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NOTES

THE LAW OF OBSCENITY: NEW SIGNIFICANCE OF THE RECEIVING GROUP

After a long history of change, the law of obscenity has presently culminated in the case Roth v. United States, where it was held that obscene publications are not within the protection of the first and fourteenth amendments. Certain standards for obscenity which had evolved were reiterated, namely, that printed matter is obscene which taken as a whole appeals to the prurient interests of the average person of the community. A state statute previously had been declared unconstitutional which prohibited the distribution of materials to the general public if they were obscene only as to children. In a subsequent case, United States v. 31 Photos, a district court found it necessary to qualify the Roth test insofar as it measured the effect of materials on the average man. This case held that under the Tariff Act the effect of the materials on the average reader or recipient, rather than on the average man in the community, was material. The recipient was the Institute for Sex Research at Indi-

1. The earliest cases did not involve obscenity as it is known today. The first reported case, Le Ray v. Sr. Charles Sedley, 1. Sid. 168, pl. 29, 82 Eng. Rep. 1037 (K.B. 1663), involved what would now be the crime of indecent exposure. Alpert, Censorship of Obscene Literature, 52 HARv. L. Rev. 40, 41-43 (1938). The first case dealing solely with obscene publication was Dominus Rex v. Curl, 2 Strange 489, 93 Eng. Rep. 849 (K.B. 1727), where the court overruled a prior case which had held that obscenity was a crime against religion, and therefore not punishable at law. Alpert, supra at 43-44. Thus, a crime at first contrary only to religious mores became a common law crime. A later leading case, Rex v. Wilkes, 4 Burr. 2527, 98 Eng. Rep. 327 (K.B. 1770), was inspired by a desire for political revenge. Alpert, supra at 44-47. Even the landmark case in the law of obscenity for a hundred years, Regina v. Hicklin, L.R. 3 Q.B. 360 (1868), was not strictly an obscenity case. The evil sought to be punished in the indictment was blasphemy, rather than obscenity, but the test used in that case fitted the censor's needs adequately when the time came to find a test for obscenity. As a matter of fact, the author's purpose in publishing the material in Regina v. Hicklin was to attack the church, not to build up a business in obscenity. Alpert, supra at 52-53. Therefore, it may be stated that the present law on obscenity entered through the back door—certainly the harm in the earliest cases was not directly recognized.

In the 1930's the Hicklin test was modified by the Ulysses case, United States v. One Book called Ulysses, 72 F.2d 705 (2d Cir. 1934), which considered the book as a whole, including its literary value. A later case added the qualification that the book was to be judged by the standard of the community as a whole, and not by the most susceptible member thereof. United States v. Levine, 83 F.2d 156 (2d Cir. 1936).

ana University, founded by the late Dr. Alfred Kinsey. The court’s assumption that the materials, which were pure pornography, were obscene as measured by the mores of the community as a whole was not challenged by either party.\(^6\) Furthermore, the government did not take issue with the contention of the claimant that the materials would not appeal to the prurient interests of the scientists who would observe them, but instead relied on the theory found in certain prior cases that such materials were obscene per se.\(^7\) The court, rejecting this contention, stated that the term obscene per se had a different meaning from that which the government was seeking to apply\(^8\) and held the materials at bar not obscene under the circumstances.

The court could have resolved the 31 Photos controversy by employing either one of two theories: it could have declared that the materials were not obscene, or it could have held the materials obscene but admissible on the theory of scientific privilege.\(^9\) Undoubtedly it always seems more palatable to judges to say they are following the letter of a statute rather than creating an exception based on some “spirit” of the statute. Thus it would seem more feasible to allow passage of materials by holding that they are not obscene, even though the privilege theory would lead to the same result. This the court did, but observed that a choice between theories was not required because the two were but opposite sides of the same coin.\(^10\)

Regardless of which theory is adopted, it is apparent that the court was dealing with two variables. The first is the degree by which the materials, as measured by any fixed standard, are prurient or obscene; the second is the bona fides of the receiving group. Each of the variables in 31 Photos was extreme.\(^11\) First, the materials involved were pure

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7. One of the most significant facts about this case was that the government did not press its case as much as it might have, probably because of the public interest involved. The disadvantage generally of placing a large degree of discretion with enforcement officials is that it results in a lack of uniformity, and that the policy of the legislature is at the mercy of many individuals—some of whom are bound to have extreme views. This danger is illustrated in the law of obscenity by an instance in which the magazine Scientific American was forced by threat of banishment from the mails to refrain from picturing a female native of New Guinea nude above the waist on its cover. Paul and Schwartz, Obscenity in the Mails: A Comment on Some Problems of Federal Censorship, 106 U. PA. L. REV. 214, 225 (1957).
8. See note 20 infra and accompanying text.
11. One can only speculate at the results for the numerous degrees of variation in between. After the cases are adjudicated the problem might become less acute, but one can envisage a painful process in getting to that point.
pornography with no literary value whatsoever; second, the good faith of the receiving group was as nearly beyond question as possible because of its association with the University, its past reputation for work in this area, and the high degree of probability that society would receive tangible benefits from the study of these materials.¹²

These variables although simply stated are difficult to measure and therefore to apply. The first, relating to the degree of pruriency as measured by the common conscience of the community taken as a whole, has been treated extensively in the literature.¹³ It is the second, relating to the bona fides of the receiving group, which is relatively novel. This variable raises the problems treated in this note.

EXISTING LAW ON THE SIGNIFICANCE OF THE RECEIVING GROUP

The Regina v. Hicklin test,¹⁴ which was the leading one for so long, measured the material challenged as obscene by "those whom it is likely to reach." There was ample authority for the holding of 31 Photos, then, in the language in prior cases.¹⁵ However, there are certain inconsistencies with existing law which are worthy of note. For example, in the Roth case the majority appears to be employing an obscene per se analysis which is contrary to 31 Photos. Chief Justice Warren, concurring, reinforces this view by accusing the majority of putting the book itself on trial, rather than the publisher or seller of the book.¹⁶ If the materials were obscene per se, then the effect on the particular receiving group would not be significant.

At this point it is necessary to define the term obscenity per se with some particularity. A strict definition would be that a publication was lewd, lascivious, and so forth in the trier of fact's mind, regardless of who published it, how it was published, for what purpose, who will read it, and what its effects will be. The term unlawful per se generally implies that certain conduct is unlawful regardless of the actor's intent or whether

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¹² The court explicitly held, however, that probability of success of the research was not a consideration for the courts. 156 F. Supp. 350, 359-60 (S.D.N.Y. 1957).
¹⁴ L.R. 3 Q.B. 360 (1868). See also note 1 supra.
¹⁵ For a collection of cases on which the court in 31 Photos relied see 128 F. Supp. 350, 354 n.15. The court attempted to distinguish two cases containing dicta to the contrary. Id. at 354 n.14, 355 n.20. The case distinguished in note 14, United States v. One Book Entitled Ulysses, 72 F.2d 705, 708 (2d Cir. 1934), stated as follows: "[I]t may also be true that the applicability of the statute does not depend on the persons to whom a publication is likely to be distributed. The importer 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." But see United States v. 1 Package, 86 F.2d 737 (2d Cir. 1936), where the court adopted the privilege theory.
¹⁶ 354 U.S. 476, 494 (1957) (concurring opinion).
any actual harm results in a particular instance. Per se intimates that only conduct will be examined.

In practical application, however, obscene per se is by no means a term of definite meaning. It should be noted that there are several factors relevant to the term obscenity. All the various intents of the creator, distributors, and consumers as to conduct and harm are important, as is also actual harm. A strict definition of obscenity per se would disregard all of these factors which relate to the harm sought to be prevented or the conduct and intent sought to be penalized. A less than strict definition would disregard any combination of factors (other than all of them), depending on the type of proceeding and at what point the attack is being made; that is, whether it is a criminal action against the creator or distributors of the materials, an in rem action against the materials themselves, or a criminal action against the buyer or consumer of the materials. In a criminal attempt or a malum-prohibitum criminal action against a creator or distributor actual harm would be disregarded. In an in rem action against the materials themselves intent, actual harm, or both may be disregarded. In a criminal action against a buyer or consumer intent on the part of the creator or distributor would be disregarded. For example, no one would contend that the intent of the publisher was relevant in the 31 Photos case where the action was founded on a forfeiture statute, yet it may well have been in the Roth case, where a criminal statute was involved. Conversely, to whom the materials were in fact destined was irrelevant in the Roth case, but relevant in the 31 Photos case. Courts should recognize that different statutes deal with different elements of obscenity, and that a finding of obscenity in an action under one type of statute may be irrelevant under another. The

18. The reason for examining conduct only is that experience indicates that where there is a certain type of conduct, there is a very high probability that there was an intent to do harm, and that the harm will follow from the conduct. In other words, rather than waste time in proof which ordinarily is predictable in outcome, the courts will indulge in a conclusive presumption.
19. The court in 31 Photos noted two definitions which it stated had been misinterpreted by government's counsel. These were that materials are obscene per se where there was not shown in the record to be any one to whom the materials would be other than prurient, and where the effect of the materials are such on the relevant group that they are obscene as a matter of law. 156 F. Supp. 350, 358 (S.D.N.Y. 1957).
20. This definition was the one which the government sought to apply in 31 Photos.
21. It should be noted that an element of the intent of a publisher or seller will generally be to send the materials to a certain group, but another group may actually be destined to receive the materials. Thus the creator, publisher or distributor of the materials at issue in 31 Photos undoubtedly never intended for them to be sent to the Kinsey Institute; and the fact that they had been diverted would have been irrelevant in a criminal action.
purpose of the obscenity laws should be to prevent a certain type of harm or an intent or attempt to perpetrate this harm. Courts in construing statutes whose purposes are not clearly stated may be misled by general rules and principles. Thus, cases involving criminal statutes should be examined critically before being accepted as precedent for cases based on consumption statutes, and vice versa.

If the majority in Roth is merely saying that the intent of the publisher is immaterial, then 31 Photos does not appear to be inconsistent with the Roth case, since the former did not look at the publisher’s intent either. Likewise, the Roth majority did not expressly dismiss the relevance of the receiving group—the entire community in that instance. Constitutional issues aside, if the postal statute and the customs statute are interpreted as imposing restrictions malum-prohibitum, and not mala-in-se, so that the intent of the publisher is immaterial, then the only relevant factor may be the effect of the materials on the receiving group. If this is the case, then Chief Justice Warren’s objection to the Roth decision simply goes to the problem of whether a defendant should be convicted in a criminal proceeding without a mens rea.

Statutory provisions for the destruction of obscene materials would imply that such materials might be obscene per se. The legislature evidently thought that obscene materials were inherently harmful and that there could be no possible utility in preserving the confiscated materials. This reasoning savors of the obscene per se theory and to that extent is contrary to 31 Photos.

31 Photos, where the receiving group was found to be bona fide, attempted to lay down a test for the bona fides of the group. It consisted of two elements: first, the number of copies sought to be imported; and second, whether the group was connected with a reputable scientific institution. Another case, holding the receiving group not bona fide,

23. It may be argued that these provisions are but additional criminal sanctions in the form of penalties. The destruction or forfeiture of obscene materials would probably not be a very heavy penalty, however, since there is little value in the picture or printing itself. This conclusion is based on the assumption that additional copies may be run off easily from other copies or the original plates. Therefore, these provisions were probably not adopted as a penalty.
25. United States v. One Unbound Volume, 128 F. Supp. 280 (D. Md. 1955). The multiple copy element would not seem to be useful to show good faith if after obtaining a single copy, other copies may be reproduced from the original and disseminated. However, if many copies are imported, bad faith may be inferred. Conversely, the prior publication point should not be relied on too heavily where there has been no prior publication, since it discriminates against newcomers in the field, but it may be used to prove good faith where there has been prior publications. Similarly, the point on
added a third element, which was whether the group had published any prior works on the subject. Although the latter case is inconsistent with 31 Photos in that the court did not make a finding as to the prurient effect on the claimant himself, the facts of both cases help to illustrate how the test for bona fide scientific interest will be applied. The materials, erotic prints from ancient vases, were sought to be imported for study by an alleged archeologist. There was no holding as to their prurient effect on the importer. The court held the material subject to forfeiture under the Tariff Act as obscene on the ground that the importer was not a bona fide scientist, in spite of the fact that he introduced his library in evidence and testified that he had taken some courses in archeology while in college. The importer was a microchemist by occupation. But the court, emphasizing the fact that the claimant was not connected with any learned society and that he had not published any works on the subject, termed him at most an amateur.

A case of similar value involved facts approximating those in the archeologist case. The opinion stated that the obscene books might have a use in anthropology and psychotherapy, and that they could be sold to laymen "who wished seriously to study the sexual practices of savage or barbarous peoples." However, under the facts of the case where distribution was to the general public, the court held the materials obscene.

**Some Specific Problems**

**The Standard within the Group**

When materials are distributed to the general public they are measured by their prurient effect on the average person of the community. If this cross section of the community standard is not employed, the test is unconstitutional. A question not answered in 31 Photos is whether this same cross section standard must be used when the receiving group is less than the entire community, or whether each individual must pass the prurient test. If the language of the opinion supports either theory, it supports the latter. Under the facts of 31 Photos, however, the court

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26. *Id.* at 282.
28. *Id.* at 514.
30. The court's finding was: "That as to those who will have access to the material sought to be imported, there is no reasonable probability that it will appeal to their prurient interest." 156 F. Supp. 350, 353 (S.D.N.Y. 1957).
was not required to make this finding. This problem is further illustrated by a case where an allegedly educational film entitled "Mom and Dad" was held obscene because shown to the general public. There was a dictum that the film would probably not be obscene if the audience were restricted to doctors and nurses. Although the opinion did not indicate, the government censor was evidently relying on a statute prohibiting the distribution of obscene materials. If in showing the film it would be necessary for the projectionist to view it, it is very likely that he as an individual would not meet the pruriency test; but if the projectionist were averaged in with the scientific viewers, the group, including himself, would probably meet the test. This sacrifice is consistent with the cross section rule as applied to the entire community. The question is whether there is a sufficient difference in the facts where distribution is to the entire community and where it is to a distinct receiving group to warrant a change in the average or cross section rule. The sacrifice of minority interests in either instance is the same if viewed relatively. If viewed in absolute terms it would be less where distribution is to a specific group. Furthermore, if scientists are to view films they must generally employ laymen to operate the cameras. There are other situations, no doubt, where scientists are required to use lay assistants. Therefore, a change from the cross section rule would not seem to be warranted.

Mixed Motives

Many questions and problems would be raised by 31 Photos and related decisions if the government should challenge the issue of prurient effect on the scientific group, or if prurient effect should be proved on trial, that is, if there are the admittedly mixed motives of prurience and valid scientific interest. Different problems arise if the receiving group is small or is but an individual than arise in a case where the group is quite large. Other problems are created if the receiving group is a private one or a private individual, as distinct from a public or quasi-public body. The type of security that should be required to guarantee that there will be no breach of trust is not yet clearly defined. What the receiving group may do with the materials and whether the state could constitutionally

31. Hallmark Productions v. Mosley, 190 F.2d 904 (8th Cir. 1951).
32. Id. at 910.
33. Missouri does not have a statute prohibiting the consumption of obscene materials by individuals. See Mo. ANN. STAT. §§ 563.270, 563.280, 563.290.
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prohibit one from creating pornography for his own personal edification are other unanswered questions.

In spite of the holding that a choice between the "not-obscene" theory and the "privilege" theory was not necessary, it is conceivable that in subsequent applications of the statutes it may make a very significant difference which theory is used. A trier of fact could conceivably find that printed materials have a prurient effect under the Roth and 31 Photos test on a recipient even though he intended to use them in some scientific inquiry. If this is the case, the not-obscene theory where the prurient effect on the receiving group is controlling would seem to be more restrictive than the privilege theory, since the latter could allow passage of the materials in the case of mixed motives. The court in 31 Photos, in saying that really these theories are but two sides of the same coin, and that generally the quantum of the scientific interest in fact varies inversely with the prurient effect on the scientists involved, is undoubtedly correct in a vast majority of cases. But even if a bona fide scientist cannot be affected by pornography in pictorial form or in literature where it is relevant to scientific inquiry, it does not necessarily follow that a receiving group importing for the effect of pruriency as well as for scientific inquiry cannot contribute something in the way of scientific advancement. Whether this is a valid assumption as a matter of law as it was in 31 Photos is questionable. The real issue where there are mixed motives should not be merely whether the receiver is a bona fide scientist or even the prurient effect of the materials on the recipient, but should be the relative values of the public interest in scientific inquiry and the public interest in not having individuals exposed to obscenity. An adoption of the privilege theory would seem to be more realistic because of its clarification of the issues and its nicer balancing of the interests.35

Private Censorship

If the privilege theory is followed, the court is not only suspending public censorship, but is in fact delegating to a private group administrative authority to censor obscene materials. Even with the holding in 31 Photos that pornography is not obscene per se and that in the hands of the Institute the materials were not obscene, there is still a form of censorship by a private group, since that group admittedly has control over a type of "hot" materials. Commonly censorship is the act of screening certain literature or art, in order to accomplish some purpose of the censor, to determine whether it shall be available for the perusal of other

35. See Lockhart and McClure, supra, note 13, at 368.
persons, generally the public. Normally, the harm resulting from an abuse of censorship is that the public is wrongfully denied access to certain literary or artistic works. However, this would not be true in the 31 Photos type of censorship because the way would always be open to determine the obscenity of the materials in another proceeding. 31 Photos forces this conclusion, since each time a new group is involved there would have to be a new inquiry to ascertain whether the materials are obscene as to that particular group. The harm in the 31 Photos situation may be that certain materials which admittedly ought to be censored, may become available to the general public. An analogous situation exists with respect to narcotics and other drugs where the druggist holds a similar power. An important difference, however, is that obscenity involves freedom of speech and the press. In this sense, then, there is private censorship.

The distinguishing factor where obscenity is privately censored is a lack of safeguards against abuse of power which ordinarily attend either public administrative power or most other private administrative power. For example, legislative committees on oversight and the courts stand ready to check an abuse of public power, and a continuous licensing system controls the handling of liquor, narcotics and other items which threaten physical well-being.

Other safeguards may attend private censorship of obscenity, however, which do not accompany other public and private administrative power. A quasi-public institution, as the claimant was in 31 Photos,

36. See note 7 supra.
37. This raises many administrative problems, discussed at pages 435-38 infra.
38. See generally Jaffe, Law Making by Private Groups, 51 Harv. L. Rev. 201 (1937).
39. It may be argued that lack of immediate safeguards is not important, since not all delegations of administrative power to private groups are attended by a licensing system. For example, under the National Labor Relations Act, 49 Stat. 453 (1935), as amended, 29 U.S.C. §§ 141-88, the Section 9 representative is given certain private economic administrative powers. Steel v. Louisville & Nashville R. Co., 323 U.S. 192 (1944). These powers are attended by certain other safeguards, however. See notes 41 and 42 infra and accompanying text. Also, under various state statutes, bar and other associations have been given a like power to police their memberships by inclusion, exclusion and expulsion. Jaffee, supra note 38, at 229, 249. A distinction may be drawn, however, in that these instances involve a delegation of economic power related to the public welfare, which should be contrasted with private power governing narcotics, liquor and obscenity which relate to the public health, morals and safety. Medical associations are given power without licensing which involves the public health directly, but the reason may be that a proper determination of an individual's fitness to practice medicine is a highly technical matter which the profession itself is deemed most able to handle. Thus, an absence of licensing may be rationalized on the theory that because of its technical nature, a licensing body would not be competent to oversee private power in this situation. This analysis would indicate that there should be a licensing system to oversee the private censorship of obscenity.
would be subject to the disciplinary action of its governing body or agency. However, if the group is a voluntary association of scientists or if the receiving "group" consists of but one scientist, admittedly bona fide, but not associated with any public institution (perhaps he is independently wealthy or makes his living writing books), this substitute sanction is nonexistent.

In addition, to the extent that private administrative action is sanctioned by the state, even where there are no licensing provisions, there may be other safeguards in the form of constitutional guarantees against arbitrary abuse of power. Also, the several state obscenity laws would be safeguards under which any group or individual, private or public, could be prosecuted for disseminating obscene materials.

If there is neither a licensing system nor constitutional guarantees in the form of private civil actions, and if the receiving group is not a quasi-public institution, external control over the use of the materials is reduced merely to state obscenity laws. Since the private group can set its own qualifications for membership, the danger is increased that certain individuals within the group will be exposed to obscene materials contrary to the policy of the particular jurisdiction involved. The danger is also increased that the group will betray its trust by innocently, negligently, or wilfully exposing the materials entrusted to it to persons without the group.

Problems in Administration

Administration of the 31 Photos test introduces a series of practical problems. A question yet to be answered is whether, after certain materials have been adjudged obscene under the Roth and 31 Photos test, a

40. Although the Institute is a separate, non-profit corporation, it is closely connected with the University in many respects. Most of the members of the Institute also teach classes for the University; they are paid through the University and occupy University facilities. In addition, the Institute is closely identified with the University in the mind of the public. Interview with Ritchie G. Davis, former attorney for the Institute, in Bloomington on Nov. 12, 1958. See also the affidavits of President H. B. Wells of Indiana University and Dr. Paul Gebhard, Executive Director of the Institute, submitted in support of claimant's motion for summary judgment in 31 Photos.


42. But the effect is to substitute the control of the states for that of the original censoring authority as expressed in the federal obscenity laws. As a practical matter, the control may not be nearly as effective as the original one, since the zeal with which state proceedings will be prosecuted will vary greatly. Therefore, even if the standards of the substituted control are the same as the original one, the practical effect of the substitution may be to bring the materials out from under a sure thing—obscenity determined by the original authority—to something less than a sure thing—a possible determination of obscenity by the substituted authority. Thus, in general, it would appear that the effect of private censorship would be to expose the public to a greater danger from the evil of obscenity than if public censorship were employed.
new determination on the issue of obscenity may be secured merely by changing the receiving group slightly. It seems that in a borderline case this process could be continued indefinitely until the defendant obtains the desired adjudication. The problem would be greatest where there is a private receiving group, rather than a quasi-public one, since the latter would tend to be more stable.

Assume that a publisher tries to mail literature which would clearly be obscene if disseminated indiscriminately to the general public. If the defense is made that the materials are being disseminated to a selected, highly sophisticated group of readers or customers on whom the materials will not have a prurient effect, 31 Photos tells us that the materials are not obscene. As a practical matter the test now becomes almost unmanageable. The court no longer has a single person to whom the test is very easily applied, as in the archeologist case, or even a small group of persons comprising a recognized institution of some kind, as in 31 Photos. If the burden of proof is on the state or government, it would seem an almost impossible task to ascertain the average of the group from the sum of all the characteristics of the individuals, but theoretically this would have to be done. Even if the group is relatively homogeneous with respect to educational background, occupation, or degree of intelligence the problem is not solved.

Recent cases which illustrate this problem involved nudist's magazines. If direct proof is required to prove prurient effect, it would be difficult to establish that all of the addressees in the group are not nudists. Even if it could be established that the addressees are all nudists, it does not necessarily follow that the magazine will not be obscene as to them, especially if it is somewhat risqué in content. However, in light of the frequent holding that nudity is not obscene per se, it would seem that any sincere pictorial or literary work of an educational nature advocating a certain type of sociological conduct, e.g. nudism, would be protected by the 31 Photos rule if there were a selective mailing list.

43. A similar administrative problem previously had led to a rule of expediency. When full length novels were challenged and it became impracticable for the jury to read the entire work, the rule was adopted that it was only necessary to examine selected passages from the book. Alpert, supra note 1, at 71. The Ulysses case overturned this rule, seemingly in spite of the impracticalities.

44. Parmalee v. United States, 113 F.2d 729, 732-36 (D.C. Cir. 1940).

45. Thus Summerfield v. Sunshine Books, 249 F.2d 114 (D.C. Cir. 1957), rev'd mem. 355 U.S. 372 (1958), decided the mailability of a nudist's magazine under the postal regulations. The holding in the Court of Appeals was that the magazines were obscene and therefore non-mailable. The facts that the textual material in the magazines was not obscene, that only certain of the pictures were charged to be so, and further that there may have been a valid educational or sociological interest involved did not impress the court. The test used by the trial court was the average reader test combined with the average person Roth test. The Court of Appeals, consistent with 31 Photos, noted
This administrative problem is created only if there must be direct proof of prurient effect in the form of examination of the group itself. One solution may be to allow indirect proof as to the characteristics of the group in the form of opinion testimony based on a random sample. Shifting the burden of proof to the defendant would not solve the problem, since the task of proving the characteristics of the group would be equally onerous as to him. If the court allows indirect proof in the form of opinion testimony, the issue would then be one of credibility. It is conceivable that because of the impracticalities of direct proof the court would allow opinion testimony in lieu thereof.

Perhaps another answer to the problem is a method employed by the Consumers Union of United States which had mailed a report on contraceptives only to those persons who signed a statement that "I am married, and use prophylactics on the advice of a physician." In order to make this means more effective, the courts could require that the statement be made under oath, though to do so would add an encumbrance that the trial court had found the mailing list not limited to members of a nudist's colony, and that these magazines were readily available to the public on newsstands. Id. at 115. The negative implication then would be that a selective mailing list would be significant. The Supreme Court reversed without opinion on the basis of Roth, but it is almost certain that the fault in the Court of Appeals was either their failure to consider the magazine as a whole or their approval of the practice of denying the use of the mails to materials not yet adjudged obscene in the statutory criminal proceeding. This administrative determination of obscenity was simply not provided for by the statute, and therefore was unlawful as a prior restraint. The fault in the Court of Appeals was not that they applied the incorrect law as to the significance of the receiving group; therefore, the court's dictum on that point is presumably still of some value.

46. Similar problems arise in unfair competition and trade mark cases. In American Luggage Works v. United States Trunk Co., 158 F. Supp. 50 (D. Mass. 1957), an unfair competition case, the issue was whether plaintiff's product design had acquired a secondary meaning with the public. Judge Wyzanski, holding the results of plaintiff's poll of the market inadmissible, indicated, however, that a properly administered and statistically valid poll would have been admissible. The court suggested the best way to administer polls or surveys would be to have the parties submit plans in a pretrial conference, agree on one, and obtain approval of the court for that plan. In this manner the difficulties of proof would be overcome and there would be no wasted expense and effort in taking an invalid poll. Similarly, a trade mark case, Marcalus Manufacturing Co. v. Watson, 156 F. Supp. 161 (D.D.C. 1957), held the results of a poll inadmissible to prove whether the public associated plaintiff's maroon oval with its products. However, the negative implication from the opinion was that a valid poll or survey would be admissible.

The use of polls, surveys and samples as evidence is a relatively new development in the law of evidence. See generally Note, 66 Harv. L. Rev. 498 (1953).

There may be a distinction between a poll, which was involved in the unfair competition and trademark cases, and a sample which would be involved in the examination of a receiving group in an obscenity case, since the former may be objectionable because of the hearsay evidence rule while the latter is not. Thus there would seem to be a stronger case for admissibility of evidence based on a valid sample than that gathered from a public opinion poll. There will be no distinction, however, if the applicability of the hearsay rule is successfully challenged. Id. at 504.

47. See note 43 supra.

which would detract from its usefulness. Nevertheless, requiring a statement under oath would seem to be both reasonable and desirable especially since there is no apparent sanction for merely signing a false statement.

If the issue of obscenity is tried by a jury, one observes the interesting phenomenon of a jury, theoretically composed of the average person, having the task of ascertaining the mores or characteristics of an allegedly more highly sophisticated group.\textsuperscript{49} It seems doubtful whether an average jury could determine, sense, or appreciate the effect of materials challenged as obscene on a group allegedly more sophisticated. However, this problem becomes less important if the opinion method of proof is used, the issue then being largely one of credibility as between expert testimony.\textsuperscript{50}

\textit{Personal Edification}

Suppose a bona fide art collector has decorated his home with decor which to the average person would be obscene. Lawful possession may have been obtained either because he created the material himself or because the mores of the community had changed during his possession. This problem may be labeled personal edification, which involves the issues of whether one can be constitutionally deprived of the right to create what to the community as a whole would be obscene; whether one can privately view materials which are obscene; and whether one can display them in his home for the benefit of family and guests, or must allow some to view and some not. Affidavits by the possessor that he will maintain security measures such as those used by the Institute in \textit{31 Photos} might have some effect on the outcome.\textsuperscript{51}

\textsuperscript{49} This problem, although real, is not novel. It is encountered in any negligence case where the duty of the jury is to establish the standard of care for conduct other than that which the average man will usually experience. For example, the standard of care for driving a car theoretically can be validly ascertained because most jurors will have driven cars, but the standard of care a physician should exercise can be ascertained only through the use of expert witnesses, and therefore will generally present only an issue of credibility except in extreme cases obvious even to non-professionals. See Ladd, \textit{Expert Testimony}, 5 \textsc{Vand. L. Rev.} 414, 418-19 (1952).

\textsuperscript{50} The role that expert testimony should play should be determined by an empirical study as to the competence of the jury to determine prurient effect. If it can be scientifically shown that the jury is incompetent to handle this, and that only an expert physiologist, psychologist or sociologist can ascertain the effect, then the issue should be taken from the jury in much the same manner that the issue of a plaintiff's physical injuries in tort cases has necessarily been taken from the jury. One problem to be considered, although of diminishing importance, would be the rule of evidence that an expert witness may not testify as to an issue of ultimate fact. 7 \textit{Wigmore, Evidence} §§ 1920-21 (3rd ed. 1940); Ladd, supra note 49, at 423-24.

\textsuperscript{51} These security measures are listed in the affidavit, filed in the \textit{31 Photos} case, of Dr. Paul H. Gebhard, Executive Director of the Institute, thusly:

To go beyond this antechamber one must pass through a door which is kept locked at all times, or go through the secretary's office and into the Executive
An exchange of pornography between a professional and an amateur photographer was found not to be within the federal statute prohibiting the delivery of obscene materials in interstate commerce by an express company. Since it found the exchanges "were for the personal and private edification of the parties," the court did not discuss or try to ascertain the prurient effect on the receiver. This would indicate that under existing statutes there is not sufficient harm in personal edification to be unlawful; the harm must be multiplied before it falls within the obscenity statutes. The court failed to mention the possibility that these materials might not be maintained under strict security measures.

In comparison, the archeologist case, in which a different result was reached under the Tariff Act, denied an individual access to obscene materials. The only distinguishing factor between the cases apparently was that different statutes were involved. This would not appear to be a significant difference, especially since the court in the case involving the photographers failed to cite any authority either in precedent or in logic for its position that personal edification somehow implies a privilege. The federal statutes are not concerned with the consumption or creation of obscene materials, except insofar as the federal government has plenary powers over interstate commerce and the mails. A disability on the part of the federal government to prohibit the creation or consumption of obscene materials should not be transformed into an exception to the statutory prohibition against mailing them, as seems to have been done.

The constitutional issue as to whether the states could prohibit the

Director's office which, in turn, communicates with the other offices and rooms. . . .

Within the library the erotic books and manuscripts have been segregated in locked cabinets for which only Gebhard, Martin, Pomeroy, and the librarian, Mrs. Hare, have keys... Erotic art, photographs, and objects are kept in locked cabinets in the Executive Director's office. . . .

The affidavit also discloses that the entire building is locked after 11:00 p.m., except for one door with an attendant; that the janitor service is in trusted hands; that campus police patrol the building at night; and that there have been no successful break-ins during the history of the Institute. The affidavit concludes by stating that the library and collections are for the sole use of Institute members or specially authorized scholars who may examine only relevant materials in "bona fide scholarly research."


53. Writers on the subject of obscenity do not agree that there is scientific proof for the assertion of the legislatures that a reading or viewing of obscene materials leads to a substantial harm to the community. Therefore, since there is substantial sociological support for either assertion, the courts are correct in allowing the legislative finding of harm presumptive validity. Compare Kinsey, Pomeroy, Gebhard and Martin, Sexual Behavior of the Human Female, (1953) 653, 662, 670-71; and Sexual Behavior of the Human Male (1948) 363, 510; Alpert, supra note 1, at 73-74; Lockhart and McClure, supra note 13, at 332-33; and Paul and Schwartz, supra note 7, at 229-30 (all generally to the effect that no harm can be shown), with S. Rep. No. 2381, 84th Cong., 2d Ses. (1956) 62; and Schmidt, A Justification of Statutes Barring Obscenity from the Mail, 26 Fordham L. Rev. 70 (1947) (supporting harmful effect).
consumption of obscenity has not been reached. Since the states can prohibit the dissemination of obscenity among the public as a whole, it would seem that they could also prohibit the consumption of it by an individual, seeing that this is the ultimate evil at which obscenity statutes are aimed. The problem is analogous to prohibiting the consumption of alcohol, which has always been considered to be within the police power of the states.

The reason that personal edification generally has not been prohibited by statute stems from the practical difficulties of enforcement. The seller or publisher is especially vulnerable to discovery and effective enforcement; consequently, most statutes have been directed at this link in the chain of traffic in obscene materials. Analogy may again be drawn to prohibition of the sale and consumption of alcoholic beverages. The experience was that the major producers, sellers, and distributors of liquor were relatively easy to shut down, whereas the individual producer-consumers (moonshiners) were difficult to seek out and arrest. The same would very likely hold true with the consumption of obscenity.

**CONCLUSION**

The character of the receiving group has recently been emphasized as an element in determining obscenity. Consequently, the concept of obscenity per se has been clarified and severely limited. By confining the test of prurient effect to the receiving group, it is possible to allow scientific organizations to pursue research under existing obscenity statutes. But other groups may then seek possession of prurient materials on the ground that the latter are not prurient as to them. This creates many administrative and legal problems which will have to be resolved as they arise. The courts, by adopting a scientific privilege, could avoid many problems and reduce the danger that less responsible non-scientific groups will gain access to such materials. A scientific privilege theory, because it creates an exception in favor of scientists only, would also reduce dangers from private administrative power and allow a balancing of interests where the motives of the receiving group are mixed. A disadvantage would be that certain non-scientific groups would be deprived of materials prurient to the community as a whole, but not as to that group. The necessity for creating and using either a privilege theory or a non-obscene theory could be obliterated by stating more clearly in statutes the evil sought to be prevented. Thus the Tariff Act,

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54. Statutes may single out certain groups and prohibit distribution of materials having a prurient effect as to them. Butler v. Michigan, 352 U.S. 380 (1957); Volanski v. United States, 246 F.2d 842 (6th Cir. 1947).
rather than prohibiting the importation of materials denoted merely as obscene, might be aimed at materials whose effect would be to cause lustful thoughts or any specifically enumerated overt sexual conduct, such as masturbation or the various sex crimes.

JENCKS AND ADMINISTRATIVE PROCEEDINGS: CONSCIENTIOUS OBJECTORS AND GOVERNMENT EMPLOYEES

In one of its more controversial decisions, the Supreme Court in *Jencks v. United States*¹ held that in criminal prosecutions the Government must release to the defense, upon request, pre-trial statements made by government witnesses which "were of the events and activity related in their testimony."² Not only was the previous rule requiring the defendant to lay a preliminary ground of inconsistency between the contents of the report and the testimony before being entitled to inspect such reports held to be in error,³ but the accepted practice of the trial judge examining the reports *in camera* to determine their relevancy and materiality before turning them over to the defendant also was specifically disapproved.⁴ Perhaps the chief reason for public dissension with respect to this decision can be attributed to the dissent of Mr. Justice Clark in which he warned: "Unless the Congress changes the rule announced by the Court today, those intelligence agencies of our Government engaged in law enforcement may as well close up shop for the Court has opened their files to the criminal and thus offered him a Roman holiday for rumaging through confidential information as well as vital national secrets."⁵ The implication from this emotional language was two-fold.

2. Id. at 668.
3. Id. at 666. The Fifth Circuit, in deciding the *Jencks* case, 226 F.2d 540 (1955), used this theory as the basis for denying the FBI report to Jencks. It based its holding on *Gordon v. United States*, 344 U.S. 414 (1953). The Supreme Court, however, held that the reliance on *Gordon* was misplaced and that the proper interpretation of *Gordon* was that "for production purposes, it need only appear that the evidence is relevant, competent and outside any exclusionary rule." *Jencks v. United States*, 353 U.S. 657, 667 (1957), quoting *Gordon v. United States*, 344 U.S. 414, 420 (1953).
4. *Jencks v. United States*, supra note 3, at 669. For authority contra, see 8 *Wigmore, Evidence* § 117-18 (3d ed. 1940). For cases which had specifically held that an *in camera* inspection by the court was proper, see, e.g., *United States v. Grayson*, 166 F.2d 863 (2d Cir. 1948); *United States v. Beekman*, 155 F.2d 580 (2d Cir. 1946); *United States v. Cohen*, 145 F.2d 82 (2d Cir. 1944); *United States v. Krulewitch*, 145 F.2d 76 (2d Cir. 1944); *United States v. Mesarosh*, 116 F. Supp. 345 (D.D.C. 1953), rev'd on other grounds, 352 U.S. 1 (1956).