

## Ulysses: A Mighty Hero in the Fight for Freedom of Expression

Marc J. Randazza

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### Recommended Citation

Randazza, Marc J. () "Ulysses: A Mighty Hero in the Fight for Freedom of Expression," *University of Massachusetts Law Review*: Vol. 11: Iss. 2, Article 3.

Available at: <http://scholarship.law.umassd.edu/umlr/vol11/iss2/3>

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## ***Ulysses*: A Mighty Hero in the Fight for Freedom of Expression**

Marc J. Randazza, JD, MAMC, LLM

11 U. MASS L. REV. 268

### **ABSTRACT**

James Joyce's *Ulysses* was a revolutionary novel, and this much is common knowledge. What is not common knowledge is how useful *Ulysses* was in pushing the boundaries of freedom of expression. This masterpiece of literature opened the door for modern American free speech jurisprudence, but in recent years has become more of an object of judicial scorn. This Article seeks to educate legal scholars as to the importance of the novel, and attempts to reverse the anti-intellectual spirit that runs through modern American jurisprudence, where the novel is now more used as an object of mockery, or as a negative example.

### **AUTHOR NOTE**

The author is a free speech lawyer representing dissident journalists, protesters, and those who find their artistic expression attacked by the powers that be. A former journalist, Randazza has a BA in journalism from the University of Massachusetts, and a master's in journalism from the University of Florida. He earned his Juris Doctor degree from Georgetown University, and he also holds an LL.M. in international intellectual property law from the Università degli studi di Torino. Randazza is admitted to practice law in Arizona, California, Florida, Massachusetts, and Nevada; dozens of federal courts; and the Supreme Court of the United States. Randazza previously served as a legal commentator for Fox News, and is now a legal columnist and commentator for CNN on free speech issues.

The author extends his thanks to Professor John McCourt of Roma Tre University for rekindling his interest in Joyce and for giving him the honor of presenting the earliest version of this work at the Annual James Joyce School in Trieste, Italy. This work is dedicated to Professor McCourt and the 20th Annual Trieste Joyce School.

I. INTRODUCTION .....	270
II. JOYCE AND THE HUMAN CONDITION .....	273
III. THE CENSORS AND THE DAWN OF FIRST AMENDMENT JURISPRUDENCE .....	274
A. Comstock .....	279
B. <i>Ulysses</i> : Obscene? .....	280
C. Obscenity in the United States: One Book Called <i>Ulysses</i> .....	281
D. <i>Roth v. United States</i> .....	285
E. <i>Stanley v. Georgia</i> and Restricting Private Possession.....	289
IV. <i>MILLER V. CALIFORNIA</i> : OBSCENITY TEST TODAY .....	292
V. CRITICISM BY THE LAITY .....	293
VI. THE JUDICIARY'S SHIFTING VIEW OF JOYCE.....	296
VII. WHY THE SHIFT? .....	308
IV. THE CONTINUED IMPORTANCE OF JOYCE SCHOLARSHIP TODAY .....	310

*I think this is the most damnable slush and filth that ever polluted paper in print. . . . There are no words I know to describe, even vaguely, how disgusted I am; not with the mire of his effusion but with all those whose minds are so putrid that they dare allow such muck and sewage of the human mind to besmirch the world by repeating it—and in print, through which medium it may reach young minds. Oh my God, the horror of it.*

—Letter to Margaret Anderson<sup>1</sup>

*“[O]ne man’s vulgarity is another’s lyric.”*

—Justice John Marshall Harlan<sup>2</sup>

## I. INTRODUCTION

If *Ulysses* could be personified, its statue would belong on grandiose pedestals in prominent squares in American cities. Truly, it belongs in the same place that the Marquis de Lafayette stands in American history.<sup>3</sup>

Lafayette, a foreigner with affection for the cause of liberty in America, lent his fortune and name to the cause. *Ulysses* later joined the fight, more as a conscript than a volunteer, to ensure that freedom

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<sup>1</sup> PAUL VANDERHAM, JAMES JOYCE AND CENSORSHIP: THE TRIALS OF *ULYSSES* 1 (1998) (quoting MARGARET C. ANDERSON, *MY THIRTY YEARS’ WAR* 212-13 (Covici, Friede 1930)).

<sup>2</sup> *Cohen v. California*, 403 U.S. 15, 25 (1971).

<sup>3</sup> Marquis de Lafayette was a general who served in both the French Royal Army and the Continental Army during the American Revolutionary War. After leaving France in pursuit of contributing to the freedom of the American colonies he worked side by side with General George Washington (the later president). Lafayette was instrumental in gaining French support for the colonials and heightening Washington’s fame. For more information see P.C. HEADLEY, *THE LIFE OF THE MARQUIS DE LAFAYETTE, MAJOR GENERAL IN THE UNITED STATES ARMY IN THE WAR OF THE REVOLUTION*, (A.L. Burt Co., Publishers, N.Y., 1903).

of expression in America truly meant something. Lafayette entered the history books a hero, and centuries have not tarnished his noble name. Joyce and *Ulysses* entered on the same footing, but in recent decades, their contribution to freedom of expression seems to be fading into the dust of history, as courts seem more interested in pointing to Joyce's writing as an example of shoddy literature. While there is room for debate on *Ulysses*'s literary merits and Joyce's writing style, *Ulysses* has done enough for the cause of liberty to deserve a medal—not the judicial scorn that has plagued it in recent decades. To continue the metaphor that began this paragraph, if there were statues to *Ulysses* across America, they would very likely be covered in graffiti and surrounded by trash, untended by a nation that turned its back on knowledge and beauty.

For decades, much of the American judiciary tended these metaphorical monuments to *Ulysses*. Beginning August 7, 1934, more than 300 judges mentioned *Ulysses* or James Joyce in their opinions. These citations—referring directly to the landmark decision *United States v. One Book Entitled Ulysses by James Joyce*,<sup>4</sup>—are universally positive.<sup>5</sup> Naturally, since that decision was the one that signaled a tectonic shift in American obscenity law, such judicial reverence was to be expected—especially because the legal shift was one protecting a piece of literary brilliance.

In the 1980s, the judicial attitude toward Joyce changed: No longer the hero of expanding free expression rights, Joyce instead was used as an example of bad writing. Cases citing James Joyce's writings or *Ulysses* directly have a greater tendency to criticize Joyce's obscure writing style—and make it apparent that most judges are not literary scholars. Today, a judge is much more likely to mention Joyce to

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<sup>4</sup> 72 F.2d 705 (2d Cir. 1934).

<sup>5</sup> See *infra* Case Table; see e.g., *United States v. Head*, 317 F. Supp. 1138, 1142 (E.D. La. 1970); *Grove Press v. Christenberry*, 175 F. Supp. 488, 498 (S.D.N.Y. 1959); *Hanby v. Alaska*, 479 P.2d 486, 492 (Alaska 1970); *People v. Richmond Cnty. News Inc.*, 179 N.Y.S.2d 76, 79 (Ct. Spec. Sess. 1958); *Burke v. Kingsley Books*, 142 N.Y.S.2d 735, 740 (N.Y. Sup. Ct. 1955); *People v. Vanguard Press, Inc.*, 84 N.Y.S.2d 427, 429 (Magis. Ct. 1947); *People ex rel. Sumner v. Miller*, 279 N.Y.S. 583, 585 (Magis. Ct. 1935).

mock another lawyer's writing than he is to invoke Joyce's name as a case citation or with any degree of reverence.<sup>6</sup>

And how sad that is, as it does not seem to be a concerted effort, but yet another marker of how the United States truly changed in the 1980s. Reviewing legal texts is like looking at the striations in a layer of rock. Where geologists can point to a line and see an indication of an event of mass extinction, we can look at these layers and see an intellectual die-off.

As previously noted, I am not a scholar of great literature. But, as Justice Potter Stewart famously stated, "I know it when I see it."<sup>7</sup> I was introduced to him in an act of literary conscription. My high school teacher unceremoniously dropped *Dubliners* on our desks and insisted that we read it, or we would not pass the class, would not graduate, and would then never amount to anything. I resisted, finding no interest whatsoever, instead (most ironically) preferring to bury my nose into the works of Anthony Burgess. The irony lies in the fact that while I might have found Burgess more appealing to my teenage punk-rock nature, Burgess himself may have been the greatest Joyce fan in history.<sup>8</sup> He so adored *Ulysses* that he smuggled a copy in to England,

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<sup>6</sup> See *infra* Case Table; e.g., *State Roads Comm'n v. Parker*, 344 A.2d 109 (Md. 1975); *Brunwasser v. Trans World Airlines, Inc.*, 518 F. Supp. 1321, 1324 (W.D. Pa. 1981); *Conchatta v. Evanko*, 83 F. App'x. 437 (3d Cir. 2003); *Newcom Holdings v. IMBROS Corp.*, 369 F. Supp. 2d 700 (E.D. Virginia 2005); *Lease v. Fishel*, 712 F. Supp. 2d 359, 376 (M.D. Pa. 2010); *Eng v. Tingen*, 2015 U.S. Dist. LEXIS 5634 (E.D.N.C. Jan. 12, 2015); *Eve Cuyen Butterworth v. 281 St. Nicholas Partners LLC*, 2014 N.Y. Misc. LEXIS 3379 (N.Y. Sup. Ct. July 22, 2014); *Catholic Health Initiatives Iowa Corp. v. Sebelius*, 841 F. Supp. 2d 270, 271 (D.D.C. 2012); see also *supra* Part VII and accompanying text.

<sup>7</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (U.S. 1964) (Stewart J, concurring). I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth* and *Alberts*, that under the First and Fourteenth Amendments, criminal laws in this area are constitutionally limited to hard-core pornography. *Id.* I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. *Id.* But I know it when I see it, and the motion picture involved in this case is not that. *Id.*

<sup>8</sup> See generally Rosa Mari Bollettieri & Serenella Zanotti, *Re Ulysses: A View from the Burgess Archives*, in *OUTSIDE INFLUENCES, ESSAYS IN HONOR OF FRANCA RUGGIERI* 37, 37 (Richard Ambrosini et al. eds., 2014). Burgess is,

where it was banned at the time, by literally clothing himself in it—*”As a schoolboy I sneaked the two-volume Odyssey Press edition into England, cut up into sections and distributed all over my body.”*<sup>9</sup> That is what I call dedication.

It was not until many years later, while I was working on a fishing boat off the coast of Alaska that Joyce took me captive.<sup>10</sup> With no modern communication on the boat, I was left with two categories of reading materials—a collection of 3D pornographic comic books and the works of James Joyce. After devouring the comic books, I reluctantly picked up Joyce. I did manage to graduate from high school without reading Joyce, but at that moment, I regretted having done so.

## II. JOYCE AND THE HUMAN CONDITION

In Joyce’s words I found the human condition painted on the fabric of reality without retouching or any rose-hued tone in those famous round glasses. For example, in *Giacomo Joyce*, he wrote of his experience at the opera in Trieste:

*The sodden walls ooze a steamy damp. A symphony of smells fuses the mass of huddled human forms: sour reek of armpits, nozzled oranges, melting breast ointments, mastick water, the breath of suppers of sulphurous garlic, foul phosphorescent farts, opoponax, the frank sweat of marriageable and married womankind, the soapy stink of men.*<sup>11</sup>

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despite his success, known to have had a serious inferiority complex coupled with hero worship when it came to Joyce.

<sup>9</sup> ANTHONY BURGESS, *RE JOYCE* 83 (W.W. Norton & Co., 2000) (1965) (published in England as *HERE COMES EVERYBODY: AN INTRODUCTION TO JAMES JOYCE FOR THE ORDINARY READER*).

<sup>10</sup> The author served as a deckhand on F/V *Kimberly Ann* in 1996. The vessel was registered to Anacortes, Washington, but worked mostly out of Alitak, Alaska. The author wishes to thank Jon Gattinella for recruiting him to work on the F/V *Kimberly Ann*.

<sup>11</sup> JAMES JOYCE, *GIACOMO JOYCE* 44 (1968).

If a reader is looking for a sunnily disposed travelogue or the happy tales of times in Italy, the reader should look elsewhere.<sup>12</sup> Joyce gave us things as they were, and one can see how he could speak to a fisherman who picked him up only because the pornographic comic books no longer entertained him. We might speculate that this is precisely the audience that Joyce would have appreciated.

### III. THE CENSORS AND THE DAWN OF FIRST AMENDMENT JURISPRUDENCE

Victorian censors who fancied themselves defenders of “the culture” or faith did not want Joyce’s version of reality in the marketplace of ideas. Joyce may have been radical but the concept of book burning was not. Cries for censorship were not rare in “the land of the free,”<sup>13</sup> despite the inspiring language presented by the First Amendment.

Despite a history of imperfect application of the principles enshrined in the First Amendment, Anglo-American jurisprudence has drifted in fits and starts toward an ever-expanding view of freedom of expression.<sup>14</sup> From pre-colonial John Milton<sup>15</sup> to post-colonial British

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<sup>12</sup> Vapid and vacuous descriptions of Italy are easy to find. For a more saccharine view of the country, see *e.g.*, FRANCES MAYES, UNDER THE TUSCAN SUN: AT HOME IN ITALY (Chronicle Books 1996); ELIZABETH GILBERT, EAT PRAY LOVE (2007).

<sup>13</sup> Early in American history, before the revolution, John Peter Zenger was arrested for seditious libel in New York after publishing a newspaper containing articles critical of the government. Though Zenger was eventually acquitted—by a jury essentially ignoring their instructions—U.S. founders and leaders for a long time followed the trend of punishing anyone criticizing the government. The 1798 Alien and Sedition Acts—though containing a “truth” exception—resulted in the convictions of James Callendar (Callendar wrote a book critical of the president, calling him a “gross hypocrite”), Mathew Lyon (a congressman who had wrote a critical journal article), Benjamin Bache (a newspaper publisher), and many others. For an extensive list and description of these suppressive decisions see, Gordon T. Belt, *Sedition Act of 1798 – a brief history of arrests, indictments, mistreatment & abuse*, FIRST AMENDMENT CTR., [http://www.firstamendmentcenter.org/madison/wpcontent/uploads/2011/03/Sedition\\_Act\\_cases.pdf](http://www.firstamendmentcenter.org/madison/wpcontent/uploads/2011/03/Sedition_Act_cases.pdf) (last visited Apr. 2, 2016).

<sup>14</sup> U.S. courts are inclined to approve and enlarge protection of political and commercial speech yet courts continue to be closeted over erotic speech. *Compare* Citizens United v. Federal Election Comm’n, 558 U.S. 310, 370 (2010)



author John Stuart Mill<sup>16</sup> to Supreme Court Justice Oliver Wendell Holmes, Anglo-American philosophy has a history of favoring the marketplace of ideas. Justice Holmes was the first to bless this theory in his 1919 dissent to *Abrams v. United States*,<sup>17</sup> where he wrote what may be the most influential passage in American legal history:

*Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises.*

*But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.*

*That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon*

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(holding that corporate funding of political advertisements for candidate elections is protected under the First Amendment) *with* *United States v. Extreme Assoc., Inc.*, 431 F.3d 150, 151 (3d Cir. 2005) (indictment for producing obscene pornography).

<sup>15</sup> See e.g., JOHN MILTON, *AREOPAGITICA* (Edward Arber, ed., London, 1869) (1644).

<sup>16</sup> See e.g., JOHN STUART MILL, *ON LIBERTY* (Longmans, Green, and Co., 1867); *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (Parker, Son, & Bourn, 1861).

<sup>17</sup> *Abrams v. United States*, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

*some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.*<sup>18</sup>

With that, Oliver Wendell Holmes opened the clouds and let the sun shine in. Strangely enough, this passage was the losing side of a debate. The *majority* opinion sustained the convictions of five men who were prosecuted under the Espionage Act of 1917. Their crime was that they distributed a series of pamphlets calling for worker solidarity in resisting the war effort.<sup>19</sup> The court held that “the language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war.”<sup>20</sup> In other words, core political speech.

Holmes’s dissent was remarkable in a vacuum, but downright shocking in light of his views as the author of majority opinions just months prior in which he justified and supported censorship. In *Schenck v. United States*,<sup>21</sup> and *Debs v. United States*,<sup>22</sup> Holmes supported silencing voices of political dissent. However, in the intervening months, Holmes reflected upon his position and changed his mind, thus changing his own legacy forever.<sup>23</sup> This is all the more remarkable, in that dissenting opinions carry no legal weight at all. Nevertheless, they can occasionally persuade and influence later cases, and Holmes’s dissent in *Abrams* is the greatest example of this phenomenon, as his dissent has become the law of the land, unlikely to be dislodged.

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<sup>18</sup> *Id.* at 630.

<sup>19</sup> *Id.* at 624.

<sup>20</sup> *Id.*

<sup>21</sup> 249 U.S. 47, 52 (1919).

<sup>22</sup> 249 U.S. 211, 215-16 (1919).

<sup>23</sup> See generally THOMAS HEALY, *THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* (Metropolitan Books, 2013).

Holmes's dissent in *Abrams* was the dawn of free expression in the United States. Before that, the First Amendment was a forgotten amendment, much like the Third Amendment is today.<sup>24</sup> But, on November 10, 1919, Holmes gave birth to modern First Amendment thought. As a mere single member's dissent, it was a sickly infant, whose likelihood of survival beyond that day was far from likely, much less certain.

Meanwhile, at about the time that the free expression sun was rising in America, so was a vicious bora<sup>25</sup> of censorship. This desire to clamp down on artistic expression grew from the mentality of Victorian times, sexual repression, and a bizarre interpretation of "morality," which its adherents pressed in every corner with evangelical fervor.<sup>26</sup> This mentality has ebbed and flowed over the

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<sup>24</sup> The Third Amendment prohibits the government from quartering troops in private homes. U.S. Const. amend. III. Aside from a few notable cases, this amendment is rarely mentioned in case law, as the issue simply rarely arises in modern times. *See, e.g.*, *Engblom v. Carey*, 677 F.2d 957, 963 (2d Cir. 1982) (holding that prison staff had an interest in protecting their property against quartering of state National Guardsmen under the Third Amendment); *Mitchell v. City of Henderson*, No. 2:13-cv-01154-APG-CWH, 2015 WL 427835, at \*18 (D. Nev. Feb. 2, 2015) (holding that municipal police officers are not "soldiers" under the Third Amendment).

<sup>25</sup> The "bora" is a cold, dry, and gusty wind that famously blows through Trieste during the winter months. *See Wind of the World: Bora-Weather UK*, WEATHERONLINE, <http://www.weatheronline.co.uk/reports/wind/The-Bora.htm> (last visited April 2, 2016).

<sup>26</sup> While his crusade might seem to be a thing of the past, we can still find his intellectual disciples in the relatively recent past. Edwin Meese, U.S. Attorney General under Ronald Reagan; John Ashcroft, U.S. Attorney General under George W. Bush; Mary Beth Buchanan, U.S. Attorney for the Western District of Pennsylvania from 2001 to 2009; Alberto Gonzalez, U.S. Attorney General under George W. Bush in 2005; and Brent Ward, U.S. Attorney for the District of Utah from 1981-1988, were all Comstockists with "morality enforcement" at the top of their lists of priorities. *See Anthony Comstock's Influence*, CASE W. RES. UNIV., <http://www.case.edu/affil/skuyhistcontraception/online2012/Comstock.html> (last visited June 22, 2015); *see also* Edwin McDowell, *Some Say Meese Report Rates an 'X'*, N.Y. TIMES (Oct. 21, 1986), <http://www.nytimes.com/1986/10/21/books/some-say-meese-report-rates-an-x.html> (discussing the "Final Report of the Attorney General's Commission on Pornography," which concluded there was a "causal relationship" between certain kinds of pornography and acts of violence); EDWIN MEESE III, *THE MORAL FOUNDATIONS OF REPUBLICAN GOVERNMENT*, IN *STILL THE LAW OF THE*

years, but the modern view of expression and the vision of the morality censors were set to clash the moment that *Ulysses* landed in the Americas.

In that clash, the marketplace of ideas itself was the title belt. *Ulysses* was an unwitting contestant in such a bout. Joyce himself did not seem to seek the fight out, and he was certainly ill equipped to pay for it. At the same time, Joyce was not exactly likely to subscribe to laissez-faire principles like the marketplace of ideas.<sup>27</sup>

LAND? 63-78 (Joseph S. McNamara ed. 1987) (“It is this venting of the moral concerns of a people that is the very essence of political life. In a popular form of government it is not only legitimate but essential that the people have the opportunity to give full vent to their moral sentiments.”); Robert D. Richards & Clay Calvert, *Symposium: Sexually Explicit Speech: Prosecuting Obscenity Cases: An Interview With Mary Beth Buchanan*, 9 FIRST AMEND. L. REV. 56 (discussing Buchanan’s commitment to prosecuting obscenity cases); Neil A. Lewis, *A Prosecution Tests the Definition of Obscenity*, N.Y. TIMES (Sep. 28, 2007), [http://www.nytimes.com/2007/09/28/us/28obscene.html?\\_r=0](http://www.nytimes.com/2007/09/28/us/28obscene.html?_r=0) (discussing six felony obscenity-related charges against Karen Fletcher, brought by Mary Beth Buchanan, for operating a Web site called Red Rose, which featured detailed fictional accounts of the molesting, torture, and sometimes gruesome murders of children under the age of ten, mostly girls); Vicki Haddock, *Son of a Preacher Man / How John Ashcroft’s Religion Shapes His Public Services*, SF GATE (Aug. 4, 2002), <http://www.sfgate.com/opinion/article/Son-of-a-Preacher-Man-How-John-Ashcroft-s-2787948.php> (discussing how Ashcroft’s religious background influences his policies and service as Attorney General); Jake Tapper, *Justice Department Targets Porn Industry*, ABC NEWS (Aug. 28, 2004), <http://abcnews.go.com/WNT/story?id=129480&page=1> (“‘Obscenities have always been a priority of the attorney general,’ said Mary Beth Buchanan, U.S. attorney for western Pennsylvania. ‘[A]nd [President Bush] has asked each U.S. attorney to make that our priority as well.’”); Barton Gellman, *Recruits Sought for Porn Squad*, WASH. POST (Sept. 20, 2005), <http://www.washingtonpost.com/wpdyn/content/article/2005/09/19/AR2005091901570.html> (discussing the FBI’s recruiting for an anti-obscenity squad under the Bush Administration, directed by Attorney General Alberto R. Gonzales, who described the initiative as “one of the top priorities”); Max Blumenthal, *The Porn Plot Against Prosecutors*, NATION (Mar. 20, 2007), <http://www.thenation.com/article/porn-plot-against-prosecutors/> (discussing U.S. Attorney Brent Ward’s federal anti-pornography campaign and crusade against pornography during the Reagan era, as well as his return to government as the chief of the Justice Department’s Obscenity Prosecution Task Force, where his main achievement was to prosecute the producer of *Girls Gone Wild*).

<sup>27</sup> The “marketplace of ideas” is a laissez-faire philosophy suggesting that, over time, wherein the competition of ideas and public discourse will result in truth

### A. Comstock

The chief American anti-obscenity crusader, Anthony Comstock, was born in 1844 to a Congregationalist mother. Comstock followed in his mother's religious footsteps after her death, when Comstock was ten, and "rationalized that abstinence from all impure thoughts and behaviors secured the faithful path to righteousness."<sup>28</sup> Not only did Comstock subject himself to this rationalization, but he also insisted on persecuting all others who did not follow this path. He challenged tobacco and alcohol use, gambling, and atheism within the military during his stretch as a Union soldier in the Civil War and later began his attack on the "commercialized sex industry."<sup>29</sup> The 1873 Act, named after Comstock, forbade any distribution or discussion of contraceptives.<sup>30</sup> Later the Comstock Act was amended to include punishment for producing "obscene, lewd, or lascivious" writings. In his final court case, against Margaret Sanger's Family Limitation, Comstock noted, "If some of these women who go around advocating Woman Suffrage would go around and advocate women having children, they would be rendering society a greater service."<sup>31</sup> Comstock ended his personal crusade with a few dedicated followers who would later test the bounds of obscenity law against *Ulysses*.

The fight to ban *Ulysses* brought these cultures to a clash—and in challenging the Victorian-Comstock censors, Joyce's supporters, and indeed Joyce scholars, lined up on the side of liberty.<sup>32</sup> *Ulysses* is the

and effective political representation, though it is not truly connected to any type of economic notion. See, e.g., Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984). Joyce was more concerned about a stubborn publication of his version of the truth no matter its effect. See generally KEVIN BIRMINGHAM, *THE MOST DANGEROUS BOOK* (2014).

<sup>28</sup> *Anthony Comstock's Influence*, *supra* note 26.

<sup>29</sup> *Id.*

<sup>30</sup> See generally Robert Corn-Revere, *New Age Comstockery*, 4 COMMLAW CONSPECTUS 173, 175 (1996).

<sup>31</sup> *Anthony Comstock's Influence*, *supra* note 26.

<sup>32</sup> While we review these concepts against the backdrop of *Ulysses*, the reader will likely be incapable of considering the remainder of this Article without pondering more modern forms of censorship—be they state sponsored or acts of terrorism. On January 7, 2015, *Charlie Hebdo* cartoonists and employees Jean Cabut, Stephane Charbonnier, Philippe Honore, Bernard Verlhac, Georges Wolinski, Elsa Cayat, Frederic Boisseau, Bernard Maris, Mustapha Ourrad,

point at which Holmes's theory takes hold beyond a small bit of "core" protected speech, and the real promise of the First Amendment truly begins to mean something to everyone—not just those engaged in self-governance, but those who simply wish for a culture free of shackles placed upon it by the few, to promote a narrow view of morality.

### B. *Ulysses*: Obscene?

*Ulysses* evokes a "somewhat tragic and very powerful commentary on the inner lives of men and women," and yet has been the subject of much disrepute with regard to its depiction of the "way people actually spoke and what people actually thought and did during a typical day."<sup>33</sup> *Ulysses* is "obscene" by one inaccurate meaning of the word, "that it deals frankly with behavior, habits and actions which in life are generally private."<sup>34</sup> One may find it strange that the "typical day" of a person could be judged as unfit for the eyes or ears of anyone. In fact, if *Ulysses* is "obscene" then "then life is obscene."<sup>35</sup>

In the late 1800s and early 1900s, books like Joyce's *Ulysses* were deemed obscene. The book was banned in the United States, England,

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Michel Renaud, as well as two French police officers, were gunned down by terrorists in response to satirical publications depicting and criticizing the Prophet Muhammad and Islam. *Charlie Hebdo Attack: Police Hunt Suspects North of Paris*, BBC (Jan. 8, 2015), <http://www.bbc.com/news/world-europe-30734762>. Later in May 2015, Anata Bijoy Das, a blogger advocating for a secular government and rationalism, was attacked and killed in Bangladesh. See Marc Randazza, *Why You Should Speak Up for Slain Blogger*, CNN (May 12, 2015), <http://www.cnn.com/2015/05/12/opinions/randazza-bangladeshi-blogger-daskilled/index.html>.

<sup>33</sup> BIRMINGHAM, *supra* note 27, at 13.

<sup>34</sup> *5 May (1958): Henry Miller to James Laughlin*, AM. READER (Apr. 7, 2016), <http://theamericanreader.com/5-may-1958-henry-miller-to-james-laughlin/>; Joseph L. Featherstone, *Critics Testify for 'Tropic of Cancer'*, HARV. CRIMSON, <http://www.thecrimson.com/article/1961/9/27/critics-testify-for-tropic-of-cancer/> (last visited Apr. 7, 2016).

<sup>35</sup> *5 May (1958): Henry Miller to James Laughlin, This Day in Lettres*, AM. READER, <http://theamericanreader.com/5-may-1958-henry-miller-to-james-laughlin/> (last visited Apr. 11, 2016) (describing Henry Moore's testimony in *Attorney General v. Book Named "Tropic of Cancer"*, 345 Mass. 11 (1962). Harry T. Moore testified that *Tropic of Cancer's* "seamier passages reflect the life of real people. . . . If this book is obscene, then life is obscene." The same can certainly be said for *Ulysses*, and James Joyce was clearly aware of the reflection of real life he had depicted. See BIRMINGHAM, *supra* note 27.

Ireland, Canada, and Australia.<sup>36</sup> The U.S. and Ireland lifted their bans in 1934, England lifted its in 1936, and Canada retained its ban until 1949.<sup>37</sup> Nevertheless, *Ulysses* staged a coup that would result in critical changes to obscenity laws in many countries, and the banning likely contributed to the book's popularity.<sup>38</sup>

### C. Obscenity in the United States: One Book Called *Ulysses*

Major developments in United States obscenity law came into play just in time to stifle *Ulysses*. In 1873, Comstock began his Post Office vendetta against the consumers of “obscene” literature.<sup>39</sup> Comstock devoted his life to defending the world from the plague of “immorality,” from contraceptives to works of art. In addition to *Ulysses*, Comstock went after all forms of sexual education, nude paintings by French modern artists, and even George Bernard Shaw's play *Mrs. Warren's Profession*.<sup>40</sup> *Ulysses* was not getting past the morality “crusader” who even expressed disgust at the language used by his military peers and the literature read by fellow workers in the dry goods store he worked in after the Civil War. Once, Comstock even boasted that he had convicted more than 3,000<sup>41</sup> people and

<sup>36</sup> VANDERHAM, *supra* note 1.

<sup>37</sup> *Id.* at 5.

<sup>38</sup> See BIRMINGHAM, *supra* note 27, at 212, 305–06.

<sup>39</sup> Despite the ban and the Post Office's guidance by Comstock's reign of literary terror, U.S. customs officials often allowed the book through without a fuss. In fact, Earnst was almost unable to bring the *Ulysses I* case because customs failed to enforce the ban without excessive persuasion. On the other hand, “in England, the Home Office did everything in its power to stop the circulation of *Ulysses* short of a criminal prosecution, which it avoided only because a trial would give the book more publicity.” English authorities prevented the book from entering the country and tracked down the named recipient to notify them that the book was found and confiscated. Even the U.S. Postal Service, save for a few Comstockians, was not that motivated. Birmingham, *supra* note 27, at 305–06, 262–63.

<sup>40</sup> 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).

<sup>41</sup> “In the forty-one years I have been here I have convicted persons enough to fill a passenger train of sixty-one coaches, sixty coaches containing sixty passengers each and the sixty-first almost full.” James C.N. Paul & Murray L. Schwartz, *Federal Censorship: Obscenity in the Mail*, HARV. L. REV. 1 (1962). I am not

destroyed “160 tons of obscene literature.”<sup>42</sup> History has not been kind to Comstock, but I would argue that it has not been cruel enough.

*Ulysses* was officially banned from the United States on February 21, 1921, with the convictions of Margaret Anderson and Jane Heap, the original U.S. publishers.<sup>43</sup> The defense began the debate over what “obscenity” and “literary value” meant.<sup>44</sup> It was the first link to looking at a potentially obscene literary work as a whole.<sup>45</sup> Prior to the *Ulysses* case, obscenity was a piecemeal analysis, leaving the value of a work on the sidelines, as censors picked apart the text for uncomfortable passages. Naturally, this was only for disfavored works, as one could imagine picking apart the Holy Bible, and but for the context, there are some pretty racy parts in it.<sup>46</sup>

At the time of *Ulysses I*, “obscene” in the United States meant anything “tending to stir the sex impulses or lead to sexually impure and lustful thoughts.”<sup>47</sup> This was not exactly American ingenuity.

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entirely convinced he did that math correctly but would not be surprised if he kept a tally.

<sup>42</sup> *Id.* at 1683.

<sup>43</sup> BIRMINGHAM, *supra* note 27 at 191–198.

<sup>44</sup> *Id.* at 304.

<sup>45</sup> *See* United States v. One Book Called “Ulysses” (*Ulysses I*), 5 F. Supp. 182, 183 (S.D.N.Y. 1933).

<sup>46</sup> “Found in nearly every home within the reach of underage children in a book plump with lecherous scenes normally confined to the sin-bins marked ‘Adults Only.’” BEN E. AKERLEY, *THE X-RATED BIBLE: AN IRREVERENT SURVEY OF SEX IN THE SCRIPTURES* 7, 216 (1999). Examples include: “And it came to pass on the morrow, that the firstborn said unto the younger, behold, I lay yesternight with my father: let us make him drink wine this night also; and go thou in, and lie with him, that we may preserve seed of our father.” *Genesis* 19:30–36 (referring to the story of Lot’s two daughters getting him drunk, sleeping with him, and later bearing his children); and “My beloved put his hand by the hole of the door, and my bowels were moved for him. Thy statute is like a palm tree, and thy breasts are clusters of grapes.” *SONG OF SOLOMON* 5:4, 7:6–9 (relaying the story of their intercourse, Solomon’s—notably black—wife describes Solomon’s obsession with her breasts).

<sup>47</sup> *Id.* Again, this could mean even the Bible, but given that the censors usually derived their moral authority from it, the Bible seemed to be exempt. And granted its broad coverage, obscenity law, even at the time, could have alluded to much more. For instance, in Canada, obscenity law covered general obscenity, not simply sexual aberrance. The early 1892 obscenity statute in Canada “made it an offence to offer for sale ‘any obscene book, or other printed



With a relatively young judiciary and a common law tradition, Americans simply imported the logic from the 1868 U.K. case *Regina v. Hicklin*.<sup>48</sup> The *Hicklin* test for obscenity was “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.”<sup>49</sup> It focused on the effect the allegedly obscene article had on the most corruptible readers and not on the book’s actual contents. A judge merely had to imagine a hypothetical scenario where someone (unlike himself, of course) could be corrupted by the work. Despite this test, Morris Ernst, the U.S. attorney who defended *Ulysses*, challenged the court to determine that a book could corrupt innocent minds.<sup>50</sup>

Judge Woolsey, in *Ulysses I*, did not only accept Ernst’s argument that a book could not corrupt the minds of most readers, but also took the first major step away from the *Hicklin* rule. At the outset of the opinion, Woolsey stated that the book is not simple to read nor understand, and a “jury trial would have been an extremely unsatisfactory, if not an almost impossible method of dealing with it.”<sup>51</sup> He pointed out that Joyce’s writing depicts the day of lower middle class citizens of Dublin, detailing what they do, say, think, and imagine. The *Hicklin* standard is easily read to conclude that many of the things Joyce details in the normal lives of people could be deemed obscene. Woolsey held that because the book looked at everyday lives, there could not truly be anything bannable because people commonly experience, or at least poor Dubliners experienced, the events *Ulysses* detailed.<sup>52</sup>

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or written matter, or any picture, photograph, model or other object, tending to corrupt morals,” but declined to provide a precise definition of obscenity. See Canada Criminal Code, R.S.C. 1982, c 163; L.W. SUMNER, *THE HATEFUL AND THE OBSCENE: STUDIES IN THE LIMITS OF FREE EXPRESSION* 12 (Toronto 2004). Thus, it is understandable that Canada would be the last country to release the ban of *Ulysses* if it applied the statutory definition of obscenity including anything “disgusting or repugnant.”

<sup>48</sup> *Regina v. Hicklin*, L.R. 2 Q.B. 360 (1868).

<sup>49</sup> *Id.* at 369.

<sup>50</sup> BIRMINGHAM, *supra* note 27, at 168–70.

<sup>51</sup> *United States v. One Book Called “Ulysses” (“Ulysses I”)*, 5 F. Supp. 182, 183 (S.D.N.Y. 1933).

<sup>52</sup> *Id.*

Woolsey also made the unusual comment for the time that those who do not like allegedly obscene content can simply look away.<sup>53</sup> This idea contradicts the *Hicklin* rule, as well as many of the obscenity tests following it. Woolsey felt that simply “turning away” is an appropriate option. But, even modern obscenity law does not take this position.<sup>54</sup> Woolsey also added that the book in question must be read and assessed for obscenity *in its entirety*. The opinion grants this assessment casually and seems to limit it to only books; “in its entirety, as a book must be [read].”<sup>55</sup> Thus, either Woolsey truly thought that books deserved a reading of the whole text, or he found a large loophole through which to bring many “obscene” books.

Upon appeal, in *Ulysses II*,<sup>56</sup> the Second Circuit Court of Appeals not only upheld Woolsey’s decision, but also laid the foundation for the now-prevailing (in the United States) *Miller* standard and distanced American law from *Hicklin*. Indeed, as the dissent suggested, the court did not make an effort to uphold *Hicklin* at all.<sup>57</sup> The appellate court broadened Woolsey’s logic and paved the way for new analysis, stating:

*[I]t is settled, at least so far as this court is concerned, that works of physiology, medicine, science, and sex instruction are not within the statute, though to some extent and among some persons they may tend to promote lustful thoughts. We think the same immunity should apply to literature as to science, where the presentation, when viewed objectively, is sincere, and*

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<sup>53</sup> See *id.* at 184. “If one does not wish to associate with such folk as Joyce describes, that is one’s own choice. In order to avoid indirect contact with them one may not wish to read ‘*Ulysses*,’ that is quite understandable.” *Id.*

<sup>54</sup> After being arrested and prosecuted for distribution and production of obscenity, Robert Zicari said “The funny thing about my business is I don’t force it on anybody. The only people that are going to be forced to watch my movies are the 12 people that sit on that jury.” Jake Tapper, *Justice Department Targets Porn Industry*, ABC (Aug. 28, 2003), <http://abcnews.go.com/WNT/story?id=129480>.

<sup>55</sup> *One Book Called “Ulysses”*, 5 F. Supp. at 185.

<sup>56</sup> *United States v. One Book Entitled Ulysses*, 72 F.2d 705, 706 (2d Cir. 1934) (“*Ulysses II*”).

<sup>57</sup> 72 F.2d at 709 (Manton, J., dissenting).

*the erotic matter is not introduced to promote lust and does not furnish the dominant note of the publication.*<sup>58</sup>

This four-tiered analysis was not necessary to rule *Ulysses* non-obscene. Woolsey had already established that *Ulysses* was an inaccessible work about ordinary lives. Yet the Second Circuit found it necessary to further develop an exception for literary works. The way the court phrased its reasoning for a literary exception highlights how impossible it is to apply obscenity law with any consistency. An average person may be sexually aroused by any number of factors, including by a scientific text, as the court reasoned.<sup>59</sup>

The dissent in *Ulysses II* argued that “the object of the use of the obscene words was not a subject for consideration,” meaning that the book as a whole is divorced from the effect a given passage has on its readers.<sup>60</sup> Under the *Hicklin* test, the whole of *Ulysses* being about the lives of Dubliners would not matter if merely one section evoked lustful thoughts.

#### **D. Roth v. United States**

Even after *Ulysses*, *Hicklin* remained partially intact. But the reasoning from *Ulysses I & II* entered the jurisprudential DNA and started to make subtle changes. Following *Ulysses*, *Roth v. United States*<sup>61</sup> took the lead as a key obscenity case. That case involved two persons convicted for selling obscene books. The Court again held that the First Amendment did not protect obscene speech on the rationale that the Constitution was intended to “assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>62</sup> The *Roth* court saw these “political and social changes” to be separate from changes in acceptance of sexual material. The Court reasoned that this was never going to be a change civilized society would desire.<sup>63</sup> There seemed to be a judicial position that

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<sup>58</sup> *Id.* at 707 (internal citation omitted).

<sup>59</sup> *Id.* at 706-07.

<sup>60</sup> *Id.* at 709.

<sup>61</sup> *Roth v. United States*, 354 U.S. 476 (1957).

<sup>62</sup> *Id.* at 484.

<sup>63</sup> *Id.*

Victorian sexual mores were there to stay, and no amount of discussion would change that.

Despite *Hicklin*'s continued influence, the Court noted 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 guaranties [of the First Amendment].”<sup>64</sup> “But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.”<sup>65</sup> The question then becomes: If obscenity cannot have redeeming social importance, then are all things with redeeming social importance not obscene? Or if obscene things contain any social importance, does the social importance become moot upon it being held obscene? In light of *Ulysses*, one would think the former view would prevail—and this concept is the key to the gift to freedom of expression that the *Ulysses* cases represent.

Though the *Roth* court followed *Hicklin*, it criticized the *Hicklin* test for its potential to stifle protected speech about sex. This criticism hints that literature should be excluded in some cases as some material, though sexual, is sufficiently interesting to the marketplace of ideas to warrant protection.<sup>66</sup> To uphold these standards, voiced earlier in *Ulysses II*, the court created a new test. *Roth* modified the obscenity test to ask “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”<sup>67</sup> The impact of the potentially obscene material was measured against the present-day standards of the “[a]verage person in the community” that the material was likely to reach.<sup>68</sup> Here, the Court followed the *Ulysses I* reasoning that not only will there be people not wanting to access the work at issue, but those who access it may not even understand it, let alone be offended by it.<sup>69</sup>

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 489.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Cf.* United States v. One Book Called “Ulysses” (*Ulysses I*), 5 F. Supp. 182, 184 (S.D.N.Y. 1933). *Ulysses* is a work that stresses incapacity for understanding. If a child were likely to access the book they would not understand what it contained. Similarly, for an obscene mailing, a child who

Since this standard is so malleable, the defendants in *Roth* argued that it did not provide a reasonably ascertainable standard of guilt or predictability. The court dismissed this argument, stating that “the thrust of the argument is that these words are not sufficiently precise because they do not mean the same thing to all people, all the time everywhere,” while determining that the test “conveys sufficiently definite warning.”<sup>70</sup>

Justices Douglas and Black dissented in *Roth*, noting that convictions based on “purity of thought which a book or tract instills in the mind of the reader” were unfaithful to the meaning of the First Amendment, especially since sexual thoughts are a daily occurrence.<sup>71</sup> The dissent cited a research questionnaire that asked college-age women what “things were most stimulating sexually.” Answers varied from dancing to theater to men in general.<sup>72</sup> Clearly, the dissent pointed out, the test based on a community standard is “community censorship in one of its worst forms.”<sup>73</sup>

Indeed, even Justice Harlan’s concurrence questioned the extent of obscenity restrictions. Citing *Ulysses II*, Harlan noted that the question of the case only involved the constitutionality of the statute and not the “correctness of the definition of ‘obscenity.’”<sup>74</sup> He noted that though a jury could easily find a book like *Ulysses* obscene, the conviction of someone for selling it would raise “the gravest constitutional problems.”<sup>75</sup> The court must make independent judgments when determining obscenity, which can often cause material with “redeeming social importance” to fall outside the First Amendment’s protection.<sup>76</sup>

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would not normally access the mailing likely would not understand the mailing upon receipt.

<sup>70</sup> *Roth*, 354 U.S. at 491.

<sup>71</sup> *Id.* at 508.

<sup>72</sup> *Id.* at 509.

<sup>73</sup> *Id.* at 512. Despite this language, the dissent still argues that “no one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct.” *Id.*

<sup>74</sup> *Roth*, 354 U.S. at 499 (Harlan, J., concurring).

<sup>75</sup> *Id.* at 498.

<sup>76</sup> *See Roth*, 354 U.S. at 495 (Warren, J., concurring).

Later, in *Jacobellis v. Ohio*, the Supreme Court attempted to reconcile the concerns over a community standards test.<sup>77</sup> As we saw in *Ulysses I & II*, such standards are difficult to establish when assessing access, understanding, and degree of offensiveness. *Jacobellis* dealt with convictions for possession and showing of obscene films. The court found that the movie, a French love story, was not obscene and that the test's "contemporary community standards" must be interpreted as the standards of society as a whole, rather than a local community.<sup>78</sup> A test relying on local standards would cause distributors to be wary about selling anything that could be remotely thought of as obscene, for fear of conviction in an especially conservative community.

Again, the *Jacobellis* dissent sounded the same worries of the dissent in *Ulysses II*. The government seeks "to maintain a decent society and, on the other hand, the right of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments," and so the dissent argued that the phrase "community standards" should mean "community," not national, standards.<sup>79</sup> Justice Stewart, in his concurrence, pointed out the nigh-unworkable vagaries of the *Roth* obscenity standard and famously stated that while he could not develop a concise definition of the term hard-core pornography, "I know it when I see it."<sup>80</sup>

In a related case, *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, the Court sought to clarify this "redeeming social importance" standard.<sup>81</sup> In *Memoirs*, the Court clarified that, to be deemed obscene, a book must be "utterly without redeeming social value."<sup>82</sup> This was in opposition to the lower court's ruling that "some minimal literary value does not mean it is of any social importance."<sup>83</sup>

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<sup>77</sup> See *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

<sup>78</sup> *Id.* at 193.

<sup>79</sup> *Jacobellis*, 378 U.S. at 199 (Warren, J., dissenting).

<sup>80</sup> *Id.* at 197.

<sup>81</sup> See *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U.S. 415 (1966).

<sup>82</sup> *Id.* at 419.

<sup>83</sup> *Id.* (quoting *Attorney General v. Book Named "John Cleland's Memoirs of a Woman of Pleasure"*, 206 N.E.2d 403, 406 (Mass. 1965)).

Again, in *Memoirs*, the Supreme Court upheld the *Ulysses II* dicta that literary work should be granted similar immunity as scientific materials. In *Ulysses I*, Woolsey did not attempt to impress upon his audience that *Ulysses* maintained literary importance and social value to all persons or even all possible readers. Yet, the social importance of Joyce's work—or of John Cleland's works—to a few well-read scholars is not a moot point, as dissenters would have you believe.

#### E. *Stanley v. Georgia* and Restricting Private Possession

The very slow move away from the *Hicklin* test continued in the 1969 case *Stanley v. Georgia*, where the Supreme Court held that the First Amendment protected the private possession of obscene materials.<sup>84</sup> Indeed, if this were the law during the time of the *Ulysses* trial, readers may have been saved. Perhaps a major purpose of one deciding to read an “obscene” book is the secrecy and taboo-ness of the matter—or simply because it challenges societal norms. With the Postal Service strictly limiting access to *Ulysses*, reading it was a challenge to be overcome—a forbidden fruit that was all the sweeter. Without such a challenge *Ulysses* may not have gained such extensive popularity.<sup>85</sup>

*Stanley* dealt with obscene films discovered during a search of the defendant's home for unrelated crimes. The Court seemed inclined to address the First Amendment questions the case posed, though the Court could have simply disposed of the case on the basis that the government conducted an unconstitutional search and seizure.<sup>86</sup> The government argued, “If the State can protect the body of a citizen, may it not . . . protect his mind?”<sup>87</sup> The Court rejected this by finding a fundamental right almost separate from the right of free speech in the “right to receive information and ideas, regardless of their social

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<sup>84</sup> See *Stanley v. Georgia*, 394 U.S. 557 (1969).

<sup>85</sup> The U.S. could have been quieter about its legal recourse against *Ulysses*, but this does not mean that *Ulysses* would have been any less popular. Essentially the only way for U.S. postal agents to make *Ulysses* less of a problem would have been to not ban it in the first place.

<sup>86</sup> See *Stanley*, 394 U.S. at 569 (1969). And again, how do you protect men's minds from their own lives? See *supra* text accompanying note 32.

<sup>87</sup> *Id.* at 560.

worth.”<sup>88</sup> Certainly after *Ulysses*, the government cannot begin to think they can “control men’s minds.” Again, as in the *Ulysses* cases, dissenters assume that the understanding is the same in all men’s minds. At least the judges in *Stanley* learned somewhere in the time since *Ulysses* that an “obscene” work may breed thoughts as far from lustful as possible—sadness, contempt, anger, and the many other feelings expressed by *Ulysses* readership over the years. The *Stanley* court reconciled this issue by clarifying that the First Amendment protects the right to speak as well as the right to receive speech.<sup>89</sup>

The Court stated, “Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one’s own home.”<sup>90</sup> This raises the question, then, of whether there are grounds for regulating certain kinds of obscene speech, but not others. After all, “[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”<sup>91</sup> The irony in the *Stanley* court’s pro-speech proclamations, of course, is that the entire concept of obscenity law aims to control men’s minds, especially under the original *Hicklin* standard. One justification for such control is that “exposure to obscene materials may lead to deviant sexual behavior or crime of sexual violence.”<sup>92</sup> Showing a development in judicial thought diverging from puritanical roots, the *Stanley* court noted that there is little evidence of a causal connection between crime and obscene materials<sup>93</sup>—yet again reaffirming the thought process of Judge Woolsey and fellow *Ulysses* readers.

Though *Stanley* attempted to make a large leap away from obscene speech restrictions—and to confirm *Ulysses*’ logic in the Supreme Court arena—multiple cases following the decision have softened

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<sup>88</sup> *Id.* at 564.

<sup>89</sup> *See id.* Note that *Stanley* does not refer to *Ulysses*, but its argument is backed by the dissent and concurrence in *Roth*, which relies on the precedent set by *Ulysses*.

<sup>90</sup> *Id.* at 565.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 566.

<sup>93</sup> *Id.* This same argument and rebuttal is consistently applied in debates concerning the sale of violent video games, particularly when minors are involved.



*Stanley*'s blow to obscenity jurisprudence. For example, in *Paris Adult Theatre v. Slanton*, the Supreme Court restricted the showing of obscene films to consenting adults in private theaters<sup>94</sup>—thus again reaffirming that obscenity law is in anticipation of the exact effect on “men’s minds,” here especially on those who may not have known what they were truly getting into.<sup>95</sup> The appellant’s theater had posted signs noting that the films screened contained nudity, and minors were refused entry.<sup>96</sup> The Court insisted that in addition to protecting minors, restrictions on obscene articles was necessary to “[stem] the tide of commercialized obscenity” and to maintain the quality of life of the community because such material may risk public safety and increase crime. People have some freedom of choice in the materials they view, the Court reasoned, but the government must have a way to protect the “gullible from the exercise of their own volition.”<sup>97</sup> *Paris* holds that preventing obscene speech from entering the hands of willing participants is an appropriate way to achieve these goals. But it is an idiotic and disgraceful decision and a slap in the face of *Ulysses* precedent.

In another case, *Osborne v. Ohio*, the Supreme Court ruled that *Stanley* did not apply when dealing with statutes restricting possession of child pornography.<sup>98</sup> Child pornography is probably when censorship is most permissible, but even in these circumstances the dissenting justices in *Osborne* were willing to uphold the individual right to possess pornography by applying the overbreadth doctrine.<sup>99</sup>

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<sup>94</sup> See 413 U.S. 49 (1973).

<sup>95</sup> See generally *id.* I’m sure it’s possible that with the rarity of adult film theaters in the 1970s that some “consenting” adults may have stumbled on a sexual scene they did not readily anticipate, yet what is one assuming “adult content” entails if not sex? I suppose murder, coveting your neighbor’s front lawn, and lying to your parents could fall within the “adult” category for some (notably any remaining Comstock progeny).

<sup>96</sup> See *id.* at 52. Though the court did not hear any information of whether minors had ever entered or tried to enter the theater.

<sup>97</sup> *Id.* at 57–59.

<sup>98</sup> *Osborne v. Ohio*, 495 U.S. 103, 108 (1990).

<sup>99</sup> *Id.* at 112 (internal quotation omitted). The Overbreadth doctrine permits challenges to speech laws that are so over-regulatory—overbroad—that the law criminalizes constitutionally protected conduct. “Where a statute regulates

In the dissent's view "the state [child pornography] law, even as construed authoritatively by the Ohio Supreme Court, is still fatally overbroad, and our decision in *Stanley* . . . prevents the State from criminalizing appellant's possession."<sup>100</sup> Justice Brennan here was not advocating for child pornography, but rather was *again* pointing out the fact that most obscenity laws cover protected speech and are thus unconstitutional.

In light of this precedent we have seen the U.S. Supreme Court swing back and forth in their respect for free expression when sexual content is in play. At the core of these case holdings the Court is inclined to favor *Ulysses I & II* but knows it runs the potential risk of upsetting a society not yet prepared to handle the bowel movements of Leopold Bloom, let alone the right of someone to make fictional stories about child abusers.<sup>101</sup>

#### IV. *MILLER V. CALIFORNIA*: OBSCENITY TEST TODAY

The controlling legal standard for determining obscenity in the United States today, the *Miller* test, finally codified the literary exception proposed in *Ulysses II*. The case of *Miller v. California*<sup>102</sup> dealt with mass mailings advertising "adult material" being considered obscene.

The unsolicited mailings prominently showed explicit nude drawings. Specifically, the Court noted that the States have a significant interest in regulating such unsolicited mailings where "the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles."<sup>103</sup> This reasoning is similar to the government's basis for convicting Anderson and Heap more than half a century earlier, which again has been highly unconvincing since that conviction.<sup>104</sup> The Court proposed a new test for obscenity, where a finding of obscenity is determined

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expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real but substantial."

<sup>100</sup> *Osborne*, 495 U.S. at 126 (Brennan, J., dissenting).

<sup>101</sup> See *infra* note 106 (discussing the case of Karen Fletcher).

<sup>102</sup> *Miller v. California*, 413 U.S. 15, 16-17 (1973).

<sup>103</sup> *Id.* at 19.

<sup>104</sup> BIRMINGHAM, *supra* note 27, at 192.

by: 1) whether the average person applying contemporary community standards (not national standards)<sup>105</sup> would find that the work as a whole appeals to the prurient interest; 2) whether the work depicts or describes, in a patently offensive way, sexual conduct defined by applicable state law; and 3) whether the work lacks serious literary, artistic, political, or scientific value.<sup>106</sup>

The *Miller* test reaffirms and clarifies *Roth*, and overturns the national standard rationale of *Jacobellis* and the “utterly without socially redeeming value” standard in *Memoirs*. Most importantly, it memorializes the importance of literary works acknowledged in *Ulysses II*, where the court valiantly, unapologetically, and for the first time, equated the importance of the literary mind with the importance of scientific discovery and explanation.

## V. CRITICISM BY THE LAITY

Vagueness, though a common criticism of most obscenity tests including *Miller*, was not an issue in the case of *Ulysses*, as Joyce himself and his publishers were well aware that the book was likely to

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<sup>105</sup> There have been other standards suggested in the United States and one even introduced in Canada. As early as 1987, Canadian courts considered readership in the assessment of the audience for allegedly obscene material. The Canadian Supreme Court has also suggested “restrictions on expressive freedom must be harm-based rather than morality-based.” Though such standards may not pose the exact problems of the “community standard,” they continue to lack clarity and “there is no good reason to think that the community’s level of tolerance accurately tracks harmfulness.” SUMNER, *supra* note 47, at 125.

<sup>106</sup> This standard is certainly better than the *Hicklin* test, but the literary, artistic, political, or scientific value, though seemingly broad, is unpredictable as applied. For example, in 2008 Karen Fletcher was prosecuted and later plead guilty to six counts of distributing obscene materials online. Fletcher had posted fictional stories on her website containing graphic descriptions of torture and molestation of children. *United States v. Fletcher*, No. CR 06-329 (D. Penn. 2008). Despite the fact that U.S. courts usually refrain from finding obscenity in text-only cases, Fletcher’s case was a prime opportunity for “obscenity” opponents to obtain a conviction based on text alone. Fletcher’s agoraphobia was a driving force behind her guilty pleading in lieu of trial. Paula Reed Ward, *Afraid of Public Trial, Author to Plead Guilty in Online Obscenity Case*, PITTSBURGH POST-GAZETTE, (May 17, 2008), <http://www.post-gazette.com/frontpage/2008/05/17/Afraid-of-public-trial-author-to-plead-guilty-in-online-obscenity-case/stories/200805170216>.

be banned under existing law—yet they chose to challenge it nonetheless. Ernst’s victory was likely due to some combination of the right judge, the right time, and general apathy regarding obscenity, aside from those who vehemently believed anything with sexual content was filth. Decades after Anderson and Heap, *Ulysses* finally succeeded in bringing about a sunrise in the struggle for a preferred position for literature under U.S. obscenity law.

Nevertheless, without the literary exception, *Ulysses* and similar works can, even under *Miller*, find themselves swallowed up by the broad obscenity rules. As dissenters opined many times, without making Holmes-level traction, “what causes one person to boil up in rage over one pamphlet or movie may reflect only his neurosis, not shared by others.”<sup>107</sup> Yet even opinions in favor of lowered obscenity restrictions indicate that judges often believe there is some type of undefined obscene thing that society will never accept even in light of changing social standards. For example, the *Miller* opinion states:

*One can concede that the ‘sexual revolution’ of recent years may have had useful byproducts in striking layers of prudery from a subject long irrationally kept from needed ventilation. But it does not follow that no regulation of patently offensive ‘hard core’ materials is needed or permissible; civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine.*<sup>108</sup>

*Ulysses* is a perfect example of the schizophrenic and erotophobic nature of American attitudes toward obscenity. Back in the 1930s when *Ulysses I & II* were decided, many citizens and judges would think that “civilized” people do not allow unregulated access to Joyce’s “filthy” literature. Yet today, most readers would be hard-pressed to find shock in their hearts at a description of urination<sup>109</sup> or the clever insult “mean bloody scut.”<sup>110</sup> As Charles McGrath recently put it:

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<sup>107</sup> *Miller*, 413 U.S. at 41.

<sup>108</sup> *Id.* at 36.

<sup>109</sup> JAMES JOYCE, *ULYSSES* 46 (1918).

<sup>110</sup> *Id.* at 326.

*By the standards of today's dirty books, Ulysses seems pretty tame, and it's hard to put yourself back in the mind-set of those who took such strenuous offense in the '20s, when the book was first published by the heroic Sylvia Beach.<sup>111</sup>*

Of course, some might not make it to the end to evaluate the work as a whole. Even the most dedicated Joycean must admit that there is a significant number of people who simply despise the work. In fact, even Ezra Pound disapproved:

*I think certain things simply bad writing, in this section. Bad because you waste the violence. You use a stronger word than you need, and this is bad art, just as any needless superlative is bad art.<sup>112</sup>*

The relative merit of *Ulysses* or lack thereof, however, is of no centrality to this study. Is Joyce a genius, or is his writing just so many more stools dropped by Leopold Bloom in exacting detail, as was further criticized by Pound?<sup>113</sup> If anyone thinks that *Ulysses* is his bawdiest work, his private letters to Nora Barnacle truly reveal him in all his glory.

*My sweet little whorish Nora I did as you told me, you dirty little girl, and pulled myself off twice when I read your letter. I am delighted to see that you do like being fucked arseways. Yes, now I can remember that night when I fucked you for so long backwards. It was the dirtiest fucking I ever gave you, darling. My prick was*

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<sup>111</sup> Charles McGrath, *How Would 'Ulysses' Be Received Today?*, N.Y. TIMES (June 9, 2015), <http://www.nytimes.com/2015/06/14/books/review/how-would-ulysses-be-received-today.html>.

<sup>112</sup> Letter from Ezra Pound to James Joyce (Mar. 29, 1918), <http://www.the-parisreview.org/blog/2015/06/16/down-where-the-asparagus-grows>. (The letter also states: "If we are suppressed too often we'll be suppressed finally and for all, to the damn'd stoppage of all our stipends. AND I can't have our august editress jailed, NOT at any rate for a passage which I do not think written with utter maestria.").

<sup>113</sup> "The contrast between Blooms interior poetry and his outward surroundings is excellent, but it will come up without such detailed treatment of the dropping feces." *See id.*

*stuck in you for hours, fucking in and out under your  
upturned rump.*<sup>114</sup>

I question whether many of us would set Joyce up with our sisters, but this is definitely a man that I would like to drink whiskey with.

If the reader has a problem with that, the reader is free to cast this Article to the ground, or line his bird cage with it, burn it, or wipe his ass with it. But, the reader has no liberty to force anyone else to read it. As the *Miller* court recognized, “there is no ‘captive audience’ problem.”<sup>115</sup> One is never forced to read Joyce. In fact, as recounted earlier, someone tried to force the author with threats of a lifetime of utter failure if he demurred. Obviously this was neither successful in forcing the author to read it nor a prescient prediction.

If one could be forced to read Joyce, what would be the greater sin? Forcing someone to read it, think about it, and consider its relative merits, or depriving a hungry mind of the opportunity to do so? The marketplace of ideas would suggest that a forced reading is of greater value than no read at all. And, given that the marketplace of ideas seems to continue to demand access to Joyce, those who wished to keep it from the hands and minds of the willing have no intellectual capital to spend there.

## VI. THE JUDICIARY’S SHIFTING VIEW OF JOYCE

When one discusses the marketplace of ideas, one must be prepared to find one’s own wares rejected. One measure of the work is to review how it is mentioned in legal citations.

Almost immediately after the 1934 *Ulysses II* landmark case, the judiciary seemed to embrace Joyce and *Ulysses* alike. Case after case mentioned the decision. Then in 1975, one case became the first to mention Joyce not in the context of obscenity law, but as an example of bad writing.<sup>116</sup> “Although the appellant in its brief, by arbitrarily packaged passages reminiscent of the chapters in James Joyce’s ‘Ulysses’ recites in great factual detail a jury-type argument.” It would not be until 1981 when such derision made its way into a

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<sup>114</sup> Letter from James Joyce to Nora Barnacle (1909), <http://loveletters.tribe.net/thread/fce72385-b146-4bf2-9d2e-0dfa6ac7142d>.

<sup>115</sup> *Miller v. California*, 413 U.S. 15, 16-17 (1973).

<sup>116</sup> *State Roads Comm’n v. Parker*, 344 A.2d 109, 119 (Md. 1975).

decision again, but the next time it would be even harsher. *Brunwasser v. Trans World Airlines, Inc.*<sup>117</sup> truly opened up on Joyce in an even more indicting manner.

*Allen N. Brunwasser's pleadings contain a good bit of this, and we are never certain whether we are reading an attempted assertion of a legal claim, or some side remark that popped into Brunwasser's mind at the time. But more than that, Brunwasser's pleadings and briefs reflect principally the style of the stream of consciousness school, so popular in that generation. We were able to understand dimly the action in "Ulysses," today it is explained by shelves of guides, commentaries, companions and concordances. As Joyce grew older he became more difficult and nobody understood "Finnegan's Wake" until the guides and commentaries began to appear. No one supplies us with guides to Brunwasser's pleadings.*

From that point forward, the prevailing judicial wind was to use Joyce as an example of how not to write a brief or a law. In the 2012 case *Catholic Health Initiatives Iowa, Corp. v. Sebelius*,<sup>118</sup> Judge Lamberth characterized the U.S. Medicare law as akin to "a law written by James Joyce and edited by E.E. Cummings." Such judicial hyperbolic license is not itself troubling, but it is as if historians started to mock Lafayette for speaking English with a French accent or for his eating habits. Even worse, it would be as if historians not only focused on the superficial elements of Lafayette's personality, but did so while ignoring his contributions to American independence.

With that, let us look at a limited overview of some cases mentioning Joyce. As the reader can see, they begin with respect for the decision, but as time goes on, the superficiality of judicial views on Joyce becomes the prevailing view.

1935	<i>People v. Miller</i> , 155 Misc. 446 (D. N.Y. 1935)	Holding that a book was not obscene, the court cites to <i>Ulysses I &amp; II</i> to clarify that obscenity statutes are	Citing
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<sup>117</sup> 518 F. Supp. 1321, 1324 (W.D. Pa. 1981).

<sup>118</sup> 841 F. Supp. 2d 270, 271 (D.D.C. 2012).

		not meant to suppress literary works.	
1938	<i>People v. Larsen</i> , 5 N.Y.S.2d (N.Y. 1938)	Cases like <i>Ulysses</i> note a change in popular attitudes and a move for the law to “avoid interference with justifiable freedom of expression.”	Citing
1940	<i>United States v. Rebhuhn</i> , 109 F.2d 512 (S.D. N.Y. 1940)	Uses <i>Ulysses</i> to say that some sexual material may not be obscene per se because some people may wish “seriously to study the sexual practices.”	Citing
1944	<i>People v. Dial Press</i> , 182 Misc. 416 (N.Y. 1944)	Found book to be obscene with use of <i>Ulysses</i> test.	Citing
1944	<i>Stall v. State</i> , 182 Misc. 416 (N.Y. 1944)	Found book to be obscene with use of <i>Ulysses</i> test.	Citing
1947	<i>People v. Vanguard Press</i> , 192 Misc. 127 (N.Y. 1947)	Quoting <i>Ulysses</i> “nowhere does it tend to be an aphrodisiac” with regard to another non-obscene work.	Citing
1949	<i>Commonwealth v. Gordon</i> , 1949 Pa. Dist. & Cnty. Dec. LEXIS 242, *3-4 (Pa. C.P. 1949)	“It should be noted at once that the wording of section 524 requires consideration of the indicted material as a whole; it does not proscribe articles or publications that merely contain obscene matter. . . . <i>United States v. Ulysses</i> , 72 F.(2d) 705 (1934).”	Citing
1952	<i>State v. Scope</i> , 7 Terry 519 (Delaware 1952)	Uses <i>Ulysses I</i> standard for assessment as a whole.	Citing



1953	New American Library of World Literature, Inc. v. Allen, 114 F. Supp. 823, 830 (D. Ohio 1953)	The <i>Ulysses</i> case has been recognized as the keystone of the modern American rule that indictable obscenity must be “dirt for dirt’s sake.”	Citing
1953	Bantam Books v. Melko, 25 N.J.Super. 292 (N.J. Chancery 1953)	<i>Ulysses</i> was banned under unpredictable authority that would pick and choose which potentially obscene literature to let in versus which to ban.	Citing
1955	<i>Burke v. Kingsley Books</i> , 208 Misc. 150 (N.Y. 1955)	Citing <i>Ulysses</i> to determine that despite criticism of the obscenity test a book constituted dirt for dirt’s sake.	Citing
1958	<i>People v. Richmond County News</i> , 13 Misc.2d 1068 (N.Y. 1958)	<i>Ulysses</i> test for “dominant theme” of the work. Found magazine obscene.	Citing
1959	<i>Grove Press v. Christenberry</i> , 175 F. Supp 488 (S.D. N.Y. 1959)	“The essence of the <i>Ulysses</i> holding is that a work of literary merit is not obscene under federal law merely because it contains passages and language dealing with sex in a most candid and realistic fashion and uses many four-letter Anglo-Saxon words. Where a book is written with honesty and seriousness of purpose, and the portions which might be considered obscene are relevant to the theme, it is not condemned by the statute even though it justly may offend many.”	Citing

1970	<i>United States v. Head</i> , 317 F. Supp. 1138, 1142 (E.D. La. 1970)	Using the test from the <i>Ulysses</i> cases (a book must be read in its entirety to determine obscenity) to find that an underground newspaper was not obscene.	Citing
1971	<i>Sullivan v. Houston Independent School Dist.</i> , 333 F. Supp. 1149 (S.D. Tx. 1971)	<i>Ulysses</i> requires a publication to be read as a whole, and it does not matter whether certain portions are obscene even in the context of student made materials distributed in school.	Citing
1973	<i>Bazaar v. Fortune</i> , 476 F.2d 570 (5th Cir. 1973)	The Court found that a student magazine could not be censored because it used vulgar language. The court used the fact that <i>Ulysses</i> was required reading for some of the college classes (which contains all of the “four-letter words” used in the magazine) and stated that <i>Ulysses</i> was a “recognized literary masterpiece,” but also distinguished the student magazine in that the court was not required to determine if “this author [had] as much literary merit as a novel by James Joyce.”	Citing
1975	<i>State Roads Comm’n v. Parker</i> , 275 Md. 651 (Maryland App. 1975)	“Although the appellant in its brief, by arbitrarily packaged passages reminiscent of the chapters in James Joyce’s “ <i>Ulysses</i> ” recites in great factual detail a jury-type	Critical

		argument.”	
1976	<i>Bloom v. Municipal Court</i> , 16 Cal.3d 71 (Cal. 1976)	<i>Ulysses</i> as an example of a protected “soporific” work, finding a state obscenity law overbroad.	Citing
1980	<i>Penthouse International, Ltd. v. McAuliffe</i> , 610 F.2d 1353, 1367 (5th Cir. Ga. 1980)	“[The Hicklin] test was adopted by some American courts but later decisions have rejected it. <i>United States v. One Book Entitled Ulysses</i> , 72 F.2d 705 (2d Cir. 1934) (rejected test when government attempted to prevent circulation of James Joyce’s <i>Ulysses</i> in the United States). In <i>Ulysses</i> , Judge Augustus Hand found some parts of the book to be obscene but stated that it was not obscene when ‘taken as a whole.’ The Supreme Court specifically rejected the segmented approach of Regina in <i>Roth v. United States</i> , 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957).”	Citing

1981	<p>Brunwasser v. Trans World Airlines, Inc., 518 F. Supp. 1321, 1324 (W.D. Pa. 1981)</p>	<p>“Allen N. Brunwasser’s pleadings contain a good bit of this, and we are never certain whether we are reading an attempted assertion of a legal claim, or some side remark that popped into Brunwasser’s mind at the time. But more than that, Brunwasser’s pleadings and briefs reflect principally the style of the stream of consciousness school, so popular in that generation. We were able to understand dimly the action in “Ulysses”, today it is explained by shelves of guides, commentaries, companions and concordances. As Joyce grew older he became more difficult and nobody understood “Finnegan’s Wake” until the guides and commentaries began to appear. No one supplies us with guides to Brunwasser’s pleadings.”</p>	Critical
1985	<p><i>State v. Helgoth</i>, 691 S.W.2d 281 (Missouri 1985)</p>	<p>Dissent claims that the child pornography statute was overbroad and the majority opinion would permit a statute prohibiting <i>Ulysses</i>.</p>	Citing

1985	<i>American Booksellers v. Hudnut</i> , 771 F.2d 323 (7th Cir. 1985)	Sarcastically noting that the Indianapolis pornography ordinance, which banned pornography because of “explicit subordination of women” would have to take another look at banning works like <i>Ulysses</i> , which depicts “women as submissive objects for conquest and domination.” “Those opposing the ordinance point out that much radical feminist literature is explicit and depicts women in ways forbidden by the ordinance and that the ordinance would reopen old battles. It is unclear how Indianapolis would treat works from James Joyce’s <i>Ulysses</i> to Homer’s <i>Iliad</i> ; both depict women as submissive objects for conquest and domination.”	Citing
1992	<i>Marshak v. Marshak</i> , 1992 WL 11168 (D. Conn. 1992)	Quoting <i>Ulysses</i> (“History is a nightmare from which I am trying to awake”) in reference to a plaintiff’s tragic history. The quote is the first sentence of the opinion.	Other

1997	Cleveland's PM on the Boardwalk v. Ohio Liquor Control Commission, 1997 WL 25522 (D. Ohio 1997)	Indicating that state obscenity law would ban <i>Ulysses</i> and rap songs generally.	Citing
1999	Dayton Tavern v. Liquor Control Commission, 1999 WL 941826 (Ohio App. 1999)	Cites <i>Ulysses</i> as a work that could be banned under an overbroad law.	Citing
1999	<i>DRABKOWSKI v. CITY OF BIDDEFORD</i> , 1999 Me. Super. LEXIS 264, *3 (Me. Super. Ct. Sept. 24, 1999)	"Adult" materials within the meaning of the Biddeford ordinance could run the gamut from soft-core pornography to works such as James Joyce's <i>Ulysses</i> .	Citing
1999	Neder v. United States, 527 U.S. 1 (1999)	Noting that James Joyce would have been convicted for selling <i>Ulysses</i> upon a jury using a statewide standard for determining obscenity.	Citing

2003	<i>Conchatta v. Evanko</i> , 83 Fed. App'x 437 (3d Cir. 2003)	Trouble in defining work to be penalized under statute, such as a reading aloud from <i>Ulysses</i> .	Critical
2004	<i>Cline v. Fox</i> , 319 F. Supp. 2d 685 (N.D. W. Virginia 2004)	“The rationality of Policy Directive 503.00(V) (P) becomes more questionable in light of the prison’s allowance of commercial pornography. Pol’y Dir. 503.00(III). Consequently, the policy permits magazines such as <i>Playboy</i> or <i>Maxim</i> , which objectify women in order to sexually arouse or gratify men. (LeMasters Depo. at 38.) But the policy would certainly forbid James Joyce’s <i>Ulysses</i> , ostensibly because such books ‘create an intolerable risk of disorder.’”	Citing
2005	<i>Newcom Holdings v. IMBROS Corp.</i> , 369 F. Supp. 2d 700 (E.D. Virginia 2005)	“Although drafted by counsel, the Deed of Rectification is entirely lacking in basic clarity. For example, there are no dates, either in the Deed’s text or next to the parties’ signatures, to establish when the Deed went into effect. Some sections, such as Section 5, include no punctuation, resulting in	Critical

		run-on prose more like that used by James Joyce in <i>Ulysses</i> than the style expected from lawyers drafting a document meant to govern complex business dealings.” (Footnote omitted.)	
2006	<i>Piggee v. Carl Sandburg College</i> , 464 F.3d 667 (7th Cir. 2006)	“No college or university is required to allow a chemistry professor to devote extensive classroom time to the teaching of James Joyce’s demanding novel <i>Ulysses</i> .”	Other
2010	<i>Couch v. Jabe</i> , 737 F. Supp. 561 (D. Virginia 2010)	Regulation denying prison inmates access to <i>Ulysses</i> was found in violation of the First Amendment.	Citing
2010	<i>Lease v. Fishel</i> , 712 F. Supp. 2d 359, 376 (M.D. Pa. 2010)	“Like some of the works of the great Irish literary figure, James Joyce, aspects of this pleading are written in a stream-of-consciousness style, one which presumes that the reader has a unique insight into the thoughts of the writer and can thus give meaning to seemingly unconnected ideas. In the hands of a literary stylist like Joyce, this manner of expression can be challenging; in the hands of counsel it is sometimes incomprehensible.”	Critical
2011	<i>Reyes v. AT&amp;T</i> , 801 F. Supp. 2d 1350 (S.D. Fl. 2011)	The “old adage of ‘be careful what you wish for’” can be traced back before <i>Ulysses</i> . Quotes <i>Ulysses</i> :	Other



		<p>“That may be too, Stephen said. There is a saying of Goethe’s which Mr. Magee likes to quote. ‘Beware of what you wish for in youth because you will get it in middle life.’”</p>	
2011	<p><i>Smith v. Beard</i>, 26 A.3d 551 (Pa. Commw. Ct. 2011)</p>	<p>“We now turn to the assertion that the Policy is unconstitutionally overbroad. In <i>Cline</i>, relied upon by Mr. Smith, the prison policy at issue prohibited all books, magazines, photographs, etc. that contained any description of sexual conduct, but allowed commercial pornography such as <i>Playboy</i>. <i>Cline</i>, 319 F.Supp.2d at 693. Thus, the policy prohibited books such as James Joyce’s <i>Ulysses</i> and George Orwell’s <i>1984</i>, but permitted <i>Playboy</i>. The district court held that such a policy was overbroad and did not bear a reasonable or rational relationship or connection to the prison’s desired goals, which were akin to the Department’s rationale for the Policy.”</p>	Citing
2011	<p>Wisconsin Interscholastic Athletic Ass’n v. Gannett Co., 658 F.3d 614 (7th Cir. 2011)</p>	<p>Regarding <i>Ulysses</i> decision as one of the “most famous free speech decisions in our history.”</p>	Citing

2012	Catholic Health Initiatives Iowa Corp. v. Sebelius, 841 F. Supp. 2d 270, 271 (D.D.C. 2012)	Judge Lamberth characterizes the U.S. Medicare law as akin to “a law written by James Joyce and edited by E.E. Cummings.”	Critical
2014	<i>Eve Cuyen Butterworth v. 281 St. Nicholas Partners LLC</i> , 2014 N.Y. Misc. LEXIS 3379, *1 (N.Y. Sup. Ct. July 22, 2014)	“The Defendants move to strike various paragraphs and claims in the prolix complaint in this matter, which consumes 239 paragraphs and 39 pages before its culmination. The Hemingway interpretation of the complaint (as opposed to James Joyce in <i>Ulysses</i> ), is a landlord and tenant dispute involving allegations of failing to maintain the property as required state and municipal building maintenance codes and/or rent stabilization rules.”	Critical
2015	<i>Eng v. Tingen</i> , 2015 U.S. Dist. LEXIS 5634, *4 (E.D.N.C. Jan. 12, 2015)	“Eng’s appellate brief is a stream of consciousness narrative that would make James Joyce proud. Unfortunately for Eng, James Joyce is not a good model to use in writing an appellate brief.”	Critical

## VII. WHY THE SHIFT?

From 1934 to 1974, there were sixteen cases referencing Joyce for the substantive reason that the *Ulysses* cases are at the foundation of free speech law in the context of obscenity prosecutions. In that same time period, there were none that mentioned Joyce to criticize his

writing. From 1975 on there were fourteen cases referencing Joyce substantively and eight for negative stylistic reasons. Did Joyce simply fall out of fashion once “Members Only” jackets came into style? If we examine 1981 to the present, the comparison is even starker.

An analysis of the psychological profiles of the affected judges is beyond the scope of this work. However, anecdotally, it seems that the descent from respect to derision followed political speech into its downward spiral of anti-intellectualism.<sup>119</sup> If we examine political rhetoric in the United States, we discover that State of the Union addresses were written for college graduates during the 19th century, but now target Americans with a mere eighth-grade reading level.<sup>120</sup> In fact, the descent has been constant and rapid. An in-depth study shows that the 1934 State of the Union address was delivered at a 15.7 Flesch-Kincaid level.<sup>121</sup> By the time George W. Bush took office, the level was a 7.5.<sup>122</sup>

Although the descent has been long, on November 4, 1981, America elected Ronald Reagan as President, and a long period of anti-intellectual rule took hold.<sup>123</sup> From that point forward, intellectualism was a political liability. Although the President and the judicial branch are separate, the President nominates Supreme Court

<sup>119</sup> See generally ELVIN T. LIM, *THE ANTI-INTELLECTUAL PRESIDENCY: THE DECLINE OF PRESIDENTIAL RHETORIC FROM GEORGE WASHINGTON TO GEORGE W. BUSH* (2008).

<sup>120</sup> Dr. Eric Ostermeyer, “My Message is Simple”: Obama’s SOTU Written at 8th Grade Level for Third Straight Year, *SMART POLITICS* (Mar. 2, 2016), <http://editions.lib.umn.edu/smartpolitics/2012/01/25/my-message-is-simple-obamas-so/>.

<sup>121</sup> *Id.* The Flesch-Kincaid test assesses written text, with a formula that translates the score to a U.S. grade level. Longer sentences with more syllables yield higher scores.

<sup>122</sup> See *id.*

<sup>123</sup> Reagan was apt to tear down the Free Speech movement with his “obey the rules or get out” mentality. Steven Hayward, *Ronald Reagan and the Transformation of Modern California*, 6 *NEXUS: J. OP.* 145, 151 (2001). “[W]hile Reagan was in real life in awe of intellectuals, ‘Reagan, in the long tradition of populism, certainly exploited the anti-intellectual biases of his constituencies.’” LIM, *supra* note 119, at 152 n.37. Reagan also attempted to take down *Roe v. Wade*. See Lawrence G. Sager, *Memoirs of a General in the Inglorious Revolution Order and Law: Arguing the Reagan Revolution*, 90 *MICH. L. REV.* 1203, 1214 (1992).

justices, the Senate confirms them and all other federal judges, and a culture of rejecting intellectuals as proper guardians of democracy was fully in place by the time MTV came on the air. It is a reasonable hypothesis that the judiciary simply followed the trend, with a calm rejection of intellectualism that would no longer tolerate the likes of Joyce in its ranks. Coupled with a sharp shift to the right in the judiciary, the die was cast: Joyce was no longer in favor.

#### IV. THE CONTINUED IMPORTANCE OF JOYCE SCHOLARSHIP TODAY

Where does that leave us today? With American judges embracing anti-intellectualism to the point that few lawyers even remember that we owe much of our freedom of expression to James Joyce, is it any surprise that the view from the bench is not one that puts Joyce in an overwhelmingly positive light? Halfway through its history as a “free book,” *Ulysses* and its author were universally mentioned only in the most positive of lights—as positive precedent or as worthy of protection. But, since that midway point, we find ourselves looking at a very different view from the robed ones.

The mere fact that there is such a thing as an academic who devotes their time to the study of *Ulysses* is a victory in itself—and as much as I think that Anthony Comstock and his ilk should be relegated to unkind corners of history books, I must thank them as well: In their zeal to ban *Ulysses*, we found the confrontation we needed in order to lay the cornerstone for the edifice that would become modern free speech jurisprudence.

I point out that it is the mere cornerstone. In more modern times, we find ourselves confronted with a horde of anti-intellectualism, which threatens to push back the liberating tide that came in that day in 1934. Further, we have found continued artistic persecution against humorists, pornographers, and musicians alike. George Carlin,<sup>124</sup>

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<sup>124</sup> FCC v. Pacifica Foundation, 438 U.S. 726 (1978). Also known as the “Filthy Words” or “Seven Dirty Words” case, wherein the U.S. Supreme Court decided that the FCC served a compelling government interest in protecting children from offensive material by prohibiting such broadcasts during certain hours. “Shit, piss, fuck, cunt, cocksucker, motherfucker, and tits!” George Carlin, *Seven Words You Can Never Say on Television* (1972).

Lenny Bruce,<sup>125</sup> Al Goldstein,<sup>126</sup> Larry Flynt,<sup>127</sup> and 2 Live Crew<sup>128</sup> all stood on the ramparts that *Ulysses* itself originally built. Those ramparts are built from the working-class language and brutal honesty that sprang from Joyce's mind. And, although it is not a legal text, *Ulysses* is as important to our concepts of liberty as anything penned by any jurist, perhaps with the exception of Holmes's dissent.<sup>129</sup> "We need to understand how and why [changes in obscenity law] occurred. Reviewing this history is important, too, because it out to make us humble about our certainties."<sup>130</sup> *Ulysses* is not just a gift to literature, *Ulysses* is a gift to freedom—and as such, lyric it was, and lyric it is.

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<sup>125</sup> Bruce was arrested on obscenity charges after a 1961 comedy show for using the word "cocksucker" and commenting that anyone offended by the sexual use of the term "to come" "probably can't come." He was arrested on three different occasions in 1962 and was eventually sentenced to a year in jail. A long run of obscenity, drug, and money laundering cases ended when Bruce was arrested after a New York show where undercover officers claimed he used obscene language more than 100 times, including "jack me off," and "nice tits." In 2003, Bruce was granted a gubernatorial pardon from the state of New York. See Doug Linder, *The Trials of Lenny Bruce*, (2003), <http://law2.umkc.edu/faculty/projects/ftrials/bruce/bruceaccount.html>.

<sup>126</sup> *People v. Heller*, 307 N.E.2d 805 (1973) (Goldstein's conviction for distributing obscene materials within his newspaper *SCREW* was upheld as constitutional under the Miller test).

<sup>127</sup> *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). The First Amendment protected a parody piece about Jerry Falwell's "first time" which appeared in Flynt's *Hustler* magazine in 1983 when the U.S. Supreme Court held that public figures cannot be compensated for intentional infliction of emotional distress resulting from protected speech.

<sup>128</sup> *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994). In a unanimous U.S. Supreme Court decision, 2 Live Crew's parody of Roy Orbison's "Oh, Pretty Woman" was protected as parody under the First Amendment and copyright law.

<sup>129</sup> See, e.g., Hon. George T. Anagnost, *Book Review: The Legal Odyssey of Joyce's Ulysses—Review of The Most Dangerous Book*, 51 ARIZ. ATT'Y 56 (2015); Stephen Gillers, *A Tendency to Deprave and Corrupt: The Transformation of American Obscenity Law from Hicklin to Ulysses II*, 85 WASH. U. L. REV. 215 (2007).

<sup>130</sup> Gillers, *supra* note 129, at 223.