From the time he turned from research on the gall wasp to the study of human sexual behavior, Indiana University's Professor Alfred C. Kinsey attracted controversy. His research created an uproar not only with the general public but also with the federal government, and Kinsey's work inadvertently took on legal as well as social importance when his efforts to import foreign erotica for study in his Institute for Sex Research clashed with federal obscenity law and led to lengthy legal battle. The government maintained that the tariff act of 1930 prohibited anyone from importing obscene materials, while Kinsey argued that the principle of academic freedom guaranteed the scholar access to erotic materials necessary for scientific research. The Kinsey customs decision of 1957 established a milestone in obscenity law with its concept of "variable obscenity," the idea that obscenity is not absolute but is determined by the nature of the audience.

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1 United States Statutes at Large, Vol. XLVI, Part I, Title III, pp. 688-89, sec. 305. Section 305 of the tariff act of 1930 prohibits the importation of "any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral. . . ." The same section allows the secretary of the treasury, who has overall responsibility for the Customs Bureau, to admit at his discretion works of "established literary or scientific merit" for noncommercial purposes.

2 U.S. v. 31 Photographs, 4-¾" x 7" in size, and various pictures, books and other articles, 156 F. Supp. 350 (1957).
Years before the legal battle began in 1950, Kinsey tried to forestall any difficulties with the tariff law that his study of imported erotica might produce. In 1947 Kinsey wrote to Huntington Cairns, the Customs Bureau's legal advisor in Washington, requesting an exception under section 305 of the tariff law of 1930 which would allow the institute to import erotic materials that might provide insight into "the significance of sex in all aspects of human activity." Kinsey's concern that materials he might seek to import for his studies would run afoul of the bureau was probably justified, for the customs collector at Indianapolis has Alden H. Baker, a seventy-seven year old Democratic political figure. In July, 1947, Baker seized a shipment to Kinsey for violation of the tariff act because it contained a graphically illustrated book on Japanese sexual practices. When news of the seizure reached the Indiana University administration, law professor Leon H. Wallace, whose father was a long time friend of Baker, was asked to intervene. In a visit to the collector, Wallace explained the scientific value of Kinsey's research and the care the institute took to prevent unauthorized public access. Impressed with his argument, Baker agreed to release Kinsey's materials. From this visit arose a modus vivendi which served the purpose of the Institute for Sex Research for the next three years.

Although the institute experienced no major customs difficulties during this period, the Wallace-Baker understanding rested on a precarious foundation because it lacked the official blessing of the Customs Bureau. This became clear in January, 1950, when a career customs official, Eugene J. Okon, was appointed Baker's assistant collector. Okon disliked the informal agreement, not because it was with Kinsey but because he felt "it wasn't the place of the Indianapolis
office to grant an exception to federal law.

In early May Okon requested guidance from the Washington bureau regarding the applicability of section 305 of the tariff act to consignments addressed to Kinsey. The *modus vivendi* collapsed as soon as Assistant Commissioner of Customs David B. Strubinger saw enclosed samples of the material Kinsey regularly received. In his reply Strubinger declared: “All the books you have submitted are grossly obscene. The most liberal interpretation could not bring them within the statutory limitations of the discretionary authority of section 305.”

Clearly, for Kinsey to receive further imports of erotica, an agreement with Washington was essential. When he learned of Strubinger’s decision, Kinsey called his long time friend, attorney Morris L. Ernst of New York, who was well known as the author of several books on censorship and as the advocate for Random House publishers in the *Ulysses* customs case of 1934. Ernst’s junior partner, Mrs. Harriet F. Pilpel, and Kinsey met with Cairns on June 19, 1950, in an attempt to reach an agreement with the Customs Bureau. Pilpel argued that the provisions of the tariff act which prohibited importation of obscene materials carried an “implied exception” in cases of qualified persons who made legitimate use of material which would otherwise be banned. “Obviously,” she said, “many works of great merit would be impossible if their authors were not permitted access to raw material which in and of itself is of no intrinsic merit whatsoever.” She argued that a precedent for the implied exception could be found in *U.S. v. One Package* (1936), a decision which upheld the right of a physician to import...
pessaries despite the prohibition against contraceptives in the tariff law. In examining the law the court had reached the conclusion that it was not the intent of Congress to ban such items when they were required for trial purposes by "conscientious and competent physicians." The same reasoning might be extended to Kinsey's use of pornography.11

Any arrangement, however, required the approval of Walter R. Johnson, the assistant commissioner for the Customs Bureau, who insisted on strict interpretation of the tariff act. On June 27 Johnson told Kinsey that he would "be advised as soon as possible whether we find any possibility of construing 'established scientific merit' as equivalent to 'established scientific significance,' but we have found nothing so far that would support such a conclusion."12 By September Johnson had decided against granting Kinsey an administrative exception to the law, and he informed Pilpel that any implied exceptions to the tariff act had to be declared by the courts.13

Blocked in the attempt to reach an administrative understanding, Kinsey reluctantly agreed to a court test. Although he regretted the time and expense of a court fight, he wrote Pilpel that he was "increasingly convinced that we should push this until we have clearly established our right to import any kind of sexual material."14 His lawyers based the main thrust of their arguments on interpretation of the tariff law rather than on the abstract principle. Their proposed test case called for patently obscene materials to be sent to the institute through the New York customs office, where the deputy collector of customs agreed to seize the packages and the district attorney promised prompt federal proceedings.15

Just as the issue seemed about to be resolved by court decision, dramatic new developments occurred in Indianapolis. Following Strubinger's reply to the Indianapolis bureau the actions of the customs office had become increasingly troublesome for Kinsey. By August, 1950, the customs office had seized material worth six hundred dollars, with additional

11 U.S. v. One Package, 86 F. 2d 737 (1936).
shipments valued at over $2,800 still in transit. Kinsey complained that "it looks as though they are going to examine every package that is addressed to us. . . . If all of this material is impounded and held up for a couple of years, it will mean considerable . . . interference with the research we are doing."16

Even Kinsey’s gloomy prediction of continued customs problems hardly prepared him for what happened next. The front page of the Indianapolis Star for November 17, 1950, carried a story entitled "‘Science’ Says Kinsey; ‘Dirty Stuff’ Says U.S.,” in which Collector Baker described the shipment of Japanese art work and seventeenth and eighteenth century French miniatures which he had shown to the press as “d--- dirty stuff . . . nothing scientific about it.” The story, also covered in the Indianapolis News and the Indianapolis Times, was picked up by the Associated Press and United Press International.17

The news created an uproar. With record breaking appropriations for the state universities pending before the legislature, Governor Henry F. Schricker feared a political backlash. He placed an irate telephone call to Indiana University President Herman B Wells, who recalls: "He was so angry that he was beyond reason. Finally I said, ‘Governor, you’re so mad that I can’t reason with you. When you calm down, we’ll discuss it,’ and I hung up the phone on the Governor of Indiana."18 Schricker was not alone in his displeasure. Customs Bureau Counsel Cairns and Assistant Commissioner Johnson were inundated with requests for information. Cairns, apparently thinking Kinsey had released the story for publicity purposes, telephoned Pilpel twice about the matter.19

17 Clippings from the Indianapolis Star, November 17, 1950; Indianapolis News, November 17, 1950; Indianapolis Times, November 17, 1950; Institute Papers. The Star had the fullest coverage of the seizure. While the News and the Times devoted 55 lines of two inch column to the story, the Star covered it with 132 lines and photographs of Kinsey and Baker. For examples of wire service coverage, see the St. Louis Post-Dispatch, November 17, 1950, the Louisville Courier-Journal, November 18, 1950, and the Denver Post, November 18, 1950. The event also received space in the Paris edition of the New York Herald-Tribune, November 19, 1950.
18 Author’s interview with Herman B Wells, November 20, 1973. The informality of this remark is related to the fact that Governor Schricker and Chancellor Wells had known each other since boyhood.
Kinsey also was angry and perplexed by the newspaper incident. Beseiged by reporters, he was described by the Star as "touchy and irritable on the whole subject." Toward the end of a long and harried day, he released a statement on the seizure which summed up his attitude toward the case and the principle of academic freedom:

In response to a recent inquiry, the Institute for Sex Research, at Indiana University, explains that it has inevitably had to gather data and materials which, under other circumstances and in other places, would be considered obscene. . . .

The Institute feels that the issue is much broader than that of the importation of a specific object at a given time and place. It considers that the issue is one which concerns all scholars who need access to so-called obscene materials for scientific investigations which in the long run may contribute to human welfare.

Baker's display to the press of material he judged in violation of the tariff act puzzled as well as irritated Kinsey, who had always considered his relationship with the collector to be cordial. Baker had probably intended no insult to Kinsey. He was a straitlaced individual who had in all likelihood never felt entirely comfortable passing Kinsey's pornographic material through the customs office. Once Okon questioned the legality of the modus vivendi, Baker was easily convinced to abandon it. The newspaper episode, however, was pure coincidence. Reporters for the Indianapolis newspapers daily roamed the Federal Building, where the customs office was located, in search of news stories. Alden Baker's office was an informal gathering place for reporters, where they often came to enjoy coffee and conversation with Baker. A reporter entered the customs office only minutes after a package to Kinsey had been opened for inspection. "The stuff was strung out on Baker's desk," Okon recalls, "and when the reporter walked in, Alden said something to the effect, 'Hey, look at this.'" The news story of November 17 was the result.

The furor of the first story had barely subsided when the customs office struck again. Baker seized a shipment on

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20 Clipping from the Indianapolis Star, November 17, 1950, ibid.
22 Harriet Pilpel to Huntington Cairns, November 21, 1950, ibid.
November 24 which he described as even worse than the others. Okon termed the shipment "so obscene that any scientific value is lost."\(^{26}\) The wire services again took note, giving the case national prominence and causing Kinsey to complain angrily about the Indianapolis customs office. After Pilpel protested vigorously to Cairns about the Indianapolis bureau releasing information to the press, however, Commissioner Johnson ordered the Indianapolis office to stop the publicity.\(^{26}\)

Although no public notices of further Kinsey seizures were released, his problems had begun to draw editorial comment in newspapers around the country. The Boston Herald published a satirical slap at the Customs Bureau for its efforts to "protect Dr. Alfred C. Kinsey against too much sex."\(^{27}\) The Anniston, Alabama, Star, however, voiced the opinion that "pictures of moral degenerates in degenerate poses hardly can reveal much of real scientific worth."\(^{28}\)

The undesired publicity had a serious effect on the test case Kinsey and his attorneys were preparing. What had promised to be a straightforward resolution in the courts was complicated by notoriety. A British gynecologist who shared Kinsey's interest in the sexual implications of obscene graffiti had agreed for the purposes of the test case to send Kinsey samples of graffiti commonly found in public toilets to help establish the value of patently obscene materials for scientific research. News of the November seizures lessened the gynecologist's willingness to take part in the case. Fearful of professional ruin if his part in the plan became known, the doctor revealed the graffiti proposal to the editor of the Journal of Sex Education, Norman Haire, and requested that he mail a sample of the material to Kinsey. Haire was willing but nervous. In a letter to Kinsey Haire explained that for his own protection he should seek prior approval from the British postmaster general.\(^{29}\) Enthusiastic about the graffiti plan, Ernst and Pilpel opposed any approach to the British postmaster general, fearing that an adverse ruling by British authorities might prejudice the case in the United States.\(^{30}\)

\(^{25}\) Clipping from the Bloomington Herald-Telephone, November 25, 1950, Institute Papers.
\(^{26}\) Harriet Pilpel to Alfred C. Kinsey, November 30, 1950, ibid.
\(^{27}\) Clipping from the Boston Herald, November 28, 1950, ibid.
\(^{28}\) Clipping from the Anniston Star, November 29, 1950, ibid.
\(^{29}\) Norman Haire to Alfred C. Kinsey, December 7, 1950, ibid.
Haire therefore backed out entirely. In a long letter to Kinsey he explained:

No prudent practising doctor in this country would take the risk of sending you the material through our mails without obtaining the P.M.G.'s permission first, for the following reasons:

In this country doctors are licensed to practice by the General Medical Council. If a doctor is found guilty of any offense, the police authorities automatically inform the G.M.C. and the latter then calls on the medical practitioner to show reason why his name should not be removed from the medical register.

I am afraid, therefore, that my previous suggestion turns out to be impracticable, and that it will be necessary for you to find somebody to send the material who is not a practising doctor.31

Kinsey was deeply embarrassed by the doctor's discomfiture. In a letter to Haire Kinsey apologized for his part in the endeavor which had caused so much trouble.32 He never again attempted to bring his British friends into the case, and when, later in the year, the attorneys tried to revive the graffiti proposal, Kinsey firmly resisted.33

With Haire out of the test case, Kinsey turned to materials from foreign book dealers. From Meyer Loshak and Son of Essex, England, he ordered several books, among them deSade's Les 120 Journees de Sodome. Kinsey advised Pilpel that the books were as openly erotic "as we can get."34 He also placed a large order, which included erotic drawings by the Belgian artist Felicien Rops, with Philobiblon, a Copenhagen book store.35

The orders from Loshak and Philobiblon began to arrive in February, but ironically the New York customs office did not seize them. Pilpel and Ernst examined the shipments with the idea of returning them to the customs office for seizure but concluded that most of the material was not suitable for a test case. They needed, Pilpel stressed to Kinsey, indisputably pornographic items. In a letter to Philobiblon on March 22, 1951, Kinsey explained the need for specifically erotic

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31 Norman Haire to Alfred C. Kinsey, December 27, 1950, Confidential Correspondence File, ibid.
32 Alfred C. Kinsey to Norman Haire, January 24, 1951, Confidential Correspondence File, ibid.
33 Alfred C. Kinsey to Harriet Pilpel, November 23, 1951, Confidential Correspondence File, ibid.
TWO ITEMS SEIZED BY CUSTOMS OFFICIALS

Courtesy Institute for Sex Research
materials to be used in a test case and requested “the most openly erotic material” available, particularly “French postcards, photographs and drawings of sexual activity, including mouth-genital contact and if possible, homosexual activity.”36 In response the book dealer prepared a varied collection which he began to send in small packages on April 4. Included in the shipments were thirty-one photographs which he described as “the most openly erotic . . . anyone could imagine—and rather pretty.”37 When the photographs from Philobiblon passed unchallenged through the New York customs office, Pilpel returned them to the deputy collector for reexamination.

In all the New York customs office seized seven of the importations addressed to Kinsey. Pilpel decided that four—the thirty-one photographs, deSade's 120 Journees, Pierre Louys' Manuel de Civilité pour les Petites Filles, and any of the books in English—should be included in the test case. She also thought some Japanese erotica seized earlier in Indianapolis would contribute to the case but doubted that Indianapolis customs would release the material to the New York office.38 On that score Kinsey had good news. Alden Baker had retired, and the new collector of customs was Deane E. Walker, a former state school superintendent who had taught high school biology from Kinsey's textbook and who was, in Kinsey's words, “very much interested in the University.” Walker agreed to send the Japanese material to the New York customs office.39

Although they had completed the groundwork for the test case, Kinsey's attorneys still had not abandoned hope of reaching an administrative agreement with the Treasury Department. Pilpel thought that if among other things Kinsey stipulated the safeguards taken to prevent public access to institute materials and submitted a “specific analysis of why each of the items now detained is of importance,” they might be able to achieve a permanent understanding with the department.40 Kinsey reluctantly agreed to another attempt for an administrative exception, but expressed misgivings. He believed firmly in the right of scientific inquiry, and his difficulties with the Customs Bureau simply increased his

36 Alfred C. Kinsey to Philobiblon, March 22, 1951, ibid.
37 Philobiblon to Alfred C. Kinsey, April 4, 1951, ibid.
determination to uphold that right. In a letter to Pilpel on June 3, 1952, Kinsey opposed any agreement which would compel him to justify the need for individual items:

It is the equivalent of asking an explorer to tell how he is going to use the material he may find on a previously unexplored continent . . . . We could very easily be put into the position of spending a major portion of our time justifying the mere accumulation of our data . . . . This is not the "academic freedom" for which American colleges and universities have always stood . . . .

I recognize that we may save time in our initial case if we settle the matter with individuals and compromise in regard to particular objects. But I am very skeptical.41

As 1952 drew to a close, the controversy was no nearer conclusion. Pilpel finally presented her arguments for an administrative exception on May 14, 1953, to Treasury Counsel Charles R. McNeill. The legal arguments were the same as those she offered in the 1950 application to Huntington Cairns: an "implied exception" existed in the tariff act of 1930 for qualified persons as set down in U.S. v. One Package. On this occasion, however, she also argued that the social and scientific value of the institute's research could be attested to by many physicians, psychiatrists, psychologists, penologists, and sociologists who had benefited from Kinsey's work.42

Months passed before the Treasury Department acted on the request. While the legal case was stalled, Kinsey published Sexual Behavior in the Human Female. Within ten days of the September 14, 1953, publication, the book was in its sixth printing, bringing further attention and criticism to Kinsey and the institute. Congressman Louis B. Heller of New York proposed that the book be banned from the mails until a congressional investigation could be held. In January, 1954, it was rumored that the Special House Committee to Investigate Tax-Exempt Foundations, headed by Tennessee's B. Carroll Reece, would examine the institute.43 In April of 1954 the Treasury Department had yet to make a decision on the Kinsey request, and Pilpel remarked, "It is clear that this is a 'hot potato' which the Secretary of the Treasury is not anxious to carry if he can avoid it."44
Pilpel and McNeill did not meet again until November, 1955, when McNeill indicated that the treasury might accept a loose definition of classical or scientific works, but not to the point of admitting such items as “dirty postcards.” Since Kinsey had flatly rejected such a compromise, Pilpel informed McNeill on December 8 that the institute felt the artistic value of the importations was immaterial, that “all the challenged importations are germane and important to the scientific studies conducted . . . and that unless scientific inquiry and research is to be stifled, all the raw materials for such inquiry . . . must be importable.” She urged an immediate Treasury Department decision. A decision was indeed forthcoming. On February 13, 1956, Secretary of the Treasury George M. Humphrey ruled against administrative discretion for institute importations and ordered the Justice Department to initiate forfeiture proceedings against the detained materials.

When he learned of the decision, Indiana University’s President Wells made one last effort to avoid a court battle. He persuaded Governor George N. Craig to write a letter to Humphrey expressing his support for the work of the Institute for Sex Research. But Assistant Secretary David W. Kendall, replying to Craig at Humphrey’s request, asserted that the issue was beyond the administrative authority of the Treasury Department. Governor Craig felt the answer was “a pretty good brush off.”

The government filed its libel against the institute’s detained materials on August 1, 1956. Wells then asked Indianapolis lawyer Hubert H. Hickam to represent the university’s interests in the case. While he fully recognized the ability of Ernst and Pilpel, the president hoped to reinforce the university’s support of the institute by also tapping the legal talents of Hickam’s solid corporation oriented law firm.

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45 Harriet Pilpel, “Memorandum re Customs Detentions of Materials: Conference at Treasury Department, Friday, November 25,” [1955], ibid.


47 David W. Kendall to Greenbaum, Wolff & Ernst, February 13, 1956, ibid.

48 George N. Craig to George M. Humphrey, February 28, 1956; Herman B Wells to George N. Craig, February 29, 1956; David W. Kendall to George N. Craig, n.d.; George N. Craig to Herman B Wells, March 24, 1956, ibid.

49 Author’s interview with Herman B Wells, November 20, 1973.
To keep the university's position as uncontroversial as possible, Wells opposed acceptance of an offer by the American Civil Liberties Union to provide legal assistance on the case. Although Kinsey complained to Pilpel's associate Leo Rosen about this rejection of assistance, President Wells' concern for the university's public image was understandable. Announcement of the government's action had resulted in a series of anti-Kinsey editorials, particularly in the Hearst newspapers. Kinsey, emotionally as well as intellectually involved in the case, had perhaps forgotten that while Wells had to consider the effect of the customs suit on the entire university, he had stood by Kinsey since the beginning of his controversial research.

Exhausted in body and spirit by years of overwork that had begun even before the customs difficulties, Kinsey was by this time a dying man. Several weeks after being hospitalized with heart trouble, he had written to Harriet Pilpel: "I have been more or less continuously in bed, in the hospital and at home, for the last three weeks. It is this heart again, and it impresses me with the importance of getting our business done systematically, while I can still keep at it." While recuperating at home Kinsey was visited by President Wells who assured him that the Indiana University Board of Trustees supported his approaching court fight. Wells recalls that Kinsey appeared agitated and far from healthy. When the professor left the room to find some notes, Wells expressed his concern to Mrs. Kinsey, saying, "Clara, we've got to put a stop to this. The man is killing himself." Mrs. Kinsey replied, "I know, but there's nothing to do about it. He won't stop."

Kinsey was still in poor condition when he insisted on returning to work. Blaine Johnson, then a student and part-time institute employee, remembers driving him to work,

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50 Alfred C. Kinsey to Leo Rosen, August 8, 1956, Institute Papers.
51 An editorial denouncing Kinsey's materials as "just plain dirty pictures" which "could not possibly contribute anything to genuine scientific research" appeared in the New York Daily Mirror, August 3, 1956. Other editorials with the same phrasing subsequently appeared in the Boston American, August 4, 1956; the Albany, New York, Times, August 7, 1956; and the Pittsburgh Sun-Telegraph, August 7, 1956. See clippings of these newspapers in the Institute Papers.
54 Author’s interview with Herman B Wells, November 20, 1973.
ALFRED C. KINSEY

Courtesy Institute for Sex Research
while the professor, too ill to drive himself, slumped in the seat and grumbled about physicians who did not know anything.\textsuperscript{55} The strain on Kinsey showed in other ways. In a telephone conversation with Rosen on August 9, Kinsey informed the attorney that he contemplated a magazine article about the right of a scientist to conduct research on sexual behavior. When Ernst learned Kinsey's intention, he expressed fear that Kinsey was "apt to be too modest and self-effacing" about his own contributions to sex research and suggested that someone else, perhaps George W. Corner or Vannevar Bush, write the article.\textsuperscript{56} Kinsey's response was stinging:

\begin{quote}
I have known Morrist \[sic\] Ernst for about 8 years. If, in the course of that time I have never been able to get him here to Bloomington, never been able to get him to sit down and get him to listen to any of the actual heat we have had to take in order to do this research, how on earth can we get a man like Vannevar Bush, who is an outspoken and avowed critic of the research, ever to give us enough time to convince him of the problem we are facing. We have already depended too much upon other people who have written on second-hand impressions and who do not know the facts of the endless complications we have had to face in these last 18 years.

I suggest you show this letter to Morris.\textsuperscript{57}
\end{quote}

It was an unfortunate letter, far more indicative of Kinsey's ill health than of a breakdown in the friendship that had developed over the years. The two men had great admiration for each other, and in suggesting that someone else write the article, Ernst was paying a compliment. The episode, however, proved the unhappy final note of their friendship, for twelve days later Kinsey was dead, "the inevitable result of all those years of driving labor, of short nights and long days, of dedication to the point of exhaustion."\textsuperscript{58}

The customs suit outlived Kinsey by more than a year. Always the dominant figure at the institute, he had handled every detail of the case. The new director, Paul Gebhard, had much to learn as he, Pilpel, and the Indianapolis attorneys, Hickam and Jerry Belknap, prepared for the legal battle. Gebhard requested distinguished individuals to file affidavits in support of the institute, while the attorneys prepared

\textsuperscript{55} Author's interview with Alan Blaine Johnson, November 23, 1973.

\textsuperscript{56} Leo Rosen to Alfred C. Kinsey, August 10, 1956, Institute Papers.

\textsuperscript{57} Alfred C. Kinsey to Leo Rosen, August 13, 1956, \textit{ibid}. Kinsey's reasons for considering Vannevar Bush "an outspoken and avowed critic" are not clear.

\textsuperscript{58} Pomeroy, \textit{Dr. Kinsey}, 439.
several legal maneuvers. In a meeting with Assistant District Attorney Benjamin T. Richards, Pilpel sought to avoid argument in court by proposing four stipulations, or agreements: a recognition of the scholarly character of the institute, the importance of its research, the relevance of the detained materials to its work, and the safeguards taken by the institute to restrict public access to erotic materials. The institute attorneys also agreed to seek a summary judgment by the court to avoid the time and expense of a jury trial. Hickam presented a motion for intervention on behalf of Indiana University in the Southern District Court of New York, and when that motion was denied, filed an *amicus curiae* brief.

The government also filed a motion for summary judgment against the detained materials on June 5, 1957, citing violation of section 305 of the tariff act of 1930. On July 16 Pilpel and Richards appeared before Judge Edmund L. Palmieri to present their arguments. Pilpel defended the standing of the Institute for Sex Research in the academic community, the careful conditions under which erotic materials were supervised, and the importance of the detained materials to the institute's research. She cited *U.S. v. One Package* (1936) to show that the courts had admitted that an implied exception to the tariff law existed. She also maintained that obscenity was not absolute but variable, dependent on use, as set down in *U.S. v. Levine* (1936), in which the court had ruled that the standard of obscenity had to weigh the likelihood of material's appeal to the "salacity of the reader." Pilpel doubted that the scientific study of

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59 Among those who contributed affidavits were Professor Frank A. Beach of the Yale University psychology department; Dr. Karl A. Bowman, a psychiatrist and teacher at the University of California Medical Center; Dr. George W. Corner of the Rockefeller Institute for Medical Research; and Eleanor Johnson, the librarian of the New York Academy of Medicine.

60 In a summary proceeding the participants agree to settle the case in court in as simple a manner as possible. In an intervention a third party demands the right to be received as a party in the case; *amicus curiae*, or "friend of the court," refers to a third party who has no right to appear in a suit but is allowed to introduce argument or evidence to protect his interests. See Henry Campbell Black, *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* (St. Paul, Minn., 1968).

61 Levine was originally convicted for mailing obscene advertisements for a book entitled *Secret Museum of Anthropology*, a photographic collection of "nude female savages from different parts of the world." The court ruled that what might be obscene in the hands of a child would not be obscene to an adult. The standard had to vary according to the reader. *U.S. v. Levine*, 83 F 2d 166 (1936).
obscenity would arouse the lasciviousness of institute researchers. But then, after arguing that the institute merited an administrative exception to the law, she boldly switched direction to argue that there existed a constitutional right of freedom of inquiry. There could be no doubt that “official regulation of the manner in which Americans seek to learn the truth is not a valid purpose of the legislative control in this country.”

Richards countered that while the government did not dispute the high reputation of the Institute for Sex Research or the value of the institute’s investigations, neither did the institute dispute the obscene character of the challenged importations. The tariff act of 1930 provided no implied exception for scientists, since the contraceptive devices at issue in the One Package case were not analogous to the obscene materials at issue in 31 Photographs. As Judge Augustus Hand had ruled in the Ulysses case in 1934, “the importation of obscene books is prohibited generally, and no provision is made permitting such importation because of the character of those to whom they are sold.” It was the duty of the court, Richards argued, to enforce the statute as it stood until such time as Congress might amend it. Should the court “permit itself to be lured into legislative action in the guise of an implied exception,” it would virtually nullify the obscenity provision of the tariff act and “invite wholesale commercial traffic in foreign pornography imported and distributed by spurious scientific organizations.”

Richards denied that forfeiture of the libeled articles would violate the institute’s constitutional rights. The most recent case handed down from the Supreme Court, Roth v. United States (1957), had reaffirmed the doctrine that obscenity was outside the bounds of constitutional protection. Since the institute materials were admittedly obscene, they could claim no constitutional refuge.

Once the arguments were presented, there was nothing to do but wait. August and September slipped by without a decision. Then on October 9 Judge Palmieri proposed four

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64 Roth, of course, is generally remembered for defining obscenity as material which appeals to “prurient interest” of the average person and for insisting that a work has to be judged as a whole rather than on the basis of selected passages. Roth v. U.S., 354 U.S. 476 (1957).
stipulations between the opposing sides. It seemed clear, he said, that both parties agreed to the prurient nature of the libeled materials and the sole scientific purpose for which the institute utilized them. It was also evident that the institute prevented public access to its obscene collections and that the material probably would not appeal to the prurient interest of the qualified persons who used them.65

Richards reacted strongly to the proposed stipulations. He agreed that the materials were obviously obscene but would not concede that scholars enjoyed any immunity to the efforts of pornography. The government did not challenge the purposes of the institute or deny the restricted availability of the materials to the public, but Richards argued that these conditions could not be demonstrated in fact.66 Pilpel's rebuttal struck hard at this reasoning. The institute had already presented the affidavits of many experts in the fields of psychology, medicine, and sociology to demonstrate these conditions. Richards, she said, could not at the same time concede the institute's arguments and still deny them by innuendo. If he could not challenge them outright, they had to stand uncontroverted.67

On October 31 Judge Palmieri handed down a decision in favor of the institute. In his view the question at bar was the meaning of the word "obscene" as it appeared in section 305 of the tariff act. The latest definition available to the court in the Roth decision defined obscenity as material that appealed to the prurient interest of the average person. The staff of the Institute for Sex Research was not made up of average persons but of scholars who imported erotic material solely for the purpose of scientific research. This material was carefully restricted from the general public's access, and it was not likely to appeal to the prurient interest of those to whom it was available for study. He therefore ruled that the detained importations were not prohibited to the institute and ordered their release.68

65 Alvin H. Schulman (law clerk to Judge Palmieri) to Benjamin Richards, October 9, 1957, Institute Papers.
66 Benjamin T. Richards to Edmund L. Palmieri, October 14, 1957, ibid.
67 Harriet Pilpel to Edmund L. Palmieri, October 18, 1957, ibid.
68 "U.S. v. 31 Photographs: Decision in Support of Summary Judgment for the Claimant, the Institute for Sex Research at Indiana University," ibid.
The Kinsey customs case was over, nearly seven years after a wandering reporter casually had entered Alden Baker's customs office in search of a cup of coffee. The case cost the institute more than $11,000 in legal fees and would have been double that if not for the generosity of the attorneys involved.69 The research time lost was incalculable.

What did it all mean? In asserting that scholars might view obscene materials without any appeal to their prurient interest, the Kinsey case established a definition of obscenity based on the variable identity of the receiving group. While Pilpel thought the decision reaffirmed the principle of freedom of scientific inquiry,70 one writer warned that the precedent could provide "an opportunity for trafficking in salacity."71 Professors William B. Lockhart and Robert C. McClure urged the courts to adopt the variable concept as the standard definition of obscenity.72

The variable concept of obscenity set down in 31 Photographs has never been developed, although it occasionally has been paid lip service.73 Instead the Supreme Court has sought to remove itself from the labyrinth of obscenity law by adopting a guideline which allows the local community to define obscenity according to its own contemporary standard. Thus, in Miller v. California (1973), the court upheld the defendant's conviction for mailing unsolicited sexual materials, such as Sex Orgies Illustrated, because he violated the contemporary community standard of Orange County, California.74 All too soon, however, the court found itself

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69 Paul H. Gebhard to Harriet Pilpel, September 19, 1957, ibid. Ernst and Pilpel calculated the legal fees at $22,070 and invited the institute to make whatever payment it could. Gebhard suggested one half the normal fee, to which they agreed.


73 In Ginzberg v. U.S. (383 U.S. 463, 1966) Justice Brennan invited a comparison between the institute's scientific use of obscene materials and Ginzberg's pandering; in Interstate Circuit, Inc. v. City of Dallas (366 F 2d 590, 1966) Judge Homer Thornberry on the Fifth Circuit Court of Appeals, cited the variable concept of 31 Photographs when he upheld a city ordinance classifying motion pictures as suitable or unsuitable for children under age sixteen.

drawn into the obscenity maze once again. In *Jenkins v. Georgia* (1974) the court overturned the conviction of an Albany theater manager for showing the film *Carnal Knowledge*, holding that a jury does not have “unbridled discretion” to determine that simple nudity is patently offensive to the community standard.\(^7\) Thus the concept of contemporary community standards has already revealed its limitations, and appellate courts once again are forced to review obscenity decisions.

No matter what definition of obscenity the courts may adopt, the basic problem remains: obscenity is virtually undefinable, as Justice Potter Stewart acknowledged when he remarked, “I know it when I see it.”\(^6\) The variable receiving group concept could rise to the foreground in the next obscenity case that appears before any court in the land. But until the term obscenity is defined, and its effects recognized, no test can have any lasting value. Perhaps the work done by Dr. Alfred C. Kinsey and the Institute for Sex Research will be of help in this task.

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