelivers in the power of male human nature to resist the most powerful of instincts, expect men and women, animated by no such exalted motives, with their moral nature more or less stunted, huddled together in dens where the bare conditions of living preclude even elementary ideas of modesty, with none of the pleasures of life, save those enjoyed in common with the animals—expect these victims of a social state, for which the educated are responsible if they do not use their superior wisdom and knowlege for its redress, to exercise all the self-control of which the celibate ecclesiastic is supposed to be incapable. If it is right to declaim against over-population as a danger to society, as involving conditions of life not only destructive of morals but conducive to crime and national degeneration, the question immediately arises, can it be

wrong to discuss the possibility of limiting births by methods which do not involve in their application the existence of an impossible state of society in the world as it is, and which do not ignore the natural sexual instincts of mankind.

Why is the philosopher who describes the nature of the disease from which we are suffering, who detects the causes which induce it and the general character of the remedies to be applied, to be regarded as a sage and a benefactor, but his necessary complement in the evolution of a great idea, the man who works out in practice the theories of the abstract thinker, to be denounced as a criminal? It was only when Jenner ventured to act on the theory which he had founded upon his observations that he was denounced and vilified in language which it is now almost impossible to conceive.

In the domain of morality as of medicine, the teachers who first publicly proclaimed the brotherhood of man, his equality in the next world, and his right to worship as he chose, were prosecuted as the enemies of society. Doctrines such as these, fit though they might be for discussion by philosophers and a select class of esoteric students, were to be put down as dangerous to society when taught to the common people as the fundamental basis upon which society must rest. The history is the same in the growth of all opinion and the perception of all truth, whether we read it in the history of the law of witchcraft, of blasphemy, or any other subject which has been the object of human thought associated with the idea of right and wrong. The current and preconceived opinion which is brought to the consideration of any such question has at first sternly resisted, next only tolerated, and only at last recognised as a right, the free discussion of its foundation in truth. The world, having first tortured those who would show a better way, has in after generations venerated as martyrs and heroes those who died for the truth as they saw it, or who endured in silence the lifelong persecution of the confessor.

With this growth of public opinion the law has also grown. A prosecution (as Lord Coleridge says in his able charge in the case of Reg. *v.* Ramsey, 1 C. and E. 137) which was possible for seditous libel, because a man decorously discussed the respective advantages of an hereditary

or elective monarchy without any reflexion upon any part of the existing government, and which was carried to a conviction, would be impossible under our present ideas of political freedom. In the region of religious discussion it is the same. In an empire, the Sovereign of which rules over more non-Christians than Christians, it has become an obsolete fiction that Christianity is part of the Common Law. Writings which a century ago would have been held by the judges of the time as blasphemous libels, simply because they question the truth of Christianity, will, as Lord Coleridge points out in the same judgement, no longer be so regarded, "because the dicta of the judges promulgating that legal doctrine of bygone times cannot be taken to be a true statement of the law as the law is now." As in religion, so in morals. The state of modern society, with all its complex aspects, has provoked the public discussion of questions relating to marriage and divorce, contagious diseases, over-population, and over-crowding, which would have shocked the old-fashioned notions of preceding generations, with their limited range of thought upon such matters. Upon some of these subjects the necessities of the day have already driven us to legislation which in past time would have been denounced as immoral by all, as it still is by a minority; and the question discussed in this pamphlet is one of a kindred character. Whilst the law has thus altered with the times in allowing a greater latitude in discussing questions fundamentally affecting religion, the Government of the country, and public morality, it has remained the same in insisting upon a respectful, grave, and decent tone of discussion. Whether this has originated in a desire to protect the innovating thinker from such violence as might be offered by the ignorant multitude to those regarded as publicly insulting the great Ephesian Diana of the day, by restraining him from the use of language likely to provoke anger, or whether it has proceeded from the exploded fallacy that truth requires the prop of penal statutes to maintain it, the law clearly is that, whether the subject of discussion be religion, government, or morals, whilst every latitude is allowed in discussing their fundamental principles, no language must be used which is stronger than is necessary for clearly expound-

ing the doctrine or system advocated by the writer. The publication of language which is calculated to destroy respect for religious or moral obligations, to incite people to violent and unconstitutional attacks upon the established Government, or to destroy public morality by the advocacy of immoral practices, is illegal; and if its necessary results if acted upon are such, it is no excuse that the person publishing it thinks he is doing a public good. The law clearly is, that though he should be actuated by the noblest aspiration for the public good, he must either achieve his reform in a legal manner or be content, if his revolutionary course of action is unsuccesful, to suffer in the cause of truth and right, hereafter, like John Brown, to be chanted as a martyr in national lyrics when public opinion has changed. A certain number of prosecutions under the law, a certain number of victims to the ignorance or superstition of those who framed it, a certain number of refusals to convict under a growing sense of its unwisdom, injustice, and barbarity, seem to be in all societies the stages passed through by laws established for the purpose of coercing the opinions of mankind before they become obsolete, if judge-made, or, if statutes, are repealed as inconsistent with advancing knowledge. Were the publication now under consideration prosecuted as an obscene libel, all the above questions would be very proper for consideration. The publication, however, does not come before us as an obscene libel at common law. The test in this case is not whether the tendency of the book is to promote immorality, but whether the language itself of the book is obscene. Were the question whether the book was an obscene libel, it might possibly be held to be such, though there was no language in it inconsistent with decency, if its purpose was inconsistent with the morals of society. This is clear from the language used by Lord Cockburn in the case of the Queen *v.* Bradlaugh and Besant; and though the work, the subject of that prosecution. was not identical with that now before us, and that was a proceeding against the defendants for an obscene libel, the principles laid down in that case, as far as can be applied, must govern this. In that case Lord Cockburn says:—

"In the first place are there in this publication details inconsistent with decency? Even if that should not be the case, the second point is whether that purpose advocated in the work is a purpose inconsistent with the morals of society?"

The second of these questions, though proper enough for consideration in the case of an obscene libel, has no necessary place in the consideration of the question whether the work is an obscene publication under the statute. To suggest, as this book does, that the evils of over-population should be prevented by married persons having recourse to such artificial means as medical science suggests to prevent conception and the consequent evils, especially to the poorer classes, which the production of too numerous progeny is certain to bring about, may be held by some persons to be the promulgation of teaching that is dangerous to morals; but it is clearly an abuse of language to say that the suggestion would make the work necessarily obscene. The prevention of conception may be secured by total sexual abstinence, or by sexual abstinence at certain periods of female life; and it is therefore idle to argue that the mere suggestion that families should be limited by the prevention of conception is an idea in itself obscene; unless it is contented that to advise total sexual abstinence is itself obscene. It has been admitted in argument before us that the bulk of this pamphlet, which consists of the most powerful arguments in support of the necessity of limiting population in old countries, and of the only effectual means of limiting it being conjugal prudence in sexual intercourse, is not open to the objection of being obscene. And it is said that had the writer contented herself with inculcating in the abstract the expediency of resorting to artificial means to prevent conception, the publication could not be the subject of prosecution. It was objected, however, that the third chapter of the pamphlet, which describes the means which may be used to prevent conception, and which describes the female sexual organs as far as is necessary for the understanding of the modes of preventing conception suggested was obscene. This brings us to the question, what is obscenity? The definition of the word obscene adopted by Sir James Martin in the case of Brenner *v.* Walker, 6 N.S.W. Reports, p. 281 runs as

follows : "Obscene ; offensive to chastity and delicacy ; impure ; expressing or presenting to the mind or view something which delicacy, purity, and decency forbid to be exposed, as obscene language and obscene pictures." Of this definition the words "expressing or presenting to the mind or view something which delicacy, purity, and decency forbid to be exposed," give the essential element which makes language and conduct obscene, and which distinguishes language and conduct as obscene from the same language and conduct when not obscene. It is, in short, the circumstances under which language is published, or acts done, that determine whether language or conduct is obscene. No natural function of the human body is obscene itself. In the physical constitution of man, including all his natural instincts, there is nothing unholy or unclean. Only in the diseased mind of the unnatural living ascetic, with his distorted views of religion, did God's handiwork in the human frame become an object of shame and disgust. In the Hebrew myth of Eden it was truly represented that sin first brought the sense of shame. The holy tie of marriage, regarded both by the law and religion as founded upon the instincts of sexual passion, and by the law regarded as a nullity where its gratification is physically impossible, has in the Christian world been taken as the type of the mystic union of Christ and his Church. Martyred saints and noblest poets have alike combined to make a union founded upon harmony in sexual feeling—an instinct which we enjoy in common with the brutes—the most perfect type of purest love and unselfish devotion, consecrated in thought as the highest ideal of earthly happiness and delight, divinely transfigured as it is in its lowest aspect by the spiritual union of soul with soul. There is nothing in the sexual act itself which is obscene, unholy, or impure, offensive to chastity or delicacy. But, whilst this is clear, it is equally clear that its commission in public would be an atrocious offence against decency, deserving condign punishment. So with regard to language. Language that might be permissible and necessary if used on certain occasions, it would manifestly be an outrage against decency to use when occasion did not warrant it. The question therefore is, when language is objected to as obscene, whether the occasion upon which it has been used

warrants its use in the manner resorted to? This view of the law, I find, is taken by the most distinguished writer upon the criminal law of modern days—that most acute thinker, Sir James Stephen. That learned judge, in his Digest of the Criminal Law, p. 105, submits the following as the true view of the law with reference to the publication of matter that would be obscene if not justified by the occasion:

"A person," he says, "is justified in exhibiting disgusting objects, or publishing obscene books, papers, writings, pictures, drawings, or other representations, if their exhibition or publication is for the public good, as being necessary or advantageous to religion or morality, to the administration of justice, the pursuit of science, literature or art, or other subjects of general interest; but the justification ceases if the publication is made in such a manner, to such an extent, or under such circumstances, as to exceed what the public good require in regard to the particular matter published."

Regarding this to be the law, as I do, the question now for determination is, whether the chapter of this book which is objected to makes the publication obscene? In deciding this, it is necessary to consider the whole pamphlet in connexion with which the alleged obscene matter is published, as without a consideration of it we cannot form an opinion whether the language complained of ceases to be obscene as warranted by the occasion. The pamphlet before us, by Mrs. Annie Besant, is entitled "The Law of Population. its consequences and its bearing upon human conduct and morals." The work starts with a statement of the theory first propounded by Malthus, now, as Lord Cockburn says, accepted as "an irrefragable truth," that population has a strong and natural tendency to increase faster than the means of subsistence afforded by the earth or that the skill and industry of man can produce for the support of life. It shows in clear and powerful language all the miseries which result to mankind from the unchecked operation of this law, and it discusses whether it is not possible for man to avert the consequences of this inevitable tendency by such means as medical science and an enlightened understanding of the laws of nature place at his disposal. As it cannot be denied that the question propounded for discussion is of enormous importance, and that it is right to advocate in the abstract the expedience of checking the advancing tide of popula-

tion, it appears to me impossible to contend that language which tells how this may be done is obscene if it goes no further than is necessary for this purpose, Having carefully read the third chapter of the pamphlet, it appears to me to be written with all decent sobriety of language. I see nothing in its language which an earnest minded man or woman of pure life and morals might not use to one of his own sex, if explaining to him or her what was necessary in order to understand the methods suggested by which married people could prevent the number of their children increasing beyond their means of supporting them. There is nothing which points to the conclusion that any language is used with the intention of exciting feelings of wantonness and lust; and it requires but slight acquaintance with the medical profession to discover that the advice given in this chapter is frequently given by them to women suffering from over-childbearing, and to those to whom partiturition is dangerous. The information afforded in the third chapter of the pamphlet, if given by a medical man to a patient suffering from over-maternity, or if whispered in matrimonial confidence, or imparted in the privacy existing between the author and the reader of her pamphlet, is not obscenity; though the public proclamatlon of the same information on a placard in George Street or Piccadilly, so that all who ran might read, would be an obscenity of the grossest kind, so clearly do the circumstances of a publication alter its character. If admitted, as it is, that the information, physiological and otherwise, given in Chapter 3 can be found in medical works of an expensive kind, it cannot affect the character of the information for obscenity that it is given in a cheap form. Information cannot be pure, chaste, and legal in morocco at a guinea, but impure, obscene, and indictable in a paper pamphlet at sixpence. The information, to be of value in a national point of view as a safeguard from the miseries of over-population and overcrowding, must be given wholesale to the masses likely to overbreed. The time is past when knowledge can be kept as the exclusive privilege of any caste or class. The fact that a book may excite prurient thoughts if used for that purpose by the low-minded and the young, does not make it obscene. Every one who knows what some, but only some, boys are, and who

remembers his school days, must know that he has seen not only Lemprière's Classical Dictionary but the Bible itself used for the disgusting purpose of picking out passages which public decency forbids to be read aloud. No one, however, thinks of prosecuting a vendor of Lemprière's Dictionary, or the Bible Society as publishers of obscene books. The intention and general scope of a work being clearly matters involved in determining the question of obscenity, it is impossible to avoid a consideration of the general purpose of the pamphlet. Its perusal must, I think, convince even the most prejudiced against the practical suggestions that it contains, that its author was only actuated by an honest and single-minded desire to benefit those desiring to escape from the burden of a larger family than their means will enable them to support. The objection which has been urged, that the means suggested for the prevention of conception might be availed of by the unmarried and immoral for the purpose of enabling them safely to indulge in vice is simply the application to this subject of the exploded delusion that knowledge is a dangerous thing. That nature has formed us with organs and propensities, which, if abused, lead to the ruin of health and the destruction of morals, is no imputation upon the wisdom of God in so constituting man. The same argument might be urged with equal force against the teaching of writing and the art of photography, because they assist people to commit forgery. The time is surely past when countenance can be given to the argument that a knowledge of any truth either in physics or in the domain of thought is to be stifled because its abuse might be dangerous to society. The guardianship of the eunuch and the seclusion of the harem were not necessary to build up the national character of English women for chastity; and it is an insult to them to argue that it is necessary to keep them in ignorance on sexual matters to maintain it. Ignorance is no more the mother of chastity than of true religion.

A further argument urged before us, as showing that the work was obscene, was that its advice as to the adoption of scientific checks to population involved a violation of natural laws and a frustration of nature's ends. The argument that nature intends every woman to conceive as often as is possible would, if carried to its logical

conclusion, result in the Indian custom of marrying every female child upon reaching puberty in order that no opportunity of conception should be lost. In all other matters of breeding but the all-important one of the breeding of the human race, the aim of man is to defeat the effects of nature's laws of reproduction, and to limit the number and kind of animals produced to the amount required for the use of man. The forces of nature, blind and ruthless in their effect, we control and defeat in their operation by all the means that science places at our command. To protect churches and hospitals from the operations of nature's laws, we put up conductors to arrest the inexorable effects of lightning, which would remorselessly destroy what pity and humanity would protect. The course of nature is to kill a noble woman, a devoted wife and loving mother, if her pelvis is too small to admit the delivery of a child with an abnormally large head. The practice of civilised man, aided by science, is in such a case of parturition to destroy the infant and to save the mother. The interference with the course of nature is direct, the practice in no way natural; but enlightened public opinion in no way condemns it. But if the pelvis of a woman is so unusually small that she never can be delivered of a child but at the peril of her life, where is the immorality in the husband and wife resorting to any preventive checks that may preserve a life that is dear and perhaps valuable to the world? It is unreasoning prejudice alone that starts the objection that such prevention of all the physical agony involved in a painful and dangerous delivery and possible loss of life is immoral and unnatural. Or, take the case of a woman married to a drunken husband, steadily ruining his constitution and hastening to the drunkard's doom, loss of employment for himself, semi-starvation for his family, and finally death without a shilling to leave those whom he has brought into the world, but armed with the authorithy of the law to treat his wife as his slave, ever brutally insisting of the indulgence of his marital rights. Where is the immorality, if already broken in health from unresting maternity, already having a larger family than she can support when the miserable breadwinner has drunk himself to death, the woman avails herself of the information given in this book, and so averts the consequences of yielding, perhaps under threats of

violence, to her husband's brutal insistence on his marital rights. Already weighted with a family that she is unable decently to bring up, the immorality, it seems to me, would be in the reckless and criminal disregard of precautions, which would prevent her bringing into the world daughters, whose future outlook as a career would be prostitution; or sons, whose inherited taint of alcoholism would soon drag them down with their sisters to herd with the seething mass of degenerate and criminal humanity that constitutes the dangerous classes of great cities. In all these cases the appeal is from thoughtless, unreasoning prejudice to conscience, and, if listened to, its voice will be heard unmistakeably indicating where the path of duty lies. As Matthew Arnold points out, the Divine nature cannot take a delight in swarming the East End of London with paupers. Surely, as he says, what conscience tell us is, "that a man's children are not really *sent* any more than his horses, his dogs, or his pictures." We may be guilty of as much immoral extravagance, and with more disastrous results, in the production of one as in the acquisition of the other. The natural man, as the typically excellent, is not he who "wild in woods a noble savage run," but one ideally perfect in Nature's eye as she conceived him in the ultimate perfection of his nature, in the full efflorescence of his physical, social, intellectual, and spiritual growth.

The argument founded upon the allegation that the advocacy of preventive checks is immoral, seems to me equally untenable and founded upon a misconception of what is true morality. As this pamphlet points out, true morality is ever identical with the greatest good of the greatest number. To quote from the pamphlet, its quoted words of another author, whose book was long advertised in the *Westminster Review*, and which has never been the subject of a prosecution, though its advocacy of preventive intercourse is as outspoken as that of the pamphlet before us:—

> "It is immoral to give life when you cannot support it. It is immoral to bring children into the world when you cannot clothe, feed, and educate them. It is immoral to crowd new life into already overcrowded houses, and to give birth to children wholesale who never have a chance of healthy life."

The cases of the Queen *v.* Hicklin and Steele *v.* Brannan, L.R. 7 C. P. 263, which have been cited, have no direct

bearing upon the question before us. They simply illustrate the doctrine that, if the immediate effect of a publication is to injure morals, the publication cannot be excused on the ground that its ultimate object was laudable. The Queen *v.* Hicklin turned upon the right of a political society to publish in the form of a pamphlet, entitled "The Confessional Unmasked," extracts from certain Roman Catholic theologians on the practice of auricular confession, the object of the society being "to protest against teachings and practices which were un-English, immoral, and blasphemous, and to maintaining the Protestantism of the Bible and the liberty of England." With all respect for the judges who decided these cases, I do not think that they are decisions which will stand the criticism of time, as they are founded upon a want of confidence in the power of truth and in the right to publish it. There lies at the bottom of them the old delusion, that it is not always safe in teaching mankind to let them know the truth. This is the mainspring theory of all prosecutions of innovating thinkers from the time of Socrates to the present day. Allow the young to question the foundations of a popular system, invite them to belief in the one, great, unseen Intelligence governing the world, surround his teaching with all the high morality of natural religion, and the teacher under this theory is but a "corrupter of youth," thought worthy of death in a past age, of fine and imprisonment in this. It was not by such hushing up of the abominations of paganism that the gods of Olympus were overthrown, and a purer undefiled religion was given to the world. It is only the public reading of the Apostolic writing through many generations that has taught mixed congregations of men and women to listen without blushing to their denunciations of the abominable and now nameless vices of antiquity. It is true that attacking the foundations of any system of morals may cause some to fall away from belief in all morality, and from the practice of any; but that is no reason why the pursuit of truth should be given up or condemned as an offence. The ultimate probable effect of the publication of what is true cannot be prejudicial to general morality and decency, if the publication is *bona fide* made in the interest of truth, and in pursuing a legitimate subject of controversy; and it is, I submit, by the ultimate result of the publication that its legality should be tested. The

decision in Steele *v.* Brannan is, of course, well founded, as far as it is an authority for the position that the publication of obscene matter cannot be justified under the guise of a report of the proceedings of a court of law ; but the weakness of the decisions, both in the Queen *v.* Hicklin and Steele *v.* Brannan, especially in the latter, seems to me to be in their not more clearly resting upon the canon suggested by Sir James Stephen as a test whether the matter published was really obscene. Begin with assuming that the latter is obscene, and the right decision is clear enough in any case. The fallacy lies in assuming that evil is done that good may come, when the real case is that some few may be injured in trying to do good to the many. In the Queen *v.* Hicklin, moreover, the work condemned described and alluded to what all men regard as filthy practices, as self abuse and the like ; and the judgment of the court proceeded upon the ground that the publication of the pamphlet would have been open to prosecution as a misdemeanor, "because the indiscrimite circulation of it in the way in which it appears to have been circulated was calculated necessarily to prejudice the minds of the people, and the publication of such obscene matter was not justified by the occasion." Lord Cockburn during the argument, p. 367, says :—

"A medical treatise with illustrations necessary for the information of those for whose education or information the work is intended, may in certain sense be obscene, and yet not the subject for indictment ; but it can never be that these prints may be exhibited for any one, boys and girls, to see as they pass. The immunity must depend upon tne circumstances of the publication."

Both Lord Cockburn and Lord Blackburn in their judgments lay stress upon the mode in which the book was sold to young and old at the corners of the streets ; and the judgment of all the judges manifestly went upon the ground that the publication of the filthy matter was not necessary in their opinions for combatting the evils of the confessional system, Lord Blackburn pointing out the occasion of the publication is never irrelevant, and that the question was whether the matter published, which might be injurious, was more injurious than the occasion warranted. Mr. Justice Mellor, who seems to have seen

the danger of burking the expression of the truth in *bona fide* controversy, in giving judgment, says :—

"I confess I have, with some difficulty and some hesitation, arrived very much at the conclusion at which my lord and my learned brothers have arrived. My difficulty was, whether or not the publication was under the finding of the recorder, within the Act having reference to obscene publications. I am not certainly in a condition to dissent from the view which my lord and my brothers have taken as to the recorder's finding, and, if that view be correct, then I agree with what has been said by my lord and my brother Blackburn. The nature of the subject itself, if it may be discussed at all (and I think it undoubtedly may), is such that it cannot be discussed without, to a certain extent, producing authorities for the assertion that the confessional would be a mischievous thing to be introduced into the kingdom; and therefore it appears to me very much a question of degree; and if the matter were left to a jury it would depend very much on the opinion which the jury might form of that degree in such a publication as the present. Now, I take it for granted that the magistrates themselves were perfectly satisfied that this work went far beyond anything which was necessary or legitimate for the purpose of attacking the confessional. I take it that the finding of the recorder is (as I suppose was the finding of the justices below) that though one-half of the book consists of casuistical and controversial questions, and so on, and which may be discussed very well without detriment to public morals, yet that the other half consists of quotations which are detrimental to public morals. On looking at this book myself I cannot question either the finding of the recorder or of the justices. It does appear to me that there is a great deal here which there cannot be any necessity for in any legitimate argument on the confessional and the like; and, agreeing in that view, I certainly am not in a condition to dissent from my lord and my brother Blackburn, and I know my brother Lush agrees entirely with their opinion. Therfore, with the expression of the hesitation I have mentioned, I agree in the result at which they have arrived.

His judgment evidently was given on the sole defensible ground that the publication of such filthy matter as was there published was not necessary for the purpose of the controversy. The general tenor of the judgments, however, shows that every case is to be determined by the question whether the occasion justifies the publication of the incriminated matter. It was not necessary, as Lord Cockburn suggests, to prevent the English people from becoming Roman Catholics that filthy matter should be sold at the corner of the streets to every boy and girl

already of the Protestant faith. Such a course of action rather pointed to the conclusion that the object of the publication was to insult a small number of religionists in England, and to make money by the sale of filthy matter. In this pamphlet there is no filthy matter published as was the case in "The Confessional Unmasked;" and the physiological information given with the information how conception may be prevented, is clearly necessary for enabling men and women to understand how the evils following upon the unlimited procreation of children may be prevented. If it is thought desirable to prevent the publication of sexual physiological information to persons of an age likely to be injured by the premature disclosure to them of matters that grown men and women have a right to know, and may consider without any danger of corrupting what we all recognise and reverence in the young as purity of mind, and which is consistent with all knowledge in mature men and women, the danger which is feared in the publication of such matters to the young may be easily prevented by making the sale to them of such publications illegal, just as the sale to them of spirituous liquors should also be made illegal. The unrestricted sale of arsenic is undoubtedly attended with some danger to society; but no one, I presume, would absolutely stop the sale of "Rough on Rats" because it may be used by some people for poisoning their neighbours. The case of the Queen *v.* Bradlaugh and Besant has been cited as an authority in support of the contention that the book is obscene, inasmuch as the pamphlet which was the subject of that prosecution, and for the selling of which the defendants were convicted, advocated the adoption of preventive checks. As I have already pointed out, the case cannot be regarded as an authority upon that point, as there the question was whether the pamphlet was an obsene libel. Whether the verdict of the jury was right in that case is not a matter of law, but of opinion. Reading the summing-up of Lord Chief Justice Cockburn with some knowledge of judicial modes of putting criminal cases to a jury, it appears to me that, though expressing no direct opinion as to its character, the learned Chief Justice thought that the book was not an obscene libel, and was cautiously guiding the jury to that conclusion. By the opinion of a jury coming to the consideration of so delicate a question of social science as

was submitted to them, probably without any previous acquaintance with subjects of the kind, I decline to be in any way bound; and I have no hesitation in saying that, had I been a member of the jury, I should have acted upon the reasoning of Lord Chief Justice Cockburn, and acquitted the defendants. Not only does the whole tenor of his Lordship's summing-up appear to me argumentatively in favour of the defendants, but, from certain passages, it appears to me that the inference is clearly to be drawn that he neither thought the physiological details of the book were obscene, nor was of opinion that its teaching would promote immorality. He says on page 261 of the special report printed by the defendants, which bears every appearance of authenticity:

"I come to the plain issue before you. Knowlton goes into the physiological details connected with the functions of the generation and procreation of children. The principles of this pamphlet, with its details, are to be found in greater abundance and distinctness in numerous works to which your attention has been directed; and having these details before you, you must judge for yourselves whether there is anything in them which is calculated to excite the passions of man and debase the public morals. If so, every medical work is open to the same imputation." Again he says, page 263: "Knowlton points out as a physiological fact—established by long experience and consistent with the present scientific theory of the subject of procreation—that if conjugal intercourse is avoided at a particular period and within a certain time of menstruation, conception cannot take place—in fact, it becomes physically or all but physically impossible. Now suppose a married man and woman, with limited means and having as many children as they can maintain, were to come to the resolution to avoid conjugal intercourse at the particular period at which the conjugal intercourse mainly produces its natural result, would that be an immoral course of proceeding? If it would be an immoral course of proceeding, the man who recommends an immoral course of proceeding in an open publication is guilty of an offence against the law. Another artificial check is suggested. (His Lordship here referred to an artificial check recommended; Knowlton, page 39.) These are very unpleasent details in a public court, but we must deal with them Is that inconsistent with morality? There may be a certain degree of indelicacy in the suggestion; but the question for your decision—and for your decision only—is whether it could have the effect of corrupting the morals of these persons who resort to the practice. A man and woman say: 'We have more children than we can supply with the

common necessaries of life; what are we to do? Let us have recourse to this contrivance.' Then, gentlemen, you should consider whether that particular course of proceeding is inconsistent with morality—whether it would have a tendency to degrade and deprave the man or woman."

That latter passage seems to me clearly to indicate that, in the opinion of Lord Cockburn, the adoption of the preventive checks recommended would not be immoral: for how could it be urged by any reasonable being that the wish of married people to bring no more children into the world than they could support, and the adoption of the necessary precautions to effect that wish, would be immoral? Instead of poor, let a case of consumptive parents be taken, or of parents one of whom has developed symptons of insanity. Who can suppose that any jury would regard any means adopted by them to prevent the procreation of a number of children, diseased and rickety, or certain to inherit a trace of insanity, would be otherwise than natural and right, and the adoption of any means that medical science could suggest to prevent it not only not immoral, but laudible in the highest degree? If it is not immoral to do what the pamphlet advocates, it seems to me impossible to argue that the mere advocacy itself is a penal offence. The question is, Where does the immorality come in? Wrongs can only be regarded as such in their relation to others, or as self-regarding. Is there in the adoption of preventive intercourse any invasion of the rights of others? Certainly none. The use of the preventive checks can only be viewed as a possible wrong in the light of a self-regarding one. How can it be argued with any show of sound reason, that the use of preventive checks (adopted, perhaps, from the determination not to bring into the world children that cannot be even fed) can be morally injurious to persons animated by a sense of duty founded upon the noblest altruism? The world would have little need of penal statutes if a consideration of the rights of others actuated the conduct of all mankind. Active altruism—the distinctive feature of Christian teaching, inculcated in the precept, "Do unto others as you would men should do unto you"—can never in its application injuriously react upon the moral nature of those who seek to put it in force with regard to any conduct which may affect the happiness of others. The profound law of

ethics, that in trying to do good to others we unconsciously benefit ourselves, is no less true here than in all other phases of human conduct. Every thought entertained, every effort made for the good of others, must elevate the thinker and the actor. Who will say that the low and vicious parents of East London's gutter children, brought up amidst all the moral horrors ot over-crowding, half-starved, and stunted in growth, without elementary notions of decency or morality—who will say that such parents would not have been morally superior if they could have seen the wrong they were doing in bringing such offspring into the world, and had taken measures to prevent it? Who will say that the future of society would not have an infinitely better outlook if the breeding of such children were to be prevented by the conjugal prudence of parents in resorting to the use of such means as would prevent their procreation. It is idle to preach to the masses the necessity of deferred marriage and of a celebate life in the heyday of passion. To attempt to stifle the cry for human nature uttered the voice of in its most powerful instinct, is indeed to fly in the face of nature. Like all attempts to regulate conduct by ignoring the facts of human nature, it must signally fail. Prostitution, with all its horrors is the outcome of enforced unnatural celibacy. To use and not abuse, to direct and control in its operation any God-given faculty is the true aim of man, the true object all morality.

As I have already stated, there is no case which either decides that this pamphlet is obscene or which can be regarded as an authority for the argument that the advocacy of preventive checks to population is immoral or obscene. The question decided in the case of Bradlaugh *v.* The Queen in Error, 3 Queen's Bench Division, was simply technical; but even in deciding that Lord Bramwell was carefully to say, "I repeat that I wish it to be understood that we express no opinion, whether this is a filthy and obscene or an innocent book; we have not the materials before us for coming to a decision upon that point." So in the case of Bremner *v.* Walker in our own court, the question for decision, as Mr. Justice Fawcett points out, was simply whether the information was good. The question whether it is right to advocate in a book the use of preventive checks was not argued, and was in no

way before the Court for decision; and Mr. Justice Fawcett therefore abstains in his judgment from saying anything upon the subject. The observation of Chief Justice Martin and of Mr. Justice Innes, going beyond the legal question raised, are mere *obiter dicta*, which are of no judicial weight, as they are the expression of opinions which were not necessarily formed for the purpose of determining whether an information under the Act 43 Vic. No. 24 should be framed in a certain way. In the case of In *re* Besant, II Chancery Division, 508, there are also expressions used by the Master of the Rolls, Sir G. Jessel, condemning another book published, but not written by, the author of this pamphlet before us, and entitled "The Fruits of Philosophy." What was the language of that book we are not informed, and we are therefore not in a position to say judicially whether it was an obscene book, though the Master of the Rolls seems to have thought it was, as he says, "I am sorry to say that on my attention being directed to some of the pages of this pamphlet, I can entertain no doubt whatever as to its being an obscene publication. My view is exactly the same as was entertained by the Lord Chief Justice of England and a jury on the occasion of the trial of Mr. Bradlaugh and Mrs. Besant for the publication of this book; and although that conviction has been set aside on a technical point, no judge, so far as I am aware, has for a moment doubted the propriety of that conviction." There was however no language used by Lord Cockburn which justified the Master of the Rolls in assuming that Lord Cockburn regarded the book as obscene, or as the convicting jury did; nor was any judge afterwards called upon to give any judicial opinion as to the propriety of the verdict. I have already given my reasons for thinking that Lord Cockburn could not have regarded the book as obscene; and the loose manner in which the Master of the Rolls here expresses himself shows how little weight is to be attached to his opinion on a point not submitted for his decision. The question of the obscenity of the book was not argued before him; and it was in no way necessary for his decision that he should determine whether the advocacy of preventive checks to population was immoral, or whether a book only giving such physiological details as were necessary to elucidate the advocacy of such a

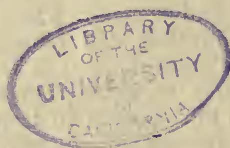
system was obscene. All that the Master of the Rolls had to decide in that case was whether effect was to be given to an agreement for separation between Mr. and Mrs. Besant, which provided that Mrs. Besant was to have the custody and bringing up of a little girl eight years of age. His judicial mind was simply exercised with the question whether allowing the agreement to be enforced was really for the benefit of the child; the statute under which he was deciding the case providing that "No court shall enforce any such agreement for separation if of opinion that it will not be for the benefit of the infant or infants to give effect thereto." The Master of the Rolls was of opinion, having regard to the fact that Mrs. Besant was preventing the child from obtaining religious instructions of any kind, and entertained speculative opinions in religion opposed to those held by the mass of mankind, and had, moreover, been convicted of publishing an obscene libel, that it could not be for the benefit of the child that she should be brought up by a mother who, the Master of the Rolls thought, must be cut off, by reason of her opinions, from social intercourse with the great majority of her sex. Whether the opinions which she held were or were not immoral, it was, under the law which he was administering, no more necessary for him to enquire than it would have been for a Roman judge, called upon to administer a similar law, to enquire during the persecutions of Nero or Diocletian whether "the detestable superstition of Christians" was well founded. It was enough for the Master of the Rolls to see that it was against the temporal interests of the child that it should be brought up in a narrow sectarian sphere, holding heretical opinions; and it became his legal duty to give her what the world would consider her best chance in life as the daughter of a clergyman of the Established Church. If the language of the Master of the Rolls and of James L. J., giving the judgment of the Lords-Justices who heard the case on appeal, is to be taken as condemning the advocacy of preventive intercourse as illegal and immoral, it is of no judicial weight, as it was not necessary that he or they should pronounce a judicial opinion upon the point. Like many, holding a popular opinion without examination, they seem to have thought themselves at liberty to assume that difference in opinion

means difference in morals, and that all not depraved by that differing opinion, must at least, if at all right-minded, be disgusted with the expression of it by those who differ. Abuse, however, of an unpopular opinion, whether. indulged in by judges or other people, is not argument; nor can the vituperation of opponents in opinion prove them to be immoral. Sitting here I can view the case from no standpoint but that of a lawyer; and I cannot rid myself of the responsibility of deciding the matter submitted for my judgment by adopting without examination the *obiter dicta* which have been cited by the Chief Justice in support of his dissent, of Judges pronouncing upon a question with reference to which their mere unreasoned opinions are of no weight against unrefuted arguments. So strong is the dread of the world's censure upon this topic, that few have courage openly to express their views upon it; and its nature is such that it is only amongst thinkers who discuss all subject, or amongst intimate acquaintances, that community of thought upon the question is discovered. But let anyone inquire amongst those who have sufficient education and ability to think for themselves, and who do not idly float, slaves to the current of conventional opinion, and he will discover that numbers of men and women of purest lives, of noblest aspirations, pious, cultivated, and refined, see no moral wrong in teaching the ignorant that it is wrong to bring into the world children to whom they cannot do justice and who think it folly to stop short in telling them simply, and plainly how to prevent it. A more robust view of morals teaches that it is puerile to ignore human passions and human physiology. A clearer perception of truth and the safety of trusting to it, teaches that in law as in religion it is useless trying to limit the knowlege of mankind by any inquisitorial attempts to place upon a judicial *index expurgatorious* works written with an earnest purpose, and commending themselves to thinkers of well-balanced minds. I will be no party to any such attempt. I do not believe that it was ever meant that the Obscene Publication Act should apply to cases of this kind, but only to the publication of such matter as all good men would regard as lewd and filthy, to lewd and bawdy novels, pictures and exhibitions evidently published and given for lucre's sake. It could never have been intended

to stifle the expression of thought by the earnest-minded on a subject of transcendent national importance like the present ; and I will not strain it for that purpose. As pointed out by Lord Cockburn in the case of the Queen *v.* Bradlaugh and Besant, all prosecutions of this kind should be regarded as mischievous, even by those who disapprove of the opinions sought to be stifled, inasmuch as they only tend more widely to diffuse the teaching objected to. To those on the other hand who desire its promulgation, it must be matter of congratulation that this, like all attempted persecutions of thinkers, will defeat its own object and that truth like a torch—" the more it's shook it shines."

As it seems to me that this book is neither obscene in its language, nor by its teaching incites people to obscenity, I am of opinion that the prohibition should go.

W. C. WINDEYER,
Senior Puisne Judge of the Supreme Court
of New South Wales.



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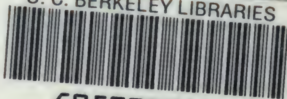
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