Reviews


That nothing exists without a name is a notion attributed by anthropologists to “primitive” society. It has a good, picturesque ring to it until something points up how the same notion bedevils us all.

Copyright is one of those humbling reminders that even lawyers can be lulled by names. Recorded intellectual productions are “copyrights,” or so we say, and if not that, they must be nothing at all. The name is everything. Then we look again, and see cobwebs.

At a time when the science if not the art of communication grows more sophisticated yearly, it may be fitting to reconsider the rules that govern transactions relating to the creative process. Not all of these rules are in copyright laws and not all are even acknowledged to be law; some of them bear inconvenient names and others have no names at all. Nevertheless they exist. They ought to be brought out of limbo, defined, and set down, and not merely to insure against criticism by future anthropologists. Works of art are too important for protection by Swiss pikes. Something more up-to-date is required, something imaginative in the image of the protégé.

Law and the creative process meet always in uneasy confrontation. They are like the British and the Americans, sufficiently alike to share common bonds, and still curiously dissimilar. They have this in common, that they both take themselves very seriously, but their self-esteem leads them off on divergent directions. Dickens, who came close to making the Law a protagonist in many of his novels, draws this memorable portrait in Pickwick XXIV when a beadle at Ipswich enters the room.

“My name’s Tupman,” said that gentleman.

“My name’s Law,” said Mr. Grummer.

“What?” said Mr. Tupman.

“Law,” replied Mr. Grummer, “law, civil power, and executive; them’s my titles; here’s my authority. Blank Tupman, blank Pickwick —against the peace of our sufferin Lord the King—stattit in that case made and purwided—and all regular. I apprehend you Pickwick! Tupman—the aforesaid.”

So much for the Law, but what of the creative process? Chekhov
The Yale Law Journal describes that in *The Black Monk*. In this tale Kovrin, a writer, is inspired by visions of a black monk who whispers to him that he is a genius. Kovrin is persuaded to be cured of his hallucination, and dies. The story suggests a view of the creative process as another order of reality trespassing on this one, bursting over the boundary line into our own. In all fairness to the law, it must be said that Dickens and Chekhov were writers, not lawyers, but their visions have meaning. Law and the creative process are in a way opposites.

Dilemmas of this kind are reflected in books about copyright law. The distinguished scholars who write them may not be consciously aware of dealing with irreconcilables but they come down, sooner or later, more on one side than on the other. The essential sympathy shows through.

In *An Unhurried View of Copyright*, Professor Benjamin Kaplan makes his position clear. He is one of the law men, not one of the gypsies. This is where he stands:

I conclude with the observation that when copyright has gone wrong in recent times, it has been by taking itself too seriously, by foolish assumptions about the amount of originality open to man as an artificer, by sanctimonious pretensions about the inequities of imitation. I confess myself to be more worried about excessive than insufficient protection, and follow Voltaire in thinking that plagiarism, even at its worst, "*est assurement de tous les larcins le moins dangereux pour la société*.”

In order to read this passage in its proper frame, the reader must be aware of two subliminal factors. One is that Professor Kaplan makes it the conclusion of his chapter entitled "Plagiarism Re-examined." The other is that he equates protection with copyright, at least by inference. Briefly then, he is thinking in terms of potential litigation founded on historic copyright law. Too much of a good thing, says Professor Kaplan. Many will agree.

*An Unhurried View of Copyright* is the most engaging, reasonable, informative “anti-protectionist” tract available. The style is elegantly donnish, quite worthy of the subject. The arguments are always temperate and mercifully lacking in the shrill imprecations against authors' rights as wicked monopolies that disfigure so many other writings on this subject. Indeed the style reminds one of that early classic, Birrell's *Seven Lectures On The Law And History of Copyright In Books* (1899).

Substance is something else again. This critic disagrees with Professor Kaplan's mistrust of copyright. So does most of the copyright
community, authors and their customers alike. Kaplanization means too much empathy with the legal process, too little with the creative. In a preface to the book Dean Warren of the Columbia Law School writes:

Professor Kaplan's emphasis on the desirability of greater freedom of dissemination of ideas is especially significant because it is at odds with a strong contemporary trend toward more restrictive and longer protection of the exclusive rights of writers and composers. In addressing himself to the challenging issues involved in the protection of literary property, with clarity, erudition and wit, he renders a special service by questioning some of the time-worn assumptions in the copyright field.

Fair enough, except for Dean Warren's assumption that more copyright impedes the free flow of ideas. Trends do require reexamination, and in this little book, it is well done. Nevertheless one can hope that history will deem it the brilliant summation of a bad case.

An Unhurried View of Copyright includes solid chapters about copyright history and proposals and prospects for legislative reform. But the heart of the book, especially in view of the author's predilection, is the section containing his reflections on plagiarism. Here we find the inevitable emphasis on Judge Learned Hand, who looms so large in traditional copyright law, together with dry comment about "specialists"—a group apparently not among Professor Kaplan's favorite people—who think fictional characters should be protected outside the stories in which they appear. At pp. 74-6 the anti-protectionist view is presented consummately:

Copyright law wants to give any necessary support and encouragement to the creation and dissemination of fresh signals or messages to stir human intelligence and sensibilities: it recognizes the importance of these excitations for the development of individuals and society. Especially is copyright directed to those kinds of signals which are in their nature "fragile"—so easy of replication that incentive to produce would be quashed by the prospect of rampant reproduction by freeloaders. To these signals copyright affords what I have called "headstart," that is, a group of rights amounting to a qualified monopoly running for a limited time. The legal device has been considered not too complex for administrative purposes and on the whole easier to handle than alternatives such as government subventions. . . .

The headstart conferred (which is the encouragement given, the inducement held out) should be moderate in all its dimensions. Magnify the headstart and you may conceivably run the risk of attracting too much of the nation's energy into the copyright-protected sectors of the economy. But more serious is the danger
of hobbling unduly the reception and enjoyment of the signals by their potential audience, or of clogging the utilization of the signals by other authors in the creation of further or improved signals for additional audiences. Eliciting publication is not an end in itself. Publication without easy access to the product would defeat the social purpose of copyright already mentioned as primary. Beyond this, various additional social needs and demands strive to make themselves felt to modulate and qualify the head-start as we move from one to another of the types of work covered by copyright.

"Headstart" is the key thought in the Kaplan perspective. Qualified headstart, socially balanced headstart, limited period of time if not grudging and reluctant headstart—all of it sounds a little patronizing to authors. Unfortunately for those of us who disagree, Professor Kaplan has a good deal of American history to support him. Surprisingly he makes little of that argument, so let us do it ourselves, in the interest of objectivity.

Britain's position is ambiguous, but American copyright law puts the public ahead of the author. Readers and audiences are its principal wards; those who create for them get thrown some good bones so they will go on producing. An informed public must be encouraged to keep reading just as a clean one must be encouraged to keep washing: accordingly, it is in the public interest to have new books and new detergents. But the soap merchant stands somehow higher than the author.

The early statutes were "Acts for the encouragement of Literature and Genius." For example, New Jersey's 1783 copyright law was entitled "An Act for the Promotion and Encouragement of Literature." The New Hampshire law of the same year stated its purpose in a preamble, "to encourage the publication of Literary Productions, honorary and beneficial to the public," while Connecticut and New York went so far as to provide price-fixing to insure the availability of books. Art. I, Sec. 8 of the U.S. Constitution confers power on the Congress

To promote the Progress of Science and useful Arts by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Of course the expressed goal is theory; the trick is balancing one set of rights against the other in fair equation. Professor Kaplan is most concerned with the commonweal. Now at last the pendulum is swinging towards the rights of authors. It will not be sufficient to those
of us who rejoice in this trend to bask in our good fortune. *An Unhurried View of Copyright* raises some fundamental questions that require answers.

To begin with, no responsible scholar suggests that mere ideas merit protection. There may be special circumstances involving fiduciary relationships or implied contracts sufficient to vary this theorem, but nobody wants to extinguish the public domain. In what follows we are dealing with some product of imagination that transcends ideas.

What, then, should be the dimensions of copyright? Time and space are the setting in which the drama plays itself out. How long? How far? Where do you mark borders?

The time question is the easier. Historically, American law has provided protection for two consecutive terms of twenty-eight years each. Most other countries in the West permit copyright to run for the author's life plus fifty years. Time and again we have had nonsensical worries occasioned by this disparity in term between American and other laws. A television program based on a British play no longer protected in the United States but still "copyright" in Canada could be shown in Detroit but not Windsor. Other things being equal, the pedestrian consideration of uniformity ought to be decisive.

And other things are at least equal. Some authors write in order to provide for their families. The members of the Berne Union, as well as most of the "specialists," accept life plus fifty as the fair term for accomplishing that aim. Professor Kaplan prefers a shorter term, and he is entitled to his opinion. But some of us would not find it shocking to have more. Most property, after all, is owned perpetually except insofar as it is consumed by creditors and estate taxes. Why must we go "the people's way" only with authors?

Indeed, there is something to be said for the old English system of University Copyright, granted to the Universities at Oxford and Cambridge, four Scottish Universities and some colleges such as Balliol, as a device to encourage scholarship. Under that system, protection was *perpetual*, subject to certain restrictions against divestiture of control. You can no longer obtain University Copyright for new works, but some of the old ones are still protected—witness the report in the *Evening Standard* for February 6, 1964, that Balliol had succeeded in enjoining the unauthorized publication of two Jowett translations.

Of course, constitutional difficulties may well preclude American experimentation with such a system, and no groundswell for amendment is likely. Nevertheless the point is worth making. The notion of a perpetual copyright to be held by America's highest institutions of
learning is neither more outlandish nor less socially laudable than fifty-six years, or ten years, or any other grudging term. Long live the Master of Balliol, or his brain children.

For the rest of us, though, if you begin with the traditional American assumption that publication starts the clock ticking, there is no such thing as a perfect time period for copyright. The only sensible approach is to join with the rest of the civilized world and have done with it.

Questions of space are more formidable. How far should the bounds of protection extend? An Unhurried View of Copyright sets out many of the standards used in measuring traditional copyrights. Professor Kaplan relies on existing case law, which is a reasonable road for a lawyer to travel. But it is not the way life is lived in the communications industries.

There a dynamic world is making ground rules for current contracts and future laws. If the genius of the common law is its ability to catch up with the market place, it had better look twice at the communications field. As suggested earlier, “copyright” is the wrong word—wrong chiefly in being incomplete—for describing the exotic new plants that grow in this surrealist garden.

Consider the following passage, introduced less in the hope of affording readers innocent amusement than of bringing out a point:

Florienbad was burning. The world's espionage capital, on the outskirts of Bucharest, was half destroyed. Among the ruins strolled tall, indifferent Secret Agent Leverett Lowell (Harvard, '42) wearing as always his Black Belt, Fifth Degree for Kajitsu (Zen combat by Screaming), puffing casually on a consciousness-expanding cigarette and followed by Alec, his lame ocelot who had figured so gallantly in the Tower of London Demolition Case. Lowell was flanked, as always, by two of his luscious Eurasian girl bodyguards.

A small man disguised as a passerby stood by a burning building, watching the flames with satisfaction. Lowell recognized him as Q 50, a medium-ranking agent of the dreaded ACL, Arson Consultants, Ltd. Q 50's eyes glistened as he turned from the conflagration and addressed Lowell.

“That's one for the insurance company, mate,” observed Q 50.

“Touché,” Lowell replied indifferently.

That deeply affecting passage, by this reviewer, appears in Vol. IV, Television Quarterly, Fall, 1965. Its want of literary excellence makes it thoroughly part of a tradition in copyright cases.

Leverett Lowell and his bizarre entourage may actually constitute
property. Taken together, they are a sort of compound of elements that the public values. Taken separately, each element may have value in its own right, even in a different setting. As things actually happen, especially in television, one of the girl bodyguards, with or without the lame ocelot, may be extracted from a series about Leverett Lowell and star in her own series without Lowell next season.

Television is the most voracious consumer of literary property on a repeating basis. It serves, accordingly, as the ideal subject for the study of new theories, new forms of legal life, new property concepts. Snobbishness has no place in such studies. Judge Learned Hand's concern was not confined to *Twelfth Night*.

In television the Leverett Lowell extract might be the subject of protracted negotiation and sale. Probably but not inevitably the character would in fact have been more fully developed in successive episodes without appreciable enrichment. Be that as it may, Lowell and his entourage might be dealt with as a commodity.

They might originate in a spy novel, or a film, or a series "presentation" designed specifically for television. Typically an independent production company acquires an option, sometimes on the text of Leverett Lowell stories, sometimes merely on the character himself and his attendant props. The most elaborate negotiations accompany such acquisitions. Does one remember to secure rights to Mr. Hudson besides Holmes and Watson? How much does the original owner receive per new program episode if the series is one hour, how much if the series is half-hour? To what extent does he share in proceeds from a sound track album, or Leverett Lowell figurines, or theatrical exhibition of two program segments stuck together as a feature film? Does he share "spin-off" proceeds when one of the minor characters goes into a different series? All of it sounds fantastic, but it happens.

The J. R. R. Tolkien mythology affords even more vivid illustration of the kinds of intangibles which may be sold in the market place of incorporeal property these days. This author creates a fictitious world filled with imaginary people, imaginary races, imaginary eras, languages, curses, treasures—all of it, each element in the compound, at least partly original and potentially valuable on its own. H. P. Lovecraft did the same thing, and a devoted readership kept buying his macabre fancies.

Television thrives on this sort of traffic. *Honey West* was telecast weekly as a spin-off from *Burke's Law*. For each spin-off that gets on, there are hundreds that occupy serious men and women in tortured negotiation for months at a time, but never appear. The spin-off
concept is crucial. It means the transplant of one or more fictitious elements into new settings. It describes extraction in business terms, and it comes up in nearly all contracts for the acquisition of television rights. There is no use pretending it will all go away if we ignore it.

Professor Kaplan and others who decry excessive protection may have a plausible rebuttal to the argument that real life has outrun their law. They may suggest that purchasers in this field merely buy quit-claims to avoid lawsuits. Sometimes that will be true; television moves quickly, and there is no time for test cases. Some of the fictitious elements that command royalties probably are nothing but ideas with names, and belong in the public domain. Certainly a slight shift in presentation, a change of name, a different occupation or nationality is sufficient to avoid legal trouble in many instances of copying. Still, there is more to it. Once in a long time we find fictitious elements such as characters that are both original and valuable, even under a different name, even snipped off and planted in a new garden. The point is that conceptually protection for elements such as these is all quite possible.

If trade custom means anything, the broadcasting industry has created standards that the common law must consider. Industry-wide collective bargaining agreements between management and the Writers Guild of America contain royalty provisions for the use of characters. Some day they may encompass additional elements, at least in general language.

Nevertheless trade custom is not everything, and Professor Kaplan is entitled to legal analysis in support of our new heresies.

In supplying it, one comes back to the question of names again. Fictitious characters are not "copyrights." Neither are fictitious eras, languages or battles. If Shakespeare were under copyright today, another's piracy of Falstaff might be a crucial factor in determining copyright infringement of particular plays, but Sir John is no copyright. He is something else, something without a name.

And yet not entirely without a name. The right name is "literary service mark protected against dilution." It lacks grace, but perhaps we shall coin something better after examining what lies behind it.

The trademark, sibling concept to the service mark, began as a liability and became an asset. In this happy course it ran parallel to the copyright. One originated as a device for policing measures and standards in the medieval guilds. The other began (in England, at any rate) as a device to record heretical authors and publishers. Then the trademark became a sales badge identifying the source of products,
and the copyright turned into an economic res, a legal claim to rights in a work of art.

The two doctrines have different rules. Trademark is of uncertain duration; its geography is not fixed, and there are sometimes restrictions on its transfer so as to avoid deceiving the public. It depends largely on facts postulated at a given moment. Such and such a name is well known in Hawaii this year as a device for identifying pineapples, but not in Bonn, where it was famous a decade ago as a name for bicycles. Copyright is quite different. The owner has the security of fixed time periods, and his protection is national, often international, in scope. Trademark is the more flexible, copyright the more certain. The trouble with copyright is that it leaves off too soon, and fails to protect characters and related imaginings by Lovecraft and Tolkien.

Here trademark is a useful supplement—or service mark to be more exact about it, since the author's creations identify his services. These services are literary, hence the term "literary service mark." Dilution in turn is a German doctrine, adopted by several states including New York and Massachusetts, that protects marks against "whittling away" by use on disparate products, even where there is no likelihood of public confusion. In this doctrine the medieval mark ripens fully into an asset without any of the old hurdles in the way of protection. Rolls-Royce shoes, theoretically, would be enjoined under the dilution doctrine. With this concept we round out the translation of that awkward phrase for Sir John Falstaff: "literary service mark protected against dilution." Today that is what Falstaff would be in law.

"Author's mark" would be a happier phrase, but what about that old legal saw "unfair competition"? That concept is not quite adequate for the needs of the business community, which is less concerned with prospective torts than with property and contracts. So author's marks, in the sense of extricable component elements of literary compounds, deserve a place in the law's lexicon.

Not all author's marks need represent fictional characters. Mad Magazine licensed amorphous rights, something like format but not quite, for use in a little revue that became a national success. When the arrangements were made, the parties were not at all concerned with conjectural lawsuits. Everyone assumed there were rights (not only in the word "Mad") and worked on dividing percentages of gross weekly box office receipts. A bystanding copyright lawyer could have brushed off the contracts as mere charades, but nobody would have listened. Readings from Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964) and Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S.
234 (1964) might have cast further doubt on the proceedings. But nobody doubted.

These are some of the reasons why copyright inadequately describes literary property. One is less than the others; it tells only part of the story. If nothing exists without a name, let us have “author’s marks” or something better.

So much for time and space. In dealing with time we have applauded the life plus fifty approach and spoken with yearning of perpetual university copyright. In dealing with space we have gone beyond the confines of copyright and suggested recognition of author’s marks as new forms of property. Anti-protectionists will find all this uncongenial, but their perspective is perhaps one-sided or worse, partial to the wrong side.

*An Unhurried View of Copyright* is a way of looking at things in terms of franchises and grants from the sovereign. It has on its side American copyright history, with its concern for the public interest in free or cheap communications and its unconcern for authors. At least it has American history on its side as far as it goes.

Against this Kaplanesque view is a different way of looking at things, more as writers and publishers and producers do. A good statement of this second view is what G. K. Chesterton wrote in *Charles Dickens* (Methuen, 1906) at p. 81:

> Ordinary men would understand you if you referred currently to Sherlock Holmes. Sir Arthur Conan Doyle would no doubt be justified in rearing his head to the stars, remembering that Sherlock Holmes is the only really familiar figure in modern fiction. But let him droop that head again with a gentle sadness, remembering that if Sherlock Holmes is the only familiar figure in modern fiction, Sherlock Holmes is also the only familiar figure in the Sherlock Holmes Tales. Not many people could say offhand what was the name of the owner of Silver Blaze, or whether Mrs. Watson was dark or fair. But if Dickens had written the Sherlock Holmes stories, every character in them would have been equally arresting and memorable. A Sherlock Holmes would have cooked the dinner for Sherlock Holmes; a Sherlock Holmes would have driven his cab. If Dickens brought in a man merely to carry a letter, he had time for a touch or two, and made him a giant.

The touch that creates giants, there perhaps is the point Professor Kaplan forgets. It appears only occasionally, and not even the most avid protectionist wants to dignify stock characters and mere ideas with property attributes. By all means enlarge the public domain with
unworthy artifice, but recognize too that there are magicians among us.

Rewarding the few magicians is unlikely to deprive the public of its divertissement. Producers of the most successful shows pay royalties for rights in literary material. They make a go of it, and few others find it necessary to present only Beaumont and Fletcher and comparable vintage pieces which happen to be public domain.

It must finally be said out loud, that if any professional deserves protection, the creative artist deserves it, because he is society's elite.

And yet these things are not generally agreed. Professor Kaplan makes the point that nowadays authors are not so often romantic figures in a lonely garret. More and more they are becoming efficiently organized production teams, processing informational data for collective entities. True enough, and sad in its way. But still, it is too soon to write an epitaph for the creative process. Perhaps that process is too mysterious to be understood at all. Some people think of it as merely a biochemical efflux, others deal with it in religious terms. The law deals with it too often as an aberration from good order, a minor outrage of sorts that has to be kept in its place.

Nobody agrees; and so it comes about that the creative process must be described in terms of parable.

We are every man in a state of siege, by forces massed outside the walls we put up long ago. Most of us get on very well pretending there is nobody outside. We attend directors' meetings, and we go home to families, and there are some who say that the siege is a fiction invented by the authorities to keep order. We post sentries and watchmen to keep out the invading army, even if there is no such thing.

And then there are subversives among us, who keep secretly in touch with the invader. These are the people who undo the bolts and open the iron gates. These are the writers, and the musicians and artists. They hear the battering ram, and have a longing for the enemy. They recognize him as their own imaginings.

There ends the parable; the mystery remains. Law and the creative process never will reach complete accommodation, but armed truce is possible. It can be arrived at, and maintained, if we worry less about a fictitious public and more about Merlin. He has earned his wages as nobly as the Lord Chief Justice and the shoemaker have earned theirs.

Life without law would be hazardous, life without art intolerable. Civilized men have no reason to suffer these deprivations if only they will come out of the fortress and inspect far-off and remote borders.

The enterprise known as movie censorship moved Dr. Ira Carmen, a member of the political science department at Ball State University, to learn how it has operated in the United States during the 20th century, and to determine if it is constitutional. He has avoided writing about the federal statutes concerning obscenity, the movie industry's self-regulation, or any influence private associations may exert upon the content or style of films. Instead, he has concentrated wholly on the functioning of state and local censoring bodies and on the constitutionality of censorship itself.¹

The book originated as a doctoral dissertation at the University of Michigan and reads with the charm, though not the brevity, of an Annotation in A.L.R. About 125 pages are devoted to a case-by-case description of what different judges of the United States Supreme Court have said in majority, concurring and dissenting opinions between 1915 and 1965. Wisely, Dr. Carmen has not limited himself to cases involving motion pictures but has included litigations covering books and magazines in which the issues of censorship and free speech under the First and Fourteenth Amendments have been raised. Following this material, he takes about 100 pages to summarize the relatively few state and local laws and the state court decisions in the area of film censorship.² Since most of the remaining pages are taken up with an extended bibliography,³ only about 30 pages of the book constitute

¹ Member of the New York Bar. A.B. 1942, LL.B., 1948, Harvard University. Author of How to Secure Copyright (1950) and Literary Property (1967).

² The states covered are those maintaining some kind of state-wide film censorship system as of early 1965: Louisiana, Florida, New York, Maryland, Virginia, and Kansas. He also discusses the state-wide film censorship system that had formerly operated in Ohio, Massachusetts, and Pennsylvania. The municipal censorship systems covered are those of Chicago, Detroit, Memphis, and Atlanta, with passing attention to Boston, Dallas, and a very few others. The list of states with state censorship has changed little in 40 years, M. Ernst & W. Seagle, To Ime Pure 28 (1928).

³ It must also be added that the six-page index is too vague in its subject-entries to
genuine analysis. Moreover, although the book was published late in 1966, the cut-off date for the sources used was with one or two exceptions March, 1965. In short, the book is both a chore to read and one that despite its recent appearance must be brought up to date by independent research. But it would be captious to leave the matter at this because—despite its real faults—it is a book that requires the most serious consideration.

Ever since Mae Irwin took leave from a play called *The Widow Jones* to record one of its scenes on fifty feet of film, the American public has been involved with the question of what can be permitted to movie makers. That strip of film, released in 1896, was called *The Kiss*, and for years it packed penny arcades, made the nickelodeon possible, and caused "respectable" people to regard the cinematographic performance as inherently iniquitous. Churchmen immediately split into two groups: those who wanted to ban motion pictures absolutely (or exclude them from the local community or from the Lord's Day, in the manner of alcoholic beverages) and those who thought they could be salvaged by close supervision. The former opinion-makers proved singularly unsuccessful, as they were later to prove with talking records, radio, and television. The day of absolute prohibition of an entire medium was over by the time the 20th century began, though it took several decades to prove it. From Jeremy Taylor in the early 18th century until Billy Sunday in the 1920's, there was indeed a Puritan ethic powerful enough to ban theatrical performances, ballet, opera, and pantomime over wide areas of the English-speaking world; but its power was waning by 1900 and today no art form is prohibited for being immoral in itself. Even on a social and ethical level, the general opinion for the past half century has been that there must be something done within the form itself that is evil before that particular means of expression can be suppressed. The salvagers among the moralists have therefore won the day.5

But they have not been, in their turn, a group of monolithic opinion. Some have consistently chosen to operate outside the scope of legal process. They have organized associations for the purpose of reviewing

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4. See CARMEN 9, and the plea in the Preface, CARMEN vii, for the author's admission of "the threat of built-in obsolescence" in such a type of study between the time research is done and the date it can be presented to the public.

5. G. BLUESTONE, NOVELS INTO FILM 36-45 (1937) describes the influence of the Legion of Decency upon American movies. It was at one time suggested that the greater influence of Catholic over Protestant critics was due to the fact that the former accepted movies, if suitably censored, whereas the latter moved for their total suppression.
and rating films as to their appropriateness from a moral viewpoint, with the intent of helping people avoid unpleasant experiences in the theater and protecting their children from the psychic damage of an immoral film. Beyond this, by means of boycotts and other forms of pressure, they have induced film makers, distributors, and exhibitors not to produce or make available to the public films that the rating group disapproves. The power of this extra-legal approach has gone far to create the restraining climate of the possible which underlies the industry's self-regulation.6

It is the second approach taken by the moral salvagers upon which Dr. Carmen has concentrated his attention. Not content merely to influence the industry, many of them have sought to employ the legal system to aid them in pursuing their ends. There are several ways in which this can be done; not all of which are, in Dr. Carmen's definition of the term, censorship. One way calls for a pre-screening of all movies to be shown within the jurisdiction, after which the screener may either ban outright any movie containing scenes objectionable to the community's moral sense or require that the offending scenes be cut if the film is to be shown. This is what Dr. Carmen calls censorship, and this is what he is against. The other way is to permit objectionable material to be shown and then to prosecute the persons concerned for obscene conduct, enjoin the film, or order it screened subsequently for deletion of prosecutable material. These latter methods are not considered censorship by Dr. Carmen; and while he concedes that they are liable to abuse, he finds no reason in policy or in the Constitution why they should not be employed to police the community's morals.7

Throughout Dr. Carmen's book runs a certain vagueness that makes it very difficult to know precisely where he stands upon a number of issues. Perhaps this is due to the difficulty of the subject-matter, or perhaps it is the result of the neutrality forced upon the author of a doctoral dissertation; but certain matters keep intruding upon the reader as bothersome and unresolved questions in the area of movie regulation.

6. For sophisticated restraining approaches see Problems of Communication in a Pluralistic Society, CONFERENCE ON COMMUNICATIONS, March 20-23, 1956 (Marquette University Press, 1956) especially papers by Professor Bourke and Judge Desmond, the latter covering ground parallel to that described by Dr. Carmen as of 1955.

7. Others, of course, use the term censorship in a far broader sense, though the system endorsed by Dr. Carmen was that used by the ancient Greeks, R. McKeon, R. Merton & W. Gellhorn, THE FREEDOM TO READ 53-54 (1957). Still, a post-event prosecution did have a censoring effect on Socrates.
First of all, there is the question of what is obscene. Dr. Carmen recounts at great length various judicial definitions of obscenity, and he is rather critical of local officials when they do not rigorously adhere to the authoritative exegesis of Roth-Albert or Kingsley or some Supreme Court Justice. Perhaps such law enforcement officers ought to be better informed, but the Court's definitions are not happy ones for any man with a taste for predictability. Dr. Carmen himself is at pains to point out the inconsistencies within the various opinions of Mr. Justice Brennan, and he is properly dubious about Mr. Justice Stewart's famous dictum about hard-core pornography: "I know it when I see it." But when it comes to telling the reader what obscenity might be, Dr. Carmen has been as coy as anyone writing in the field. Of course, he is no worse in this respect than the draftsmen of three international conventions on the control of the traffic in pornography; but it would have been helpful to know what aroused Dr. Carmen—unless he, like Mr. Justice Stewart, doesn't know till he sees it.8

Secondly, Dr. Carmen seems to accept the dogma that movies are no different from other forms of communication and should never have been subjected to different treatment by the law. He is sharply critical of Mr. Justice McKenna, who concluded in 1915 that movies were unique in their effects on audiences, and he insists repeatedly that movies should be treated just like books, periodicals, plays, and theatrical performances.9 He does not specifically extend his reasoning to radio and television as well, but nothing he says suggests any logical ground for excluding them. To this view, two objections could be interposed: that restraints similar to those used on films have been applied to other art forms, and that viewing a film really is different from reading or from attending the legitimate theater.

Until the 16th century, boroughs licensed all theater performances and exercised powers of restraint over them not unlike those of a modern municipal police chief who wants to run a clean town and to make sure no dirty movies, naughty nightclub acts, or lurid burlesque routines get shown. It is true that these duties were placed under the control of the Master of the Revels (and were later subsumed by his administrative superior, the Lord Chamberlain); but initially any act that trod the boards had to reckon with a medieval board of burgesses.

9. Carmen 14-15, grounding his opinion upon Note, 60 Yale L.J. 636, 704-03, which in turn claimed that "[m]odern communication research has largely disproved the existence of such a distinction."
Prior to the end of the 17th century, only books printed by the Stationers' Company could be lawfully published in England, and the Company maintained a committee to pass upon the lewdness of books. It was not an active committee, nor a very effective one; but it operated in a manner not very different from some of the modern film-censor boards. Also, beginning in the 18th century, the Society for the Suppression of Vice started to oversee lending libraries and the reading of the newly literate masses, with results not too different in effect from those the Legion of Decency had on films after 1922.10

But apart from this ancient history, there is the not inconsiderable majesty of Marshall McLuhan's apérisus that "the medium is the message" and that film, radio, video tape, live television broadcasting, audio tape, and long-playing records are not in the same category as anything appearing in print or occurring between a performer and a live audience. Whether movies and the like involve the viewer more or remove him further has been a subject of dispute; but the result is clearly not the same, at least according to Professor McLuhan. So perhaps the judges and censors who have insisted that a film has greater impact than a book or even a still-picture have not been such yahoos after all. As Sergeant Robert Murphy expressed it when interviewed by Dr. Carmen in the Chicago Police Department, "One must remember that audio-visual techniques are the most provocative means of communication and, therefore, must be carefully watched." Presumably, Marshall McLuhan would agree, though he would likely stop with the watching.11

Another issue Dr. Carmen necessarily avoids is that raised by the film censor of the Atlanta Library Board: "... movies are made only for financial profit and not for educational or artistic reasons."12 Quite properly, Dr. Carmen argues that this fact ought not to put them outside the protection of the First Amendment, since the same charge could as well be leveled against book publishers: the profit motive is ubiquitous in our society. Yet the fact remains, as attested to by such blithe spirits as F. Scott Fitzgerald and Norman Mailer, that movies are made for money and not for reasons of science or aesthetics. Therefore, if obscenity is a bad thing and if movies are better at pandering obscenity than any other communicative form, the crass motives of their makers and exhibitors cannot be overlooked; and the sensibilities

of creative intellects, crushed by harsh censorship, ought not to be attributed to the moguls of the industry or to the camera-crankers of the "Nudies."

But, of course, is obscenity a bad thing in and of itself? Dr. Carmen assumes that it is constitutional to ban a book, periodical, still-picture, film, phonograph record, and so forth simply because it is obscene. Naturally, he would apply the more recent tests of the United States Supreme Court that it must be without redeeming social, scientific, or aesthetic value; but he assumes that, lacking those, it is an unmitigated evil. Though unhappy over the possible unconstitutionality of pre-screenings and prohibitions growing out of them, Dr. Carmen is not averse to vigorous prosecution for obscenity, "after-the-event," of anyone distributing an infected means of communication.13

In this he is probably expressing a general community sentiment. The day when state and local boards pre-screened films may be gone forever, despite the ruling in Times Film Corp. v. Chicago in 1961.14 The New York Court of Appeals ruled in 1965 that the United States Supreme Court had found their state film censorship system unconstitutional under the Fourteenth Amendment,15 while in 1966 Virginia both repealed the statute establishing motion picture censorship and applied their obscenity prosecution statute to motion pictures.16 Kansas, which had refused even to answer Dr. Carmen's communications and which had the reputation among other censors as the "toughest" in the country, extensively amended its regulations, effective January 1, 1966, to meet many of the criticisms previously aimed at its system.17 The trend is clearly toward subsequent prosecution rather than pre-screening, and Dr. Carmen's book itself is an arrow in that direction.

But how much protection does this really afford?

Perhaps films can be divided into several categories: those made by producers, large and small, for general distribution; those made for the specialized "art house" audiences, whether such audiences are genuinely interested in aesthetics or simply in titillation; those made for scientific or educational purposes, even if they are potentially of wider

13. Carmen 259-60.
14. 365 U.S. 43. See Carmen 100-18, in which this case is dealt with in extenso through comparison with other decisions.
15. Trans Lux District Corp. v. Regents, 16 N.Y.2d 711, 261 N.Y.S.2d 903, 209 N.E.2d 558 (1965). This case was decided after Dr. Carmen's book had gone to press and his reference to it is necessarily brief. Carmen 123n.
interest because of the subject matter; and the “blue movie,” or smoker film, made for private viewings in homes or lodge halls. One of the problems that beset the early film industry was the failure to sort out and segregate these markets, with the result that products kept reaching the wrong audiences. This result is unlikely to occur in the present state of the film industry, but critics disturbed by obscenity have a tendency to obfuscate the differences between these varieties of movies made for such very different audiences—and so do the producers of the general circulation movie. In an age that has adopted the conformity of non-conformity, they have been obliged to make bold promises of unrestraint to persuade the incipient ticket purchaser that the downtown Bijou has something almost as racy as those smoker movies. He may never be among a group of bankers for whom the girl will jump out of the cake, nor may he ever be in the warm, beery atmosphere of a private “blue”-film collector’s home; but he thinks the Bijou is offering something just about as juicy—because that’s what the advertisements say.18

It is doubtful if the Bijou can ever succeed in meeting the implications of that promise, no matter how liberal mores become or how indifferent the law may be to sex exhibitions. The sources of sexual stimulation vary among different people, and many of the “blue” movies are aimed at a very special audience. A perennial favorite on the smoker circuit depicts a priest interrupting mass to copulate with a female corpse in a coffin and later sodomizing the acolytes on the altar. It is highly doubtful that such a picture will ever appear at the Bijou, although in more disguised forms the Bijou may be hinting at just such conduct in its horror and “teen” films, especially with the now current themes of necrophilia and pedophilia. More refined displays on film, such as the one of the naked woman having intercourse with an eel, will remain out of general circulation even if the moral tastes of Americans should sink below the level of Petronius’ Rome: what is sexually stimulating to one man is nauseating to another, and some stimulants are too peculiar.19 But the very fact that such weird demands exist strengthens the power of the suggestive advertisement, just as long as it avoids specificity: it lets the Bijou lure with the

18. Harold Hobson, a critic for the London Sunday Times, has raised some of these issues in reviewing Colin Spencer’s play, The Ballad of the False Barman, 13 ARTesch 55-56 (April, 1967).

19. Over sixty decades ago, G. Stanley Hall had noted this. “[T]he pervasiveness and wide and fantastic irradiations of sex symbolism have some support . . . in the prurient fancy . . . whose sensitiveness is so hypertrophied that [it] sees indecent allusions in almost every form, act, and word.” G. Hall, Adolescence 470 (1904).
seduction of unknown evil because, in that sense, Theda Bara is not dead.

But such attractions at the Bijou will be the cynosure of more than potential ticket-buyers. Those in the community who believe obscene films cause criminal and asocial conduct are also interested. Whether or not films do produce such conduct is a vexed question upon which Dr. Carmen refuses to take a stand. Yet it runs through all arguments on the obscenity issue. Can a book, a magazine, a recording, or a movie cause criminal conduct by one exposed to such influence? If there were a wider suppression of morally questionable material, would there be a decline in crime and psychopathology?

The police certainly believe the answer to both questions is yes. Any policeman will say that “every” sex offender he arrests has pornographic materials in his possession. The censors whom Dr. Carmen interviewed were also equally sure that their work was saving society from the assaults of obscenity upon the immature of all ages. Indeed, they were nearly all careful to observe that the most objectionable aspect of American movies was not a direct expression of lust but rather a morbid preoccupation with violence. This emphasis gibes with the claims of those who for many years have said that the high incidence of aggressive crime in America has been due to the constant exposure of its youth to gory, cruel, sado-masochistic comics, cartoons, movies, and television serials. Not even Walt Disney has been spared, with the result that certain scenes involving the step-mother queen in Snow White have been suppressed since its original showing three decades ago. The same thing has happened to Wizard of Oz, where the more dramatic scenes of the Wicked Witch have been removed. But while American children have been protected from Snow White and the Wizard of Oz, not much has been done to insulate them from other fictive horror-shows, of which the James Bond movies would be only among the worst examples. A child who observed Commander Bond in the fading clinch of one of these garish epics might be excused for thinking pain and death are synonyms for sex.

20. Censers in New York State and Memphis thought the problem in American films was violence, Carmen 271, 311, but Maryland and Virginia censors were not too concerned about violence as compared to sex, id. 279, 289, and the Chicago censors were concerned only if the movie caused violence, id. 299.

21. See the discussion by Orlow and Francis, Mass Communication and Crime, Sociology of Crime (Roucek ed. 1961) beginning at p. 229. Of course, since 1939 children’s librarians have largely succeeded in removing from their shelves as unsuitable reading material the books of the Grimm Brothers and L. Frank Baum, upon which the above fairy-tale films were based.
Dr. Carmen, who describes the unpleasantness of sitting through a movie banned by the Virginia censors, would approve the suppression of films—or any other communications media—that led either children or adults to commit acts harmful to themselves or others. Indeed, despite his antagonism to pre-screening of films he is troubled by Justice Musmanno’s conviction that “[d]amage is done at the very first exhibition of the film,” and by the Justice’s question, “[h]ow will the [subsequent] punishment of the exhibitor heal the lacerating wounds made in the delicate sensations of children and sensitive adults who witness a picture of lewdness, depravity and immorality?”

Any one who has observed an autopsy of a victim of a sexual assault must be similarly troubled. Even to read an autopsy report in which the victim had a blazing lump of coal thrust into her vagina must disturb the contemplative, to cite but one illustration. Why was such a crime perpetrated in this particular manner? What moved the psyche of the attacker to find his pleasure in this particular way? Did any obscene pictures in his possession charge him up to the commission of this kind of a battery? Assuredly, if such a correlation could be established, the sacrifice of obscene publications in exchange for the cessation of such activity would be a small price to pay.

But the correlation seems lacking. Sex offenses occurred in Puritan New England in sufficient numbers that the governor of Massachusetts Bay consulted the elders as to what steps to take to cope with them.23 Clearly, there were few external inducements in the way of pictures, books, or theatrical performances that could have produced these crimes. The “Mountain-Man” of Burnt Cabins, Pennsylvania, had no obscene literature around him at the time of his capture. The police did find in his house a brick chamber almost exactly like that in the film and novel, The Collector; but there was no evidence he was familiar with either. The only book they found was a well-thumbed popular work on the marriage customs of primitive peoples, in which particular attention seemed to have been given to the mock-rape variety of mating. This man had the delusive desire to kidnap a woman and drag her away into a cave in the mountains, where he and

22. Carmen 242-43. In a recent appellate argument before the Pennsylvania Supreme Court concerning the novel Candy, Mr. Justice Musmanno put counsel Albert Gerber, Esq., author of Sex, Pornography, and Justice (1965) through a rigorous grilling, expressing the same viewpoint as the one quoted by Dr. Carmen. See the reports in the Philadelphia Inquirer and the Philadelphia Evening Bulletin, on April 26, 1967.

she would live—"happily ever after," one assumes. He had made repeated efforts to consummate such a kidnapping before his seizure of Miss Bradnick, but no one could say whether this single book triggered his delusion or whether the delusion had been formed before he read the book.24 And, of course, while most sex offenders do have sex-oriented material in their possession, the quantity of such stuff sold in the United States would indicate that most of its readers are not led by it into lives of overt crime. Admittedly, however, no one can know what goes on in private rooms, so perhaps this argument is not as persuasive as it appears—or perhaps it is just further proof of the proposition that all men are guilty of some offense.

In fact, this is the belief of many who would suppress obscene material. They start with the assumption that all men are evil, that they learn with effort to suppress their natural selves, and that it is the function of church, state, and society to help the individual in this never-ending, never-finally-successful struggle.25 It is also the view of certain modern existentialist ethicalists, who conclude, however, that since all men are so hopeless no man can judge another—so let the obscenity of the human race be.26 Dr. Carmen eschews all of these theological and philosophical debates, but they are nonetheless central to the importance of suppressing some mode of expression on the ground that it is obscene, hence harmful, hence punishable. Without either behavioral evidence or some philosophical premise about the nature of man, it is impossible to know whether one is dealing with something of supreme importance or a mere triviality.

Yet even dismissing obscenity as trivial does not completely dispose of the subject of censorship. Dr. Carmen seems to believe that since Near v. Minnesota27 obscenity has increasingly become the sole reason for censoring particular modes of expression. But is it? Certainly Regina v. Hicklin, the leading case upholding censorship, rested on more than a desire to protect the immature.28 That, to be sure, is the rationale the case is commonly cited for, and modern courts have departed from Hicklin because they found that rationale unpersuasive.

24. The information on this case is drawn from a presentation at the Fifth FBI Sex Crimes Criteria Seminar near Swiftwater, Pennsylvania, Mar. 16-17, 1967.
27. 283 U.S. 697 (1931).
But in fact the prosecution was initiated primarily because the tracts concerned were Protestant propaganda which attributed vile conduct to members of Roman Catholic religious orders, intended for distribution among Irish Catholics living in England. Though the English prosecutor may have had no doubt that Irish immigrants were immature, his greater concern was their propensity to riot. Literature such as this was designed to produce civil tumult—a result which would probably have pleased its publishers even more than instant Irish conversion to the Queen's religion.29

Dr. Carmen doubts that this ground would support either prior or subsequent censorship of a film.

In any event it is difficult to conceive of the Supreme Court's placing its stamp of approval on the commonly used practice of deleting from movies "certain words" like "nigger" that might offend the Negro. Nor is it possible that scenes in moving pictures that depict hangings or the burning of human beings can be cut out arbitrarily, consistent with free speech guarantees.30

In the case of The Birth of a Nation, the N.A.A.C.P. has concentrated upon social pressure to prevent its showing, pursuing it even to church exhibitions in remote rural villages.31 On the other hand, the K.K.K. has been pushing hard for its revival, arguing that it is a major artistic event in the history of the cinema that cannot be suppressed merely because it might incite some violent action by its viewers.32 Because of its large Negro population and because of its long history of Negro-white rioting, Chicago's police censors will rarely allow the use of the word "nigger" in a film.33

All of this raises the issue of whether the public authority can suppress in whole or in part, previously or subsequently to a public appearance, any mode of communication—other than a cry of fire in a crowded theater—on the grounds that it might have or has had the consequences of causing a public disturbance. The Miracle could not be banned on the ground of sacrilege, according to the United States Supreme Court. And yet, despite that decision, it was effectively

30. CARMEN 231.
31. The efforts of the NAACP included the prevention of a showing of a privately owned copy of the film in the Universalist Church of Smithton, Pa., in 1964.
32. CARMEN 316 (quoting Christine S. Gilliam).
33. Id. 299 (quoting Sergeant Robert E. Murphy as saying that the previewing board of the Film Review Section of the Chicago Police Department reached this conclusion despite lack of objection from a Negro member).
banned by smoke bombs in the theater, raucous pickets in front of the box-office, and constant investigations by hostile officials to discover if the theater were in violation of fire, health, or building codes. When any mode of expression leads to riot or disorder in the streets, some means can usually be found for suppressing it, whatever liberal pronouncements the court may have made. But must these measures be extra-legal, sub-constitutional devices, or can the law under the First and Fourteenth Amendments consciously take account of the likelihood that certain words or scenes will lead to violence? If so, must the law wait until the violence actually occurs? And if the law must wait, is it confined to punishing the violent or may it enjoin that which has induced them to violence? A little knowledge of what Jacob Burckhardt called "the terrible twentieth century" makes these questions pertinent.

Assuming that such relics as The Birth of A Nation or Jew Süss do lead to disorder or do poison the body politic, does this simply become the price that must be paid for maintaining a free market place of ideas? Or can the problem be resolved by breaking up the viewing public into segmented audiences, with different treatments for the differing segments? For example, it has often been suggested that films be rated as fit for audiences of any age, for adults or for children only, or for children when accompanied by adults. The last rating category implies that parents rather than the state should be the final arbiters as to what is harmful to their offspring; but whatever their theoretical merits, such ratings have not been very effective in excluding children from any films, since the thorough policing of cinemas is in practice too burdensome a job. Another frequent suggestion has been special distribution. This method is in fact commonly employed, to exempt films "to be exhibited for purely educational, charitable, fraternal, or religious reasons." Presumably these special limited audiences have been regarded as outside the harmful reach of the contents of such films. Some local authorities have extended the idea by permit-

34. The kind of extreme attitudes one can expect where the issue of sacrilege is raised can be illustrated by religious groups that approve the death penalty for blaspheming the name of Jesus. SLAVES OF THE IMMACULATE HEART OF MARY, SAINTS TO KNOW AND LOVE 164 (1954).

35. See T. Robinson, Men, Groups, and the Community 136, 138 (1940) for a brief discussion of the question in the context of a democratic society dealing with political groups urging violence to terminate Democracy.

36. See CARMEN 247-49.

37. This type of language seems to have been present in all state censorship acts. See CARMEN 143, 154, 167, 177.
ting the local "art-house" to show a wider spectrum of films than others and then keeping close police watch upon the privileged house.  

Giorgio Nelson Page, a leading Italian opponent of obscenity in entertainment, has suggested that where art forms are subsidized by government, the subsidizing authority should grant or withhold funds on the basis of conformity to prescribed moral rules. By extension, his approach would also countenance a system of tax rebates for the makers of moral films, or a refusal of business deductions to makers of films found to be obscene, or a system of license fees graduated according to the amount of obscenity in the film. Indeed, if the present National Foundation of the Arts and Humanities in the United States were to subsidize films, they would probably prescribe standards as to the type of films desired. But the American constitutional system poses in these areas large barriers to Page's sort of suggestions. Indeed, Dr. Carmen even wonders if an official system of limiting certain film viewings to a few selected sites would not constitute a deprivation of the property rights of those businessmen whose enterprises were not favored by selection or of the producers of the films so limited in circulation who would thereby be deprived of the chance of the larger income from a wider audience.

The best argument for free expression of ideas has always been, of course, that the cost is ultimately redeemed by the results. Both materially and spiritually, the liberal, anti-censoring view is one of optimism as to final positive results from permitting even lewd or violence-inducing expressions. The Supreme Court's protection of all allegedly obscene expression which has any redeeming social, scientific, or aesthetic value is a product of this analysis. Probably the Court would even approve the use of obscenity for therapeutic purposes, if a reasonable case for its efficacy could be made in some particular instance.

It is not too unreasonable a caricature to describe the Court's view as holding that obscenity does no harm until and unless a final determination of worthlessness has been passed upon the entire work in which the offensive stuff appears. Several years ago the Hungarian satirist Somogyi had a good deal of fun with this kind of approach when he asked the question, "Can a nude mirror a social truth, as we

38. Id. 203 (citing a Detroit practice), 308-09 (citing a Memphis practice which had been discontinued because it "was resented by other exhibitors").
39. Id. 204. Though his comments are cast in terms of what he calls "illegal" practices, it seems plain he would regard such practices as unconstitutional if a statute made clear such a policy of segregation.
rightly demand from all works of art?” After insisting that “this question is as simple as the nose on your face” he set up several examples of what are or are not “redeemed lewd uses.” An unredeemed example would be a nude woman sitting in a cafe, because “no decent girl would appear naked in a busy place of entertainment.” A redeemed example would be a woman taking a shower because it emphasizes, “in addition to the feminine lines,” both hygiene and the housing program. Indeed, a nude woman’s picture may be doubly redeemed, as by his example of “Nymph in a Forest,” which “undoubtedly implies that we have already liquidated the hooligans who used to scare the daylights out of the nature lovers.” Clearly, as Somogyi indicates, this process of determining ultimate redeemability can be a very tricky business.41

In a sense, the whole program of censorship versus total liberty is covered by what Dr. Carmen calls his “summing up.” Censorship has to be used, at this point, in a broader sense than Dr. Carmen has used it; but as the experience of Grove Press has proven in the numerous litigations in which it has become involved throughout the United States, a post-screening prosecution or injunction can be nearly as oppressive as a pre-screening requirement and can constitute a kind of censorship. But putting definitions aside, this is how Dr. Carmen sees the problem in its fundamental terms:

The First Amendment guarantees free speech to each member of the American political community. But this privilege can be the bane of an adult citizenry if it is misused, abused, or corrupted. In short, free speech is impossible without ground rules.42

And what would Dr. Carmen do in the case of those persons who refuse to observe the ground rules? He deals with them in separate categories but, despite the libertarian sentiments so often expressed in other parts of the book, his conclusion is quite emphatic.

[S]ociety’s right to be free from the revulsions of obscenity . . . means that adults may be kept from seeing films whose dominant appeal relates to the prurient instincts of the average person. For the child, this should mean immunization from everything that is obscene regardless of other competing values that a movie might enhance . . . [B]ecause a free society buttressed by a First Amendment presupposes an enlightened, mature, average man who more

41. See Somogyi, Can a Naked Woman Contribute to the Cultural Front, LUDAS MATYI, Mar. 22, 1962 (reprinted in 3 ATLAS 480 (1962)).
42. CARMEN 259.
times than not can work out his destiny better than others can
do it for him. . . . methods of control for both these elements of
society must be balanced and regulated by guarantees of due
process such as are afforded in the courts. 43

Thus, despite Dr. Carmen’s opposition to what he calls censorship,
he does not favor license in expression, or a liberty even approaching
license. Such language assumes a consensus as to what is obscene. It
likewise imputes to obscenity an inherent horror that must make the
hackles rise on Hugh Hefner’s Playboy head. He would recognize in
this language the voice of a defender of the values traditional to West-
ern Civilization ever since St. Augustine came back to the bosom of
St. Monica and Mother Church. 44 Aesthetically society may not want
more obscene expressions than are already available 45 and morally
society may want a greater concentration on abstract values than is
currently common. But scientifically there is at present no certainty
that exposure to obscenity leads directly to criminal or anti-social con-
duct. Perhaps it does; perhaps it does not; perhaps it even has a posi-
tive value for releasing inhibited feelings through a deflected and
vicarious outlet. As yet, none of these are the proven result and it may
be a little premature to be as righteous as Dr. Carmen’s conclusion.

Constitutionally, however, Dr. Carmen has accurately described the
probable future course of the United States Supreme Court in these
cases. There is a general public concern over what is regarded as a
“rising tide” of obscenity and pressure is growing for a federal statute
wider in scope and more modern in application than the present
legislation. Indeed, the Ginzburg decision may have been a disguised
appeal to Congress from the Court itself to draft laws along the line
of suppressing procurers. 46 It shifts attention from the prostitute to
the pimp and makes his motive all-important. Perhaps the Court feels
Congress will relieve it of the job of serving as Head Smut Board for
the United States. In any event, this issue is not settled as yet 47 and

43. Carmen 259-60.
44. For a brief version of St. Augustine’s entelechy see Dino Bigongiari, The Political
Ideas of St. Augustine, in The Political Writings of St. Augustine App. (Paolucci ed.
1963).
45. For example, the commentator Ralph Collier called for an investigation by the
Federal Communications Commission to clean up “the garbage that has been tipped over”
into current popular music and praised radio broadcasters who ban such songs from the
air waves in a radio broadcast on Station WFLN in Philadelphia, May 1, 1967.
46. It appears to me this is what underlies Memoirs v. Massachusetts, 383 U.S. 413
(1966) and Ginzburg v. United States, 383 U.S. 463 (1966), though Mishkin v. United States,
383 U.S. 502 (1966), may indicate a misunderstanding on my part of what Mr. Justice
Brennan was driving at in the first two cases.
47. Fred M. Vinson, Jr., Chief, Criminal Division, United States Department of Justice,
in the future litigation Dr. Carmen's book is likely to be cited. As a libertarian, one would hope it will be his freer rather than his more rigid views that will prevail.

EARL FINBAR MURPHY†

has issued a restated definition of obscenity for departmental guidance, Memorandum of April 13, 1967. This possibility is reinforced in the Court's recent pronouncements in Redrup v. New York, 37 S. Ct. 1414 (1967); Holding v. Blankenship, 37 S. Ct. 1418 (1967); and Blankenship v. Holding, 37 S. Ct. 1419 (1967).

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