

RESPONSE: A TRUE VULGARITY

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I. INTRODUCTION

In *The Decline of American Culture: The Role of the Federal Judiciary*, Professor Thomas Marks suggests that several federal court opinions overturning regulations against certain swear words in broadcast media have in part caused a general decline in public morality.²⁸¹ Most recently, in *Fox Television Stations, Inc. v. Federal Communications Commission*,²⁸² the United States Court of Appeals for the Second Circuit invalidated a Federal Communications Commission (FCC) rule change regarding “fleeting expletives.”²⁸³ The FCC had expanded the previous rule by imposing a fine on broadcasters who used certain swear words in an “isolated, non-literal, fleeting” manner.²⁸⁴ Against a dissent by Judge Leval,²⁸⁵ the panel majority held that the rule change was not properly explained and was therefore “arbitrary” under the Administrative Procedure Act.²⁸⁶

Professor Marks believes that this decision is one in a series of decisions that has weakened public morality.²⁸⁷ However, Professor Marks’s analysis is flawed because the banned words do not implicate morality at all.²⁸⁸ The panel majority, the dissent,

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281. *Supra* nn. 2–9 and accompanying text.

282. 489 F.3d 444 (2d Cir. 2007).

283. *Id.* at 447.

284. *Id.* at 455.

285. *Id.* at 467–474 (Leval, J., dissenting). Judge Leval argued that the FCC rule change was consistent with the Administrative Procedure Act requirements because it “gave a reasoned explanation for its change of standard.” *Id.* at 467.

286. *Id.* at 447. The panel majority emphasized that the FCC unwaveringly adopted the position over the past several decades that fleeting expletives did not violate its indecency regulations. *Id.* at 446–447.

287. *See supra* nn. 8–14 and accompanying text (asserting that the *Fox* case was one of a series of Supreme Court decisions contributing to the degradation of America’s culture).

288. *See infra* pt. II (discussing the absence of a moral proscription against f*** and

and Professor Marks all interpreted the issue incorrectly. The correct question is not whether “fleeting expletives” implicate morality but instead whether a regulation banning individual words *in any context* is constitutionally valid. The court in *Fox* was not free to decide this question correctly because of precedent in *Federal Communications Commission v. Pacifica Foundation*,²⁸⁹ which upheld a ruling against a radio station that broadcasted so-called indecent language.²⁹⁰ If the Supreme Court decided *Pacifica Foundation* correctly, a discussion on “fleeting expletives” would be entirely unnecessary. Any regulation banning individual words from broadcast, whether spoken deliberately or fleetingly, is unconstitutional because the words do not implicate any issues of morality or any other legitimate state interest, and such a regulation constitutes content-based regulation that cannot survive strict scrutiny.²⁹¹

The Decline of American Culture: The Role of the Federal Judiciary focuses, as this rebuttal shall focus, primarily on the words “f***” and “s***,”²⁹² though the argument is applicable to several other expletive terms. F*** and s*** were the two words at issue in *Fox*²⁹³ and were two of the words used in George Carlin’s *Seven Filthy Words* monologue at issue in *Pacifica Foundation*.²⁹⁴ F*** is a synonym for copulation or intercourse,²⁹⁵ and s*** is a synonym for defecation or feces.²⁹⁶ Professor Marks believes that the use of these synonyms is immoral and that they should therefore be banned from broadcast radio and television in

s***).

289. 438 U.S. 726 (1978) (plurality).

290. *Id.* at 751. The Court emphasized the broadcast’s pervasiveness and accessibility to children. *Id.* at 748–749.

291. *Infra* pts. II–III (finding that certain disfavored synonyms are not immoral and that regulations banning them are unconstitutional).

292. As a matter of personal choice, the Response will follow the conventions of Professor Marks’s Article and not spell out the full words. *Supra* n. 15. This Response will reference them only as follows: “f***” and “the F-Word” refer to the word “fuck”; and “s***” and “the S-Word” refer to the word “shit.”

293. 489 F.3d at 452.

294. 438 U.S. at 751.

295. Merriam-Webster Online Dictionary, *Fuck*, <http://www.m-w.com/dictionary/fuck> (accessed Apr. 29, 2008).

296. Merriam-Webster Online Dictionary, *Shit*, <http://www.m-w.com/dictionary/shit> (accessed Apr. 29, 2008).

most contexts.²⁹⁷ As articulated in the argument below, I disagree.

Part II of this Response will analyze the F-Word and the S-Word from the perspective of a few philosophical systems of ethics and conclude that such words do not truly implicate morality. Part III of this Response will then analyze the constitutional law surrounding these words and conclude that any regulation banning the terms is necessarily unconstitutional.

II. A MORAL ANALYSIS OF WORD CHOICE

At the outset, it seems intuitive to me that these swear words do not truly implicate morality. I have used and been exposed to these words since childhood and have never felt harmed or hurt by them. On the other hand, for many Americans the converse is true. Intuitively, they believe that these words are immoral and should not be used, or at least should only be used in certain situations.²⁹⁸ However, moral decisions and rules need not be a “matter of personal predilections”²⁹⁹ or mere intuition. There are several systems of ethical thought that can guide us in our moral decisions.³⁰⁰ I decided to research some of these systems, and the results of my research find no clear reason to ban the F-Word or the S-Word.

A. Kant’s Categorical Imperative

Immanuel Kant is one of the most well-known moral philosophers of the western world and is studied extensively in the field of ethics philosophy.³⁰¹ Kant is perhaps most well-known for the

297. *Supra* n. 23 and accompanying text (providing only one instance where using certain disfavored synonyms is acceptable: when a tired 9/11 first responder cursed on the news the morning of 9/12).

298. See AP, *Watch Your Mouth! Americans See Profanity Getting Worse, Poll Finds*, <http://www.msnbc.msn.com/id/12063093/> (Mar. 29, 2006) (finding that 51% of Americans either do not use the F-Word at all or use it no more than a few times per year).

299. *Pacifica Found. v. FCC*, 556 F.2d 9, 26 (D.C. Cir. 1977), *rev’d*, 438 U.S. 726 (1978) (quoting *Cohen v. Cal.*, 403 U.S. 15, 21 (1971)).

300. See generally David Robinson & Chris Garratt, *Introducing Ethics* (Richard Apignanesi ed., Totem Books 2005) (discussing the theories put forth by significant moral philosophers throughout history). Admittedly, my academic background is in business, not philosophy, although I do find myself personally interested in the study.

301. See Immanuel Kant, *Groundwork of the Metaphysic of Morals* 8 (H.J. Paton ed., Harper & Row 1964) (referring to Kant’s *Groundwork of the Metaphysic of Morals* as being

idea of the categorical imperative, a system that attempts to ground morality in the realm of reason.³⁰² The first formulation of the categorical imperative is that we should “[a]ct only on that maxim through which you can at the same time will that it should become a universal law.”³⁰³ This tenet suggests the following multi-part analysis of any maxim: (1) a maxim or principle must be formulated; (2) this maxim must be imagined as a law universally applied to all people; (3) it must be determined whether this maxim applied universally is “conceivable”; and (4) it must be decided whether the maxim can be constantly willed.³⁰⁴ If a maxim satisfies this analysis, it is moral.³⁰⁵

For instance, a maxim that suggests it is permissible to kill another human being fails the categorical imperative.³⁰⁶ Such a maxim applied universally would “expose me and everyone else to violent death, which is something that one cannot consistently will.”³⁰⁷ Killing, therefore, fails the “contradiction in the will” test.³⁰⁸ Lying or using deceptive language also fails the categorical imperative test.³⁰⁹ It is impossible to conceive of a world where people universally lie and deceive.³¹⁰ In such a world the concept of trust cannot exist because people universally lie.³¹¹ Yet, it must exist if our lies are to be deceptive.³¹² Under this formulation, deception fails the “contradiction in conception” test.³¹³

similarly situated with Plato's *Republic* and Aristotle's *Ethics*).

302. Robert Johnson, *Stanford Encyclopedia of Philosophy, Kant's Moral Philosophy*, <http://plato.stanford.edu/entries/kant-moral/#ForUniLawNat> (last updated Apr. 6, 2008).

303. Kant, *supra* n. 301, at 88 (emphasis removed). A maxim is a subjective tenet of action that is distinguishable from an objective tenet. *Id.* at 88 n. 51. The former is the theory on which a person acts, while the latter is a principle based on how the person *should* act. *Id.*

304. Johnson, *supra* n. 302.

305. *Id.* If one is unable to satisfy the third requirement, one cannot act on the maxim. *Id.* However, if one is only unable to satisfy the fourth step, one may pursue a policy permitting such derogations. *Id.*

306. Julian H. Franklin, *Killing and Replacing Animals*, 2 *J. Animal L. & Ethics* 77, 86 (May 2007).

307. *Id.*

308. Johnson, *supra* n. 302. If the maxim were applied universally, it would destroy the trust necessary for a society. Franklin, *supra* n. 306, at 87.

309. Johnson, *supra* n. 302.

310. *Id.*

311. *Id.*

312. *Id.* In order for someone to deceive another person, there must be a relationship of trust. *Id.* Without such trust, a person cannot be deceived. *Id.*

313. *Id.*

Turning this analysis to the use of disfavored synonyms does not suggest that their use is morally impermissible. Going through the analysis, we must first formulate the following maxim: Use the word f*** for intercourse and the word s*** for feces. Then, we imagine it as a universal law: People ought to universally use the word f*** for intercourse and the word s*** for feces. Are there any contradictions in such a universal law that makes it inconceivable? I cannot see any. Can one constantly will such a world? I absolutely can.³¹⁴ The maxim does not fail the “contradiction in conception” test, nor does it legitimately fail the “contradiction in will” test. Under a Kantian categorical imperative approach to ethics, the use of the F-Word and S-Word are morally permissible.

B. Mill’s Utilitarianism and Liberty

John Stuart Mill is another widely read and studied ethical philosopher.³¹⁵ Mill advocated utilitarianism as a moral-value premise.³¹⁶ Utilitarianism asserts that an action is right only if it increases happiness or pleasure, and an action is wrong if it increases pain.³¹⁷

As with the Kantian discussion above, murder and dishonesty will almost always fail a utilitarian analysis. The pleasure or utility one receives from killing or lying will nearly always be outweighed by the pain the victim and society at large feel. However, one cannot show the same thing to be true with using the F-Word or the S-Word. Mill famously stated that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”³¹⁸ If one cannot show that a person is harmed by hearing or

314. I am sure that those who disagree with me about the F-Word and the S-Word would suggest they cannot consistently will such a world. I ask anyone making such an argument to continue reading. Without a showing of a real and concrete harm, the F-Word and the S-Word are easy to consistently will. Being unable to consistently will society as a bloody war zone is quite different from being unable to consistently will the use of a few words.

315. See John Stuart Mill, *On Liberty* vii (Currin Shields ed., Prentice Hall 1958) (providing context to Mill’s arguments and explaining the impact of his political and moral philosophy) [hereinafter Mill 1].

316. Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 St. John’s L. Rev. 725, 796 n. 393 (2006).

317. John Stuart Mill, *Utilitarianism* 14–15 (Ward Small 1899).

318. Mill 1, *supra* n. 315, at 13.

using these disfavored terms, then the government is not rightfully exercising its power in regulating them. One may, of course, suggest that they are “harmed” by language that one does not like because one is offended.³¹⁹ This assertion needs a bit more support to suggest that the words actually cause harm. Millions of Americans purposefully avail themselves to these words. For example, the number-one-grossing motion picture of all time³²⁰ includes both the F-Word and the S-Word, as do many best-selling albums and books.³²¹ It is obvious that if the swear words were harmful, then this media would not sell so well.

Two obvious counterarguments need to be addressed. The first is that people willfully seek out plenty of harmful things, such as cigarettes, and that this disproves any presumption that something harmful would not sell. In the case of harmful things that people seek out, such as cigarettes, the product has scientifically proven harms³²² and addictive qualities.³²³ Additionally, we have not only evidence of harm but also an explanation for continued commercial success. We do not have these facts regarding the F-Word or the S-Word. All we have to suggest that they are harmful are assertions that some people are offended by them.

319. See e.g. *supra* n. 29 (explaining the FCC’s conception of indecent and its basis for restricting offensive language for the protection of vulnerable children).

320. *The World Almanac and Book of Facts* 237 (Zoë Kashner et al. eds., World Almanac Bks. 2007) (citing *Variety Magazine*); see also Alan Riding, *Why ‘Titanic’ Conquered the World*, 21 N.Y. Times S2 (Apr. 26, 1998) (explaining that the primary factor in *Titanic*’s success is emotive, rather than commercial appeal). Understanding the overall emotional appeal of *Titanic*, the incorporation of expletives in this context demonstrates an independent reason to value them. See *infra* n. 333 (stating that the emotive function provides independent value to offensive words).

321. Pink Floyd’s *The Wall*, for example, is one such best-selling album. *The World Almanac and Book of Facts*, *supra* n. 320, at 247 (citing Record Industry Association of America, Washington, D.C.). Two of the album’s songs, *Nobody Home* and *The Trial*, use the s-word. Pink Floyd Online, *Pink Floyd Lyrics, The Wall*, <http://www.pinkfloydonline.com/lyrics/thewall.html> (accessed Apr. 29, 2008). Author J.D. Salinger’s best-selling book, *Catcher in the Rye*, uses expletives throughout the text. USA Today, *Life, Books, Top 100 Best-Selling Books*, http://www.usatoday.com/life/books/news/2004-03-31-top-100-bestselling_x.htm (updated Mar. 31, 2004) (rankings based on overall sales); see Helen Frangedis, *Dealing with the Controversial Elements in The Catcher in the Rye*, 77 The English J. 72, 73 (Nov. 1998) (providing a literary analysis of a classic coming-of-age story and drawing attention to the use of curse words commensurate with the characters’ emotional development).

322. Am. Cancer Socy., *Tobacco and Cancer*, http://www.cancer.org/docroot/PED/ped_10.asp?sitearea=PED (accessed Apr. 29, 2008).

323. Natl. Inst. Drug Abuse, *Research Report Series: Tobacco Addiction*, <http://www.nida.nih.gov/ResearchReports/Nicotine/Nicotine.html> (accessed Apr. 29, 2008).

There is no reason to believe consumers would continue to purchase the media if it were in fact harmful. The best explanation for the continued commercial success of media with the F-Word and the S-Word is that the words are not actually harmful.

The second counterargument is that the harm does not necessarily come from the words themselves but from losing control over when one hears them on broadcast radio or television. Such an argument, however, must assume some harm from the words themselves. When one listens to broadcast media, one has “lost control” over when one hears words and phrases like “tablecloth” or “stock market.” No one complains that one has lost control over these words because no one has any objections to such words themselves. The only reason someone might object to losing control over when one hears a certain word would be because of an objection to the word itself.

Thus, we do not have evidence of harm from these disfavored terms besides the assertions of some people who are offended by them. And, we have evidence to suggest that the words are in fact not harmful because media containing the words sell very well. How can one then legitimately compare any imagined harm from hearing these words to the harm from, for example, an assault?³²⁴ If one has no reason to believe in a concrete harm from the F-Word or the S-Word, one must conclude that a utilitarian analysis shows the words to be morally permissible.

C. Judeo-Christian Tradition

The majority of people living in the United States are Christian.³²⁵ The traditions of the Christian Bible have a strong influence on the morality of many adherents.³²⁶ Professor Marks pri-

324. However, the Court in *Pacifica* did just this, stating that “[t]o say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.” *Pacifica*, 438 U.S. at 748–749 (plurality).

325. See CIA, *CIA—The World Factbook—United States*, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html#People> (last updated Apr. 15, 2008) (stating that 51.3% of people in the United States are Protestant, 23.9% are Roman Catholic, and 1.7% are Mormon).

326. See *Kaplan v. Indep. Sch. Dist.*, 214 N.W. 18, 18 (Minn. 1927) (explaining that the Bible is a book “which for ages has been regarded by the majority of the peoples of the most civilized nations as the fountain of moral teachings”); see also *supra* n. 3 (explaining that the Ten Commandments are well known as a source of moral law).

marily grounds his reasoning that f*** and s*** are immoral on Biblical passages.³²⁷ He lists nearly two dozen biblical passages in support of this proposition.³²⁸ These passages speak both directly and by way of metaphor to “evil,” “filthy,” or “wicked” language.³²⁹ At first, these passages may appear to support Marks’s proposition. After all, if one accepts the Bible as a moral guide that proscribes bad language, then bad language must be immoral. However, a crucial step is missing in that analysis—defining which words or type of words that the Bible says are in fact “bad.” The Bible has some clear instructions on immoral speech, such as a proscription against telling lies,³³⁰ which other ethical systems proscribe as well.³³¹ The only biblical support for proscription against specific word choice regards taking the Lord’s name in vain.³³² Presumably, this means the Bible says one can say “gosh darn it” where one could not say “God damn it.” This rule, of course, does not really provide any guidance about any other disfavored synonyms. Therefore, one must conclude that there is no biblical proscription against their use. Any moral legislation restricting speech that uses the Bible for moral authority should be limited to the morals actually described in the Bible. If the Bible does not proscribe the F-Word and the S-Word or analogous terms contemporary to the authorship of the Bible, then the Bible is insufficient moral authority to decry the words as immoral.

In summation, the previous discussion is not intended to advocate for the use of any of the three moral systems described, and it is far beyond the scope of this Response to defend Kant,

327. See generally *supra* n. 3 (providing justification for his position using Bible excerpts, and couching his position in terms of Judeo-Christian morality derived from the Bible).

328. *Supra* n. 3.

329. *Id.*

330. Consider the following from the King James Version:

- Thou shalt not bear false witness against thy neighbour. *Exodus* 20:16.
- A righteous *man* hateth lying; but a wicked *man* is loathsome, and cometh to shame. *Proverbs* 13:5 (emphasis in original).
- [A]ll liars shall have their part in the lake which burneth with fire and brimstone *Revelations* 21:8.

331. See e.g. *supra* nn. 309–313 and accompanying text (using lie telling and deception to illustrate the application of Kant’s categorical imperative).

332. Consider the following from the King James Version: “Lest I be full, and deny *thee*, and say, Who is the LORD? or lest I be poor, and steal, and take the name of my God in *vain*.” *Proverbs* 30:9 (emphasis in original).

Mill, or the Bible as perfect or complete moral codes. The discussion is merely intended to demonstrate a general lack of authority to declare that f*** and s*** are immoral synonyms. Instead, they are merely disfavored synonyms. And if these disfavored synonyms are not actually immoral, regulations against them bear no rational relation to public morality.

III. WHAT'S IN A WORD?

A. Symbols

Do the words “s***” and “f***” have identical meanings to the words “feces” and “intercourse,” or do the disfavored synonyms represent unique ideas by virtue of their “emotive” value?³³³ After all, a word is nothing more than a symbol.³³⁴ Some symbols have more than one meaning.³³⁵ If I can speak of feeding my Shih Tzu dog shiitake mushrooms without any charge of indecency, this indicates that the audible symbols that make up the s-word are not inherently disfavored. Therefore, if it is not the symbol itself that is disfavored, it must be the idea that the symbol represents. The s-word cannot then symbolize the same idea that the word “feces” symbolizes. But if “feces” is not indecent, neither the symbol nor the idea it represents are indecent. If the audible symbols in s*** are not inherently indecent, and the same idea represented by “feces” is not indecent, the word cannot be considered indecent. Yet, for many, it is. The only logical way around this is to suggest that the idea represented by s*** is at least somewhat unique from the idea represented by “feces.”

333. As the Court found in *Cohen v. California*, the emotive function “practically speaking, may often be the more important element of the overall message sought to be communicated.” 403 U.S. 15, 26 (1971) (explaining how offensive words are often more a symbol of an emotional charge, which is often more important in conveying the overall message than the actual word itself, and in this way, restriction of offensive words seems even more dangerous).

334. *Id.*

335. Misconstruing these meanings can lead to comical irony, such as the perception of President George W. Bush as a satanic heavy-metal fan. President Bush was photographed at the University of Texas while giving the “hook ‘em horns” hand signal for their football team the Longhorns. Russ Belville, *The Sign Language of George W. Bush*, http://www.oregonherald.com/n/radicalruss/20050123_bush-sign-language.html (Jan. 23, 2005). It just so happens that the “hook ‘em horns” gesture is exactly the same as that commonly associated with devil worship and heavy-metal music. *Id.*

The emotive differences between various terms relating to the same idea are easier to see with the F-Word than the S-Word. To my ears, some of these different terms have significant emotive coloring. Intercourse sounds clinical or sterile. Lovemaking, of course, implies that there is love involved in the act. F***ing—to me anyways—lacks an implication of love. A closer synonym that is not usually bleeped would be “screwing.” Of course, if correct, banning the F-Word amounts to restricting the viewpoint that sex can exist without love or that sex without love is acceptable behavior. If I am wrong and Justice Stevens is right,³³⁶ we revert to concluding the restrictions are arbitrary.

B. Less Offensive Language

Justice Stevens in his *Pacifica* plurality suggested that a requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. After all, he asserted that “[t]here are few, if any, thoughts that cannot be expressed by the use of less offensive language.”³³⁷ We do not need to determine the accuracy of Justice Stevens’s statement. If Justice Stevens is correct that any idea can be expressed in a less offensive manner, then restrictions against those ideas are content neutral. Yet, content-neutral regulations must be reasonable.³³⁸ Because we have seen that the disfavored synonyms bear no relation to protecting morality and are chosen arbitrarily, any regulations against these terms must fail the rational-basis test and be found unconstitutional because they are unreasonable. If Justice Stevens is incorrect, and “s***” or “f***” represent unique ideas separate from “feces” or “intercourse,” then any regulation banning disfavored synonyms is content based, and strict scrutiny must be applied. However, the regulation *must* fail strict scrutiny. If the compelling state interest is public morality, the means are not “necessary” to that end

336. *Pacifica*, 438 U.S. at 742–748.

337. *Id.* at 743 n. 18 (Stevens, J., Burger, C.J. & Rehnquist, J., concurring in Parts IV-A & IV-B).

338. See *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 799 (1996) (citing *Perry Educ. Assn. v. Perry Loc. Educators’ Assn.*, 460 U.S. 37, 45 (1982), in the Court’s general discussion of reasonable time, place, or manner restrictions on free speech).

because disfavored synonyms cannot reasonably be called immoral.³³⁹ Banning the words from broadcast, in reality, is done for aesthetic reasons, and aesthetics have never been a compelling state interest.³⁴⁰

In conclusion, competing theories about the use of symbols suggest different constitutional tests on the validity of regulation. No matter which theory one chooses, regulations banning the use of these symbols in broadcast media fail the implicated test. Therefore, any regulation banning the broadcast of disfavored synonyms must be flatly unconstitutional.

IV. CONCLUSION

Ultimately, I agree with Professor Marks that the federal judiciary has ruled in ways that lead to the decline of American culture but for drastically different reasons. Any regulation that bans the use of certain words in broadcast media will find no moral authority under the three ethical systems discussed. Any such regulation should fail, either because no rational basis for the regulation exists, or because the regulation is not necessary for a compelling state interest. When the Court upholds such regulations, as it did in *Pacifica*,³⁴¹ the court upholds superstition and unreason. Even if some dislike or disfavor the words personally, we must not ban them, for confronting that which we truly dislike is a sign of strength.³⁴² The alternative is hiding our fears underneath the floorboards, like the still-beating heart of the man with the vulture eye, only to be terrorized by every pulsing beat until we finally betray our own sanity.³⁴³ We must shatter unnecessary taboo for our own sake because failure to do so may be the truest vulgarity of all.

339. For a discussion of why the use of "f***" and "s***" is not reasonably linked to morality, see *supra* Part II.

340. See *Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 823 (1984) (citing the following from *Cohen v. Cal.*, 403 U.S. 15: "But a government interest in aesthetics cannot be regarded as sufficiently compelling to justify a restriction of speech based on an assertion that the content of the speech is, in itself, aesthetically displeasing").

341. 438 U.S. at 749-751 (plurality).

342. *Cohen*, 403 U.S. at 25.

343. See generally Edgar Allan Poe, *Tales of Mystery and Imagination* 295-300 (H. Frowde 1903) (reprinting Edgar Allan Poe, *The Tell-Tale Heart* (1843)).