Santa Clara University
School of Law

Santa Clara Law Review

Volume 17 | Number 4 Article 9

1-1-1977

Book Review [Literature, Obscenity & Law]

Santa Clara Law Review

BOOK REVIEW

LITERATURE, OBSCENITY & LAW. By Felice Flanery Lewis. Carbondale, Ill.: Southern Illinois University Press. 1976. Pp. xi + 297. Cloth. $12.50.

Reviewed by David M. Brown*

Ms. Lewis, in a preface to her book, differentiates her analysis from the plethora of books and articles on the subject of obscenity by its focus on the effect of obscenity litigation on the development of literary trends in the United States and abroad.

Although the book treats, in cursory fashion, the history of obscenity law and notes the changing legal "standards" which the courts have fashioned to deal with the elusive concepts involved, this is not a work from which the law student or practitioner will gain a comprehensive legal perspective. She extracts from court opinions not the evolution of judicial trends in obscenity litigation, but rather their validity as literary critiques. And, with minor exceptions, her focus is exclusively on literature with a capital "L"—a focus which, in view of the current judicial and prosecutorial emphasis on hard-core pornography, in most respects limits the work. It is indeed possible to read this book as nothing more than a survey of the idiosyncratic opinions held by judges, prosecutors, policemen, and assorted vice society entrepreneurs on what constitutes good literature, art, or genuine literary ability. As such, however, the book has value only as a catalogue of curiosities—holding up for deserved ridicule the absurd spectacle of legal judgments couched in the language of pseudo-literary criticism.

One can, however, extract some feel for the problems this field of law presents to practitioners, but only at some considerable cost to the reader in view of the author's technique and style.

Positing the year 1890 as roughly the beginning of a "sexual revolution" in literature and also the beginning "of a sustained effort to censor fiction, regardless of its literary qual-

* Partner of Fleishman, Brown, Weston & Rohde, Beverly Hills; B.A., 1965, University of Southern California; LL.B., 1968, Stanford University; Member, California State Bar and United States Supreme Court Bar.

ity, through legal action,"[1] the book is divided into chapters each of which roughly encompasses a decade of activity (with considerable overlapping because of the often lengthy hiatus between the appearance or initial circulation of some works and their entanglement with the courts or other pro censorship forces).

Ms. Lewis has attempted to identify, and with some unfortunate results to label, the dominant theme which she perceives as characteristic of either a generally recognized trend in literature or as common to the works which attracted legal attention. The technique utilized is to quote at various length from the books (or plays) litigated during a particular period, to analyze the author's literary theme or intent, and to quote from and analyze the various court decisions as they identify, merge, and muddle varying elements of moral, literary, religious, and class standards into legal principles. The various works and authors are compared to each other within each period covered and contrasted to those preceding and following, as are the recurring and often contradictory legal standards by which each was judged.

The essence of Ms. Lewis' assessment of legal opinions as valid literary criticism is stated in her comments on a 1930 New York opinion condemning as obscene the printed version of a play written in 1903 by an author described as "a Viennese doctor who in the 1890's had achieved an international reputation as a brilliant and psychologically acute playwright and novelist."[2] In one section of the opinion, the court had commented on the failure of the author's purpose, as perceived by the court:

> It is very clear that the author of the book now before us . . . was not thinking of the spiritual, but devoted the whole book to the animal instincts of the human race. His efforts were not a lesson in morality, nor an attempt to uplift the mind of the reader.[3]

Ms. Lewis notes that this opinion revealed "a theory that has influenced many obscenity decisions, the belief that imaginative literature should inspire or improve humanity—indeed,

1. F. LEWIS, LITERATURE, OBSCENITY & LAW 1 (1976) [hereinafter cited as LEWIS].
2. *Id.* at 80.
3. People v. Pesky, 230 App. Div. 200, 243 N.Y.S. 193 (1st Dep't, 1930), *aff'd* 254 N.Y. 373, 173 N.E. 227 (1930). *See* LEWIS at 81.

that its primary rationale for existence is moral purpose."[4] Noting that such a philosophy is derived from both religion and utilitarianism, and continues to attract adherents today, Ms. Lewis points out that "a judge who contends that literature should uplift the mind has adopted a very narrow theory of art that, while harmless when held by the average person, can result in a prejudicial decision in the courtroom."[5] She also notes that many members of the judiciary appear to think that authors have no purpose other than to embody in their works a message that could just as well be presented in one way as in another, and that nothing would be lost by rearranging a literary work to suit the demands of taboos. Such judges,

> failing to realize that literature would have little of significance to offer unless it encompassed "the range of articulate human imagination as it extends from the height of imaginative heaven to the depth of imaginative hell," thought there was no reason why authors should not be satisfied to stay within certain bounds in choosing their subject matter.[6]

Though she concludes that the history of literary censorship in the United States provides insight into the "national psyche and our present age as a whole"[7]—citing the fear of discussion of subjects like prostitution, adultery, homosexuality, and intimate bodily functions and the "tendency to view disturbing phenomena as much less dangerous when ignored than when exposed by the printed word"[8]—Ms. Lewis somewhat curiously refrains from drawing any conclusion as to her main theme, i.e., the nature and quality of the interaction between literature and the law. "[I]t is entirely possible that censorship acted as a brake, preventing a precipitous change in literary mores. However, no direct correlation is evident between favorable or unfavorable court decisions and the progress of the sexual revolution in literature available to Americans."[9]

Though such restraint may be an admirable characteristic of one who poses herself as a mere objective historian, her stance is belied by the material she presents. *Literature, Obscenity & Law* is a catalogue of prior restraint, intimidation,

---

4. LEWIS, at 81.
5. *Id.* at 82.
6. *Id.* at 244-45.
7. *Id.* at 245.
8. *Id.*
9. *Id.* at 244.

destruction of property, financial ruin, and the persistent spectacle of persons basing legal judgments and imposing penal sanctions on thoroughly untutored assessments of the function of literature and unprovable assumptions regarding its impact on society.

Moreover, from a legal standpoint, the correlation, or lack of it, between court decisions and the progress of the sexual revolution in literature is beside the point. The issue—which Ms. Lewis treats rather tentatively in her final chapter on the impact of the Burger Court decisions in 1973 and 1974—is the right of individuals in our society to choose for themselves what they read or view and the inability of government to justify, constitutionally or pragmatically, interference with the communicaton of ideas, or the control of peoples' minds.

Although she dismisses out of hand so called hard-core pornography as virtually indefensible on any ground, she notes the return of the Burger Court to outmoded notions regarding the necessity of protecting that amorphous class usually designated as weak or susceptible from their own thoughts. Ms. Lewis points out the irony of Burger's insistence that censorship can be tailored to exclude legitimate ideas from the compass of penal laws, when obscenity litigation over the last 100 years involving major American and European authors has shown the contrary to be true.

The author's final stance is that we must take the bad with the good, accept indefensible hard-core material as beyond the right of government to control in order to protect reputable authors, booksellers and others. Ultimately, Ms. Lewis posits Justice Douglas' speech/conduct distinction as the only acceptable criteria for legal judgment.

Although this book adds little to the wealth of published information on the history of censorship, it does once again support the contention that censorship inevitably is unable to distinguish between the valuable and the valueless in expressive media, no matter how much the censor, in good faith or bad, attempts to suppress only the hard-core.