The Law of Obscenity and Military Practice

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I. INTRODUCTION

In recent years, problems surrounding the law of obscenity have become increasingly important and this development has resulted in a corresponding awareness of these problems by the courts, both state and federal. This awareness is now being extended into the military legal field. Two recent decisions, one by the United States Court of Military Appeals and the other by an Army board of review, have focused attention on the military's handling of obscenity problems under the Uniform Code of Military Justice. These recent decisions encompass issues occurring in civilian practice as well as issues peculiar to the military. Before any analysis of these and related decisions can be undertaken, however, it would be well to investigate the legal and practical tests for determining obscenity in order to avoid the error committed by one international convention. In the 1930's this convention met in Geneva to discuss the common problem of controlling the publication and dissemination of obscenity. Even after prolonged and heated debate the convention was unable to agree on a working definition of obscenity. But, as one noted author put it, after concluding that they didn't know what they were talking about, the convention members settled down to discuss the subject.

II. WHAT IS OBSCENITY?

The question posed by the title of this section had long perplexed American courts as well as the aforementioned international convention. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency. None of the factual material herein relating to trials by court-martial has been drawn from privileged documents.

4 Huxley, Vulgarity in Literature (1930).
tional convention when the case of United States v. Roth\(^5\) was presented to the United States Supreme Court. Roth was a leading publisher and seller of erotic literature and other materials who had made the mistake of sending certain of his material through the mail. He was convicted in the Southern District of New York for violating the federal mail obscenity statute\(^6\) and his conviction had been affirmed by the United States Court of Appeals.\(^7\) Because the delicate and far-reaching constitutional question of whether obscene expression is protected by the First Amendment was involved in the case, the Supreme Court granted review. The Court held that obscenity is not expression protected by the First Amendment and affirmed Roth's conviction. Then, to insure that protectible expression was not mistaken for that which was not, the Court attempted to define precisely what obscenity was. In so doing the Court substantially adopted the American Law Institute's view that "a thing is obscene if, considered as a whole, its predominant appeal is to prurient interest."\(^8\) The rationale for the Court's holding that obscenity was not protected expression under the First Amendment was that obscenity did not have "the slightest redeeming social importance." Thus, in effect, the Court said that material may only be condemned as obscene which has for its chief purpose the appeal to man's baser instincts since such appeals have no redeeming social importance.

The narrowness of this standard is illustrated in part by the possibility that some material may be so vile or repulsive as not to appeal to the prurient interest of the average person in the community and therefore be within the ambit of constitutional protection.\(^9\)

Thus, unless the Supreme Court chooses to broaden its test for determining obscenity, and there appears to be no disposition

\(^7\) 237 F.2d 796 (2d Cir. 1956).
\(^8\) Model Penal Code § 207.10 (Tent. Draft No. 6, 1957). The Court in turn relied upon Webster's Dictionary to define "prurient interest" as "itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity or propensity, lewd." Webster, New International Dictionary 1996 (2d ed. unabr. 1949).
\(^9\) That Henry Miller's *Tropic of Cancer* represents such material has been suggested. Clayton, "Maryland 'Tropic' Ruling Faces Test," The Washington Post, Dec. 25, 1961, § B, p. 16, cols. 1–3. Mr. Clayton, the Washington Post legal writer, reported that Justice Department lawyers discovered that many people found Miller's writings, which also include *Tropic of Capricorn* and *Quiet Days at Clichy*, disgusting and shocking but not sexually exciting. For this and other reasons "there was remarkable agreement that the Government could not win if it charged that Miller's work is obscene." Shortly after this conclusion was reached the Post Office and Customs Bureau bans on *Tropic of Cancer* were lifted.
on the part of the Court to do so at this time,\textsuperscript{10} obscenity prosecutions, both military\textsuperscript{11} and civilian should be limited to the condemnation of the publication or the dissemination of pornography,\textsuperscript{12} \textit{i.e.}, material designed to arouse and excite the immature, base and unnatural sexual instincts of the recipients.\textsuperscript{13} More specifically, pornography is material "which is designed to act upon the reader as an erotic psychological stimulant" or "aphrodisiac."\textsuperscript{14} Definitions in this area are woefully inadequate to convey precise meanings because words are used to explain other words or concepts that have little or no concreteness. It is enough to say, however, that whether obscenity is a broader concept than pornography or is synonymous with it, prosecutions should be limited to the publication and dissemination of materials \textit{obviously} produced to exploit the sexual nature of men and women.\textsuperscript{15}

\textsuperscript{10}If anything, the trend of thinking on the Court would seem to be in the direction of narrowing the test for obscenity. At least two justices would tighten the standard for condemning obscenity by requiring that the condemned material be both appealing to prurient interest and patently offensive to the sensibilities. Manual Enterprises v. Day, 370 U.S. 478 (1962) (opinion by Harlan, J., concurred in by Stewart, J.).

\textsuperscript{11}It is settled that individuals in the armed services are entitled to the constitutional protections of the Bill of Rights except those which are expressly or by necessary implication inapplicable to the defense establishment. United States v. Jacoby, 11 USCMA 428, 29 CMR 244 (1960); Burns v. Wilson, 346 U.S. 137 (1953). Therefore, trial counsel are apparently bound by the First Amendment rulings of the Supreme Court and in preparing to prosecute "obscenity" cases would be well-advised to scrutinize the material in question closely, even to the point of submitting it officially to other individuals for their reactions before proceeding to trial.

\textsuperscript{12}In People v. Richmond County News, Inc., 9 N.Y.2d 578, 175 N.E.2d 681, 216 N.Y.S.2d 369 (1961), a majority of the New York Court of Appeals, in two separate opinions, decided that in conformity with the Supreme Court's decision in \textit{Roth}, the prohibitions of New York's criminal obscenity statute must be limited to "hard-core pornography." See Lockhart & McClure, \textit{Censorship of Obscenity: The Developing Constitutional Standards}, 45 Minn. L. Rev. 5, 60 (1960). But see Monfred v. State, 266 Md. 312, 173 A.2d 173 (1961) (majority and dissenting opinion). While Justice Harlan's opinion in Manual Enterprises v. Day, \textit{supra} note 10, left open the question whether anything other than "hard-core pornography" may be condemned constitutionally, it is submitted that the only material meeting the two-fold test for obscenity laid down in the opinion is "hard-core pornography."

\textsuperscript{13}The Kronhausens, \textit{Pornography and the Law} 18, 178-244 (1959); Lockhart & McClure, \textit{supra} note 12, at 62–66.

\textsuperscript{14}The Kronhausens, \textit{op. cit. supra} note 13, at 178.

\textsuperscript{15}A valuable study providing an interesting guide for the determination of material constructed to exploit the prurient interest of individuals is that conducted by Drs. Eberhard and Phyllis Kronhausen and reported in their book, \textit{Pornography and the Law}. They isolate the main characteristic of pornography as the "buildup of erotic excitement." \textit{Op. cit. supra} note 13, at 178. It is interesting to note that the Government appended this work to its appellate pleading before the Army board of review in CM 405791, Ford, \textit{supra} note 2, as an aid to the board in determining whether \textit{Helen and Desire} by Frances Lengel was obscene.
In summary, then, when we talk about obscenity we do not refer to erotic material in its entirety but rather to that material which deliberately exploits sex in such a way as to arouse and excite the sex instincts and drives of persons who are exposed to the material.

III. COMMON OBSCENITY QUESTIONS IN CIVILIAN AND MILITARY PRACTICE

The two recent Army obscenity cases raise many questions which also confront the civilian bench and bar. Discussion of these common questions will be followed by a separate discussion of obscenity problems particularly relevant to military practice.

The first significant obscenity case to reach the United States Court of Military Appeals is that of United States v. Holt in which the accused, a thirty-two year old sergeant, wrote a series of "love letters" to a young under-age girl with whom he was having a sexual affair. The girl saved the letters which were subsequently discovered by her mother. The sergeant was charged with carnal knowledge in violation of Article 120 and three specifications of mailing obscene letters in violation of Article 134. He pleaded guilty to all charges and specifications, but as a matter in aggravation the trial counsel introduced the sergeant's letters after the findings. On appeal to an Army board of review, the accused contended that his plea of guilty to the mail offenses was improvidently entered since the letters were not obscene. Without

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16 As Justice Brennan said in his opinion for the Court in the Roth case, "... [S]ex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." 354 U.S. at 487.
18 While the obscenity specifications gave no indication under which clause of Article 134 they were laid, appellate counsel for both the defendant and the Government assumed that the federal mail obscenity statute, 18 U.S.C. § 1461 (1958), had been incorporated in the prosecution under the "crimes and offenses not capital" clause of the general article. 12 USCMA at 472 n. 1, 31 CMR at 58 n. 1. For a thorough discussion of the history and legal problems surrounding the federal mail obscenity statute, see Paul & Schwartz, Federal Censorship: Obscenity in the Mail (1961); Paul, The Post Office and Non-Mailability of Obscenity: An Historical Note, 8 U.C.L.A. L. Rev. 44 (1961); Paul & Schwartz, Obscenity in the Mails: A Comment on Some Problems of Federal Censorship, 106 U. Pa. L. Rev. 214 (1957); Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5 (1960); Zuckman, Obscenity in the Mails, 33 So. Cal. L. Rev. 171 (1960).
ruling on the precise question presented, the board, one member dissenting, held the sergeant's plea inconsistent with his testimony on sentence that he "intended the letters only as 'love letters.'" The Judge Advocate General then certified to the Court of Military Appeals the broad question whether the board of review was "correct in holding that the plea of guilty . . . was improvident." As a result of The Judge Advocate General's action several important questions of obscenity law confronted the Court.

The first of these questions was whether a letter writer's subjective intent has any relevance to a prosecution for sending obscene matter through the mail. If the answer was in the affirmative, the sergeant's protestations that the letters were intended by him as nothing more than letters of affection to a loved one would clearly be inconsistent with his plea of guilty. Several years earlier in the landmark case of *United States v. Dennett* the United States Court of Appeals was faced with a similar problem. In that case the defendant, a woman of unimpeachable character, had mailed copies of a pamphlet which she had written for the purpose of instructing her two sons on "The Sex Side of Life." While the court reversed the woman's conviction for violating the federal mail obscenity statute on the ground that the pamphlet was not obscene, Judge Augustus Hand, speaking for the court, clearly rejected the woman's defense of good motives as irrelevant. In effect, the case ruled that violation of the mail obscenity statute required only *general intent*. It would be enough to ground a conviction under the statute for the Government to show that the defendant mailed legally obscene matter knowing simply the contents of that matter. Thé "whys" and "wherefores" of the mailing were of no consequence.

19 39 F.2d 564 (2d Cir. 1930).

20 "It is doubtless true that the personal motive of the defendant in distributing her pamphlet could have no bearing on the question whether she violated the law. Her own belief that a really obscene pamphlet would pay the price for its obscenity by means of intrinsic merits would leave her much as ever under the ban of the statute." 39 F.2d at 568. *Accord,* Verner v. United States, 183 F.2d 184 (9th Cir. 1950). See Grove Press, Inc. v. Christenberry, 175 F.Supp. 488, 501-02 (S.D.N.Y. 1959), aff'd, 276 F.2d 433 (2d Cir. 1960).

21 See also Magon v. United States, 248 Fed. 201 (9th Cir. 1918), cert. denied, 249 U.S. 618 (1919); Knowles v. United States, 170 Fed. 409 (8th Cir. 1909).

22 But, of course, there would be no need for the Government to show that the accused knew or even suspected that the matter was obscene. Rosen v. United States, 161 U.S. 29 (1896); Magon v. United States, *supra* note 21; see Burton v. United States, 142 Fed. 57 (8th Cir. 1906).
In arguing to the Court of Military Appeals that Sergeant Holt's testimony was not legally inconsistent, the Government urged the Court to follow federal precedent in order to assure development of obscenity law under Article 134 of the Uniform Code consistent with settled federal law. This the Court did. In stating that "purity of motive is no defense to impurity of writing," the tribunal clearly held that a writer's subjective intent in writing and mailing material later adjudged to be obscene is immaterial. Thus, testimony by an accused as to his subjective intent or motive in mailing a letter cannot be legally inconsistent with his guilty plea.

Because of the broad nature of the certified question, the Court was also presented with the issue originally raised by the accused before the board of review, namely, whether the letters were actually obscene. The Court refused to meet this issue head-on because it was of the belief that the question of obscenity was for the triers of fact, with review limited to the question of the legal sufficiency of the findings.23 The Court said that had the accused not pleaded guilty and had the court-martial returned findings of guilty on the merits, it would be compelled to hold the evidence (the letters) sufficient to support the conviction. This approach would involve only the same scope of appellate review accorded all criminal prosecutions by the Court.

It is submitted that the Court of Military Appeals may be taking too restricted a view of its powers of review in obscenity cases. If the determination of what is and what is not obscene is purely an ordinary factual question, then the Court was, of course, correct in refusing to examine the letters for any purpose other than to uphold the legal sufficiency of the court-martial's determination that the letters were obscene. But there is much respectable authority for the proposition that the determination of what is and what is not obscenity is something more than an ordinary factual matter to be left in the exclusive control of the finders of fact.24 Under this proposition, even the fact that the accused pleads guilty in an obscenity prosecution would not alter the appellate court's duty to go beyond the question of legal sufficiency.

23 See United States v. Wheatley, 10 USCMA 539, 28 CMR 105 (1959), affirming CM 401092, Wheatley, 28 CMR 28 CMR 461 (semble).
The theory behind this somewhat unique proposition is that the question of what may be suppressed as obscene through criminal prosecution is a constitutional matter which appellate courts have a solemn duty to consider. This constitutional consideration amounts to a de novo finding on the question of whether the material alleged to be obscene by the prosecution and found to be obscene by the triers of fact is obscene. Such a determination goes beyond the determination whether a reasonable trier of fact could find the material in issue obscene and represents justifiable "second-guessing" by the appellate courts.

The best judicial exposition of the theory to date may be found in Judge Fuld's opinion in People v. Richmond County News, Inc. In that case the defendant corporation had been found guilty in the trial court of distributing an obscene magazine in violation of section 1141 of the New York Penal Code, the state's criminal obscenity statute. The conviction was reversed by the state's intermediate appellate court on the ground that the proof failed to establish the defendant's knowledge of the magazine's obscene character. The state appealed, and by a narrow margin of four to three, the New York Court of Appeals held that the magazine in question was not obscene, regardless of the finding below. Judge Fuld minced no words in declaring the appellate court's power to make this determination:

The courts below have characterized the magazine as "obscene," but whether that finding is justified requires us . . . to make an independent constitutional appraisal of the magazine. This court, as the State's highest tribunal, no less than the United States Supreme Court, cannot escape its responsibility in this area "by saying that the trier of the facts, be it a jury or a judge, has labeled the questioned matter as 'obscene,' for, if 'obscenity' is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind." Roth v. United States, 354 U.S. 476, 497-498 . . . [Harlan, J., concurring] . . .

If a state appellate court can be so certain that the question of what is and what is not obscene involves constitutional judg-
ment which it must exercise independently of the lower courts, then surely a federal court, such as the Court of Military Appeals, would be hardpressed to find substantial grounds for abdicating this judgment to the triers of fact. This is particularly true in light of the Court's recently pronounced intention to champion the constitutional rights of military personnel against all encroachments. Since it seems clear that before criminal prosecutions for the publication, dissemination or communication of obscenity will be sanctioned, the material in question must be found to be of such character, i.e., obscene, as to be beyond the pale of First Amendment protection, the Court may well have erred in failing to make an independent appraisal of Sergeant Holt's letters, despite his plea of guilty.

Perhaps the most significant question raised in Holt was the standard to be utilized by triers of fact and, assuming they have the power to make independent determinations, the appellate courts, in finding obscenity. This question more than any other has preoccupied the courts over the years. Until the Supreme Court's decision in United States v. Roth, many American courts applied the harsh and confining standard enunciated in Regina v. Hicklin that material could be adjudged obscene by the effect of an isolated excerpt upon particularly susceptible persons. Rigid application of this rule would undoubtedly result in forcing down the level of American literature. At least one federal trial court

29 But see Monfred v. State, supra note 24.
30 Two federal appellate courts have now taken it upon themselves to make independent judgments as to the character of allegedly obscene material. See United States v. Keller, 259 F.2d 54 (3d Cir. 1958); Capitol Enterprises, Inc. v. City of Chicago, supra note 24. While a majority of the United States Supreme Court have not ruled expressly on this question of independent review by appellate tribunals, certain of the Court's per curiam decisions suggest that such procedure is also followed by the Court itself. See Times Film Corp. v. City of Chicago, 355 U.S. 35 (1958); reversing 244 F.2d 432 (7th Cir. 1957); Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958), reversing 249 F.2d 114 (D.C. Cir. 1957); One, Inc. v. Olesen, 355 U.S. 371 (1958), reversing 241 F.2d 772 (9th Cir. 1957).
31 The Court's statutory jurisdiction limiting review to the law should prove no bar since th's judgment involves no more than the application of constitutional legal standards to the material in issue. The Court has already held that it has the power to decide mixed questions of law and fact. See United States v. Flagg, 11 USCMA 636, 29 CMR 452 (1960).
32 See United States v. Jacoby, 11 USCMA 428, 29 CMR 244 (1960), in which the Court stated, in upholding the right of accused service personnel to personal confrontation of witnesses as guaranteed by the Sixth Amendment, that "...[t]he protection in the Bill of Rights, except those which are expressly or by necessary implication, inapplicable, are available to members of our armed forces." 11 USCMA at 430–31, 29 CMR at 246–47. See also Warren, The Bill of Rights and the Military, 37 N.Y.U. L. Rev. 181 (1962).
33 [1868] 3 Q.B. 360.
revolted against this existing standard in the early 1930's, but it was not until the Roth case that a more liberal standard was made the law of the land. The Supreme Court rejected the Hicklin test as unconstitutional in that it condemned material which had legitimate claim to protection under the First Amendment. In its place the high court substituted the test that material was obscene and beyond constitutional protection only if, when judged as a whole, it appealed to the prurient interest of the average person in the community. No longer could lawful criminal prosecutions be based on isolated passages of otherwise reputable literary works.

Once the Supreme Court had spoken it might seem that the Court of Military Appeals and all other federal and state courts would have merely to apply this new obscenity standard in all cases. But it must be remembered that Roth involved the mailing of mass circulation publications to all sorts of persons throughout the United States. Therefore, in Holt the Government questioned whether the standard enunciated in Roth was the appropriate one to be applied in the case of private handwritten letters mailed to one specific individual. While arguing that the letters were obscene under the Roth standard, the Government contended alternatively that in personal letter cases, mail matter should be declared obscene if it appealed merely to the recipient's prurient interest in the case of one addressee and the prurient interest of the average person in a limited audience if the mail matter is directed to a specialized group. Essentially what the Government was con-

34 United States v. One Book Called “Ulysses,” 5 F.Supp. 182 (S.D.N.Y. 1933), aff’d, 72 F.2d 705 (2d Cir. 1934).
35 Inasmuch as only two justices have spoken in favor of narrowing this obscenity standard by adding the requirement of “patent offensiveness,” see note 10 supra, it must be assumed that this standard remains unchanged as the basic yardstick for measuring obscenity.
36 For the opinion that the Roth decision will have a beneficial influence on American letters, see Lewis, “Power to Censor Is Still Unclear,” New York Times, Dec. 20, 1959, § 4, col. 5, p. 8E.
37 Brief for the United States, p. 13, United States v. Holt, 12 USCMA 471, 31 CMR 57 (1961). In support of its position the Government relied principally on the case of United States v. 31 Photographs, 156 F.Supp. 350 (S.D.N.Y. 1957). In that case the Government sought to confiscate certain materials which the Institute for Sex Research, Inc. (the “Kinsey Institute”) sought to import into the United States. In releasing the material to the Institute, Judge Palmieri held that a proper determination of obscenity required looking to the impact of the questioned material upon those whom it is likely to reach. Since those whom the foreign pornography was likely to reach were all objective scientists devoted to the serious study of sex in all of its manifestations, the judge could not hold the material obscene as to the receiving group involved. The Government in Holt also relied upon the more recent case of Manual Enterprises, Inc. v. Day, 289 F.2d 465 (D.C. Cir. 1961), which involved administrative action by the post office barring certain
tending for was a variable standard of obscenity as opposed to the rigid constant standard of Roth.\footnote{38} This approach takes into consideration the actual audience to whom allegedly obscene material is communicated and would allow material to be condemned as obscene if it appealed to the prurient interest of those to whom it is directed, even though it had no such appeal to the average person in the community.\footnote{39} This standard can be a double-edged sword as far as the Government is concerned since it is possible for material to be considered obscene under the constant standard of Roth and yet not be obscene in relation to the audience or receiving group to which the material is directed.\footnote{40} The Government subsequently was made fully cognizant of this fact in the Ford case.\footnote{41} In Holt the Court felt it unnecessary to decide what standard would be applicable to private personal letters because the letters there could be found to be obscene, regardless of the standard utilized. But the Court, while leaving the question open, did note that the Government had "conceded" that the Roth standard was inapplicable.\footnote{42}

allegedly homosexual periodicals from the mail. The United States Court of App als found that the publications were such that the "average man in the community" would be an atypical reader, not likely to be affected by the publications, and, therefore, the impact of the publications had to be tested by the average member of the audience to which the materials were directed, i.e., the average homosexual. This decision was reversed by the Supreme Court, 370 U.S. 478 (1962), but the issue of variable obscenity was never reached by the Supreme Court nor was any law fixed by the decision. Two of the justices, Harlan and Stewart, decided that the Post Office Department and the Court of Appeals had relied on an erroneous standard for determining obscenity, i.e., the Roth standard alone, and proceeded to find the magazines in question not obscene under the standard set forth in their opinion. Justices Brennan, Warren and Douglas held only that Congress had given the Post Office Department no authority to withhold allegedly obscene material from the mails by administrative action and hence, reversal of the ban was required. Justice Black concurred solely in the result. The only other Justice to take part in the decision was Justice Clark who dissented, saying, "While those in the majority, like ancient Gaul, are split into three parts, the ultimate holding of the Court today... requires the United States Post Office to be the world's largest disseminator of smut and Grand Informer of the names and places where obscene material may be obtained." 370 U.S. at 619.

\footnote{38} The leading proponents of the variable obscenity standard are Professors William B. Lockhart and Robert C. McClure of the University of Minnesota Law School. They make a persuasive argument for this more flexible approach to obscenity in their leading article Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 77-88 (1960).


\footnote{40} See United States v. 31 Photographs, supra note 37.


\footnote{42} 12 USCMA at 472, n. 2, 31 CMR at 58, n. 2. The Court's understanding that the Government had conceded this point is apparently erroneous for the Government argued alternatively in its brief that even were the variable standard not applicable the appellant's letters should still be condemned as obscene under the Roth standard. Brief for the United States, p. 14.
Grasping firmly to the Government's theory in *Holt*, the appellant Ford insisted that his letters to a pornography peddler describing in lurid detail the kinds of pornographic photographs he desired could not be considered obscene. The peddler was simply in the business of filling such orders and would be left unaffected by the letters. The Government's embarrassment at finding its own theory being used against it points up the problem of attempting to use one obscenity standard to cover all or even a large number of cases. Obscenity cases have too many unique facets to be comfortably categorized and ruled by *stare decisis*. What standard should be used to govern private personal mailings is still open to the inventiveness of counsel and court, whether military or civilian.

If, however, one uniform standard is to be chosen by the courts, then it is submitted it should be the variable standard with its emphasis on the audience to whom questioned material is directed. This standard has the advantage of flexibility which the fixed standard of *Roth* does not possess. Under the variable standard the mailing of hard-core pornography to an organization like the Kinsey Institute would not be a violation of law because intended for scientists whose primary interest in the material would be serious. Under the unbending standard of *Roth* the sender of this same material, though his motives be pure, would have to be held in violation of federal law since the material would appeal to the prurient interest of the average person in the community even though not intended for his eyes. On the other hand, the variable standard can be employed to strike at the vile profiteers whose market is the youth of the country or other groups which are particularly susceptible to erotic excitement. Their mailings, frankly appealing to adolescent or aberrant curiosity, would be condemned under the variable standard even though the mailings are adjudged as failing to arouse the prurient interest of the average person in the community. So long as the prurient interest of the average child or deviant of the group to which the material is directed is appealed to, the sender would be subject to the sanctions of the law.

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44 One federal court, however, in a decision subsequent to *Holt*, has held that the constant standard of *Roth* applies to private personal letters as well as to mass circulation distributions. United States v. Ackerman, 293 F.2d 449 (9th Cir. 1961).

Thus, the flexibility of the variable standard of obscenity provides a basis for judging the true character of the conduct of the sender by looking at the nature of the audience to whom the material is directed. And certainly the law should distinguish between the sender who directs material through the mail for scientific or educational purposes and the sender who seeks only to line his pockets by corrupting a segment of the normal population or preying upon the deviations of abnormal groups within society.

The final question raised in Holt was whether the federal mail obscenity statute 46 covers the obscene private letters of persons having a close personal relationship. Appellate defense counsel contended that the fact that Sergeant Holt and his girl friend were lovers exempted them from the prohibitions of the statute. The Court had little trouble disposing of this contention since the legislative history of the present statute clearly indicated the act's all-inclusive nature. 47

In Ford the most important question of obscenity law raised was that involving scienter or guilty knowledge. The accused officer was a collector of pornography who, in addition to mailing several obscene letters to a pornography merchant, also exhibited and disseminated certain obscene material to friends. In one instance the accused loaned a bartender in a bar frequented by him a copy of the book Helen and Desire. 48 The evidence of record did not establish that the accused had any knowledge of the contents of the book which he loaned to the bartender. During an out-of-court hearing the law officer sua sponte brought up the question of scienter and concluded that lack of knowledge of the contents of the book was not an element of the Article 133 offense of conduct unbecoming an officer and gentleman but that such lack of knowledge could be raised by the accused as a complete defense under the label off “mistake of fact.” 49 The law officer also ruled

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49 The instruction on scienter was as follows: “... [K]nowledge by the accused that the material, which was in fact lewd and lascivious, was contained in or appeared upon the item exhibited or loaned to another, is not an essential element of the offense...”; however, the facts and circumstances,
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that the only knowledge the accused had to possess was that of the actual contents of the book in question. The accused's belief as to the nature and quality of the material was irrelevant.\(^{50}\) On appeal to the Army board of review the accused officer contended that the law officer erred in instructing the court-martial that knowledge was not an element of the offense. Prejudice would arise from shifting the burden of coming forward with the evidence from the Government to the accused. The board agreed with the accused and held that scienter was an element of the offense. However, the board refused to reverse the finding of guilty of conduct unbecoming an officer. In construing the law officer's instruction the board found that the law officer had actually informed the court-martial that knowledge was an element of the offense's case; hence the accused had not been prejudiced.

Whatever the relative merits of the board's construction, the decision is significant because it clearly holds that guilty knowledge is an element of the offense of conduct unbecoming an officer when the conduct condemned is the dissemination of obscenity.\(^{51}\) It would also seem that the decision is authority for the proposition that the degree of scienter required is only that of knowledge of the contents of the allegedly obscene material. The board of review at least talked in those terms in its opinion.

In the author's opinion the decision in Ford is sound and should be adopted by the Court of Military Appeals in the event that tribunal is faced with the issue of scienter. First, from a procedural as shown by the evidence, indicate the possibility from which the court might generate a reasonable doubt as to whether the accused might have made a mistake of fact. If the court, in considering the evidence, does not exclude beyond a reasonable doubt the possibility on the circumstantial evidence in this case that the accused did not know of the contents of the document or photograph at the time it was shown or released by him to another, then that the fact will relieve the accused of all responsibility, and he must be acquitted. With respect to this evidence, the court is advised that if the accused was laboring under such a mistake, and if his mistake was honest and reasonable, he cannot be found guilty; however, such mistake must be both honest and reasonable in order to justify an acquittal. If the accused was not aware that he was presenting the matter to another person, then he cannot, if that belief was honest and reasonable, be found guilty of this offense, and that is so even though his knowledge is not a fact that must be proved by the prosecution as an essential element."

\(^{50}\) For support on this ruling the law officer might turn by way of analogy to the federal mail obscenity statute which requires only knowledge of the contents of the mail matter alleged to be obscene. See note 22 supra.

\(^{51}\) Several service boards of review have also taken this position on scienter in cases involving the striking of superior commissioned or non-commissioned officers. CGCMS 21251, Gill, 30 CMR 740 (1961); ACM 16234, Castro, 28 CMR 760 (1959); CM 360874, Murphy, 9 CMR 473 (1953); CM 359569, Moffet, 9 CMR 543 (1953).
standpoint it seems desirable to require the Government to plead and prove guilty knowledge and to allow the accused to contest this element by pleading not guilty and by coming forth with evidence of his lack of knowledge of the material. This approach, inherent in Ford, is less complicated than one requiring the accused to plead and prove an affirmative defense of lack of knowledge, with the Government then being required to rebut the affirmative defense. This raising of the question of scienter by way of affirmative defense entails several shifting of the burden of coming forward with the evidence, and it would be well to avoid this. The Ford approach has the added virtue of being consonant with the existing federal procedure in mail obscenity prosecutions.52

From a substantive standpoint the Ford holding that scienter is an element of the Government’s case is also sound. It avoids a possible constitutional infirmity present in the affirmative defense approach to raising the issue of scienter. Certainly, a compelling argument can be made that when a democratic sovereign curtails freedom to publish and disseminate written and pictorial matter by instituting criminal prosecutions, the sovereign should be the party burdened with pleading and coming forward, in the first instance, with evidence of scienter. To place this burden on the accused might have a decisive effect on the outcome of the trial. Where there is a lack of evidence on a given issue, the party having the burden of coming forward with the evidence loses on that issue. A procedural rule favoring the prosecution and making the defense against obscenity prosecutions more difficult could intimidate publishers and disseminators of written and pictorial material to curtail the publication and dissemination of some material which may be within the protection of the First and Fourteenth Amendments. This possible indirect effect of a procedural rule of law might be enough to condemn the rule as infringing on constitutional rights.53

An important point to note with regard to the issue of scienter is that very little law in this area is settled. Trial counsel preparing to prosecute obscenity cases under Articles 133 and 134 would be well-advised, then, to introduce on their own initiative as much circumstantial and direct evidence of guilty knowledge as is reasonably available. Failure to consider the question of scienter carefully could well result in settling the law at the expense of the Government’s case.

52 See text accompanying notes 68–79 infra.
53 Cf. Smith v. California, 361 U.S. 147 (1959) (the leading federal decision holding for the requirement of scienter in obscenity prosecutions).
OBSCENITY AND MILITARY PRACTICE

IV. OBSCENITY PROBLEMS OF SPECIAL CONCERN TO THE MILITARY

A. SUBSTANTIVE QUESTIONS

The standard for condemning material as obscene is whether the material appeals to the prurient interest of the average person in the contemporary community.\(^5^4\) A question relative to the \textit{Roth} standard which has particular relevance to the military is the definition of "community." Is the relevant community geographic in nature or institutional? Or is the concept of "community" really rather meaningless? If, in \textit{Roth}, the Supreme Court was referring to a grouping of people in a particular space, courts-martial would have to take into consideration the location of the Army post wherein the alleged obscenity offense occurred together with the mores of the civilian and military communities in that locale. If, on the other hand, the Supreme Court was speaking generally of the present day over-all American cultural society, as Justices Harlan and Stewart suggest in their opinion in \textit{Manual Enterprises v. Day},\(^5^5\) the location of the alleged offense would be immaterial. From the viewpoint of those interested in uniformity throughout the military establishment, the less geographical in nature the concept the more desirable it will be. Material which is obscene at one Army installation should be obscene at any other installation, whether that installation be located on the plains of Kansas or at Governor's Island, New York.

Finally, a more practical but no less important question for military justice is the conduct which may be condemned under Articles 133 and 134 of the Uniform Code. There is no question that the sending of obscene letters and other material through the mail is violative of the Code.\(^5^6\) So is the making of obscene phone calls to unconsenting women\(^5^7\) and the exhibiting of obscene

\(^{54}\) United States v. Roth, 354 U.S. 476 (1957).
\(^{55}\) 370 U.S. 478 (1962). Two Justices, Harlan and Stewart, have already stated their belief that the relevant community is national in scope. "There must first be decided the relevant 'community' in terms of whose standards of decency the issue must be judged. We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency." 370 U.S. at See also Lockhart & McClure, \textit{Censorship of Obscenity: The Developing Constitutional Standards}, 45 Minn. L. Rev. 5, 113–14 (1960).
motion pictures for profit in a government-owned building. While there are few reported military obscenity cases, and generalization can be hazardous, it would seem that any open and notorious communication or dissemination of obscene language or material would be conduct unbecoming an officer and gentleman, conduct to the discredit of the service, or conduct prejudicial to good order and discipline. But the trend of the military cases is opposed to the idea that mere possession of obscene matter is violative of either Article 133 or 134 of the Uniform Code. And in the Ford case an Army board of review held that the exhibition of obscene pictures by an officer to another while in his own quarters during a social occasion did not constitute conduct unbecoming an officer and gentleman. It has been suggested that to punish mere possession of obscenity would be a violation of First Amendment guarantees.

Under present interpretations of the general articles only those acts involving obscenity which have a decided tendency to degrade or corrupt servicemen or civilians, bring discredit upon the service, destroy discipline and respect for rank are condemned. Certainly, the sale of salacious material or the exhibition of salacious shows or films for a price is corrupting and degrading to both seller and purchaser. Commercial transactions involving obscene matter should not be tolerated. Nor should the notorious exhibition of obscenity to those of lower military status by men of greater status be tolerated. Such exhibition would cause, if nothing else, contempt toward the exhibitors, which contempt could be easily translated into disciplinary problems. Although the possession of obscenity and the limited dissemination of such material in social situations must be condemned in a moral sense,
such conduct is not, in and of itself, violative of Articles 133 and 134. The Army boards of review have made a distinction between a soldier’s military life and his private life in this area of the law.

B. PROCEDURAL QUESTIONS

The first important procedural question in obscenity prosecutions under the Uniform Code is how alleged offenses are to be pleaded. Most of the important issues are well handled in the Simmons case. In that case the accused was found guilty of communicating telephonically obscene language to a female under a specification which detailed the language used and labeled this language as obscene. The accused contended that because the words used were open to a possible innocent interpretation, and “were not obscene per se,” the specification did not state an offense. In order to state an offense, according to the accused, the Government had to further allege that the accused used the words in an obscene manner and that they were so understood by the female to whom they were addressed. In affirming the findings of guilty, an Army board of review held that a specification which made a bare allegation that an accused uttered obscene language to a female would be legally sufficient. The board found support for its holding in the modern practice of avoiding the pleading of evidentiary facts.

The board’s decision, based as it is on the modern practice of notice pleading, is applicable to every type of obscenity offense. Thus, in the case of mail offenses it would only be necessary in the specifications to identify the objectionable letters by postmark and to characterize the letters as obscene. The same is true of obscene publications and motion pictures. All that is required is that the material be identified by title, that the time and place of the offense be alleged, and that the material be characterized as obscene. Because of the rule that allegedly obscene matter must

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61 CM 400786, Simmons, supra note 57.
62 See 27 CMR at 656 for the language of the specification.
63 Section 1461 of the Criminal Code of the United States talks in terms of “lewd, lascivious, obscene,” and if the federal mail obscenity statute is specifically incorporated in the pleading, it is advisable to characterize the mail matter in this fashion. Otherwise, a characterization that the mail matter is “obscene” is sufficient since the words used in section 1461 are synonymous, and use of more than one of them would be surplusage.
64 In the case of prosecutions under Article 134 it is unnecessary to allege that the particular conduct was to the prejudice of good order and discipline or that it was to the discredit of the service. United States v. Marker, 1 USCMA 393, 400, 3 CMR 127, 134 (1962); ACM 14661, French, 25 CMR 851 (1958), aff’d in part and rev’d in part, 10 USCMA 171, 27 CMR 245 (1959). But, of course, an instruction to the court-martial on this element is required. United States v. Williams, 8 USCMA 325, 24 CMR 135 (1957); United States v. Gittens, 8 USCMA 673, 25 CMR 177 (1958).
be judged as a whole, it would be unwise in drafting specifications to pick out particular written passages or visual scenes for inclusion in the pleadings. Specifications quoting such passages or describing such scenes would be subject to attack on appeal on the ground that improper standards had been utilized by the Government, and therefore the charges and specifications did not allege offenses. In the case of untitled photographs or motion pictures, however, a simple allegation that the film or photograph is obscene would likely not withstand a motion to make more definite and certain. In such case, the specification should contain a general, over-all description of the material.

Another question with regard to pleading is under what clause of Article 134 should obscenity offense be brought. The general article has three clauses under which specifications may be laid: (1) disorders and neglects to the prejudice of good order and discipline in the armed forces; (2) conduct of a nature to bring discredit upon the armed forces; and (3) federal crimes and offenses not capital.65 Mail offenses may fall within any one or more of these categories and can always be alleged under the third clause of Article 134. But is it wise to specify that certain conduct violates a particular enumerated federal statute? The answer, from the prosecution's point of view, is decidedly not. The federal statute may require a particular mode or element of proof that would not be required by alleging the offense generally under the first or second clause or both of these clauses of Article 134. Furthermore, the fact that the specification does not designate the particular federal statute upon which the prosecution is based does not necessarily mean that the specification is insufficient to show a violation of that federal statute.66 Thus, by refraining from designating a particular federal statute, the Government may very well be able to prosecute its case under any one or all of the clauses of Article 134. On the other hand, by designating the particular federal statute violated, the Government may restrict itself unduly to the theory embodied in the third ("crimes and offenses not capital") clause of the general article. This is so because in such prosecutions the law officer need not instruct the court-martial that the alleged misconduct is either prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces or both. The absence of such instructions would

necessarily limit the Government to a theory of the case controlled solely by the third clause of the general article. Such practice, while advantageous to the Government, is subject to the criticism that it violates the spirit of modern notice pleading in that it avoids giving the accused notice of the precise theory of the Government's case. However, as long as the general article affords the Government the opportunity to proceed with its case on more than one theory, neither ethics nor law requires the prosecution to limit itself by giving notice of its choice of theories.

Turning now to questions of proof in obscenity cases, the Government's burden is met in much the same way as it would be in prosecutions in federal civil courts. For mail offenses, the proof required is almost identical to prosecutions under Section 1461. The Government must show that the accused (a) knowingly deposited in the mail (b) obscene matter. In the case of private letters the burden of showing a knowing deposit is met by proof, including the expert testimony of handwriting or typewriter analysts, that the accused wrote the letter in question. In cases involving other than privately written material, the knowing deposit can only be established by circumstantial evidence. The obscenity of the mailed matter is generally established by its bare introduction; however, testimony by experts on literary pornography that the material is pornographic would also likely be admissible. This opinion testimony would not violate the so-called "ultimate issue" doctrine since it represents only a literary judgment as to the nature of the material and does not "usurp" the court-martial's responsibility to determine the legal nature of the material. But the literary judgment is relevant, since it is a factor bearing on the question of whether the material has redeeming social value.

For other than mail offenses, the Government must introduce the material alleged to be obscene and, to overcome the present rule that bare possession of pornography does not violate the Uniform Code, should show that the material was openly and

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68 CM 400388, Schneider, supra note 59 (prosecution under 18 U.S.C. § 1462 (1958), failed because statute held not applicable to domestic transportation of pornographic materials but only to importation of such materials from abroad).
69 See note 22 supra.
70 Cf. note 79 infra and accompanying text.
72 See notes 59 and 60 supra and accompanying text.
notoriously disseminated or communicated. In most instances proof of open and notorious communication will be readily available.73

The defense can, of course, content itself with a general denial and need not introduce any evidence. But the defense may wish to assert either a lack of guilty knowledge on the part of the accused or the non-obscenity of the material. On the question of scienter, defense proof will usually be in the form of testimony by the accused, should he be willing to take the stand, that he was unaware of the contents of the material in issue. A more complex question of proof is presented when the defense chooses to defend on the ground that the material is not obscene, judged by contemporary standards. The defense has two options. First, it may wish to show that the conduct for which the accused is being prosecuted is prevalent in the military and is tolerated by the contemporary military community, assuming that the concept of the contemporary community does have legal significance.74 This would require testimony as to both the prevalence and general acceptance of the alleged misconduct. While testimony by military personnel on the prevailing moral climate in the military may well be relevant,75 admissibility of such evidence is questionable on two grounds. First, there would seem to be no real need for this type of testimony since the members of a court-martial would have as much knowledge of the prevailing mores of the military community as would any witnesses whom the accused might be able to secure.76 Second, and more basic, such testimony, particularly

73 In the case of CM 405791, Ford, supra note 56, however, the Government only became aware of the accused's conduct when New York police and postal inspectors discovered certain of Ford's letters in the files of a New York pornography peddler. Subsequent investigation by military police criminal investigators turned up the fact that the accused had loaned the book Helen and Desire to a civilian and had shown a pornographic picture to a fellow officer.

74 Some support for such a defense might be gleaned from the case of CM 401092, Wheatley, 28 CMR 461, aff'd, 10 USCMA 539, 28 CMR 105 (1959). In that case the accused, a company commander, was convicted of maltreatment of subordinates in that he permitted members of his cadre to require trainees to respond to the order to "sound off" by repeating certain "four-letter" words a dozen times. An Army Board of review, while finding the response obscene and crude, also found that the response "could not be considered unduly shocking to the sensibilities of those who heard it in the milieu in which it was used." 28 CMR at 463 (emphasis added). The Army board found some support in the testimony of one trainee who considered the required response to be nothing more than a mild and somewhat humorous form of hazing.

75 See note 79 infra.

76 It is highly unlikely that an accused in an obscenity prosecution could secure the favorable testimony of the only recognized experts in the field of military morals—military chaplains.
in officer cases, appears to go to an ultimate issue in obscenity prosecutions, i.e., whether the conduct engaged in is unbecoming to an officer and gentleman or is prejudicial to good order and discipline.77 Whatever the objection, one Army board of review has already held such evidence to be inadmissible.78

The other option would be to show that the material has redeeming social value. This can be established either through the positive testimony of literary experts that the material has literary value or the negative testimony of experts on pornography such as psychologists that the material is not pornographic. Again, as with expert testimony for the Government, this evidence is relevant and does not conflict with the "ultimate issue" limitation on expert opinion testimony. Therefore, there should be no question as to its admissibility.79

V. CONCLUSION

In examining this article the reader must inevitably become aware of the many unresolved questions in the field of criminal obscenity law. Some of these questions may in time be answered by federal, state and military tribunals. Many others, because of the deeply conceptual nature of obscenity law, may never be subject to the type of final resolution favored by practicing counsel. But the military lawyer interested in military justice and the protection of the legitimate interests of a civilized society such as our own should not be discouraged by the often nebulous consistency of the law. Rather, he should be encouraged to lend his talents to making sharper and more precise the available tools of legal analysis in this field, for though there may be no empirical proof to establish that the unrestrained dissemination of pornography has a deleterious effect upon a society, common sense tells

77 A different situation would seem to exist where the conduct is alleged to be service discrediting. If the activity charged is in relation to civilians, whether or not the activity is prevalent and accepted in the military community would be only one factor in determining the ultimate issue of whether or not it represents service discrediting conduct.
78 CM 405791, Ford, supra note 56.
79 Yudkin v. State, 182 A.2d 798 (Md. 1962) (unanimous opinion); see Grove Press, Inc. v. Christenberry, supra note 71, in which District Judge Bryan, in authorizing for mailing the book Lady Chatterley's Lover by D. H. Lawrence, relied heavily upon the expert opinion of noted literary critics. While the case came before the United States District Court on appeal from an administrative decision of the Post Office Department, Judge Bryan held that he had the duty to determine the question of obscenity de novo. See also Smith v. California, 361 U.S. 147, 160 (1959) (concurring opinion by Frankfurter, J.).
us that such traffic may lead to the perversion of normal healthy sex attitudes of young people and may also result in overt sex offenses. Society should be protected against this form of corruption. One way in which this can be accomplished is through the continued enforcement of our criminal obscenity law, no matter how difficult it may sometimes prove to be.

This is not to say, however, that the civilian and military police and prosecutors should become latter day Anthony Comstocks. Intelligence and discrimination are required if enforcement is to have a salutary effect. A free society must protect itself against harmful sexual deviation and yet not lose its precious freedom of expression.

While the difficulties in creating precise legal doctrine and concepts in this field are necessarily great, the military lawyer has a responsibility to make the effort because a rational, workable, but properly circumscribed, obscenity law is needed to protect society.