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## **A TENDENCY TO DEPRAVE AND CORRUPT: THE TRANSFORMATION OF AMERICAN OBSCENITY LAW FROM *HICKLIN* TO *ULYSSES II***

**STEPHEN GILLERS\***

There will be, doubtless, the usual outcry from circles self-styled artistic and literary over the fining of the two women who edit and publish *The Little Review* for printing in it a presentation of life in Dublin as seen by a writer by the name of Joyce—a work to which, for reasons few except himself are likely to guess, he gave the title of ‘*Ulysses*.’<sup>1</sup>

There are still those people who are not outraged by the mention of natural facts who will ask ‘what is the necessity to discuss them?’ But that is not a question to ask about a work of Art. The only question relevant at all to *Ulysses* is—Is it a work of Art?<sup>2</sup>

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1. *Topics of the Times: Taste, Not Morals, Violated*, N.Y. TIMES, Feb. 23, 1921, at 12 (following the obscenity convictions of Margaret Anderson and Jane Heap for publishing an excerpt of Joyce’s work in progress).

2. jh, *Art and the Law*, LITTLE REVIEW 7 (Sept.–Dec. 1920). The author was Jane Heap.

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## I. INTRODUCTION

Today, the store at 27 West Eighth Street in New York's Greenwich Village sells shoes. No sign commemorates the role of an earlier tenant, a bookstore, in the battle to publish James Joyce's *Ulysses* in the United States. Two blocks away, a plaque on the Jefferson Market Library recalls that from 1876 to 1932 the building was called the Jefferson Market Courthouse and housed the "women's court." Unmentioned is that Margaret Anderson and Jane Heap were prosecuted in the building for obscenity after publishing an excerpt from (the yet unfinished) *Ulysses* in *The Little Review*, their low circulation literary magazine.<sup>3</sup> A likeness of Margaret Anderson appears in a mural on the uptown platform of the Christopher Street subway station a few blocks south of the library, alongside those of Marcel Duchamp, Eugene O'Neill, Edna St. Vincent Millay, and others who made Greenwich Village the Bohemian capital of

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3. See *infra* text accompanying notes 175–76.

the United States in the 1920s. The mural describes Anderson as “publisher”; it does not mention *The Little Review*.

*Ulysses* is among the best English language novels of the twentieth century,<sup>4</sup> but the prosecution of Anderson and Heap prevented the book’s publication in the United States for a dozen years after Joyce completed it in 1921. Personal and financial risks were seen as too high. Like Anderson and Heap, anyone in New York who published or sold the book risked a \$1,000 fine and a year in jail.<sup>5</sup> The post office would likely exclude the book from the mail and destroy copies placed there, making publication financially rash.<sup>6</sup> Benjamin W. Huebsch, the American publisher of Joyce’s *Dubliners* and *A Portrait of the Artist as a Young Man*, passed on *Ulysses*.<sup>7</sup> Until the young Bennett Cerf appeared in 1932 with his new company Random House, no one would chance publication<sup>8</sup> despite Joyce’s growing reputation,<sup>9</sup> or the fact that on February 2, 1922, Joyce’s fortieth birthday, Sylvia Beach published *Ulysses* in France (in English) through her bookstore, Shakespeare and Company, without incident and with good sales, amounting to eleven editions in the ensuing decade.<sup>10</sup> Within weeks, smuggled copies of the French edition were selling for \$50

4. The board of the Modern Library voted *Ulysses* the best English language novel of the twentieth century. *A Portrait of the Artist as a Young Man*, also by Joyce, was third. The Modern Library is owned by Random House, which publishes *Ulysses*. The listing can be found at: <http://www.randomhouse.com/modernlibrary/100bestnovels.html> (last visited Nov. 10, 2007). Other publications concur. See, e.g., Michelle Pauli, *Joyce Tops Poll of Most Valuable Books*, GUARDIAN UNLIMITED, Jan. 19, 2006, <http://books.guardian.co.uk/news/articles/0..1690275.00.html>.

5. N.Y. PENAL LAW § 1141 (1909) (becoming N.Y. PENAL LAW § 235.05 (McKinney 1982)).

6. Exclusion from the mails was the fate of three issues of *The Little Review* containing excerpts from *Ulysses*. PAUL VANDERHAM, JAMES JOYCE AND CENSORSHIP 28–34 (1998); Jackson Bryer, *Joyce, Ulysses, and The Little Review*, S. ATLANTIC Q. 148, 153–55 (1967).

7. RICHARD ELLMANN, JAMES JOYCE 406, 504 (1982); B.L. REID, THE MAN FROM NEW YORK: JOHN QUINN AND HIS FRIENDS 484–85 (1968). See also HERBERT GORMAN, JAMES JOYCE 279–80 (1948) (reprinting letters from Benjamin Huebsch to John Quinn, dated March 24, 1921, and April 5, 1921).

8. Samuel Roth published unauthorized (and corrupted) excerpts of *Ulysses* in his magazine *Two Worlds Monthly* from 1925 to 1927. Joyce sued, enjoining Roth from further publication in 1928, by which time he had stopped. ELLMANN, *supra* note 7, at 587.

9. See, e.g., H.W. Boynton, *Outstanding Novels of the Season*, NATION, Apr. 5, 1917, at 403; H.G. Wells, *James Joyce*, NEW REPUBLIC, Mar. 10, 1917, at 159.

10. For a discussion of the publishing history of *Ulysses* by Sylvia Beach, see generally NOEL RILEY FITCH, SYLVIA BEACH AND THE LOST GENERATION: A HISTORY OF LITERARY PARIS IN THE TWENTIES AND THIRTIES (1983). In her 1956 autobiography, Beach recounts how she came to publish the book. After the conviction of the editors of *The Little Review* in New York, Joyce told Beach: “My book will never come out now.” Beach replied: “Would you let Shakespeare and Company have the honor of bringing out your *Ulysses*?” SYLVIA BEACH, SHAKESPEARE AND COMPANY 47 (1959). Beach was on the verge of publishing the twelfth edition of *Ulysses* when Joyce contracted with Random House. FITCH, *supra*, at 329.

in New York (equivalent to more than \$500 today).<sup>11</sup> Even so, in the summer of 1922, John Quinn, a prominent and politically connected New York lawyer, told Harriet Shaw Weaver, Joyce's British benefactor: "*Ulysses*, unexpurgated, unchanged, cannot be published in the United States without the certainty of prosecution and conviction."<sup>12</sup> Quinn was a collector of art, a patron of writers and artists, and a friend of Joyce, Yeats, and Ezra Pound.<sup>13</sup> He figures prominently in this story because, in 1920 and 1921, he mounted the first American court defense of *Ulysses* when he represented Anderson and Heap in their obscenity trial.<sup>14</sup> Quinn did not want the case. He believed that the legal test of *Ulysses* should await its completion, when the book, judged as a whole, would in his view have a better chance of escaping the censor.<sup>15</sup> Today, Quinn's defense of Anderson and Heap is his most famous case. It entitles him to a footnote in the literary history of the United States. Maybe Quinn was right about the certainty of conviction for publishing *Ulysses* following the Anderson and Heap trial; or, as I will argue, maybe not.<sup>16</sup> If Quinn was right, however, he is partly to blame for failing to do all he could to win, perhaps because he was certain that any effort was doomed to fail.<sup>17</sup>

But Quinn is only partly to blame. The courts are also at fault. In 1921, the law, though changing, remained largely and thoughtlessly hostile to anything in print (or other medium) if "the matter" had a "tendency . . . 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>18</sup> This is the test for obscenity that Chief Justice Cockburn set down in *R v. Hicklin*, an 1868 decision of the Queen's Bench in England.<sup>19</sup> *Hicklin* had substantial influence on American obscenity law in the last third of the

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11. REID, *supra* note 7, at 532.

12. *Id.*

13. Quinn's friendships with artists and writers and his involvement with the arts generally are detailed in nearly every chapter of REID, *supra* note 7.

14. The *Ulysses* excerpt that prompted the prosecution of Anderson and Heap describes a sexual (though not a physical) encounter between Leopold Bloom and Gerty MacDowell on a Dublin beach. See *infra* text accompanying notes 178–80.

15. Quinn might have changed his mind after seeing "Penelope," the yet unwritten final chapter, containing Molly Bloom's erotic soliloquy. Quinn thought *Ulysses* would have the best chance in a privately printed expensive edition. Letter from John Quinn to Margaret C. Anderson at 12–13 (Feb. 5, 1921) (original in collection of S. Ill. U., Carbondale). The circumstances leading to Quinn's defense of an excerpt of *Ulysses* published in *The Little Review* are told in BRYER, *supra* note 6; REID, *supra* note 7 at 441–42; VANDERHAM, *supra* note 6, at 37–56.

16. See *infra* Part IV.D.

17. See *infra* text accompanying notes 251–52.

18. *R v. Hicklin*, [1868] 3 Q.B. 360, 371.

19. *Id.*

nineteenth and first third of the twentieth centuries and thereafter. That law was muddled, to say the least. American rulings are inconsistent. A court might offer *Hicklin* as the main, or only, justification it needed to suppress a work. Another court might struggle to escape the *Hicklin* straitjacket. Who, after all, would want to be remembered as the judge who suppressed Voltaire, Ovid, Fielding, or Rabelais, each of whose works had been the subject of New York litigation?<sup>20</sup> Results were idiosyncratic as well because *Hicklin* left censorship decisions to the imagination of the triers of fact in each case (judge or jury), who were expected, without the benefit of expert testimony, to predict how those most susceptible to “immoral influences” (not themselves) might respond to the alleged obscenity.<sup>21</sup>

The *Hicklin*-inspired regime is all the more remarkable because nothing in Cockburn’s brief test for obscenity can pass for legal reasoning, or any other kind of reasoning. Its single sentence seems tossed off.<sup>22</sup> It offers no authority, no analysis, no awareness of the breadth of its declamation. No matter. Several American courts, searching for precedent for their own obscenity cases, subscribed to *Hicklin* with little or no evaluation of alternatives, the practical implications, the unusual factual context of the *Hicklin* decision, or the free speech provisions of the national and state constitutions. Other courts then cited those courts. In this way, *Hicklin* infiltrated American case law even when *Hicklin* itself went uncited. For ninety-nine years, although with declining influence, *Hicklin* served as a kind of legal lasso judges could use to restrain expression in literature and the arts. Even as late as 1951, a federal judge in San Francisco cited the *Hicklin* test to declare Henry Miller’s *Tropic of Cancer* and *Tropic of Capricorn* obscene.<sup>23</sup>

The New York Court of Appeals, the state’s highest court, first quoted Cockburn in an 1884 case, *People v. Muller*, which convicted a clerk for selling nine photographs of French paintings portraying naked women.<sup>24</sup> Although *Hicklin* would not again appear in a majority opinion of the court until 1953,<sup>25</sup> *Muller*’s approval of the *Hicklin* test made it binding on New York courts and influential beyond. As of 1920, when Quinn was called to defend a portion of one chapter of *Ulysses* before a criminal court in Manhattan, the Court of Appeals had not abandoned *Hicklin* or *Muller*.

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20. See *infra* text accompanying note 252.

21. *Hicklin*, 3 Q.B. at 371.

22. *Id.*

23. *United States v. Two Obscene Books*, 99 F. Supp. 760 (N.D. Cal. 1951).

24. *People v. Muller*, 96 N.Y. 408 (1884).

25. See *infra* note 117.

But a few lower courts had implied discontent with their potential breadth.<sup>26</sup> Careful observers of the time might have predicted an imminent, if gradual, shift toward greater freedom for writers and artists. In retrospect, we know that this prediction would have been correct. The decade of the 1920s marked a turning point in this area of law. Could Quinn's case, one of the last big victories for the forces of *Hicklin*-inspired suppression, instead have been a significant victory in the movement away from *Hicklin*? I believe so.<sup>27</sup>

*Hicklin* was permanently interred nationwide in 1957 when the United States Supreme Court decided *Roth v. United States*, which by giving "obscenity" a constitutional definition allowed significant federal protection against censorship of writers and artists.<sup>28</sup> But *Hicklin* caused much mischief until then. Not only *Ulysses*, but publication of other books—by Theodore Dreiser, D.H. Lawrence, and Henry Miller, among others—was delayed or denied under *Hicklin*'s dubious authority. Plays were not produced. Art was suppressed.<sup>29</sup> We will never know what was not written, painted, photographed, or performed—or was altered—to avoid *Hicklin*'s reach. This point bears emphasis. When scholars evaluate the consequences of a court decision, they are understandably inclined to consider its influence on other decisions. They look to what is there, not what is absent. Yet *Hicklin* and the prosecutions it spawned would have led artists, authors, producers, and publishers to refrain from activity because of the personal and financial risks, which is of course what happened in the dozen years between Sylvia Beach's publication of *Ulysses* in 1922 and the Random House edition.

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26. See *infra* text accompanying notes 233–50.

27. See *infra* text accompanying notes 273–78.

28. *Roth v. United States*, 354 U.S. 476, 489 (1957) ("The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press."). *Roth* collects lower court cases rejecting the *Hicklin* standard. *Id.* at 489 n.26.

29. *United States v. Two Obscene Books*, 99 F. Supp. 760 (N.D. Cal. 1951) (*Tropic of Cancer* and *Tropic of Capricorn* by Henry Miller); *People v. Muller*, 96 N.Y. 408 (1884) (photographs of paintings); *People v. Pesky*, 243 N.Y.S. 193 (N.Y. App. Div. 1930), *aff'd*, 254 N.Y. 373 (1930) (a book containing a play); EDWARD DE GRAZIA, *GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS* 91, 135–39 (1993) (Lawrence and Dreiser). In *Liveright v. Waldorf Theaters Corp.*, 221 N.Y.S. 194 (N.Y. App. Div. 1927), a theater owner refused to allow Liveright to mount a play, despite his lease of the theater, because production of the same play had earlier resulted in the arrest of the actors and producers. Liveright sought an injunction to require the defendant to permit the play. *Liveright*, 221 N.Y.S. at 195. The court refused on the ground that the request was not "in the realm of equitable jurisdiction." *Id.* at 196.

No judicial pronouncement from an American or British court in the last 140 years has been as harmful to creative artists as Cockburn's single sentence. Yet *Hicklin*'s facts are unusual, as we shall see. For one thing, the publication before the *Hicklin* court was a piece of advocacy, a polemic, not art or fiction.<sup>30</sup> *Hicklin* was also unusual because the manner in which the offending publication was distributed made it easily available to children. It would have been simple for a later court to acknowledge *Hicklin*'s definition of obscenity as perhaps correct for its peculiar facts and then to ignore it when evaluating a book, play, or painting aimed at adult audiences. The failure of American courts to address these subtleties, while also unreflectively adopting an obscenity standard that could easily ban Shakespeare, Chaucer, Ovid, and the Bible, is breathtaking. It took the second *Ulysses* case ("*Ulysses II*") finally to inflict serious (but by no means fatal) harm on *Hicklin*'s place in American jurisprudence. *Hicklin* (or its test) won the first confrontation with Joyce's work, but it lost the second.<sup>31</sup> Weakened, it nevertheless remained part of American jurisprudence for another twenty-five years.

## II. TWO STORIES: ONE DOCTRINAL, ONE PRACTICAL

We have two stories, doctrinal and practical, both fascinating and instructive. The doctrinal story first. It begins with *Hicklin*, traces its influence, and examines how courts came to shed that influence. In this story, the law is initially timid, even when it liberates the matter alleged to be obscene. Then came the second *Ulysses* litigation and a Second Circuit opinion rejecting *Hicklin* by name. In the ensuing five decades, judges made it increasingly difficult for the state to suppress a creative work. By the 1980s, obscenity prosecutions were rare, especially in urban areas and on the coasts. Today, cable television and the Internet have almost entirely eroded the ability to effectively suppress whatever remains constitutionally unprotected. Fortune 500 companies have entered the market and profit from the sale of what was once (and may still be) called "hard-core pornography"—that is, what Justice Potter Stewart had in mind

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30. See *infra* text accompanying notes 48–51.

31. The prosecution of Margaret Anderson and Jane Heap for publishing an excerpt from one chapter of *Ulysses* in *The Little Review* was the first encounter between Joyce and the *Hicklin* standard, discussed at *infra* text accompanying notes 171–217. The second encounter was, of course, Random House's effort to establish that *Ulysses* itself, now in book form, could be admitted into the United States. *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd, sub nom.* *United States v. One Book Entitled Ulysses by James Joyce* (Random House, Inc.), 72 F.2d 705 (2d Cir. 1934).

when he said, “I know it when I see it.”<sup>32</sup> True, the government retains power over the airways because it can revoke licenses and impose fines. But that power is deployed to restrict broadcast of much that is not obscene, material that in other media has been constitutionally protected for decades.<sup>33</sup> Obscenity battles today are fought mainly at the margins: First, to protect children from being used as subjects in sexually explicit videos and photographs, an essential goal better seen as ending child abuse.<sup>34</sup> Second, to keep sexually explicit material away from those under eighteen,<sup>35</sup> also a worthy goal, especially for younger children, but one that the Internet and cable television make difficult even for the most determined parents. Third, to insure that sexually explicit materials are not thrust upon those who do not wish to view them.<sup>36</sup>

Despite changes in obscenity doctrine and enforcement, studying the influence of *Hicklin* and the events leading up to *Ulysses II* remains important. It tells us how change happens in the law, including constitutional law. At times, however, that change, though gratifying, is not much more doctrinally coherent than the precedent it limits or overturns.<sup>37</sup> Candor about sex in art, fiction and non-fiction, and later film, went from enjoying almost no legal protections in 1900 to virtually no restrictions in 2000. Books, movies, and photography exhibits that cause little or no stir today would have flabbergasted the groups committed to suppressing vice a century ago.<sup>38</sup> We need to understand how and why

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32. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). That Fortune 500 companies now have equity interests in what would conventionally be understood as pornography has been much reported. For example, Frontline produced a report on Public Television entitled “American Porn,” which Frontline described as “a multibillion-dollar business.” See Frontline, *American Porn*, <http://www.pbs.org/wgbh/pages/frontline/shows/porn/>.

33. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding the power of the Federal Communications Commission to fine a radio station for using “7 dirty words”).

34. See, e.g., 18 U.S.C. § 2251A (2000).

35. See, e.g., N.Y. PENAL LAW §§ 235.21, 235.22 (2007).

36. *Miller v. California*, 413 U.S. 15, 18–19 (1973) (“This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.”) (footnote omitted).

37. The 1933 district court opinion upholding Random House’s effort to import a copy of *Ulysses* from France, for example, has won extravagant praise for decades, but it is an abysmal example of judicial reasoning, very nearly a caricature of what we think of as law. See *infra* text accompanying notes 341–67.

38. In 1990, an Ohio jury acquitted the executive director of the Cincinnati Art Museum, who was prosecuted for displaying Robert Mapplethorpe’s sexually provocative photographs. Isabel Wilkerson, *Cincinnati Jury Acquits Museum in Mapplethorpe Obscenity Case*, N.Y. TIMES, Oct. 6, 1990, at 1. The museum’s director, Dennis Barrie, was also acquitted. Five of the 175 photographs in the exhibition “depicted men in sadomasochistic poses and were the basis of charges that the museum and Mr. Barrie had pandered obscenity.” *Id.* at 6.

these changes occurred. Reviewing this history is important, too, because it ought to make us humble about our certainties. *Hicklin* and its followers in American jurisprudence aimed to control thought. They said so explicitly.<sup>39</sup> The dominant targets of the opinions were ideas and images, which courts ruled could not be disseminated because they could inspire morally unworthy thoughts in some viewers or readers. Courts saw no need to find even a remote connection between bad thoughts and bad conduct. Bad thoughts alone justified suppression.<sup>40</sup>

Today, of course, we do not need a study to remind us that ideas should not be suppressed even if deemed morally offensive. We do not currently face legal contraction of First Amendment rights for the arts, at least not by the courts. If local legislatures occasionally go overboard, they will be corrected.<sup>41</sup> But that does not mean the *Hicklin* to *Ulysses* study is merely an interesting chapter in legal history, although it is certainly that. The study has current value. The suppression of *Ulysses*, which seems preposterous today, should caution us against temptation to use the law or the purse to control the lives or thoughts of others who are harming no one.

The practical story, incident to the doctrinal one, focuses on the *Ulysses* litigations. Two lawyers in the same city, working a dozen years apart with somewhat different precedent and case records, before different courts, sought to avoid *Hicklin* and other decisions to achieve their clients' goals. The first lawyer, John Quinn, expected to fail and did;<sup>42</sup> the second lawyer, Morris Ernst, ardently believed the law should protect his client's right to publish and won.<sup>43</sup> Ernst's 1933 success in freeing the finished book does not mean that a more confident Quinn would have won at trial in 1921 by using Ernst's arguments. For although Quinn had to defend only a portion of one chapter of the book, the climate then was less

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39. See, e.g., *infra* note 40 and text accompanying note 109.

40. In a pre-trial decision refusing to hold that *The Well of Loneliness* was not obscene as a matter of law, the court ruled that the book was "calculated to deprave and corrupt minds open to its immoral influences." *People v. Friede*, 233 N.Y.S. 565, 570 (N.Y. Magis. Ct. 1929). The predicted corruption of at least some minds was the evil that the state could prevent without regard to the conduct that might or might not ensue from the corruption. How exactly reading this book, whose subject was lesbianism, would actually corrupt or "influenc[e]" a reader, is left unsaid. At trial, all three judges acquitted the publisher. See PAUL S. BOYER, *PURITY IN PRINT* 133–34 (2d ed. 2002).

41. *Executive Arts Studio, Inc. v. City of Grand Rapids*, 391 F.3d 783 (6th Cir. 2004) (enjoining ordinance limiting operation of adult bookstore). I acknowledge as a special case exception *National Endowment for the Arts v. Finley*, 524 U.S. 569, 572 (1998) (requiring that the NEA consider general standards of "decency and respect" for diverse beliefs and values of the American public in making grants is not facially invalid under First Amendment).

42. See *infra* Part IV.C.

43. See *infra* Parts IV.E and IV.F.

hospitable to sex in print. I will suggest, however, that Quinn might have won on appeal with the arguments Ernst made and if Quinn had been willing, as Ernst was, to reach beyond the court for support from the influential public.<sup>44</sup> Quinn did not appeal because he thought loss was inevitable. The case law was more favorable to Ernst than to Quinn and Ernst benefited from the fact that Joyce's reputation was firmly established by 1933. But Ernst had a burden Quinn did not have. The entire book, especially the final chapter, is far more sexually explicit than the pages Quinn had to defend.<sup>45</sup>

Others have told a third story about American obscenity prosecutions in the half century leading up to the Second Circuit's 1934 opinion in *Ulysses* (and thereafter). That story, equally important, asks why those who wished to censor books and plays were so successful—before legislative bodies and among the public—even when their claims defied common sense. Studies have offered many explanations. One cites the sheer determination of Anthony Comstock, the first secretary of the New York Society for the Suppression of Vice, founded in 1873,<sup>46</sup> and of individuals who supplied money and energy to anti-vice groups, a determination that others were unwilling to challenge even if they disagreed. Another explanation identifies the wish of elite groups to keep candor about such things from the lower classes, a threat otherwise present as literacy increased and books became cheaper. A third view is that support for the anti-vice efforts was part of a larger movement to improve the lives of the lower classes by freeing them from “filth” of all kinds, not only disease and unhealthy living conditions. Others have seen the anti-vice movement as a way to keep women ignorant about birth control, abortion, and even sex. And yet others have argued that the upper class joined this effort in order to protect their own children from a temptation that might cause them to lose their expected place in society.<sup>47</sup>

I do not join this third debate. My interest is how the courts responded to censorship charges once they were leveled, or more particularly, how and why they failed to respond in a mindful way. That is, why did they fail to bring anything that can be recognized as the rule of law to the issues

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44. See *infra* text accompanying notes 253–58.

45. The final chapter is the “Penelope” episode in which Molly Bloom, half awake, recalls events in her life, both before and after her marriage to Leopold Bloom. Her reverie is in several places particularly explicit. JAMES JOYCE, *ULYSSES* 738–83 (Vintage ed. 1990).

46. DE GRAZIA, *supra* note 29, at 4.

47. The literature containing these explanations is identified in Donna I. Dennis, *Obscenity Law and the Conditions of Freedom in the Nineteenth-Century United States*, 27 *LAW & SOC. INQUIRY* 369 (2002) (book review).

raised in the contests before them? Where did American courts find the law? What weight did they give to the right to speak and publish? What conditions, in addition to the skills of Morris Ernst, contributed to the federal rulings that freed *Ulysses*, rulings that began (but only began) a decades-long retreat from the *Hicklin* straitjacket and toward greater artistic and literary freedom?

To understand the *Ulysses* cases it is necessary to appreciate their antecedents, especially the *Hicklin* decision in England and three subsequent obscenity prosecutions (two state and one federal) in nineteenth-century New York. These four cases are discussed next. The Article then moves to its two main acts: the prosecution of Anderson and Heap and the federal court decisions that allowed Random House safely to publish *Ulysses* in the United States. The second of these federal decisions, from the Second Circuit Court of Appeals, may be seen as the progenitor of modern obscenity law. Less prominent cases in the story are examined throughout.

### III. ANTECEDENTS OF THE *ULYSSES* CASES: *HICKLIN*, *BENNETT*, *MULLER*, AND *KNOEDLER*

The lawyers who had to defend *Ulysses* (or a part of it) against obscenity charges in the third and fourth decades of the last century faced at least three hostile appellate cases that would have to be overruled or distinguished for any chance of success. Appreciating the legal strategies and results in the *Ulysses* cases requires attention to these and other decisions prior to 1920, when Anderson and Heap were charged.

#### A. *R v. Hicklin*

[T]he most filthy and disgusting and unnatural description it is possible to imagine.<sup>48</sup>

*R v. Hicklin*<sup>49</sup> has its genesis in religious animosity—Protestant against Catholic—but it was not a case about blasphemy or religious difference. Nor was it, strictly speaking, a criminal prosecution, although a statutory peculiarity gave it a criminal law dimension. The case most resembles an

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48. *R v. Hicklin*, [1868] 3 Q.B. 360, 371.

49. The full title of the case in the law reports is “The Queen, on the Prosecution of Henry Scott, Appellant, v. Benjamin Hicklin and Another, Justices of Wolverhampton, Respondents.” *Id.* at 360. The explanation for this title will become apparent in the text.

action for forfeiture. The objects of the forfeiture were copies of a pamphlet entitled “The Confessional Unmasked” and provocatively subtitled “shewing the depravity of the Romish priesthood, the iniquity of the Confessional, and the questions put to females in confession.”<sup>50</sup> I quote from the official report for the sequence of events leading up to the action:

The appellant [Scott] is a metal broker, residing in the town of Wolverhampton, and a person of respectable position and character. He is a member of a body styled “The Protestant Electoral Union,” whose objects are, inter alia, “to protest against those teachings and practices which are un-English, immoral, and blasphemous, to maintain the Protestantism of the Bible and the liberty of England,” and “to promote the return to Parliament of men who will assist them in these objects, and particularly will expose and defeat the deep-laid machinations of the Jesuits, and resist grants of money for Romish purposes.” In order to promote the objects and principles of this society, the appellant purchased from time to time, at the central office of the society in London, copies of a pamphlet, entitled “The Confessional Unmasked” . . . of which pamphlets he sold between two and three thousand copies at the price he gave for them, viz., 1s. each, to any person who applied for them.

A complaint was thereupon made before two justices of the borough [respondents], by a police officer acting under the direction of the Watch Committee of the borough, and the justices issued their warrant under the above statute, by virtue of which warrant 252 of the pamphlets were seized on the premises of the appellant, and ordered by the justices to be destroyed.

The pamphlet consists of extracts taken from the works of certain theologians who have written at various times on the doctrines and discipline of the Church of Rome, and particularly on the practice of auricular confession. On one side of the page are printed passages in the original Latin, correctly extracted from the works of those writers, and opposite to each extract is placed a free translation of such extract into English. The pamphlet also contains a preface and notes and comments, condemnatory of the tracts and principles laid down by the authors from whose works the extracts are taken. About one half of the pamphlet relates to casuistical and controversial questions which are not obscene, but the remainder of

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50. *Id.* at 362.

the pamphlet is obscene in fact as relating to impure and filthy acts, words, and ideas. The appellant did not keep or sell the pamphlets for purposes of gain, nor to prejudice good morals, though the indiscriminate sale and circulation of them is calculated to have that effect; but he kept and sold the pamphlets, as a member of the Protestant Electoral Union, to promote the objects of that society, and to expose what he deems to be errors of the Church of Rome, and particularly the immorality of the Confessional.<sup>51</sup>

The recorder overruled the local justices. He agreed that the pamphlets were obscene,<sup>52</sup> which Scott's counsel had in any event conceded, but concluded that they could not be destroyed "under these circumstances," a reference to Scott's purposes, which Chief Justice Cockburn later characterized for the Queen's Bench as "not to do harm, but good."<sup>53</sup> Scott's counsel argued that the absence of "criminal intention" deprived the court of jurisdiction to order destruction of the pamphlets.<sup>54</sup> A modern lawyer would reply that the owner's intent is irrelevant because a forfeiture action proceeds against the thing itself.<sup>55</sup> It is not a prosecution of the owner; however, the governing statute in *Hicklin* had a peculiarity, whose purpose would appear to be to protect speech. The statute permitted seizure and destruction of an article only if its "publication . . . would be a misdemeanor and proper to be prosecuted as such."<sup>56</sup> (The conjunctive "and" can be seen as a further limitation.) The Queen's Bench therefore

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51. *Id.* at 362–63.

52. Chief Justice Cockburn states that the recorder did not reverse the magistrates on the ground that the pamphlet was not obscene.

[H]e leaves that ground untouched, but he reversed the magistrates' decision upon the ground that, although this work was an obscene publication, and although its tendency upon the public mind was that suggested upon the part of the information, yet that the immediate intention of the appellant was not so to affect the public mind, but to expose the practices and errors of the confessional system in the Roman Catholic Church.

*Id.* at 370.

53. *Id.* at 363–64.

54. *Id.* at 363.

55. *See, e.g.,* *Riley v. 1987 Station Wagon*, 650 N.W.2d 441, 443 (Minn. 2002) ("In Minnesota, an action for forfeiture is a civil *in rem* action. The property seized becomes the defendant based on the legal fiction that it is the inanimate object itself, not its possessor or owner, that is guilty of wrongdoing.") (citations omitted).

56. *Hicklin*, 3 Q.B. at 361 n.1. The statute required the magistrate to find that the "articles . . . are of such a character and description that the publication of them would be a misdemeanor, and proper to be prosecuted as such." *Id.* The magistrate also had to find that the obscene material was kept "for the purposes of sale or distribution, exhibition for the purposes of gain, lending upon hire, or being otherwise published for purposes of gain." *Id.* The word "gain" is used only with regard to certain of the forbidden conduct, not all of it, a point stressed by counsel for the Queen, who argued that the "word 'gain' does not occur in the clause, 'for the purpose of sale or distribution.'" *Id.* at 368.

had to decide whether distribution of the pamphlet could be punished as a crime. “Here,” Scott’s counsel argued, “the publication of this pamphlet, though obscene, was with an honest intention of exposing the Roman Confessional . . . .”<sup>57</sup>

Queen’s counsel sought to distinguish between intention and motive.<sup>58</sup> In so far as intent is relevant, he argued, “it must be inferred that [Scott] intended the natural consequences of his act” and those were to “prejudice good morals.”<sup>59</sup> Cockburn accepted this argument. Motive was irrelevant. Since Scott had conceded that the pamphlet was obscene, the court could infer intent.<sup>60</sup> Scott did not claim ignorance of its content. Because he distributed the pamphlet, aware of its content, and because the pamphlet was obscene, Scott was guilty.

Cockburn dismissed Scott’s claim “that there are a great many publications of high repute in the literary productions of this country the tendency of which is immodest, and, if you please, immoral, and possibly there might have been subject-matter for indictment in many of the works which have been referred to.”<sup>61</sup> (Counsel had cited Chaucer, Dryden, Shelley and Byron.)<sup>62</sup> The court was unmoved. It was concerned only with the pamphlet before it. Cockburn then stated what he called the “test of obscenity” in language that would become famous in English and American jurisprudence, though often cited without regard to the facts before the *Hicklin* court:

I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.<sup>63</sup>

Cockburn elaborated. It was “quite certain,” he said, “that [the pamphlet] would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character.”<sup>64</sup> He emphasized that the pamphlet “is sold at the corner of streets, and in all directions, and of course it falls into the hands of persons of all classes, young and old, and the minds of those hitherto

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57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 370.

61. *Id.* at 371.

62. *Id.* at 365, 374, 365.

63. *Id.* at 371.

64. *Id.*

pure are exposed to the danger of contamination and pollution from the impurity it contains.”<sup>65</sup> For Cockburn and the other judges, it was important that Scott made no effort to control the pamphlet’s distribution. Cockburn underscored this importance when he compared the audience for Scott’s pamphlet to the one for medical books:

A medical treatise, with illustrations necessary for the information of those for whose education or information the work is intended, may, in a certain sense, be obscene, and yet not the subject for indictment; but it can never be that these prints may be exhibited for any one, boys and girls, to see as they pass. The immunity must depend upon the circumstances of the publication.<sup>66</sup>

Obscenity, then, does not depend on context. Even a medical treatise may be obscene “in a certain sense.” However, obscenity alone will not justify seizure or prosecution. Whether a medical treatise may be seized as obscene depends on the circumstances of its distribution. Later courts, in lifting Cockburn’s definition of obscenity out of the opinion, ignored the emphasis on Scott’s manner of distribution.

Cockburn recognized that Scott wished to encourage discussion on a subject of public interest, at least as Scott saw it. Implicitly, at least, Cockburn understood that an adverse ruling would interfere with Scott’s “honest” objective. That realization appears to have given Cockburn some pause. (Justice Mellor was explicit on this point, as discussed below.) Cockburn overcame his concern by weighing Scott’s means for achieving his objective against the harm his pamphlet would cause. The balance favored suppression because “the probability is, that nine hundred and ninety-nine out of every thousand into whose hand this work would fall would never be exposed to the chance of being converted to the Roman Catholic religion.”<sup>67</sup> Because Scott’s method was highly inefficient, in other words, he could not justify distribution of the pamphlet in the manner he chose. For Cockburn this was no close case. He called some of the passages in the pamphlet “the most filthy and disgusting and unnatural description[s] it is possible to imagine.”<sup>68</sup> One example is set out in the margin.<sup>69</sup>

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65. *Id.* at 372.

66. *Id.* at 367.

67. *Id.* at 372.

68. *Id.* at 371.

69. The following excerpt is said to come from the writing of Alphonso De Liguori, who the pamphlet says “was canonized at Rome on the 26th of May, 1839.” The purpose in setting out this

Concurring, Justice Blackburn emphasized the “indiscriminate” nature of the distribution<sup>70</sup> and mentioned “schoolboys”<sup>71</sup> as among the potential recipients. He then drew telling analogies. He first cited a case where a man was charged with selling “unwholesome” bread to “a military asylum” where it would be fed to children.<sup>72</sup> Although it was not alleged that “[the man] intended to make the children suffer,” it was held “quite sufficient that he had done an unlawful act in giving them bread which was deleterious.”<sup>73</sup> He then cited a case “in which a person carried a child which was suffering from a contagious disease, along the public road to the danger of the health of all those who happened to be in that road.” That conduct could be prosecuted as a misdemeanor even though it was not “alleged that defendant intended that anybody should catch the disease.”<sup>74</sup> The comparison of obscene matter to tainted food and a contagious disease helps explain why England viewed obscene material as dangerous in the first place. Disease and tainted food injure the body. They must be stopped. Obscenity “deprave[s] and corrupt[s]” the mind, which is also an “evil” (Cockburn uses this word).<sup>75</sup> That must be stopped. In short, reading the “filthy” passages in “The Confessional Unmasked” would deprave and corrupt the minds of some individuals into whose hands it may fall, especially given Scott’s mode of dissemination.

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English translation of the works of Liguori (and others) was to reveal the content of what occurs in the confessional.

It is asked, 1st, does a man sin mortally by commencing the act of copulation in the hinder vessel, that he may afterwards finish it in the proper vessel? This is denied by Navarr. &c., provided there be no danger of pollution; because, otherwise, as they say, all touches, even venereal, are not grievously illicit among married persons. But it is commonly and more truly affirmed by Sanchez, &c. The reason is, because the very act of copulation after this manner (even without spending) is real sodomy, although not consummated, just as copulation itself in the natural vessel of a strange woman is real fornication, though there may be no spending. But is it a mortal sin for a man to rub his \_\_\_ against the hinder vessel of the wife? This is denied by Sanchez, &c., because to touch the mouth of the hinder vessel is not ordained for sodomical copulation. But it is more truly affirmed by Pontius, &c., and also by Tambur. (who testifies that the opinion of Sanchez has been expunged from some books. Nay, Moyas asserts that Sanchez himself had retracted, in the Antwerp edition, anno 1614.) The reason is, that such touch cannot morally take place without affecting sodomy.

ALPHONSO DE LIGUORI, THE CONFESSIONAL UNMASKED 58 (1867).

70. R v. Hicklin, [1868] 3 Q.B. 360, 376.

71. *Id.* at 377.

72. *Id.* at 376.

73. *Id.*

74. *Id.* Cockburn also adopts this analogy, using the words “contamination and pollution from the impurity [the pamphlet] contains.” *Id.* at 372.

75. *Id.* at 372.

Finally, Justice Mellor had what he called “hesitation”<sup>76</sup> even though, in the end, he agreed with the others. He believed that the subject of Scott’s argument was legitimate for public discussion and wrote that “it cannot be discussed without to a certain extent producing authorities for the assertion that the confessional would be a mischievous thing to be introduced into this kingdom.”<sup>77</sup> But to what extent? For Mellor, that was the key issue. It was “very much a question of degree.”<sup>78</sup> Scott went “far beyond anything which was necessary or legitimate for the purpose.”<sup>79</sup> The result might have differed if Scott’s text had been more subtle. It might then have satisfied Mellor’s explicit balancing of the interest in public debate against the content of the pamphlet. But not even a toned-down text would likely have satisfied Cockburn’s implicit balancing test, which weighed the content of the pamphlet against the strong improbability that it could achieve Scott’s goal.

*Hicklin* differs from most of the cases that later embraced Cockburn’s one sentence definition of obscenity. The pamphlet Scott sold advocated an idea; it was not a creative work. As Mellor recognized, that idea could scarcely be separated from the content of the questions allegedly put in “The Confessional” and which Scott wished to publicize. Of course, Scott could have described the content generally, but that would have much diminished the force of his argument, which depended on the explicit nature of the questions. The court was therefore in the position of using the designation “obscene” to limit public debate on an issue that Mellor, at least, considered a legitimate public concern. The court did not allow publication of the very language needed to focus the debate. Later courts that cited either *Hicklin* or its test for obscenity mostly addressed creative works. One exception is the prosecution of Deboigne Bennett for distributing “Cupid’s Yokes,” discussed below.<sup>80</sup>

This difference leads in turn to a broader question: Should the degree of protection for a written work turn on whether it is fiction (or other creative work) or is instead an effort to address an idea or a matter of public policy? If so, which purpose should enjoy greater protection? Should courts weigh, as Cockburn did, the likelihood that an advocacy piece would successfully change minds? Should the courts weigh, as Mellor did, whether the interest in public debate could be satisfied with a

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76. *Id.* at 378.

77. *Id.*

78. *Id.*

79. *Id.*

80. *See infra* text accompanying notes 83–115.

less explicit text? Some of these questions, largely ignored in the following decades, surfaced in the second *Ulysses* case, implicitly in the majority opinion and explicitly in the dissent, to the advantage of fiction, which emerged with the same legal protection as non-fiction.<sup>81</sup>

*Hicklin* soon migrated to the United States, carrying in its luggage three important and influential legal principles. First, indiscriminate distribution of sexually explicit material, whose nature is known to the distributor, can support an obscenity prosecution regardless of the distributor's good motives. Second, the fact that intent can be inferred from knowledge of the content creates something close to absolute liability. The defendant will not be heard to say that although he knew the content, he did not know it was obscene. Last, Cockburn's broad language suggests he would likely have ruled the same even if Scott had limited distribution to adults. The American courts did not read the case as turning on the likelihood that the pamphlets would reach children. Nor did they treat a broader reading as gratuitous, though it was. Mostly, they just quoted a single sentence.

#### B. *United States v. Bennett*

The most obscene, lewd, and lascivious matter may be conveyed by words which in themselves are not of an obscene character. The question is as to the idea which is conveyed in the words that are used, and that idea characterizes the language.<sup>82</sup>

As demonstrated by this and other incoherent pronouncements in *United States v. Bennett*,<sup>83</sup> *Hicklin*'s several opinions, and the disparity between its unusual facts and its ambitious pronouncements, made it difficult to predict what courts would find unprintable. In 1879, *Bennett*, an obscenity prosecution, made matters worse. The excerpt quoted above was part of the trial court's instruction to the jury.<sup>84</sup> But earlier in the instructions the court also told the jurors that "[f]reelovers and freethinkers have a right to their views, and they may express them, and they may publish them."<sup>85</sup> One can scarcely imagine how a lay jury could reconcile the apparent contradiction even if it could discern the court's meaning: While freethinkers have a "right" to express and publish "their views,"

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81. See *infra* text accompanying notes 410–11.

82. *United States v. Bennett*, 24 F. Cas. 1093, 1102 (C.C.S.D.N.Y. 1879) (No. 14,571).

83. 24 F. Cas. 1093 (C.C.S.D.N.Y. 1879) (No. 14,571).

84. *Id.* at 1100–02.

85. *Id.* at 1101.

they cannot publish obscene ideas, and ideas can be obscene even if no obscene language is used to express them. So, that must mean that freelovers and freethinkers may not express and publish at least some of their views on free love and free thought. *Bennett* is the first reported American obscenity case to cite *Hicklin*. It addressed a far tamer document than did *Hicklin* and, unlike *Hicklin*, was a true criminal prosecution, not a hypothetical one. But like *Hicklin*, and unlike later cases that rely on it, *Bennett's* focus was a work of advocacy, not a creative work. Using the "obscenity" label to foreclose distribution of the work, therefore, impeded discussion of ideas, a purpose that the court purported to disclaim but inevitably endorsed.

*Bennett's* factual background is unusual. The prosecution seems to have had its genesis in a battle of wills between Anthony Comstock<sup>86</sup> and two men whose social views made them his polar opposite. The defendant was Deboigne M. Bennett, but he was not the author of the offending publication. As Professor David Rabban tells the story, Ezra Heywood, born in 1829, published a twenty-three page pamphlet entitled "Cupid's Yokes" in 1876.<sup>87</sup> Heywood was an abolitionist, civil libertarian, labor reformer, peace activist, and advocate of the right of women to vote.<sup>88</sup> In many ways he was ahead of his time and in some ways, perhaps, of present times, too. Apparently, Heywood was not shy in proclaiming his views on these issues. Rabban writes:

[*Cupid's Yokes*] linked free love to abolitionism and labor reform under an umbrella of anarchist commitments to individual autonomy and freedom from state control. Although *Cupid's Yokes* included some sexually explicit references to birth control, it was essentially a polemical attack on marriage. *Cupid's Yokes* contained

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86. On Comstock generally, see HEYWOOD BROUN & MARGARET LEECH, ANTHONY COMSTOCK: ROUNDSMAN OF THE LORD (1927); MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF YOUTH 29–36 (2001). Comstock believed that "[t]he three great crime-breeders of today are intemperance, gambling, and evil reading." Mary Alden Hopkins, *Birth Control and Public Morals: An Interview with Anthony Comstock*, HARPERS WEEKLY, May 22, 1915. Regarding the last, he wrote in a letter celebrating the fortieth anniversary of the Society for the Suppression of Vice: "If you allow the devil to decorate the Chamber of Imagery in your heart with licentious and sensual things, you will find that he has practically thrown a noose about your neck and will forever after exert himself to draw you away from the 'Lamb of God which taketh away sins of the world.'" *Id.* Once vile pictures "enter through the eye and ear into the chamber of imagery in the heart of the child, nothing but the grace of God can ever erase or blot it out." *Id.*

87. David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 STAN. L. REV. 47, 58–61 (1992).

88. *Id.* at 58.

few references to sexual activity and no passages that could conceivably be considered prurient or titillating.

According to Heywood, the institution of marriage allowed “the legalized slavery of women,” the “idea that women belong to men” as a form of property. The “great social fraud” marriage made sex a “marketable commodity.” A prostitute may be bought for a night, but a wife “becomes a ‘prostitute’ for life.” Heywood regarded marriage and capitalism as “twin relic[s] of barbarism.” The profit system and marriage, both sanctioned by the state, robbed individuals of their personal sovereignty.

Heywood asserted that “the right of private judgment, which is conceded in politics and religion,” should be extended to domestic life as well. He regarded “sexual self-government,” the right of individuals to determine for themselves “when, where, and how” their sexual organs will be used, as a key component of “Personal Liberty and the Rights of Conscience.” “If government cannot justly determine what ticket we shall vote, what church we shall attend, or what books we shall read,” Heywood asked, “by what authority does it watch at key-holes and burst open bed-chamber doors to drag lovers from sacred seclusion?”<sup>89</sup>

Rabban’s conclusion that *Cupid’s Yokes* contained “no passages that could conceivably be considered prurient or titillating” is certainly true. The pamphlet was a polemic pure and simple, advocating libertarian ideas that surely offended most people in 1876 and some of which would offend many people today. But they were nonetheless ideas. The tone of the pamphlet is preachy. It probably works better in a speech than read. Examples of statements that might have attracted prosecution are:

The Free Love faith proclaims the fact that persons recognized in law as capable of making a sexual contract are, when wiser by experience, morally able to dissolve that contract; and that Passion is not so depraved as to be incapable of redemption and self-government.

Marriage, then, being the creature of *men’s* law, we have the same right to alter or abolish it that we have respecting any other human institution. The principles of Nature derived from a careful

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89. *Id.* at 62 (footnotes omitted).

study of essential liberty and equity are a safer guide than crude social codes which come to us from the ignorant and despotic past.

It is admitted that, if the previous partners in her bed are divorced by death or other cause, a woman may truly love and wisely marry the second or fifth man; but the purity of her love for the fifth man is not determined by the previous four being dead or divorced; were they all living and her personal friends, she can love the last man as truly as she loved the first.

Love is not burnt out in one honeymoon, or satisfied by one lover; the secret history of the human heart proves that it is capable of loving any number of times and persons, and that the more it loves the more it can love. This is the law of Nature, thrust out of sight and condemned by common consent, yet secretly known to all. Variety is as beautiful and useful in love as in eating and drinking. The one-love theory, based on jealousy, comes not from loving hearts, but from the greedy claimant.

The eye, the arm, or leg perishes by non-use; so without natural vent, exuberant sexual vitality wastes and destroys.

Why should the right of private judgment, which is conceded in politics and religion, be denied to domestic life? . . . Why should priests and magistrates supervise the Sexual Organs of citizens any more than the brain and stomach? If we are incapable of sexual self-government, is the matter helped by appointing to “protect” us, “ministers of the Gospel,” whose incontinent lives fill the world with “scandals?”<sup>90</sup>

Comstock, whose law and goals Heywood criticized in the pamphlet, instigated a successful federal criminal prosecution in Massachusetts for posting the pamphlet in the United States mail.<sup>91</sup> Heywood was sent to

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90. E.H. HEYWOOD, *CUPID'S YOKES: OR THE BINDING FORCES OF CONJUGAL LIFE* 5, 6, 13, 14, 17, 21 (1877) (emphasis added) (footnotes omitted). A further subtitle for the pamphlet is: “An Essay to Consider some Moral and Physiological Phases of Love and Marriage, Wherein is Asserted the Natural Right and Necessity of Sexual Self-Government.”

91. On Comstock's power of arrest as a “special agent” of the post office, see JAMES PAUL & MURRAY SCHWARTZ, *FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL* 24 (1961); 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, 748 (1992); Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 FORDHAM L. REV. 263, 304–05 n.296 (1986).

prison for two years.<sup>92</sup> Thereafter, Bennett, whom Rabban describes as the “leader of the most militantly antireligious and socially radical wing of the freethought movement,”<sup>93</sup> took up Heywood’s cause, not because Bennett agreed with all of Heywood’s ideas about free love but, like a good civil libertarian, because he wanted to support Heywood’s right to express his views in a publication that Bennett did not consider obscene.<sup>94</sup> Comstock then arrested Bennett. A New York federal jury convicted him of mailing the pamphlet. The sentence was thirteen months.<sup>95</sup> Why was Bennett’s sentence less than Heywood’s for the same act? Perhaps because Bennett was not the author, or because he did not agree with all of Heywood’s views, or because his purpose in mailing the pamphlet was specifically to challenge the law, or simply because the judge was different. We cannot know.

Much of the appellate opinion affirming Bennett’s conviction is taken up with deciding whether the indictment had to repeat the language charged as obscene.<sup>96</sup> It did not, said the court, so long as the defendant was able to learn of the allegedly obscene parts, as through a bill of particulars, which Bennett had not bothered to request.<sup>97</sup> Several other holdings are more immediate to this study. The trial judge told the jury that (1) the pamphlet was obscene if “any substantial part of it, [was] obscene, lewd, lascivious, or of an indecent character;”<sup>98</sup> (2) “Freelovers and freethinkers have a right to their views, and they may express them, and they may publish them; but they cannot publish them in connection with obscene matter, and then send [them] through the mails;”<sup>99</sup> (3) a work can be obscene even though it contains no obscene words because the “question is as to the idea which is conveyed in the words that are used;”<sup>100</sup> (4) the jury had to decide whether the “tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such

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92. Rabban, *supra* note 87, at 64.

93. *Id.*

94. *Id.* at 65.

95. *Id.*

96. *United States v. Bennett*, 24 F. Cas. 1093, 1095–98 (C.C.S.D.N.Y. 1879) (No. 14,571).

97. *Id.* (citing case law from England, Massachusetts, Michigan, Vermont, Illinois, and other American jurisdictions). Omission of the offensive language from the text of the indictment did not prejudice the defendant, who “had information given to him as to the offence charged, by the date of the mailing, by the title of the book, and by the address on the wrapper.” *Id.* at 1098. The defendant could have obtained a copy of the book, with the obscene passages designated “by asking for a bill of particulars.” *Id.*

98. *Id.* at 1102.

99. *Id.* at 1101.

100. *Id.* at 1102.

influences, and into whose hands a publication of this sort may fall;”<sup>101</sup> and (5) a work is obscene “if it would suggest impure and libidinous thoughts in the young and the inexperienced.”<sup>102</sup> The second, third, and fifth instructions are contradictory, if not logically then practically. How can “freelovers and freethinkers” publish their views on marriage and sexuality if these views can be declared obscene, even without obscene words, or if the authors can then be prosecuted for an “idea” that “would suggest impure and libidinous thoughts in the young and inexperienced?” Without recognizing it, or if recognized without acknowledging it, *Bennett* affirmed a conviction for conveying ideas, in unobjectionable language, because of the “impure” thoughts they would “suggest” in a population seen as particularly susceptible.

Regarding the charge that the work would be obscene if “any substantial part” was such, the prosecutor had marked certain passages and the court instructed the jurors that they “may confine their attention to the marked passages. It is upon those passages alone that this case must turn.”<sup>103</sup> On the issue of whose minds might be depraved by the marked passages, the trial judge was quite clear that the jurors were not to consider their own minds but rather, and almost tautologically, “the minds of those open to such influences and into whose hands a publication of this character might come.”<sup>104</sup> How the jury was to know the operation of the minds of these individuals is incomprehensible, especially as no expert testimony was then (or for decades following) permitted in obscenity prosecutions, not that it is clear who such an expert might have been at the time.

Last, an issue that would loom in years ahead was the state of mind that the prosecution had to prove. As in *Hicklin*, the jury was told that Bennett’s motive was irrelevant.<sup>105</sup> But the prosecution had to show that Bennett acted “knowingly” because that was what the statute required. It was not enough to prove that Bennett knew that he mailed the work. He had to know its contents. But this turned out not to be an issue because, as the court told the jury, the fact that the defendant “knew what the book

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101. *Id.* The court articulated this standard in various ways. For example, shortly thereafter the court told the jury that “[p]assages are indecent within the meaning of this act, when they tend to obscenity—that is to say, matter having that form of indecency which is calculated to promote the general corruption of morals.” *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 1102.

105. *Id.* (“The question is, whether this man mailed an obscene book; not why he mailed it. His motive may have been ever so pure; if the book he mailed was obscene, he is guilty.”).

was that he mailed was not controverted.”<sup>106</sup> Nor did the jury have to find that Bennett meant to mail an obscene book. Regardless of his motives, and even if he actually believed the book was not obscene, the jury could convict him if it found the marked passages obscene, as the court defined that term.

The circuit court approved all of the instructions, citing *Hicklin*.<sup>107</sup> Indeed, *Hicklin* was its primary authority for the definition of obscenity. No American appellate precedent was cited on the question. The only other authorities cited were a second English case that relied on *Hicklin*<sup>108</sup> and the trial judge’s charge to the jury in the prosecution of Ezra Heywood, which seems to have afforded Heywood even less protection than the *Hicklin* standard. In *Heywood*, the judge told the jury that it “may consider . . . whether [certain books] excite *impure desires* in the minds of the boys and girls or other persons who are susceptible to such impure thoughts and desires.”<sup>109</sup> This had to be the test because “[i]f any other standard were adopted, probably no book would be obscene, because there would be some men and women so pure, perhaps, that it would not excite an impure thought.”<sup>110</sup> The only options, in other words, were either to weigh the effect of the book on children or on someone “so pure,” and the latter was unacceptable because then “probably no book would be obscene.”<sup>111</sup>

The *Bennett* trial judge slightly altered the *Hicklin* definition of obscenity. In *Hicklin*, Cockburn had said:

I think the test of obscenity is this, whether the tendency of the matter *charged as obscenity* is to deprave and corrupt those whose minds are open to such *immoral* influences, and into whose hands a publication of this sort may fall.<sup>112</sup>

In *Bennett* the trial judge told the jury that the test of obscenity was

whether the tendency of the matter is to deprave and corrupt *the morals of* those whose minds are open to such influences, and into whose hands a publication of this sort may fall.<sup>113</sup>

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106. *Id.* at 1101.

107. *Id.* at 1104.

108. *Id.* (citing *Steele v. Brannan*, [1872] 7 L.R.C.P. 261).

109. *Id.* at 1105 (emphasis added).

110. *Id.*

111. *Id.*

112. *R v. Hicklin*, [1868] 3 Q.B. 360, 371 (emphasis added).

113. *Bennett*, 24 F. Cas. at 1102 (emphasis added).

The *Bennett* charge omitted the words “charged as obscenity” and the word “immoral” and inserted “the morals of” after “corrupt.” A small distinction, but now the jury was asked about the corrupting effect on a reader’s “morals,” not the reader as such. The circuit court wrote that the “meaning of the two sentences is identical.”<sup>114</sup>

If *Hicklin* was bad for writers and publishers, *Bennett* was worse because of the far tamer content of *Cupid’s Yokes*. While *Hicklin* reported confessional dialogue that was fairly explicit, if only in a roundabout way, *Cupid’s Yokes* contained nothing of the kind. If it offended, it was because of its ideas. The effect of *Bennett* was to warn polemicists that discussion in print of socially radical views about sex and marriage, and especially of the former outside the latter, was punishable as a crime regardless of the language used. Although the pamphlet in the prosecutions of Bennett and Heywood had been mailed, thereby providing federal jurisdiction, distribution of allegedly obscene matter outside the mails could be punished under state law.<sup>115</sup>

### C. The Prosecution of August Muller of Barclay Street

[The] object of the statute was to . . . protect the community against . . . contamination and pollution.<sup>116</sup>

The 1884 opinion of the New York Court of Appeals in *People v. Muller* marks *Hicklin*’s first appellate appearance in a New York obscenity case.<sup>117</sup> August Muller was convicted for selling obscene photographs of

114. *Id.* at 1104.

115. Prior to 1934, when the Second Circuit affirmed Judge Woolsey’s decision admitting *Ulysses* into the United States, *Bennett* did not have significant influence, but it had some. The United States Supreme Court cited it mainly on the issue of what an obscenity indictment must allege to constitute proper notice. *Rosen v. United States*, 161 U.S. 29, 39 (1896). But *Rosen* also approved of the trial court’s jury charge, which rested on *Hicklin*. See *infra* text accompanying notes 401–05. No majority opinion of the New York Court of Appeals cited *Bennett* for the definition of obscenity. A New York appellate court relied on its definition once. *People v. Pesky*, 243 N.Y.S. 193, 196 (App. Div. 1930). See also *Dreiser v. John Lane Co.*, 171 N.Y.S. 605, 606 (App. Div. 1918) (dicta). In the Second Circuit, *Bennett* remained good law until 1930, although that was not apparent until 1934, when *United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705, 708 (2d Cir. 1934), concluded that *United States v. Dennett*, 39 F.2d 564 (2d Cir. 1930), was “inconsistent with” *Bennett*. Two years later, Learned Hand held that *Dennett*, which his cousin Augustus wrote, had in fact overruled *Bennett*. *United States v. Levine*, 83 F.2d 156, 157 (2d Cir. 1936). *Levine* also concluded that the New York Court of Appeals had also rejected *Bennett*, in effect though not by name, in *Halsey v. N.Y. Society for the Suppression of Vice*, 136 N.E. 219 (N.Y. 1922), decided nineteen months after the convictions of Anderson and Heap.

116. *People v. Muller*, 96 N.Y. 408, 413 (1884).

117. The first appearance of *Hicklin* in a New York Court of Appeals opinion occurs in *Gardner*

paintings in a store on Barclay Street in lower Manhattan. The court paraphrased the *Hicklin* test and approved its use for photographs. No other judicial authority is cited in the opinion and the sole non-judicial authority is an evidence treatise,<sup>118</sup> cited for the proposition that Muller was not entitled to call expert witnesses. The trial court had refused to allow Muller to call an artist and a student of art to testify to what artists understood to be the difference “between pure art and obscene and indecent art.”<sup>119</sup> Some forty years later, in the first *Ulysses* case, Jane Heap would echo the legitimacy of the implied claim that art and obscenity are mutually exclusive categories,<sup>120</sup> and more than three decades after that, the United States Supreme Court would largely agree.<sup>121</sup> Eventually, too, expert testimony would be permitted to assist juries in deciding whether a writing or image was obscene.<sup>122</sup>

v. *People*, 62 N.Y. 299 (1875). But *Gardner* was not an obscenity case. *Hicklin* was cited on an evidentiary issue. After *Muller*, *Hicklin* did not again appear in a Court of Appeals opinion until 1922, when the dissent cited it in *Halsey*. 136 N.E. at 221. *Halsey* is further discussed *infra* at text accompanying notes 233–39. *Hicklin* next appeared in a majority opinion of the Court in 1953, when *Commercial Pictures Corp. v. Bd. of Regents*, 305 N.Y. 336 (1953), upheld the refusal of the Board of Regents to license “La Ronde” for exhibition. The United States Supreme Court reversed in *Superior Films, Inc. v. Dep’t of Educ. of Ohio Div. of Film Censorship*, 346 U.S. 587 (1954). The Court of Appeals’ two citations to *Hicklin* after 1953 are for historical reasons only, not as authority. See *People v. Richmond County News, Inc.*, 9 N.Y.2d 578, 584 (1961); *Excelsior Pictures Corp. v. Regents of the Univ. of N.Y.*, 3 N.Y.2d 237, 242 (1957). The last time *Hicklin* appeared in any reported New York State case was 1970, where the trial court cited it in finding an issue of “Zap Comix No. 4” obscene. *People v. Kirkpatrick*, 316 N.Y.S.2d 37, 45 (N.Y. Crim. Ct. 1970), *aff’d*, 329 N.Y.S.2d 769 (App. Div. 1971). But here, too, it is cited only for historical purposes and not as authority.

118. The citation is to Greenleaf on *Evidence*. *Muller*, 96 N.Y. at 412 (citing SIMON GREENLEAF, GREENLEAF EVIDENCE, § 440).

119. *Muller*, 96 N.Y. at 411.

120. See *infra* text accompanying notes 220–21.

121. *Roth v. United States*, 354 U.S. 476, 487 (1957); *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964). See also FREDERICK SCHAUER, THE LAW OF OBSCENITY 136–39 (1976). *Miller v. California*, 413 U.S. 15 (1973), cut back on the explicit holding of *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), that art and obscenity are hermitically distinct categories—that is, if it is art it cannot be obscene. *Miller* exempted literary and artistic efforts from the reach of obscenity laws only if they had “serious . . . value.” *Miller*, 413 U.S. at 22–25 (emphasis added).

122. As early as 1894, however, just a decade after *Muller*, New York judges themselves cited the opinions of literary critics. *In re Worthington Co.*, 30 N.Y.S. 361 (N.Y. Sup. Ct. 1894) (regarding “Arabian Nights,” “Tom Jones,” Rabelais, Ovid’s “Art of Love,” and the Confessions of Rousseau, among other works). So too did the appellate court in *St. Hubert Guild v. Quinn*, 118 N.Y.S. 582 (N.Y. App. Term 1909) (regarding Voltaire’s “The Maid of Orleans,” and “The Philosophical Dictionary”). The New York Court of Appeals cited expert opinion in *Halsey*, 136 N.E. at 220. See also *People ex rel. Kahan v. Creative Age Press, Inc.*, 79 N.Y.S.2d 198 (N.Y. Magis. Ct. 1948). In the prosecution of the editors of *The Little Review* for publishing an excerpt from *Ulysses*, then a work in progress, the New York Court of Special Sessions did allow at least two experts, but they did not make much of an impression. See *infra* text accompanying notes 196–99 and 306–08. In a roundabout way, expert views were made available to the court a decade later in the effort to win the right to import *Ulysses* into the United States. *United States v. One Book Called “Ulysses,”* 5 F. Supp. 182 (S.D.N.Y. 1933), *aff’d* 72 F.2d 705 (2d Cir. 1934). See *infra* text accompanying notes 307–08, 334–37.

But in 1884, the New York court (and others) thought otherwise. “To permit such evidence would put the witness in the place of the jury,” it wrote, “and the latter would have no function to discharge. The testimony of experts is not admissible upon matters of judgment within the knowledge and experience of ordinary jurymen.”<sup>123</sup>

The Court of Appeals summarized the facts:

The evidence on the trial in support of the indictment related to nine photographs produced before the jury, which were proved to have been sold by the defendant in the ordinary course of his employment as a clerk in a store for the sale of books, pictures and photographs, in the city of New York. The record contains no special description of the photographs, except that it appears that they represented nude females, and were photographic copies of paintings which had been exhibited in the Salon in Paris, and one of them at the centennial exhibition in Philadelphia, and that among them were pictures designated “La Asphyxie,” “After the Bath,” and “La Baigneuse.”<sup>124</sup>

As the case came to New York’s highest court, the remaining legal issues were few. The alleged obscenity of the photographs was not an issue because defense counsel had not “furnished them as a part of the record,” leaving the judges “unable to pass upon the question of their obscenity or indecency.”<sup>125</sup> That made the court’s citation to *Hicklin*’s test for obscenity wholly gratuitous. It had no need to consider whether the photographs were obscene. Unfortunately, this aspect of *Muller* seems to have escaped the attention of later courts. With the question of obscenity out of the picture, the only remaining questions of note were the admissibility of expert testimony and whether the state had to prove that Muller intended to sell obscene photographs. The court said proof of “special intent” to sell obscene pictures was not required, citing *Hicklin* here as well.<sup>126</sup> The state only had to show that Muller sold the paintings and that they were obscene.<sup>127</sup> (Nonetheless, the trial judge did allow

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123. *Muller*, 96 N.Y. at 412 (citations omitted).

124. *Id.* at 409–10. “La Baigneuse,” painted by Leon Jean Basile Perrault, is described at *infra* text accompanying note 139. August Muller was twenty-two years old when he was arrested. JANE CLAPP, ART CENSORSHIP: A CHRONOLOGY OF PROSCRIBED AND PRESCRIBED ART 157 (1972).

125. *Muller*, 96 N.Y. at 410.

126. *Id.* at 413.

127. *Id.* at 411. The opinion is not entirely clear. The court may have confused intent and motive or it may have meant to say that it was only necessary to prove that Muller intended to sell the pictures he sold, not that he had the specific intent to sell obscene pictures. The element of state of mind is addressed at *infra* text accompanying notes 130–37.

Anthony Comstock to testify that a year earlier he had bought Balzac's "Droll Stories" at Muller's shop, a prior act apparently offered to prove that Muller specifically intended to sell an obscene work.)<sup>128</sup> Having negated "special intent" as an element of the crime, the court then muddled the analysis in two other parts of its opinion. In one, it focused on the photographs of the paintings, not their creators, and seemed to imply that they could be capable of having a "motive." After stating the *Hicklin* test for obscenity in print, the court wrote:

We think it would also be a proper test of obscenity in a painting or statue, whether the *motive of the painting or statue*, so to speak, as indicated by it, is pure or impure, whether it is naturally calculated to excite in a spectator impure imaginations, and whether the other incidents and qualities, however attractive, were merely accessory to this as the primary or main purposes of the representation.<sup>129</sup>

By seeming to divorce the obscenity question from the mind of the author or distributor, by speaking of the work as though it had a "motive," the court treated the litigation as one for forfeiture of a dangerous instrumentality. Indeed, the court wrote that "[t]he object of the statute was to suppress the traffic in obscene publications, and to protect the community against the *contamination and pollution* arising from their exhibition and distribution."<sup>130</sup> The obscene object is implicitly analogized to tainted food or a contagious disease, an analogy that also appeared in Justice Blackburn's opinion in *Hicklin*.<sup>131</sup> In this view, the creator's intent or motive would seem to be irrelevant. Tainted food and a contagious disease were evil in themselves and had to be stopped.

But then, in what might be seen as a complete reversal, the court identified a circumstance in which the motive or specific intent of the author or distributor will be critical. Whether a particular item is obscene, it wrote, "may in some cases depend on circumstances."<sup>132</sup> The court mentioned a "medical book for the instruction of medical men," which "may contain illustrations suitable and proper as a part of the work, but which, if detached and published alone for circulation, might be deemed indecent within the statute."<sup>133</sup> Years later, the Supreme Court would also

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128. *Pictures Held to be Impure: Mr. Comstock Not Well Informed as to Balzac*, N.Y. TIMES, Dec. 19, 1883, at 3.

129. *Muller*, 96 N.Y. at 411 (emphasis added).

130. *Id.* at 413 (emphasis added).

131. See *supra* text accompanying notes 70–75.

132. *Muller*, 96 N.Y. at 413.

133. *Id.* The example of medical books repeatedly presented a quandary for courts in the early

identify the manner in which material is marketed as relevant in an obscenity prosecution.<sup>134</sup>

In *Muller*, the seller's motive or specific intent then is not wholly irrelevant. A medical book publisher might cite a motive to train doctors in defense of an obscenity charge. Whether that defense would establish that the material was *not* obscene because of the limited distribution, or whether it would instead establish that although the material was obscene the defendant could not be prosecuted for obscenity because of a benevolent motive, is not always clear. In any event, a limited distribution defense was unavailable to Muller because it had "no relation to the issue" in the case.<sup>135</sup> Why not? Because "[t]he pictures in question were kept for general sale, except that they were not sold to boys under twenty-one years of age."<sup>136</sup> The implication is that they were not sold to women of any age or that no women would wish to buy them. But any adult male could buy them. Again we see an echo of *Hicklin*, where Scott distributed "The Confessional Unmasked" to any pedestrian with a shilling to buy a copy.<sup>137</sup>

One wonders what the result in *Muller* would have been if the photographs were sold only to serious art students who could produce a note from their teacher. Would they still be obscene? Although the Court of Appeals did not discuss that question, the trial judge might then have allowed a defense: "In charging the jury Judge Brady said that the purity or indecency of a picture depended entirely on the manner of its exhibition. If it were, by that manner, calculated to arouse immoral thoughts, it would be indecent."<sup>138</sup> In this view, context would either mean that an item was not obscene or it would be a defense to prosecution even if the item was obscene. Comstock himself thought context mattered. He distinguished between original paintings, which he did not prosecute, and photographic copies, which, he said, were sold "wholesale at fifty cents a piece to small dealers" who then sell them to "our youth—boys and girls—and by these very sales encourage that very lasciviousness against

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obscenity cases. If certain explicit depictions of sex or sex organs are obscene, then why wouldn't they also be obscene even in the hands of medical students and physicians? And yet courts were obviously unwilling to ban research and treatment in the field. That, in turn, forced courts to view the issue of obscenity contextually, at least to this limited extent. But once courts concluded that context matters, they had to grapple with the extent to which it matters.

134. *Ginzburg v. United States*, 383 U.S. 463 (1966).

135. *Muller*, 96 N.Y. at 413.

136. *Id.*

137. See *supra* text accompanying notes 65–66.

138. *Pictures Held to be Impure*, *supra* note 128.

which the law is provided.”<sup>139</sup> In his book *Morals vs. Art*, Comstock wrote that the nude “figure thus exhibited to cultured minds in an art gallery, where it legitimately belongs, is a very different thing from what it appears to be to the common mind on the public streets in the shape of a photograph.”<sup>140</sup> Even to Comstock, the location and identity of the intended audience counted, although the extent to which Comstock thought it should matter became murkier in the *Knoedler* case, discussed below.

Aside from intent and motive is the question of knowledge. Muller was only a store clerk. One issue that might have arisen but did not was whether he even knew the content of the photographs. But the nine photographs were apparently offered for sale as individual items, not in a book with a cover. An agent of the Society for the Suppression of Vice testified that the pictures “were taken from a drawer by Muller, the inference being that they were kept concealed, because they were known to be obscene, until they were called for.”<sup>141</sup> Muller claimed the pictures were not taken from a drawer, but were hung on the shop walls with other pictures.<sup>142</sup> In any event, because Muller knew what the photographs were photographs of and because there were no special “circumstances” that would permit Muller to compare himself to (say) publishers of medical books, the only issue for the jury was whether they were obscene—and that was *not* an issue for the Court of Appeals because the pictures were not before it.

*Muller* can be seen as a quite unremarkable decision for the time, given its narrow focus. But even in 1884, we see the stirrings of judicial discomfort with the reach of the concept of obscenity, at least in New York. The fact that the obscene matter consisted of photographs of recognized French paintings<sup>143</sup>—whose judicial suppression could easily lead to harsh caricatures about American “prudery”—may explain this passage in the court’s opinion:

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139. NICOLA BEISEL, *IMPERILED INNOCENTS: ANTHONY COMSTOCK AND FAMILY REPRODUCTION IN VICTORIAN AMERICA 177–78* (1997).

140. *Id.* (citing ANTHONY COMSTOCK, *MORALS VS. ART* 8–9 (1887)).

141. *Pictures of a Doubtful Kind*, N.Y. TIMES, Dec. 18, 1883, at 3.

142. *Id.*

143. The court wrote that some of the “paintings had been exhibited in the Salon in Paris, and one of them at the centennial exhibition in Philadelphia.” *People v. Muller*, 96 N.Y. 408, 410 (1884). The painters, however, are not well known to the public today. So far as can be determined, the paintings were “*La Asphyxie*” by Cherubino Pata, “*After the Bath*” by Joseph Wencker, “*La Baigneuse*” by Leon Jean Basile Perrault, and “*La Repose*” by Chambord. CLAPP, *supra* note 124, at 157 (1972). “Eight of the nine pictures had been exhibited at the Salon in Paris, and the remaining canvas at the Centennial Art Exhibition in Philadelphia,” according to Clapp. *Id.*

It is evident that mere nudity in painting or sculpture is not obscenity. Some of the great works in painting and sculpture as all know represent nude human forms. It is a false delicacy and mere prudery which would condemn and banish from sight all such objects as obscene, simply on account of their nudity. If the test of obscenity or indecency in a picture or statue is its capability of suggesting impure thoughts, then indeed all such representations might be considered as indecent or obscene. The presence of a woman of the purest character and of the most modest behavior and bearing may suggest to a prurient imagination images of lust, and excite impure desires, and so may a picture or statue not in fact indecent or obscene.<sup>144</sup>

What does the court mean? What is the definition of “mere nudity”? We can only guess. The paradox of *Muller* is this: while affirming the misdemeanor conviction, the court excluded “mere nudity” in an image from the reach of the obscenity laws. The opinion both suppresses and protects. This protection will shortly appear in the prosecution of a prominent art dealer who also sold photographs of French paintings. That prosecution,<sup>145</sup> like *Muller*’s, was instigated by the Society for the Suppression of Vice, and it targeted photographs of at least some (or perhaps all) of the same paintings that led to *Muller*’s conviction.

Of course, exemption of “mere nudity” from the definition of obscenity only makes sense in representational art, not in literature. If nudity alone is not obscene in a painting, and putting aside the depiction of sex acts themselves, what would make a painting that contained a nude form obscene? One answer, judging from the prosecution of the Knoedler Gallery, discussed next, may be the story the painting means to tell.<sup>146</sup> In that sense, pictorial representations can be analogized to printed matter. A painting, like a book, can tell a story, although constructing the story of a painting will often require greater viewer participation than is demanded of the reader of a book. Some viewers (or readers) may infer an erotic story that others do not and which the artist did not even intend. In that case, who is the author of the obscenity, the creator or her audience? And can the audience’s interpretation be attributed to the creator for purposes

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144. *Muller*, 96 N.Y. at 411.

145. See *infra* text accompanying notes 147–62.

146. Other answers are where the picture is sold or exhibited and the social class of the seller and buyer. See *infra* text accompanying notes 153–55.

of criminal liability? The early cases answer the latter question affirmatively, if for “audience” we substitute jurors.

*D. The Prosecution of a Respectable House: Edmund Knoedler of Fifth Avenue*

*Muller*’s observation that “mere nudity” is not obscene did not help August Muller because the issue of the photographs’ obscenity was not before the court. But only three years later, the observation did help Edmund Knoedler and M. Knoedler & Co., an art gallery on Fifth Avenue and Twenty-second Street, described by the *New York Times* as a “respectable house which has furnished respectable citizens with good pictures for more than a generation.”<sup>147</sup> The *Knoedler* case, an epilogue to *Muller*, so close in time, suggests that the identity of the defendant and his clients does matter. Comstock took pains to exploit the hypocrisy.

After Comstock’s agent purchased 117 photographs of French paintings from the gallery, Edmund Knoedler and his clerk, George Pfeiffer, were arrested.<sup>148</sup> The *Times*, which had not addressed the prosecution of Muller, except to report it, published editorials harshly criticizing Comstock’s action. “The impertinence of reformers of that stamp,” it wrote, “who are themselves coarse and fancy that all other people must see things through their own vulgar spectacles, is unfortunately by no means a new thing in the world.”<sup>149</sup> In a letter to the paper, officers of the Society for the Suppression of Vice, including Samuel Colgate, its president, wrote that the decision to arrest Knoedler had been made not by Comstock but by the Executive Committee of the Society, that the judge issuing the arrest warrant had inspected the pictures before doing so, that Knoedler had been warned that the pictures were obscene and given a copy of the obscenity statute, and most striking, that “[s]ome of the pictures, for the sale of which the dealer was arrested, have been legally adjudicated to be ‘indecent’ and ‘obscene’” by the New York courts, including the Court of Appeals.<sup>150</sup> This is an unmistakable

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147. *The Comstock Nuisance*, N.Y. TIMES, Nov. 16, 1887, at 4. M. Knoedler & Co. was founded in 1846 and remains in business on the upper eastside of Manhattan. See Knoedler & Co., <http://www.knoedlergallery.com/gallery.html> (last visited Nov. 10, 2007).

148. *Mr. Comstock’s Work: Beginning a Prosecution Against a Prominent Art Firm*, N.Y. TIMES, Nov. 13, 1887, at 3.

149. *The Comstock Nuisance*, N.Y. TIMES, Nov. 16, 1887, at 4.

150. Samuel Colgate et al., Letter to the Editor, *Mr. Comstock’s Society*, N.Y. TIMES, Nov. 17, 1887, at 9.

reference to *Muller*. Comstock also implied, in a letter and a speech, that the Court of Appeals had already found some of the pictures obscene.<sup>151</sup>

This last claim is, of course, entirely incorrect. The New York Court of Appeals affirmed Muller's conviction but it did not address the issue of obscenity of the pictures because the pictures were not before it.<sup>152</sup> The lower courts, however, had looked at the pictures and allowed the jury's verdict to stand.<sup>153</sup> That fact gave Comstock a basis to argue before a friendly meeting of Baptist ministers:

"Now," Mr. Comstock went on, "if these pictures [seized from Muller] were indictable on Barclay Street they are indictable on Fifth Avenue. If it was our duty to arrest and convict the poor vendor on Barclay Street, our duty is equally plain toward the rich one on Fifth Avenue. We are not striking at men, but at a violation of the law. . . ."<sup>154</sup>

To which, what could his critics, who were silent during his prosecution of Muller, possibly reply? Could it be that in Edmund Knoedler's possession the pictures were not obscene, but in August Muller's possession they were? Comstock and his Society thought not. Others might disagree on the ground of the intended distribution. Knoedler & Co. served the upper classes. Muller's customers, they might claim, were not motivated to buy photographs of pictures of naked women because they appreciated French art. The courts that decided the two cases did not explicitly adopt this distinction, but the different clientele could explain the difference in the press reaction to Comstock's prosecutions. Is that a distinction the law wished to make? Comstock's retort called the question.

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151. Anthony Comstock, *Comstock on Art: An Explanatory Letter Concerning the Recent Arrests in this City*, N.Y. TIMES, Nov. 24, 1887, at 3; *Sustaining Mr. Comstock: Baptist Ministers on the Nude in Art*, N.Y. TIMES, Dec. 13, 1887, at 2.

152. See *supra* text accompanying note 125.

153. Samuel Colgate's letter to the *New York Times* quotes the intermediate appellate court in *Muller* as follows:

The pictures produced upon the trial have been handed up on the argument of the appeal as they had been marked as exhibits upon the trial. They are pictures of nude females in a variety of attitudes and postures, which the jury might very well and naturally would determine to be both indecent and obscene in their character. Ordinarily they would be so pronounced, although they would not exert the same demoralizing and sensuous effects upon all persons alike.

Samuel Colgate, *supra* note 150, at 9 (quoting *People v. Muller*, 32 Hun 209 (N.Y. Gen. Term 1884)).

154. *Sustaining Mr. Comstock*, *supra* note 151.

Knoedler and his clerk fared much better than Muller. As the case advanced, the offending photographs were reduced from the 117 seized to only thirty-seven and the court later dismissed the complaint against thirty-five of them, leaving two for trial.<sup>155</sup> Among the thirty-five dismissed paintings were at least four that appear to have secured Muller's conviction.<sup>156</sup> One of these is "La Baigneuse" ("The Bather") by Leon Jean Basile Perrault (1832–1908). It is a painting of a naked young woman lying on a hammock with her arms above her head. Her legs are dangling over the edge of the hammock. One foot is touching the ground. Her head is turned toward the viewer but she is not looking at the viewer. She appears deep in thought. Her body is entirely exposed except that because of her angle, and because her legs are pressed together, her vaginal area is not exposed.

Nicola Beisel reports that of the two Knoedler paintings warranting a trial, "Entre 5 et 6 heures en Breda Street" appears to have been lost, but she writes that Breda Street was a center of Parisian prostitution.<sup>157</sup> The other painting, "Rolla" by Henri Gervex (1852–1929), is loosely based on an 1833 poem of the same name by Alfred De Musset (1810–1857).<sup>158</sup> The picture portrays a young man standing by an open window in a comfortable hotel room on a bright morning. On the bed is Marion (or Marie), a beautiful, high-priced courtesan on whom Rolla has spent all his money.<sup>159</sup> The picture shows Marion asleep, nude, lying provocatively

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155. *The Knoedler Case*, N.Y. TIMES, Mar. 24, 1888, at 8.

156. See *supra* text accompanying note 143.

157. BEISEL, *supra* note 139, at 190.

158. *Id.*

159. Excerpts from the poem, translated from the French, follow:

With a melancholy eye Rolla gazed on  
The beautiful Marion asleep in her wide bed;  
In spite of himself, an unnameable and diabolical horror  
Made him tremble to the bone.  
Marion had cost dearly.—To pay for his night  
He had spent his last coins.  
His friends knew it. And he, on arriving,  
Had taken their hand and given his word that  
In the morning no one would see him alive.  
...  
When Rolla saw the sun appear on the roofs,  
He went and leaned out the window.  
...  
Rolla turned to look at Marie. .  
She felt exhausted, and had fallen asleep.  
And thus both fled the cruelties of fate,  
The child in sleep, and the man in death!

across the bed, one leg dangling over the side. She is entirely exposed to view except that a small corner of a sheet covers her vaginal area. The picture may be mildly erotic, not because of the nudity but because of Marion's pose. It is not explicit, but it could be seen as provocative. It is much like "La Baigneuse" if the viewer looks only at the female figure. Why did the court then dismiss the charge against "La Baigneuse" but not "Rolla"? Perhaps the court did so because the woman in "Rolla" is a courtesan (although a viewer unfamiliar with the poem might not realize that). Also, "Rolla" has a man in the picture; a man who implicitly has just spent the night with the sleeping, naked woman. "La Baigneuse" has only a solitary nude woman, on a hammock, not in a hotel room. These differences might have led the court to conclude that a jury could find "Rolla" obscene because "Rolla" told a story. A viewer could infer the nature of the relationship between the man and the woman and perhaps imminent tragic consequence. (In the poem, Rolla kills himself by taking poison.) It is a tale of debauchery (sex for hire) followed by suicide. "La Baigneuse" by contrast offers no "before and after" story, let alone one that a judge might find morally questionable. There is no suggestion that anything untoward had just occurred or was about to occur. In concluding that a jury could find that "Rolla" was obscene, the court would find support from the Salon of Paris, which in 1878 refused to show the picture.<sup>160</sup>

The disposition of the *Knoedler* case does not appear in the official records. We may assume that the parties reached a resolution, perhaps one that did not entail conviction, or at least did not involve jail. Jane Clapp writes that each defendant was fined \$300.<sup>161</sup> But what is most interesting about the prosecution, beyond the differences in the amount of respectable public criticism of Comstock (none for the prosecution of Muller, vocal on behalf of Knoedler three years later), is the reason the trial judge gave for dismissing the complaint against thirty-five of thirty-seven photographs. According to one news report of the time, "[t]he Judge held that the mere

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Alfred De Musset, *Rolla* (1833), in HOLLIS CLAYSON, *PAINTED LOVE* 81 (2003). Clayson tells the history of the painting, its critical reception, and how it deviates from the poem's descriptions of the hotel room and Marion. *Id.* at 79-90.

160. BEISEL, *supra* note 139, at 190. Both pictures may be found on various Internet sites. "La Baigneuse" is available at <http://www.artxchangenetwork.com/Picture.aspx?idPicture=3092> (last visited Sept. 29, 2007). "Rolla" is available at [http://jssgallery.org/Other\\_Artists/Henri\\_Gervex/Gervex\\_Rolla.htm](http://jssgallery.org/Other_Artists/Henri_Gervex/Gervex_Rolla.htm) (last visited Sept. 29, 2007).

161. CLAPP, *supra* note 124, at 161. Nicola Beisel reports that "[m]ost histories of the case claim that the defendants were fined three hundred dollars, which was the amount of their bail, so perhaps Knoedler and his assistant decided to forgo a trial." BEISEL, *supra* note 139, at 250 n.123.

portrayal of the nude in art, so long as there was nothing wrong in the motive, was not an infringement of the law, quoting [*People v. Muller*] in support of this opinion.”<sup>162</sup> August Muller’s loss led to Edmund Knoedler’s (substantial) victory. But we remain in the dark about what the court means by “nothing wrong in the motive” or how it reaches that conclusion.

#### IV. WHO’S AFRAID OF GERTY AND MOLLY? THE TWO TRIALS OF ULYSSES

##### A. *People v. Anderson and Heap*

*Hicklin*, *Bennett*, and *Muller* largely defined New York’s obscenity law when, in 1920, *Ulysses* first came to the attention of the state’s courts. Of course, there were other state obscenity prosecutions in the interim. Some lower courts showed greater tolerance for candor about sex, as discussed hereafter.<sup>163</sup> But no case had redrawn the legal map of these three precedents when, on September 29, 1920, John S. Sumner, the second Secretary of the New York Society for the Suppression of Vice, purchased copies of the July–August issue of *The Little Review* in a Greenwich Village bookstore.<sup>164</sup>

With almost no money, Margaret Caroline Anderson, then 27, started *The Little Review* in Chicago in March 1914.<sup>165</sup> The magazine moved to New York in 1917.<sup>166</sup> *The Little Review*, twenty-five cents an issue, published good poets and writers, the already famous, and the soon-to-be-famous: Ezra Pound, Ford Madox Huefer (who had changed his name from Ford Hermann Huefer and would later change it to Ford Madox Ford), T.S. Eliot, and William Carlos Williams, among others.<sup>167</sup> It also published James Joyce, specifically chapters of *Ulysses* in progress, as fast

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162. *The Knoedler Case*, *supra* note 155.

163. *See infra* text accompanying notes 233–53.

164. VANDERHAM, *supra* note 6, at 41; Bryer, *supra* note 6, at 155.

165. Bryer, *supra* note 6, at 149. Anderson’s autobiography does not give her birth date. The University of Wisconsin–Milwaukee library, which has some of her archives, says she was born on November 24, 1886. Univ. of Wisconsin–Milwaukee, Archives Dep’t, <http://www.uwm.edu/Library/arch/findaids/uwmmss12.htm> (last visited Sept. 15, 2007).

166. MARGARET ANDERSON, *MY THIRTY YEARS’ WAR* 142–46 (1930). Because Anderson’s rambling autobiography shows little interest in dates or years, it is necessary to read carefully to figure out approximately when an event occurred. These pages establish that Anderson and Heap published the magazine from New York from 1917 to 1923. *The Little Review* ceased publication in 1929. *Id.* at 270.

167. These and other names appear in the table of contents of MARGARET ANDERSON, *THE LITTLE REVIEW ANTHOLOGY* 5–7 (1953).

as it could do so after Joyce sent them to Pound and Pound sent them to Anderson. Anderson wrote that on receiving the first chapter from Pound, the magazine's European editor, she was moved to exclaim (it is not clear to whom, if to anyone): "This is the most beautiful thing we'll ever have, I cried. We'll print it if it's the last effort of our lives."<sup>168</sup> The "we" refers to Anderson and Jane Heap, her partner in publishing and (for a time) in love. Serialization of *Ulysses* began with the March 1918 issue.<sup>169</sup> It was not the "last effort" of Anderson's and Heap's lives either. They printed twenty-three more episodes through December 1920.<sup>170</sup> Some of those chapters got them into trouble with the post office, which burned issues in which the *Ulysses* chapters appeared. But these problems were nothing you could not deal with if you were dedicated to great literature as you saw it, which Anderson and Heap certainly were. So they continued publishing and publishing more Joyce.

#### B. The Little Review Gets Investigated

What led Sumner to buy *The Little Review*? The July–August 1920 number contained the final part of the "Nausicaa" episode of *Ulysses*.<sup>171</sup> Anderson and Heap, wishing to boost their circulation, had mailed copies to potential subscribers.<sup>172</sup> Somehow, a copy was sent to a girl whose age is unknown except that she could read and understood enough of the Joyce excerpt to claim to be shocked, and perhaps she was. She showed it to her father, a prominent New York lawyer, who is also unidentified and who *was* shocked. He sent it to the Manhattan district attorney, Edward Swann, with a note.

"Dear Sir," it began:

I enclose a copy under another cover—of a copy of '*The Little Review*' which was sent to my daughter unsolicited. Please read the passages marked on pages 43, 45, 50 and 51. If such indecencies don't come within the provisions of the Postal Laws then isn't there some way in which the circulation of such things can be confined among the people who buy or subscribe to a publication of this kind? Surely there must be some way of keeping such 'literature'

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168. ANDERSON, MY THIRTY YEARS' WAR, *supra* note 166, at 175.

169. *Id.*; Bryer, *supra* note 6, at 150.

170. Bryer, *supra* note 6, at 149.

171. *Id.* at 155.

172. VANDERHAM, *supra* note 6, at 37.

out of the homes of people who don't want it even if, in the interests of morality, there is no means of suppressing it.<sup>173</sup>

Swann consulted Sumner, a lawyer himself.<sup>174</sup> Sumner visited the Washington Square Bookshop, which Anderson and Heap were known to frequent and where, for a time, they had an office.<sup>175</sup> He bought copies of the issue, read the "Nausicaa" episode, found it obscene, and filed a complaint against an owner of the bookstore at the Jefferson Market Courthouse a few blocks away. (The building now houses a public library where the public can borrow *Ulysses*.) Shortly thereafter, the owner was dropped from the case and Anderson and Heap were named defendants.<sup>176</sup>

The portion of the Nausicaa episode that appeared in the July–August 1920 issue of *The Little Review* runs about sixteen pages. It is headed "Episode XIII (Continued)," but for legal purposes it might as well have had no heading. It was impossible to argue that the episode had to be judged in the context of the book as a whole. The idea, commonplace today, that a piece of writing must be judged as a whole—that the entire work cannot be called obscene based solely on parts of it—was just beginning to take hold in the law.<sup>177</sup> But in 1921, *Ulysses* was not yet a book. There was no whole. Or to put it another way, in the eyes of the law the excerpt in the July–August issue *was* the whole. On the other hand, Anderson and Heap may have been better off not having to defend the entire book. That would have required defense of the final chapter, the "Penelope" episode, which in great detail recounts the erotic thoughts of a

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173. *Id.* at 37–38. Swann's reaction was decidedly more aggressive than the lawyer's sensible solution of simply insuring that distribution of the magazine be limited to those who wanted to read it.

174. Sumner graduated from New York University School of Law in 1904. Obituary, *John S. Sumner, Foe of Vice, Dies*, N.Y. TIMES, June 22, 1971, at 38.

175. John Quinn's letters to Anderson in February 1921 are addressed to 27 West Eighth Street, the location of the bookstore. *See, e.g.*, Letter from John Quinn to Miss Margaret C. Anderson (Feb. 5, 1921) (original in collection of S. Ill. U., Carbondale).

176. GORMAN, *supra* note 7, at 277–78. Gorman reprints Sumner's complaint of October 21, 1920. Sumner had visited the bookstore on September 29, 1920 and had filed his first complaint on October 4, 1920. On October 21, he substituted Anderson and Heap for the owner of the bookstore. Bryer, *supra* note 6, at 157.

177. The New York Court of Appeals made this point, without citation to authority, in *Halsey v. N.Y. Soc'y for the Suppression of Vice*, 234 N.Y. 1, 4 (1922). The Court acknowledged that *Mademoiselle de Maupin*, at issue there, contained "many paragraphs . . . which taken by themselves are undoubtedly vulgar and indecent." *Id.* But it went on to hold that

[n]o work may be judged from a selection of such paragraphs alone. Printed by themselves they might, as a matter of law, come within the prohibition of the statute. So might a similar selection from Aristophanes or Chaucer or Boccaccio or even from the Bible. The book, however, must be considered broadly as a whole.

*Id.*

half-asleep Molly Bloom and contains a fair number of four-letter words. “Penelope” was the episode that gave Morris Ernst his greatest challenge a dozen years later.<sup>178</sup> “Nausicaa” is tame by comparison.

What happens, then, in the last part of “Nausicaa” (as printed in *The Little Review*), and what happened in court? The novel *Ulysses* records not quite twenty-four hours in the life of thirty-eight-year-old Leopold Bloom of Dublin, beginning in the morning of June 16, 1904, and ending in the small hours of the following day. Bloom’s experiences that June day loosely follow those of Ulysses in Homer’s *Odyssey*. The “Nausicaa” episode finds Leopold Bloom on the beach at about 8:00 p.m. Twenty-one-year-old Gerty MacDowell and two friends are nearby. Her friends leave to see fireworks a distance away. Gerty, out of sorts with her boyfriend, remains. She is aware and pleased that Bloom is watching her. Satirizing romance fiction, Joyce writes:

She leaned back far to look up where the fireworks were and she caught her knee in her hands so as not to fall back looking up and there was no one to see only him and her when she revealed all her graceful beautifully shaped legs like that, supple soft and delicately rounded, and she seemed to hear the panting of his heart his hoarse breathing, because she knew about the passion of men like that  
 . . . .<sup>179</sup>

And so on. Gerty continues to lean back as Bloom watches. Bloom ejaculates in his pants. They never touch. But it was enough for Sumner, who filed his complaint.

Now Anderson and Heap needed a lawyer. They went to John Quinn. Quinn was born poor in 1870 in Ohio. He went to Harvard Law School, came to New York, and achieved financial success before the era of the large law firm.<sup>180</sup> Four decades after his death, though largely unknown except to some scholars of the period, Oxford University Press published a seven-hundred-page biography of Quinn.<sup>181</sup> His place in the history does not, as with some lawyers, depend on his famous trials or cases, but rather on the fact that he associated with others—as benefactor, counselor, or

178. See *supra* note 45 and *infra* text accompanying notes 338–41.

179. James Joyce, *Ulysses: Episode XIII (Continued)*, *LITTLE REVIEW*, July–Aug. 1920, at 42–43. Gerty’s age has been debated. We are told that she “would never see seventeen again.” JAMES JOYCE, *ULYSSES* 350 (Vintage ed. 1990). Later, Joyce writes that “she would be twenty-two in November.” but “she” could refer to Gerty’s friend Edy, mentioned in the same sentence. *Id.* at 352. There is no other clue.

180. REID, *supra* note 7.

181. *Id.*

friend—who were, or later became, famous. Evidence of Quinn’s supporting role appears in two 1923 photographs often found in histories and biographies of the era. Taken in Paris, the photographs show Joyce, Ezra Pound, Ford Madox Ford, and Quinn, three writers and a lawyer.<sup>182</sup> Of the four, Quinn, staring (not just looking) at the camera, has the most intense demeanor.

Artists and writers were Quinn’s friends. He collected their works and contributed to their support. He helped *The Little Review*, too, in part by providing funds to pay Pound to be its European editor.<sup>183</sup> Pound introduced Joyce’s work to Anderson and Heap.<sup>184</sup> To say that Quinn did not much like Anderson and Heap is an understatement judging by his descriptions of them in letters to Pound. “[P]issing rabbits,” is one of his kinder characterizations.<sup>185</sup> But Quinn was devoted to Joyce and helped support the magazine<sup>186</sup> because of his love of modern European (especially Irish) literature. So it fell to Quinn to defend its editors. He did so because he believed, correctly it turned out, that if they were convicted, Joyce would not soon find a publisher for *Ulysses* in the United States. Quinn also believed that publishing *Ulysses* in installments was a bad idea. He had urged Joyce to stop sending chapters to Anderson and Heap—and had urged them to stop printing them.<sup>187</sup> All to no avail.

### C. *Anderson and Heap Get Prosecuted and Convicted*

The first court hearing on Sumner’s complaint, held October 21, 1920, went badly. Its purpose was to decide whether the case should be dismissed or go to trial. Quinn had so little faith in the possibility that the case would be dismissed at this early stage that he did not even plan to attend the hearing. As he wrote to Pound later that day:

One of the young lawyers from my office, whom I had sent up to court to do the waiving, waiving everything but immunity, telephone[d] to me . . . and said that he thought we would have a good chance to get a dismissal. I had just come in from a big

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182. One of the photographs is included in REID, *supra* note 7, at unnumbered page following 238. The other appears in ELLMANN, *supra* note 7, at unnumbered page following page 482.

183. REID, *supra* note 7, at 285.

184. ANDERSON, MY THIRTY YEARS’ WAR, *supra* note 166, at 174–75.

185. Letter from John Quinn to Ezra Pound (Oct. 16, 1920) (original in collection of S. Ill. U., Carbondale).

186. REID, *supra* note 7 at 343.

187. *Id.* at 441, letter from John Quinn to James Joyce (Apr. 13, 1921), *reprinted in* 83 BULL OF RES. IN THE HUMAN 26, 34 (Spring 1980).

auction sale of 425 lots in the Bronx, belonging to a corporation that I represented, and was in the midst of dictating some urgent matters, when the before mentioned telephone message reached me, and I said and said and said to the aforementioned lawyer from my office that I would “Come right up”, “Come right up”, “come right up”, and the aforementioned lawyer said and said and said that he would have the case held until I came up; and I added: “Right up”, “Right up”, “Right up”. So I dropped the aforementioned dictation and went right up, right up, right up on the Sixty [Sixth] Avenue Elevated, and right down into the dingy court.<sup>188</sup>

Quinn, politically connected, was a friend of the judge, Joseph Corrigan, and thought he was “one of the most liberal men on the bench.”<sup>189</sup> We have no official record of the oral argument but we do have the subsequent Quinn correspondence, recollections of Anderson and Heap, and press reports. Quinn’s key argument tried to distinguish between filth and obscenity. “Nausicaa” might be filthy, he maintained, but not everything filthy is obscene. Here is Quinn’s description of his argument in a letter written the same day:

I told who Joyce was, and what he had written and how serious an artist he was, and then got right down to the discussion of whether the July–August number was filthy in the meaning of the law. I defined “filthy” in literature and art, admitted that there was filth in literature and art, but that it was not filth that would corrupt, but rather that would brace and deter. Spoke of Swift and Rabelais’ filth. Contrasted the strong hard filth of a man like Joyce with the devotion to art of a fort flabby man like Wilde. Pointed out that it was beauty that corrupted, filth that deterred . . .

Said that one should judge filthy not in the abstract, not in a flying machine ten thousand feet up in the blue sky, but by its effect upon the average man or woman, not its effect upon a degenerate on one side, or a convent bred saphead on the other. That there were

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188. Letter from John Quinn to Ezra Pound (Oct. 21, 1920) (original in collection of S. Ill. U., Carbondale). This and other letters from Quinn reveal his wish to let Pound, Joyce, and others know that he was an important lawyer handling valuable matters for big clients, but was prepared to put the interests of his creative friends ahead of remunerative work. The letters also show Quinn’s efforts to attempt a writing style that he surely did not use with corporate clients. He was writing to artists and showing that he was also capable of playing with language (e.g., “right up”, “right up”, “right up”. . . and “right down into the dingy court”).

189. *Id.*

many things in life that were filthy, but not filthy as prohibited by the statute. That filthy in the statute was as filthy did. Not filthy in the abstract filthy in its result, pragmatically filthy, and not filthy in the absolute.

And then I tried to pin his Lordship Corrigan down on the syllogism that the average person reading the July–August number would either understand what it meant, or would not. If he understood what it meant, then it couldn't corrupt him, for it would either amuse or bore him. If he didn't understand what it meant, then it couldn't corrupt him.<sup>190</sup>

What Quinn apparently did not do was discuss the excerpt with any specificity. Perhaps Quinn chose not to be specific to make it easier, in light of the attendant publicity, for Judge Corrigan to dismiss the case. That would certainly be a plausible, and perhaps the best, strategy: ignore the elephant in the room. But Judge Corrigan saw only the elephant. After reading the excerpt he said, “[t]hat was the episode where the man [meaning Leopold Bloom] went off in his pants, which no one could misunderstand, and that I think is smutty, filthy within the meaning of the statute.”<sup>191</sup> And he put the case over for trial in the Court of Special Sessions.

A quick trial is not what Quinn wanted. He wanted time. He attempted to have the case referred to the more congested Court of General Sessions.<sup>192</sup> It would then take a year or more to go to trial, with the verdict decided by a jury, not a panel of judges.<sup>193</sup> Quinn may have believed that a jury would be less able than three Special Sessions judges to untangle Joyce's prose and understand what was happening in the episode. Quinn also hoped that *Ulysses* would be finished and published before there could even be a trial.<sup>194</sup> This was a desperate strategy. Even if trial were delayed, and even if Joyce could timely finish the book, the prospect of a conviction, which Quinn still believed certain, would have made publication in the interval a risky venture. But Quinn seemed to think (or hope) otherwise. He told the Irish writer Shane Leslie that the reason he made “the motion for a jury trial was that it would postpone the

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190. *Id.*

191. *Id.*

192. Letter from John Quinn to Shane Leslie (June 21, 1922) (original on file with the N.Y. Public Library).

193. *Id.*

194. *Id.*

trial of the case until after *Ulysses* could be published and sold and then the trial would be largely academic.”<sup>195</sup> It was the strategy that turned out to be academic. The effort to send the case to the Court of General Sessions failed. Trial was set for February 14, 1921, before a panel of three judges.<sup>196</sup>

Quinn was allowed to call at least two expert witnesses, John Cowper Powys, an author and lecturer, and Phillip Moeller of The Theater Guild. Scofield Thayer of *The Dial* was on hand to testify, too, but it appears that he did not do so because his testimony was deemed cumulative.<sup>197</sup> Anderson later wrote that the expert testimony went this way:

Mr. Quinn calls literary “experts” to the stand to testify that *Ulysses* in their opinion would not corrupt our readers. The opinions of experts is regarded as quite unnecessary, since they know only about literature but not about law: *Ulysses* has suddenly become a matter of law rather than of literature—I grow confused again; but I am informed that the judges are being especially tolerant to admit witnesses at all—that such is not the custom in the special sessions court. . . .

Mr. John Cowper Powys testifies that *Ulysses* is too obscure and philosophical a work to be in any sense corrupting. (I wonder, as Mr. Powys takes the stand, whether his look and talk convey to the court that his mind is in the habit of functioning in regions where theirs could not penetrate: and I imagine the judges saying: “This man obviously knows much more about the matter than we do—the case is dismissed.” Of course I have no historical basis for expecting such a thing. I believe it has never happened . . . .)

Mr. Philip Moeller is the next witness to testify for *The Little Review*, and in attempting to answer the judges’ questions with intelligence he asks if he may use technical terminology. Permission

195. *Id.* at 5. Earlier, Quinn recognized the opposite, i.e., that a pending trial in General Sessions would also inhibit publication. Letter from John Quinn to Ezra Pound (Oct. 16, 1920) (original in collection of S. Ill. U., Carbondale).

196. The trial began on February 14, then adjourned for a week, with oral arguments on February 21. *Improper Novel Costs Women \$100*, N.Y. TIMES, Feb. 22, 1921, at 12. The trial was before Judges Kernochan, McInerney, and Moss. *Court Puzzled by Experts on Book’s Morals*, N.Y. TRIB., Feb. 15, 1921, at 5.

197. This is what Anderson recalled shortly after the trial, Margaret Anderson, “*Ulysses*” in *Court*, in LITTLE REVIEW ANTHOLOGY 307 (1953), though much later she recalled that Thayer did testify. ANDERSON, MY THIRTY YEARS’ WAR, *supra* note 166, at 220. The *New York Tribune* reported that only Powys, who it said was “internationally known as a lecturer on literature, and Philip Moeller, the playwright and also president of the Theater Guild,” testified. *Court Puzzled*, *supra* note 196.

being given he explains quite simply that the objectionable chapter is an unveiling of the subconscious mind, in the Freudian manner, and that he saw no possibility of these revelations being aphrodisiac in their influence. The court gasps, and one of the judges calls out, “Here, here, you might as well talk Russian. Speak plain English if you want us to understand what you’re saying.” Then they ask Mr. Moeller what he thinks would be the effect of the objectionable chapter in the mind of the average reader. Mr. Moeller answers: “I think it would mystify him.” “Yes, but what would be the effect?” (I seem to be drifting into unconsciousness. *Question*—What is the effect of that which mystifies? *Answer*—Mystification. But no one looks either dazed or humorous, so I decide that they regard the proceedings as perfectly sensible.)<sup>198</sup>

Press reports add to Anderson’s description. When Moeller said that Joyce employed the “Freudian method of psychoanalysis” in *Ulysses* and added that the book “most emphatically was not aphrodisiac,” Justice Kernochan called a halt.

“What’s this!” he exploded. “What’s that?”

Mr. Quinn rushed forward with an explanation. “Well, if I may explain to your honor,” he said, “aphrodisiac is an adjective derived from the noun Aphrodite, supposed to be the goddess of beauty or love”—

“I understand that,” broke in Justice Kernochan, “but I don’t understand what this man is talking about. He might as well be talking in Russian.”<sup>199</sup>

The decision to call experts, and the fact that they were allowed, is noteworthy for two reasons. First, the Court of Appeals had expressly ruled against experts in 1884 in the *Muller* case, which was still good law.<sup>200</sup> Nonetheless, nearly four decades had passed and it was apparent

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198. Anderson, “*Ulysses*” in *Court*, *supra* note 197, at 306–07. The press reported that Powys’s testimony “proceeded smoothly.” Powys testified that

in his opinion Joyce’s style was too “obscure” to “deprave and corrupt the public,” comparing it to a cubist painting in the sense that the latter was a departure from the orthodox methods of painting. He said further that because of the unusual style of combining narrative with dialogue the public would be “repelled” rather than attracted to *Ulysses*.

*Court Puzzled*, *supra* note 196.

199. *Court Puzzled*, *supra* note 196.

200. *See supra* text accompanying notes 118–19.

that attitudes were shifting. Courts themselves cited expert opinions.<sup>201</sup> Second, on February 5, 1921, Quinn had written to Anderson and Heap to tell them he would not call experts. He explained that “[c]onviction is absolutely certain” and “the Appellate Court will with absolute certainty affirm the decision of the lower court.”<sup>202</sup> Further, printing costs for an appeal would be prohibitive. His clients were welcome to consult separate counsel if they wished and he, Quinn, would be “glad to turn over to him the entire matter.”<sup>203</sup> But then on February 8, Quinn again wrote Anderson. This time he urged her to “have in court ready to testify at least two character witnesses who can testify as to the history of *The Little Review* and your objects and motives and purposes in publishing it, and as to your general reputation and standing in the literary world.”<sup>204</sup> Quinn’s reason was not to avoid a conviction, which he still deemed “certain,” but to avoid a jail sentence. Then Quinn added a second request, for Anderson’s suggestions of “at least two witnesses” who could testify to Joyce’s “standing as a writer” and the “tendency” of the excerpt Anderson published, by which he must have meant the tendency to deprave and corrupt, which is the *Muller/Hicklin* test for obscenity.<sup>205</sup> But even here, the purpose of the experts would only be “in mitigation of sentence.”<sup>206</sup> Quinn ended the letter by saying that he would not be able to see Anderson and Heap “until Friday afternoon.”<sup>207</sup> That would be February 11. The trial was to begin the following Monday. We can conclude that Quinn did not consult with and prepare the experts beforehand. Judging from his instruction to Anderson to have the experts “in court ready to testify,” he did not expect to meet them until Monday.

Quinn reworked his argument from what it had been at the October hearing. No longer did he emphasize distinctions in types of filth. He fell back on his secondary argument: The work was so obscure, no one could possibly understand it. Not even Quinn himself understood it. If no one could understand it, no one could be corrupted. As he explained to Joyce in a letter several months later:

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201. See *supra* note 122.

202. Letter from John Quinn to Miss Margaret C. Anderson, at 16 (Feb. 5, 1921) (original in collection of S. Ill. U., Carbondale).

203. *Id.* at 17.

204. Letter from John Quinn to Miss Margaret C. Anderson, at 1 (Feb. 8, 1921) (original in collection of S. Ill. U., Carbondale).

205. *Id.* For the test, see *supra* text accompanying note 63.

206. Letter from John Quinn to Miss Margaret C. Anderson, *supra* note 204, at 2.

207. *Id.*

I took the only tack that could be taken with the three stupid judges, and that was that no one could understand what the thing was about. I nearly got away with it. I got two of them to admit that they could not understand it. After the witnesses were examined they said they wanted to read the magazine. So there was an adjournment of a week to February 21st. I knew that two of the judges were more interested in eating and smoking and perhaps drinking and poker-playing probably or church-going, or maybe all, than they were in reading *The Little Review*, and that there was no chance that they would read it in the meantime. But the third judge was one of these nervous asses. He reminded me for all the world of one of these restless hyenas that move up and down and backwards and forwards in a cage. He is an ass without the slightest glimmer of culture, but he knows the meaning of words. I made what many people in court called a brilliant argument, and my assistant, Mr. Watson, felt when we got through that the case was won, for two of the judges had agreed with me that they could not understand it. I made the analogy of Cubist painting and so on.<sup>208</sup>

A year later, recounting the trial to Shane Leslie, Quinn expanded on what he called his “cubistic painting” argument: “I likened Ulysses to cubistic painting, experimental, tentative, revolutionary, if you like, but certainly not depraving or corrupting. I said: ‘some men like and even buy cubistic painting. But that does not mean that it corrupts them or drives them to whore houses.’”<sup>209</sup>

Press reports offer a little more detail. According to the *New York Tribune*, Quinn

hinted that the readers of *The Little Review* knew how to protect their morals and said that the average men and women were safe from danger, because if they read the magazine, which was improbable, they would be either unable to comprehend Joyce’s style, or would be bored and disgusted.<sup>210</sup>

Quinn acknowledged that “certain passages of the chapter were disgusting, but insisted that ‘it is no crime to be disgusting.’”<sup>211</sup>

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208. Letter from John Quinn to James Joyce (Apr. 13, 1921), reprinted in 83 BULL. OF RES. IN THE HUMAN. 26, 35 (Spring 1980).

209. Letter from John Quinn to Shane Leslie, at 5 (June 21, 1922) (original on file with the N.Y. Public Library).

210. *Ulysses Adjudged Indecent; Review Editors Are Fined*, N.Y. TRIB., Feb. 22, 1921, at 13.

211. *Id.*

Although Quinn may have believed that he had no choice but to argue as he did, the argument had several holes. First of all, a nonrepresentational painting, “cubistic” or otherwise, does not generally depict a sex act, at least not a discernible one. Nor does it have a narrative in the usual sense. Second, the “nobody can understand it so it can’t corrupt” argument had capsized before Judge Corrigan, who easily concluded, without need for explanation from opposing counsel, that “the man went off in his pants, which no one could misunderstand.”<sup>212</sup> The chance of obscuring that part of the story was even more remote at the trial itself, where a prosecutor would be (and in fact was) ready to read aloud and argue the meaning of the language. So perhaps Quinn would have been better advised directly to confront what his argument necessarily ignored, namely what happened between Leopold Bloom and Gerty MacDowell on the Dublin beach at 8:00 p.m. on June 16, 1904. With a view to an appeal (were he willing to consider an appeal), Quinn might have tried to distinguish between pictures, at issue in *Muller*, and prose, stressing that the former, because visually explicit and leaving little to the imagination, posed greater dangers to morality. Would the strategy have been successful? We cannot know, but it was not emphasized.

Trial resumed on February 21. As Bryer reports,

Joseph Forrester, the prosecutor announced that he was going to read the offensive passages aloud. At this, one of the judges, regarding the beautiful and innocent-looking Miss Anderson with a protective paternity, refused to permit the obscenity to be read in her presence. When Quinn smilingly informed him that she was the editor, the justice replied that he was sure she hadn’t known the significance of what she was publishing.<sup>213</sup>

Quinn, in his April letter to Joyce, described the ensuing events:

[Forrester] denounced the book so vehemently that I thought he would have an apoplectic fit. I made one good point in reply: pointing to Forrester, purple and puffing, his face distorted with rage, I said: “There is my best exhibit. There is proof that Ulysses does not corrupt or fill people full of lascivious thoughts. Look at him! He is mad all over. He wants to hit somebody. He doesn’t want to love anybody. He wants somebody to be punished. He’s mad. He’s angry. His face is distorted with anger, not with love.

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212. See *supra* text accompanying notes 190–91.

213. Bryer, *supra* note 6, at 161.

That's what Joyce does. That's what *Ulysses* does. It makes people angry. They want to break something. They want somebody to be convicted. They feel like prosecuting everybody connected with it, even if they don't know how to pronounce the name *Ulysses*. But it doesn't tend to drive them to the arms of some siren. And after all it isn't a crime to make people angry."<sup>214</sup>

Quinn's strategy did not work. Justice McInerney said, "I think that this novel is unintelligent, and it seems to me like the work of a disordered mind."<sup>215</sup> Anderson and Heap were convicted. Punishment was a \$50 fine for each defendant, which they did not have. A benefactor paid it.<sup>216</sup> Anderson later regretted that she had not chosen jail instead.<sup>217</sup> *The Little Review* published what would be its final *Ulysses* excerpt in the November–December 1920 issue.

Neither client thought much of the defense (or what the law recognized as a defense) because neither thought that art could be judged by legal or moral standards. Joyce wrote "art" and that should have been the end of it, so far as they were concerned. Or, as Heap later put it in *The Little Review* (recalling Joyce's description of Gerty leaning back): "Girls lean back everywhere."<sup>218</sup> And in reply to the charge that "Nausicaa" would corrupt the minds of young girls, Heap wrote: "So the mind of the young girl rules this country? . . . If there is anything I really fear it is the mind of the young girl."<sup>219</sup> She concluded that "the only question relevant at all to *Ulysses* is—Is it a work of Art?"<sup>220</sup> One of the story's sweet ironies is that decades later, when the United States Supreme Court fashioned a test for deciding whether writing, allegedly obscene, was protected by the First Amendment, it asked Heap's question—is it art? But being a court, it needed many more words to ask it.<sup>221</sup>

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214. Letter from John Quinn to James Joyce (Apr. 13, 1921), reprinted in 83 BULL. OF RES. IN THE HUMAN. 26, 35 (Spring 1980).

215. *Greenwich Village's Editores Finest*, N.Y. HERALD, Feb. 22, 1921, at 8.

216. ANDERSON, MY THIRTY YEARS' WAR, *supra* note 166, at 221.

217. *Id.* at 226.

218. Jane Heap, *Art and the Law*, in ANDERSON, LITTLE REVIEW ANTHOLOGY, *supra* note 167, at 302.

219. *Id.*

220. *Id.* at 303.

221. *Roth v. United States*, 354 U.S. 476, 484 (1957) (implying that a work had to be "utterly without redeeming social importance" to lack First Amendment protection as obscenity); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass.*, 383 U.S. 413, 419 (1966) (plurality of three justices states that "[a] book cannot be proscribed unless it is found to be utterly without redeeming social value"); *Miller v. California*, 413 U.S. 15, 24 (1973). *Miller* denied First Amendment protection to a work that "taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* (emphasis added). *Miller* concluded that the "utterly" standard in prior cases

Anderson regretted that Quinn had not been more forceful about stressing Joyce's reputation despite the court's lack of interest:

John Quinn's idea was for Jane and me to remain inconspicuous, meek and silent, and to surround ourselves with "window trimmings"—meaning a group of conservative quietly-dressed women and innocent boarding-school girls. We felt that he was wrong in not wanting us to speak. I still believe we could have given a clearer idea of Joyce's motives than he succeeded in doing. He was brilliant in defining Joyce's prestige in the world of letters, in exploiting his own prestige in the legal world, and in scoring government officials whose ignorance didn't permit them to distinguish between literature and pornography. But he didn't stress the quality of Joyce's mind or the psychology which explains Rabelaisian tendencies. When one of the judges protested that he wasn't interested in hearing anything about James Joyce, that he merely wanted to discuss the obscene writing in question, John Quinn let his opportunity slip entirely—without even seeing it, I believe. I nearly rose from my seat to cry out that the only issue under consideration was the kind of person James Joyce was, that the determining factor in aesthetic and moral judgment was always the personal element, that obscenity *per se* doesn't exist. But, having promised, I sat still.<sup>222</sup>

Anderson is on to something here. It would have been easier for the court to have acquitted if the judges were aware of Joyce's status and the reasons for it. It would have taken some courage for the judges to conclude that the beach episode was not obscene. Judges are not immune to popular opinion. Greater emphasis on Joyce's prominence might have given them the armor they needed or wanted to repel public criticism of a decision to dismiss the case. Of course, this assumes that it would have been possible to make this proof; yet, as Anderson herself wrote shortly after the trial, the judges showed no interest in Quinn's effort to tell "who James Joyce is" and viewed their job as solely to decide whether "certain passages of *Ulysses* (incidentally the only passages they can understand) violate the statute."<sup>223</sup> But Quinn could have tried to galvanize

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"has never commanded the adherence of more than three Justices at one time." *Id.* at 25.

222. ANDERSON, *MY THIRTY YEARS' WAR*, *supra* note 166, at 219–20.

223. ANDERSON, *in* *LITTLE REVIEW ANTHOLOGY*, *supra* note 167, at 306.

“respectable” public opinion extra-judicially.<sup>224</sup> It had worked for Alfred Knoedler.<sup>225</sup>

After the convictions, as he had predicted, Quinn was unable to interest publishers in the book. Quinn died in 1924. *Ulysses* would not be published in the United States until 1934. Meanwhile, in Paris, Sylvia Beach published *Ulysses* under the imprint of her bookstore, Shakespeare and Company. Maurice Darantiere, the Dijon printer of the book, sent her the first two volumes by overnight rail. Beach was at the Paris station at 7:00 a.m. to receive them. It was February 2, 1922, Joyce’s fortieth birthday. She delivered one copy to Joyce and placed the second in her shop window.<sup>226</sup> *Ulysses* was published.

As he promised, Quinn did not appeal Anderson’s and Heap’s convictions. They had no money to hire new counsel, of course, or print a record. Quinn represented them without fee and not for any love of them. He thought they were taking advantage of Joyce for their own celebrity.<sup>227</sup> Yet Quinn also understood that the conviction, if left undisturbed, would likely prevent publication of *Ulysses* in the United States for some time notwithstanding that the verdict represented the views of only three men—not a jury and not an appellate court. We can never know why, despite Quinn’s devotion to Joyce and literature, the same devotion that led him to defend *The Little Review* in the first place and to support Joyce and it financially, he summarily rejected the possibility of an appeal, even at his own expense.

On the other hand, Quinn’s decision not to appeal can also be seen to have a strategic purpose. He had assumed before trial that conviction was inevitable and that an appellate court would inevitably affirm. The first prediction came true. An appellate decision affirming the conviction would likely be accompanied by an opinion whose harsh language could eliminate whatever slim chance remained for publication of the book once finished. In other words, a bold publisher just might be willing to go forward in the face of a lower court conviction of Anderson and Heap for publishing one part of one chapter. But an appellate court’s condemnation of that chapter might scare off even the most fearless publishers. We must remember that not only money was at risk. John Sumner was still out there

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224. See *infra* text accompanying notes 333–36.

225. See *supra* text accompanying notes 147–49.

226. ELLMANN, *supra* note 7, at 524.

227. Quinn believed that Anderson and Heap were using *Ulysses* to gain fame for themselves while paying Joyce nothing and sacrificing Joyce’s chances to publish the book in the United States. Letter from John Quinn to Ezra Pound (Oct. 16, 1920) (original in collection of S. Ill. U., Carbondale).

and was sure to bring criminal charges against any publisher of *Ulysses*. (A decade later he actively supported the decision to prevent importation of the book into the country.)<sup>228</sup> We know that Quinn did try to persuade Ben Huebsch and others to take on *Ulysses* following the Anderson and Heap convictions, to no avail.<sup>229</sup> Ten years later, Huebsch again passed on the opportunity.<sup>230</sup> It took the upstart Bennett Cerf and his new company, Random House, to do what established publishers would not do as late as 1932.

#### *D. Could Quinn Have Won an Appeal?*

We can never know what the outcome of an appeal to the highest New York court might have been.<sup>231</sup> Yet for good reasons we can surmise that chances for reversal were at least fair, certainly better than Quinn believed. A different strategist might have made the attempt once it was clear that a conviction, left standing, would scare off all publishers. But who should choose the strategy? Here, another complexity enters the equation. Anderson and Heap were convicted, not Joyce. They alone had the right to appeal. Yet their appeal, if unsuccessful, would affect Joyce more than anyone. Harsh appellate language aside, Anderson and Heap would lose nothing from a decision affirming the convictions. And they would gain nothing from a reversal of their convictions but a clean criminal record, which did not seem to concern them.<sup>232</sup> It was Joyce who stood the most to lose or gain. Yet it was not his decision. So far as we know, the question of appeal never arose after trial, either with Joyce or the defendants. It is worth asking whether an appeal might have succeeded. To do so, we need to examine other obscenity prosecutions shortly before and after the trial of Anderson and Heap.

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228. See *infra* text accompanying notes 419–21.

229. GORMAN, *supra* note 7, at 279–81.

230. He gave as a reason the inability to obtain the rights from Sylvia Beach. See THE UNITED STATES V. ONE BOOK ENTITLED *ULYSSES* BY JAMES JOYCE 100 (Michael Moscato & Leslie Le Blanc eds., 1984).

231. Any appeal would have to be taken to the Appellate Division of the Supreme Court and then as of right to New York Court of Appeals. *People v. Robinson*, 143 N.E. 745 (N.Y. 1924); *People v. Ekerold*, 105 N.E. 670 (N.Y. 1914). See also *People v. Johnston*, 79 N.E. 1018 (N.Y. 1907); *People ex rel. Comm'rs of Pub. Charities and Corrections v. Cullen*, 45 N.Y. 401 (N.Y. 1896).

232. The possibility that *The Little Review* could resume publishing *Ulysses* following reversal must be counted as remote. By the time the case moved through the appellate courts, the book would be finished or nearly so. Further, an appellate finding that the “Nausicca” episode was not obscene would provide no immunity against prosecution for publication of other excerpts from the work in progress.

The tide was turning against John Sumner and the Society for the Suppression of Vice toward and after the end of the First World War. They lost several important prosecutions in this period. One loss was the 1918 acquittal—before the same court that later tried Anderson and Heap—of Raymond Halsey, a bookstore clerk, for selling Sumner a copy of Theophile Gautier's *Mademoiselle de Maupin*, first published in France in 1835 and in the United States in 1917.<sup>233</sup> The book was sexually transgressive for its time and for much time thereafter, far more so than the *Ulysses* excerpt Quinn defended. Following his acquittal, Halsey sued the Society for malicious prosecution and in 1919 won \$2,500 from a jury, which concluded that Sumner did not even have so much as probable cause to prosecute the book as obscene.<sup>234</sup> This was quite a remarkable conclusion given the book's content. The appellate division upheld Halsey's award in 1920<sup>235</sup> and the Society appealed. In his brief to the Court of Appeals, counsel for the Society described the book in some detail in order to impress on the judges just how salacious were its themes and, therefore, the reasonableness of the prosecution. For example, he wrote:

Beginning with Chapter III, our hero describes his amours with the fair Rosette, running through Chapters III, IV & V. The whole description reeks with lasciviousness. It is a vivid appeal to lewd passions. There is hardly a reference to woman in any page, in which she is considered in any other light than as a desirable or undesirable mistress. Virtue in a woman is apparently inconceivable. Her value depends upon her physical charms and her complaisance. All through the book runs a cynical contempt for all that we consider clean, decent and virtuous. Some of his experiences with Rosette are portrayed in language which if printed in a public paper would lead to instant denunciation. . . .

Beginning with Chapter VI, the writer introduces a new character. "Rosalind," masquerading in man's attire as the

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233. *Halsey v. N.Y. Soc'y for the Suppression of Vice*, 136 N.E. 219 (N.Y. 1922); BOYER, *supra* note 40, at 61.

234. *Halsey*, 136 N.E. at 219.

235. *Halsey v. N.Y. Soc'y for the Suppression of Vice*, 185 N.Y.S. 931 (App. Div. 1920). Actually the case has a somewhat more tangled history. Following the first malicious prosecution verdict for Halsey, the appellate division reversed because the trial judge had instructed the jury that probable cause was lacking as a matter of law. *Halsey v. N.Y. Soc'y for the Suppression of Vice*, 180 N.Y.S. 836, 838 (App. Div. 1920). This was a jury question. *Id.* On remand, Halsey won again and his victory was affirmed on two appeals. *Id.*

Chavalier Theodore de Serannes, succeeds in inflaming Rossette's passions and a large part is given to Rosette's vain efforts in trying to bring "Theodore" as a lover to the crucial point, and her inability to repay Rosette's love in the one way desired, ending in a duel with Rosette's brother Alcibiades. She nearly gets herself into difficulties at a tavern. The balance of the book is devoted largely to Roselind's adventures, her hopes of securing a desirable lover. She finally is discovered by D'Albert and yields herself to him. The latter half of the book is devoted to the amours of D'Albert with Rosette and Roselind. The enormous prolixity of the author makes it difficult to attempt a complete analysis of that pastime, without taking more space than would be justifiable in a brief. The author seemed to be so enamoured with lewdness that he cannot tear himself away from it, but lingers over every detail, especially the more suggestive of his descriptions, taking pages to describe the amorous raptures of the principal actors. . . .

The book is really a novel, written for the sole apparent object of describing the successful amours of a French gentleman of fashion. It describes all women as wanton, all men of fashion, at best, as libertines. . . .<sup>236</sup>

The Court of Appeals affirmed, citing expert opinion.<sup>237</sup> This is the same court that nearly forty years earlier, in *Muller*, refused to allow the defendant to introduce the testimony of experts on the issue of obscenity. But of course it was a different court. The majority opinion cited Henry James, Arthur Symons, George Saintsbury, James Perkins, and at some length, Benjamin Wells. All were writers or students of literature and all quotes are from books or articles dating back more than fifty years.<sup>238</sup> The Second Circuit would later cite *Halsey* in affirming Judge Woolsey's finding that *Ulysses* was not obscene.<sup>239</sup>

Another loss to the Society, in September 1922, was a judge's dismissal of a complaint against publisher Horace Liveright. The book that

236. Brief of Appellant at 10–13, *Halsey v. New York Soc'y for the Suppression of Vice*, 136 N.E. 219 (N.Y. 1922) (inconsistency in the spelling of names is not corrected).

237. *Halsey*, 136 N.E. 220–21.

238. "We may take judicial notice that [the book] has been widely sold, separately and as a part of every collection of the works of Gautier. It has excited admiration as well as opposition." *Id.* at 220. Halsey's brief to the Court of Appeals does not cite this critical history, which the court appears to have discovered on its own.

239. *United States v. Levine*, 83 F.2d 156, 157 (2d Cir. 1936).

got Liveright into trouble was a translation of Petronius's *Satyricon*.<sup>240</sup> And in the same month, another judge dismissed a Sumner complaint against publisher Thomas Seltzer, who like Liveright was willing to push the boundaries of what traditional publishers recognized as "good taste." Seltzer published D.H. Lawrence's *Women in Love*, Arthur Schnitzler's *Casanova's Homecoming*, and *A Young Girl's Diary* with a preface by Sigmund Freud.<sup>241</sup> It is true that Liveright's and Seltzer's victories against the Society came more than a year after the Anderson and Heap convictions, but they show that courts at the time were moving steadily away from *Hicklin* and *Muller*. The Court of Appeals, in upholding the jury's finding of no probable cause in the *Halsey* case in 1922 (despite the book's theme and explicitness), did not even cite *Muller* and *Hicklin*, although the dissent did.<sup>242</sup> Further, before Anderson and Heap's trial, lower courts had several times ruled against the Society in Halsey's malicious prosecution case.<sup>243</sup>

There are more cases. In the summer before Anderson and Heap were arrested, the appellate division in Manhattan reversed a jury conviction of Harper & Brothers and its president, Clinton Brainard, for selling *Madeleine*, an anonymous autobiography of a prostitute and madam.<sup>244</sup> The court could "see no useful purpose in the publication of the book" and could not "agree that it has any moral lesson to teach," but it could not say that the book "contains a single word or picture which tends to excite lustful or lecherous desire."<sup>245</sup> Again, the majority opinion did not cite *Muller* or *Hicklin*, although the dissent did.<sup>246</sup> Sumner also caused the prosecution of *Jurgen*, by James Branch Cabell, a book seemingly innocent but allegedly replete with double entendres and "phallic hints and references."<sup>247</sup> Quinn initially represented the publisher and managed to have the case transferred to the Court of General Sessions, exactly the strategy he would later unsuccessfully attempt for *The Little Review*. Although the police raid leading to the prosecution of *Jurgen* occurred in January 1920, the trial was not held until October 1922, when a new lawyer succeeded in having it dismissed.<sup>248</sup>

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240. BOYER, *supra* note 40, at 82–83.

241. *Id.* at 78–81.

242. *Halsey*, 136 N.E. at 222 (Crane, J., dissenting).

243. *See supra* text accompanying notes 234–37.

244. *People v. Brainard*, 183 N.Y.S. 452 (App. Div. 1920).

245. *Id.* at 456.

246. *Id.* at 457 (Dowling, J., dissenting).

247. BOYER, *supra* note 40, at 75.

248. *Id.* at 78.

Another decision that would have been useful to Anderson and Heap on appeal was *United States v. Kennerley*.<sup>249</sup> Citing *Bennett*, Learned Hand, then on the district court, reluctantly refused to dismiss an indictment for sending an obscene book through the mail, but criticized the state of the law:

I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time, as conveyed by the words, “obscene, lewd, or lascivious.” I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses.<sup>250</sup>

Hand later served on the panel that affirmed Judge Woolsey and whose opinion embraced the “honestly relevant” test he floated here. Kennerley was acquitted at trial. His lawyer was John Quinn.

Why were these prosecutions unsuccessful? First, like Fielding’s *Tom Jones*, which a New York court found not obscene in 1894 in *In re Worthington*,<sup>251</sup> Mademoiselle de Maupin enjoyed present and historical critical support, as did Rabelais, Ovid, Boccaccio, and Voltaire, each of whose works had also escaped censorship in New York in recent years.<sup>252</sup> Second, publisher Selzer mounted an aggressive defense, including impressive expert witnesses and a public relations campaign.<sup>253</sup> Although Quinn called expert witnesses at the trial of Anderson and Heap, he did so at the last minute, apparently with no preparation, and solely in order to reduce the risk of jail following conviction. He may have viewed publicity, or any effort to woo what we today call the media, as contrary to his professional role. He even lamented Anderson and Heap’s decision to bring supporters to the courtroom.<sup>254</sup> Otto Kahn, who helped support *The Little Review* financially, told Anderson after the verdict, “John Quinn is

249. 209 F. 119 (S.D.N.Y. 1913).

250. *Id.* at 120–21.

251. 30 N.Y.S. 361 (N.Y. Sup. Ct. 1894).

252. *Id.* (deciding not to destroy *Arabian Nights*, the works of Rabelais, and Ovid’s *Art of Love* for violating obscenity law); *St. Hubert Guild v. Quinn*, 118 N.Y.S. 582 (App. Div. 1909) (Voltaire); BOYER, *supra* note 40, at 82–83.

253. BOYER, *supra* note 40, at 80.

254. Bryer, *supra* note 6, at 160.

rather old fashioned, I'm afraid. I should have given you Morris Gest<sup>255</sup> as a publicity agent and had the case on all the front pages."<sup>256</sup> Publicity could have stressed Joyce's international reputation. Quinn did try to raise Joyce's stature at trial and was rebuffed. A less "old fashioned" lawyer could have sought to achieve the same goal extra-judicially, which might have made the press more sympathetic and had an influence on appellate courts or even the trial judges. Anderson and Heap had much press coverage but no press support.<sup>257</sup> The *New York Times* said that the book was so obscure—of interest especially to "psychopathologists"—that it was not worth banning.<sup>258</sup> Quinn's passivity in this regard is exactly opposite to Morris Ernst's prodigious cultivation of respectable opinion nationwide a decade later—support that made it easier for the federal judges hearing his case to free *Ulysses* without fear that they would be crossing clear boundaries of social acceptability. Of course, none of this means an appeal would have succeeded. Working against Quinn was the fact that Joyce was relatively new, without the armor that long historical endorsement can confer. Also, Quinn had only part of a chapter to defend, not the entire book. In that part, a young woman leans back to reveal parts of her body to an older man, who is watching from nearby and who ejaculates in his pants while watching the woman exhibit herself. Perhaps most challenging to a defense lawyer is the implication that the woman is aware of and pleased by the man's conduct. Could that scene have made it past a New York court in 1921 or 1922?

Yes. With the advantage of the *Brainard* and *Halsey* cases, a lawyer in Quinn's position should have realized in 1921 that the New York courts were divided on how broadly to utilize their power to suppress works of art through conviction of authors and publishers. Quinn's *certainty* that the convictions would be affirmed is not defensible. Quinn might have lost, but he also might have won. The unsuccessful prosecutions of Liveright and Seltzer and other events in the ensuing decade confirm the diminishing power of the opponents of "vice" and the increasing unwillingness of judges to be the censors of art or books, at least not

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255. Morris Gest was a successful Broadway producer. See *400 at Funeral of Morris Gest*, N.Y. TIMES, May 19, 1942, at 20 ("More than 400 persons, many of whom are prominent in the theatre, were present.").

256. BOYER, *supra* note 40, at 85.

257. See ANDERSON, MY THIRTY YEARS' WAR, *supra* note 166, at 226 ("During the trial and afterward not one New York newspaper came to our defense, not one spoke out for Joyce, not one cared to be identified with the *Ulysses* scandal.").

258. *Taste, Not Morals, Vindicated*, N.Y. TIMES, Feb. 23, 1921, at 12.

where enlightened public opinion had come to the defense.<sup>259</sup> The New York Society won some of its cases, and it scared some publishers from even offering certain books,<sup>260</sup> but in the following decade, appellate victories where the work and its author had a respectable following often eluded the Society. One Society victory in this period was over Arthur Schnitzler's play "Reigin" (or "La Ronde"). In 1930, the appellate division divided 3–2 in affirming the conviction of Philip Pesky, a bookstore clerk, for selling the play.<sup>261</sup> Like Anderson and Heap, Pesky had been convicted before a panel of three judges in the court of special sessions (with one judge dissenting).<sup>262</sup> Underscoring the stark division in the New York case law on book censorship at the time, the majority cited *Bennett and Muller* and the dissent cited *Brainard and Worthington*.<sup>263</sup> The New York Court of Appeals affirmed later that year, over two dissents.<sup>264</sup> The majority emphasized the deference due the trier of fact and refused to find that the "the writing is so innocuous as to forbid the submission of its quality to the triers of the facts."<sup>265</sup>

Yet less than two years after this decision, the same court (4–3) reversed convictions, affirmed by the appellate division, for producing the play "Frankie and Johnnie."<sup>266</sup> The majority cited *Muller* passingly, ignoring its broader language. It wrote that the question was not "whether [the play] would tend to coarsen or vulgarize the youth who might witness it but whether it would tend to lower their standards of right and wrong, specifically as to the sexual relation."<sup>267</sup> And it continued in a vein that clearly showed receptivity to greater license in theatrical works and therefore books:

Perhaps in an age of innocence the facts of life should be withheld from the young but a theatre goer could not give his approval to the

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259. See BOYER, *supra* note 40, at 95. Boyer concludes that by 1922 Sumner "believed firmly that 'the chance of being convicted' was 'the chief deterrent against a flood of still more vicious books,' yet clearly the credibility of this deterrent would soon vanish if the pattern of acquittals continued." *Id.* at 97.

260. *Id.* at 135 (describing how Knopf would back down to avoid action by Sumner).

261. *People v. Pesky*, 243 N.Y.S. 193, 198 (App. Div. 1930).

262. *Id.*

263. *Id.* at 196–97, 199.

264. *People v. Pesky*, 193 N.E. 227 (N.Y. 1930).

265. *Id.* Pro-censorship forces did have other victories in New York courts in the ensuing decades. Perhaps most noteworthy is the prosecution of Doubleday & Company for publishing Edmund Wilson's book *Memoirs of Hecate County*. *People v. Doubleday & Co.*, 77 N.E.2d 6, 7 (N.Y. 1947), *aff'd by an equally divided court*, 335 U.S. 848 (1948).

266. *People v. Wendling*, 180 N.E. 169 (N.Y. 1932).

267. *Id.* at 169–70.

modern stage as “spokesman of the thought and sentiment” of Broadway and at the same time silence this rough and profane representation of scenes which repel rather than seduce.

The production of such a play may be repulsive to puritanical ideas of propriety as would “Camille” and may be offensive to the more liberal minded as lacking in taste and refinement, as would the morally unobjectionable “Abie’s Irish Rose.” The play may be gross and its characters wanting in moral sense. It may depict women who carry on a vicious trade and their male associates. It cannot be said to suggest, except “to a prurient imagination,” unchaste or lustful ideas. It does not counsel or invite to vice or voluptuousness. It does not deride virtue. Unless we say that it is obscene to use the language of the street rather than that of the scholar, the play is not obscene under the Penal Law, although it might be so styled by the censorious.<sup>268</sup>

This decision is especially noteworthy because the statute under which the defendants were convicted (unlike the statute in the prosecution of Anderson and Heap) specifically targeted plays that “tend to the corruption of the morals of youth or others.”<sup>269</sup>

In 1929, a magistrate ordered that a complaint be filed against the publisher of “The Well of Loneliness,” which the court described as “a novel dealing with the childhood and early womanhood of a female invert.”<sup>270</sup> The court continued its description:

In broad outline the story shows how these unnatural tendencies manifested themselves from early childhood; the queer attraction of the child to the maid in the household; her affairs with one Angela Crosby, a normally sexed, but unhappily married woman, causing further dissension between the latter and her husband, her jealousy of another man who later debauched this married woman, and her despair, in being supplanted by him in Angela’s affections, are

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268. *Id.* at 170 (citations omitted).

269. N.Y. Penal Law § 1140-a (1920) (repealed) read at the time that “any person who as owner, manager, producer, director, actor or agent or in any other capacity prepares, advertises, gives, directs, presents or participates in, any obscene, indecent, immoral or impure drama, play, exhibition, show or entertainment . . . which would tend to the corruption of the morals of youth or others” was guilty of a misdemeanor.

270. *People v. Friede*, 233 N.Y.S. 565, 566–67 (N.Y. Magis. Ct. 1929). The court cited *Hicklin* and *Muller*. *Id.* at 568. The court stressed that the recent amendment to § 1140-a forbade any play “dealing with the subject of sex degeneracy or sex perversion.” *Id.* at 569. The prosecution in *Friede*, however, was not of a play but a book.

vividly portrayed. The book culminates with an extended elaboration upon her intimate relations with a normal young girl, who becomes a helpless subject of her perverted influence and passion, and pictures the struggle for this girl's affections between this invert and a man from whose normal advances she herself had previously recoiled, because of her own perverted nature. Her sex experiences are set forth in some detail and also her visits to various resorts frequented by male and female inverts.

The author has treated these incidents not without some restraint; nor is it disputed that the book has literary merit. . . . Yet the narrative does not veer from its central theme, and the emotional and literary setting in which they are found give the incidents described therein great force and poignancy. The unnatural and depraved relationships portrayed are sought to be idealized and extolled. The characters in the book who indulge in these vices are described in attractive terms, and it is maintained throughout that they be accepted on the same plane as persons normally constituted, and that their perverse and inverted love is as worthy as the affection between normal beings and should be considered just as sacred by society.

The book can have no moral value, since it seeks to justify the right of a pervert to prey upon normal members of a community, and to uphold such relationship as noble and lofty. Although it pleads for tolerance on the part of society of those possessed of and inflicted with perverted traits and tendencies, it does not argue for repression or moderation of insidious impulses.<sup>271</sup>

In the face of this hostility, Morris Ernst, who represented the defendants in *Friede* and who a few years later would represent Random House in its effort to publish *Ulysses*, "began a massive advertising campaign on behalf of his clients."<sup>272</sup> Tried before a panel of three judges two months later, the defendants were acquitted and within a year, the publisher had sold 100,000 copies of the book.<sup>273</sup>

New York obscenity law was at a crossroads in 1921 when Anderson and Heap were convicted. Down one path, still available to jurists who wished to take it, was the harsh dicta of *Muller*, quoting *Hicklin*. Down the

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271. *Id.* at 566–67.

272. BOYER, *supra* note 40, at 133.

273. *Id.* at 133–34.

other path was the view that the obscenity statute did not reach descriptions of sex simply because they were offensive if they did not also “excite lustful and lecherous desire.”<sup>274</sup> In the following decade, judges took the second path far more often than the first until it became the predominant one. Certainly, Quinn’s chances of reversal would have been greater at the end of the decade than at its start; but if the case had been tried differently, if respected opinions about Joyce had been encouraged extra-judicially before (and then if necessary following) the trial, if Quinn had sought review of the convictions even as high as the Court of Appeals,<sup>275</sup> the chance of reversal would have been at least fair. Given the stakes, it was worth the effort or at least serious consideration. In the case of the book *Jurgen*, Boyer reports that Quinn also thought that “conviction was inevitable” and hoped that the case would be “forgotten” following transfer to the Court of General Sessions in 1920.<sup>276</sup> He persuaded the publisher to withdraw the book to reduce the likelihood of a harsh sentence if the case was tried. After the transfer, Quinn withdrew from the case.<sup>277</sup> Quinn was wrong in both predictions.<sup>278</sup> The matter was not forgotten and a new lawyer won an acquittal in 1922. Quinn evinced the same timidity and pessimism in the case against Anderson and Heap. The publishing history of *Ulysses* could have been quite different if Quinn had mounted a more aggressive defense or an appeal.

E. United States v. One Book Entitled *Ulysses* by James Joyce: *The Prelude*<sup>279</sup>

We now move ahead a decade. It is December 1931. Bennett Cerf is the thirty-three-year-old president of Random House, which he started in 1927 with his friend, Donald Klopfer.<sup>280</sup> Older generations remember Bennett Cerf as a long time contestant on the television quiz show “What’s My Line?,”<sup>281</sup> but he had a prior and more interesting life. That would no doubt have been true whether or not Cerf had acquired the right to publish *Ulysses*, but winning it contributed to his early success and the success of Random House. As Cerf described it in a 1934 essay, written

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274. *People v. Eastman*, 81 N.E. 459, 460 (N.Y. 1907) (Cullen, J., concurring).

275. See *supra* note 231 on the jurisdictional questions.

276. BOYER, *supra* note 40, at 76.

277. *Id.*

278. See *id.* at 78.

279. *And Bennett Cerf Remembers Events That Didn’t Happen and Forgets One That Did.*

280. Alden Whitman, *Bennett Cerf Dies; Publisher, Writer*, N.Y. TIMES, Aug. 29, 1971, at 56.

281. *Id.*

shortly after he published *Ulysses*, he was “summoned” to the brokerage firm of Sartorius & Smith in December 1931 by Robert Kastor, a wealthy businessman, but more importantly, the brother of Helen Joyce, wife of Georgio Joyce, James Joyce’s son.<sup>282</sup> Forty-five years later, in his autobiography “At Random,” Cerf would airbrush Kastor out of the story. By then, Cerf was the hero, the person who got the idea to free *Ulysses* in the United States and who wrote to Joyce, care of Sylvia Beach, to elicit his interest.<sup>283</sup> Back in 1934, however, Cerf recalled that Kastor had asked him if Random House was interested in publishing *Ulysses*. After consulting Klopfer, Cerf said yes.<sup>284</sup> By April, Random House had a contract giving it the United States rights to the book. Joyce received a \$1,000 advance and would receive an additional \$1,500 on publication and royalties on sales of between fifteen and twenty percent.<sup>285</sup> About this time, too, Cerf made what was the most important non-editorial decision on the way to his goal. He called Morris Ernst. Why Ernst?

Ernst was born in Alabama in 1888,<sup>286</sup> eighteen years Quinn’s junior. Where Quinn seemed to seek accommodation with the forces of suppression, Ernst’s style was opposite. He confronted them directly. Ernst’s father had immigrated to the United States from Eastern Europe. When Ernst was two, the family moved to New York. Ernst went to Williams College and to New York Law School at night, selling shirts and furniture by day.<sup>287</sup> By 1931, when Kastor summoned Cerf, Ernst was a prominent New York lawyer, a partner in Greenbaum, Wolff & Ernst, and a general counsel of the American Civil Liberties Union.<sup>288</sup> He had successfully argued several censorship cases in federal and state courts.<sup>289</sup> Ernst was interested in *Ulysses* even before Cerf called. He had been scouting for a client to hire him to bring a case. He must have realized that in winning the right to publish *Ulysses* he could achieve three goals simultaneously: support civil liberties, become more famous, and earn a

282. Bennett Cerf, *Publishing Ulysses*, CONTEMPO: A REV. OF BOOKS AND PERSONALITIES, Feb. 15, 1934, at 1.

283. BENNETT CERF, *AT RANDOM* 90 (1977).

284. Cerf, *Publishing Ulysses*, *supra* note 282, at 2.

285. The text of the contract is printed in *THE UNITED STATES OF AMERICA v. ONE BOOK ENTITLED ULYSSES BY JAMES JOYCE*, *supra* note 230, at 105–07. Adjusting for inflation, \$2,500 equals more than \$37,000 in 2006.

286. Alden Whitman, *Morris Ernst, ‘Ulysses’ Case Lawyer, Dies*, N.Y. TIMES, May 23, 1976, at 40.

287. *Id.*

288. *Id.*

289. These included *People v. Friede*, 233 N.Y.S. 565 (N.Y. Magis. Ct. 1929) (“The Well of Loneliness”) and *United States v. Dennett*, 39 F.2d 564 (2d Cir. 1930) (“Sex Side of Life”).

lot of money. In August 1931, four months before Kastor's call, Ernst's associate Alexander Lindey met with Sylvia Beach's sister about American rights to the book.<sup>290</sup> That avenue was not productive. In October 1931, Ernst wrote to Ben Huebsch, the publisher of *Dubliners* and *Portrait of an Artist*, "in regard to possible services that we might render in connection with the legalization of Joyce's *Ulysses*."<sup>291</sup> But Huebsch declined.<sup>292</sup> Ernst remained determined. Not shy, he must have let it be known that he wanted to bring a case that would free *Ulysses* for American publication because word had clearly reached Cerf. In his 1977 autobiography, Cerf wrote that he "had heard Morris Ernst say one night" that he would "like to wage a fight to legalize" *Ulysses*.<sup>293</sup> Soon after Kastor called Cerf at the end of 1931, Cerf called Ernst. By March 1932, they were planning strategy.

Random House faced two huge financial obstacles. Because the young company had little money, it needed confidence that *Ulysses* would not be prosecuted *before* committing to pay for publication. And it could not afford Ernst's fees. Ernst solved both problems. His strategy was to have one copy of the Shakespeare and Company (English) edition of *Ulysses* sent from France and seized by Customs as obscene.<sup>294</sup> Ernst would then contest that charge in court.<sup>295</sup> If he won, Random House would publish. This way, before Random House spent any money publishing the book, it could test its legal right to do so in at least one court. That reduced (though it did not eliminate) one financial risk. The other problem was how to pay the lawyer. Ernst had thought about that, too. His firm agreed to a retainer of \$500, at least \$50 per day in the event of a jury trial, and something else.<sup>296</sup> The firm would get a royalty of between two and five percent of

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290. THE UNITED STATES OF AMERICA V. ONE BOOK ENTITLED *ULYSSES* BY JAMES JOYCE, *supra* note 230, at 77–78.

291. *Id.* at 98–100.

292. *Id.* at 100.

293. CERF, AT RANDOM, *supra* note 283, at 90. Cerf died in August 1971. Between 1967 and 1971, he participated in interviews at Columbia University's Oral History program and then edited a transcript of the interviews. The manuscript became the basis for the 1977 autobiography, augmented from other sources. Cerf and Ernst began their discussions even before Cerf had a signed contract with Joyce. Random House sent the contract to Joyce on March 23, and Cerf notified Ernst on April 13, 1932, that the signed contract "came in from Joyce yesterday." THE UNITED STATES OF AMERICA V. ONE BOOK ENTITLED *ULYSSES* BY JAMES JOYCE, *supra* note 230, at 108, 118.

294. VANDERHAM, *supra* note 6, at 88.

295. *Id.*

296. THE UNITED STATES OF AMERICA V. ONE BOOK ENTITLED *ULYSSES* BY JAMES JOYCE, *supra* note 230, at 108–12. The correspondence over fees hit one snag. Ernst had insisted on an additional fee in the event of a jury trial. His position was that it would "in no event be less than \$50.00 per day." *Id.* at 109. Cerf responded with a definite offer of "*per diem* compensation for possible time in court . . . [at] precisely \$50.00 a day." *Id.* at 110. Ernst replied that he did not "want to seem unduly insistent"

any money Random House earned on the sale of *Ulysses*, the exact percentage depending on the edition. Think about it. A royalty on the profits from the sale of *Ulysses* in the United States with no time limit. Some sources report that the royalty was to last only for Ernst's life<sup>297</sup> (Ernst died in 1976) but that is not what the correspondence over the fee says.<sup>298</sup> Greenbaum, Wolf & Ernst is now defunct.<sup>299</sup> I asked Random House if any descendants of the firm's lawyers continued to receive royalties from *Ulysses*, but it declined to say.

Ernst believed that his chances of winning in court would be improved if the addressee for the copy of *Ulysses* sent from Paris was a prominent American. But who? Unlike John Quinn, Ernst and Cerf planned a public campaign so the judges who would decide the book's fate might find comfort and protection in an elite opinion. Cerf first asked the recently retired Oliver Wendell Holmes to agree to accept delivery of a copy of *Ulysses*. Cerf gushed:

If you will permit us to do so, I would like to have this Paris copy of *Ulysses* addressed to you. There is no man in the entire country whose name in connection with this case would be more helpful in swaying any member of the judiciary. By the same token, I feel that there is no man in this country more apt than you to be

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but nonetheless did insist on his formulation of not less than \$50.00 per day. *Id.* at 111. Ernst predicted that the prospect of a jury trial was "remote," and as it turns out, there was none. *Id.*

297. Cerf so recalls in his autobiography, *At Random*, published the year following Ernst's death and six years after Cerf died. Cerf wrote that he had lunch with Ernst in March 1932 and asked if Ernst would fight the case in court if Random House could "get Joyce signed up to do an American edition of *Ulysses*." Then he added, "'We haven't got the money to pay your fancy prices'—he was a very high-powered lawyer—but I'd like to make you a proposition. We'll pay all the court expenses, and if you win the case, you'll get a royalty on *Ulysses* for the rest of your life.'" CERF, *supra* note 283, at 90; see also GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 333 (1994) ("Ernst would get a royalty on *Ulysses* for the rest of his life if it were successfully published in the United States."). It is unlikely that the idea for a royalty originated with Cerf. The prior October, Ernst had offered Ben Huebsch a maximum fee of \$2,000 plus a four percent royalty. *THE UNITED STATES OF AMERICA V. ONE BOOK ENTITLED ULYSSES BY JAMES JOYCE*, *supra* note 230, at 99. Ernst's 1976 obituary in the *New York Times* is ambiguous on this question. "The *Ulysses* cases unwittingly provided Mr. Ernst with a substantial life-long income. In the place of a fee, which Mr. Cerf thought too high, Random House agreed to pay Mr. Ernst a 5 percent royalty on its hardbound edition and 2 percent on its Modern Library Giant and Vintage editions. As a result, he received several hundred thousand dollars." Whitman, *supra* note 286, at 40. This description does not exclude continued payment to his heirs. I question the word "unwittingly." I think instead that Ernst knew exactly what he was doing and saw the upside if *Ulysses* was successfully published in the United States.

298. *THE UNITED STATES OF AMERICA V. ONE BOOK ENTITLED ULYSSES BY JAMES JOYCE*, *supra* note 230, at 108 (referring to a royalty of 2–5 percent on "all copies of the book" depending on the edition and without limitation as to time).

299. The firm closed in June 1982. RICHARD ABEL, *AMERICAN LAWYERS* at 186 (1991).

willing to lend his name to fight to win James Joyce the due that has so long been owing to him on *Ulysses* in the United States.<sup>300</sup>

Two days later, Holmes's secretary said no.<sup>301</sup> The next day, Cerf sent an equally effusive letter to Nicholas Murray Butler, president of Columbia University, Cerf's alma mater.<sup>302</sup> Three days later, Butler's assistant said no.<sup>303</sup> Undaunted, the next day Cerf tried a third time, telling Roy Howard, of the Scripps-Howard newspapers, that Howard was the ideal recipient of the book.<sup>304</sup> Five days later, Howard's assistant said no.<sup>305</sup> Cerf and Ernst then gave up and authorized Paul Léon, Joyce's secretary in Paris, to send the book to Random House itself.<sup>306</sup> Ernst instructed Cerf to ask Léon to paste complimentary reviews of *Ulysses* in the book.<sup>307</sup> They had to be pasted in the book to make them part of the book. Ernst's idea was that the judge who eventually decided the case would then see the reviews, which might not otherwise be allowed in evidence.<sup>308</sup> On May 1, 1932, Léon cabled Cerf:

JAMES JOYCES BOOK *ULYSSES* FORWARDED YOU AS  
FIRST CLASS REGISTERED MAIL DESIGNATED BREMEN  
SAILED 28 DUE NEW YORK MAY THIRD CONTAINING  
COPIES PASTED IN VOLUME OF DOCUMENTS  
ENUMERATED MY LETTER DESPATCHED SAME BOAT  
CABLE RECEIPT<sup>309</sup>

The *New York Times* of May 4, 1932 reports that the Bremen did indeed arrive in New York on May 3, docking in Brooklyn.<sup>310</sup> In his 1977

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300. THE UNITED STATES OF AMERICA V. ONE BOOK ENTITLED *ULYSSES* BY JAMES JOYCE, *supra* note 230, at 113–14.

301. *Id.* at 115.

302. Letter from Bennett Cerf to Nicholas Butler (Apr. 2, 1932) (on file in Random House Archive, Columbia University).

303. Letter from Nicholas Butler's Assistant to Bennett Cerf (Apr. 5, 1932) (original in Random House Archive, Columbia University).

304. Letter from Bennett Cerf to Roy Howard (Apr. 6, 1932) (on file in Random House Archive, Columbia University).

305. Letter from Roy Howard's Assistant to Bennett Cerf (Apr. 11, 1932) (original in Random House Archive, Columbia University). Roy Howard himself initially declined, citing his time commitments. Letter from Roy Howard to Bennett Cerf (Apr. 7, 1932) (original in Random House Archive, Columbia University). Cerf responded that no time would be required. Letter from Bennett Cerf to Roy Howard (Apr. 9, 1932) (original in Random House Archive, Columbia University).

306. THE UNITED STATES OF AMERICA V. ONE BOOK ENTITLED *ULYSSES* BY JAMES JOYCE, *supra* note 230, at 119.

307. *Id.*

308. *Id.*

309. *Id.* at 133.

310. *Shipping and Mails*, N.Y. TIMES, May 4, 1932, at 41.

autobiography, Cerf recalls what happened next.<sup>311</sup> Random House sent an agent to the dock to make certain the book was seized. Absent seizure, the plan would collapse. It was “one of the hottest days in the history of New York,” Cerf wrote.<sup>312</sup> “The temperature on the dock must have been 120 degrees.”<sup>313</sup> The Customs people just wanted to go home. “They were stamping everything without opening it.”<sup>314</sup> The Random House emissary protested. “I insist that you open that bag and search it,” he said, according to Cerf.<sup>315</sup> So the Customs officer opened the bag and, on finding *Ulysses*, said: “Oh, for God’s sake, everybody brings that in. We don’t pay any attention to it.”<sup>316</sup> But the Random House agent insisted that the book be seized and so it was.

This is a wonderful story. But in a quip often attributed to Mark Twain about such stories: “Interesting if true and interesting anyway.”<sup>317</sup> Cerf’s story is most likely not true. The weather in New York on May 3, 1932, the day the Bremen docked, reached a high of sixty-nine degrees Fahrenheit, hardly “one of the hottest days in the history of New York,” as Cerf claimed.<sup>318</sup> The next day the high was seventy-two degrees.<sup>319</sup> In the following six days, the high temperature ranged from fifty-six to sixty-six degrees Fahrenheit.<sup>320</sup> Furthermore, the contemporaneous record reveals that Ernst had a better plan to prevent the book from slipping through Customs. He wrote to the Collector of Customs on May 2, the day before the boat arrived, to inform him that *Ulysses* was on it. The same day, he phoned the news to the Customs legal department. And just to be safe, he wrote a follow up letter to the legal department on May 6.<sup>321</sup> A week later,

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311. CERF, AT RANDOM, *supra* note 283, at 92.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.* at 93.

317. This observation is often attributed to Twain, as a Google search will immediately reveal, although I could not find it in his published writings.

318. *The Weather*, N.Y. TIMES, May 4, 1932, at 41. A day earlier the high was sixty-three degrees. *The Weather*, N.Y. TIMES, May 3, 1932, at 47.

319. *The Weather*, N.Y. TIMES, May 5, 1932, at 40.

320. *The Weather*, N.Y. TIMES, May 6, 1932, at 37; *The Weather*, N.Y. TIMES, May 7, 1932, at 33; *The Weather*, N.Y. TIMES, May 8, 1932, at S12; *The Weather*, N.Y. TIMES, May 9, 1932, at 33; *The Weather*, N.Y. TIMES, May 10, 1932, at 42; *The Weather*, N.Y. TIMES, May 11, 1932, at 41.

321. THE UNITED STATES OF AMERICA V. ONE BOOK ENTITLED *ULYSSES* BY JAMES JOYCE, *supra* note 230, at 132–34 (Letter from Morris Ernst to Collector of Customs (May 2, 1932)). On May 6, 1932, Ernst wrote again, referencing “our telephone conversation of May 2” and asking whether the copy of *Ulysses* “has been seized by the Collector of Customs; and if so, what action is being contemplated thereon. *Id.* at 135 (Letter from Morris Ernst to Collector of Customs (May 6, 1932)).

the Assistant Director of Customs assured Ernst that the book had been seized.<sup>322</sup>

#### F. *Ulysses Returns to Court*

So Ernst's strategy succeeded. Customs had the book and Ernst could challenge the seizure in court. But this took some time. The United States waited seven months, until December 9, 1932, to bring the matter to court.<sup>323</sup> It took nearly another year for the case to be argued. Despite this delay, the government supported Ernst's strategy in two important ways. First, review of court documents reveals that the government repeatedly accommodated Ernst's desire to assign the case to Judge John Munro Woolsey,<sup>324</sup> who Ernst believed would be more receptive to his arguments than any other judge on the federal bench in Manhattan.<sup>325</sup> Second, the government also agreed to have Woolsey try the case without a jury, which Ernst believed would increase his chances of victory.<sup>326</sup>

Who was Woolsey?<sup>327</sup> Woolsey's family had come to America before the Revolutionary War, settling in the Northeast, although the judge was born in 1877 in South Carolina, where his parents had moved in 1870.<sup>328</sup> Woolsey was educated at Andover, Yale, and Columbia Law School.<sup>329</sup> He practiced admiralty law in New York for his entire legal career.<sup>330</sup> President Coolidge nominated Woolsey to the district court in 1928, but

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322. *Id.* at 142. That Cerf's story is improbable is revealed in another inaccuracy. He writes that he and others in New York took a copy of *Ulysses* and pasted in it the good opinion of literary luminaries, then shipped it to France to be sent back to the United States. CERF, AT RANDOM, *supra* note 283, at 92. But the documentary evidence shows that the book originated in Paris. *See supra* text accompanying notes 306–67.

323. THE UNITED STATES V. ONE BOOK ENTITLED *ULYSSES* BY JAMES JOYCE, *supra* note 230, at 165.

324. *Id.* at 172, 176, 202.

325. *See, e.g., id.* at 219, Interoffice Memorandum from Morris Ernst to Jonas Shapiro, dated Aug. 25, 1933 ("Please follow up the *Ulysses* case next week. Don't let it get away from Woolsey"). Ernst's choice of Woolsey is easy to understand. In 1931, Woolsey ruled that the book *Married Love*, by Dr. Marie Stopes, was not obscene and could be imported into the United States. The lawyer for the publishing company that sought to import the book was Morris Ernst. *Removes Federal Ban on Book on Marriage*, N.Y. TIMES, Apr. 7, 1931, at 20.

326. THE UNITED STATES OF AMERICA V. ONE BOOK ENTITLED *ULYSSES* BY JAMES JOYCE, *supra* note 230, at 179–80.

327. The biographical information in this paragraph, unless otherwise cited, is taken from John M. Woolsey, Jr., *Judge John M. Woolsey*, 37.3 JAMES JOYCE Q. 367 (Spring/Summer 2000); and S.J. Woolf, *A Judge Who Scans the Drama of Life*, N.Y. TIMES, Mar. 11, 1934, at SM7.

328. *Id.*

329. *Id.*

330. Woolsey, *supra* note 327, at 368.

the congressional term ended before he was confirmed.<sup>331</sup> President Hoover re-nominated him and he took his seat in 1929.<sup>332</sup> He served until 1943 and died in 1945 at age sixty-eight.<sup>333</sup>

Ernst's legal memoranda in support of his arguments are particularly impressive for the array of opinions and exhibits he collected. The firm's "Preliminary Memorandum" in the district court contained testimonials from prominent persons supporting *Ulysses*, books and articles whose subject was Joyce or *Ulysses* or both, comments from librarians endorsing *Ulysses* and expressing a desire to circulate the book, and critical reviews of *Ulysses*.<sup>334</sup> The memorandum declares (surely an overstatement) that "no course dealing with twentieth century English letters, given at any of our colleges or universities, fails to include Joyce and *Ulysses*."<sup>335</sup> It places *Ulysses* on "the reading list at Harvard in connection with English 26, given last year by T.S. Eliot . . . and three years ago by I.A. Richards, Professor at Cambridge and Peking."<sup>336</sup> The purpose behind this strategy, which John Quinn had eschewed, is apparent and instructive. By providing judges (and therefore the public) with the favorable views of those whose positions gave them special standing to identify literary value, it became respectable and safe for judges to permit publication. Important, too, is what Ernst did not argue and what the two *Ulysses* opinions did not cite: the First Amendment. At the time, constitutional free speech and press guarantees offered no brake on the government's ability to suppress obscenity. Obscenity was not constitutionally protected. The Constitution seemed to place no limit on what could be defined as obscene. Today, obscenity is still not constitutionally protected, but in 1957 the Supreme Court held that the First Amendment placed limits on how "obscenity" may be defined.<sup>337</sup>

Judge Woolsey spent his vacation in 1933 reading *Ulysses* and books about *Ulysses*.<sup>338</sup> He held oral argument on November 25, not in the federal courthouse but in a courtroom at the Association of the Bar of the

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331. *Id.*

332. *Id.*

333. Obituary, *John M. Woolsey, Retired Jurist*, 68, N.Y. TIMES, May 5, 1945, at 15.

334. THE UNITED STATES OF AMERICA V. ONE BOOK ENTITLED *ULYSSES* BY JAMES JOYCE, *supra* note 230, at 229. Ernst's brief to the court is printed at *id.* at 378.

335. *Id.* at 262.

336. *Id.* at 263. The firm learned of the Richards course from an unsolicited letter that a Harvard student wrote to Random House. The student, Peter A. Pertzoff, then provided the firm, at its request, with a copy of his thesis in the class. *Id.* at 211.

337. *Roth v. U.S.*, 354 U.S. 476 (1957).

338. *To Pass On 'Ulysses'*, N.Y. TIMES, Aug. 30, 1933, at 16. *See also* United States v. One Book Called "Ulysses," 5 F. Supp. 182, 183 (S.D.N.Y. 1933).

City of New York on West Forty-fourth Street.<sup>339</sup> No transcript of the argument exists. But if we allow ourselves small literary license, we can construct a reliable “transcript” solely from the direct and indirect quotes in contemporaneous press reports.<sup>340</sup>

**Samuel Coleman** (the government’s lawyer): I do not think that obscenity necessarily should be limited to exciting sexual feeling. I can understand people reading something that does not excite them in such a manner but which they might still pass on as being obscene. I should say a thing is obscene by the ordinary language used and by what it does to the average reader. It need not necessarily be what the author intended. On these grounds, I think there are ample reasons to consider *Ulysses* to be an obscene book. Although there are good old Anglo-Saxon words in many books that have been passed on by courts, obscenity is in the very texture of *Ulysses* and could not be eradicated without destroying essential values of the book. No one would dare attack the literary value of the book. I liked *Ulysses* but there is obscenity in it.

**Morris Ernst:** Libraries and the people all over America already have accepted *Ulysses* through bootleg sources as a classic, and the court should follow the will of the public. I have made a study of what language in books does to the ordinary reader and have yet to find one single instance where it could be proved that the reading of any book led to the commission of a crime of passion. When I first read the book I found it very difficult to understand and recognized little value in it. Later, however, I recognized the great significance of the novel. The law does not require that adult literature be reduced to mush for infants.

**Judge Woolsey:** Suppose that a girl of eighteen or twenty read the soliloquy of Marion Bloom. Wouldn’t it be apt to corrupt her?

**Ernst:** That is not the standard we should go by.

**Woolsey:** I studied a copy of *Ulysses* very carefully, marking all words and passages that might be considered obscene, and I am distressed and bothered because I seem to understand all these allusions; it is a very disturbing book. I am entirely against

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339. *Court Undecided on ‘Ulysses’ Ban*, N.Y. TIMES, Nov. 26, 1933, at 16.

340. *‘Ulysses’ Case Reaches Court After 10 Years*, N.Y. HERALD-TRIB., Nov. 26, 1933, at 17; *Court Undecided*, *supra* note 339.

ensorship. I am entirely opposed to it. I think things should take their chance in the marketplace. Otherwise you have bootlegging, everybody sees about as much as though the traffic was openly permitted, and the profits all go to persons illegally engaged.

Parts of the book are pretty rough, really, but other parts are swell. There are passages of moving literary beauty, passages of worth and power. I tell you, reading parts of that book almost drove me frantic. The last part, that soliloquy, it may represent the moods of a woman of that sort. That is what disturbs me. I seem to understand it. At the same time there were sections that were so obscure, so vague, so unintelligible—I didn't know what they were about. I found those parts dull and boring. The book left me bothered, stirred, and troubled.

**Ernst:** I think that is exactly the effect of *Ulysses*. You have not used the adjectives “shocked” or “revolted.” You have used the adjectives “bothered,” “troubled.”

On December 6, 1933, Woolsey ruled that the government could not seize *Ulysses* as obscene.<sup>341</sup> Woolsey's decision has been hailed, by Ernst and others, even to the present day. Ernst called it “wise and epoch-making.”<sup>342</sup> Random House used it as the preface to *Ulysses* for half a century.<sup>343</sup> Richard Ellmann, Joyce's biographer, called the opinion “eloquently and emphatically” delivered.<sup>344</sup> But not everyone agrees. Paul Vanderham has criticized the opinion from the point of view of a scholar of literature. The ““well-intentioned lies”” in Woolsey's opinion, he writes, “misrepresented the nature of *Ulysses* and, implicitly, literature in general.”<sup>345</sup> Within months of Woolsey's opinion, critic and author Ben Ray Redman, while welcoming the result, was highly critical of its definition of obscenity and the effect on literature. “Let me repeat,” he wrote,

341. *Court Lifts Ban On “Ulysses” Here*, N.Y. TIMES, Dec. 7, 1933, at 21.

342. MORRIS L. ERNST, *The Censor Marches On*, in THE UNITED STATES OF AMERICA V. ONE BOOK ENTITLED *ULYSSES* BY JAMES JOYCE, *supra* note 230, at 19, 24. Paul Vanderham collects other compliments of Woolsey's decision, including from academics, editors, critics, and of course Bennett Cerf himself. VANDERHAM, *supra* note 6, at 129–30.

343. VANDERHAM, *supra* note 6, at 150 (Woolsey's decision was appended to the British edition until 1960 and the American edition until 1986).

344. ELLMANN, *supra* note 7, at 666.

345. VANDERHAM, *supra* note 6, at 116 (quoting Leslie Fiedler). *See also* BOYER, *supra* note 40, at 252–54 (collecting favorable and unfavorable responses).

that the legal definition of obscenity, enunciated by Judge Woolsey in the course of duty, bears no relation to the facts of life and the realities of literature, and that we cannot even begin to talk of satisfactory formulas for censorial judgment until this definition is abolished or altered beyond recognition.<sup>346</sup>

My criticism is different. The opinion is not recognizable as law. It proves why the law should mostly stay out of the censorship business. Twenty-five years later, Learned Hand, one of three judges who heard the government's appeal from Woolsey's decision, told his biographer, Gerald Gunther, that Woolsey thought himself "literary" and "That's a very dangerous thing for a judge to be. I didn't say it was a *bad* quality; I said it was a dangerous one . . . ."<sup>347</sup>

Hand was right. Some of the language in Woolsey's opinion purports to be literary while reading more like parody. For example:

Joyce has attempted—it seems to me, with astonishing success—to show how the screen of consciousness with its ever-shifting kaleidoscopic impressions carries, as it were on a plastic palimpsest, not only what is in the focus of each man's observation of the actual things about him, but also in a penumbral zone residua of past impressions, some recent and some drawn up by association from the domain of the subconscious.<sup>348</sup>

Woolsey's legal analysis was more straightforward but no more impressive. It posed a series of questions that Woolsey seems to have invented to give him a license to address the literary value of the book. It is at most a small overstatement to say that the decision is useful law for only one book. Other publishers and their lawyers would be hard pressed to explain how its obstacle course of tests might benefit them.<sup>349</sup> Certainly the particular hoops through which Woolsey made Joyce jump are the product of no discernable precedent. Woolsey could only have found them in his imagination.

Here is how Woolsey reached his decision. He said that the "first" question to ask is "whether the intent with which [a] book was written . . . was what is called, according to the usual phrase, pornographic, that is,

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346. Ben Ray Redman, *Obscenity and Censorship*, XCV SCRIBNER'S MAG. 341, 343 (1934).

347. GUNTHER, *supra* note 297, at 338.

348. *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182, 183 (S.D.N.Y. 1933).

349. Redman also argued that Woolsey's analysis does little more than liberate "a single book." Redman, *supra*, note 346, at 342.

written for the purpose of exploiting obscenity.”<sup>350</sup> If the answer is yes, the book is banned, apparently regardless of its merit.<sup>351</sup> But *Ulysses* survived this test because Woolsey did “not detect anywhere the leer of the sensualist.”<sup>352</sup> We might ask what evidence enabled Woolsey to conclude that Joyce was not leering or how Woolsey defined a sensualist. But let that go. Woolsey then proceeded to review the artistic merits of the book. He addressed Joyce’s “technique.” The word “technique” appears seven times in Woolsey’s opinion.<sup>353</sup> He believed that it was his prerogative to decide whether Joyce was “honest in developing the technique.”<sup>354</sup> If not, he wrote, “the result would be psychologically misleading and thus unfaithful to his chosen technique. Such an attitude would be artistically inexcusable.”<sup>355</sup> Perhaps, but that would be a reason for a bad review, not legal suppression by a man who had spent his career as an admiralty lawyer. But let that go, as well.

Was Joyce true to his technique in Woolsey’s eyes? Joyce used “dirty” words, Woolsey wrote, but they “are old Saxon words known to almost all men and, I venture, to many women, and are such words as would be naturally and habitually used, I believe, by the types of folk whose life, physical and mental, Joyce is seeking to describe.”<sup>356</sup> (Is the implication that they are not “the types of folk” in Woolsey’s social orbit? But then how does he know what words they “naturally and habitually” use?) “Accordingly,” Woolsey wrote, “I hold that ‘Ulysses’ is a sincere and honest book, and I think that the criticisms of it are entirely disposed of by its rationale.”<sup>357</sup>

But even that was not legally sufficient. Woolsey then introduced yet a third test for Joyce to overcome. It is perhaps the hardest. It was not enough that Joyce was not a sensualist, did not leer, and was artistically honest. “I must endeavor,” Woolsey wrote, “to apply a more objective standard to this book in order to determine its effect in the result, irrespective of the intent with which it was written.”<sup>358</sup> At last, citing authority, Woolsey wrote that “obscene” means “[t]ending to stir the sex

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350. *One Book Called “Ulysses,”* 5 F. Supp. at 183.

351. *Id.*

352. *Id.*

353. *Id.* at 183–84.

354. *Id.* at 183.

355. *Id.*

356. *Id.* at 183–84.

357. *Id.* at 184.

358. *Id.*

impulses or to lead to sexually impure and lustful thoughts.”<sup>359</sup> Ah, but whose impulses and thoughts? Could it be Woolsey’s own impulses and thoughts? No, it could not because that would not be “objective.” Rather, Woolsey said he must predict the reaction of readers “with average sex instincts—what the French would call the *l’homme moyen sensuel*.”<sup>360</sup> How does Woolsey know about such persons unless Woolsey is one of them, a proposition he implicitly excludes? Does he hire Dr. Kinsey? Does he conduct a poll? As it happens, Woolsey did conduct a poll, in a manner of speaking. Telling neither litigant,<sup>361</sup> Woolsey “checked my impressions with two friends of mine.”<sup>362</sup> They “were called on separately, and neither knew that I was consulting the other.”<sup>363</sup> Woolsey gave each friend the legal definition of “obscene” and asked whether *Ulysses* was within it. He does not say whether he considered each friend *l’homme moyen sensuel*. Neither friend, Woolsey reported, thought that the book tended “to excite sexual impulses or lustful thoughts.”<sup>364</sup> Left unclear is whether Woolsey’s friends were offering their own reactions or those of some hypothetical reader. Woolsey then concluded, “It is only with the normal person that the law is concerned . . . . Whilst in many places the effect of *Ulysses* on the reader undoubtedly is somewhat emetic, nowhere does it tend to be an aphrodisiac.”<sup>365</sup> “Emetic” is an interesting word. (So is “whilst.”) My dictionary defines “emetic” as “an agent that induces vomiting.”<sup>366</sup> In other

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359. *Id.* Woolsey cites seven opinions, all in a row, but never refers to their facts or any detail about their holdings. He does not cite, and consequently does not have to address, the seemingly inconsistent precedent set down by *United States v. Bennett*, 24 F. Cas. 1093 (S.D.N.Y. 1879). See discussion of *Bennett* in *supra* text accompanying notes 83–115. Why then the citations? Perhaps it was an effort to give an *ex cathedra* pronouncement the outward semblance of law.

360. *United States v. One Book Called “Ulysses,”* 5 F. Supp. 182, 183 (S.D.N.Y. 1933).

361. Today, this conduct would violate the code of conduct for United States Judges. Canon 3A(4) permits a judge to “obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.” CODE OF CONDUCT FOR U.S. JUDGES CANON 3A(4). It is unclear whether the two men Woolsey consulted were “expert[s] on the law applicable” to the proceeding before him. But if they were not, then Woolsey would have been conducting a factual investigation and that, today, is categorically forbidden by Canon 3A(4). Alternatively, the two men Woolsey consulted might be deemed experts within the meaning of Article VII of the Federal Rules of Evidence. See FED. R. EVID. 702 (recognizing experts who have “scientific, technical, and other specialized knowledge”). If so, Rule 706 allows court-appointed experts. Any party is entitled to depose such an expert and is free to cross-examine a court-appointed expert if he or she testifies.

362. *One Book Called “Ulysses,”* 5 F. Supp. at 184.

363. *Id.*

364. *Id.* at 184–85.

365. *Id.* at 185.

366. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY (9th ed. 1988).

words, *Ulysses* could be legally imported because it could make people throw up.

Who were Woolsey's two friends? He didn't tell us. Paul Vanderham has identified them as Henry Seidel Canby, who was editor of the *Saturday Review of Literature*, and Charles E. Merrill, Jr.<sup>367</sup> This must refer to the Charles Merrill, born in 1885, who founded the Merrill Lynch brokerage firm. Woolsey consulted no women readers, presumably because they could not qualify as *l'homme moyen sensuel*.

On January 25, 1934, Random House published the book with a first printing of 10,000 copies, which had been sold in advance.<sup>368</sup> A month and five more printings later, 35,000 copies were in circulation.<sup>369</sup> The price was \$3.50,<sup>370</sup> which today equals about fifty dollars. Random House took a chance in relying on Woolsey's decision. The government planned to appeal, and it might win. It almost did. Even if Random House won on appeal, the decision of a federal trial and appellate court in New York would not bind state courts or federal courts elsewhere. What would local prosecutors do? Random House bet that Woolsey's decision would inoculate the book against attack nationwide. This was by no means certain, but it turned out to be true.

A new United States Attorney, Martin Conboy, was in office when Woolsey issued his ruling. That was not good for Random House. Conboy was listed as an officer of the New York Society for the Suppression of Vice in its 1929 Annual Report.<sup>371</sup> (John Sumner, who had pursued the successful prosecution of Anderson and Heap a dozen years earlier, remained the Society's Secretary and encouraged prosecution of the book.)<sup>372</sup> Conboy had also been active in something called the "Clean Books League," started by a state judge incensed that a lending library had given his sixteen-year-old daughter a copy of Lawrence's *Women in Love* and further incensed on learning that a court had already declared the book not obscene.<sup>373</sup> It is unsurprising then that Conboy overruled his assistant's recommendation against an appeal. Hearing the appeal were Learned Hand, his cousin Augustus Hand, and Martin Manton, the Chief Judge of the Circuit Court, who was later convicted of, and imprisoned for,

367. VANDERHAM, *supra* note 6, at 125.

368. John Chamberlain, *Books of the Times*, N.Y. TIMES, Jan. 25, 1934, at 17; *Book Notes*, N.Y. TIMES, Jan. 10, 1934, at 19.

369. *Book Notes*, N.Y. TIMES, Feb. 22, 1934, at 19.

370. *Books of the Times*, *supra* note 368, at 17.

371. VANDERHAM, *supra* note 6, at 130.

372. *See infra* text accompanying notes 420–21.

373. DE GRAZIA, *supra* note 29 at 74 (1992).

corruption.<sup>374</sup> According to Ernst's account, written twenty-five years later, when Conboy got up before the Second Circuit, he began: "This book is one day in the life of a Hungarian anti-Christ Jew."<sup>375</sup> Ernst's memory of the beginning of Conboy's argument is not a direct quote and Ernst qualifies it by purporting to recount what Conboy stated "in effect."

The *New York Herald-Tribune* quotes similar language but in a different and somewhat less disturbing context. According to the *Herald-Tribune*, in seeking to disassociate the novel from *The Odyssey* by Homer, on which it is loosely based, Conboy stressed, not in opening his argument but in the course of it, that the book was "a setting forth of what purports to take place in one day in the life of a Hungarian Jew in Dublin, together with his thoughts and ruminations and those of his wife."<sup>376</sup>

An opinion by Augustus Hand, joined by Learned, affirmed Woolsey.<sup>377</sup> Gunther writes that the Hands did not want Random House to be able to use the appellate opinion to sell the book.<sup>378</sup> Consequently, it could not be quotable. So Augustus was given the assignment. Augustus could be relied on to write an unquotable opinion. Learned, they knew, could not.<sup>379</sup> Augustus's opinion proved quotable anyway, though Learned would likely have written a more memorable one. This should not surprise us. Judges surely recognize when the fates have sent them a case that offers the possibility of everlasting fame, the precise nature of the fame depending on how they rule and the quality of their written opinion.

Judge Manton dissented. "Who can doubt the obscenity of this book after a reading of the pages referred to, which are too indecent to add as a footnote to this opinion?," he wrote.<sup>380</sup>

Augustus Hand's opinion echoes the test for obscenity that Learned briefly advanced in *United States v. Kennerley*,<sup>381</sup> which Augustus did not cite. There, while refusing to dismiss an indictment under constraint of *Bennett* and *Hicklin*, Learned went on to ask whether the test should

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374. GUNTHER, *supra* note 297, at 503–13.

375. Morris Ernst, *Reflections on the Ulysses Trial and Censorship* 5, in THE UNITED STATES OF AMERICA V. ONE BOOK ENTITLED *ULYSSES* BY JAMES JOYCE, *supra* note 230, at 44, 46. Although it was published in 1965, it was written in 1959. *Id.* at 53 (Ernst writes that the essay was written in 1959).

376. *Conboy Opens U.S. Appeal to Bar Ulysses*, N.Y. HERALD-TRIB., May 17, 1934, reprinted in THE UNITED STATES OF AMERICA V. ONE BOOK ENTITLED *ULYSSES* BY JAMES JOYCE, *supra* note 230, at 445, 446.

377. *United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705 (2d Cir. 1934).

378. GUNTHER, *supra* note 297, at 338–39.

379. *Id.*

380. *One Book Entitled Ulysses by James Joyce*, 72 F.2d at 709 (Manton, J., dissenting).

381. *United States v. Kennerley*, 209 F. 119 (S.D.N.Y. 1913).

instead be whether the alleged obscenity is “honestly relevant to the adequate expression of innocent ideas.”<sup>382</sup> And he contemplated that the time might come, though it had not yet, “when men think innocent all that which is honestly germane to a pure subject, however little it may mince its words.”<sup>383</sup> Now, in a memorandum following oral argument, Learned Hand wrote that he continued to favor a test of relevance, but was willing to compromise:

Personally I should be disposed to make relevance the test almost always.

Here at any rate the offending passages are clearly necessary to the epic of the soul as Joyce conceived it, and the parts which might be the occasion for lubricity in the reader are to my thinking not sufficient to condemn a very notable contribution to literature.<sup>384</sup>

Now, in the *Ulysses* opinion, Hand’s *Kennerley* dictum became key to the holding. The idea of relevance (germaneness) appears three times in the majority opinion and is essential to the court’s holding:

Though the depiction happily is not of the “stream of consciousness” of all men and perhaps of only those of a morbid type, it seems to be sincere, truthful, relevant to the subject, and executed with real art.<sup>385</sup>

That numerous long passages in *Ulysses* contain matter that is obscene under any fair definition of the word cannot be gainsaid; yet they are relevant to the purpose of depicting the thoughts of the characters and are introduced to give meaning to the whole, rather than to promote lust or portray filth for its own sake.<sup>386</sup>

In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence; for works of art

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382. *Id.* at 120–21.

383. *Id.* at 121.

384. Preconference Memorandum from Learned Hand for *United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705 (July 6, 1934) (original in Harvard University Law Library Archives).

385. *United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705, 706 (2d Cir. 1934).

386. *Id.* at 706–07.

are not likely to sustain a high position with no better warrant for their existence than their obscene content.<sup>387</sup>

The opinion's breakthrough test for obscenity anticipated the one the Supreme Court would adopt more than two decades later and must be recognized as the beginning of the modern age of obscenity law. The work, the circuit court said, had to be judged "as a whole."<sup>388</sup> Even if parts standing alone are obscene, a court had to evaluate the "dominant effect."<sup>389</sup> The test for obscenity does not depend on the author's motives (although the opinion equivocates here by referring to the book's "sincerity").<sup>390</sup> Instead, the work must be "viewed objectively."<sup>391</sup> The test does not look to the response of those particularly vulnerable to "lustful thoughts."<sup>392</sup> Last, the court said, it is appropriate to consider the views of "approved critics."<sup>393</sup> The court recognized that "*Ulysses* is rated as a book of considerable power by persons whose opinions are entitled to weight."<sup>394</sup>

These conclusions seriously undermined goals of the anti-vice societies and would, once developed and applied, spell their disappearance. We can only imagine what the reaction of Anthony Comstock might have been. He would have foreseen his life's work upended. But Comstock was long dead. As for his successor, Sumner, we do not have to imagine. Sumner ardently urged the United States to seek review in the Supreme Court.<sup>395</sup> Language used and scenes depicted in Molly Bloom's soliloquy—which contains a level of detail about sex and lust (and in the soliloquy of a woman no less) that would have surpassed anything popularly accepted until then or in fact for years thereafter—would now escape judicial condemnation and censorship so long as this candor was embedded in material that "taken as a whole" allowed a court or jury to conclude that the work does not "promote lust" among ordinary adults. The vice societies might protest that nothing could now stop an intent reader with lust in his heart from skipping "the work as a whole" and focusing on "the

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387. *Id.* at 708.

388. *Id.* at 707.

389. *Id.* at 708.

390. *Id.* at 706–08.

391. *Id.* at 707.

392. *Id.*

393. *Id.* at 708.

394. *Id.* at 706. That line vindicates Ernst's decision to marshal extra-judicial endorsements of Joyce and the book.

395. *See infra* text accompanying notes 420–21.

good parts.” True, but inconsequential under a “net effect”<sup>396</sup> test, which promised to eliminate a substantial amount of the censor’s business and reduce its judicial victories.

But the circuit court’s opinion also posed problems for artists and writers. It was now left to juries and judges to decide whether a work is “sincere” (“sincere” or “sincerity” is used four times in the opinion)<sup>397</sup> and whether “the erotic matter is not introduced to promote lust.”<sup>398</sup> The opinion does not say that a judge can overturn a jury’s guilty verdict through an independent review of the facts, which means that unless a work is not obscene as a matter of law, a defendant’s fate will depend on the sensibility and liberality of randomly selected jurors.<sup>399</sup> Furthermore, a test asking whether sexually explicit content is “relevant” to the work as a whole might lead courts to evaluate literary quality, as Woolsey did. While an author or publisher may now call expert witnesses to say that a work has “originality, beauty, and distinction,”<sup>400</sup> so too may the prosecution call experts to say that it does not.

The opinion is less than forthright in its treatment of precedent, in particular in its conclusion that the Supreme Court’s decision in *Rosen v. United States*,<sup>401</sup> still good law, had not adopted a *Hicklin*-inspired definition of obscenity.<sup>402</sup> Possibly *Rosen* had not embraced *Hicklin*, but the contrary view is at least as tenable or more so. Hand read *Rosen* to approve *Hicklin* only for the proposition that “allegations in the indictment as to an obscene publication need only be made with sufficient particularity to inform the accused of the nature of the charge against him.”<sup>403</sup> That reading was more hopeful than candid. In *Rosen*, the allegedly obscene matter consisted of pictures of “females, in different attitudes of indecency.”<sup>404</sup> The trial judge gave a *Hicklin* charge to the

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396. *One Book Entitled Ulysses by James Joyce*, 72 F.2d at 707. The court also used the phrase “dominant effect” when it wrote that it believed “that the proper test of whether a given book is obscene is its dominant effect.” *Id.* at 708.

397. *Id.* at 706 (two times), 707, 708.

398. *Id.* at 707. The references to sincerity and intent—presumably of the artist—seem inconsistent with the court’s insistence that the work be “viewed objectively.” Or the court might be attributing human motives to the work itself. The *Muller* court did the same. *See supra* text accompanying notes 128–31.

399. Eventually, the Supreme Court held that in obscenity cases, as in other First Amendment cases, appellate courts may conduct an independent review of the facts. *See, e.g., Miller v. California*, 413 U.S. 15, 25 (1973); *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974).

400. *One Book Entitled Ulysses by James Joyce*, 72 F.2d at 707.

401. *Rosen v. United States*, 161 U.S. 29 (1896).

402. *One Book Entitled Ulysses by James Joyce*, 72 F.2d at 708.

403. *Id.*

404. *Id.* at 43.

jury. The Supreme Court, after describing the material alleged to be obscene, said the instructions were “quite as liberal as the defendant had any right to demand,” which would seem to be an endorsement of the *Hicklin* charge.<sup>405</sup>

As for *United States v. Bennett*,<sup>406</sup> which relied on *Hicklin* and would appear to be binding circuit precedent, the Hands concluded that its “rigorous doctrines” were “inconsistent with our own decision in *United States v. Dennett*.”<sup>407</sup> (This is the editorial “our;” Augustus wrote *Dennett*.) “Inconsistent” is a convenient word for the court to use. Literally true at some level, but it implies that *Dennett* made a greater break with precedent than its language can support. *Dennett* overturned a jury conviction for sending through the mails a pamphlet entitled “Sex Side of Life,” which the court said was written “with sincerity of feeling” by a mother for her two sons and other adolescents.<sup>408</sup> (The mailing was an unsuspecting response to a government sting operation.)<sup>409</sup> The problem with Augustus’s reliance on *Dennett* to reject *Bennett* is that not a word in *Dennett* disapproved of *Bennett*, which it cited along with *Hicklin* and *Rosen*. Put another way, a lawyer reading *Dennett* could not fairly conclude that the *Hicklin* test, as emphatically preserved in *Bennett*, had ceased to be good circuit law when judging fiction.

And here was another significant gap in the court’s analysis, only casually acknowledged. *Hicklin*, *Bennett*, and *Dennett* all addressed non-fiction: polemical or advocacy pieces in the first two cases, an introduction to sex for adolescents in the last one. *Ulysses* was fiction. Should fiction enjoy the same level of protection that *Dennett* afforded a sex guide for adolescents? The court said yes but did not say why. Meanwhile, the dissent identified the leap. “*Ulysses* is a work of fiction. It may not be compared with books involving medical subjects or description of certain physical or biological facts. It is written for alleged amusement of the reader only.”<sup>410</sup> This is an interesting challenge to which there are certainly answers. It could, for example, be argued that literature and the arts are as important to humankind as candor when telling adolescents about the “sex side of life.” The majority did not make that argument, except perhaps by identifying great works of literature that might also succumb to censorship

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405. *Rosen*, 161 U.S. at 43.

406. *United States v. Bennett*, 24 F. Cas. 1093 (S.D.N.Y. 1879).

407. *One Book Entitled Ulysses by James Joyce*, 72 F.2d at 708.

408. *United States v. Dennett*, 39 F.2d 564, 569 (2d Cir. 1930).

409. DE GRAZIA, *supra* note 29, at 323 n.\* (1992).

410. *One Book Entitled Ulysses by James Joyce*, 72 F.2d at 710.

under a less generous test and by giving examples of works that had been censored in fact, including by Byron and Shelley, but were now recognized as great literature.<sup>411</sup>

A final riddle presented by the circuit's *Ulysses* opinion is that it addressed a book, a novel, whose "erotic passages," the court said, "are submerged in the book as a whole."<sup>412</sup> How might other artists—painters or photographers, say—determine whether the court's decision provided freedom for work in their medium? A painting or photograph is not "submerged" in anything larger than itself. A nude is a nude. Allegations of obscenity against paintings cannot readily be met with the defense that the work has to be considered as a whole. The painting is the whole. And while an entire play is greater than any of its parts, *Ulysses* left it unclear whether its tests were also meant to apply to live theater, with its greater capacity for explicit representation.

But the uncertainties that might trouble writers and artists did not concern Conboy, the United States Attorney, who understood the breadth of Hand's opinion and urged the Justice Department to seek Supreme Court review. He argued that the decision overruled *Bennett* and *Hicklin*, both of which had "consistently been followed by the Federal Courts."<sup>413</sup> And he argued that

[t]he departure of the Court from the rules which have heretofore been applied, has introduced uncertainty and confusion into the law, which renders it extremely difficult for both the customs and postal authorities properly to administer their Departments with regard to the question of whether or not books are obscene.<sup>414</sup>

This was certainly true. It is much easier to enforce the obscenity laws if the only task is to prove that even one small part of a book is obscene; it is harder to do so if the alleged obscenity embedded in a book requires consideration of the "dominant effect" of the work, especially if critical evaluation may legitimately bear on the answer and be introduced through expert testimony. Conboy may have anticipated that writers, artists, and critics would be loathe to provide the government with expert testimony so that it might suppress artists and writers.

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411. The majority identified *Venus and Adonis*, *Hamlet*, *Romeo and Juliet*, and the *Eighth Book of The Odyssey* as works that would be subject to suppression if a book were not considered as a whole. *Id.* at 707.

412. *Id.*

413. Letter from Martin Conboy, United States Att'y, to Homer Stille Cummings, Att'y Gen., at 2 (Aug. 31, 1934) (on file with the National Archives).

414. *Id.*

But Conboy's hope for high court review went unfulfilled. The general counsel of the Treasury Department let it be known to the Solicitor General that the Customs Bureau had no interest in Supreme Court review.<sup>415</sup> Then, remarkably, a Justice Department lawyer, in a memorandum to the Solicitor General, concluded that neither *Bennett* nor *Hicklin* should be read to authorize conviction based on only a part of a published work. Consequently, he wrote, *Ulysses* did not in fact overrule *Bennett* or *Hicklin*, which in turn made high court review less compelling. The memorandum reasoned that “[i]f it were true that obscene passages must stand alone and be decided without regard to their setting in the book or publication, then the admission of the whole book in the *Bennett* case was error, for nothing was competent under such a theory except the alleged obscene passages.”<sup>416</sup> This analysis is brazenly wrong. It seriously misreads the cases. The Hands themselves believed that their opinion overruled *Bennett*, or at the very least that it confirmed that *Dennett* had done so. *Bennett* merely recognized that the broader context might put the offending part in an innocent light and that the defendant should have the chance to so argue. That is the reason the entire work was admitted. Contrary to the Department's memo, the trial judge in *Bennett*, who was affirmed on appeal, told the jury that a work was obscene “if any substantial part” of it was obscene.<sup>417</sup> Even more restrictive, he told the jury to “confine your attention to the marked passages . . . . It is upon those passages *alone* that this case must turn.”<sup>418</sup> To no avail, Conway argued that substantial parts of *Ulysses* were obscene and on that question,

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415. Memorandum from Alexander Holtzoff to the Solicitor Gen. (Sept. 10, 1934) (on file with the National Archives).

416. Memorandum from Harry S. Ridgely to the Solicitor Gen. (Sep. 10, 1934) (on file with the National Archives). The final page of this memorandum contains the word “APPROVED” and the signature of Joseph B. Kennan, Assistant Attorney General. It was the same Mr. Kennan who, in a March 6, 1934 memorandum for the Solicitor General, recommended that the government appeal Judge Woolsey's decision to the Second Circuit. That earlier memorandum concluded that the language in *Ulysses* made it obscene and immoral. It cited *United States v. Limehouse*, 285 U.S. 424, 426 (1932), for a definition of “obscene,” “lewd,” and “lascivious,” very much like the *Hicklin* test—“‘Calculated to corrupt and debauch the mind and morals of those into whose hands it might fall’ and induce sexual immorality.” In urging appeal, Kennan wrote that a “book minutely describing adulterous acts and referring to unnatural sex desires and thoughts as this book does . . . can be described only as ‘obscene’ and ‘immoral’.” Memorandum from Joseph B. Keenan to the Solicitor General, at 4 (Mar. 6, 1934) (on file with the National Archives). Woolsey may have admitted the entire book, he wrote, because he “looked upon it from an artistic and literary sense, and from his own point of view, which would be far from that of a man of ordinary intelligence and of an ordinary appreciation of literature and art,” whom Kennan said was “commonly known as the man on the street.” *Id.* at 3. I could find no explanation for Kennan's about-face.

417. See *supra* note 98 and accompanying text.

418. See *supra* note 103 and accompanying text (emphasis added).

of course, the Second Circuit agreed.<sup>419</sup> But it was not enough to ban the book.

Sumner, who had been around the block with *Ulysses* in his successful prosecution of Anderson and Heap thirteen years earlier, may have seen his victory slipping away, not that their convictions would be overturned in law, but that they would be culturally and historically overturned, viewed as a legal error, which must have appeared even worse. He also worried about the precedent the circuit opinion set. He told the Attorney General that if the opinion were to stand, “it is difficult to know what book may be successfully prosecuted under the Federal law for obscenity.”<sup>420</sup> This was unduly pessimistic in the immediate term; but over the long term, Sumner was more prescient than perhaps he (or others) knew. Today, it is unlikely that any book consisting solely of words will be suppressed as obscene. When informed of the decision not to seek review, Sumner bemoaned “that the good old American fighting spirit is lacking, when the Department fails to follow up a hard-won partial victory in a district where ‘broadmindedness’ seems to be considered a judicial virtue.”<sup>421</sup> The partial “victory” must mean the Manton dissent, which was the only “victory” Sumner was going to get.

## V. CONCLUSION

Today, at least for text, we really do seem to be at “the end of obscenity,” as Charles Rembar titled his 1968 book in an excess of optimism.<sup>422</sup> The title works as a prediction, but it was inaccurate as a contemporary description. The Internet, cable television, and greater receptivity to candor in theater, books, and films (not to mention T-shirts) have all contributed to the near demise of obscenity as a useful legal

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419. *United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705, 706–07 (2d Cir. 1934) (“That numerous long passages in *Ulysses* contain matter that is obscene under any fair definition of the word cannot be gainsaid . . .”). Conboy also wrote that

even if the Court is correct in its position that the book is to be judged as a whole, rather than by particular passages which it contains, it nevertheless seems clear that the objectionable passages in *Ulysses* are so numerous and so lengthy that they permeate and color the whole book to such an extent that they render the entire book obscene.

Letter from Martin Conboy, United States Att’y to Homer Stille Cummings, to Att’y Gen. (Aug. 31, 1934) (on file with the National Archives).

420. Letter from John Sumner to Karl A. Crowley, Solicitor of the Post Office (Oct. 13, 1934) (on file with the National Archives). This letter was intended for the Solicitor General and upon learning of his error, Sumner forwarded it to the Attorney General on October 18, 1934.

421. Letter from John Sumner to Hon. Joseph B. Keenan, Assistant Att’y Gen. (Oct. 24, 1934) (on file with the National Archives).

422. CHARLES REMBAR, *THE END OF OBSCENITY* (Random House, 1968).

category, though still very much a cultural one. (I put aside as conceptually distinct the protection of children and unwilling adults.)<sup>423</sup> Augustus Hand's opinion freeing *Ulysses* for publication (or perhaps one should say "continued publication" because it had already been published before the appeal was decided) set down guideposts that later courts used to define the level of constitutional protection that sexually explicit material would thereafter enjoy: the work must be judged as a whole; the effect must be assessed against community standards and not the susceptibility of the most vulnerable; the work's merit or value must be weighed in deciding the question; and expert opinion is relevant to the answer.<sup>424</sup> The Supreme Court has fiddled with these ingredients, now more permissive, now a bit less, but the ingredients remain essentially the same.<sup>425</sup> And the variations in emphasis matter little if at all today. They will interest constitutional scholars and historians, less so writers and artists. Of course, the First Amendment still does not constitutionally protect obscenity as such. Probably, it never will.<sup>426</sup> But legal efforts to suppress whatever may fall outside its protection will almost always be fruitless, certainly so if the alleged obscenity are words in print. The end of the story is good for artists and writers, whose choice of subject need no longer pose a threat to their freedom, but it took far too long to get there. American courts should have limited *Hicklin*'s broad language immediately. Yet not only did they embrace *Hicklin* unthinkingly, some, including the Second Circuit in *Bennett*, expanded its reach to punish ideas deemed immoral.<sup>427</sup> Further, unlike *Hicklin*, where the only consequence to the loser was loss of the pamphlets he wished to distribute, and therefore his best argument in the public debate he hoped to encourage, *Bennett* sent a man to prison.<sup>428</sup>

We end with a sentiment from our beginning. A bad decision (*Hicklin*) spawned a worse one (*Bennett*) until bold judges weakened it with a new precedent (*Ulysses*). Meanwhile, we can never know what books were not written, plays not performed, pictures not painted, because *Hicklin* was out there intimidating artists and publishers from taking a chance on them.

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423. See *supra* text accompanying notes 34–36.

424. See *supra* text accompanying notes 388–94.

425. See cases cited at note 221 *supra*.

426. State constitutions may protect obscenity. *State v. Henry*, 732 P.2d 9 (Or. 1987) (dissemination of obscenity is protected under the free speech provisions of the Oregon Constitution).

427. See *supra* text accompanying notes 114–15.

428. See *supra* text accompanying note 95.