

ROBERT L. HILLIARD AND MICHAEL C. KEITH

DIRTY DISCOURSE

SEX AND INDIAN BROADCASTING



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Dirty Discourse

Sex and Indecency in Broadcasting

Second edition

Robert L. Hilliard and Michael C. Keith



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Publishing**

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Dirty Discourse

There is what I call the American idea. . . . I will call it the idea of freedom.

—Theodore Parker

Because the touchstone of indecency determinations—contemporary standards—is subjective, the distinctions that arise from that standard are arbitrary and seem more arbitrary the more they are explained.

—John Crigler

FOREWORD

This book examines a most important and complicated topic. One of the central questions it probes is whether or not the government should continue to expect broadcasters to operate in a manner that upholds community standards pertaining to moral conduct and behavior. My answer is an unequivocal yes because broadcasting is different than other media. I go back many years to what my law school friend Justice John Stevens wrote in a Supreme Court First Amendment opinion about why radio is different. When you are in a car with a child there is no way you can edit or censor what is coming out of the speaker. It comes at you without warning, so as long as we are concerned as a society about protecting and helping our young people, I don't think there will be an end to the limits pertaining to what can be said over the air. The Supreme Court has made it clear that with respect to the First Amendment broadcasting is a special case because it uses the public airwaves. Not everyone who wants to be a broadcaster can be one. It is a privilege to get a broadcast license, which under our law requires holders to serve the public and not the private interest. There will always be arguments about the First Amendment. They are healthy arguments, and they should continue, but I don't think that the First Amendment as applied to broadcasting is the same as it is when applied to other media, such as print. Debating significant issues is a good thing. It is what has made this country strong. Of course, to argue any point effectively, you must be well informed. Hilliard and Keith offer enough information on the subject of indecency and obscenity in radio to give the reader a solid appreciation and understanding of this ongoing and controversial issue.

Newton N. Minow

Northwestern University,
Annenberg Professor of Communication, Law and Policy;
former Chair, Federal Communications Commission

PREFACE

Freedom of speech is what differentiates democracies from most other forms of government. When a government—federal, state or local—imposes restrictions on what its citizens may say out of its belief that “big brother” knows best, then civil liberties are threatened.

When it is done for political purposes—sometimes under the guise of national emergencies as during America’s era of McCarthyism when the public was brainwashed to believe that anyone who disagreed with McCarthy was a threat to the country’s well-being—the democracy teeters on the edge of fascism.

In most countries criticism of the nation’s leaders is tantamount to treason, based on the “if you don’t support us, you’re against us” dictum. With rare exceptions America’s leaders have resisted this means of gaining or consolidating power. Most have agreed, albeit sometimes reluctantly, with Republican president Theodore Roosevelt that “to announce there must be no criticism of the president, or that we are to stand by the president right or wrong, is not only unpatriotic and servile, but is morally treasonable to the American public.”

Is there not, then, any speech that is impermissible in a democracy? Over the years government control of political speech has fluctuated with the political attitudes of the country as a whole, most often resulting in post-facto mea culpas that are ignored and repeated from time to time. What most Americans have with some consistency generally agreed upon, however, since the European settlement of this part of the North American continent, is the unacceptability of speech that is obscene, profane, blasphemous or indecent. As historically presented in Chapter 1 of this book, the United States has long been a country that has reflected the legacy of the Puritanism and Victorianism brought by the earliest immigrants.

The problem is that changes in time and social attitudes, the pluralistic nature of the citizenry and the geographic breadth of the commonwealth preclude a common definition of what is indecent and even of what is profane or obscene. What may appear to be “dirty discourse” to some may be considered to be laudable satire to others.

Where at one time perceived dirty discourse was dealt with at the local level on which it was disseminated, the advent of the mass electronic media now makes such communication a national matter—and with the development of the Internet, an international concern.

We try in this book to present not only information on what constitutes alleged dirty discourse and the development and current status of statute, case and administrative law dealing with it, but also the beliefs, attitudes and actions of those who present such material, those who condemn such material and those who defend it. Needless to say, our principal concentration is on the means of greatest distribution—radio with the phenomenal growth of “shock jocks” and rap music lyrics at the end of the twentieth century and the beginning of the twenty-first. We give more moderate attention to television and the Internet.

Even as authors we are sometimes not sure what we would label obscene or profane or indecent. The language of sex and dirty words, as disturbing as it sometimes is to us, is not as disturbing as the language we discuss in our book *Waves of Rancor: Tuning in the Radical Right*, in which the language of hate groups advocating hatred and violence against designated minority and other groups appears to us to be the extreme of dirty discourse.

But, as you read this book, judge for yourself. Should Mae West have been penalized in the 1930s for sexual innuendo, without uttering a profane word, to a greater degree than Howard Stern has been for overt sexual descriptions and profane language in the past decade?

Many, if not most, Americans think that concern with indecency in the media began with the partial baring on television of one of Janet Jackson’s breasts in the 2004 Super Bowl half-time show. Crackdowns on perceptions of indecency in America have been going on since even before the British colonies became the United States. Compared to shock-jock material, comedians’ late-night “blue” routines, and many prime-time sex-oriented sitcoms, the Jackson *cause célèbre* was, in the opinion of many media experts, rather mild. Yet, it set off the strongest nationwide protests, fueled by media exploitation, and resulted in the strongest government reaction and action in our history regarding indecency.

If, after you have finished this book, you can devise reasonable definitions of the obscene, profane and indecent that can be applied to the mass media today, please let us know, for it’s something we believe Congress, the courts and the Federal Communications Commission have not yet been able to do.

Another kind of censorship that we believe to be more insidious than that related to material labeled as indecent is the censoring of ideas and information. This kind of censorship is endemic in governments that attempt to control their citizens' hearts and minds, given that radio and television, in today's world, are the most powerful forces for manipulating people's beliefs and feelings. Such media control is common practice in totalitarian governments and even in ostensibly democratic countries where the party in power wishes to convince the public to support its special interest agenda and its efforts to stay in power. In such situations alternative viewpoints and even objective information are labeled "right wing" or "left wing" (depending on the political orientation of the party in power) and condemned as being false and prejudicial. In the United States the alternative media system is what we call public broadcasting, the noncommercial radio and television stations and networks differentiated from the dominant privately owned broadcasting entities. Because it has generally offered information and ideas—both objective and alternative—not provided by the politically conservative owned and operated private media, public broadcasting has frequently been vilified by political parties and politicians who do not wish the public to see that, on occasion, the Emperor's clothes are indeed deceptive. In the United States, at this writing in 2006, the increasingly extremist right-wing government has taken unprecedented steps to censor and even to try to eliminate the alternative potentials of public broadcasting. Using the time-worn crying-wolf term of "liberal"—a pejorative term in a conservative political atmosphere—President George W. Bush, through his appointed head of the Corporation for Public Broadcasting, has attempted to remove any critical information about or discussion of his controversial policies by vilifying public broadcasting, demanding that it censor any material not supportive of his administration's beliefs and policies, and drastically cutting its appropriations. Should he succeed, America will no longer have free, alternative media discourse. We would consider such a situation the epitome of real indecency.

We wish to thank Elizabeth Swayze, Laura Stearns, Desiree Zicko, Tessa Hanford, and their colleagues at Blackwell Publishing, the media personalities and critics who provided comments for this book, and our friends and family members who lent their encouragement and support. And, lest we forget, our appreciation to the Tom Paines and William O. Douglasses who have fought and continue to fight to protect America's freedom of speech, press and assembly and all of our personal civil liberties and rights against those who would usurp them, whether the usurpers are foreign, domestic or in our own government.

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CHAPTER 1

I CAN'T DEFINE IT, BUT . . .

In 1937 Mae West, the Hollywood sex symbol of the 1930s, was blacklisted from radio for several decades. In a skit about the Garden of Eden on NBC's *Chase and Sanborn Hour*, written by famed radio writer Arch Oboler, she played the role of Eve seducing Adam. She wasn't blacklisted because of *what* she said. It was the *way* she said it—with the sultry, sexual innuendo in the *tone* of voice that was expected of her. By today's standards her performance and the skit would hardly raise an eyebrow. But then, the Federal Communications Commission (FCC), reflecting the standards of so-called morality at the time, reprimanded NBC, and NBC banished West from the principal mass medium of that era.¹

In 1996 the FCC fined a station \$10,000 for carrying a Howard Stern program that included the following dialogue:

So, I start dancing with her . . . I'm rubbing . . . she doesn't have any panties on. I'm rubbing her legs . . . and I'm squeezing her ass . . . once in a while my arm slides into the wrong place, you know what I mean? . . . I'm manipulating her . . . spreading her cheeks . . . had her going, writhing with pleasure . . . then I got her down on the bed and then with the vibrators . . . and the vibrator disappeared . . . and my tongue was used.²

The degree of dirty discourse in Stern's performance was considerably more than that in the vocal quality of Mae West's. Yet West's punishment considerably exceeded that levied on Stern and the station carrying his program. Why the discrepancy?

Certainly, time—60 years in this instance—was a factor. Public attitudes change with time, and official implementation of those attitudes changes concomitantly. Place, however, is also a factor. What may be regarded as

indecent by most of the population in one geographic area or in one town or city may not be so considered in another. Supreme Court Justice Potter Stewart summed up the problem many years ago when he said that he couldn't define obscenity, but that "I know it when I see it."³

Since the establishment of the Federal Radio Commission in 1927, federal regulators have been trying to establish definitions of indecency and obscenity. Today, the Federal Communications Commission relies on a 1973 Supreme Court decision that may be the best effort possible, but that still leaves the meanings cloudy and confused.

The FCC has noted that obscene material has been defined by the Supreme Court as follows:⁴

- (1) an average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest;
- (2) the material must depict or describe, in a patently offensive way as measured by contemporary community standards, sexual or excretory conduct;
- (3) the material, taken as a whole, must lack serious literary, artistic, political, or scientific value.

While noting that obscene material is banned from the airwaves at all times, in a 1987 statement asserting its commitment to monitor indecency over the airwaves, the FCC used some of the Supreme Court's language above to define indecency for purposes of limiting the broadcast of such materials, with the exception of specified hours under the label of adult programming:

Language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.⁵

Given the impossibility of defining who an "average" person is and the existence of a myriad of contemporary community standards, depending on what locality in the country one happens to be in at a given time, one falls back on the subjective "I know it when I see it." In other words, no one size fits all.

From Whence it Came

The roots of attempts to define obscenity and control it in the supposed public interest, as applied to the United States and, in particular, its

mass media, go back long before the United States became a sovereign entity.

The concepts of indecency or obscenity, as we think of them today, developed primarily in the English common law of the seventeenth and eighteenth centuries. Prior to that, censorship of public utterances, verbally or in print, was principally oriented to political and religious speech. In the Middle Ages in Europe, the power of the Catholic Church included censorship and punishment for dissemination of material it disapproved of. But the church's concern was more with blasphemy and heresy than it was with sexual material. Still, Boccaccio's *Decameron*, a classic in its brothel language and licentious stories, was banned by the pope in the thirteenth century, not for its obscenity, however, but for its satire—satire of the clergy.

A couple of centuries later the first Catholic index of banned books was issued. Again, indecency or obscenity per se was not the issue—the books on the list were banned because of their “theological errors.”

Pre-Victorian England was as hypocritically Victorian as its succeeding generations. In the early eighteenth century the controlling powers began to seek action against representations of sex in literature. The increasing literacy among populations no longer restricted the reading of bawdy writing to the elite, many of whom believed that they could not be corrupted by such material, but that the rest of the population could be. Not yet governed by precedents of common law, prosecutions took place in the church. In fact, the first case brought to the civil courts, in the early 1700s, was dismissed because the government had not yet enacted any laws pertaining to indecency or obscenity in writing, and the case was referred to the church courts.

In 1725 the first conviction for obscenity in the civil courts, that is, under English common law, was for the writing of a book entitled *Venus in the Cloister, or the Nun in the Smock*. The author, Richard Curl, was charged with disturbing society's civil order. From that time on, concerns about and prosecutions of the writing and distributing of alleged obscene materials increased, and catch-all laws were developed to cope with the increasingly common phenomenon through the remainder of the eighteenth century.

Administrators in the British colonies in North America not only reflected the attitudes in the mother country, but sometimes went beyond them in restricting material that disturbed their fancies. The colonial legislature of Massachusetts led the way in 1712 with a law that criminalized the publishing of “any filthy, obscene, or profane song, pamphlet, libel or mock sermon.”⁶ The censure of the church restricted the speech of lay and religious people alike.

Arguably one of the most important events regarding the suppression of alleged obscene speech was the founding in England in 1802, by Thomas Bowdler, of the Society for the Suppression of Vice. His effectiveness in censoring any material he and his followers considered immoral or improper gave us the term *bowdlerize*. In the decade following the founding of his society, dozens of writers and publishers were convicted of disseminating obscene materials.

New World Standards

Although no longer colonies of England, the United States did not extend its newfound political freedom, or its First Amendment guarantees of freedom of speech and press, to speech, literature or arts that might be considered an affront to the puritan sensibilities of its leading citizens. The first common law conviction for obscenity in the United States was of Jesse Sharpless in Philadelphia in 1815 for distributing allegedly obscene pictures. A few years later, in the same state, Peter Holmes was convicted of obscenity for attempting to distribute the book *Fanny Hill*. At the same time, the first state statute law dealing with obscenity was enacted in Vermont. The concern with obscenity grew. In 1842 America enacted a tariff act that prohibited the "importation of all indecent and obscene prints, paintings, lithographs, engravings and transparencies." In 1857 printed matter was added to the list.⁷ Mailing any allegedly obscene materials was made a criminal act by Congress in 1865.

By midcentury the common law was well established, and in 1857 in Britain, Parliament codified the common law into a statute law called the Obscene Publications Act, or, more popularly, Lord Campbell's Act. Although this act was principally oriented toward the question of seditious libel and for the first time established truth as a defense in libel cases, it also put greater restrictions on speech that might be deemed to be obscene. The first prosecution under Lord Campbell's Act occurred in 1868 in a case that had a profound impact on American law as well. Benjamin Hicklin, the recorder of London at that time, voided the seizure of an anti-Catholic pamphlet written by a Henry Scott. Hicklin's decision was reversed by the chief justice of Britain in the case *Regina v. Hicklin*, which established what became known as the Hicklin rule. This rule stated, in effect, that obscenity may be judged by the degree to which it would appear to corrupt with immoral influence the most susceptible persons in society—presumably children. Specifically, the Hicklin rule, which became the basis for judging obscenity in the United States for the remainder of the nineteenth century and into the early twentieth century, was as follows:

The test of obscenity is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.⁸

This meant, of course, that any matter that was deemed to have a potential immoral influence on the youngest child would be banned as well from the eyes and minds of adults. It was well into the twentieth century before the United States revised that approach, and it was still another half century when a version of the Hicklin rule, applied by Congress to the Internet, was declared unconstitutional.

A name that became synonymous with the crusade against indecency, obscenity and profanity, under the rubric "vice," was that of Anthony Comstock. He founded citizens' groups throughout the United States to combat his version of vice. In 1873 his lobbying of Congress resulted in what became known as the Comstock Law, in which the Post Office was given authority to ban the mailing of any "obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character."⁹ And who was designated by the Post Office to oversee this task? Why, Anthony Comstock, of course! The Comstock approach, finding virtually any reference to sex obscene, became paramount in the United States.

Prurient Ether

The first important reversal of the Hicklin rule and the Comstock influence in the United States occurred in 1933, when a federal judge, John Woolsey, allowed the importation of James Joyce's *Ulysses*. Instead of judging the book's immoral influence based on its impact on the most susceptible members of society, per the Hicklin rule, Woolsey judged it based on its effect on a person with average adult sexual instincts. The Hicklin rule was finally laid to rest in U.S. jurisprudence in 1957 in the case of *Roth v. United States*, in which Samuel Roth was found guilty of mailing obscene material, but in which the concept of obscenity was stated by the Supreme Court as

whether to the average person, applying contemporary community standards, the dominant theme of the material taken as whole appeals to the prurient interest.¹⁰

It was during this period of continuing court tests of obscenity cases that broadcasting grew and along with it problems relating to indecency and

obscenity on the airwaves. Although for the present generation radio and television appear to have been around forever, millions of Americans still alive remember when radio began and millions more when television was introduced. As history goes, radio and television are still quite young. The first radio station with regularly scheduled programming, KDKA in Pittsburgh, went on the air in 1920; the first station to be licensed, in 1921, was WBZ in Springfield, Massachusetts. There were no rules and regulations for radio. Anyone who had the money to set up a transmitter and broadcast equipment merely went to the Department of Commerce in Washington, D.C., got a license and went on the air. Within a short time there was chaos on the air. Stations broadcast on the same frequencies, with those with more power and higher antennas drowning out the others. For years radio station owners literally begged the government to do something about it, to establish regulations that would facilitate the orderly development of radio services nationwide without signal interference. Finally, in 1927 Congress passed the Dill-White Act (named for its principal sponsors), more formally known as the Radio Act of 1927. The act established the Federal Radio Commission (FRC), which was given regulatory authority over radio. The principal duties of the FRC were to issue licenses; allocate frequency bands for use by different classes of stations, including ship and air communication; assign specific frequencies to individual stations; and assign permissible power for each station. It was also authorized to take actions that could prevent monopolies, require stations to be individually and solely responsible for whatever programming they aired, and develop other regulations that it deemed necessary. Perhaps the most significant aspect of the Act was the requirement that stations operate in the "public interest, convenience, or necessity."¹¹ Concomitant with this clause was one that stated that "no person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication."¹² Although the FRC did not issue any rules regarding indecency or obscenity at that time, the "indecency" clause was incorporated into the Communications Act of 1934 and provided the basis for later federal regulation regarding perceived "dirty discourse" on the air. It was subsequently made a part of the U.S. criminal code in 1948 and specified a fine of up to \$10,000 and imprisonment of up to two years. It was three years after the passage of the Federal Radio Act of 1927 and the establishment of the FRC that the first action was taken against a station for violating the "indecency clause." Defeated in a congressional primary election, a man named Robert Duncan continued to attack his opponent on program time he purchased from radio station KVEP in Portland, Oregon. Not only did the station lose its license, but Duncan was tried and sentenced to six months in jail and a \$500 fine for "knowingly, willfully and feloniously uttering obscene, indecent and profane language by means of radio communication."¹³ In an