

REVIEWS

THE TRIAL OF LADY CHATTERLEY. Edited by C.H. Rolph. Baltimore: Penguin Books, 1961. Pp. 250. \$.95.

D.H. LAWRENCE finished writing *Lady Chatterley's Lover* in Florence, Italy, in 1928.¹ Importation of the novel was barred on grounds of obscenity in both the United States and England, but there was a substantial underground circulation in pirated editions and smuggled copies, and the book became one of the most widely discussed "banned" works of this century. Thirty-one years were to pass, however, before the novel as Lawrence finally wrote it was to become generally available to the public in this country.² In July, 1959, a federal district court overturned a decision by the Postmaster General who had refused to transmit the book through the mails.³ In England, fifteen months later, in October, 1960, a jury returned a verdict of not guilty in a criminal prosecution which had been instituted under the Obscene Publications Act of 1959⁴ against Penguin Books Limited who had published the novel in Great Britain. *Lady Chatterley's Lover* promptly became a best seller in both countries.

To commemorate its legal triumph, Penguin published the book under review: *The Trial of Lady Chatterley*. It is, in essence, the transcript of the trial in England. Unfortunately, it is not the verbatim text; the transcript appears to have been substantially edited. But the book contains much of the opening and closing statements by counsel, the court's charge to the jury, and a good deal of the testimony. The editor, C.H. Rolph, a member of the Committee of the Society of Authors who played an important role in securing legislative reform in England of the law governing obscenity, is plainly not an unbiased commentator. His editorial asides are heavily weighted in favor of the defendant. Nonetheless, the book makes fascinating reading. It is a valuable addition to the legal literature on censorship and a fitting monument to a great case.

1. See ALDINGTON, PORTRAIT OF A GENIUS, BUT . . . 320 (1950); Letter, Lawrence to Martin Secker, March 5, 1928, in THE SELECTED LETTERS OF D. H. LAWRENCE 273 (Trilling ed. 1958).

2. Lawrence wrote three versions of *Lady Chatterley's Lover*. See Schorer, Bibliographical Note, in LAWRENCE, LADY CHATTERLEY'S LOVER 367 (Grove Press ed. 1959). The first version was published in the United States in 1944 under the title *The First Lady Chatterley*. The second version has never been published. An expurgated edition of the third version was published in this country in 1932. The third version contains the four-letter words, omitted from the earlier drafts. Its publication led to the litigation discussed in this essay.

3. Grove Press, Inc. v. Christenberry, 175 F. Supp. 488 (S.D.N.Y. 1959), *aff'd*, 276 F.2d 433 (2d Cir. 1960).

4. 7 & 8 Eliz. 2, c. 66.

The publication of *The Trial of Lady Chatterley* invites a comparative analysis of the American and English proceedings with respect to Lawrence's novel—a consideration, that is, of the way in which the two legal systems broached a common problem. In addition, the book inspires appraisal of the various trial techniques available to the defense given a charge of obscenity, specifically, the use of expert witnesses. Finally, the book underscores the difficulties connected with the use of the judicial process for the purpose of adjudicating issues so elusive, so subtle, and so freighted with emotional impact as "obscenity" and "literary merit."

I

When Lawrence died in 1930, he was regarded as one of the most important English writers of his time. His reputation has grown steadily in the years that followed. E.M. Forster has described him as "the greatest imaginative novelist of [my] generation."⁵ The literary merits of this particular novel by Lawrence have been warmly debated by critics. There are those who, like Archibald MacLeish, regard it as "one of the most important works of fiction of the century;"⁶ there are some who think it "crude and strident," "tediously discursive," and an artistic failure;⁷ and there are others, such as Colin Welch, an English critic, who "while conceding that *Lady Chatterley* is a work of great literary merit, indeed of dark, magical, and terrible beauty, nevertheless believe it to be a profoundly immoral or even evil work."⁸ In any event, it is obvious that the suppression of a book of this character by an author of Lawrence's immense stature poses questions of censorship in an acute form.

The legal difficulties of the novel stemmed first from Lawrence's use of normally unprintable four-letter Anglo-Saxon words. Lawrence was an evangelist for candor in the discussion of sexual matters.⁹ In an essay he wrote in 1929, Lawrence observed that "gradually all the old words that belong to the body below the navel have come to be judged obscene."¹⁰ "What is obvious," he wrote, "is that the words in these cases have been dirtied by the mind, by unclean mental associations. The words themselves are clean, so are the things to which they apply."¹¹ He felt that "The simple and 'natural' obscene words must be cleaned up of all their depraved fear associations and readmitted into the consciousness to take their natural place."¹² Lawrence undertook in *Lady*

5. See ROLPH, *THE TRIAL OF LADY CHATTERLEY* 112 (1961) [hereinafter cited as *The Trial*].

6. MacLeish, in LAWRENCE, *LADY CHATTERLEY'S LOVER* vi (Grove Press ed. 1959).

7. *The Censor as Aedile*, *The London Times Literary Supplement*, Aug. 4, 1961, p. 475. See also Katherine Anne Porter, *A Wreath for the Gamekeeper*, 14 *Encounter* 69 (Feb. 1960); Shonfield, *Lawrence's Other Censor*, 17 *Encounter* 63 (Sept. 1961).

8. Welch, *Black Magic, White Lies*, 16 *Encounter* 75 (Feb. 1961).

9. See e.g., Lawrence's famous essay, "Pornography and Obscenity," in LAWRENCE, *SELECTED LITERARY CRITICISM* 32 (1955).

10. Lawrence, "Introduction to Pansies," *id.* at 27-28.

11. *Id.* at 28.

12. *Id.* at 29.

Chatterley's Lover to redeem the four-letter words by using them in a serious context. Apart from the four-letter words and the vivid description of the sexual act, the book was a target for censors because of its treatment of the theme of adultery.¹³ "It sets upon a pedestal promiscuous and adulterous intercourse," counsel for the Crown told the jury in England.¹⁴ Lawrence believed that industrialization had sapped much of English life of vitality and led to inhibited and artificial sexual relations lacking in tenderness. His story of the love affair between the impotent, aristocratic mine-owner's wife and his game-keeper was designed to give artistic expression to this theme.

The American case involving *Lady Chatterley's Lover* had its genesis early in 1959 when Grove Press, a reputable American publishing firm, decided to publish an unexpurgated edition of the novel in this country. On May 6, 1959, Grove Press was notified that twenty-four parcels containing copies of the novel were being withheld from dispatch by the Postmaster at New York City on the grounds that there was probable cause for believing the book was "nonmailable under the provisions of [the federal obscenity statute]¹⁵ . . . in that said book is obscene, lewd, lascivious, indecent and filthy in character and content, and that its dominant effect and theme is such as to appeal to the prurient interest."¹⁶ Twenty thousand advertising circulars for the book, deposited for mailing by Readers Subscription, Inc., who had obtained the book club rights, were also detained in the Post Office at about the same time on the theory that the circulars gave information where obscene material could be obtained.¹⁷ Grove Press denied that the book was obscene or that its dominant effect was designed to appeal to prurient interests, and it maintained that if the book were nonmailable, its free speech and property rights would be abridged in violation of the first and fifth amendments.¹⁸ An administrative hearing was held be-

13. In June, 1959, the Supreme Court held that a motion picture, based upon *Lady Chatterley's Lover* and bearing the same title, could not constitutionally be denied a license by a state film censorship board. *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684 (1959). A New York statute permitted refusal of a license to an "immoral" film which was defined by the statute as a motion picture "which portrays acts of sexual immorality . . . as desirable, acceptable or proper patterns of behavior." *Id.* at 685. The exhibitor had been denied a license on grounds that the "whole theme of this motion picture is immoral" because the "theme is the presentation of adultery as a desirable, acceptable and proper pattern of behavior." *Ibid.* The Supreme Court concluded that censorship of a film on this ground could not be reconciled with the first amendment.

14. *The Trial* at 17.

15. 69 Stat. 183 (1955), 18 U.S.C. § 1461 (1958).

16. Letter from General Counsel, Fraud and Mailability Section, U.S. Post Office, to Postmaster, New York City, N.Y., May 6, 1959, on file *In the Matter of Grove Press Inc.*, Post Office Docket M-16 (1959).

17. See Order, May 28, 1959, on file *In the Matter of Grove Press Inc.*, Post Office Docket M-16 (1959).

18. See letter, Charles Rembar to Herbert D. Warburton, May 11, 1959, on file *In the Matter of Grove Press Inc.*, Post Office Docket M-16 (1959). Readers Subscription acknowledged that a ruling holding the book to be nonmailable would be dispositive of its rights to mail the circulars advertising the book. *Id.*, Transcript of Hearing, p. 5, (May 14, 1959).

fore a judicial officer of the Post Office.¹⁹ Subsequently, the Postmaster General, following (as he thought) the tests of obscenity promulgated by the Supreme Court in 1957 in *Roth v. United States*²⁰—"whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest"²¹—ruled that the book was obscene and, therefore, nonmailable.²²

Grove Press and Readers Subscription promptly petitioned the District Court for the Southern District of New York for an injunction to restrain enforcement of the decision and for a declaratory judgment that the book was not obscene.²³ The government contended that the decision of the Postmaster General was conclusive unless shown to be clearly erroneous. The district court, however, declined to give special deference to the administrative determination: "The Postmaster General has no special competence or technical knowledge on this subject which qualifies him to render an informed judgment entitled to special weight in the courts."²⁴ The court then went on to hold that *Lady Chatterley's Lover*, judged by the standards laid down in the 1934 decision involving James Joyce's novel *Ulysses*²⁵ and the Supreme Court's opinion in *Roth*, was not obscene. In setting aside the decision of the Postmaster General as "contrary to law and clearly erroneous," the court said that "to interpret the obscenity statute so as to bar 'Lady Chatterley's Lover' from the mails would render the statute unconstitutional in its application, in violation of the guarantees of freedom of speech and the press contained in the First Amendment."²⁶ On appeal, the order of the district court en-

19. The Judicial Officer made no preliminary decision, as is customary, on grounds that a ruling holding "the book to be mailable would require a reversal of rulings of long standing by this Department and . . . cast doubt on the rulings of a coordinate executive department", *i.e.*, the Treasury which barred importation of the book. He referred the matter to the Postmaster General for decision. Order, May 28, 1959, on file *In the Matter of Grove Press Inc.*, Post Office Docket M-16 (1959).

20. 354 U.S. 476 (1957).

21. *Id.* at 489.

22. Departmental Decision, June 11, 1959, on file *In the Matter of Grove Press Inc.*, Post Office Docket M-16 (1959). He articulated the rationale of his decision as follows:

The contemporary community standards are not such that this book should be allowed to be transmitted in the mails.

The book is replete with descriptions in minute detail of sexual acts engaged in or discussed by the book's principal characters. These descriptions utilize filthy, offensive, and degrading words and terms. Any literary merit the book may have is far outweighed by the pornographic and smutty passages and words, so that the book, taken as a whole, is an obscene and filthy work.

Ibid.

23. *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488 (S.D.N.Y. 1959), *aff'd*, 276 F.2d 433 (2d Cir. 1960).

24. 175 F. Supp. at 495. See Note, 73 HARV. L. REV. 583 (1960).

25. *United States v. One Book "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

26. 175 F. Supp. at 503.

joining enforcement was sustained by a unanimous court.²⁷ When the government elected not to seek review in the Supreme Court, the case in this country was at an end.

In England, on July 29, 1959, eight days after the district court's opinion was announced in the United States, the Royal Assent was given to a new statute which had been passed by Parliament in order, as its preamble recited, "to provide for the protection of literature and to strengthen the law concerning pornography."²⁸ The Obscene Publications Act of 1959 was the end product of years of agitation in England for reform in the law governing obscenity.²⁹ Among other changes,³⁰ the act made an important revision in the standard of obscenity formulated in 1868 by Lord Cockburn in *Queen v. Hicklin*.³¹ The 1959 Act provides that the test is whether the effect of the work "if taken as a whole, [is] such as is likely to deprave or corrupt persons who are likely, having regard to all relevant circumstances, to read, see, or hear the matter contained or embodied in it."³² The act also creates a new substantive defense: "A person shall not be convicted of an offense against . . . this Act . . . if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern."³³ The English law thus gives explicit recognition to the aesthetic insight that a book may be both obscene and of literary merit.³⁴ The statute further declares that "the opinions of experts as to literary, artistic, scientific, or other merits of an article may be admitted in any proceedings under this Act either to establish or to negate the said ground."³⁵ In other words, the English statute permits expert testimony, theretofore inadmissible,³⁶ with respect to the literary

27. *Grove Press, Inc. v. Christenberry*, 276 F.2d 433 (2d Cir. 1960).

28. Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66.

29. See A.P. Herbert, Introduction in ST. JOHN-STEVAS, *OBSCENITY AND THE LAW* (1956).

30. For a detailed discussion of the changes made by the 1959 Act, see, e.g., Williams, *The Obscene Publications Act, 1959*, 23 MODERN L. REV. 285 (1960); Clark, *Obscenity, The Law and Lady Chatterley-I*, CRIM. L. REV. (Eng.) 157 (March 1961).

31. L.R. 3 Q.B. 360, 371 (1868): "[W]hether 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." Under this standard, the effect of isolated passages of a work upon the immature and the abnormal was a legitimate criterion for judging obscenity. See *Roth v. United States*, 354 U.S. 476, 488-89 (1957); ST. JOHN-STEVAS, *OBSCENITY AND THE LAW* 128 (1956).

32. Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, § 1(1).

33. *Id.*, § 4(1).

34. See Kaplan, *Obscenity as an Aesthetic Category*, 20 LAW & CONTEMP. PROB. 544 (1955).

35. Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, § 4(2).

36. In the 1928 prosecution of Radclyffe Hall's *The Well of Loneliness*, the court held that testimony by experts designed to show that the work would not have a tendency to corrupt or deprave was inadmissible. The defense offered to tender forty witnesses, including distinguished authors, Professor Julius Huxley, clergymen, and physicians, among others. See ST. JOHN-STEVAS, *OBSCENITY AND THE LAW* 101-02 (1956).

or other merits of a book challenged as obscene, but leaves it to the jury to decide whether, in light of the merits weighed against the alleged obscenity, publication is for the common good. The act contemplates that if the jury feels the book is not obscene the matter is at an end, but if it believes the book is in fact obscene, it is then obliged to consider if its publication is justified by literary or other merit.

After the statute was passed, Penguin reached the decision to observe the thirtieth anniversary of Lawrence's death in 1960 by publishing six of his novels, including an unexpurgated edition of *Lady Chatterley's Lover*.³⁷ The company acknowledged that it was influenced in this decision by the new statute and the rulings favorable to the book in the United States.³⁸ When it became clear in August, 1960, that a prosecution would be instituted if the book were published, Penguin had twelve copies of the book delivered to a Scotland Yard inspector.³⁹ This act constituted "publication" within the meaning of the Obscene Publications Act; it set the stage for a test case. A summons was duly issued and in October, 1960, the case came to trial in the Central Criminal Court in London.

The prosecution maintained that the book "sets upon a pedestal promiscuous and adulterous intercourse. It commends, and indeed it sets out to commend, sensuality almost as a virtue. It encourages and indeed even advocates, coarseness and vulgarity of thought and of language . . . [I]t must tend to deprave the minds certainly of some and you [the jury] may think many of the persons who are likely to buy it"⁴⁰ The defense, on the other hand, contended that, viewed as a whole, the novel "would not tend to deprave or corrupt anyone," and that, in any event, even if it were prima facie obscene the literary and other qualities of the work were such that it was in the public good that it should be published.⁴¹ As noted above, the jury found for the defendant.

II

There are a number of obvious points of difference between the proceedings in the two countries. In the United States, the case originated in an administrative action and was civil throughout.⁴² The English case was a criminal prosecution, tried to a jury. The American case was carried on within a constitutional framework; the principal arguments on points of law were couched in terms of limitations on the government's power under the first

37. See Clark, *Obscenity, The Law and Lady Chatterley-II*, CRIM. L. REV. (Eng.) 224-25 (April 1961).

38. *The Trial* at 142.

39. *Id.* at 1-2.

40. *Id.* at 17.

41. *Id.* at 33.

42. An obscenity case in this country may also originate as an injunction proceeding in a court of equity, *Kingsley Books v. Brown*, 354 U.S. 436 (1957), or as a criminal prosecution in either the federal or state courts. *E.g.*, *Roth v. United States*, 354 U.S. 476 (1957); *Smith v. California*, 361 U.S. 147 (1959).

amendment to censor the book.⁴³ While the theme of free speech was by no means absent from the English proceeding, it was not the cornerstone of the defense as it was in this country. There was a sharp disparity in the dispatch with which the proceedings were concluded. In England, there was a six-day trial, a verdict was reached by a jury, and the case was at an end. In this country, on the other hand, the case was first tried to a judicial officer within the Post Office; all of the testimony was received in a single day. The case was then decided by the Postmaster General on the basis of the record. It was thereafter argued on points of law in the district court and again before the court of appeals. In short, the final decision in England was made by a jury, presumably on the basis of the elaborate testimony; in this country, the final decision was made by judges primarily on the basis of argument as to points of law.

In England, the test of obscenity was whether the work would "deprave and corrupt"; in this country, the applicable standard was whether the book "appeals to prurient interest." There is a theoretical difference in these two tests but there was no important practical difference as the tests were applied in these two cases.⁴⁴ In England, a statute explicitly makes literary merit a possible justification. In this country, there is in effect a judge-made exception for "classics" or works of conspicuous excellence.⁴⁵

But the foregoing differences, whether real or simply theoretical, should not be permitted to obscure a number of fundamental similarities in the two proceedings. The governmental authorities in both countries conceded that *Lady Chatterley's Lover* had some literary merit. "Let me at once concede,"

43. Justice Douglas has stated that English law and practice with respect to obscenity have "little relevance to our problem, since we live under a written Constitution. What is entrusted to the keeping of the legislature in England is protected from legislative interference or regulation here." *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 698 (1959) (concurring opinion). Contrast concurring opinions by Frankfurter, J., *id.* at 693-94; *Smith v. California*, 361 U.S. 147, 166-67 (1959).

44. "Appeals to prurient interests" refers to "qualities of the material itself: the capacity to attract individuals eager for a forbidden look." See MODEL PENAL CODE § 207.10(2), comments (Tent. Draft No. 6, 1957). On the other hand, "corrupt or deprave" implies that a change of character or actual misconduct follows from contact with obscenity. In *Regina v. Penguin*, the trial judge instructed the jury that "to deprave means to make morally bad, to pervert, to debase, or corrupt morally. The words 'to corrupt' mean to render morally unsound or rotten, to destroy the moral purity or chastity of, to pervert or ruin a good quality, to debase, to defile." *The Trial* at 227-28. There would be a significant practical difference in the two tests if the prosecution were required to prove under the "corrupt and deprave" standard that persons were in fact perverted by reading the book, or if the defense were permitted to introduce expert testimony to establish that no such consequences follow from reading a book. The trial judge in the *Penguin* case ruled, however, that proof of publication standing alone establishes an intent to deprave or corrupt and that the defense cannot introduce testimony to show that the book does not have this consequence. *The Trial* at 126-27.

45. See *United States v. Roth*, 237 F.2d 796, 819-20 (2d Cir. 1956); Kalven, *The Metaphysics of the Law of Obscenity*, SUP. CR. REV. 1, 13 (1960).

counsel for the Crown said in his opening address, "that D.H. Lawrence is a well recognized and indeed great writer. Let me at once concede, but perhaps not to so great an extent, that there may be some literary merit in this book."⁴⁶ Counsel for the Post Office made a similar concession: "We do not contend that Lawrence is a writer without standing or that his efforts in *Lady Chatterley's Lover* lack any literary merit."⁴⁷ The contention by governmental authorities in both countries, however, was that the book's dominant effect was obscene and outweighed its literary merit. Further, in both countries, the government simply introduced the book and then rested its case. Proof of publication constituted a *prima facie* case. Neither the Post Office nor the Crown produced a single expert witness. The burden of justifying publication realistically fell upon the publishers.

In both countries, the defense leaned heavily upon expert witnesses. In the United States, Grove Press called two expert witnesses at the Post Office hearing: Malcolm Cowley and Alfred Kazin, prominent literary critics.⁴⁸ It sought to show through these two witnesses Lawrence's stature as a writer, and more significantly, the liberalization in recent years of the community's standards with respect to literature. The Postmaster General, in his opinion, acknowledged that this testimony was "relevant and competent," but he brushed it aside as "advisory only."⁴⁹ It must be said that the testimony of these witnesses carries little impact when read in cold print—the basis on which the Postmaster General decided the case. Their testimony was interspersed with numerous objections by Post Office counsel; neither witness was allowed to present a sustained exposition of his opinion; and the testimony was simply not sufficiently detailed to persuade.

What made the defense in England extraordinary was the imaginative use of expert witnesses. Invoking its statutory right to call expert testimony to prove the qualities of a work in connection with the "justification" defense, the defendant called the astonishing total of thirty-five expert witnesses, including E.M. Forster; Dame Rebecca West; Stephen Potter; Cecil Day Lewis, the poet and critic; professors of literature at Cambridge, Oxford, Nottingham, Leicester, and Liverpool Universities; C.V. Wedgwood, the noted historian; the Bishop of Woolwich and Canon Milford, Master of the Temple; editors and literary critics from England's leading newspapers; the member of Parliament who introduced the Obscenity Act; an educational psychologist; the Provost of King's College, Cambridge; the headmaster of a boys' grammar school and the classics mistress of a girls' grammar school; and others. The parade of some of the most prominent persons in English intellectual life made the case a *cause celebre* in England.

46. *The Trial* at 18.

47. Transcript of Hearing, pp. 27-28, In the Matter of Grove Press Inc., Post Office Docket M-16 (1959).

48. *Id.* at 68, 122.

49. Departmental Decision, note 22 *supra*.

The testimony of these experts, as Penguin pointed out somewhat ruefully after the trial, constituted "probably the most thorough and expensive seminar on Lawrence's work ever given."⁵⁰ That is precisely what the testimony was: a brilliant, provocative, highly sophisticated series of statements on the meaning of the book, its symbolism, Lawrence's intentions in writing it, its merit as a work of art, its place in English literature and in Lawrence's writings, and so on.

Certain themes recur through the testimony of these witnesses: Lawrence was a great and gifted writer; *Lady Chatterley's Lover* is a sincere and honest book; far from exalting promiscuity, Lawrence regarded the sexual act with a kind of reverence; the four-letter words and the descriptions of the sexual act were relevant to a legitimate artistic purpose; the book contains many passages of poetic beauty. No one can assess the impact of this testimony with certainty, but its effect must have been enormous, particularly since the prosecution did not produce a single countervailing expert. The prosecution sought to explain this omission by noting that it had conceded at the outset that the work had literary merit.⁵¹ The prosecution resorted to a familiar technique in dealing with the experts for the defense—it urged the jury to dismiss them as lacking in common sense.⁵² Anticipating this tactic, the defense was at pains to elicit from the various witnesses testimony showing that they were men of affairs, that they had children, and that they were not persons "living a rarefied life."⁵³ The trial judge gave the jury the usual admonition with respect to expert testimony—"our criminal law in this country is based upon the view that a jury takes of the facts and not upon the view that experts may have"⁵⁴—but it is doubtful, to say the least, that this remark dispelled the aura created in the courtroom by the procession of distinguished witnesses. The jury returned a general verdict of not guilty. There is, therefore, no way of knowing whether it concluded that the book was not obscene, or whether it felt that its merits so outweighed the obscenity that it was in the public good that it be published.

The American prototype for the English trial, and perhaps the only proceeding remotely comparable to it, was not the case in this country involving *Lady Chatterley's Lover*, but the 1943 action by the Post Office to revoke the second class mailing privileges of *Esquire Magazine* on grounds that it was

50. Quoted in Sparrow, *Regina v. Penguin Books Ltd.*, 18 *Encounter* 35 (Feb. 1962). The costs of the defense were reportedly 13,000 pounds, or approximately \$36,400. *The Trial* at 249.

51. *The Trial* at 208.

52. "I do suggest that they [the expert witnesses] have got what in Scotland is said to be a bee in their bonnet about this matter, and indeed, when one sees and hears some of them launching themselves at the first opportunity, with the first question that is asked of them, into a sermon or a lecture, according to their vocations in this world, with apostolic fervour, as they did, one cannot help feeling that, sincerely and honestly as they feel, they feel in such a way that common sense perhaps has gone by the board." *The Trial* at 213.

53. *The Trial* at 177-78.

54. *The Trial* at 226.

obscene.⁵⁵ At the administrative hearing, Bruce Bromley, counsel for Esquire, summoned as expert witnesses H.L. Mencken; Channing Pollock, the playwright; Raymond Gram Swing, the radio commentator; the Secretary of the New England Watch and Ward Society; psychiatrists associated with Harvard and Yale Universities; the principal of a private school in Chicago; clergymen; a Columbia University professor of education; executives of advertising agencies; and a host of others.⁵⁶ Bromley would show the witnesses cartoons, drawings, or jokes from Esquire to which the Post Office had excepted, and he would propound conclusory questions such as these: "Do you see anything in that which is obscene, lewd, lascivious, indecent, or filthy? Do you think it has any tendency to corrupt morals or to lower the standards of right and wrong in an average person? Do you see anything in it which would stimulate improper sexual thoughts?"⁵⁷ Bromley demolished the case against Esquire by a masterful use of humor and ridicule. He made the Post Office appear priggish, humorless, and preposterously out of step with contemporary mores. Humor—a tremendously effective but an extremely risky technique in a proceeding of this type—was an asset not available to counsel for *Lady Chatterley's Lover*. Wit was not one of Lawrence's strong points; the novel is deadly serious.

The rhetoric of the defense of *Lady Chatterley's Lover* in both countries was indignation against censorship; the appeal was to enlightenment and tolerance. It was an appeal appropriate to the work under attack. Manifestly, however, the rhetoric and techniques used in defending *Lady Chatterley's Lover* cannot be employed in defending the more typical obscenity case, for example, the prosecution of a vendor of so-called "hard core" pornography—the "filthy bawdy muck that is just filth for filth's sake."⁵⁸ After all, Lawrence was a world famous author; critics of the first rank were ready and willing to attest to the merit of the book. Experts of this character are simply not available in the ordinary obscenity case. No expert can be summoned to defend the "artistic merit" of a French postcard or the "literary merit" of a magazine addressed to homosexuals. The defense of *Lady Chatterley's Lover* is, therefore, not a model for all obscenity cases. Indeed, it has been suggested in England that *Regina v. Penguin* may magnify the difficulties of the defense in future cases involving controversial books of some but lesser merit than *Lady Chatterley's Lover* by authors less well known than Lawrence, for the reason that judges and jurors will expect a comparable procession of experts.⁵⁹

55. *Esquire v. Walker*, 151 F.2d 49 (D.C. Cir. 1945), *aff'd sub nom. Hannegan v. Esquire*, 327 U.S. 146 (1946).

56. Transcript of Record, *Esquire v. Walker*, 151 F.2d 49 (D.C. Cir. 1945).

57. Transcript of Record, *id.* at pp. 54 *et seq.*

58. *Regina v. Martin Secker & Warburg*, [1954] 1 W.L.R. 1138, 1143.

59. Clark, *Obscenity, The Law and Lady Chatterley-II*, CRIM. L. REV. (Eng.) 224, 233 (1961).

In a concurring opinion in *Smith v. California*,⁶⁰ Justice Frankfurter concluded that a party charged with obscenity has a constitutional right "to enlighten the judgment of the tribunal, be it the jury or as in this case the judge, regarding the prevailing literary and moral community standards and to do so through qualified experts."⁶¹ In his view, denial of an opportunity to present expert testimony deprives the accused of the right to defend himself and consequently violates due process. Justice Frankfurter observed that "community standards or the psychological or physiological consequences of questioned literature can as a matter of fact hardly be established except through experts."⁶² He explicitly adverted in this connection to the English statute permitting expert testimony as to literary and other merits.⁶³

But assuming that experts are competent, what is the permissible scope of the expert testimony? Indeed, who is an expert with respect to "prevailing literary and moral community standards?"

The trial judge in *Regina v. Penguin* made a number of important rulings concerning the allowable range of expert testimony. He ruled that "it is not open to the defense to call evidence to prove that there was no intention [by the author] to deprave or corrupt."⁶⁴ He held that while the defense could adduce evidence that publication was in the interests of learning or literature, the experts could not go on to testify that publication was for the common good; that ultimate issue was for the jury.⁶⁵ In addition, the court ruled that the defense could not call witnesses to show what effect the book might have on the ordinary reader.⁶⁶ The defense, in other words, was foreclosed from calling psychiatrists or other experts to show that reading does not "deprave or corrupt."

Justice Frankfurter indicated, however, that it would be open to a defendant in this country to call experts to prove the "psychological or physiological consequences of questioned literature." In light of this opinion, the defense could call psychiatrists or psychologists to testify that there is no proof that reading will alter an individual's character structure or stimulate a person to immoral behavior.⁶⁷ Experts of this nature might well be vital to the defense in the more typical obscenity case.

III

A basic question discussed in England, where the case has inspired lively and continuing debate,⁶⁸ is whether the judicial process is appropriate for

60. 361 U.S. 147, 161 (1959).

61. *Id.* at 164-65. See also Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MICH. L. REV. 5, 98-99 (1960).

62. *Ibid.*

63. *Id.* at 166-67.

64. *The Trial* at 127.

65. *Id.* at 127-28.

66. *Id.* at 127; see also *id.* at 203-04.

67. See *United States v. Roth*, 237 F.2d 796, 812-17 (2d Cir. 1956) (App., per Frank, J.).

68. See, e.g., *The Censor as Aedile*, *The London Times Literary Supplement*, Aug. 4,

resolving issues of literary merit. The question would have been posed even more sharply had the prosecution created a conflict in the testimony by presenting its own experts.⁶⁹ Is it not anomalous, it is asked, to leave to twelve laymen the resolution of questions which may deeply divide informed authorities? An assessment of a work's literary merit involves value judgments which are far removed from judgments on questions of fact which are customarily confided to jurors. Given the first amendment, there is a further paradox in the use of juries in this country. The jury is deemed to be a cross-section of the community, reflecting average views. But freedom of expression means the right to express the unusual, the unconventional, and even the distasteful. Is it consonant with this view to relegate resolution of the question to a societal instrument which is designed to mirror the view of the average man?

Judge Learned Hand has given the classic response to these questions:

[S]hould not the word "obscene" be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence.⁷⁰

* * *

As so often happens, the problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable. We impose such a duty upon a jury . . . because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of the community. There can never be constitutive principles for such judgments, or indeed more than cautions to avoid the personal aberrations of the jurors . . . Thus, "obscenity" is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premise, but really a small bit of legislation ad hoc, like the standard of care.⁷¹

There is finally the problem presented by the ambiguity of the phrase "literary merit." The English statute does not define these words. The trial judge in the *Penguin* case asked one of the expert witnesses, Dr. Vivian Pinto, Professor of English at Nottingham University, what he understood the phrase to mean. Dr. Pinto's thoughtful response underscores the immense practical difficulties in judicially administering such a test:

1961, p. 475; Welch, *Black Magic, White Lies*, 16 Encounter 75 (February 1961); West, Williams, Hoggart, & Jarrett-Kerr, *'Lady Chatterley,' the Witnesses, and the Law*, 16 Encounter 52 (March 1961); Williams, *The Law and Literary Merit*, 17 Encounter 66 (Sept. 1961); Sparrow, *Regina v. Penguin*, 18 Encounter 35 (Feb. 1962).

69. It has been reported that the prosecution asked T.S. Eliot to testify in its behalf, and that he responded by offering his services to the defense. MacDonald, *London Letter*, 28 PARTISAN REV. 248, 254 (1961).

70. *United States v. Kennerley*, 209 Fed. 119, 121 (S.D.N.Y. 1913).

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

It is not easy to put in a few words. I look for a number of things in a book. I look for the quality of the writing, for the importance of the subject matter, the meaning of the book, whether it has a true and valid meaning; the experience that lies behind it is important, and whether the artistry, the craftsmanship, is adequate, and whether it succeeds in conveying the author's experience, and whether that experience is a significant experience, and I think what is called the longimanous test is a good test, when you come back to it and get fresh pleasure from it, and I did that.⁷²

But troublesome as the "literary merit" exception may be, a test of obscenity which did not furnish immunity for such classics as *Lysistrata*, Fielding's *Tom Jones*, or *Madame Bovary*, or for contemporary works of distinction, would be intolerable. As the late Judge Jerome Frank put it: "A statute yielding such deprivation would not only be laughably absurd but would squarely oppose the intention of the cultivated men who framed and adopted the first amendment."⁷³ The real difficulty, of course, arises in deciding whether contemporary works have "literary merit." It is a relatively easy task to establish that works by Rabelais or Zola are literature.

In this country, the *Lady Chatterley* case belongs with the *Ulysses* decision as a landmark in upholding literary freedom. It marks a reaffirmation of judicial hostility toward administrative censorship. In England, Lord Radcliffe has suggested that *Regina v. Penguin* may mark "a final turning away from the older idea that written words can be things dangerous enough in themselves to merit punishment for the man who has let them loose on society."⁷⁴ The recent prosecutions against booksellers of Henry Miller's *Tropic of Cancer*⁷⁵ and the refusal by New York State film censors to license a motion picture on drug addiction because of its use of a four-letter word⁷⁶ suggest that this view may be unduly sanguine, at least so far as the United States is concerned. In any event, the two cases resulted in judicial vindication of the artistic integrity of D.H. Lawrence.

The impression which survives a scrutiny of these two proceedings is that obscenity is an "exquisitely vague" concept,⁷⁷ that the social evils which obscenity legislation is designed to suppress are not easy to pinpoint, and that the defense of obscenity charges calls for imaginative, and even heroic, efforts by the defense. Lawrence himself may have pointed to the root of all these difficulties when he perceptively observed that "What is pornography to one man is the laughter of genius to another."⁷⁸

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72. *The Trial* at 83.

73. *United States v. Roth*, 237 F.2d 796, 820 (2d Cir. 1956).

74. RADCLIFFE, *CENSORS* 20 (1961).

75. See Lewis, *The Most Recent Troubles of 'Tropic': A Chapter in Censorship*, N.Y. Times Book Review, January 21, 1962, p. 4, col. 3.

76. See Crowther, *Choice of Words*, N.Y. Times, February 11, 1962, § 2, p. 1, col. 8.

77. The phrase is Judge Frank's, *United States v. Roth*, 237 F.2d 796, 826 (2d Cir. 1956).

78. Lawrence, *Pornography and Obscenity*, in LAWRENCE, *SELECTED LITERARY CRITICISM* 32 (1955).

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