To Inflame the Censors

Hemingway's Use of Obscenity in *To Have and Have Not*

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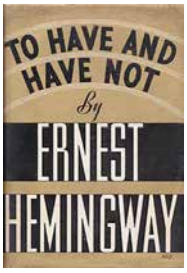


Ernest Hemingway's dedication to "full use of the English language" provoked a backlash culminating in the 1938 Detroit ban of To Have and Have Not. *The legal battle over the ban of the controversial novel was mired by procedural irregularities, but the litigation catalyzed legal and artistic breakthroughs that ultimately furthered Hemingway's objective of promoting realism in literature.*

EDITOR'S NOTE: THIS ARTICLE CONTAINS LANGUAGE WHICH SOME READERS MAY FIND OFFENSIVE.

INTRODUCTION

In the cabin of a rescue boat at sea between Cuba and Key West, Harry Morgan lies dying. Shot in the stomach by bank robbers during a getaway gone wrong, the protagonist of Ernest Hemingway's *To Have and Have Not* uses his last breaths to stammer through a soliloquy that embodies a raw and fatalistic view of humanity:

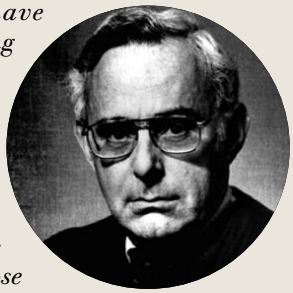
> "A man," Harry Morgan said, looking at them both. "One man alone ain't got. No man alone now." He stopped. "No matter how a man alone ain't got no bloody fucking chance."

Famous for its uncensored use of the f-word, this signature passage of *To Have and Have Not* epitomizes Hemingway's commitment to "full use of the [English] language." But the author did not use profanity for shock value. Instead, Hemingway's devotion to realistic writing compelled the use of harsh language. The author described his mission as "mak[ing] a picture of the world as [he had] seen it, without comment," even though he was aware that "much will be unpleasant, much will be obscene, and much will seem to have no moral viewpoint."[1]

The line between realism and obscenity would be tested in a legal battle regarding one community's effort to ban *To Have and Have Not*. Although Hemingway's supporters lost that battle, their arguments in favor of realistic literature would prevail years later in landmark First Amendment cases.

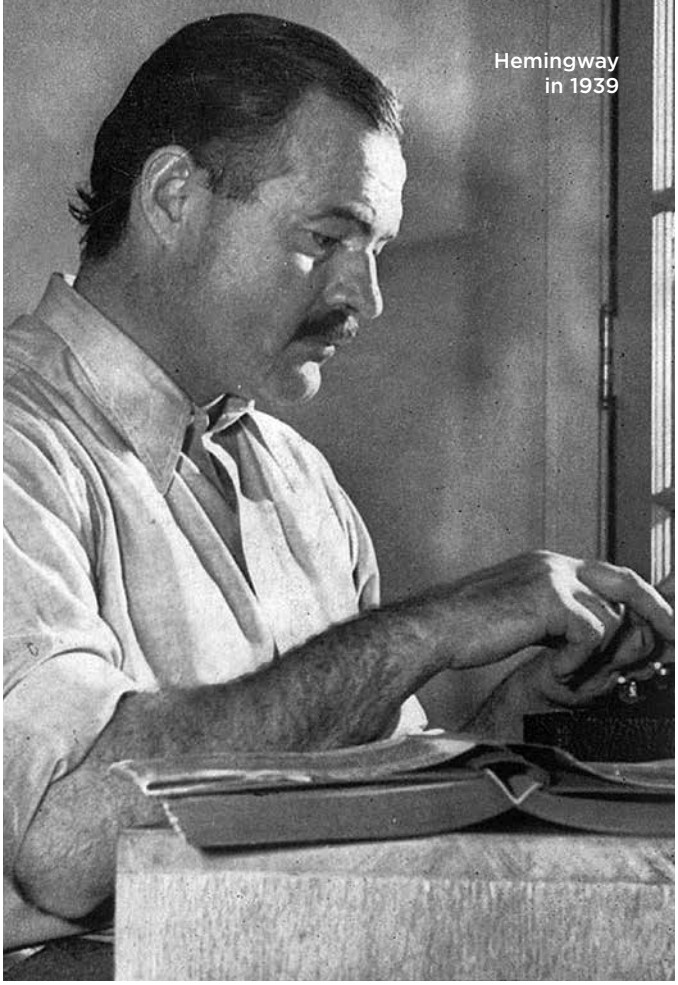
REALISM AND OBSCENITY IN EARLY WORK

From the outset of his nonfiction career, Hemingway sought to portray the world as he had experienced it. One reviewer



This article would never have been written without the urging and encouragement of my dear colleague, Judge Avern Cohn. Judge Cohn is an ardent student of both literature and history, and he never embraces one without considering the other. He is indeed the literary sleuth whose relentless efforts uncovered the only existing copy of Wayne County Chancery Judge Ira Jayne's December 20, 1939 order denying the injunction sought by Detroit book dealer Alvin Hamer against Detroit Prosecutor McCrea and the DPD for interfering with the sale of Hemingway's To Have and Have Not. Judge Cohn ultimately unearthed it in the archives of the Harry Ransom Center at the University of Texas in Austin, Texas (the Wayne County Circuit Court file having been long lost in a courthouse fire). It was his sharing of the back story of his pursuit of Judge Jayne's Order along with an abstract that he himself had written on Hemingway which served as the impetus for this article. I am forever grateful to Judge Cohn for his infectious scholarly zeal, his unbridled intellectual curiosity, and his generous mentorship.

–Hon. Mona K. Majzoub


PUBLIC DOMAIN

Hemingway in 1939

described his first collection of short stories, *In Our Time*, as "realism unmitigated, mostly concerning conventionally unpleasant subjects."[2]

As he developed that style, the use of coarse language created tension with his publishers. After Scribner purchased the advance rights to *The Sun Also Rises*, publication was nearly halted due to its use of the word "bitch" in reference to the character Lady Brett Ashley.[3] Charles Scribner "would no sooner allow profanity in one of his books than he would invite friends to use his parlor as a toilet room."[4] To his credit, however, Scribner consulted his friend Judge Robert Grant (himself an author) who recommended that Scribner publish *The Sun Also Rises* despite the obscenity.[5] Scribner remained ambivalent until Max Perkins (who would go on to edit most of Hemingway's work) threatened to resign if Scribner declined to publish the novel.

But although Perkins championed Hemingway's depiction of scandalous subject matter, he tried to quash Hemingway's use of certain profane words that he "knew could result in the book's suppression." Explaining this stance to Hemingway, Perkins wrote:

> The majority of people are more affected by *words* than things. I'd even say that those most obtuse toward *things* are most sensitive to a sort of word. I think some words should be avoided so that we shall not divert people from the qualities of this book to the discussion of an utterly unpertinent and extrinsic matter.[6]

Hemingway replied that he "never used a word without first considering whether or not it was replaceable," and ultimately, the word "bitch" remained in the novel.[7] As Perkins predicted, *The Sun Also Rises* was banned in Boston.[8]

Prior to publication of Hemingway's next novel, *A Farewell to Arms*, excerpts of the book were serialized in Scribner's magazine and promptly banned in Boston.[9] Use of the words "fucking," "cocksucker," and "balls" worried Perkins, who asked Hemingway to omit those words and to "reduce somewhat the implications of physical aspects in the relationship [between the main characters]."[10] Hemingway told Perkins that he would not be unreasonable regarding redactions, but would push for "all we can possibly get" in terms of profanity.[11] This was not simply a matter of thumbing his nose at censors. Hemingway told Perkins that his fight for "the full use of the language . . . may be of more value in the end than anything I write."[12]

Ultimately, Scribner decided that the three controversial words "could not be printed, or plainly indicated," which Perkins justified by explaining that the Boston ban would cause the book to be "scrutinized from a prejudiced standpoint," so any traditionally indecent material would leave Hemingway "in the least defensible position."[13] As a last-gasp measure, Hemingway recommended substituting "scrotum" for "balls."[14]

Following *A Farewell to Arms*, Hemingway sidelined traditional literature in favor of a more documentarian style. "Refusing to be merely a fiction writer," he sought to write "a book without models or comparisons,"[15] which would explore, among other subjects, "one of the simplest things of all and the most fundamental [which] is violent death."[16] The result was *Death in the Afternoon*, Hemingway's treatise on Spanish bullfighting.

Critics praised the book's clarity and detail but objected to passages that strayed from the theme to "shock th[e] innocent grandam . . . with the ancient four-letter words."[17] But *Death in the Afternoon* was not merely crass. As another reviewer noted, the book prizes honesty above all—Hemingway praised bullfighters who were "true, emotional, not tricked, pure, brave, honest, noble, candid, honorable, [and] sincere," while deriding those who were "low, false, vulgar, cowardly," and "cynical."[18] In extolling such brutal subject matter, Hemingway projected "a willingness to accept things as they are, bad as they are, and to recompense oneself by regarding them as a picturesque tragedy."[19]

As Hemingway continued to explore the macabre in his 1933 collection of short stories, *Winner Take Nothing*, the literary establishment regarded such dark subject matter unworthy of his talent, with one reviewer commenting that "nobody objects to brutality *per se*, but . . . I can't feel that [Hemingway's] stories about sport and sudden death lead to anything large or profound."[20]

Nevertheless, in his next book, *Green Hills of Africa*, Hemingway stuck to his guns, attempting to write an "absolutely true" account of his hunting safari in Kenya. While editing *Green Hills*, Perkins lobbied for the removal of the word "condom," which Hemingway had used as a metaphor for the transience of bygone achievements, because "fanatics sought the least excuse to attack an author's work."[21] But Hemingway

argued that "condom" was the "most dignified" word for a "very serious passage," and the word remained in the final text.[22] Eventually, "Perkins realized that Hemingway did not use [profane] words simply to exercise his literary rights, but to maintain the integrity of his style."[23]

OBSCENITY IN *TO HAVE AND HAVE NOT*

Hemingway's need to accurately depict ugly truths remained powerful as he constructed *To Have and Have Not*. Employing "multiple voices, jump cuts from place to place, and differing views of high life and low, he was trying to write beyond his previous limits."[24]

To Have and Have Not featured "twelve killings, all carried out in the goriest manner," descriptions of sex and masturbation, and "direct presentation of all the better known four-letter words."[25] This included, for the first and only time in Hemingway's writing, an uncensored use of the f-word, which in *Death in the Afternoon* was printed as "f--k" and in an earlier passage of *To Have and Have Not* was printed as "f---."[26] That Hemingway insisted on the bare profanity amplifies Harry Morgan's dying message.

While some critics appreciated Hemingway's frank depiction of harsh realities, others balked at what appeared to be gratuitous vulgarity.[27] These opposing views would take center stage in a lawsuit arising from an effort by Detroit-area Catholic organizations and the Wayne County Prosecutor to ban *To Have and Have Not*.

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LEGAL LANDSCAPE: FREEDOM OF SPEECH AND OBSCENITY IN 1938

The First Amendment directs that "Congress shall make no law . . . abridging the freedom of speech." Courts have long interpreted that provision as being less than absolute.[28] In *Chaplinsky v. State of New Hampshire*, for example, the Supreme Court of the United States recognized "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem . . . includ[ing] the lewd and obscene."[29] At the time of that decision, however, the category of "obscene" material falling outside the scope of the First Amendment was far from "well-defined and narrowly limited." To the contrary, for decades prior to the Supreme Court's declaration in *Miller v. California* that obscenity must be evaluated from the perspective of "the average person" and must consider "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value,"[30] courts in the United States employed widely divergent obscenity analyses, which often focused on isolated passages of allegedly obscene works, as viewed from the perspective of society's most impressionable members.[31]

Most attempts to define "obscenity" begin with a discussion of *Regina v. Hicklin*,[32] an English case that "permitted a book to be condemned as obscene on the basis of an isolated passage rather than requiring consideration of the work as a whole, and . . . also made the most susceptible audience, not the average reader, the measure of obscenity."[33]

Various courts in the United States endorsed the *Hicklin* rule, either expressly[34] or by focusing on isolated passages and/or the "most susceptible audience."[35] The Michigan Penal Code of 1931 followed the *Hicklin* approach, making it a misdemeanor to sell any book "containing obscene immoral, lewd, or lascivious language . . . manifestly tending to the corruption of the morals of youth."[36]

But in 1933, a dispute regarding James Joyce's *Ulysses* stemmed the tide of *Hicklin*'s draconian approach. After *Ulysses* was banned by U.S. Customs, Joyce's publisher arranged for a copy of the novel to be seized at the border.[37] In reviewing the matter, Judge John Woolsey of the United States District Court for the Southern District of New York emphasized that the book must be read "in its entirety" and from the perspective of "a person with average sex instincts."[38] Based on this analysis, Judge Woolsey overturned the ban, concluding that "although [*Ulysses*] contains . . . many words usually considered dirty, I have not found anything that I consider to be dirt for dirt's sake." On appeal, Judge Augustus Hand expressly rejected *Hicklin* and announced a "dominant effect" test that considered the "relevancy of the objectionable parts to the theme" and "the established reputation of the work in the estimation of approved critics."[39]

Even after *Ulysses*, however, "the *Hicklin* rule was not finally defeated."[40] Courts continued to apply *Hicklin* in one form or another.[41] Notably, the Michigan obscenity statute in effect in 1938 expressly embodied *Hicklin*'s two most heavily criticized features: criminalizing works that merely "contain[ed] obscene . . . language" and focusing on the "morals of youth."

THE BAN

In May of 1938, on the basis of a complaint filed by the Detroit Council of Catholic Organizations, Wayne County Prosecutor Duncan C. McCrea criminalized distribution of *To Have and Have Not* and directed the Detroit Police Department's "obscene literature squad" to notify Detroit book dealers of the ban.[42] Under the threat of prosecution, the Detroit Public Library pulled the novel from circulation.[43]

Detroit book dealer Alvin C. Hamer filed an action in Wayne County Circuit Court, seeking to enjoin McCrea and the Detroit Police Department from "interfering with the sale of" *To Have and Have Not*.[44] Hamer framed the issue as "whether adults of normal intelligence will be allowed to choose their own reading material and think for themselves without interference from

prosecuting attorneys and policemen."[45] In defense, McCrea contended that *To Have and Have Not* was "filthy, vulgar, obscene, and blasphemous" and vowed that he would not read passages in open court due to the presence of women.[46]

Scribner did not intervene in the suit, much as it declined to challenge Boston's ban of *A Farewell to Arms*. At the time of the former ban, Perkins wrote that Scribner "considered taking the Boston ban to court," but decided that it would accomplish little because while "the intelligent people in Massachusetts" opposed their state's obscenity law, the "Irish Catholics rule[d] th[at] town."[47]

On June 18, 1938, Wayne County Circuit Judge James Chenot denied Hamer's motion for a temporary injunction, reasoning that "there may be some justification for the claim that the book in question is a violation of the statute."[48] The case was then transferred to Judge Ira W. Jayne for a trial on the merits.[49]

During the trial before Judge Jayne, expert witnesses in support of the novel, an official from the Detroit Public Library and a professor of English from the University of Michigan, testified that "the book [should] be judged in its entirety rather than by one section."[50] On cross examination, prosecutors focused on the book's most objectionable passages, and emphasized its effect on young readers.[51] Similarly, experts for the prosecution, including religious officials and members of the Detroit Police Department, asserted that the novel's protagonist was "a sex-driven creature . . . whose acts verge on the abnormal" and that "the novel would have a corrupting influence on girls and all persons under 17 years old."[52] In addition, a professor of psychology from the University of Michigan testified that he would not read the book to his 14-year-old son because it "does not handle sex delicately, but commercially."[53]

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Closing arguments in the case reflected the themes developed by each side over the course of the trial. The prosecutors maintained that the book was obscene "both in part and in whole," while Hamer's team urged the court to consider the book in its entirety, noting that out of *To Have and Have Not*'s 250 pages, McCrae's team cited "only seven or eight passages as objectionable."[54]

On December 20, 1939, Judge Jayne issued an order declining to grant the injunction sought by Hamer on the basis that the issue was better suited for a jury trial in a criminal case.[55] In his opinion, Judge Jayne remarked that "[t]empting as it may be to a chancellor to add his opinion in the age-old controversy over the validity of realism in art, this case clothes him with no such opportunity."[56] The result was perhaps unsurprising given that the judge had previously questioned the propriety of resolving a dispute in which "no action had ever been taken by the Detroit Police against Hemingway's book," and even asked Hamer's attorneys, "Why was it that you brought this suit anyway?"[57]

HEMINGWAY TAKES THE SIDE DOOR IN *FOR WHOM THE BELL TOLLS*

Ernest Hemingway's next novel, *For Whom the Bell Tolls*, took a creative approach to obscenity, using three subversive techniques to sneak adult concepts past censors: first, merely substituting the words "obscenity" or "unprintable" in place of standard profanities; second, using a word that rhymes with the profanity, as in "muck my grandfather and muck this whole treacherous muck-faced mucking country and every mucking Spaniard in it;" and third, transliterating Spanish idioms, such as "I obscenity in the milk of your mother."[58] All three techniques employed context clues to make clear to savvy readers what would be lost on uncultured censors. This approach vindicated Max Perkins' intuition that censors objected more to "profane" words than to adult concepts.

CENSORSHIP LINGERS: DETROIT POLICE DEPARTMENT BLACKLISTS

The anticlimactic civil action failed to offer meaningful review of Detroit's censorship regime, and no subsequent criminal test case was arranged. The result was a *de facto* ratification of the vague and overly broad Michigan obscenity statute and of the Detroit Police Department's suppressive tactics, both of which would persist well into the 1950s.

In 1952, the United States House of Representatives Select Committee on Current Pornographic Materials held hearings regarding an "Investigation of Literature Allegedly Containing Objectionable Material."[59] The Committee interviewed Herbert W. Case, the inspector in charge of the "license and censor bureau" (the "Censor Bureau") of the Detroit Police Department, the function of which was to "pass[] upon the propriety of books, magazines, and comics offered for public consumption within the city of Detroit."[60]

Inspector Case described the role of the Censor Bureau as well as its *modus operandi*. First, the two book distributors operating in Detroit voluntarily submitted their publications to the Detroit Police for content screening prior to distribution.[61] Books were screened into three categories: (1) approved, (2) partially objectionable (defined as "one which we might object to in part or maybe a paragraph or a certain portion of that may technically fall within the meaning of our Michigan state statute, but is not one that we feel would be a good case to present to court"), and (3) obscene under the Michigan statute.[62] Books in the obscene category were banned from sale, under the threat of prosecution.[63] The list of "partially objectionable" titles was distributed to book dealers, who were instructed that if a complaint was

received regarding one of the listed books, it would have to be removed from the stands.[64] Due to the likelihood of receiving a complaint, many dealers declined to sell books on the "partially objectionable" list in the first place.[65]

Because distributors generally agreed to comply with the blacklists, the courts were deprived of the opportunity to review whether any particular title violated the obscenity statute.[66] In describing the pre-screening procedure, Inspector Case stated, "If we can keep [a banned book] out of circulation and it doesn't hit the streets, why, we are accomplishing a lot more than attempting to do something about it after it has gained its objective of being circulated."[67] Inspector Case also expressed concern that taking a case to trial "exploits the title" because it "lets a lot of people know about it."[68] Echoing this sentiment, Wayne County Assistant Prosecutor John J. Rusinack stated, "We try to keep the public out of it. We don't make our list public because then you get into a lot of trouble."[69]

In 1953, the Censor Bureau's list of banned books contained approximately 150 titles.[70] At the time, a vocal faction of the public supported censorship, including the National Organization for Decent Literature (the "NODL"), the stated goals of which were:

> 1) the arousal of public opinion against "objectionable" magazines, comics, and paper-bound books; 2) more rigorous enforcement of existing laws governing obscene literature; 3) promotion of new and more strict legislation to suppress such literature; 4) preparation of monthly lists of magazines, comics, and paper-bound books disapproved by the organization; and 5) visitation of newsstands and drug stores to secure the removal of blacklisted literature.[71]

The NODL maintained its own blacklist of more than 350 titles, which were deemed to be objectionable because they contained one or more of the following: (1) "glorif[ication] of crime and the criminal," (2) contents that are "largely 'sexy,'" (3) "illustrations and pictures [that] border on the indecent," (4) articles on "illicit love," and (5) "disreputable advertising."[72]

Commentators observed that the Detroit Police Department's blacklist "show[ed] . . . obtuseness to literary values" and noted that "[i]t is quite apparent that the [Detroit Police Department's] censor bureau has never accepted the Detroit public library's offer to advise it on literary values."[73] Nevertheless, the reach of the Censor Bureau extended beyond Wayne County, with its lists of banned material being distributed to "seventeen or eighteen other cities in Michigan" and to the Chief of Police in Youngstown, Ohio.[74] Moreover, Inspector Case testified that at least one publisher submitted manuscripts to the Censor Bureau for approval before publication "so that certain deletions can be made before going to print."[75] Because publishers could not afford to print a "special Detroit edition," this practice "undoubtedly result[ed] in nationwide censorship of some books by the Detroit [censor] bureau."[76]

HAMER'S ARGUMENTS PREVAIL IN *BUTLER* AND *MILLER*

In 1957, nearly twenty years after the *To Have and Have Not* saga, free-speech proponents began to chip away at Detroit's censorship hegemony. In *Butler v. Michigan*, the Supreme Court held that Michigan's obscenity statute violated the Due Process Clause of the Fourteenth Amendment because it criminalized sales to adults for the sake of protecting youth morals.[77] As Justice Felix Frankfurter observed, Butler "was convicted because Michigan . . . made it an offense for him to make available for the general reading public . . . a book that the trial judge found to have a potentially deleterious influence upon youth."[78] Justice Frankfurter famously analogized this practice to "burn[ing] the house to roast the pig."[79] Notably, Butler challenged the statute on the additional grounds that it was "vague and indefinite" and that it unconstitutionally prohibited works merely "containing certain proscribed language."[80] However, the Court determined that it was not necessary to reach these issues.[81]

In 1973, more than fifteen years after *Butler* and thirty-five years after the Detroit ban of *To Have and Have Not*, those arguments gained traction in *Miller v. California*.[82] In *Miller*, the Supreme Court vacated an obscenity conviction obtained under a California statute, and held that "obscenity" must be analyzed in the context of the whole work, with consideration of the following factors:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[83]

Accordingly, the *Miller* Court endorsed the principal contentions made by free-speech advocates during the legal battle over *To Have and Have Not*. In modern obscenity cases, a court must consider a work "taken as a whole" and viewed from the perspective of the "average person."

CONCLUSION

As exemplified by the battle over the Wayne County ban of *To Have and Have Not*, Ernest Hemingway's insistence on realistic language and literature was revolutionary. The ideals he fought for in his early work would not be realized in Hemingway's lifetime, but his purposeful use of obscenity lent credibility to free-speech advocates who would ultimately prevail in landmark First Amendment cases.

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65 *Id.*; Lockhart and McClure, *supra* note 4040, at 317.
66 H.R. Rep. No. 82-2510, at 53.
67 *Id.* at 55. *See* Lockhart and McClure, *supra* note 40, at 309 ("[A] judicial proceeding is not suitable for the mass suppression of large numbers of books. The censor prefers a procedure that permits the secret suppression of books en masse.").
68 H.R. Rep. No. 82-2510, at 55.
69 *Detroit Public Not Told What Is Censored*, *supra* note 64.
70 Leo Sonderegger, *Censors Guard Young Morals in Detroit*, The Minneapolis Star, February 9, 1953, at 17.
71 Lockhart and McClure, *supra* note 40, at 304.
72 *Id.* at 305. *See also* William J. Hempel and Patrick M. Wall, *Extralegal Censorship of Literature*, 33 N.Y.U. L. Rev. 989, 992 (1958).
73 *Id.* at 319.
74 *Id.* at 315.
75 H.R. Rep. No. 82-2510, at 58.
76 Leo Sonderegger, *What Detroit Censors May Affect All U.S.*, The Minneapolis Star, February 11, 1953, at 33.
77 *Butler v. State of Mich.*, 352 U.S. 380, 77 S. Ct. 524, 1 L. Ed. 2d 412 (1957).
78 *Id.* at 382-83.
79 *Id.*
80 Brief for Appellant at 6, *Butler v. State of Mich.*, 352 U.S. 380 (1957), 1956 WL 88994.
81 *Butler*, 352 U.S. at 382 ("Appellant's argument here took a wide sweep. We need not follow him.").
82 *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).
83 *Id.* at 24 (internal citations omitted).

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