Marquette Law Review

Volume 41
Issue 3 *Winter 1957-1958*

Article 9

1958

Constitutional Law: Obscenity Not Within the Area of Constitutionally Protected Speech or Press

Erwin J. Keup

mony cannot be considered as substantive evidence. The Court considering the "unorthodox view" of Dean Wigmore remarked:

> "The previous statement was when made and remains an ex parte affair, given without oath and test of cross examination. Important also is the fact that, however much it may have mangled truth, there was assurance of freedom from prosecution for perjury. The chief merit of cross examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestion of others, whose interest may be, and often is to maintain falsehood rather than truth."[20]

The Court further remarked that there are additional practical reasons for not attaching anything of substantive evidential value to extra judicial assertions which come in only as impeachment. It was urged that such unrestricted use as evidence would increase both temptation and opportunity for the manufacture of evidence and declarations extracted by the most extreme of "third degree" methods could easily be made into affirmative evidence.[21]

It is the conclusion of this writer that the ratio decidendi of the orthodox view in this matter is preferable. Although the Wisconsin Court in the featured case did not give a detailed consideration to both positions, it is submitted that the Minnesota Court's reasoning in the *Saporen* case, is sound. Obviously any prior inconsistent statement which violates the rule against hearsay, that is: (1) is not made under oath; (2) is made without the opportunity for cross examination; (3) is made without confrontation, would be inadmissible as substantive evidence. However, even if the statement would be non-hearsay or fall within its exceptions, it would seem that for the policy reason of discouraging the manufacture of evidence, it would be more practical to exclude the prior inconsistent statement as substantive evidence.

RICHARD GLEN GREENWOOD

Constitutional Law: Obscenity Not Within the Area of Constitutionally Protected Speech or Press — In case No. 582, on certiorari to the United State Supreme Court, the defendant conducted a business in New York in the publication and sale of books, photographs, and magazines. Circulars and advertising matters were used to solicit sales. Defendant was convicted by a jury in the District Court for the Southern District of New York upon four counts of a

[20] See note 17 *supra*.
[21] *Ibid.*

twenty-six count indictment charging him with mailing obscene books, periodicals, photographs, and advertising circulars in violation of the federal obscenity statute.[1] His conviction was affirmed by the Court of Appeals for the Second Circuit.[2] In case No. 61, on appeal to the United States Supreme Court, the defendant conducted a mail order business from Los Angeles. He was convicted by the judge of the Municipal Court of the Beverly Hills Judicial District (having waived a jury trial) under a misdemeanor complaint which charged him with lewdly keeping for sale obscene and indecent books and with writing, composing, and publishing an obscene advertisement of them, in violation of the California Penal Code.[3] The conviction was affirmed by the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles.[4] The United States Supreme Court in a consolidated opinion *held*: Both convictions affirmed. The federal obscenity statute punishing the mailing of material that is obscene, lewd, lascivious, or filthy, or other publications of an indecent character, and the California obscenity statute making punishable, *inter alia,* the keeping for sale or advertising of material that is obscene or indecent, do not offend constitutional safeguards against convictions based upon protected material nor do they violate constitutional requirements of due process by failing to give adequate notice of what is prohibited.[5] Chief Justice Warren, in a separate

---

[1] The federal obscenity statute provided, in the pertinent part:
" .... Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, letter, writing, print, or other publication of an indecent character; and—
"
". . . .
".... Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles or things may be obtained or made, whether sealed or unsealed.
"
". . . .
"..... Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
"..... Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or aiding in the circulation or disposition therof, shall be fined not more than $5,000 or imprisoned not more than five years, or both. . . ." 18 U.S.C. 1461 (1950).
The 1955 amendment of this statute, 69 STAT. 183, is not applicable to this case.

[2] Roth v. United States, 237 F.2d 796 (2d cir. 1956).

[3] The CALIFORNIA PENAL CODE provides, in pertinent part:
"Every person who wilfully and lewdly, either:
"3. Wites, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; or,
"4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print or figure; . . . .
"6. . . . is guilty of a misdemeanor. . . ." CAL. PENAL CODE ANN. 311 (1955).

[4] Alberts v. State of California., 138 Cal App.2d 909, 292 P.2d 90 (1956).

[5] No issue was presented in either case concerning the obscenity of the material involved.

opinion, concurred in the result but expressed doubts as to the wisdom of the broad language used in the majority opinion and limited the decision to the facts before the court and to the validity of the statutes in question as there applied. Mr. Justice Harlan concurred in the results of the California conviction (case No. 61) but dissented in the federal obscenity statute conviction (case No. 582) on the grounds that the regulation of obscenity embodied in the federal statute was beyond federal power. Mr. Justice Douglas, joined by Mr. Justice Black, dissented in both cases, asserting that sustaining the convictions would make the legality of a publication turn on the purity of thought which a book instills in the mind of a reader rather than provocation of overt acts or antisocial conduct and therefore the federal and state statutes were violative of the constiutional guaranties of free speech and press. *Roth v. United States,* 354 U.S. 476 (1957).

The majority opinion, written by Mr. Justice Brennan, speaking for five members of the Court, for the first time squarely lays down the rule that obscenity is not within the area of constitutionally protected speech or press either: (1) under the First Amendment, as to Federal Government, or (2) under the Due Process Clause of the Fourteenth Amendment, as to the states. Numerous cases involving dicta are cited by the Court indicating that the Court always assumed that obscenity is not protected by the freedoms of speech and press.[6] The Court then goes on to point out that historically, the unconditional phrasing of the First Amendment was not intended to protect every utterance — proof of which lies in the fact that the guaranties of freedom of expression[7] in effect in ten of the fourteen states which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the fourteen states provided for the prosecution of libel,[8] and all of these states made either blasphemy or profanity, or both, statutory crimes.[9]

---

[6] Ex parte Jackson, 96 U.S. 727, at 736-737 (1878); United States v. Chasse, 135 U.S. 255, at 261 (1890); Robertson v. Baldwin, 165 U.S. 275, at 281 (1897); Public Clearing House v. Coyne, 194 U.S. 497, at 508 (1904); Hoke v. C.S., 227 U.S. 308, at 322 (1913); Near v. State of Minnesota, 283 U.S. 697, at 716 (1931); Chaplinsky v. State of New Hampshire, 315 U.S. 568, at 571-572 (1942); Hannegan v. Esquire, Inc., 327 U.S. 146, at 158 (1946); Winters v. People of State of New York, 333 U.S. 507, at 510 (1948); Beauharnais v. People of Illinois, 343 U.S. 250, at 266 (1952).

[7] DEL. CONST. art. I,§5 (1792); GA. CONST. art. LXI (1777); MD. CONST., Decl. of Rights §38 (1776); MASS. CONST., Decl. of Rights art. XVI (1780); N. C. CONST., Decl. art. XLI (1776); S. C. CONST. art. XLIII (1778); VT. CONST. art. XIV (1777); VA. Decl. of Rights §12 (1776).

[8] CONN. PUB. STAT. LAWS 355 (1808); DEL. CONST. art 1, §5 (1792); GA. PENAL CODE, 8th Div. §8 (1817), Digest of the Laws of Ga. 364 (Prince 1822); II MD. PUBLIC GENERAL LAWS 1096 (Poe 1888); Commonwealth v. Kneeland, 20 Pick. 206, 37 Mass. 206(1838); ACT FOR THE PUNISHMENT OF CERTAIN CRIMES NOT CAPITAL (1791), LAWS OF N.H. BEC (1792); ACT RESPECTING LIBELS (1799), N.J. REV. LAWS §DVV AVRJJQ; People v. Crosswell, 3 Johns. Cas. N.Y., 337 (1804); 2 LAWS OF N.C. 999 (1821); PA. CONST. art. 9, §7 (1790); R.I. CODE OF LAWS (1647). Proceedings of the First General As-

The Court's main argument in support of its holding that obscenity is not within the area of constitutionally protected speech or press is that obscenity is utterly without any redeeming social importance while only those utterances that form an essential part of an exposition of ideas having some social value are assured protection by the First Amendment.[10] The Court expressed the following opinion:

> "All ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the guaranties, unless excluadable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956."[11]

It is submitted, that the controversial part of this decision is the Court's *affirmation* of the standard for the judging obscenity as laid down in a number of lower court decisions;[12] to wit: Whether to the

---

sembly and Code of Laws 44-45 (1647); R. I. CONST. art. 1, §20 (1842); 1 LAWS OF VT. 366 (Tolman 1808); Commonwealth v. Morris, 1 Va. Cas. 176, 3 Va. 176 (1811).

[9] Act for the Punishment of Divers Capital and Other Felonies, ACTS AND LAWS OF CONN. 66, 67 (1784); I LAWS OF DEL. 173, 174 (1797); DIGEST OF LAWS OF GA. 512, 513 (Prince 1822); DIGEST LAWS AND LIBERTIES OF MASS. BAY §3 (1646); MASS. BAY COLONY CHARTERS & LAWS 58 (1814); REV. STAT. OF MASS. 741 (1836); LAWS OF N. H. 252, 256 (1792); LAWS OF N. H. 258 (1792); 2 LAWS OF N.Y. 257, 258 (Jones & Varick 1777-1789); People v. Ruggles, 8 Johns. R. 290 (1817); 1. N.C. LAWS 52 (Martin Rev. 1715-1790); ACT TO PREVENT THE GRIEVOUS SINS OF CURSING AND SWEARING (1700); II STATUTES AT LARGE OF PA. 49 (1700-1712); ACT FOR THE PREVENTION OF VICE AND IMMORALITY §II (1794), 3 LAWS OF PA. 177, 178 (1791-1802); ACT TO REFORM THE PENAL LAWS §33, 34 (1798), LAWS OF R. I. 584, 595 (1798); ACT FOR THE MORE EFFECTUAL SUPPRESSING OF BLASPHEMY AND PROPHANENESS (1703), LAWS OF S. C. 4 (Grimke 1790); ACT FOR THE PUNISHMENT OF CERTAIN CAPITAL, AND OTHER HIGH CRIMES AND MISDEMEANERS §BJ (1797), 1 LAWS OF VT. 352, 339 (Tolman 1808); ACT, FOR THE PUNISHMENT OF CERTAIN INFERIOR CRIMES AND MISDEMEANORS §20 (1797), 1 LAWS OF VT. 352, 361 (Tolman 1808); ACT FOR THE EFFECTUAL SUPPRESSION OF VICE §1 (1792), ACTS OF GENERAL ASSEMBLY OF VA. 286 (1794).

[10] Chaplinsky v. New Hampshire, 315 U.S. at 571-572 (1942).

[11] 1 L. Ed. 2d 1507 (1957).

[12] *E. g.,* Walker v. Popenoe, 149 F.2d 511 (D. C. Cir. 1945); Parmelee v. U.S., 113 F.2d 729 (D.C. Cir. 1940); U.S. v. Levine, 83 F.2d 156 (2d cir. 1936); U.S. v. Dennett, 39 F.2d 564 (2d cir. 1930); Khan v. Leo Feist Inc., D.C., 70 F.Supp. 450 *aff'd,* 165 F.2d 188 (2d. cir. 1947); U.S. v. One Book Called "Ulysses." D.C., 5 FSupp 182, *aff'd,* 72 F.2d 705 (2d cir. 1934); American Civil Liberties Union v. City of Chicago, 3 Ill.2d334, 121 N.E.2d 585 (1954); Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E.2d 840 (1945); State of Missouri v. Becker, 364 Mo. 1079, 272 S.W.2d 283 (1954); Adams Theatre Co. v. Keenan, 17 N.J. 267, 96 A.2d 519 (1953); Bantam Books, Inc., v. Melko, 25 N.J. Super. 292, 96 A.2d 47 (1953); Commonwealth v. Gordon, 66 Pa. D.&C. 101, *aff'd sub nom.* Commonwealth v. Feigenbaum, 166 Pa.Super. 120, 70 A.2d 389 (1950); *cf.* Roth v. Goldman, 172 F.2d 788, at 794-795 (2d cir. 1949).

average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.[13]

Two of the four dissenting justices, Mr. Justices Douglas and Black, attack this standard of obscenity applicable to the statutes in question, on the grounds that punishment is inflicted for thoughts provoked without proof either that the obscene material will perceptibly create a clear and present danger of anti-social conduct[14] or will probably induce its recipients to such conduct.[15] These dissenting justices express their fears by stating:

> "For the test that suppresses a cheap tract today can suppress a literary gem tomorrow. All it need do is to incite a lascivious thought or arouse a lustful desire. The list of books that judges can place in that category is endless."[16]

In a separate opinion, Justice Harlan dissented to the conviction under the federal obscenity statute in case No. 582. He asserts that the federal government has no business under any power whatsoever to bar the sale of books because they might lead to "any kind of thoughts." He contends that the interests which obscenity statutes protect are primarily entrusted to state care and not to the Federal Government. The Federal Government's sphere of control, as he sees it, is pretty well limited to regulations of hard-core pornography. He does, however, concur in the conviction under the California obscenity statute in case No. 61. on the ground that the legislation by its very language does not, as does the federal statute, attempt to punish on the ground that obscene material excites lustful thoughts. The California law is saved, Harlan feels, because it *assumes* that obscene material can "deprave or corrupt" the reader and therefore induce criminal or immoral sexual *conduct.* This, says Harlan, presents a debatable issue which prevents him from substituting his judgment for that of the California Legislature.

The majority approach causes Justice Harlan to fear that the broad standard for judging obscenity, as laid down therein, may result in a loosening of the tight reins which the state and federal appellate courts should hold upon the enforcement of obscenity statutes. He reasons that it will tend to obscure the peculiar responsibilities resting on the appellate courts of determining for *themselves* whether the attacked expression is suppresable within constitutional standards, and

[13] *I.e.,* material having a tendency to excite lustful thoughts. Webster's New International Dictionary (Unabridged 2d ed. 1949) defines *prurient,* in pertinent part, as follows:
" . . . . Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd . . . ."

[14] Schenck v. United States, 249 U.S. 47 (1919).

[15] Dennis v. United States, 341 U.S. 494 (1951).

[16] 354 U.S. at 476.

thus encourage them to rely on easy labeling and jury verdicts, which in effect leaves the fate of a particular book at the mercy of possible unqualified lower court judges and juries.

There appears to be good reason for not inducing the appellate courts to relax their control. It does seem that the question whether a *particular* book may be suppressed is not a mere matter of classification of "fact" to be entrusted to a fact finder, be it judge or jury, but a question of *constitutional judgment* which the appellate courts *must* determine for themselves.

As Justice Harlan states:

> "Every communication has an individuality and 'value' of its own. The suppression of a particular writing or other tangible form of expression is, therefore, an *individual* matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppressable within constitutional standards. Since those standards do not readily lend themselves to generalized definitions, the constitutional problem in the last analysis becomes one of particularized judgments which appellate courts must make for themselves."[17]

In the only other Supreme Court case to raise the question of constitutional protection for those charged with publishing or selling obscene literature, *Doubleday & Co. v. New York*,[18] the eight justices[19] who sat, divided four-to-four and, as is the custom in such cases, there was no announcement as to who voted which way and no opinion was rendered clarifying the question. It should be noted that defendant publishing company's brief centered solely on the contention that works of literature, both fictional and non-fictional, dealing with sex problems are entitled to the same constitutional protection as any other literature and can be suppressed only when the publication created a "clear and present danger" to the substantial interest of the state.

After careful thought, it is this writer's opinion that if the defendants, in the instant case, had not in the past been old hands at publishing and surreptitiously mailing lurid pictures and materials for profit,[20] the decision in the instant case would have at best resulted in a four-to-four deadlock, as in the *Doubleday* case with a very good likelihood of a five-to-four vote against conviction. This conclusion is reached through a careful study of Mr. Chief Justice Warren's concurring opinion, which was the fifth vote for conviction in the in-

---

[17] 1 L. Ed. 2d at 1514.

[18] 297 N.Y. 687, 335 U.S. 848 (1948).

[19] Justice Frankfurter did not participate.

[20] Defendant Roth previously convicted on similar charges, Roth v. Goldman, 172 F.2d 788 (2d Cir. 1949).

stant case. The Chief Justice, in limiting the majority opinion to the facts of this particular case, stated that it was not the book on trial but the *person.* The conduct of the defendant is the central issue with the nature of the book as an attribute of the defendant's conduct. He sums up the case as:

> "The personal element in these cases is seen most strongly in the requirement of *scienter.* Under California law, the prohibited activity must be done 'willfully and lewdly.' The federal statute limits the crime to acts done 'knowingly.' In his charge to the jury, the district judge stated that the matter must be 'calculated' to corrupt or debauch. The defendants in both these cases were engaged in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interests of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. That is all we need to decide."[21]

Under this view, a publisher of a book which tends to arouse lustful thuoghts in its readers would not be convicted unless it was proven that he willingly and/or knowingly published the book with the intention of arousing the prurient interests of his customers.

However, in spite of Mr. Chief Justice Warren's attitude, the chance that the holding of the instant case would be reversed where the defendant was not shown to have the necessary scienter seems very remote in the face of another Supreme Court decision handed down on the same day as the instant case. This decision, *Kingsley Books v. Brown,*[22] was allegedly based on the instant decision, and held that Due Process Clause of the Fourteenth Amendment is not violated by a state statute which authorizes the chief executive or legal officer of a municipality in which a person, firm, or corporation sells or distributes, or is *about to sell or distribute,* obscene written and printed matter, to maintain an action for an injunction to prevent the sale or distribution. The *Kingsley* case also ended in a five-to-four decision for conviction, but in this decision, Chief Justice Warren was on the side of the dissent, stating that the case was not a criminal obscenity action but one wherein the New York police, under a different state statute than the one used in the instant case, summarily seized books which, *in their opinion,* were unfit for public use because of obscenity and then obtained a court order for their condemnation and destruction. Thus in fact, the law put the book on the stand and not its manner of use. It therefore seems that the majority opinion in the instant case is accepted as the law unaffected by the qualifying concurring opinion of Chief Justice Warren.

---

[21] 1 L. Ed.2d at 1513.
[22] 77 S.Ct. 1325 (1957).

Does this then mean that the fear of the dissent, in the instant case, that the standard of obscenity as so adopted will suppress the "literary gem" of tomorrow if it in any way incites a lascivious thought or arouses a lustful desire, is based upon well founded grounds? This writer tends to answer this question in the negative after a thorough investigation of the lower court decisions[23] from which the instant case drew its standard for judging obscenity. Books of "literary distinction" or works which have "an accepted place in the arts," including Ovid's *Art of Love* and Boccacio's *Decameron* have been held not to be within obscenity statutes.[24] Works of physiology, medicine, science, and sex instruction are not within obscenity statutes, though to some extent and among some persons they may tend to promote lustful thoughts.[25] Realistically coarse scenes and vulgar words were held not to be obscene in themselves but they are considered in determining the dominant effect of the book on its average readers.[26] The dominant theme of the book must be obscene,[27] although if an objectionable part is totaly irrelevant to an unobjectionable dominant theme, the book is usually found obscene.[28] Introduction into evidence of literary criticisms and classical books of a comparable nature are admissible.[29] Even the Court in the instant case referred to certain exceptions to the general standard:

> "However, sex 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 and constitutional protection of freedom of speech and press."[30]

Considering these exceptions in light of the standard for judging obscenity as adopted in the instant case, along with the fact that all forty-eight states have obscenity statutes,[31] this writer is of the opinion that the danger of infringement upon the constitutional rights of freedom of speech and press does not lie in the standard for judging obscenity but in *whom* this power of judging will finally rest.

---

[23] See note 12 *supra.*
[24] See *e.g.,* United States v. Levine, 83 F.2d 156, at 157 (2d cir. 1936); United States v. One Book Called "Ulysses," 5 F.Supp. 182 (S.D. N.Y. 1933). 72 F.2d 705 (2d cir. 1934); Roth v. Goldman, 172 F.2d 788 (2d cir. 1930).
[25] United States v. Dennett, 39 F.2d 564 (2d cir. 1930).
[26] Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E.2d 840 (1945).
[27] United States v. One Book Called "Ulysses," 72 F.2d 705 (2d cir. 1934).
[28] See note 26 *supra.*
[29] See notes 20 & 27, *supra.*
[30] See note 11 *supra* at 1508.
[31] Hearings before Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, pursuant to S. Res. 62, 84th Con., 1st Sess. 49-52 (May 24, 1955). Although New Mexico has no general obscenity statute, it does have a statute giving to municipalities the power "to prohibit the sale or exhibiting of obscene or immoral publications, prints, pictures, or illustrations." N. M. STAT. ANN., §§ 14-21-3, 14-21-12 (1953).

There is much criticism[32] as to whether a trial judge or jury could properly apply a standard calling for such generalized definitions as: average person, community standards, dominant theme as a whole, and prurient interest. Mr. Justice Harlan, in his dissent, asserts a solution to these criticisms when he states that the question whether a particular work is obscene involves not really an issue of fact but a question of *constitutional judgment* of the most sensitive and delicate kind. He illustrates this contention most persuasively:

> "Many juries might find that Joyce's 'Ulysses' or Bocaccio's 'Decameron' was obscene, and yet the conviction of a defendant for selling either book would raise, for me, the gravest constitutional problems, for no such verdict could convince me, without more, that these books are 'utterly without redeeming social importance.' "[33]

ERWIN J. KEUP

Military Law: Coercion and Duress as a Defense to Collaborating with the Enemy — Lieutenant Colonel Harry Fleming was captured by the Chinese Communist forces near the Yalu River in North Korea in October 1950. He was held as a prisoner of war in various prison camps in North Korea. Upon his return to the United States he was court martialed. The charge against Fleming was that he, while a prisoner of war, did willfully, unlawfully and knowingly collaborate, communicate and hold intercourse directly with the enemy by joining with, participating in, and leading discussion groups and classes reflecting views and opinions that the United Nations and the United States were illegal aggressors in the Korean conflict, and by participating in the preparation and making communist propaganda recordings designed to promote disloyalty and disaffection among the United States troops, by praising the enemy and attacking the war aims of the United States. The charge was substantiated by the evidence.

The evdence also showed the pressure and privation which the prisoner Fleming had to endure. Immediately before his capture he was wounded about the back and legs. For ten days after his capture he was given no food or water. He was forced to march seventy miles to the prison camp in that condition, and during that time he was frequently questioned. Each time he refused to answer he was physically abused by being kicked, slapped and pushed. Due to wounds, mistreatment, malnutrition and debilitation he lost about forty pounds. At the camp the prisoners were so crowded that there was not enough room for them to lie down at night and stretch out. They were not given winter clothing or shoes, and the food ration consisted of but

[32] Lockhart & McClure, *Literature, The Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295, 391. (1938).
[33] See note 11 *supra* at 1514.