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June 17, 2024

Dear President Biden:

Pursuant to Article II, Section 2, Cl. 1 of the United States Constitution and 28 CFR § 1.1, Roderick Bradford, publisher of *The Truth Seeker*,[1] respectfully requests a posthumous pardon for DeRobigne Mortimer Bennett ("D.M. Bennett"), the founder of *The Truth Seeker*, who was convicted in 1879 of violating the "Act for the Suppression of Trade in and Circulation of Obscene Literature and Articles of Immoral Use," Act of March 3, 1873, ch. 258, § 2, 17 Stat. 599, commonly known as the Comstock Act.

The Comstock Act has been much in the news of late because of efforts to revive its long-moribund provisions in ongoing debates over freedom of expression, abortion, and

[1] Roderick Bradford is the seventh editor/publisher of *The Truth Seeker*, the oldest continuously published freethought magazine in the United States. The magazine was founded in 1873 by D.M. Bennett, the subject of this petition. The Foundation for Individual Rights and Expression (FIRE), which is submitting this petition on his behalf, is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty.

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contraceptives.[2] Although framed as an obscenity law, the Act was so broadly worded that it was used to prosecute literature, art, scientific and medical texts, and, in Bennett's case, the publisher of a freethought journal. It was also wielded as a weapon against opponents of the Comstock Act who, like D.M. Bennett, advocated for its repeal. Developments in constitutional law through the twentieth century rendered the statute largely a dead letter, but recent events are threatening to breathe new life into this obsolete law.

By granting this pardon, the President would help right the injustice resulting from D.M. Bennett's wrongful prosecution and conviction, and at the same time send the important message that Victorian Era laws should not be revived to undermine Americans' individual rights. As philosopher George Santayana warned, "those who cannot remember the past are condemned to repeat it." In this regard, a posthumous pardon for D.M. Bennett would be an act of remembrance that may help forestall reliving a lamentable past.

Why This Petition Is Important

A pardon of D.M. Bennett would serve as a reminder of what happens when laws to enforce public morality override constitutional protections for freedom of expression. Bennett's prosecution starkly illustrates what can go wrong when enforcement of the law becomes politicized to crush political opponents. Admittedly, a posthumous pardon, by definition, cannot alter the plight of the deceased. In that narrow sense, such a pardon comes too late to save a living person from the acknowledged wrongs committed by the government. But a posthumous pardon does have other important and socially beneficial effects:

- It corrects the *institutional record* by publicly expunging the guilt associated with the unlawful or unconstitutional actions of the government.

- It has *precedential value* as an official declaration that such unlawful or unconstitutional action will not be repeated in the future.

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[2] *See*, *e.g.*, Elisha Brown, *Policy Experts Lay Out a Possible Future for the Comstock Act*, MICHIGAN ADVANCE, April 16, 2024; Hassan Alu Kanu, *The Truth About the Comstock Act*, THE AMERICAN PROSPECT, April 9, 2024; Nathaniel Weixel, *Fears Grow Over Comstock Act, Justices Thomas, Alito*, THE HILL, March 28, 2024; Charlie Savage, *What is the Comstock Act?*, NEW YORK TIMES, March 26, 2024; Ellen Wexler, *The 150-Year-Old Comstock Act Could Transform the Abortion Debate*, SMITHSONIAN MAGAZINE, June 15, 2023; Luke Vander Ploeg and Pam Belluk, *What to Know About the Comstock Act*, NEW YORK TIMES, May 16, 2023; Emily Bazelon, *How a 150-Year-Old Law Against Lewdness Became a Key to the Abortion Fight*, NEW YORK TIMES, May 16, 2023; Amber Phillips, *How an Old Anti-Porn Law Could be Used to End Medication Abortion*, WASHINGTON POST, April 19, 2023; Lauren MacIvor Thompson, *The Original Comstock Act Doesn't Support the New Antiabortion Decision*, WASHINGTON POST, April 12, 2023; Michelle Goldberg, *The Hideous Resurrection of the Comstock Act*, NEW YORK TIMES, April 8, 2023; Jonathan Friedmen and Amy Werbel, *The Comstock Act at 150: A Highly Relevant Cautionary Tale for Today*, THE HILL, March 3, 2023; Rachel Roubein and McKenzie Beard, *What Does a 19th-Century Federal Law Have to do With Abortion?*, WASHINGTON POST, March 21, 2023.

- It corrects the *reputational memory* of the deceased person by clearing his or her name in the historical record.

- It serves as a *public apology*—an admission by the government that it once exerted its powers in ways that cannot be reconciled with the supreme law of the land.

- And, finally, it benefits *the pardoner* by placing him on the right side of history in proclaiming and upholding essential First Amendment freedoms.

This petition is important because no battle to preserve our rights is ever truly won, as Bennett's case so well illustrates. Even under the undeveloped constitutional protections of the late nineteenth century, Bennett's prosecution was a miscarriage of justice, and the evolution of First Amendment and constitutional law through the twentieth century rendered prosecutions like Bennett's entirely unthinkable now. A December 2022 opinion of the Office of Legal Counsel described the law in question as "the handiwork of Anthony Comstock—'a prominent anti-vice crusader who believed anything remotely touching upon sex was . . . obscene'—who successfully lobbied Congress and state legislatures in the nineteenth century to enact expansive laws 'to prevent the mails from being used to corrupt the public morals.'" Office of Legal Counsel Opinion, *Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions*, 46 Op. O.L.C. __, slip op. at 3 (Dec. 23, 2022) (quoting *Bolger v. Youngs Drug Prods. Corp*., 463 U.S. 60, 70 n.19 (1983)). The OLC opinion observed the Comstock Act "is perhaps best known for having prohibited the distribution of a wide range of writings until courts and the Executive Branch determined that the Free Speech Clause of the First Amendment significantly limited the permissible reach of the law." *Id*.

But the progress of the past century cannot be sustained unless we reinforce why it was necessary for the law to evolve in the first place. And, as certain recent cases make clear, some current decisionmakers have forgotten—or perhaps never knew—how the Comstock Act's dark and disastrous past shaped the development of First Amendment law. Court decisions through the twentieth century rendered the Comstock Act largely unenforceable, but because of some recent developments it is being described as a "zombie law" that is threatening to come back to life. *See*, *e.g*, Kate Cohen, *Kill the Zombies! Undead Laws Can Come Back to Bite You*, WASHINGTON POST, April 10, 2024.

For example, a federal court in Texas last year cited the Comstock Act as historical support to deny injunctive relief after a public university president canceled a planned PG-rated drag show at a campus public forum because he was personally offended by what he assumed would be a "demeaning" performance. *Spectrum WT v. Wendler*, No. 2:22-CV-048-Z, 2023 WL 6166779, at *1–2 (N.D. Tex. Sept. 21, 2023), *appeal pending*, No. 23-10994 (5th Cir.). In the face of ironclad constitutional law that prohibits discrimination against speech based on a public official's disapproval of a particular viewpoint, the president refused to budge "even"—as he put it—"*when the law of the land appears to require it*." *Id*. at *12. But this did not matter to the court, which conducted a "historical analysis" of the "Free Speech ecosystem" (which included the Comstock Act) to reach a conclusion directly at odds with modern First Amendment jurisprudence. *Id*. at *2. Contrary to that court's analysis, established law for many decades holds that government officials cannot arbitrarily prohibit performances they consider "offensive," *Se. Promotions, Ltd. v. Conrad*,

420 U.S. 546 (1975), and that viewpoint discrimination is "an egregious form of content discrimination" and presumptively unconstitutional. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

Similarly, the Comstock Act is central to *FDA v. Alliance for Hippocratic Medicine*, No. 23-235, which currently is before the Supreme Court. This case does not involve a First Amendment challenge but addresses the reliance on the Comstock Act to prohibit mailing of drugs that can be used for chemical abortions. The district court held that "the plain text of the Comstock Act controls" to bar the mailing of "[e]very obscene, lewd, indecent, filthy or vile article, matter, thing, device or substance." *All. for Hippocratic Med. v. FDA*, 668 F. Supp. 3d 507, 522 (N.D. Tex. 2023). Although the Fifth Circuit affirmed the decision on other grounds, Judge Ho wrote separately to say that the Comstock Act's plain text was controlling, and he devoted several pages discussing why it provides an independent basis for the ruling. *All. for Hippocratic Med. v. FDA*, 78 F.4th 210, 267–70 (5th Cir. 2023) (Ho, J., concurring in part and dissenting in part). Respondents in the case argued to the Supreme Court that the Comstock Act supports the decision, Brief for the Respondents in *FDA v. All. for Hippocratic Med.*, No. 23-235 at 56–58, and some Justices suggested at oral argument they may agree. *FDA v. All. for Hippocratic Med.*, No. 23-235, Argument Tr. at 26–28, 47–48, 90 (Mar. 26, 2024). All of this is contrary to OLC's detailed analysis concluding that "since early in the twentieth century, federal courts have agreed" the Comstock Act does not "categorically prohibit the mailing or other conveyance of items designed, adapted, or intended for presenting or terminating pregnancy." 46 Op. O.L.C. __, slip op. at 5.

In short, granting this pardon request is needed not just to correct the injustice imposed on D.M. Bennett 145 years ago. It is also necessary to serve as a positive reminder of why the Comstock Act was a historical mistake that is antithetical to cherished First Amendment values. It is important not just to correct past errors, but also to help forestall current threats.

Why Now?

There is never a wrong time to do the right thing. But a posthumous pardon is not just about the past. The Comstock Act's legacy of suppression will continue so long as its wrongs remain unpardoned and its illegitimacy remains constitutionally unresolved. Now is the time to call out old wrongs for what they are and to declare our nation's continuing commitment to the freedom of expression for the future.

We understand the general policy of the Department of Justice is not to accept posthumous pardon petitions for federal convictions so that resources can be devoted to clemency requests filed "by living persons who can truly benefit from a grant of clemency." Office of the Pardon Attorney, Pardon After Completion of Sentence, https://www.justice.gov/pardon/apply-pardon (updated April 30, 2024). But there are exceptions to this general policy where the request is based on more than just the manifest injustice experienced by a given petitioner. For example:

- President Bill Clinton pardoned Lieutenant Henry Ossian Flipper, who had been convicted of Conduct Unbecoming an Officer in 1881 and dismissed from the Army in 1882. Flipper, a former slave, was the first black graduate of West Point and served with the fabled Buffalo Soldiers. He was falsely charged with embezzlement, for which he was acquitted, but convicted of Conduct Unbecoming an Officer. Although a

subsequent Army review found the charge was racially motivated, President Chester A. Arthur declined to issue a pardon. President Clinton posthumously pardoned Lieutenant Flipper in 1999, and West Point presents an annual award in his name to the cadet who best demonstrates leadership, self-discipline, and perseverance.[3]

- President George W. Bush issued a posthumous pardon to Charles Thompson Winters, who had served 18 months for violating the 1939 Neutrality Act after he helped supply aircraft to Israel to aid in its 1948 war for independence. His actions were credited with helping Israel survive in the early days of its existence.[4]

- President Donald Trump pardoned heavyweight boxing champion Jack Johnson, who was convicted in 1913 for violating the Mann Act, to help correct "a racially motivated injustice" that occurred during a "period of tremendous racial tension in the United States." An earlier congressional resolution had advocated granting the pardon "to expunge a racially-motivated abuse of prosecutorial authority of the federal government from the annals of criminal justice in the United States, and in recognition of the athletic and cultural contributions of Jack Johnson to society." The pardon was granted in 2018.[5]

- President Trump also pardoned suffragist Susan B. Anthony, who in 1872 was arrested in her hometown of Rochester, New York for casting a ballot in violation of laws that only permitted men to vote. She was convicted after a widely publicized trial but refused to pay the fine. Anthony urged Congress to adopt a constitutional amendment extending voting rights to women, which was called at the time the "Susan B. Anthony Amendment." It was ratified in 1920 as the Nineteenth Amendment to the Constitution. Anthony was pardoned on the centennial of its ratification.[6]

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[3] *See, e.g.*, Darryl W. Jackson, Jeffrey H. Smith, Edward H. Sisson, & Helene T. Krasnoff, *Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 IND. L.J. 1251 (1999); Steve Vogel, *First Black Army Officer is Pardoned by Clinton*, WASHINGTON POST, February 20, 1999.

[4] *See, e.g.*, Eric Lichtblau, *Jailed for Aiding Israel, but Pardoned by Bush*, NEW YORK TIMES, December 23, 2008; Deb Riechmann, *Bush Pardons Man Who Helped Israel During Wartime*, SAN DIEGO UNION-TRIBUNE, Dec. 24, 2008.

[5] *See, e.g.*, John Eligon and Michael D. Shear, *Trump Pardons Jack Johnson, Heavyweight Boxing Champion*, NEW YORK TIMES, May 24, 2018. *See* Jason Meisner, *108 Years After Racially Motivated Trial, Court Docket for Black Heavyweight Champ Jack Johnson Goes Public*, CHICAGO TRIBUNE, January 19, 2021; Sarah Kaplan, *Jack Johnson, World's First Black Boxing Champion, Was Jailed Under Jim Crow. Will He Get a Posthumous Pardon?* WASHINGTON POST, February 5, 2016; Geoffrey C. Ward, UNFORGIVABLE BLACKNESS: THE RISE AND FALL OF JACK JOHNSON (Knopf: New York 2004).

[6] *See, e.g.*, *Trial of Miss Susan B. Anthony for Illegal Voting—The Testimony and Arguments*, NEW YORK TIMES, June 18, 1873; Maggie Haberman and Katie Rogers, *On Centennial of 19th*

Each of these examples illustrates how the value of a posthumous pardon can transcend the interest of securing justice for the individual involved. A posthumous pardon for D.M. Bennett falls into this exceptional category as well because it is inextricably tied to current events. It would not be merely a symbolic statement to acknowledge and correct a past wrong. Pardoning D.M. Bennett would put the United States on record against the revival of a zombie law to threaten the rights of millions of living Americans. It would send the clear message that Anthony Comstock's cold, dead hands should not be allowed to reach from beyond the grave to claw back America's hard-won constitutional rights.

Factual Background

D.M. Bennett was convicted in 1879 of violating the Comstock Act for mailing a copy of an anti-marriage tract titled *Cupid's Yokes, or The Binding Forces of Conjugal Life*.[7] He was the founding publisher of the leading freethought journal *The Truth Seeker*, which was devoted to "science, morals, free thought, free discussions, liberalism, sexual equality, labor reform, progression, free education and whatever tends to elevate and emancipate the human race." Bennett and his journal were equally known for the things he opposed, which were listed on the masthead as including "priestcraft, ecclesiasticism, dogmas, creeds, false theology, superstition, bigotry, ignorance, monopolies, aristocracies, privileged classes, tyranny, oppression, and everything that degrades or burdens mankind mentally or physically." *The Truth Seeker* was founded in 1873 and is still published today, making it the longest freethought journal in continuous publication. It began publication the same year Congress passed the Comstock Act, and the two were on a collision course from the beginning.[8]

Bennett was convicted of transmitting an "obscene" publication in violation of the Comstock Act, but it is difficult to find anything remotely sexual in *Cupid's Yokes* apart from a clinical reference or two mentioning words like semen and coition. *Cupid's Yokes* was a twenty-three-page pamphlet written by free love advocate Ezra Heywood that advocated "sexual self-government" and opposed the institution of marriage which it compared to slavery. It also advocated gender equality and equal pay for equal work.[9] Heywood's pamphlet argued that "by

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Amendment, Trump Pardons Susan B. Anthony and Targets 2020 Election, NEW YORK TIMES, August 18, 2020. The Susan B. Anthony Museum declined the pardon on grounds the activist did not believe she had done anything wrong. Neda Ulaby, *Susan B. Anthony Museum Rejects President Trump's Pardon of the Suffragist*, NATIONAL PUBLIC RADIO, August 20, 2020.

[7] *United States v. Bennett*, 24 F. Cas. 1093 (S.D.N.Y. 1879). A copy of the decision is attached as Exhibit 1.

[8] *See* Robert Corn-Revere, THE MIND OF THE CENSOR AND THE EYE OF THE BEHOLDER: THE FIRST AMENDMENT AND THE CENSOR'S DILEMMA 32–33 (New York: Cambridge University Press 2021) at 36–37.

[9] *See, e.g.*, THE MIND OF THE CENSOR, *supra*, 32–33; Heywood Broun and Margaret Leech, ANTHONY COMSTOCK: ROUNDSMAN OF THE LORD 170–74 (New York: Albert & Charles Boni, Inc., 1927).

excluding woman from industrial pursuits and poisoning her mind with superstitious notions of natural weakness, delicacy, and dependence, capitalists have kept her wages down to very much less than men get for the same work."[10] A copy of *Cupid's Yokes* is attached as Exhibit 2.

By most accounts *Cupid's Yokes* was nothing but a "dull little sociological treatise," but the pamphlet also was intentionally provocative, calling out the Reverend Henry Ward Beecher, most famous clergyman of the day, for hypocrisy in committing adultery with a congregant, and charging Anthony Comstock with despotism and cruelty.[11] It described Comstock as "a *religious monomaniac*, whom the mistaken will of Congress and the lascivious fanaticism of the Young Men's Christian Association have empowered to use the Federal Courts to suppress free inquiry." *Cupid's Yokes* advocated immediate repeal of "the National Gag-Law" and proclaimed of Comstock: "This is clearly the spirit that ignited the fires of the Inquisition."[12]

Such views made Ezra Heywood and anyone who supported him instant targets of Anthony Comstock. The moral crusader wrote that *Cupid's Yokes* was "a most obscene and loathsome book" that was "too foul for description," and he castigated Heywood personally as the "chief creature" promoting the "vile creed" of free love.[13] Comstock prosecuted Heywood three times for publishing and selling *Cupid's Yokes*. After an 1878 conviction for which Heywood was sentenced to two years in prison and hard labor, President Rutherford B. Hayes granted executive clemency. The President wrote in his diary "it is no crime by the laws of the United States to advocate the abolition of marriage" and he did not consider *Cupid's Yokes* to be "obscene, lascivious, lewd, or corrupting in the criminal sense."[14]

None of this deterred Comstock, who ramped up his efforts to silence what he described as "the howling, ranting, blaspheming mob of repealers."[15] As Comstock saw it, any effort to alter "his" law was "one of the basest conspiracies ever concocted against a holy cause."[16] D.M. Bennett wrote at the time that "Comstock made up his mind that Mr. Heywood must be crushed out and sent

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[10] Ezra H. Heywood, *Cupid's Yokes* 21 (Princeton, MA: Co-Operative Publishing Co., 1876).

[11] Broun & Leech, *supra*, at 171.

[12] *Cupid's Yokes*, *supra*, at 11–12; Broun & Leech, *supra*, at 193.

[13] Anthony Comstock, TRAPS FOR THE YOUNG 163 (Cambridge, MA: Harvard University Press 1883/1967).

[14] T. Harry Williams, ed., HAYES, THE DIARY OF A PRESIDENT, 1875–81 183–84 (New York: David McKay Company, Inc. 1964); THE MIND OF THE CENSOR, *supra*, at 35.

[15] Anthony Comstock, FRAUDS EXPOSED; OR, HOW THE PEOPLE ARE DECEIVED AND ROBBED, AND YOUTH CORRUPTED 393 (New York: Cosimo Classics 1880/2009).

[16] Comstock, TRAPS FOR THE YOUNG, *supra*, at 192. *See* Margaret A. Blanchard and John E. Semonche, *Anthony Comstock and His Adversaries: The Mixed Legacy of This Battle for Free Speech*, 11 COMMC'NS L. AND POL'Y 328–32 (Summer 2006).

to prison."[17] The same sentiment extended to all who supported Heywood or opposed the Comstock Act—and that naturally included Bennett.

Bennett actively campaigned for repeal of the Comstock Act in the pages of *The Truth Seeker* and made weekly appeals for signatures on a repeal petition. This placed Bennett in Comstock's crosshairs, and he was arrested in November 1877, just after announcing his intention to submit his repeal petition to Congress in early 1878. The timing was as suspicious as the charges were spurious. Bennett was arrested for publishing his essay titled *An Open Letter to Jesus Christ* and for a scientific article (written originally for *Popular Science Monthly*) titled *How Do Marsupials Propagate Their Kind?* Even by the standards of the time, the idea of prosecuting a publisher for obscenity for criticizing the Christian religion or for a scientific paper describing the mating habits of possums and kangaroos simply was too much. The charges were dropped in early 1878 after the matter was brought to the attention of President Hayes and the Postmaster General.[18]

But Comstock was not done with Bennett, whom he described as an "apostle of nastiness" and the "ringleader in this fraud" of seeking repeal.[19] Bennett had pledged in the pages of *The Truth Seeker* to send to anyone who wanted it a copy of *Cupid's Yokes*, and Comstock took him up on the offer. Writing under the fictitious name of G. Brackett, the undercover moralist ordered several tracts, including "a copy of the Heywood book you advertise Cupid's something or other, you know what I mean."[20] Comstock again arrested Bennett, and this time the charges stuck—the publisher was convicted and sentenced to thirteen months hard labor in Albany prison.

Legal Background

Bennett's prosecution is inconceivable today, either for his opposition to the Comstock Act or because he mailed a "free love" pamphlet. As was clear from President Hayes' earlier pardon of Ezra Heywood, as well as the first failed attempt to prosecute Bennett, the case against him was utterly baseless even under nineteenth century standards. But the broad language of the Comstock Act and the lack of judicial precedent to serve as a guardrail against abuse made it possible for Comstock to use the law as a weapon to silence speech and punish political enemies.

Anthony Comstock was a dry goods clerk and anti-smut vigilante who was dispatched by the New York YMCA in 1873 to lobby Congress for a federal anti-obscenity law. It was popularly dubbed the Comstock Act because of his central role in securing its passage, and Comstock forever

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[17] D.M. Bennett, CHAMPIONS OF THE CHURCH: THEIR CRIMES AND PERSECUTIONS 1060 (New York: Liberal and Scientific Publishing House, 1878).

[18] *See* THE MIND OF THE CENSOR, *supra*, at 36–38.

[19] Comstock, FRAUDS EXPOSED, *supra*, at 495–96.

[20] *See* Broun & Leech, *supra*, at 180; THE MIND OF THE CENSOR, *supra*, at 38; David M. Rabban, FREE SPEECH IN ITS FORGOTTEN YEARS 36–37 (London: Cambridge University Press, 1997).

thereafter referred to it as "my law."[21] Officially titled an "Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use," it was one of 260 bills crammed through Congress on March 3, 1873, the eve of President Ulysses S. Grant's second inauguration.[22] The Act provided:

> No obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of an abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature . . . shall be carried in the mail.

Comstock was authorized to enforce the law personally as a special agent of the Post Office. With this authority, and in his dual role as Secretary of the New York Society for the Suppression of Vice, Comstock "served for forty years as the national line between virtue and vice."[23]

Legendary journalist H.L. Mencken wrote that Comstock "first capitalized moral endeavor like baseball or the soap business, and made himself the first of its kept professors."[24] Near the end of his four-decade career as an anti-vice crusader, Comstock claimed to have convicted enough people "to fill a passenger train of sixty-one coaches, sixty coaches containing sixty passengers each and the sixty-first almost full." He also said he had destroyed 160 tons of obscene literature and four million pictures. Another grisly fact was the pride Comstock took when he hounded adversaries to their deaths. He openly boasted of causing at least fifteen suicides.[25]

The Comstock Act applied to all that was obscene, lewd, or lascivious, anything intended for the prevention of conception or for procuring an abortion, or anything "intended or adapted for any indecent or immoral use." Under its broad mandate everything that Comstock considered immoral was, by definition, obscene and therefore illegal. And his concept of immorality was expansive, extending to anything he believed had the remotest connection to sex. This included blasphemy,

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[21] James C. N. Paul, and Murray L. Schwartz, FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL 22 (New York: The Free Press of Glencoe, Inc., 1961).

[22] Ch. 258, Sec. 2, 17 Stat. 598, 599 (1873). *See* THE MIND OF THE CENSOR, *supra*, at 18–20; Broun & Leech, *supra*, at 128–44.

[23] Amy Werbel, *Searching for Smut*, COMMON-PLACE (October 2010). *See generally* THE MIND OF THE CENSOR, *supra*, at 14–54; Amy Sohn, THE MAN WHO HATED WOMEN (New York: Farrar, Straus & Giroux 2021); Amy Werbel, LUST ON TRIAL (New York: Columbia University Press, 2018); Anna Louise Bates, WEEDER IN THE GARDEN OF THE LORD: ANTHONY COMSTOCK'S LIFE AND CAREER (Lanham, MD: University Press of America, Inc., 1995); Broun and Leech, *supra*, at 145-193, 222-243.

[24] H.L. Mencken, A BOOK OF PREFACES 255 (New York: Alfred A. Knopf, 1917).

[25] *See* Broun & Leech, *supra*, at 15–16; THE MIND OF THE CENSOR, *supra*, at 19–20; Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741, 758 (1992).

sensational novels and news stories, art, and even scientific and medical texts. Comstock threatened to close down the 1893 World's Fair in Chicago because the Midway Plaisance included an exhibition with the belly dancer Little Egypt; he waged a campaign against the New York Art Students' League in 1906; and he sought to censor the works of numerous authors, including Walt Whitman and George Bernard Shaw. His final case in 1915 was a successful prosecution of William Sanger, the husband of birth control pioneer Margaret Sanger, for handing out his wife's pamphlet entitled *Family Limitation*.[26]

Comstock's excesses were not kept in check because the United States had not yet developed a body of First Amendment law to limit the scope of his broadly worded law. In the absence of decisions by American courts, Comstock seized on an 1868 ruling from Victorian England, *Regina v. Hicklin*. That decision defined obscenity as anything that "depraves and corrupts those whose minds are open to such immoral influences" and asked only "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences." [27] Comstock enthusiastically embraced the ruling, calling it divinely inspired and "one of the most remarkable cases on record."[28] It is little wonder Comstock adopted the Victorian standard; it enabled the government a free hand to enforce "morality," however that notion may be conceived. In some cases, judges would not even permit jurors to review the books themselves, holding that the titles alone were enough to support a conviction.[29]

D.M. Bennett was prosecuted and convicted for distributing *Cupid's Yokes* under the *Hicklin* rule. [30]

D.M. Bennett's Conviction Violated Basic Constitutional Principles

Even by the standards of the time, D.M. Bennett's prosecution plainly violated basic principles of free expression. President Hayes had pardoned Ezra Heywood, the author of *Cupid's Yokes*, even as Anthony Comstock was prosecuting Bennett for simply making it available. Neither Attorney General Charles Devens nor the President believed the pamphlet was obscene, but Comstock prosecuted Bennett anyway. After Bennett's conviction, his supporters presented President Hayes with a petition for executive clemency that contained 200,000 signatures. In addition, fifteen thousand personal letters protesting Bennett's prosecution reached the President's

[26] *See* THE MIND OF THE CENSOR, *supra*, at 40–54.

[27] *Regina v. Hicklin*, LR 3 QB 360 (Queen's Bench, 1868).

[28] Anthony Comstock, MORALS VERSUS ART 17, 26 (New York: J. S. Ogilvie & Company, 1887).

[29] *See* THE MIND OF THE CENSOR, *supra*, at 23.

[30] *United States v. Bennett*, 24 F. Cas. at 1104–05.

desk. Hayes later wrote in his diary, "I am satisfied that Bennett ought not to have been convicted."[31] But he denied the pardon after Comstock personally intervened to block it.[32]

Bennett's 1879 trial lacked basic constitutional safeguards that we take for granted today: the prosecution was based on passages selected by the prosecutor and not the work as a whole; the question was not whether the book might be obscene for the average person, but whether in might tend to affect the morals of a hypothetical child; and it did not matter whether the pamphlet had serious literary, artistic, political or scientific value. Echoing Comstock, the prosecutor proclaimed that "the United States is one great society for the suppression of vice." [33]

The presiding judge, Charles L. Benedict, agreed. Judge Benedict had earlier presided over the Comstock Act prosecution of Dr. Edward Bliss Foote, author of a popular home health guide, for mailing a pamphlet that described various methods of birth control. At his trial, Foote was not allowed to enter his pamphlet as evidence, as Judge Benedict believed there was no need to send medical works through the U.S. mails. He explained that if Congress had intended to exempt doctors' medical advice from the obscenity law it would have said so.[34]

And so it was with Bennett's prosecution. His lawyer was precluded from introducing other books as evidence of what type of literature is commonly accepted in the community. These included assorted works of Shakespeare, *Queen Mab* by Percy Shelly, the *Decameron* by Boccaccio, among others. Judge Benedict also refused to allow the defense to compare the language of *Cupid's Yokes* to certain passages from the Bible.[35] Nor was the defense permitted to use the entire text of *Cupid's Yokes* as evidence. The court ruled that the pamphlet was "so lewd, obscene and lascivious" it would be "improper to be placed upon the [court] records" and it confined evidence to eighteen passages marked and read to the jury by the prosecutor. And, despite the fact that a publisher was being criminally prosecuted for distributing a pamphlet, Judge Benedict ruled that "freedom of the press . . . has nothing to do with this case."[36]

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[31] *See* Roderick Bradford, D.M. BENNETT: THE TRUTH SEEKER 194 (Amherst, NY: Prometheus Books 2006).

[32] *Id.* at 189, 192; Comstock, FRAUDS EXPOSED, *supra*, at 496; Broun & Leech, *supra*, at 182; THE MIND OF THE CENSOR, *supra*, at 39–40.

[33] *See* Broun & Leech, *supra*, at 89; Bradford, *supra*, at 165; THE MIND OF THE CENSOR, *supra*, at 39.

[34] *United States v. Foote*, 25 F. Cas. 1140, 1141 (S.D.N.Y. 1876).

[35] *See* Bradford, *supra*, at 168.

[36] *United States v. Bennett*, 24 F. Cas. at 1093, 1099, 1101.

Under these standards, the trial's outcome was preordained. Bennett was convicted and sentenced to pay a $300 fine and serve thirteen months' hard labor at Albany Penitentiary.[37]

More protective First Amendment standards did not emerge until midway through the twentieth century. But it was abuses like D.M. Bennett's conviction that helped drive a sea change in the law. As early as 1913, noted jurists like Learned Hand questioned whether "mid-Victorian morals" should be the rule and whether our treatment of sex should "be confined to the standard of a child's library." Pursuing that objective, he wrote, "seems a fatal policy."[38] Over time, the law evolved in numerous cases, including the 1934 decision overturning the ban on importing James Joyce's masterpiece *Ulysses*. The court in that case expressly rejected the reasoning used to convict D.M. Bennett and concluded it was not enough to condemn a book based on isolated passages. Instead, it held the question in each case must be "whether a publication taken as a whole has a libidinous effect." Any other rule would condemn works of Aristophanes, Chaucer, Boccaccio, Shakespeare, or even the Bible, and that, the court concluded, could not be what Congress had in mind. [39]

In 1957 the Supreme Court in *Roth v. United States* made clear that "sex and obscenity are not synonymous" and it rejected the *Hicklin* standard as being "unconstitutionally restrictive of the freedoms of speech and press." It proclaimed that all ideas "having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection" of the First Amendment. Rather than judging a work by its imagined effect on "the most susceptible persons," the Supreme Court held that it must evaluate speech by its impact on "the average person in the community." This review could not be limited to "isolated passages," and instead, "books, pictures and circulars must be judged as a whole, in their entire context," and courts could not dwell on "detached or separate portions in reaching a conclusion." The analysis could not be mired in the Victorian standards of the previous century, but by "present-day standards of the community."[40]

With *Roth* and the decisions that followed it, nothing was left of the Comstock Act's broad mandate to restrict speech, and it has been a dead letter since the mid-twentieth century. With respect to provisions of the Comstock Act that deal with contraceptives and abortion, the Office of Legal Counsel's detailed analysis found that "[o]ver the course of the last century, the Judiciary, Congress, and USPS have all settled on an understanding of the reach of section 1461 and related provisions of the Comstock Act that is narrower than a literal reading might suggest." It concluded

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[37] *See* Bradford, *supra*, at 182. A $300 fine is the equivalent of approximately $9,400 in 2024 dollars.

[38] *United States v. Kennerley*, 24 F. Cas. 119, 120–121 (S.D.N.Y. 1913).

[39] *United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705, 706–08 (2d Cir. 1934).

[40] *Roth v. United States*, 354 U.S. 476, 484, 487, 489–90 (1957).

that this has been the consensus view among courts "since early in the twentieth century." 46 Op. O.L.C. __, slip op. at 5.

The Benefits of a Posthumous Pardon

D.M. Bennett was over sixty when he was remanded to Albany Prison, reportedly one of the worst in the nation.[41] He was already in poor health when reporting for his sentence at hard labor and nearly died during his confinement. And it is likely that the prison term contributed to Bennett's death two years after his release. A posthumous pardon cannot change what happened. But it can provide both a measure of vindication and a warning against repeating the mistakes brought about by the Comstock Act.

Pardons have been granted for many reasons throughout history, but the Supreme Court has stated that one of the primary purposes of a pardon is "to afford relief from . . . [an] evident mistake in the enforcement of the law."[42] As former California Governor Pete Wilson explained in granting a posthumous pardon, "a just society may not always achieve justice, but it must constantly strive for justice."[43] The Supreme Court has also described pardons as an essential mechanism for promoting the public welfare. In *Biddle v. Perovich,* 274 U.S. 480, 486 (1927), it pointed out that "a pardon in our days is not a private act of grace . . . it is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."

In 2001, then Maryland Governor Parris Glendening pardoned John Snowden, who was erroneously convicted of murder and hanged in 1919.[44] Governor Glendening explained that "[w]hen [we are] faced with a possible miscarriage of justice, even one from the distant past, our values compel us to take a second look. . . . [W]hile it is too late to prove the innocence or guilt of Mr. Snowden, we can conclude that the hanging may well have been a miscarriage of justice."[45] In a similar situation, former California Governor Pete Wilson pardoned Jack Ryan, the supposed "Coyote Flat killer" who was convicted of murdering two men in 1925. The pardon stemmed from the discovery of evidence demonstrating that Ryan had been coerced into pleading guilty for a crime he did not commit. Governor Wilson granted the pardon to preserve the integrity of the state's

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[41] *See* Bradford, *supra*, at 201 ("The Albany Penitentiary, opened in 1846, had a dark history of overcrowding, water torture, and even death as a form of punishment.").

[42] *Ex Parte Grossman*, 276 U.S. 87, 120 (1925).

[43] Quoted in Dave Lesher, *Dead Man's Name Finally to Be Cleared,* L.A. TIMES, April 15, 1996.

[44] Press Release, *State of Maryland Governor's Press Office, Governor Glendening Grants Posthumous Pardon to John Snowden* (May 31, 2001), https://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/013600/013632/pdf/glendening.pdf.

[45] *Id*.

justice system.[46]

A famous example of executive clemency involved Nicola Sacco and Bartolomeo Vanzetti, Italian immigrants who were executed in 1927 after being convicted of theft and murder. Then Massachusetts Governor Michael Dukakis acted to vindicate Sacco and Vanzetti in 1977 because the judge in their case had refused to grant a new trial despite the discovery of exculpatory evidence and because of the pervasive anti-immigrant sentiment that existed at the time. In his statement announcing his action, Governor Dukakis declared, "[t]he stigma and disgrace should be forever removed from the names of Nicola Sacco and Bartolomeo Vanzetti, from their families and descendants."[47]

Posthumous pardons arising from violations of the First Amendment carry a special resonance, as they both atone for past injustices and promise better behavior by the government going forward. In 2003, then New York Governor George Pataki pardoned pathbreaking comedian Lenny Bruce for his 1964 conviction for "obscene" comedy routines. Like the prosecution of D.M. Bennett, Lenny Bruce's conviction was illegitimate even under the standards of his day. In announcing the pardon, Governor Pataki said "[f]reedom of speech is one of the greatest American liberties, and I hope this pardon serves as a reminder of the precious freedoms we are fighting to preserve." He described it as "a declaration of New York's commitment to upholding the First Amendment."[48] A copy of Governor Pataki's pardon proclamation is attached as Exhibit 3.

In 2006, then Montana Governor Brian Schweitzer granted posthumous pardons to seventy-nine men and women who had violated the 1918 Montana Sedition Act. The Act had been used to quell normal acts of dissent during World War I. And, as with D.M. Bennett, First Amendment law had not yet evolved to provide the basic protections for the defendants involved. Governor Schweitzer described the wartime prosecutions as "one of the darkest periods in Montana's political history" because the sedition law "punished even the mildest forms of political dissent" and enforced a "unanimity of thought concerning the United States' involvement in the War." Drawing on his constitutional authority to "secure the blessings of liberty for this and future generations," he issued the mass pardons because "there is no time limitation for correcting injustice and clearing the names of honorable people."[49] A copy of Governor Schweitzer's pardon proclamation is attached as Exhibit 4.

It is particularly fitting for the President to use the pardon power to highlight the importance of First Amendment rights that have been abridged under an unjust law. In fact, this lesson is nearly

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[46] *See* Lesher, *supra*.

[47] *See* Jackson, *supra*, at 1282.

[48] John Kifner, *No Joke! 37 Years After Death Lenny Bruce Receives Pardon,* NEW YORK TIMES, December 24, 2003.

[49] Proclamation of Clemency for Montanans Convicted Under the Montana Sedition Act in 1918-1919, https://justfacts.votesmart.org/public-statement/171099/proclamation-of-clemency-for-montanans-convicted-under-the-montana-sedition-act-in-1918-1919. *See* Jim Robbins, *Pardons Granted 88 Years After Crimes of Sedition*, NEW YORK TIMES, May 3, 2006.

as old as the Republic, as President Thomas Jefferson used executive clemency to undo damage caused by the Sedition Act of 1798. That law made it a crime to "write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government" with the intent to defame Congress or the President. Sedition Act of 1798, 1 Stat. 596. The law was used aggressively to punish political opponents of the Adams Administration, including newspaper editors.[50] The Act expired by its own terms and was never tested in court, but the consensus of history is that it was fundamentally at odds with the First Amendment. This judgment owes much to President Jefferson's act of pardoning and remitting the fines of those who had been convicted under the law. As Jefferson later wrote, "I considered . . . that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image."[51]

And so it is with the Comstock Act.

In the case of D.M. Bennett, the need for a posthumous pardon is even more compelling because of the ways the Comstock Act is being used in the present day to threaten individual rights. This petition is not just about the past; it calls for a reaffirmation of basic constitutional principles that developed as a response to the abuses of Anthony Comstock and his law. Some have suggested a legislative solution and have called for repeal of the Comstock Act.[52] That may be a worthy project, but it is the domain of Congress. Only the President can issue a pardon to help and ameliorate the grave injustices of the past while at the same time proclaiming that our constitutional scheme will not tolerate petty moralistic tyrants.

Conclusion

"The search for justice has no statute of limitations."[53] By that equitable measure D.M. Bennett should be posthumously pardoned. It is never too late to correct an injustice, especially one that involved the persecution and prosecution of a man because he published his sentiments freely. As legendary trial lawyer Clarence Darrow wrote of D.M. Bennett and others in the freethought movement: "It is well for us to remember these men and women who have made it safe to think. The world owes an enormous debt to the fighters for human freedom, and we cannot suffer their names to be forgotten now that we are reaping the fruits of their intelligence and devotion."[54]

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[50] Leonard Levy, LEGACY OF SUPPRESSION 258 (1960).

[51] 4 JEFFERSON'S WORKS 555–56 (Washington ed.) (Letter to Abigail Adams, July 22, 1804).

[52] *See* Chelsea Cirruzzo and Rory O'Neill, *A Second Act for Comstock*, POLITICO, April 4, 2024; Nathaniel Weixel, *Democratic Senator Eyeing Bill to Repeal Comstock Act*, THE HILL, April 2, 2024.

[53] *See Governor Glendening Grants Posthumous Pardon*, *supra.*

[54] George Macdonald, FIFTY YEARS OF FREETHOUGHT: BEING THE STORY OF THE TRUTH SEEKER (New York: The Truth Seeker Co., 1931) (foreword by Clarence Darrow).

It is vital to remember past abuses and to reaffirm the hard-fought principles forged over the past century to prevent a drift toward an authoritarian world in which the government is the arbiter of morality. To pardon D.M. Bennett posthumously is to affirm the principles that are central to American freedom.

For the foregoing reasons, Petitioner Roderick Bradford respectfully requests that you pardon D.M. Bennett for his 1879 conviction under the Comstock Act.

Respectfully submitted,

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Counsel for Petitioner

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Exhibit 1

16 Blatchf. 338

Case No. 14,571, 16 Blatch f. 338; 8 Repor ter, 38; 12 Myer's Fed. Dec. 692; 25 Int. Rev. Rec. 305[1]

Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 8 Reporter, 38, and 25 Int. Rev. Rec. 305, contain only partial reports.

Circuit Court, S.D. New York.

UNITED STATES
v.
BENNETT.

May 31, 1879.

Synopsis

This was an indictment against Deboigne M. Bennett.

Attorneys and Law Firms

William P. Fiero, Asst. Dist. Atty.

Abram Wakeman, for defendant.

Before BLATCHFORD, Circuit Judge, and BENEDICT and CHOATE, District Judges.

Opinion

BLATCHFORD, Circuit Judge.

The indictment against the defendant contains two counts. The first count avers, that the defendant, 'on the twelfth day of November, in the year of our Lord one thousand eight hundred and seventy-eight, at the Southern district of New York, and within the jurisdiction of this court, did unlawfully and knowingly deposit, and cause to be deposited, in the mail of the United States, then and there, for mailing and delivery, a certain obscene, lewd and lascivious book, called 'Cupid's Yokes, or The Binding Forces of Congjugal Life,' which said book is so lewd, obscene and lascivious, that the same would be offensive to the court here, and improper to be placed upon the records thereof; wherefore, the jurors aforesaid do not set forth the same in this indictment; which said book was then and there inclosed in a paper wrapper, which said wrapper was then and there addressed and directed as follows: G. Brackett, Box 202, Granville, N. Y.' The second count avers, that the defendant, 'on the twelfth day of November, in the year of our Lord one thousand eight hundred and seventy-eight, at the Southern district of New York, and within the jurisdiction of this court, unlawfully and knowingly did deposit, and cause to be deposited, in the mail of the United States, then and there, for mailing and delivery, a certain publication of an indecent character, called 'Cupid's Yokes, or The Binding Forces of Conjugal Life,' which said publication is so indecent that the same would be offensive to the court here, and improper to be placed on the records thereof; wherefore, the jurors aforesaid do not set forth the same in this indictment; which said publication was then and there inclosed in a wrapper, which said wrapper was then and there addressed and directed as follows, to wit: G. Brackett, Box 202, Granville, N. Y.' The defendant was tried at one of the exclusively criminal terms of this court, held under the provisions of sections 613 and 658 of the Revised Statutes, by the district judge for the Eastern district of New York. The jury rendered a verdict of guilty, and the defendant has moved for a new trial, on a case and exceptions, and also to set aside the verdict, and for an arrest of judgment upon the same the motion being made at an exclusively criminal term, held under the same sections, by the circuit judge for the Second judicial circuit, and the district judges for the Southern and Eastern districts of New York. [Case unreported.]

Before the commencement of the trial, the counsel for the defendant moved the court, that the case be remitted from this court to the district court for this

district, so that the defendant might be there tried, and thereby acquire a right to the benefit of the act of March 3, 1879 (20 Stat. 354), entitled 'An act to give circuit courts appellate jurisdiction in certain criminal cases.' The court denied the motion. The act of 1879 provides, that 'the circuit court for each judicial district shall have jurisdiction of writs of error in all criminal cases tried before the district court, where the sentence is imprisonment, or fine and imprisonment, or where, if a fine only, the fine shall exceed the sum of three hundred dollars.' It then provides for the settlement of a bill of exceptions, and for the allowance of a writ of error, and for the affirmance or reversal, by the circuit court, of the judgment of the district court, when it is a judgment against the defendant, in a criminal case. In this case, the sentence may be imprisonment or fine and imprisonment, or, if a fine only, the fine is to be not less than $100, nor more than $5,000. But, this indictment was found in this court before the act of 1879 was passed, and there is no provision of law whereby an indictment can be remitted by a circuit court to a district court, unless the district attorney deems it necessary. Such is the provision of section 1037 of the Revised Statutes. Section 1038 provides for the remission of an indictment from the district court to the circuit court, when, in the opinion of the district court, 'difficult and important questions of law are involved in the case,' but there is no provision under which a circuit court can, of its own motion, or on the application of the defendant, remit an indictment to a district court.

The case states as follows: 'The prosecution then proved the deposit, by the defendant, in the United States mail, for mailing and delivery, of the work entitled 'Cupid's Yokes, or The Binding Forces of Conjugal Life.' The counsel for the prosecution then announced that he had marked the passages in the work already in evidence, in its entirety, which he would read to the jury, and with the reading of those passages to the jury he rested on the part of the prosecution.' The counsel for the prisoner thereupon moved for the discharge of the prisoner, on the following grounds, to wit: '1. That the statute under which this indictment has been presented is not warranted by, and is in contravention of, the constitution of the United States, and is, therefore, without force and void. 2. That the indictment itself is defective, because it does not set out the whole pamphlet, nor localize in any way in it the matter alleged to be within the statute, nor the passages relied upon as obscene or of an indecent character, and which are now, for the first time, asserted as the grounds of this prosecution. 3. That the first count of the indictment is not sustained by the proof, for it avers the deposit of a book, whereas the ***1095** proof shows a deposit of a pamphlet. This, under the statute, is a fatal variance. 4. The second count is also liable to a similar objection. It avers the deposit of 'a certain publication of an indecent character,' without further describing it, and the averment is not sustained by the evidence given. It is, therefore, void for uncertainty. 5. That the indictment does not allege an offence under the statute, in that it does not set forth that the said pamphlet is 'non-mailable' under said statute, and that it does not set out that the prisoner knew that the same was non-mailable, as is required by the statute, so as to constitute an offence thereunder.' The court denied the motion.

The statute under which this indictment proceeds is section 3893 of the Revised Statutes, as amended by section 1 of the act of July 12, 1876 (19 Stat. 90). It provides as follows: 'Every obscene, lewd or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, * * * are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post office, nor by any letter carrier, and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter * * * shall be deemed guilty of a misdemeanor, and shall, for each and every offence, be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the court.' The question of the constitutionality of this statute, so far as the offences charged in this indictment are concerned, seems to us to have been definitely settled by the decision of the supreme court in Ex parte Jackson, 96 U. S. 727. That decision related to a statute excluding from the mail letters and circulars concerning lotteries, but the views of the court apply fully to the present case.

It is insisted that the book or publication alleged in the indictment to be obscene, lewd and lascivious or of an indecent character, should have been set forth in haec verba in the indictment, or that, at least, the passages in it relied upon as obscene or of an indecent character, should have been thus set forth. This is claimed, on the view, that the accused, has a right to demand a precise statement,

in the indictment, of all the facts constituting his alleged offence. The indictment proceeds on the ground, that, if it states that the obscene, lewd or lascivious book is so obscene, lewd and lascivious, or that the publication of an indecent character is so indecent, that the same would be offensive to the court and improper to be placed on the records thereof, and that, therefore, the jurors do not set forth the same in the indictment, it is not necessary to set forth in haec verba the book or publication or the obscene or indecent parts of it relied on, provided the book or publication is otherwise sufficiently identified in the indictment for the defendant to know what book or publication is intended.

It is the law of England, as decided in Bradlaugh v. Reg. 3 Q. B. Div. 607, by the court of appeal, that, in an indictment at common law, for publishing an obscene book, it is not sufficient to describe the book by its title only, but the words thereof alleged to be obscene must be set out, and, if they are omitted, the defect will not be cured by a verdict of guilty, and the indictment will be bad, either upon a motion in arrest of judgment, or upon a writ of error. This decision reversed, on a writ of error, that of the queen's bench division in Reg. v. Bradlaugh, 2 Q. B. Div. 569. The indictment in that case identified the book only by its title, and it neither set forth the book nor any part of it, and it did not allege any reason for not setting forth the same. The conclusion arrived at by the court of appeal was, that, whenever the offence consists of words written or spoken, those words must be stated in the indictment, and, if they are not, it will be defective upon demurrer, or on motion in arrest of judgment, or on writ of error. The court rejected the reason given for not setting forth on the record obscene libels, that the records of the court should not be defiled by the indecency, and it pointed out, that, in order to bring the indictment before it within the American cases cited to it, referred to hereafter, it would have been necessary to aver that the libel was so indecent and obscene that it ought not to appear on the records of the court.

In Com. v. Holmes, 17 Mass. 336, the indictment was for an offence at common law—publishing an obscene print, in a book, and also for publishing such book. The second count did not set forth the book or any part of it, but alleged that it was so obscene that it would be offensive to the court and improper to be placed on the records thereof, and that, therefore, the jurors did not set it forth in the indictment. The fifth count described the print. The defendant, after conviction, moved in arrest of judgment, because, in certain counts, no part of the book was set forth, and because, in certain other counts, the print was not so particularly described as it ought to have been, so that the jury might judge whether the same was obscene. The court said: 'The second and fifth counts in this indictment are certainly good, for it can never be required that an obscene book and picture should be displayed upon the records of the court, which must be done if the description in these counts is insufficient. This would be to require that the public itself should give permanency and notoriety to indecency, in order to punish it.'

In Com. v. Tarbox, 1 Cush. 66, the indictment was for a statutory offence—publishing and distributing a paper containing obscene language. The indictment set forth what it ***1096** alleged to be the purport and effect of the paper and gave no excuse for not setting it forth in haec verba. The defendant, after conviction, moved in arrest of judgment, because the indictment did not profess to set out the words or tenor of the publication, but only its substance, and did not aver any reason or excuse for not setting out the words. The court say: 'In indictments for offences of this description, it is not always necessary that the contents of the publication should be inserted; but, whenever it is necessary to do so, or whenever the indictment undertakes to state the contents, whether necessary or not, the same rule prevails as in the case of libel, that is to say, the alleged obscene publication must be set out in the very words of which it is composed, and the indictment must undertake or profess to do so, by the use of appropriate language. The excepted cases occur whenever a publication of this character is so obscene as to render it improper that it should appear on the record; and then the statement of the contents may be omitted altogether, and a description thereof substituted; but, in this case, a reason for the omission must appear in the indictment, by proper averments. The case of Com. v. Holmes, 17 Mass. 336, furnishes both an authority and a precedent for this form of pleading. In the present case, the indictment sets out the printed paper according to its purport and effect, and not in haec verba, or according to its tenor, or by words importing an exact transcript. The mode of pleading adopted cannot be sustained, and, the indictment being insufficient, judgment is arrested.'

In Com. v. Sharpless, 2 Serg. & R. 91, the indictment charged that the defendant 'did exhibit

and show for money to persons, to the inquest aforesaid unknown, a certain lewd, wicked, scandalous, infamous, and obscene painting, representing a man in an obscene, impudent and indecent posture with a woman.' After a verdict against the defendant, a motion in arrest of judgment was made, on the ground that the picture was not sufficiently described in the indictment. On this point, Tilghman, C. J., says: 'We do not know that the picture had any name, and, therefore, it might be impossible to designate it by name. What, then, is expected? Must the indictment describe minutely the attitude and posture of the figures? I am for paying some respect to the chastity of our records. These are circumstances which may be well omitted. Whether the picture was really indecent the jury might judge from the evidence, or, if necessary, from inspection. The witnesses could identify it. I am of opinion that the description is sufficient.' The motion in arrest was overruled.

In People v. Girardin, 1 Mich. 91, the indictment charged that the defendant printed and published 'a certain wicked, nasty, filthy, bawdy and obscene paper and libel, entitled City Argus, in which said libel are contained, among other things, divers wicked, false, feigned, impious, impure, bawdy and obscene matters, language and descriptions, wherein and whereby are represented the most gross scenes of lewdness and obscenity,' &c. After conviction, the defendant moved in arrest of judgment, on the ground that the obscene matter was not set forth in the indictment. The motion was overruled. The court said: 'There is another rule, as ancient as that contended for by the counsel for the prisoner, which forbids the introduction in an indictment of obscene pictures and books. Courts will never allow their records to be polluted by bawdy and obscene matters. To do this, would be to require a court of justice to perpetuate and give notoriety to an indecent publication, before its author could be visited for the great wrong he may have done to the public or to individuals. And there is no hardship in this rule. To convict the defendant, he must be shown to have published the libel. If he is the publisher, he must be presumed to have been advised of the contents of the libel, and fully prepared to justify it. The indictment in this cause corresponds with the precedents to be found in books of the highest merit. If authority were necessary, the case of Com. v. Holmes, 17 Mass. 336, fully sustains the views we have expressed.'

In State v. Brown, 1 Williams [27 Vt.] 619, the indictment was for selling an obscene publication, which was described in the indictment as 'a certain lewd, scandalous and obscene printed paper, entitled 'Amatory Letters,' 'Ellen's Letter to Maria,' and 'Maria's Letter to Ellen,' which said printed paper is so lewd and obscene that the same would be offensive to the court here, and improper to be placed upon the records thereof, wherefore, the jurors aforesaid do not set forth the same in this indictment.' The defendant demurred to the indictment, but it was held sufficient. The court, (Redfield, C. J.,) say: 'Ordinarily, the indictment, in a case like the present, should set forth the book or publication in haec verba, the same as in indictments for libel or forgery. This seems to be an acknowledged principle in the books. But, even in indictments for forgery, it may be excused, as, if the forged instrument is in the possession of the opposite party. So, also, in a case like the present, if the publication be of so gross a character that spreading it upon the record will be an offence against decency, it may be excused, as all the English precedents show. Some of the precedents are much like the present, describing the obscene character of the publication in general terms. But, more generally, the nature of the publication is more specifically described. But, in both cases, the principle of the case is the same. If the paper is of a character to offend decency and outrage modesty, it need not be so ***1097** spread upon the record as to produce that effect. And, if it is alleged, in such case, to be a publication within the general terms in which the offence is defined by the statute, it is sufficient, which seems to be done in the present case. The degree of particularity with which the paper could be described without exposing its grossness, would depend something upon the nature of that feature, whether it consisted in the words used or the general description given. In the former case, it could not be more particularly described than it here is, without offending decency.'

In McNair v. People [89 Ill. 441], the view of the court was, that, if the obscene publication is in the hands of the defendant, or is not in the power of the prosecution, or the matter is too gross and obscene to be spread on the records of the court, and the excuse for the failure to set out the obscene matter is averred in the indictment, the supposed obscene matter need not be set out in the indictment.

One Heywood was indicted in the district court of the United States for the district of Massachusetts. The indictment contained two counts. The first

count alleged that the defendant 'did unlawfully and knowingly deposit, and cause to be deposited, in the mail of the United States of America, then and there, for mailing and delivery, a certain obscene, lewd and lascivious book, called 'Cupid's Yokes, or The Binding Forces of Conjugal Life,' which said book is so lewd, obscene and lascivious that the same would be offensive to the court here and improper to be placed upon the records thereof, wherefore, the jurors aforesaid do not set forth the same in this indictment, which said book was then and there enclosed in a wrapper and addressed as follows, that is to say: 'E. Edgewell, Squan Village, New Jersey, Box 49.'' The second count alleged that the defendant 'did wilfully and unlawfully deposit, and cause to be deposited, in the mail of the United States of America, then and there, for mailing and delivery, a certain publication for an indecent character, called 'Cupid's Yokes, or The Binding Forces of Conjugal Life,' which said publication is so indecent that the same would be offensive to the court here and improper to be placed upon the records thereof, wherefore, the jurors aforesaid do not set forth the same in this indictment, which said publication was then and there enclosed in a paper wrapper and addressed as follows, that is to say: 'E. Edgewell, Box 49, Squan Village, New Jersey.'' The indictment was remitted to the circuit court, and the defendant was tried on it before Judge Clark, at the October term, 1877, and convicted. Afterwards he filed a motion in arrest of judgment, in January, 1878, before sentence, on the ground that the act of congress under which the indictment was found, to wit, section 3893 of the Revised Statutes, was unconstitutional, inoperative and void. In June, 1878, he filed a motion for leave to amend said motion in arrest, by assigning the additional cause, that 'the indictment does not set out the book alleged to be obscene, lewd and lascivious and indecent, and the same is not made a part of said indictment.' Both motions were heard before Mr. Justice Clifford and Judge Clark and were overruled, and the defendant was sentenced to pay a fine and be imprisoned.

No case in the United States has been cited where an indictment in form like the one in this case, for publishing or circulating or mailing an obscene or indecent publication, has been held defective, either on demurrer or on motion in arrest of judgment. In Knowles v. State, 3 Day, 103, the information alleged that the defendant exhibited a horrid and unnatural monster, highly indecent, unseemly, and improper to be seen or exposed, as a show. It stated no circumstances describing the appearance of the thing, and gave no excuse for omitting such description. It was held bad, on a motion in arrest of judgment. In State v. Hanson, 23 Tex. 232, the indictment alleged that the defendant 'did publish an indecent and obscene newspaper called 'John Donkey,' manifestly designed to corrupt the morals of the youth of said county.' The composition or print was not set out or described, nor was any excuse given in the indictment for failling to do so. The indictment was held bad, on exception. In People v. Hallenbeck, 52 How. Prac. 502, the indictment alleged that the defendant did utter, write and publish a certain obscene, lewd and indecent paper and writing, which said paper was enclosed in an envelope and deposited in the post office of the United States at said town of Catskill, for mailing and delivery, the said envelope being then and there addressed by the words following, that is to say: 'Mrs. Mary T. Westmore, Catskill, N. Y.' The indictment was demurred to. The court held, that, as there was no description whatever of the alleged libellous writing, not even by its title, and not the slightest thing was mentioned by date, subject matter, expression, thought or word, which identified or described the alleged obscene writing, the indictment was bad.

For the rule that an indictment must state the facts which constitute the crime, three reasons have been assigned by the authorities: (1) That the person indicted may know what charge he has to meet; (2) that, if convicted or acquitted, he may with facility plead or prove a plea of autrefois convict or autrefois acquit; (3) that he may take the opinion of the court before which he is indicted, by demurrer, or by motion in arrest of judgment, or the opinion of a court of error by writ of error, on the sufficiency of the statements in the indictment. As to the first two reasons, Lord Justice Bramwell says, in Bradlaugh v. Reg., 3 Q. B. Div. 616, that ***1098** 'those two reasons may be disregarded, because an accused person is very rarely ignorant of the charge which he is called upon to meet, and no real difficulty exists as to pleading or proving a former conviction or acquittal,' adding, however, that it was a very plausible observation, that, where the book as a whole is charged as an offence, the defendant cannot tell what passages will be selected as those on which the charge is to be supported. As to the third reason, the lord justice says, that, in his opinion, it is to this day substantial and cannot be disregarded.

As to being informed of the charge which he has to meet, so far as regards being furnished with a copy of the book or with a copy of the alleged obscene parts of it, a defendant can always procure such information by applying to the court, before the trial, for particulars. In the present case, there is no complaint that such application was made and refused, and the case shows that, at the trial, immediately after the mailing of the book was proved, the counsel for the prosecution announced that he had marked the passages in the book which he would read to the jury, and then read them to the jury. The defendant made no claim that he was not until then advised what such passages were, or that he was prejudiced by not being until then so advised, nor did he move to delay the trial because not sooner advised of them; and the court afforded time for the examination of such marked passages and their contexts, by adjourning until the next day, before the counsel for the defendant commenced his summing up to the jury.

We are unable to recognize the force of the suggestion, that the defendant, in the case of an indictment for depositing an obscene book in the mail, is entitled to take the opinion of the court by demurrer, as to whether the matter alleged to be obscene is obscene. The suggestion referred to has never been regarded, in the American cases, as of sufficient weight to lead to a following of the present English rule. The true view, we think, is, that if, in a case like the present one, any question can be raised to the court, it can only be the question whether, on the matter alleged to be obscene, a verdict that it is obscene would be set aside as clearly against evidence and reason. This question can be fully raised before the trial, by a motion to be made on the indictment and a bill of particulars. Under all other circumstances, it is for the jury to say whether the matter is obscene or not. See Com. v. Landis, 8 Phila. 453.

In the present indictment, the defendant had information given to him as to the offence charged, by the date of the mailing, by the title of the book, and by the address on the wrapper. The indictment states the reason for not setting forth the book to be, that it is too obscene and indecent to be set forth. A copy of the book, with a designation of the obscene passages relied on, could have been obtained before the trial, by asking for a bill of particulars. The defendant was not deprived of the right 'to be informed of the nature and cause of the accusation.' The weight of authority, as well as of reasoning, is in favor of the sufficiency of the present indictment. See U. S. v. Foote [Case No. 15,128].

It is objected, that the publication in question is not a 'book,' as alleged in the first count of the indictment, but is a pamphlet of 23 pages. It consists of one sheet of 16 pages and a half sheet of 8 pages, secured together, making 24 pages of white paper, with a cover of 4 pages of colored paper. It has a title page, which is page one of the white paper, and the title on such title page is printed identically on page one of the cover. Page 24 of the white paper and pages 3 and 4 of the cover are filled with advertisements. The case shows, that the defendant's counsel, on the trial, in his offers of evidence and in his questions to witnesses, called the publication in question a 'book.' He so called it in questions to the defendant as a witness. We think there is nothing in the objection.

It is also objected, that the second count does not state whether the publication is a book, a pamphlet, a picture, a paper, a writing, or a print, or what other publication than any one of those it is; and that it is bad for uncertainty. Whether the second count is good or not, the first count is good and sufficient to support the conviction.

It is also contended, that it is not sufficient for the indictment to allege that the defendant knowingly deposited the obscene book, but that it should aver that he knew the same to be non-mailable matter under the statute. We think the objection untenable. If the defendant knew what the book was which he was depositing, if he did not deposit it by mistake, or if he did not deposit it when he thought he was depositing another book, it is of no consequence that he may not have known or thought it to be obscene and so non-mailable, so long as it was, in fact, obscene, and he knew he was depositing the identical book complained of.

The defendant, as a witness at the trial, was asked, on direct examination: 'Q. At any time, in the sale or mailing of this book, you may state whether you did it with a knowledge or belief that it was obscene?' On objection, the question was excluded. The propriety of such exclusion is manifest, as will appear from views to be presented hereafter, in connection with the charge and the defendant's requests to charge.

At the close of the testimony, the counsel for the defendant offered to read to the jury the whole

book in question, and the district attorney objected to the reading of the whole book. The district attorney had marked the particular portions of the book which he claimed to be within the statute, ***1099** and stated that he did not claim that any portions of the book, except those which were marked, brought it within the scope of the statute. The court said: 'I do not feel called upon to permit the reading of any portions of the book, except the parts marked, unless it be in immediate connection, to qualify that particular portion of the book. The general scope of the book is not in issue. I, therefore, shall confine the counsel to those parts that the government has marked. If counsel on the part of the defence think proper to read them to the jury, I do not forbid that, and I allow any latitude of comment upon those portions; but, as to the rest of the book, in my opinion, there is no occasion for its being read. When counsel reach that stage where it is proper to sum up the case, portions of it may be read then. The jury shall have the whole book, but the necessity of reading the whole book is not apparent, and I am inclined to forbid it, and give you an exception. If there is any particular sentence necessary to make the sense and meaning of a passage clear, I intend to allow you to read that.' To this ruling the defendant's counsel excepted. The case afterwards says: 'The counsel then proceeded, under permission of the court, to read, and to comment to the jury upon, each of the passages marked, as relied upon by the prosecution, and the context of the same. The passages relied upon by the prosecution, and read and commented on by the prisoner's counsel, are marked and numbered with black ink, in the Exhibit 'Cupid's Yokes' herewith submitted to the court, and the contents of the same, read by the prisoner's counsel, are indicated by red ink, and are at pages 1, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and each one of the jurymen had a copy of the book in his hand during the reading, and took the same with him.' The case elsewhere states, that the court allowed the counsel for the defendant to read and comment on the contexts of the passages marked by the prosecution, so far as to show the meaning of the language of the marked passages. So far as the case shows, the counsel for the defendant was, under this ruling, left entirely free to select and read everything which he thought would show the meaning of the language of the marked passages, except that, after reading the last passage marked by the prosecution, marked 22, he offered to read to the jury the last page of the book, page 23, and, on objection, the court refused to permit it to be read, and the defendant excepted. It is entirely clear, that the page so excluded contained nothing which shows the meaning of the language of any passage marked by the prosecution. We do not perceive that the defendant was deprived of any right or privilege to which he was entitled. The jurors had each of them a copy of the whole book, and the parts which the defendant's counsel was excluded from reading and commenting on, were parts which, under the law applicable to this case, may properly be regarded as not being in the book.

In commenting on one of the passages which he read, the counsel for the defendant stated that he desired to read from another book, a clause of a similar character, by way of showing 'how that sort of illustration or expression or narrative is regarded in standard literature.' The court excluded all reference to, and illustrations from, other books and publications, and the defendant's counsel excepted. We are unable to see that there was any error in their exclusion. It is the duty of the court to prevent the presentation to the jury of any issues other than the one on trial, and it did not tend to show that the marked passage in question was not obscene, that another passage in the book from which the marked passage was quoted, or another passage in some other book, was not generally accepted as obscene.

The foregoing are all the matters occurring prior to the requests to charge, in respect to which error is alleged, in the argument of the defendant's counsel.

Prior to the charge to the jury, the following requests to charge were made by the defendant and were refused by the courts, except as they agree with its charge and rulings as made: '(1) That, by the word 'obscene' is meant, 'that which openly wounds the sense of decency,' by exciting lust or disgust. That, by 'indecent' is meant, the wanton and unnecessary expression or exposure, in words or pictures, of that which the common sense of decency requires should be kept private or concealed. That, where words which might otherwise be obscene or indecent, are used in good faith, in social polemics, philosophical writings, serious arguments, or for any scientific purpose, and are not thrust forward wantonly, or for the purpose of exciting lust or disgust, they are justified by the object of their use, and are not obscene or indecent, within the meaning and purpose of the law. (2) That none of the words used in the parts of the essay in question relied upon by

the prosecution are, by and of themselves, necessarily obscene or indecent; that all of said words are well known and common words of the English language, and may be properly used as such, and are not within the meaning and purpose of the law, unless wantonly and unnecessarily used, so as to offend the sense of decency. (3) That the true character of these words, and whether they are obscene or not, must be determined by their context, and by the scope and purpose of the whole essay, and by the jury. That any of the words objected to, which may at first seem to be unnecessarily used, are not within the law, if reasonably required by the argument and the context, and if they were plainly so used by the author. ***1100** (4) That, because some of the words and sentences used may be, from certain points of view, or generally, immodest, indelicate, impolite, unbecoming, blasphemous, irreligious, immoral, and bad in their influence upon society, such words and sentences are not, therefore, necessarily obscene, and do not make the essay obscene, within the intent of the law, nor under this indictment. (5) That the whole scope of the essay and the purposes and intent of the author must be considered, before it is found that the words and sentences claimed to be objectionable bring it within the meaning and purpose of the law. That, if the general intent and purpose of the essay was not to make an obscene or indecent publication, the passages relied upon by the prosecution do not necessarily make it so. (6) That the fact, that the words and sentences claimed to be obscene, or similar ones, are, and have been for years, in common use in scientific, polemic, or controversial writings, and in reformatory and general literature, is to be considered by the jury, in determining whether they are used in this essay so as to be really an offence under the law or not, and that such use affords a strong presumption that they are not within the law. (7) That, when the words and sentences claimed to be obscene are used in a social polemic, the necessity and propriety of their use in a work of that character should be considered by the jury, and, if they appear to have been used by the author in good faith, for the purposes of the polemic, and not wantonly, for the purpose to offend decency or to excite lust or disgust, they do not constitute an offence under the statute. (8) That, although it may appear certain to the jury, that the doctrines and sentiments of the passages relied upon by the prosecution, or of the whole essay, would be injurious to the community, or destructive to society, if generally practiced, yet, if said words and sentences were used by the author in good faith, to properly and reasonably set forth his mistaken and wicked doctrines and sentiments, and not wantonly or unnecessarily, to offend decency or to excite lust or disgust, such words and sentences are not within the law. In no case should the jury be influenced by the effect which, in their judgment, those mistaken and wicked doctrines and sentiments might have upon morals, or society, or the family, or religion, or the welfare of the community, if brought into general practice. (9) That, this statute, being in derogation of the common law, and restrictive of the liberties of the citizen, and of a highly penal character, should be strictly construed, in cases of this kind. (10) That, when, in cases under this law, doubts and uncertainties arise as to the meaning and intentions of the words objected to, or in construing them with the context, or if there are difficulties in applying the definitions given by the court, all reasonable doubts, uncertainties and difficulties are to be resolved by giving the accused the benefit of them.'

The court then charged the jury as follows: 'The statute under which the defendant is indicted provides, that 'every obscene, lewd, or lascivious book or pamphlet, picture, paper, writing, print, or other publication of an indecent character' is non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post office, nor by any letter-carrier; and that any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything so declared to be non-mailable matter, shall be guilty of an offence, and liable to the punishment stated. The object of this statute was to prevent the employment of the mails of the United States for the purpose of disseminating obscene literature. The necessity of such a statute is obvious to any person who has paid attention to the facts. If you think what the United States mails are, how they are protected by the law, where they go, the secrecy attending their operations, you will at once see, that, for the distribution of matter of any kind upon paper, there is no other engine of equal power. It is the machine best adapted to the dissemination of obscene literature, because of the fact that it reaches every person, and letters delivered by the mail can be received in secret by the person to whom they are addressed, whether in their own or in fictitious names. For this reason the mails have been used, and the extent to which they have been used for that purpose is appalling to one acquainted with the facts. These facts have been made known to the

congress of the United States, the government of the United States alone being charged with the carrying of the mails, and it being competent for the congress of the United States to say what shall be and what shall not be carried in the mails, whereupon congress declared that obscene matter should not be so carried. Nobody can question the justice, the wisdom, the necessity of such a statute. This statute does not undertake to regulate the publication of matter. Matter of any kind may be published, and not violate this law. It does not undertake to regulate the dissemination of obscene matter. Such matter may be sent by express, without violating any law of the United States. But, what the United States government says is, that the mails of the United States shall not be devoted to this purpose. It is a law to protect the community against the abuse of that powerful engine, the United States mail. The constitutionality of the law is not a question here. The statute is the law of the land, and it is to be enforced by the courts, to be obeyed by the citizens. Under this statute, this defendant is charged with having deposited in the mail an obscene book or publication. There has ***1101** been some talk about who made the complaint. But, who made the complaint which caused this prosecution to be instituted is a matter of no consequence to you or to me. The motives of the person who made the complaint are not material here. Most infractions of law are discovered and punished by reason of hostility or enmity on the part of some person in the community against some other person. But that does not affect the question of the guilt or innocence of the party accused, when he is properly accused under the law. So, you will dismiss from your consideration the question whether Mr. Comstock has hostile feelings against this man or not. It makes no difference whether he has or has not. The prosecution is not his. It is the prosecution of the United States. Under our form of criminal procedure, a prosecution must be endorsed by the district attorney, an officer selected under the law, as a public prosecutor. There is not such an officer in all countries. In England, I think, to this day, there is no public prosecutor, which accounts, perhaps, for the happening of such an event as was alluded to by the counsel, in the case of Shelley's works. But here there is a public prosecutor, and he must entertain the complaint and present it to the grand jury. The grand jury, under their oaths, must find it a case proper to be presented to a petit jury; and that has been done in this case. Whether it is wise to institute such prosecutions or not, is not a question for you or for me. You are not the district attorney; you have not the responsibility of the district attorney upon you; and it is not likely that you will be willing to assume that responsibility, by deciding any case like this upon the question whether the effect of such a prosecution will be good or ill. Your duty in this case, under your oaths, can only be discharged by rendering a verdict according to the facts proven. The facts belong to you; the questions of law belong to the court. You will not undertake, therefore, to speculate upon the construction of the law, but leave that responsibility upon the court, where it, belongs. You will consider the facts, for, your responsibility is a responsibility in regard to the facts of the case. I do not intend, in my remarks, to convey to you my opinion of the questions of fact involved. I intend to leave you, upon your oaths and your responsibility, to say what are the facts here, and to render the verdict which the facts may require. This is not a question of religion, nor a question of the freedom of the press. There is no such question involved in this prosecution. This defendant may entertain peculiar views on the subject of religion; he may be an infidel; he may have peculiar and improper notions on the marriage relation; he may be a freethinker; he may be whatever he pleases; that should have no effect upon your deliberations. Whatever may be his beliefs or opinions, he is entitled here to a verdict at your hands, impartially, upon the simple fact involved in this case, and upon no other fact. If you should find a verdict against this man because you do not like his doctrines in respect to religion, if you should find a verdict against him because you do not like attacks on the marriage relation, you would do injustice to the man, and to the community also, for the community has no other interest than to have criminal cases decided correctly according to the law, and impartially upon the facts. But, if you should find that this book is an obscene book, he having deposited it, and you nevertheless acquit him because of any opinion you may have in harmony with his doctrines or beliefs, you would be equally guilty of an injustice. You are not, therefore, called upon by your verdict to express your opinion in regard to any doctrines alluded to in this publication. All men in this country, so far as this statute is concerned, have a right to their opinions. They may publish them; this man may entertain the opinions expressed in this book, or he may not. Freelovers and freethinkers have a right to their views, and they may express them, and they may publish

them; but they cannot publish them in connection with obscene matter, and then send that matter through the mails. If, in the discussion of any doctrine, any man uses obscene matter, he cannot send it through the mails of the United States, without violating the law. Of course, freedom of the press, which, I think, was alluded to, has nothing to do with this case. Freedom of the press does not include freedom to use the mails for the purpose of distributing obscene literature, and no right or privilege of the press is infringed by the exclusion of obscene literature from the mails. That this man mailed this book is proved, and not controverted; that he knew what the book was that he mailed is not controverted. The statute has the word 'knowingly.' That means that the man must know what book he deposited. A boy might be sent with an obscene book wrapped in a paper, and he might deposit it in the mail, and he would not be guilty under this statute, for it says, 'knowingly;' but, when a man deposits in the mail a book, if he knows what the book is, then he has made a deposit knowingly, within the statute. You could have no question about that, it not being controverted that this man mailed this book, and that he knew what book he was mailing. The only question, therefore, which you are called upon to decide, is, whether or not the book is obscene, lewd or lascivious, or of an indecent character. Now, you have had this book in your hands, and the district attorney has marked certain passages. He does not claim that any passages in that bring it within the statute, ***1102** except those marked, and, therefore, you may confine your attention to the marked passages, as the matter which you are to determine upon. It is upon those passages alone that this case must turn. There has been some discussion in this case, tending in the direction of the argument, that, if the general scope of the book was not obscene, the presence of obscene matter in it would not bring it within this statute. Such is not the law. If this book is, in any substantial part of it, obscene, lewd, lascivious, or of an indecent character, then it is non-mailable under this statute and the defendant is guilty. Any other rule of law would render the statute nugatory. If a person should write an essay upon the subject of honesty, and fill it with notes containing filthy and obscene stories, and could then pass it through the mails on the ground that it was an essay on honesty, the way would be easy to a disregard of the statute. So, I again charge you, that the general scope of this book is not the matter in hand, but the question is, whether those marked passages are obscene or indecent in character. There are, in the language, words known as words obscene in themselves. It is not necessary, in order to make a book obscene, that such words should be found in it. The most obscene, lewd, and lascivious matter may be conveyed by words which in themselves are not of an obscene character. The question is as to the idea which is conveyed in the words that are used, and that idea characterizes the language. As I have stated, the object with which this book is written is not material, nor is the motive which led the defendant to mail the book material. The effect likely to be produced by this matter which was in the book is the question for you. A man might—I mention this by way of illustration only—a man might conclude that it would be the best way to promote honesty and purity to bind together in a single book all the obscene stories that could be found—and we may imagine a person to honestly entertain the belief that that course would be the best way to excite disgust and so to prevent vice—he might honestly entertain that view and be as good a man as any man in the community, yet, if he published such a book and concluded to disseminate it through the mails, he would be a violator of this statute. The question is, whether this man mailed an obsence book; not why he mailed it. His motive may have been ever so pure; if the book he mailed was obscene, he is guilty. You see, then, that all you are called upon to determine in this case is, whether the marked passages in this book are obscene, lewd or of an indecent character. Now, I give you the test by which you are to determine the question. It is a test which has been often applied, and has passed the examination of many courts, and I repeat it here, as the test to be used by you. You will apply this test to these marked passages, and if, judged by this test, you find any of them to be obscene, or of an indecent character, it will be your duty to find the prisoner guilty. If you do not find them, judged by this test, to be obscene, or of an indecent character, it will be your duty to acquit him. This is the test of obscenity, within the meaning of the state: It is, whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of this sort may fall. If you believe such to be the tendency of the matter in these marked passages, you must find the book obscene. If you find that such is not the tendency of the matter in these marked passages, you must find the book not obscene, and acquit the prisoner. The statute uses the word 'lewd,' which means, having a tendency to excite lustful

thoughts. It also uses the word 'indecent.' Passages are indecent within the meaning of this act, when they tend to obscenity—that is to say, matter having that form of indecency which is calculated to promote the general corruption of morals. Now, gentlemen, I have given you the test; it is not a question whether it would corrupt the morals, tend to deprave your minds or the minds of every person; it is a question whether it tends to deprave the minds of those open to such influences and into whose hands a publication of this character might come. It is within the law if it would suggest impure and libidinous thoughts in the young and the inexperienced. There has been some comment on the fact, that, in many libraries you may find books which contain more objectionable matter, it is said, than this book contains. It may be so; it is not material here. When such books are brought before you, you will be able to determine whether it is lawful to mail them or not. Here, the question is with reference to this book; and it is of no importance how many books of worse character this man, or that man, or the other man, has, or whether the tendency of those books is worse or better than this book. The question is, the tendency of this book. If you find that the tendency of the passages marked in this book is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of this sort may fall, it is your duty to convict the defendant, notwithstanding the fact that there may be many worse books in every library of this city. Now, gentlemen, I have endeavored to bring you down, in your examination of this case, to the precise point. This is a question, as I have before stated, for you alone; the responsibility is upon you, and upon each of you, to say, upon your oaths, after an examination of those passages, what the tendency of those passages ***1103** is, and whether they have that tendency which I have described to you as necessary to be found in order to bring it within this statute. The statute is an important statute; it is a statute to be enforced in all proper cases; it is not a statute to be strained; it is not a statute for twelve men to refine upon. The question which I have stated to you calls for good judgment—one to be submitted to the intelligent judgment of twelve intelligent men, who should judge sensibly, not straining points, when they determine what the tendency of the matter in this book is. It is a criminal case, and the defendant is entitled to the benefit of a reasonable doubt. You are bound to be satisfied beyond a reasonable doubt, that the tendency of this matter is such as I have described. This must not be a fancy. By a reasonable doubt is meant a doubt arising from the want of evidence. As to what the book contains, there is no dispute; and you must be satisfied in your own minds, satisfied clearly, so that you are willing to say on your oaths that you believe, that the tendency of the matter in those marked passages is such as I have described. If you believe such to be the tendency of this matter, then you must find the book non-mailable and the prisoner guilty. If you are not satisfied beyond a reasonable doubt, that the tendency of this matter is such as I have described to you, then it is your duty to give him the benefit of that doubt and acquit him.'

At the close of the charge, the defendant requested the court to charge the jury, in addition, as follow: 'That the jury are the final judges of the law and fact in this case, and that the definitions charged by the court are not conclusive upon them. That the court should make no absolute test or definition of the words of the statute, and that the test and definitions made and submitted to the jury by the court are advisory, and not authoritative or conclusive upon them.'

The defendant also objected to the definitions given, and excepted to each of them in detail, and also excepted to each and every part of the charge, rulings and directions of the court contrary to or inconsistent with the foregoing requests, and to the refusal of the court to charge the same.

It is contended, that the court erred in what it said to the jury as to the test of obscenity within the meaning of the statute; that it substituted the stated test for the words of the statute; that the stated test was, as a definition, erroneous, and was not a definition of obscenity; that it was a definition of an effect and not of the word 'obscenity;' that, because an essay tends to deprave and corrupt the morals of society, it does not follow that it is obscene; that, while all obscenity tends to immorality, all immorality is not obscenity; and that essays on the drama, gluttony, inebriety, gaming, cock fighting, horse racing, polygamy, divorce or blasphemy, advocating or palliating any of them might tend 'to deprave and corrupt the morals of those whose minds are open to such influences and into whose hands a publication of this sort may fall,' but they would not necessarily be obscene. It is a mistake to suppose, that, in what the court said as to the test of obscenity, it intended to give to the jury a definition of 'obscenity.' The dictionary says, that 'obscene' means, 'offensive to

chastity and decency; expressing or presenting to the mind or view something which delicacy, purity and decency forbid to be exposed.' The statute and the indictment both use the word 'obscene' without affixing to it any definition. In the first request to charge made before the charge was given, the defendant requested the court to charge that the word 'obscence' and the word 'indecent' mean severally what is set forth in such request. The court refused so to charge except as such request agreed with its charge. There is nothing in the charge which is contrary to the substance of such request. On the contrary, after using, in the course of the charge, the words 'obscene,' 'lewd,' 'lascivious' and 'indecent,' as being words whose meaning the jurors, as intelligent men, fully understood, and as being words needing, therefore, no definition to be given of them by the court to the jury, the court defines the word 'lewd,' as used in the statute, (it being also used in the first count of the indictment,) as meaning 'having a tendency to excite lustful thoughts.' The court did not define the word 'lustful' any more than the first request to charge defined the word 'lust,' or the words 'sense of decency.' The court then defined the word 'indecent,' as used in the statute, (it being also used in the second count of the indictment,) as meaning 'tending to obscenity'—'having that form of indecency which is calculated to promote the general corruption of morals.' This does not mean any other form of indecency calculated to promote the general corruption of morals, than the obscene form; because, the court immediately proceeds to say, that, in what it had said about corrupting morals, it had been speaking of corrupting the morals and depraving the minds of those 'open to such influences,' that is, the influences of 'obscene' matter, and that it meant thereby matter which would 'suggest impure and libidinous thoughts in the young and inexperienced.' It did not define the word 'impure' or the word 'libidinous' any more than the first request to charge defined the word 'lust' or the words 'sense of decency.'

In saying that the 'test of obscenity, within the meaning of the statute,' is, as to 'whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of this sort may fall,' the court substantially said, that the matter must be regarded as obscene, if it ***1104** would have a tendency to suggest impure and libidinous thoughts in the minds of those open to the influence of such thoughts, and thus deprave and corrupt their morals, if they should read such matter. It was not an erroneous statement of the test of obscenity, nor did the court give an erroneous definition of obscenity, or a definition different from that of the first request to charge. It gave a definition substantially agreeing with that of such request.

In Reg. v. Hicklin, L. R. 3 Q. B. 360, the question arose as to what was an 'obscene' book, within a statute authorizing the destruction of obscene books. The book in question was, to a considerable extent, an obscene publication, and, by reason of the obscene matter in it, was calculated to produce a pernicious effect, in depraving and debauching the minds of the persons into whose hands it might come. It was contended, however, that, although such was the tendency of the book upon the public mind, yet, as the immediate intention of the person selling it was not so to affect the public mind, but to expose certain alleged practices and errors of a religious system, the book was not obscene. As to this point, Cockburn, C. J., said: 'I think, that, if there be an infraction of the law, the intention to break the law must be inferred, and the criminal character of the publication is not affected or qualified by there being some ulterior object in view, (which is the immediate and primary object of the parties,) of a different and an honest character. It is quite clear, that the publishing an obscene book is an offence against the law of the land. It is perfectly true, as has been pointed out by Mr. Kydd, that there are a great many publications of high repute in the literary productions of the country, the tendency of which is immodest, and, if you please, immoral, and, possibly, there might have been subject-matter for indictment in many of the works which have been referred to. But it is not to be said, because there are in many standard and established works objectionable passages, that, therefore, the law is not as alleged on the part of this prosecution, namely, that obscene works are the subject-matter of indictment; and I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. Now, with regard to this work, it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character.' These views seem to us very sound. In the present case, the remarks made by the court, in its charge, as to the test of obscenity, were made in reference to

suggestions like those made in the Hicklin Case. It was contended, that the motive and object of the book were material. On this question the court said: 'The question is, whether this man mailed an obscene book; not why he mailed it. His motive may have been ever so pure; if the book he mailed was obscene, he is guilty. You see, then, that all you are called upon to determine in this case is, whether the marked passages in this book are obscene, lewd, or of an indecent character. Now, I give you the test by which you are to determine this question. It is a test which has been often applied, has passed the examination of many courts, and I repeat it here, as the test to be used by you. You will apply this test to these marked passages, and, if, judged by this test, you find any of them to be obscene or of an indecent character, it will be your duty to find the prisoner guilty. If you do not find them, judged by this test, to be obscene or of an indecent character, it will be your duty to acquit him. This is the test of obscenity, within the meaning of the statute: It is whether, &c.' The test there stated is substantially the same as that stated by Cockburn, C. J. The words 'charged as obscenity,' and the word 'immoral' used by Cockburn, C. J., are dropped, and the words 'the morals of,' are not used by Cockburn, C. J. But the meaning of the two sentences is identical. The case of Reg. v. Hicklin, was approved in Steele v. Brannan, L. R. 7 C. P. 261, where Bovill, C. J., states that he fully concurs in the decision in Reg. v. Hicklin.

In the case against Heywood, before referred to, the defendant was the writer of the book, and the book was the same book which is in question in the present case. In the trial of the Heywood Case, Judge Clark, in charging the jury said: 'A book is obscene which is offensive to decency. A book, to be obscene, need not be obscene throughout the whole of its contents, but, if the book is obscene, lewd, or lascivious or indecent in whole or in part, it is an obscene book, within the meaning of the law, a lewd and lascivious and indecent book. A book is said to be obscene which is offensive to decency or chastity, which is immodest, which is indelicate, impure, causing lewd thoughts of an immoral tendency. A book is said to be lewd which is incited by lust, or incites lustful thoughts, leading to irregular indulgence of animal desires, lustful, lecherous, libidinous. A book is lascivious which is lustful, which excites or promotes impure sexual desires. A book is indecent which is unbecoming, immodest, unfit to be seen. A book which is obscene, as I have said to you before, or lewd, or lascivious, or indecent, in whole or in part, or in its general scope or tendency, in its plates or pictures, or in its reading matter, falls within the scope of the prohibition of the statute. * * * An argument has been made here to show you that Mr. Heywood was a moral man, a well-behaved man, and that his design in publishing this work was a good one, that he really believed the doctrines which he taught. But the court say to you, ***1105** that, such an argument cannot be received and considered by you, and cannot make any difference in the question of guilt or innocence. A man might believe that obscene things may be and ought to be corrected, and he might argue against them and publish for this purpose; but still the book might not be allowed to go through the mails, if obscene in itself. It is not the design. There is no reference in the statute to the design that a man has in putting the book in the mail, whether for a bad or a good purpose; but the law says, explicitly, that such books shall not go through the mails, and that, if anybody deposits them, he is to be punished for it. There is no question here in regard to the suppression or the spread of knowledge. * * * Something was said in regard to other books—that these books are no more offensive than some other books, but you are not sent here to try other books, nor to compare this book with other books, and you heard the court rule out all other books. The sole question is, whether these books are obscene, lewd, or indecent. Other books may be so, or may not be so. They may or may not have gone in the mail. * * * Observations were made in regard to the extent to which these books might be obscene, lewd, lascivious or impure, or might excite unlawful or impure desires; and it was said to you, that you might read these books, and they would excite no impure desire in you, no impure thought; but that is not a sure criterion, by any means. These books are not sent ordinarily to such people as you. But you may consider whether they are obscene, or lewd, or lascivious to any considerable portion of the community, or whether they excite impure desires in the minds of the boys and girls or other persons who are susceptible to such impure thoughts and desires. If any other standard were adopted, probably no book would be obscene, because there would be some men and women so pure, perhaps, that it would not excite an impure thought; but it is to be governed by its effect upon the community—whether it is obscene and is of dangerous tendency in the community generally, or any considerable portion of the community.' These views are, in substance, those contained in the

charge in the present case.

We are of opinion that there was no error in what was charged by the court as to the test of obscenity. No other part of the charge was specifically complained of in the argument; but it was urged that the court erred in refusing to charge as requested in the second paragraph of the first request, and in requests 2, 3, 4, 5, 6, 7, 8 and 9.

As to the second paragraph of the first request, we are of opinion that the object of the use of the obscene or indecent words is not a subject for consideration. In addition to the observations already cited from the case of Reg. v. Hicklin, Cockburn, C. J., says, further: 'May you commit an offence against the law in order that thereby you may effect some ulterior object, which you have in view, which may be an honest or even a laudable one? My answer is, emphatically, no. The law says, you shall not publish an obscene work. An obscene work is here published, and a work the obscenity of which is so clear and decided, that it is impossible to suppose that the man who published it must not have known and seen that the effect upon the minds of many of those into whose hands it would come, would be of a mischievous and demoralizing character. Is he justified in doing that which clearly would be wrong, legally as well as morally, because he thinks that some greater good would be accomplished? * * * I hold, that, where a man publishes a work manifestly obscene, he must be taken to have had the intention which is implied from that act; and that, as soon as you have an illegal act thus established, quoad the intention and quoad the act, it does not lie in the mouth of the man who does it to say: 'Well, I was breaking the law, but I was breaking it for some wholesome and salutary purpose.'' In Steele v. Brannan, supra, it was contended that the book treated of a matter which might properly be the subject of discussion and controversy, and that the object of those who put it forward was not only innocent but praiseworthy, inasmuch as they intended thereby to advance the interests of religion and of the public, and that therefore, the book was not obscene. The court held otherwise, and approved the ruling in the Hicklin Case. The views of Judge Clark, to the same effect, have been quoted.

As to request 2, it was charged in substance, so far as its propositions are correct. The rest of it falls within what has been said as to the last paragraph of the first request. This last observation applies also to request 3.

As to request 4, its substance was charged, and, as to anything in it not charged, there was no error in not charging it.

The observations made as to the last paragraph of the first request apply, also, to requests 5, 6 and 7, and the first paragraph of request 8.

The last paragraph of request 8 was, in substance, charged.

We perceive no error in the refusal to charge as requested in request 9. This statute differs from no other criminal statute, and the jury were properly instructed on the subject of a reasonable doubt.

We have given no attention to any exceptions appearing in the case, which are not presented in the printed brief of the counsel for the defendant.

The case contains the following statement: 'During the absence of the jury, the court sent to them by the officer in charge, and, in the absence of the prisoner, after exhibiting the same to the counsel for the prisoner, a direction in writing, that they might deliver a sealed verdict to said officer, and that thereupon ***1106** they should be allowed to separate and directed to appear in court at the hour of the opening of the court on the next day. At about 6.30 o'clock the next morning, (March 21st, 1879,) the jury delivered a sealed verdict to the officer, and were thereupon allowed by him to separate. The court resumed its session at 11 o'clock a. m. of that day, and the jury, having been called by the clerk, announced, by their foreman, that they had agreed upon a verdict, and that he had handed a sealed verdict to the officer in charge of them. The counsel for the prisoner duly excepted to the direction of the court that the jury should bring in a sealed verdict at all, and to the reception by the court of such a verdict from the officer, and also to the right of the jury to separate at all until they had rendered their verdict in open court. Under these exceptions the jury were allowed to render a verdict of guilty, as stated in the sealed verdict received by the court from the officer, in the presence of the defendant, and which was thereupon announced and recorded in open court, as a verdict of guilty. The counsel for the prisoner then and there requested that the jury be polled, which was done, and thereupon each of the jurymen, to the question of the clerk, whether the verdict announced was his verdict, answered in the affirmative.' It is contended for the defendant, that the direction of the court to the jury, in the absence

of the prisoner, and without his consent, that they might deliver a sealed verdict to the officer in charge and then separate, and their doing so, is ground for a new trial. The propositions urged to this end are, that sealed verdicts have no authority in law without the prisoner's consent; that they have been introduced with great reluctance and great suspicion in civil cases, and are always a source of danger; that the separation of juries in criminal cases, after the charge of the court, is always a recognized source of danger to the prisoner, to which the law does not voluntarily expose him; that the prisoner cannot prove a negative, to show that he has not been injured; that the direction of the court is no justification or protection; that an instruction to the jury, that, after a long confinement, they may obtain a much desired release by a sealed verdict, is a direct inducement to the minority of the jury to yield against the prisoner, and was effective against him in this case; that the absence of authority for the course pursued upon this trial, and the reluctance with which any separation, before or after the charge, is allowed, is conclusive for the prisoner, on this point; and that, while the rule has been somewhat relaxed from necessity only, this has never been done so as to allow of a sealed verdict and a general separation of the jury, without the prisoner's presence, knowledge and consent, before their real verdict should be rendered in court and in the prisoner's presence.

It appears, by the case, that the direction in writing to the jury, that they might deliver a sealed verdict to the officer and might then separate, was exhibited to the counsel for the prisoner before it was sent to the jury by the court; that the jury strictly followed such direction; that the court received the sealed verdict from the officer the next morning, in the presence of the jury and of the defendant, in open court, after the jury had then and there announced that they had agreed upon a verdict and that such sealed verdict contained it; that the verdict of guilty announced and recorded was the verdict contained in such sealed verdict; and that, on the polling of the jury, at the request of the counsel for the defendant, each juror stated that the verdict announced was his verdict.

It is laid down in Whart. Cr. Law (6th Ed.) § 3125, that, 'in misdemeanors, there is no difficulty, in practice, in permitting the jury to separate during the trial.' In the present case, the statute expressly declares the offence to be a misdemeanor. Wharton cites the leading case of Rex v. Woolf, 1 Chit. 401, where it is held, that, in a case of misdemeanor, the dispersion of the jury does not vitiate the verdict. The dispersion referred to is one before agreement on a verdict. A fortiori, a dispersion after agreement, and after the verdict is written and signed and sealed up, and where the jury afterwards attend in court with it, and the court receives and opens it, and the jury give an oral verdict in accordance with it, on being polled, does not vitiate the trial. In People v. Douglass, 4 Cow. 26, it is laid down, that the mere separation of a jury is not a sufficient cause for setting aside a verdict either in a civil or a criminal case, if there be no farther abuse. In People v. Ransom, 7 Wend. 417, 424, it is said, that any irregularity or misconduct of the jurors will not be a sufficient ground for setting aside a verdict, either in a criminal or a civil case, where the court are satisfied that the party complaining has not, and could not have, sustained any injury from it. In Com. v. Carrington, 116 Mass. 37, the question arose, whether, in a criminal case, not capital, the jury may be authorized by the court, without the consent of the defendant, to separate after agreeing upon, signing and sealing up a paper in the form of a verdict, and afterwards return a verdict in open court, in accordance with the result so stated and sealed up. It was held, that such a course is proper. The court say: 'The tendency of modern decisions has been to relax the strictness of the ancient practice which required jurors to be kept together from the time they were empanelled until they returned their verdict, or were finally discharged by the court. In civil cases the jury are never kept together at the intermissions of the sittings of the court pending the trial; and it is well settled, that, after the case is finally committed to them, they may be allowed by the court to separate, if they first agree upon and ***1107** seal up their verdict, and afterwards affirm it in open court; and that, if their verdict, when opened, does not cover all the issues on which they are to pass, the case may be recommitted to them and a verdict subsequently rendered will be good. Winslow v. Draper, 8 Pick. 170; Pritchard v. Hennessy, 1 Gray, 294; Chapman v. Coffin, 14 Gray, 454. But if, upon returning into court, one of the jurors dissents from the verdict to which all had agreed out of court, it cannot be recorded. Lawrence v. Stearns, 11 Pick. 501. In capital cases, indeed, the uniform practice in this commonwealth has been to keep the jury together from the time the case is opened to them until their final discharge. But the practice is equally well settled, and in accordance with the decisions

elsewhere, that, pending a trial for a misdemeanor, the jury may be permitted by the court, without the consent or knowledge of the defendant, to separate and go to their homes at night, without vitiating the verdict. Rex v. Woolf, 1 Chit. 401; s. c. nom. Rex v. Kinnear, 2 Barn. & Ald. 462; McCreary v. Com., 29 Pa. St. 323. If the jury, in a case of misdemeanor, are allowed, without the consent of the defendant, to separate after the case is finally committed to them by the court, and before the verdict is returned, the verdict cannot be recorded, unless it clearly appears that the verdict was not influenced by anything that took place during the separation. It was accordingly held, that, where the jury were allowed by the judge to disperse upon stating to the officer they had agreed on and sealed up a verdict, and, upon coming into court, rendered an oral verdict, without any sealed verdict being produced or opened, or its contents made known to the defendant or his counsel, the verdict was invalid. Com. v. Durfee, 100 Mass. 146; Com. v. Dorus, 108 Mass. 488. But, when all possibility of improper influences is excluded by conclusive evidence that the jury arrived at and reduced to writing, before their separation, the same result which they afterwards announced in open court, the verdict may be received and recorded. State v. Engle, 13 Ohio, 490; State v. Weber, 22 Mo. 321; Reins v. People, 30 Ill. 256.' These views seem to us to be the clear result of the authorities, and to be founded in reason. In the present case, it clearly appears that the jury, before they separated, arrived at the same result which they afterwards orally announced in due form, when enquired of by the clerk, in open court, and therefore, that the verdict was not influenced by anything that took place during the separation.

We have examined the cases cited by the counsel for the defendant, and find in them nothing inconsistent with the foregoing views.

After a careful consideration of all the points presented, we are unanimously of opinion, that the motion for a new trial, and to set aside the verdict, and for an arrest of judgment upon the same, must be denied.

All Citations

16 Blatchf. 338, 24 F.Cas. 1093, 25 Int.Rev.Rec. 305, No. 14,571, 8 Rep. 38

Exhibit 2

CUPID'S YOKES:

OR,

The Binding Forces of Conjugal Life.

An Essay to Consider some Moral and Physiological Phases of

LOVE AND MARRIAGE,

Wherein is Asserted the Natural Right and Necessity of

SEXUAL SELF-GOVERNMENT;

The Book which the United States Government and Local Presumption have repeatedly sought to suppress, but which Still Lives, Challenging Attention.

BY

E. H. HEYWOOD.

AUTHOR OF "HARD CASH," "CIVIL LIBERTY," "YOURS OR MINE," "THE LABOR PARTY," "THE GOOD OF EVIL," "WAR METHODS OF PEACE," AND OTHER ADDRESSES.

FIFTIETH THOUSAND.

PRINCETON, MASS.
CO-OPERATIVE PUBLISHING CO.

FEW HAPPY MATCHES.

By Isaac Watts, D. D. August, 1701.

Say, mighty Love, and teach my song,
To whom my sweetest joys belong,
And who the happy pairs
Whose yielding hearts, and joining hands,
Find blessings twisted with their bands,
To soften all their cares.

Not the wild herd of nymphs and swains
That thoughtless fly into the chains,
As custom leads the way;
If there be bliss without design,
Ivies and oaks may grow and twine,
And be as blest as they.

Not sordid souls of earthly mould
Who drawn by kindred charms of gold
To dull embraces move;
So two rich mountains of Peru
May rush to wealthy marriage too,
And make a world of Love.

Not the mad tribe that hell inspires
With wanton flames, those raging fires
The purer bliss destroy;
On Ætna's top let furies wed,
And sheets of lightning dress the bed
T' improve the burning joy.

Nor the dull pairs whose marble forms
None of the melting passions warm,
Can mingle hearts and hands;
Logs of green wood that quench the coals
Are married just like stoic souls,
With osiers for their bands.

Not minds of melancholy strain,
Still silent, or that still complain,
Can the dear bondage bless;
As well may heavenly concerts spring
From two old lutes with ne'er a string,
Or none beside the bass.

Nor can the soft enchantments hold
Two jarring souls of angry mould,
The rugged and the keen;
Sampson's young foxes might as well
In bands of cheerful wedlock dwell,
With firebrands tied between.

Nor let the cruel fetters bind
A gentle to a savage mind,
For Love abhors the sight;
Loose the fierce tiger from the deer,
For native rage and native fear
Rise and forbid delight.

'Two kindred souls alone must meet,
'Tis friendship makes the bondage sweet,
And feeds their mutual loves;
Bright Venus on her rolling throne
Is drawn by gentlest birds alone,
And Cupids yoke* the doves.

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*Since some "cultured" critics think Cupid's Yokes are "salacious" words, the Springfield Republican saying that I ought to be imprisoned for giving such a title to my book, it is interesting to note that the venerated Orthodox hymnist, Dr. Watts, used these very words nearly two centuries ago voicing in the above poem the same sentiments which the United States Courts have adjudged "obscene!" The passages on which I was convicted will be found, in Parker Pillsbury's Letter to me, entitled "Cupid's Yokes and the Holy Scriptures Contrasted," advertised on another page.—E. H. H.

CUPID'S YOKES.

Love in its dual manifestations, implies agreement, he who loves and she who reciprocates the inspiration therein are quickened, neither to hurt the other, nor evade any moral or pecuniary obligation which the incarnate fruits of their passion may present. When a man says of a woman, "She suits me"—that is, she would be to him a serviceable mate, —he does not often as seriously ask if *he* is likely to suit *her;* still less, if this proposed union may not become an ugly domestic knot which the best interests of both will require to be untied. Whether the number outside of marriage, who would like to get in, be greater or less than the number inside who want to get out, this mingled sense of esteem, benevolence, and passional attraction called Love, is so generally diffused that most people know life to be incomplete until the calls of affection are met in a healthful, happy and prosperous association of persons of opposite sex. That this blending of personalities may not be compulsive, hurtful, or irrevocable; but, rather, the result of mutual discretion — a free compact, dissolvable at will — there is needed, not only a purpose in Lovers to hold their bodies subject to reason; but also radical change of the opinions, laws, customs, and institutions which now repress and inebriate natural expressions of Love. Since ill-directed animal heat promotes distortion rather than growth; as persons who meet in convulsive embraces may separate in deadly feuds, — sexual desire here carrying invigorating peace, there desolating havoc, into domestic life, — intelligent students of sociology will not think the marriage institution a finality, but, rather, a device to be amended, or abolished, as enlightened moral sense may require.

When the number of opinions for and against a given measure are equal, it is called "a tie vote," and is without force and void, unless the speaker of the assembly throws his "casting vote," thereby giving to his side a majority of one, and enabling the measure to become a "law," binding, not only on those who favored, but also on those who opposed it! Not to note the manifest injustice and absurdity of such "an act," in the popular connubial assembly of bride and groom both vote one way, — that is, to "have" each other, — while the binding, or casting, vote is given by a "speaker," called priest or magistrate, who is supposed to represent society so far as it is a Civil act, and God so far as it is a sacrament* or religious matter. But, since neither society nor deity has ever "materialized" at weddings in a manner definite enough to become responsible for what Lovers may do or suffer in their untried future, we have no further use for a "speaker" in our nuptial congress, and must search elsewhere for the moral obligations which Lovers, by their tie vote to be "one," incur. In its desire to

MORAL TIES.

* A sacrament is any ceremony producing an obligation, sacredly binding.—*Worcester.* An invisible hand from heaven mingles hearts and souls by strange, secret, and unaccountable conjunctions.—*South.* The mind is God's book, and its healthy attractions are his laws — *Austin Kent.*

"confirm this amity by nuptial knot," society forgets that Lovers are Lovers by mutual attraction which does not ask leave to be, or to cease to be, of any *third* party: that its effort to "confirm" Love by visible bonds tends to destroy Magnetic Forces which induce unity; and that Lovers are responsible only for what they, themselves, do, and the fruits thereof. Since the words "right" and "duty" derive their ethical qualities from our relations to what is essentially reasonable and just, — to the nature of things,* — legislative "acts" neither create nor annul moral ties. As "alone we are born, alone we die, and alone we go up to judgment," so no one can escape from himself; but each must administer the Personal and Collective interests which he or she embodies. Being the authors and umpires of their rights and duties, the sexes weave moral ties by free and conscientious intimacy, and constantly give bonds for their mutual good behaviour. Cause and effect are as inseparable in human actions as in the general movements of Nature; choose as you please, the results of the choice you are the responsible author of. Relieving one from outer restraint does not lessen, but increases this Personal Accountability: for, by making him *Free*, we devolve on him the necessity of self-government; and he must respect the rights of others, or suffer the consequences of being an invader. In claiming freedom for myself, I thereby am forbidden to encroach.† When man seeks to enjoy woman's person *at her cost*, not a Lover, he is *a libertine*, and she a martyr. How dare woman say she loves man, when seeking her own good at his expense? Perfect Love "casts out fear," and also sin; if derived from the Greek *sinein*, to injure, the word sin implies invasion, injury; thus gratification of sexual desire in a way that *injures* another is *not* Love, but sin. Though they have a right to enjoy themselves at their own cost, yet, if their passion is hurtful, a sense of duty to themselves and others should teach Lovers continence.

VIRTUE, CHASTITY.

Having its root in the Latin *vir*, a man, the radical import of the word virtue is manly strength: usage invests it with intelligence to know and power to resist wrong.‡ One cannot choose without comparing the objects of choice; without judging for himself what is right, and personally placing himself at the disposal of Reason; hence, Virtue consists in ability to reason correctly, and force of will to obey Thought. But, since one cannot choose or act, when mental and physical movement is suppressed, Liberty, occasion, is the primary and indispensable condition of Virtue; while vice originates in stagnant ignorance, which the policy of repression enforces. The conscience, feeling, or impres-

* Everything is right which is conformable to the supreme rule of human action; but that only is *a right* which, being conformable to this supreme rule, is realized in society, and vested in a particular person. What is our duty to do we must do because it is right, not because any one can demand it of us.— *Whewell.* Duty is a moral obligation imposed from within; obligation, a duty imposed from without.— *Worcester.* Duty is the relation or obliging force of that which is morally right.— *Webster.* There are no rights without corresponding duties.— *Coleridge.* Men have no right to do what is not reasonable.— *Burke.*

† True self-love and social are the same.— *Pope.* Love worketh no ill to his neighbor; therefore love is the fulfilling of the law.— *St. Paul.*

‡ Virtue implies opposition to passion or wrong.— *Fleming.* That course of action, by which a man fulfills or tends to fulfill the purposes of his being, is virtuous.— *Worcester.* Virtue is nothing but voluntary obedience to truth.— *Dwight* The four cardinal virtues are prudence, fortitude, temperance, and justice.— *Paley* The virtuous freely choose to live in accordance with the right reason of Nature.— *Plato.*

sions which precede and inspire thought announce the presence of ethical intelligence, and indicate how largely human actions are influenced by spiritual impulse. While, therefore, Liberty is the father, Conscience is the mother of Virtue. Chastity is power to choose between æsthetic health and disease, a power born of the same mental scope and activity which promote Virtue.* Sexual passion is not so much in fault as reason; flesh is willing, but spirit is weak; the mind is unable to tell the body what to do. When the true relation of the sexes is known, ideas rule and bodies obey brain; purity of motive—just and ennobling action—follow the lead of free inquiry. The popular idea of sexual purity, (freedom from fornication or adultery, abstinence from sexual intercourse before marriage, and fidelity to its exclusive vows afterwards), rests on intrusive laws, made and sustained by men, either ignorant of what *is* essentially virtuous, or whose better judgment bows to Custom that stifles the cries of affection and ignores the reeking licentiousness of marriage beds. Is coition pure only when sanctioned by priest or magistrate? Are scandal-begetting clergymen and bribe-taking statesmen the sources of virtue? The lascivious deliriums prevalent among men, the destructive courses imposed on women, and the frightful inroads of secret vice on the vitality of youth of both sexes, all show the sexual nature to be, comparatively, in a savage state; and that even public teachers have *not begun* to reason originally on questions of Love, virtue, continence or reproduction.

While Passion impels movement in one person towards another, and tends to overleap *unnatural* barriers, its proposals are, nevertheless subject to rejection; created and nourished by the object of attraction, it is toned by Love which generates, but never annuls moral obligations. If intrusive, passion is hurtful; but, the person assailed, has a natural right of resistance; and, if a woman or girl, her effort in self-defence will be reinforced by disinterested strength around her. If men do not rally to protect a woman thus imperiled, it is because their sense of right is distorted by an idea that women belong to men, and that the person of this particular woman is, somehow, the property of the man who can overpower her. Our applause of an example of Love measures the contempt which right-minded people feel for a man who imposes himself, or the unwelcome fruit of his passions, on woman. She is "safe" among men, not through laws which deny Liberty, but by prevailing knowledge of the fact that Nature vests *in herself* the right to control and dispose of her own person. If Lovers err, it is due not to Liberty,† but to ignorance, and the demoralizing effect of the marriage system If free to go wrong, disciplined by ideas, they will work out their own salvation in the school of experience. The Free Love faith proclaims the fact that persons recognized in law as capable of making a sexual contract are, when wiser by experience, morally able to dissolve that contract; and that Passion is not so depraved as to be incapable of redemption and self-government.

PASSION. REASON.

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* Chastity is the regulated and strictly temperate satisfaction, without injury to others, of those desires which are natural to all healthy, adult beings.—*Benjamin Franklin.* Prostitution, sexual intercourse *without* affection; Chastity, sexual intercourse *with* affection.—*Robert Owen.*

† Freedom is the only cure for the evils which freshly acquired freedom produces. —*Macaulay.* When appetite draws one way, it may be opposed, not by any appetite or passion, but by some cool principle of action, which has authority without any impulsive force.—*Reid.* They only are free who are divinely bound.—*John Owen.*

FORCE OF CUSTOM.

The essential principle of Nature, Love, is a law unto itself; but, resisted by custom, its natural intent and scope are not generally understood. We were all trained in the school of repression or inebriacy; and taught that, to express ourselves otherwise than by established rules, is sinful.* To get out of one's body to think, to destroy all his old opinions, is almost necessary, to enable him to approach and investigate a new subject impartially. The grave tendencies of the Love question, its imperative force in human destiny, its momentous relations to government, religion, life, and property, demand revolution in social doctrines, and institutes, more beneficently severe than is yet fully conceived of. But, since nothing is fixed but natural right, the most radical method of treatment is the most truly conservative. Evils like libertinism and prostitution, which have baffled the wisest human endeavor, will yield only to increasing intelligence, and the irresistible forces of Conscience. I beg my readers, therefore, to bring to this subject honest intent to know truth and obey it. That the grand Principle of Love is potent with greater good than is realized in human affairs, is certain; that this noblest element of human being does not logically lead to the marital and social ills around us, is equally evident. The way out of domestic infelicity, then, must lie through larger knowledge of the nature of Love and of the rights and duties involved in its evolution.

MARRIAGE, A HUMAN DEVICE.

Since the sexual union, (for life or until legally divorced), of one woman with several men — Polyandry; or that of one man with several women — Polygamy; or that of one man with one woman — Monogamy, is a conventional agreement between two or more individual contractors and a collective third, society, marriage, in either of its three historical forms, is a human device to tame, utilize, and control the sexual passion, which is supposed to be naturally ferocious and ungovernable. What Nature "hath joined," man need not attempt to "put asunder;" but, since the legalized marital relation† is so chaotic and mischievous, (clergymen and legislators themselves often being the first to violate what they profanely assume to be a divine ordinance); and since Deity has never yet come forward to own that he is "the author and finisher" of marriage laws, it is better to attribute them to the erring men who enacted them, than to accuse Divine Wisdom of so much folly. Marriage, then, being the creature of *men's* laws, we have the same right to alter or abolish it that we have respecting any other human institution. The principles of Nature derived from a careful study of essential liberty and equity, are a safer guide than crude social codes which come to us from the ignorant and despotic past. Woman,

* The rules of etiquette, the provisions of the statute book, and the commands of the decalogue have grown from the same root, Custom. * * * The right of private judgment, which our fathers wrung from the Church, remains to be claimed from Fashion, the dictator of our habits.—*Herbert Spencer*. The Orinoco-Indian woman, who would not hesitate to leave her hut without a fragment of clothing on, dare not commit such a breach of decorum as to go out unpainted.—*Humboldt*. Habit is the deepest law of human nature.—*Carlyle*. We gain a residence in the senses by birthright, but are born late into ideas, the country of the mind.—*Alcott*.

† I have observed so few happy matches, and so many unfortunate ones, and have so rarely seen men love their wives at the rate they did whilst they were their mistresses, that I wonder not that legislators thought it necessary to make marriages indissoluble to make them lasting. I cannot fitlier compare marriage than to a lottery: for in both he that ventures may succeed and may miss; if he draws a prize he hath a rich return for his venture; but in both lotteries there is a pretty store of blanks for every prize.—*Hon. Robert Boyle*, 1665.

who, being up first in the morning hours of history, played a winning hand in this marriage game,* is again coming to the front; and, in the parliament of Reason, where the thought, impulse, attraction, and conscience of both sexes have free play, better methods of social intercourse and reproduction will be matured than exclusive *male* wisdom has yet invented. It is for the Free Love School to develope an order of sexual unity worthy to be called a sacrament, and which sensible people need not blush to share.

"Will you have me?" is the prayer by which man seeks partnership in the being of woman; and she also has persuasive ways and means to pray to, and "capture," him. This would be well, were it not a compulsory choice of evils, and were they able to determine, in advance, the grave interests of offspring, industry, business, health, temperaments, and attractions, which mutually concern them, and on the adjustment of which depends their future weal or woe. Girls become pubescent† at about 12, and boys at 14, though girls, then, are much older, sexually, than boys: from these ages young people are capable of all the pleasures and miseries of passional experience. But, since sexual union for life is extremely hazardous for both parties,—it being impossible to correct the fatal mistake of marriage without the commission of crime by one or the other,—they are usually left to illicit intercourse, or to exhaust their vitality in secret vices. Even when married,—coming into this new relation without knowledge of its uses or of self-control,—they prey on each other, and a few years of wedded life and child-bearing may leave the wife an emaciated wreck of her former self, and the husband

MARRIAGE, COMPULSIVE.

* The evolution of human society commenced in the institution of complex marriage. But we are informed by authentic historical documents, that, in the very early times, public opinion becoming more and more enlightened in certain favored communities, the women of these communities—sustained by that public opinion and shocked and scandalized by the social condition in which they found themselves—were enabled to successfully revolt against complex marriage, and to overthrow it. Strange as it may seem, the old-world women established a new social organization for the more advanced communities, and a new marriage system, based on the ground of absolute female supremacy. (How the women managed to do it the writer shows, but I have not space to quote.—E. H. H.) In the new order of things the husband became the subject of the wife; the woman was absolute owner of the homestead; property descended, and relationships were counted, exclusively in the female line; and the women seized and retained the principal share of political power.***The companions of Romulus (the founder of Rome) were men who ran away, took to the woods, to escape from the rigors of female government. These runaways established themselves in easily-defended fastnesses, distributed the land surrounding them among themselves as "real estate," following out the lesson which the women had taught them. It was in this way that the title to "real estate" began to vest in men, to the exclusion of women, and to descend in the male, instead of the female line. The heads of the groups in this new society were males, and members of the groups were also males. It was necessary, therefore, in order that the new society should become complete, that each male should steal a wife for himself from some neighboring tribe, and bring her to the mountain fastness. The men did not fail to perform the special duty that devolved upon them. The case of Rome was not an isolated one. All over Europe, and all over Asia, men rose against the women, transferred the titles to land, from the women to themselves by armed force, dethroned the sovereign witch-women by whom they had been so long governed, and supplied themselves with "CAPTIVE WIVES." This new institution of the "captive wife" gave occasion, in Europe, to the establishment of monogamy: in Asia, to that of polygamy.—*Wm. B. Greene in "Socialistic, Communistic, Mutualistic, and Financial Fragments," pp.*188–203.

† Puberty is the time of life at which a person is capable of procreation or of bearing young, which, according to the civil law, is at 12 years of age for females, and 14 for males.—*Bacon.* This is the English view, but puberty varies with cli-

very much less, a man, than Nature designed him to be. Though *bewildered* moralists advise early marriage, they well know how often puny offspring rebuke the alliance,* teaching indiscreet parents that coition should have stopped short of reproduction. Those who think the evil is not in the essential immorality of the marriage system, but in its abuses, denounce with just severity the legalized slavery of women therein.† The absurdity to which Mr. Greene refers, below, consists in an effort to make the wife legally "equal" to the husband inside of nuptial bonds; it is an effort to make her an equal victim an an equal oppressor with him. Since marriage involves the loss of liberty, many of our best people, especially women, never marry, preferring to endure the ills of celibacy rather than fly to what may prove irretrievable ruin. Slavery is voluntary or involuntary; voluntary when one sells or yields his or her own person to the irresponsible will of another; involuntary when placed under the absolute power of another without one's own consent. The compulsive features of marital law are incidental and secondary to the marriage relation itself, which is unnatural and forced. Pen cannot record, nor lips express, the enervating, debauching effect of celibate life upon young men and women. Who supposes that, if allowed to freely consult their natural wits and good sense, they would tie themselves up in the social snarl of matrimony? Yet they are now compelled to choose between suicidal evils of abstinence and the legalized prostitution of marriage. Some, by clandestine intimacies, live below marriage; others, by personal defiance, and at the expense of social ostracism, attempt to live above it; but both are on the "ragged edge" of peril, as were "free negroes" who tried to live above or below the old slave system. The fierce blood-hounds put upon the track of fugitive slaves, were forerunners of the "dogs of war" which marriage now trains to hunt down its victims. A system so prolific of hypocrites and martyrs is compulsive in the most mischievous sense of that word, and will be abolished when free and virtuous people resolutely confront it.

TYRANNY OF LUST.

Since marriage does not provide for the education of sexual desire or of its expression, but gives legal "right" and power to sin, every priest or magistrate, who "solemnizes" the rite, sells indulgences of a far more disastrous nature than those which scandalized the Romish Church. On account of her political, social, and pecuniary vassalage, woman is the chief martyr to the relentless license granted man; but cases are on record where the husband was effectually subdued by the tigress, with whom he went into the nuptial "paradise."‡ Founded on the supposition that man's love is naturally ferocious, marriage attempts, by legal means, to furnish food for his savage nature; and we have but to lift

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mates; in temperate New England it is often delayed till 15 and 17, while in torrid regions it comes at 10 and 11, and earlier. It is said that one of Mahomet's wives bore him a son when she was but 10 years of age! What kind of a life does such a fact indicate that this especial "Prophet of God" led among young girls?

* In the entire animal kingdom, the fruits of the first signal of reproductive instinct are constantly imperfect.—*Aristotle* Marriages soon after puberty produce a diseased, puny, and miserable population.—*Montesquieu*. Give a boy a wife, and a girl a bird, and death will soon knock at the door.—*German Proverb*.

† Marriage is the only actual bondage known to our law. There remain no legal slaves, except the mistress of every house.—*J. S. Mill*. The definition of the wife's condition, as given in the English law-books, contain all the elements of a definition of domestic slavery. But the definition of the husband's status, as given in the same law-books, is that of a lord, not that of a slave. * * * American legislation is more absurd than that of England.—*Greene's "Fragments," pp.* 212–13.

‡ It is said of Valeria Messalina, wife of Claudius Cæsar, that "her husband's

the roofs of "respectable" houses to find the skeleton's of its feminine victims* It is because the marriage theory is unnatural and barbarous that it works out such shocking results. In the phrase "tyranny of lust," I have brought a good word into bad company, and must apologize for its misuse; for lust properly means desire, prayer, exuberant strength. So, likewise, the popular view of Love gives a devilish intent and drift to the divinest of words. Advocates of marriage cling to the exploded doctrine of natural depravity, and Freethinkers, Spiritualists and Atheists, who scout theological perdition, think social hells of permanent necessity in human life. Nowhere does the human intellect so disgrace itself as in its cowardly half-ashamed, and hypocritical attitude in the presence of Free Love. When woman's thought comes forward in the discussion, we hope for better things. In the early struggle of history which led to the establishment of polyandry (as in later domestic conflicts), the ruling impulse of the women was not sexual desire, but, rather, spiritual superiority, intuitional strategy, by virtue of which they were masters of men in the realm of religious mysticism. On the contrary, the repulsive evidence of sexual depravity, in men, referred to in the notes below, indicate the savage use, now made of animal force, which is capable of beneficent expenditure. When man loves woman intelligently, what is now consuming passional heat, will make him a genial, civil, and serviceable being. The unreserved devotion, with which a lover gives himself and his fortune to his bride, discloses the possible divine life on earth. But when impulsive, self-forgetting love, overflowing the narrow limits of family enclosures, gives one's heart and purse to deserving girls and women, the now, seemingly, savage suitor becomes Providence incarnate. Charles Sumner, in his will, gave money to the daughters of the poet Longfellow, of Dr. S. G. Howe, and of the Rev. Dr. Wm. H Furness, "in consideration of his profound regard for their estimable parents;" but cases have occurred, and will multiply, as civilization prevails, where men of no blood relation, and without a hint of sexual intimacy, give money, and even estates, to girls and women, worthy of love and distinction, irrespective of their parents, ennobling themselves and human kind in so doing.

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chief officers became her adulterers, and were allied with her in all her abominations. She cast an eye of lust on the principal men in Rome, and whom she could not seduce to gratify her propensities she would contrive to destroy. She was so excessive in her sensuality, that she often required the services of the strongest and most vigorous men to satisfy her lusts."—*History and Philosophy of Marriage*, *pp.* 107-108.

* Victoria C. Woodhull speaks of a New York clergyman who married a beautiful woman, and, sometimes demanding indulgence, six or eight times a day, actually killed her by his lecherous excesses.—*Sacredness of Sexual Freedom*, *p.* 23. M. Lallemand, in his work on spermatorrhœa, speaks of a Greek who for years indulged on an average fourteen times a day.—*Elements of Social Science*, *p.* 61. I know a physician, who, the first year, and while his wife was pregnant with twins, indulged seven hundred and thirty times. * * * The woman is now broken down and harsh.—*Quintus in Social Revolutionist*, *June*, 1875, *p.* 187. Hereare my mother's words:—"Oh! your father's death is such a relief, he was so amative; I could never talk to him on any subject, or lie one moment in the morning, without his becoming excited. I submitted to it all, because I thought I was married, and ought. I thought it a woman's duty to submit to what I conceived to be man's right. When I think of my suffering during child-bearing and nursing, when I look on a life of force and violation, I must say your father's death was a relief." My mother sleeps in the grave.—*Cora Corning in Social Revolutionist*, *July*, 1857.

"WHO IS SHE?"

Though man may "propose," and woman "accept," a notion inhabits the average *male* head that the irresistibly attractive force of woman's nature makes *her* responsible for any mutual wrong-doing. Thinking woman at the bottom of all mischief, when a male culprit is brought into court, the French ask "Who is she?" If he said that Mrs. Elizabeth R. Tilton "thrust her love on him unsought,"* the Rev. Henry Ward Beecher thereby indicated how much there is in him of the "old Adam," who remarked to the "Lord God," interviewing him after he had indulged in the "forbidden fruit," "The woman whom thou gavest to be with me, she gave me of the tree, and I did eat." The insanity plea put forward in courts of law by aggrieved "husbands" who, as in the Sickles and McFarland case, murder men that are attracted to their "wives," also affirms, in a round-about way, the supposed inability of a man to control himself when under the spell of woman's enchantment. Contrary to the old law which regarded the husband and wife as one, and the husband that one, when the twain sin, *she* is held responsible, and he is excused on the ground that he was over-persuaded, and too weak to withstand her wishes. From the Garden of Eden to Plymouth Church, skulking has been the pet method of man to escape from the consequences of sexual indiscretion. Beecher's confessions and "letters of contrition," with his later denials, sadly illustrate the pathetic penitence, the sniveling cowardice, and brazen-faced falsity with which "great men" endeavor to appease, cajole, and defy equivocal public opinion.† The harsh judgments pronounced on women which abound in the literature‡ of all ages, are equalled only by the evidences of ludicrous puerility which men display when confronted with their sexual "deeds done in the body." The tragic anarchy which now distracts social life originates first in the "legal" denial of the right of people to manage their own sexual affairs; and secondly in the supposed exemption from moral responsibility of either man or woman in Love.

NATIONAL GAG-LAW.

The facts of married and single life, one would suppose, are sufficiently startling to convince all serious-minded people of the imperative need of investigation; especially of the duty of young men and women to give religiously serious attention to the momentous issues of Sexual Science. But, on the threshold of good intent, they are met by established ignorance forbidding them to inquire. It is even thought dangerous to discuss the subject at all.§ In families, schools, sermons, lectures, and newspapers its candid consideration is so studiously suppressed that children

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*Mr. Beecher says he never made such a statement. †My allusions to Mr. B. are not intended to indorse the "exposure" view, for his alleged relations to Mrs. Tilton are none of *my* business; but his words and acts as a public teacher of morals, and his false attitude, as an official "solemnizer" of the social crime of marriage, make him a legitimate subject of criticism. While his natural right to commit adultery is unquestionable, his right to lie about it is not so clear.

‡Better a thousand women should perish than that one man cease to see the light. —*Euripides*. Frailty! thy name is Woman!—*Shakespeare*. Unhappy sex! whose beauty is your snare!—*Dryden*. A state's anger should not take knowledge either of fools or women.—*Ben Jonson*. I will greatly multiply thy sorrow and conception; in sorrow thou shalt bring forth children; and thy desire shall be to thy husband and he shall rule over thee.—*Gen. iii.* 15. Her house is the way to hell, going down to the chambers of death. Who can find a virtuous woman?—*Solomon*, who kept 700 wives and 300 concubines, or "fast" women!

§The woman that deliberates is lost, *Addison*. The man who reflects is a depraved animal,—*Rousseau*. Regarding physicians who do not follow the beaten

and adults know nothing of it, except what they learn from their own diseased lives and imaginations, and in the filthy by-ways of society. Many noble girls and boys, whom a little knowledge from their natural guardians, *parents and teachers*, would have saved, are now, physically and morally, utter wrecks. Where saving truth should have been planted, error has found an unoccupied field, which it has busily sown, and gathers therefrom a prolific harvest. The alleged increase of "obscene" prints and pictures caused both Houses of the U. S. Congress, March 1, 1873, to pass a bill, (or, rather an amendment of the Post Office Act of June, 1872), which was immediately signed by the President, said to be "For the suppression of Obscene Literature," and from which I make the following extract :—

§ 148.—That no obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, nor any article or thing designed or intended for the prevention or conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature, nor any written or printed card, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly, or indirectly, where, or how, or of whom, or by what means either of the things before mentioned, may be obtained or made, nor any letter upon the envelope of which, or postal card upon which indecent or scurrilous epithets may be written, or printed, shall be carried in the mail; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any of the hereinbefore-mentioned articles or things, or any notice, or paper containing any advertisement relating to the aforesaid articles or things, and any person who, in pursuance of any plan or scheme for disposing of any of the hereinbefore-mentioned articles or things, shall take or cause to be taken, from the mail any such letter or package, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall, for every offence, BE FINED NOT LESS THAN ONE HUNDRED DOLLARS NOR MORE THAN FIVE THOUSAND DOLLARS, OR IMPRISONMENT AT HARD LABOR NOT LESS THAN ONE YEAR NOR MORE THAN TEN YEARS, OR BOTH, IN THE DISCRETION OF THE JUDGE.

I Credit Congress and President Grant with good intentions in framing this "law;" for, ignorant of the cause of the evils they proposed to correct, they were probably unaware of the unwarrantable stretch of despotism embodied in their measure, and of the abuse which would be made of it. A humane man, Dr. Lewis has not the savage disposition which the extracts I have quoted, below, from his book, indicate; the influence of "obscene literature" may be as depraving as he affirms; but his measures of repression are a clear invasion of natural right, and will serve only to hasten the downfall of marriage, which he writes to uphold. "Prohibition a Failure" is the title of a book, in which Dr. Lewis, by irrefutable logic, shows that the policy which he brings to the social question is indefensible and self-defeating when applied to the liquor traffic. When the Doctor as intelligently studies Social reform as he has temperance, he will blush to remember the heated words that have fallen from his pen. Regarding Anthony Comstock, representative of the Young Mens' Christian Association and the real author of the "law" quoted above, I regret to be unable to entertain so favorable an opinion. In a letter addressed to Hon. C. L. Merriam, M. C., dated Brooklyn, N. Y., Jan. 18, 1873, he says: "There were four publishers on the 2nd of last March: *to-day three of these are in their graves, and it is charged by their friends that I* WORRIED THEM TO DEATH. BE THAT AS IT MAY, I AM SURE THAT THE WORLD IS BETTER OFF WITHOUT THEM." This is clearly the spirit that lighted the fires of the Inquisition. Appointed

path of custom in prescribing for sexual disease, Dr. Dio Lewis asks, "Is there no law by which such miscreants may be suppressed? * * * It seems hard that decent men are not allowed to shoot them on sight as they would shoot a mad dog. —*Chastity, pp.* 23-205.

special supervisor of the U. S. Mails (by what authority I am unable to learn); and, by religio-sectarian intolerance, constituted censor of the of the opinions of the people in their most important channel of inter-communication, he is chiefly known through his efforts to suppress newspapers and imprison editors disposed to discuss the Social Question. In Nov., B. L. 1, he procured the arrest and imprisonment of Victoria C. Woodhull and her editorial associates for publishing a preliminary ventilation of the "Brooklyn Scandal," which afterwards filled American newspapers. Subsequently, he caused the incarceration, during seven months, of George F. Train for publishing in his newspaper (The Train Ligue) certain quotations from the Christian Bible, touching the same "scandal" which the implicated churches employ Mr. Comstock to hush up. As I write this (Jan. 1, Y. L. 4), a note from another subject of his vengeance, John A. Lant, editor and publisher of the N. Y. Toledo Sun, dated Ludlow St. Jail, New York, Dec. 30, 1875, says: "Judge Benedict to-day sentenced me to imprisonment in Albany Penitentiary one year and six months. I will endeavor to send you a copy of the sentence. It is worth to us all it costs me." Mr. Lant's crime is sending through the mails his newspaper, containing criticisms of the "scandal," and of Rev. H. W. Beecher! Mr. Comstock's relation to Mr. Lant, as heretofore to Mrs. Woodhull and Mr. Train, is that of *a religious monomaniac*, whom the mistaken will of Congress and the lascivious fanaticism of the Young Mens' Christian Association have empowered to use the Federal Courts to suppress free inquiry. The better sense of the American people moves to repeal the National Gag-Law which he now administers, and every interest of public and private moral ty demands thorough discussion of the issue which sectarian pride and intolerance now endeavor to postpone.

LOVE, NOT EXCLUSIVE.

"Beauty is a joy forever," and for all; the quality of beauty being to awaken admiration and esteem in observers to the extent of their ability to appreciate it. To be susceptible of beauty in one thing does not unfit, but rather prepares us to appreciate it in others. Love of the beautiful in person, or of character, is not less involuntary and non-exclusive than in things. A man cannot love even one woman truly unless he is free to love what is lovable in all other women. The fact that sexual love is passional, as well as æsthetic, does not make it exclusive. The philosophic Irishman who liked to be alone, especially "when his swate-heart was with him," expressed the natural privacy of Love, and also indicated the scientific fact that the affectional union of two creates a collective third personality, superior, in some respects, to either constituent factor. If from this mystical confluence of two beings there springs a child, even this Evolution of Love does not make either one of the three persons less accountable to self and truth, or less permeable by material and spiritual, human and divine influences which either may encounter. Monogamists hold that Love is possible only between one man and one woman, the word monogomy meaning *to marry to one only*.* Yet, *so called* monogamists constantly violate that principle; for, if divorced by death, crime, or the courts, scarcely a man or woman hesitates to marry the second, third, or fifth time. Are they any

* To have one wife only and not to marry a second; to disallow second marriage. —*Webster*. Monogamy is the marriage of one wife only, as distinguished from bigamy or polygamy.—*Blount*. It is the condition of not marrying a second wife after the death of the first.—*Chambers*.

the less "pure" in doing so? Certainly not; second, third, or subsequent marriages may be more healthful and harmonious than the first, for the good reason that at least one of the parties has had the benefits of experience. It is admitted that, if the previous partners in her bed are divorced by death or other cause, a woman may truly love and wisely marry the second or fifth man; but the purity of her love for the fifth man is not determined by the previous four being dead or divorced; were they all living and her personal friends, she can love the last man as truly as she loved the first. Consistent with the teachings of the Bible, which sanctions polygamy,* Christians support missionaries in foreign lands, who welcome to church membership and the communion table, men who have a plurality of wives. David, the "man after God's own heart," compassed the death of Uriah to get possession of his wife, Bathsheba † and "took more wives and concubines out of Jerusalem after he was come from Hebron," for God "gave him the house of Saul and the wives of Saul into his bosom." Though Solomon was very "promiscuously" married, Sunday-School children are yet taught to revere him as "the wisest man." The monogamic or o e-love theory is both theoretically and practically rejected by modern Christians, (as likewise by "Infidels") and, if they will honestly follow Jesus,—who, while he did not directly condemn polygamy, was yet, theoretically, a woman's emancipationist—he will take them into his Free Love Kingdom of Heaven, where he says, "they neither marry nor are given in marriage."

Though the Jehovah-God of the Bible, disliking irresponsible divorce, "hateth putting away," he is a thorough polygamist; its Jesus-God as plainly favors the entire abolition of marriage. Out of the modern Christian Church have come three phases of sexual morality,—Shakerism, or the utter proscription of sexual intercourse; Mormonism, or sanctified polygamy; and Oneida-Perfection with its "free" love and omnigamy. While the question of marriage and property are to be settled on the basis of Reason, the Bible and other records of the past thought being only incidental evidence, the Oneida Community ‡ are nearer sound on these two points than any other Christian sect. I give, therefore, a brief abstract of their Love doctrine, mainly in the words of their Seer and pastor, Rev. J. H. Noyes. The kingdom of heaven supplants all human governments; in it the institution of marriage, which assigns the possession of one woman to one man, does not exist, the intimate union of Love extending to the whole body of believers.§ The pentecostal spirit abolishes exclusiveness in regard to women and children, as respecting property. The new commandment is that we love each

THE ONEIDA VIEW.

* Polygamy existed legally, and was not put down by the moral sense of the Jewish nation.—*Woolsey's Divorce and Divorce Legislation, p.* 12. The Sacred Scriptures represent the wisest and best men that ever lived as practising polygamy with the divine blessing and approval.—*History and Philosophy of Marriage, p.* 63.

† God did not approve of his method of procedure, for he said to David, "I will take thy wives and give them to thy neighbor" . . . And, of Bathsheba's child by him, he said it "shall surely die." David "wept and fasted" to atone for the "scandal," the Prophet Nathan being the *exposer* in this case, who, as Mrs. Woodhull to Beecher, said, *Thou art the man.* God let him have Bathsheba, who became the mother of Solomon.

‡ "Bible argument defining the relations of the sexes in the Kingdom of Heaven," being part of the First Report of the Oneida Association.

§ Those interested to consult texts are referred to Matt. vi. 10; xxii. 30. Eph. i. x. John xvii. 10-21. Acts ii. 44, 45; iv. 32. 1 Cor. vii. 29-31. Rom. iv. 15. 1 Cor. vi. 12. See "History of American Socialisms," pp. 621-9.

other fervently, not in pairs, but *en masse;* as religious excitements act on amativeness, this is an indication of the natural tendency of religion to Love. The union of hearts expresses and ultimates itself in union of bodies. Love is attraction; seeking unity, it is desire; in unity, happiness. In unobstructed Love, or the free play of the affinities, sexual union is its natural expression. Experience teaches that sexual love is not restricted to pairs; second marriages annul the one-love theory and are often the happiest. Love is not burnt out in one honeymoon, or satisfied by one lover; the secret history of the human heart proves that it is capable of loving any number of times and persons, and that the more it loves the more it can love. This is the law of Nature, thrust out of sight and condemned by common consent, yet secretly known to all. Variety is as beautiful and useful in love as in eating and drinking. The one-love theory, based on jealousy, comes not from loving hearts, but from the greedy claimant. The law of marriage "worketh wrath;" provokes jealousy; unites unmatched natures and sunders matched ones; and making no provision for sexual appetite, causes disease, masturbation, prostitution, and general licentiousness. Unless the sexes come together *naturally*, desire dammed up breaks out irregularly and destructively. The irregularities and excesses of amativeness are explosions incident to unnatural separations of male and female elements, as in the explosion of electric forces. Mingling of the sexes favors purity; isolation, as in colleges, seminaries, monasteries, &c., breeds salacity and obscenity. A system of complex marriage, supplying want, both as to time and variety, will open the prison doors both to the victims of marriage and celibacy; to those in married life who are starved, and to those who are oppressed by lust; to those who are tied to uncongenial natures, and to those who are separated from their natural mates; and to those in the unmarried state who are withered by neglect, diseased by unnatural abstinence, or ploughed into prostitution and self-pollution by desires which have no natural channel. Carrying religion into life, pledging the earnings of each for the support of the whole, the Oneidans seek "not the union of two but the harmony of all souls."

CHOICE, NOT COERCION.

Whether the Oneida scheme succeeds or fails,* as an experiment it is doing great service to civilization; and New York State has the thanks of all intelligent reformers for permitting Perfectionism to illustrate its ideas of sexuality in its own way. But their conceited and self-righteous contempt for Socialists who "have no religion," and their belief that Liberty tends to demoralization, — "leads to hell," — show the Oneidans to be ignorant of the source of the spirit of toleration and progress, which presided at their birth and has compelled marriage bigots to leave them unmolested.† Making better use of religion than any other Christian sect, the Oneidans yet fail to learn the deepest lesson which Jesus taught, are mistaken in supposing that Free Love and Free Labor are possible only within their iron-clad scheme of

* The Oneida Community, coerced by religio-superstitious threats of Christians, formally abandoned their complex-marriage system in November, Y. L. 7.

† If Christians had their way, their outraged sense of "virtue" would impel them to assail and scatter the Oneida Community. The Presbyterians of Central New York recently implored the State authorities to abate this "moral nuisance," as they call it. Always opposed to reform as a body, "Professing Christians" are "conscientiously" hostile to efforts to free, legal and illicit "prostitutes," from their marriage masters.

Socialism, and that the first lesson of progress is to have one's Individuality broken on their religio-communistic wheel. Impelled with Paul to prove all things and hold fast to that which is good; inspired by the good old doctrine of Jesus, that each soul must *judge for itself what is right*, and be saved or "lost" on its own individual responsibility; declining to join the "bread-and-butter brigades" of Communism, Lovers will find their salvation in *Liberty* to choose,—to live on their own merits. The persistent growth of the "social evil" in defiance of all efforts to abate it, shows an irresistible tendency of people to associate even against law and custom; when they obey the higher law of Liberty, which makes social *choice sacred*, and Individual Integrity a duty, domestic life will gravitate towards unity, and Love become the potentially redeeming force which Nature intended it to be.*

"HONEY-MOONS."

But since human nature is imperfect, and passional heats often precede cool reason, young people cannot too early learn that they may choose wrongly; and that, if not guided by the rudder of thought, they must learn wisdom by collision with the rocks of experience. It is better, however, to do wrong and suffer the consequences, than to be "saved" by mediatorial agencies which *act for us*, thereby overriding our necessity and power to reason, and divorcing us from an original relation to truth; better go to hell by choice than to heaven by compulsion. Those who hold, with Victor Hugo, that "the foolishness of Lovers is the wisdom of God," must have a large share of idiocy in *their* idea of Supreme Truth. The crude propensity of youth to unserviceable devotion to attractive maidens, when "life is half moonshine and half Mary Jane," is matched by the voluptuous freaks of Gray-Beard, who wants to be "better accommodated than with a wife." The amorous usurpation and delirious sentimentalism, which are the legitimate stock-in-trade of modern novelists, (in whose books Lovers are chiefly heroic in fornication, and, when married, cease to be interesting until "soiled" with adultery), are the main prop of the marriage system. The affinity-seekers,† whose insipidities mar even the best of poetry, and who expect "perpetual honey-moons" when they find "their mates," but who find "mates" only to soon loathe and discard them, are at once logical exponents and ludicrous examples of "wedded bliss." The philosophy which supposes another imperfect, or reprehensible, because she, or he, does not, and cannot suit me or you, is an insane philosophy. To waste under burdens of "inner life unshared," or vainly expect happiness in the union of blighted personalities, is our destiny, until we

* Adultery is an offence committed against a vicious social order among men, an imperfect social State, and is engendered by it exclusively: so that, when society comes or is acknowledged as the normal state of man, adultery will disappear as the fog of a marsh disappears before the morning sun. * * * Our existing conjugality, accordingly, is not marriage except in name, because it disallows an inward, free, or spontaneous tenure, and admits only a legally enforced or outward one. It is simply a legalized concubinage of the sexes.—*Henry James.*

† Marriage originated otherwise than in contracts by which one man bound himself to one woman exclusively, and, reciprocally, one woman to one man. It has been almost always based in modern times and in Christian countries on the "affinity theory," that is, on mutual consent grounded in natural attraction and the recognized natural interadaptation of the parties to each other, each being the affectional complement and counterpart of the other; such mutual consent following upon a necessary prelude of courting and love making, in which the fact of the "affinity" is authentically tested in respect to its genuineness.—*Greene's "Fragments," pp.* 201, 202.

learn that the human heart can find its home only in social concord which does not invade the sanctity of Individual Liberty.* The sexes naturally "expect each other," love to live and work together, love to find rest, and be lost in each other. Eating all the antagonism and heart-break which marriage causes, how much, even now, of rational joy, healthful association, and redeeming ecstacy there is in conjugal life! Greater than justice, stronger than reason, wiser than philosophy, is this widely diffused, and to be all-controlling Sentiment of Love.

Mystery of sex.

In Experiencing the Ecstacy of Love, we accept the sway of Reason, and the inevitable sequences of cause and effect. What we sow, thereof we reap; Fate is unexplored fact. Wise heads have thought coition a mysterious lottery; but it is mystified by ignorance and superstition.† Whether it shall produce a child is a matter of choice; and the sex and character of the child are predetermined by its makers, the parents. "Queen bees lay female eggs first; afterwards, male eggs; so, with hens, the first-laid eggs give female, the last, male products. Mares shown the stallion late in their periods, drop horse-colts rather than fillies. If stock raisers wish to produce females, they should give the male at the first signs of heat; if males, at the end of the heat." With the human female, conception in the first half of the time between menstrual periods will probably produce girls; in the last half, boys. If coition occurs within six days from the cessation of the menses, girls are usually the result; if from nine to twelve after cessation, boys.‡ Regarding the physical, intellectual, and moral character of children it is surprising that parents who are careful to secure the best parentage for their canary birds and chickens, are utterly heedless in reproducing their own species. What graver act than to give life to a human being? What clearer right has a child than to be well-born? More impressive than the theological "Judgment-day" will be the tribunal

* The Shakers, who try to suppress sexual love, and the Oneidans, who would redeem and glorify it, are now the two leading exponents of Communism, in the States; and the ruins of New Harmony Robt. Owen prophecied that individual property and marriage must go down together; while the old Brook-Farm Association died of too much love of marriage, usury, and "cultured" sentimentalism. There is some truth in Mr. Noyes' idea that a religious basis is necessary to successful association; but the "religion" must consist in obedience to Justice, Truth, and Liberty—not to a theological Christ merely. The Shakers and Oneidans have only taken women and children into the old property conspiracy, and, according to the popular idea of "co-operation," they divide the profits, or spoils, among a larger number of thieves. But, by abolishing interest, rent, and profits, we shall establish property on the basis of Equity: and Love and Liberty, in the absence of marriage, will promote associative unity.

† For this cause shall a man leave his father and mother, and be joined unto his wife, and they two shall be one flesh. This is a great mystery.—*St. Paul.* I should love to have such children as I can imagine, but I have no great desire to put into the great lottery of paternity.—*De Tocqueville.* I cannot doubt that the structure of animals is governed by principles of similar uniformity with that of the rest of the universe.—*Newton.* Little improvement can be expected in morality until the producing of large families is regarded with the same feeling as drunkenness, or any other physical excess.—*J. S. Mill.* Man scans with scrupulous care the character and pedigree of his horses, cattle, and dogs, before he matches them; but when he comes to his own marriage, he rarely, or ever, takes any such care.—*Darwin's "Descent of Man."*

‡ The above statements respecting human offspring are based on facts within my own knowledge. Other theories for predetermining sex are afloat, but this is the most reliable one I have met. Those wishing to pursue the interesting subject farther are referred to Napheys's "Physical Life of Woman," pp. 129, 32; Trall's "Sexual Physiology," pp. 119, 260; and Noyes' "Scientific Propagation."

before which diseased and crime-cursed children summon guilty parents to answer for the sin-begetting use of their reproductive powers. People are little aware to what extent it is incumbent on them to forcordain what their children shall be. Better that every marriage bond in Christendom be severed than that one child be given life "legally," when it can have a superior parentage by coition above statute law. No woman or man should have a second child by his or her marital partner, when there is another person potently worthy of the selection by whom he or she can have a better child.* It was an ignorant and tyrannical prejudice which *forbade* Plato, Jesus, Paul, Newton, Humboldt, and other bachelors of the past, to give to the world that grandest achievement in art, — a Child. Many of the noblest Women now live as maligned "old maids," and will go down to their graves childless, because the natural right of maternity is denied them. "Good people" will think me rash in making such statements; but I appeal from them to the wiser future, which will *demand* that the reproductive instinct be inspired by intelligence and placed under the dominion of the will.†

That sexual intercourse is yet an Ethiopia, an unexplored tract of human experience; is due to a prevailing impression, among religious people, that it is "unclean,"‡ and, among Freethinkers, that it is uncontrollable; both views tend to remove it from the jurisdiction of Reason and Moral Obligation. But, "to the pure all things are pure," and, while "religion never was designed to make our pleasures less," Science brings disciples of God and Fate to answer for their misdeeds before the tribunal of Human Intelligence. Neither superstitious Supernaturalism with its theatrical terrors, nor learned Infidelity, "full of wise saws and modern instances," should deter the sexes from thought and experiment as to the best uses of themselves. That woman expects man, or man woman, is as natural and proper as desire for food or clothing. Since the mind cannot rule the body until it becomes acquainted with it, Lovers, — who are "servants of Providence, not slaves of Fate," — are divinely called to be *students in the laboratories of their own bodies*. The eye, the arm, or leg perishes by non-use; so without natural vent, exuberant sexual vitality wastes and destroys. Not to mention the fearful loss of vigor through involuntary emissions,

SEXUAL HEALTH.

* Lycurgus laughed at those who revenge with war and bloodshed the communication of a married woman's favors; and allowed that if a man in years should have a young wife, he might introduce to her some handsome and honest young man, whom he most approved of, and when she had a child of this generous race, bring it up as his own. On the other hand, he allowed, that if a man of character should entertain a passion for a married woman on account of her modesty and the beauty of her children, he might treat with her husband for admission to her company, that so planting in a beauty-bearing soil, he might produce excellent children, the congenial offspring of excellent parents.—*Plutarch's Lives, p.* 36.

† Each generation has enormous power over the natural gifts of those that follow, and it is a duty we owe to humanity to investigate the range of that power, and to exercise it in a way that, without being unwise towards ourselves, will be most advantageous to future inhabitants of the earth. * * * All life is single in its essence, but various, ever-varying, and inter-active in its manifestations; men, and all other animals, are active workers and sharers in a vastly more extended system of cosmic action than any of ourselves, much less of them, can possibly comprehend.—*Galton's "Hereditary Genius," pp.* 1, 376.

‡ Thinking woman impure, the ancients called her monthly flowing *purgation*. Hence the command of Moses that men should not approach her at certain periods. But what theology calls "purgation," science proves to be "the sacred wound of love in which mothers conceive."

celibate abstinence and solitary vice probably engender more disease and death than all other causes combined.* Though he well knows the cause and cure of these ills, what physician dare prescribe the natural remedy? Accursed is the "civilization" which thus immolates its best life on the altars of superstitious ignorance! Retribution comes in wide-spread venereal diseases, syphilis so generally permeating male blood that it is unsafe for a lady to kiss a man lest she be infected fatally. Though probably less injurious than the fatal drain of involuntary emissions and self-abuse, yet, because illicit intercourse is usually undisciplined and excessive, it is often extremely hurtful. Since intense passion is never expressed in obscene terms, the sources of Love are pure; so vice does not consist in the judicious gratification of sexual desire, but in *repression* and disordered *excess*. Health, Temperance, Self-Control, and native graces are developed by intimate exchange of Heat and Magnetism, while both sexes are thereby fitted for Parentage.† The progress of civilization is marked by the degree of freedom and intimacy between the sexes. In the East, women appear in public veiled, it being thought sinful for them to allow their faces to be seen by any men not their husbands; here they walk, ride, dance, pray with, or kiss men, *strong in the dignity of a naturally beneficent mutualism*. We now forbid the sexes, unless married, to sleep together; but this restriction is a relic of Oriental customs, which will vanish as intelligence increases. In schools, churches, theatres, shops, factories, counting rooms, each sex is benefitted by the presence of the other. The same exchange of impulse, thought, emotion, magnetism, and grace, which develops and refines both sexes in industrial and social meeting publicly, will be still more improving in the most intimate

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* Of those unfortunates who jump from bridges, take arsenic, hang themselves, or otherwise seek death, nearly *two-thirds* are unmarried, and in some years nearly *three-fourths*. In France, Bavaria, Prussia, and Hanover, four out of every five crazy women are unmarried, and throughout the civilized world there are three or four single to one married woman in the establishments for the insane.—*Napheys's "Physical Life of Woman," p.* 41. Sydenham says "Hysteric affections constitute one-half of woman's chronic diseases." * * * Hysteria is comparatively unknown in India, where it is a matter of religious feeling to procure a husband for a girl as soon as menstruation begins, but in this country, (England), whose customs enforce celibacy, no other disease is so wide-spread. * * * A happy sexual intimacy is the best remedy for hysteria.—*Elements of Social Science, pp.* 176–82. Thrown upon himself by the asceticism of our morality, the young man falls into solitary indulgence. Haunted by amatory ideas, and tormented by excitement of the sexual organs, the spirited youth wars manfully for the citadel of his chastity. * * * Night brings no consolation after the gloomy day, for he lives in constant dread of nocturnal discharges of semen, which weaken him so much, that in the morning he feels as if bound down by a weight to his couch. * * * He consults physicians, but, overawed by the general erroneous moral views on these subjects, they shrink from their duty to assert the sacredness of the bodily laws in opposition to preconception. * * * Rosseau was an instructive instance of a most noble mind, struggling under the inevitable ruin of a secret bodily disease. * * * Pascal also is thought to have had the disease, and probably Sir Isaac Newton, who is said to have lived a life of strict sexual abstinence, which produced before death a total atrophy of the testicles, showing the natural sin which he had committed. * * * It is a disgrace to medicine and mankind that so important a class of diseases have become the trade of unscientific men.—*Ibid*, 80, 81, 83, 102. See also Lewis' "Chastity," and Trall's "Sexual Physiology."

† The utility of the passions well directed has become a maxim in medicine as in morality; the fathers in medicine and their modern followers agree in this.—*Napheys, p.* 76. Children should be the fruit of liberty and light; it is doubtless of the most elevated voluntary love that heroes have been born.—*Michelet*. The passions are the celestial fire that vivifies the moral world: it is to them that the arts and sciences owe their discoveries, and man the elevation of his position.—*Helvetius*.

relations of private life. It will ere long be seen that a lady and gentleman can as innocently and properly occupy one room at night as they can now dine together.*

In the distorted popular view, Free Love tends to unrestrained licentiousness, to open the flood-gates of passion and remove all barriers in its desolating course; but it means just the opposite; it means the *utilization of animalism*, and the triumph of Reason, Knowledge, and Continence. SEXUAL CONTINENCE.

As is shown in the opening pages of this Essay, to say that every one should be free, sexually, is to say that every one's person is sacred from invasion; that the sexual instinct shall no longer be a savage, uncontrollable usurper, but be subject to Thought and Civilization. The damning tendency of marriage begins in giving the sexes "legal" license and power to invade, pollute, and destroy each other: and the immaturity of Science is painfully apparent, when it accepts the fatalistic theory of Love, and abandons the grave issues of coition to chance and "necessity." Though my experience is quite limited, facts within my personal knowledge enable me to affirm without fear of refutation, that Lovers' exchange, in its inception, continuance, and conclusion, can be made subject to Choice; entered upon, or refrained from, as the mutual interests of both, or the separate good of either, requires.† Until Lovers, by pre-good sense, become capable of Temperance and Self-possession in sexual intercourse, it is an outrage on children to be begotten by them. Though Paul thought it "better to marry than to burn," it is best and feasible to neither marry nor burn; for, as in Plato's phrase, Lovers are persons in whose favor "the gods have intervened," sexual intercourse may be constantly under the supervision of both human and divine good sense. Since children are begotten by their parents, not by an act of Congress, or divine Providence, married people are forced to study methods of preventing conception;‡ unnatural, disgusting, and very injurious means are frequently used, especially by some clergymen and moralists who, in their public teachings, hold that coition, except for reproduction, should be forbidden by law! From six or eight days before appearance of the menses to ten to

* The evils of celibacy I believe to be a fruitful source of uterine disease. The sexual instinct is a healthy instinct, claiming satisfaction as a natural right.—*Dr. E. J. Tilt, London.* Our appetites, being as much a portion of ourselves as any other quality we possess, ought to be indulged; otherwise the individual is not developed. If a man suppresses part of himself, he becomes maimed and shorn. The proper limit of self-indulgence is, that he shall neither hurt himself nor hurt others. Short of this, everything is lawful. It is more than lawful; it is necessary. He who abstains from safe and moderate gratification of the senses, lets some of his essential faculties fall into abeyance, and must, on that account, be deemed imperfect and unfinished. He may be a monk; he may be a saint; but a man he is not.—*Buckle.*

† I keep under my body, and bring it into subjection.—*St. Paul.* The discharge of the semen, instead of being the main act of sexual intercourse, is really the sequal and termination of it. Sexual intercourse, pure and simple, is the conjunction of the organs of union, and the interchange of magnetic influences, or conversation of spirits, through the medium of that conjunction. . . . Abstinence from the propagative part of sexual intercourse may seem impracticable to depraved natures, and yet be perfectly natural and easy to persons properly trained to chastity. . . . A very large proportion of all children born under the present system, are begotten contrary to the wishes of both parents, and lie nine months in their mother's womb under their mother's curse.—*Noyes' Male Continence, pp.* 12, 13, 15.

‡ When the health of the mother is doubtful, and the family cash box empty or a pre-disposition to some grave malady inherited, they will ask how conception may be prevented, or the next child postponed.—*Lewis' Chastity, p.* 89.

twelve days after their cessation occurs, conception may follow coition; * but intercourse at other periods rarely causes impregnation; if, however, it escapes control, it exhausts both persons, admonishing them to keep within the associative limit, which is highly invigorating, and not to allow themselves to gravitate to the propagative climax. To participate in *generative-sexual intercourse*, instead of dwelling so much upon it in thought and imagination, is Nature's own method to promote continence. The fact that those in whom the seminal nature is most repressed, — young male victims of sexual weakness, hysterical girls, hypoish boys and men, single women, priests, and poets, — dwell much in thought on social subjects, and yet, by unreasoning custom, are denied natural association with the opposite sex, is most disastrous to themselves and society. If persons do not acquire habits of continence by force of will, Nature's method is sharp and decisive; she confronts them with a child, which effectually tames and matures both parents. Far better that their attraction lead to "illegal" parentage, than end in marriage, or by suicidal celibacy. The fashionable method of single persons, and of very many married people, is to get rid of the child before birth by abortion; but this murderous practice is unworthy of Free Lovers: they accept and rear the child, but take care that the next one be born of choice, not by accident. Since the increase of population outruns increase in means of subsistence, Malthus urged that, unless people refuse to marry, or defer it till middle life, there will be too many consumers for the food grown; and that, if they do not heed this admonition, Nature sternly represses excessive increase of population, "by the ghastly agencies of war, pestilence, and famine." Lycurgus favored destroying imperfect and sickly children; Plato, in his imaginative Republic, advises a similar weeding-out process; and, thinking sexual desire "a most enervating and filthy cheat," Shakerism endeavors to exterminate it — three popular devices to govern propagation and Population: 1. The Shaker-Malthus method, which forbids sexual intercourse; 2. The abortion-child-murder method, which destroys life before or after birth; 3. The French-Owen method of barriers, withdrawal, &c., to arrest the process in its course; — but, since they are either unnatural, injurious, or offensive, all these devices are rejected by Free Lovers. Extending the domain of Reason and self-control over the whole human system, and believing that all things work together for the good of those that love good, they not only believe, but *know*, that, under self-discipline, "every organ or faculty in the body works invariably, in all cases, and at all times, for the good of the whole."

CAUSES OF "PROSTITUTION."

The thread of philosophy with which people connect scattered facts of their social experience, is religiously used to entangle so-called "fallen women," in hopeless depression. But, if each "common" woman entertains an average number of five men as her customers, for every woman who "sells her virtue" there must be five "fallen" men who buy it. How

* Conception may take place from sexual union within six days before the beginning, to ten days after the cessation, of the menstrual evacuation.—*T. L. Nichols' Human Physiology p.* 271. M. Bischoff, the celebrated German physiologist, says that coition to be fruitful, must take place from eight days before to twelve after the menses cease. . . . Various unnatural means are employed to prevent the seminal fluid from entering the womb, thus preventing the union of the sperm and germ cell which is the essential part of impregnation; among these means are withdrawal before emission; the use of safes, or sheathes; the introduction of a piece of sponge so as to guard the mouth of the womb, and the injection of tepid water into the vagina immediately after coition. But these methods, except the latter, are injurious and disgusting.—*Elements of Social Science pp.* 348–9. See also Owen's "Moral Physiology."

came they to have money to buy it? How came she to be so dependent that she consents to sell the use of her person for food and clothing? Wine, women, and wealth are three prominent objects of men's desire; to be able to control the first two, they monopolize the third; having, through property in land, interest on money, rent, and profits, subjected labor to capital, recipients of speculative increase keep working *men* poor; and, by excluding woman *from* industrial pursuits and poisoning her mind with superstitious notions of natural weakness, delicacy, and dependence, capitalists have kept her wages down to very much less than men get for the same work.* Thus, men become buyers, and women sellers, of "virtue." But many women, not in immediate need of money, engage in "the social evil;" for, allied with this financial fraud is the great social fraud, marriage, by which the sexes are put in unnatural antagonism, and forbidden natural intercourse; social pleasure, being an object of common desire, becomes a marketable commodity, sold by her who receives a buyer for the night, and by her who, marrying for a home, becomes a "prostitute" for life.† The usury system enables capitalists to control and consume property which they never earned, laborers being defrauded to an equal extent; this injustice creates intemperate and reckless desires in both classes; but when power to accumulate property without work is abolished, the habits of industry, which both men and women must acquire, will promote sexual *Temperance*. In marriage, usury, and *the exceptionally low wages of women*, then, I find the main sources of "prostitution." Luckily the profit-system will go down with its twin-relic of barbarism, the marriage-system; in life united, in death they will not be divided.

SEXUAL RIGHTS.

In telling the woman of Samaria, who had just said to him "I have no husband," "Thou hast had five husbands; and he whom thou now hast is not thy husband," Jesus quietly recognized, without reproof, her natural right to live with men as she chose; and when a woman "taken in adultery, in the very act," was brought to him for criticism and sentence, he sent her accusers home to their own hearts and lives by the emphatic rebuke, "He that is without sin among you, let him first cast a stone at her." By the Mosaic Law she should have been stoned to death, and the lascivious ignorance of religio-"cultured" Massachusetts would imprison her; but wiser Love points her to the upward path of social and industrial liberty. Impersonal and spiritual, Love has also its material and special revelations, which make it a sacredly private and personal affair. Why should the right of private judgment, which is conceded in politics and religion, be denied to domestic life? If Government cannot justly determine what ticket we shall vote, what church we shall attend, or what books we shall read, by what authority does it watch at key-holes and burst open bed-chamber doors to drag Lovers from sacred seclusion? Why should priests and magistrates supervise the Sexual Organs of citizens any more than the brain and stomach? If we are incapable of sexual self-government, is the matter helped by appointing to "protect" us, "ministers of the Gospel," whose incontinent lives fill the world with "scandals?" If unwedded

* Sexual despotism, making almost every woman, socially speaking, the appendage of some man, enables men to take systematically the lion's share of whatever belongs to both.—*John Stuart Mill*. Working women, as compared with men, are defrauded of fifty per cent. of their rightful earnings.—*Amasa Walker*.

† It is a lamentable truth that the troubles which respectable, hard-working, married women undergo, are more trying to the health, and detrimental to the looks, than any of the harlot's career.—*Herbert Spencer*.

lovers, who cohabit are lewd, will paying a marriage fee to a minister make them "virtuous?" Sexual organs are not less sacredly the property of individual citizens than other bodily organs; this being undeniable, Who but the individual owners can rightly determine When, Where, How and for What purpose they shall be used? The belief that our Sexual Relations can be better governed by statute, than by Personal Choice, is a rude species of conventional impertinence, as barbarious and shocking as it is senseless. Personal Liberty and the Rights of Conscience in Love, now savagely invaded by Church, State, and "wise" Freethinkers, should be unflinchingly asserted. Lovers cannot innocently enact the perjury of marriage; to even voluntarily become slaves to each other is deadly sin against themselves, their children, and society;* hence marriage vows and laws, and statutes against adultery and fornication, are unreasonable, unconstitutional, unnatural and void.

HEARTS, TRUMPS.

Against all repressive opposition, Individualism steadily advances to become a law unto itself; the right of private judgment in religion, wrested by Luther from Intolerance in continental Europe — later asserted in politics by Hampden and Sydney against the English Stuarts, and by Adams and Jefferson against British-American centralization — is now legitimately claimed in behalf of sexual self-government. Protestantism, Magna Charta, Habeas Corpus, Trial by Jury, Freedom of Speech and Press, The Declaration of Independence, Jeffersonian State Rights, Negro-Emancipation, were fore-ordained to help Love and Labor Reformers bury sexual slavery, with profit-piracy, in their already open graves. Thanks to the inspired energy of ancestral reformers, the guarantees of personal liberty, which we inherit from our predecessors, are all-sufficient in this Free-Love battle. Those who resist free tendencies to-day can read their doom in the prophetic wrath of Proudhon, who, confronting property usurpation and Napoleonic despotism in France, said, *He who fights against ideas will perish by ideas!* Yet not ideas, not intellect merely, but moral appeal, the might of Conscience, and the all-persuasive impulses of the human heart enter this conflict. Human nature may well blush if the *drama of deceit* enacted in the "Brooklyn Scandal" is to be taken as a fair expression of American thought and feeling. But the array of intellect, scholarship, and eloquence opposed in that struggle; the impressive pomp of courts, the

* The Master said, "Swear not at all;" and no exception in favor of the marriage oath is made. Sacramental marriage is outside of the normal conditions of human society. . . . Under the Christian dispensation, no man can rightfully make himself, by any process cognizable before the civil courts, a voluntary slave. . . . No man can rightfully repudiate his own conscience; neither can he, by any foregone act, mortgage his own conscience in the future. . . . The 11th amendment of the Mass. Constitution says, "No subordination of any one sect or denomination to another shall ever be established by law." . . . If one sect believe on moral and religious grounds, that it is wicked to put all people under the alternative of not marrying at all, or of marrying for life, where is the constitutionality of the law which forces them to marry in a way against which they have conscientious scruples? With what show of justice could the courts punish, with fine and imprisonment, parties living in such a way that fornication and bastardy, through their example, becomes respectable?—*Greene's "Fragments," pp.* 220-2. Those who marry as little intend to conspire their own ruin as those who swear allegiance; and as a whole people is to an ill government, so is one man or woman to an ill marriage.—*Milton.* Did South Carolina, which, before negro emancipation, had no divorces, present a better civilization than Connecticut and Indiana, in which divorces were readily obtained? Does the Romish Church, which opposes divorce, embody higher types of character than Protestant Churches favoring it?

mustering clans of ecclesiastical authority, the listening attitude of thousands of pulpits, and the recording pens of an omnipresent Press, —all these are for a day, fleeting and contemptible, when weighed against an honest heart-throb between one man and one woman! The loud clamor of words will cease, the majesty of courts fade, churches vanish, Christianity itself pass away, but the still, small voice of Love will continue to be heeded by Earth's millions gathering at its shrines! And as the dictation of statutes is increasingly resisted and the wrath of slave masters defied, more and more will the bonds of affection be welcomed, for the yokes which Cupid imposes "are easy and their burden light." I opened this Essay accepting Love as the *regnant* force in social life; I conclude it by emphasizing the same faith. Money, ambition, respectability, isolation, magnetic fervor, fascinating touch, glowing beauty, —whatever influences concur to induce social union, the nourishing power to continue and prosper it, is the attractive force of personal worth, the call to live and serve together, the impulse to defer self and partial interests to the welfare of the Being loved.* Sired by Wisdom, born of Truth, Love stimulates enterprise, quickens industry, fosters self-respect, reverences the lowly and worships the Most High, harmonizing personal impulse with the demands of morality, in a well-informed faith, which renders conventional statutes useless, where "the heavens themselves do guide the state."

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* Judged by the final test, the chief thing, in life, is love.—*Theodore Tilton.* There must be a unitary passional code, enacted by God, and interpreted by attraction.—*Fourier.* Individuality, as the principle of order and repose, is directly opposed to promiscuity.—*Josiah Warren.* He whom love alone does not satisfy cannot have been filled with it.—*Richter.* No man is qualified to feel the worth of a woman who reverences herself. . . No woman shall receive an acknowledgement of love from my lips to whom I cannot consecrate my life.—*Goethe.* Let the motive be in the deed not in the event; be not one moved by the hope of reward; he who doeth what is to be done, without affection, obtaineth the Supreme.—*Krceshna.*

☞ At this date June 1, Y. L. 8, Cupid's Yokes first officially assailed in Halifax, N. S., while being sold there by Josephine S. Tilton in Y. L. 5, though less than 4 1-2 years old, has been complained of or prosecuted a dozen times or more, twice burned in public squares by indignant city marshals, repeatedly "suppressed" by the United States and State Governments, meeting persecution which for superstitious rancor is unparalleled by any book since the appearance of Paine's Age of Reason that so shocked conservatives in America and Europe before the Revolution of B. L. 97. Sentenced to two years imprisonment at hard labor in Dedham Jail, June 25th, Y. L. 6, July 21 following I discarded the A. D. notation of time which recognizes a mythical God in the calendar, puts Christian collars marked "J. C." on naturally free necks, and registers as subjects of the lascivio-religious despotism which the male-sexual origin and history of the cross impose.—dating instead, Y. L. in the Year of Love, from the formation of the New England Free Love League in Boston, Feb. 25th, 1873. Announcing the New Heavens and the New Earth, the Natural Society, foreseen by sensitives, poets and philosophers, Cupid's Yokes, after each "suppression," rises with new vigor to wrestle with benighted Irrationalism,—strong in the New Faith, the New Morality which is destined to supersede present religion, law and order. Like the "little book" spoken of in St. John's Revelation (Chap. x, 2-10), sweet in the mouths but bitter in the bellies of vulgar bigots, explaining the mystery of Good as foreseensed by its servants the prophets, pronouncing Christian "time no longer," this oracle of the banner State of Life, Love, now gives ideas and law to 40,000,000 American people. From Stephen Pearl Andrews, Mary Wolstonecraft and Charles Fourier, back to Plato and Jesus, Seers in all ages have favored Intelligence in Love and Parentage; and since Physiological information, "anything designed or intended to prevent conception" is the objective thought to be suppressed by Comstock's "laws" it is the imperative duty of citizens to proclaim it: for, not superstitious Nescience, but knowledge of ourselves as Human Bodies, naked truth between Man and Woman, Science is the right rule of faith and practice in Sexuality. More protestant than Protestants, yet essentially Catholic, Free Love proclaims the Right of Private Judgment in morals.—E. H. H.

EVOLUTION, REVOLUTION.

FREE LABOR, FREE LOVE, ANTI-DEATH AND TAXES.—USURY, RENT, MARRIAGE, WAR, DEATH AND TAXES, being in conflict with the Nature of Things, must pass away. Prove all things and hold fast that which is good. Know yourself and judge for yourself what is right and best in life. Seek Truth, and work out your own Salvation, incarnating EQUITY, cost what it may.

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CUPID'S YOKES: OR, THE BINDING FORCES OF CONJUGAL LIFE. An Essay to consider some moral and physiological phases of Love and Parentage, wherein is asserted the natural right and necessity of Sexual Self-Government. It reveals the principles and purposes of the Free Love movement. By E. H. Heywood. This book has sent three men and two women to prison; been pronounced "obscene" by two State Judges, three Juries and five United States Judges; but a half million people, including President Hayes and att'y General Devens, declare it NOT OBSCENE. The more it is "suppressed" the louder it speaks, proclaiming a new and beneficient Evolution of Liberty, Law and Order. Price 15 cents.

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Exhibit 3

State of New York

Executive Chamber

THE PEOPLE OF THE STATE OF NEW YORK; TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, At a Court held in and for the County of New York, Leonard Alfred Schneider, a/k/a Lenny Bruce was convicted of the crime of Obscenity, and was thereupon sentenced to a term of imprisonment of four months, and it being represented unto me that it is proper to pardon the said Leonard Alfred Schneider, a/k/a Lenny Bruce:

THEREFORE KNOW YE, That I have pardoned, remised and released, and by these presents do pardon, remise and release the said Leonard Alfred Schneider, a/k/a Lenny Bruce, of and from the offense whereof, in the said court, he stands convicted as aforesaid, and of and from all Sentences, Judgments and Executions thereon.

IN TESTIMONY WHEREOF, I affixed my signature and caused the Great Seal of the State to be hereunto affixed,

WITNESS, GEORGE E. PATAKI, GOVERNOR, in the City of Albany, this twenty-third day of December, two thousand three.

G E. Pataki

Passed the Office of the Department of State this twenty-third day of December, two thousand three.

RANDY A. DANIELS

Secretary of State

BY: Gary M. Trachel
Special Deputy Secretary of State

Exhibit 4

IN THE NAME AND BY THE AUTHORITY OF THE

STATE OF MONTANA

PROCLAMATION OF CLEMENCY FOR MONTANANS CONVICTED UNDER THE MONTANA SEDITION ACT IN 1918-1919

WHEREAS, in America, free speech is a fundamental right in times of war and peace alike; and

WHEREAS, the emotional fervor surrounding the United States' entry into the first World War led to the enactment of the Montana Sedition Act of 1918, which made a negative utterance alone, about America, its leaders or its wartime policies, grounds for imprisonment; and

WHEREAS, in 1918 and 1919, 78 men and women in Montana were imprisoned or fined under the Sedition Act for making remarks critical of America, the President, the Government, the Flag, the War and other subjects; and

WHEREAS, these convictions not only violated basic American rights of speech and dissent but were obtained in some cases by means of entrapment or with the unstated intention of persecuting immigrants, organized laborers and other groups; and

WHEREAS, though these 78 individuals are now deceased, in the 88 years since these prosecutions were brought the State of Montana has never formally redressed the injustice; and

WHEREAS, those convicted for similar offenses under a 1917 federal law were all subsequently pardoned by Presidents Harding, Coolidge and Roosevelt; and

WHEREAS, equity, justice and respect for human rights decree that these 78 persons be fully absolved and their names cleared.

NOW, THEREFORE, I, Brian Schweitzer, by this proclamation do hereby pardon all individuals from Sedition alleged to have been committed during 1918-1919 under the Montana Sedition Act, 1918 Mont. Laws Ch. 11, § 1, and from the conviction of Sedition and from all sentences, judgments and executions thereon.

Dated at Helena, Montana, this 3rd day of May, 2006.

GREAT SEAL OF THE STATE OF MONTANA
ORO Y PLATA

Signed: _____
Brian Schweitzer, Governor

Attest: _____
for Brad Johnson, Secretary of State