Inspired Filth: Working Blue in Vaudeville America

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The common law long held that words could be punished if their utterance might cause a breach of the peace. This article thus examines a seemingly simple question: When did American law transform this long-standing rule as it pertained to vulgar, filthy, or "blue," words and begin to consider the simple utterance of those words as criminal actions in and of themselves? To answer that question, we looked to stand-up comedy and discovered a tradition of regulating filthy words that reached back to the post-Civil War era. There, the regulation of words as obscene coincided with the emergence of sanitized entertainment spaces, epitomized by vaudeville and the increased presence of women and children in public spaces. On these stages "blue" words were illicit; resistance from performers such as Sophie Tucker and Russell Hunting would only confirm the prevalence of this legal regulation. These performers and their regulation invite us to observe a post-war legal transition that was not just about citizenship and individual rights and to recognize that filthy words also underpinned a new legal order. A century before George Carlin, Richard

Pryor, and Lenny Bruce famously pushed the boundaries of comic expression, "blue" language stood at the center of efforts to separate ordinary people from their words; the legal protections for speech were made contingent on their capacity to protect, and even generate, the profits of owners, managers, and investors. This post-war transformation of filthy words from common law to statute reminds us that the right to speak has long been subject to an economic hierarchy in which the interests of the wealthy are paramount. As vaudeville reveals, in modern America access to this right has been strongest when words reinforced this hierarchy and weakest when they threatened it.

"There was no arguing about the orders in the blue envelopes. They were final. You obeyed them or quit. And if you quit, you got a black mark against your name in the head office and you just didn't work in the Keith Circuit anymore."[1]

Sophie Tucker (1945)

INTRODUCTION

In late 1973, New York City radio station WBAI broadcast a segment that included a bit by comic George Carlin on "Filthy Words"—a profane hit-list that included "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits," seven illegal words that could never be uttered on television. Anticipating blowback, the station issued a warning in advance that the segment contained "sensitive language which might be regarded as offensive to some." Conservative activist John Douglas disregarded the notice and chose instead to listen to a program he knew would offend him before filing a complaint with the Federal Communications Commission (FCC). The episode was broadcast during the day, he complained, and his fifteen-year-old son heard it. In response, the FCC did not formally sanction the station—at least not this time—but instead cautioned the station's parent corporation, Pacifica, against these types of broadcasts. The debate that emerged over the authority to regulate words transformed a cultural performance into a legal question about the meaning of obscenity and the limits of free speech. When the dispute made it to the Supreme Court, the

1. SOPHIE TUCKER, SOME OF THESE DAYS 149 (1945).

justices ruled, by a narrow margin, that the FCC had statutory authority to regulate "any obscene, indecent, or profane language" broadcast over the airwaves, notwithstanding the First Amendment.[2]

The high Court's decision could not possibly have come as a surprise to Carlin, who, alongside comics like Richard Pryor and Lenny Bruce, had made a career harvesting moral agendas like John Douglas' for brilliant comedic material. But the ruling about indecent language, which drew from a long line of twentieth-century opinions about obscenity, overlooked an obvious, but fundamental, question: When did certain words become classified in law as filthy? Carlin hinted at this question in the same bit that offended Douglas, musing that there was no such thing as bad words; instead "[there were] bad thoughts, bad intentions . . . and words."[3] For Carlin, words were simply the vehicles used to convey ideas, whether good, bad, indecent, offensive, or otherwise; the regulation of words could only be superficial because it overlooked the underlying idea, which was the source of offense.

This article traces the origins of a legal order built around words and the ways social and moral disapproval found expression in the law. In the process, it explores how bad words became a legal matter. It examines the sudden explosion of statutory interest in defining filth in the middle of the nineteenth century and uses vaudeville—the great late-nineteenth century urban entertainment—as a case study. Vaudeville was big business; it spanned the nation, organizing playhouses into eastern and western circuits that invited men and women and children to comingle as they were entertained in shared spaces. Vaudeville, because it sought to appeal to a broad audience, also faithfully observed bans on salacious, prurient, sexual topics. In the process, vaudeville helps us understand how concerns about words shaped law and cultural performances—on a stage—that sought to remake everyday American life. In this process, law was refashioned to define clean, sanitized entertainment, as well as filth. By the turn of the twentieth century, distinctions between safe and criminal words were so clear that performers like Sophie Tucker—quoted in this paper's epigraph—could quickly distinguish between the two.

2. The decision was 5-4 in favor of the FCC. Fed. Commc'n Comm'n v. Pacifica Found., 438 U.S. 726, 731 (1978); JAMES SULLIVAN, SEVEN DIRTY WORDS: THE LIFE AND CRIMES OF GEORGE CARLIN 150 (2011).

3. GEORGE CARLIN, *Seven Words You Can Never Say on Television*, on CLASS CLOWN (Atl. Records 1972).

Despite the extensive literature devoted to First Amendment law, the criminalization of filthy, "blue" words as revealed by the rise of leisure culture in the late-nineteenth century—and epitomized by vaudeville—remains largely unexplored. An examination of vaudeville will deepen and strengthen our understanding of the enormous legal importance of sanitized words, symbolized by the era's notorious Comstock Laws and reinforced by claims about a shift in late-nineteenth century law toward the criminalization of victimless activities, such as prostitution, drunkenness, and gambling.[4] It will also reinforce claims that Anthony Comstock's moral authority, stemming from the federal legislation passed in 1873 and bearing his name, evolved from a focus on material items—images, birth control, sexual stimulants—to include spoken words.[5] It not only corroborates arguments that public space structured, and was structured by, racial and sexual identities to help determine what types of activities occupied them, but also shows that words were increasingly used as the marker of respectable public space.[6] Finally, this article ratifies arguments that in the nineteenth century, big constitutional principles, like freedom of speech, were often worked out locally.[7] Building on these analyses of the rise of victimless crime, the morality of words, the recalibration of public spaces, and the working out of constitutional principles, this paper demonstrates that the regulations of words was far from prosaic; it would underpin legal authority after the Civil War.

Organized into three sections that examine in turn the common law regulation of speech in the early-national period, the rise of male-oriented leisure spaces in the era before vaudeville, and the advent of vaudeville leisure in the era of stringent statutory restrictions on filthy

4. LAWRENCE FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 134–39 (1993).

5. AMY WERBEL, LUST ON TRIAL: CENSORSHIP AND THE RISE OF AMERICAN OBSCENITY IN THE AGE OF ANTHONY COMSTOCK 248–49 (2018).

6. *See, e.g.*, GLENDA ELIZABETH GILMORE, GENDER AND JIM CROW WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896-1920 102–05 (1996); KATHY PEISS, CHEAP AMUSEMENTS: WORKING WOMEN AND LEISURE IN TURN-OF-THE-CENTURY NEW YORK (2011); CHRISTINE STANSELL, CITY OF WOMEN: SEX AND CLASS IN NEW YORK, 1789-1960 (1987).

7. MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE:" STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 2 (2000); LAURA EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH 7 (2009).

words, this paper reveals that the regulation of obscene words marked an important shift in nineteenth century law from common law to statute—or from a common law emphasis on the effects of the words to a statutory focus on the idea that the words themselves were dangerous. The creation of specific legal categories to punish obscene, filthy words was driven by concerns over the changing nature and composition of public space in this era. As the country sought to rebuild in the generation after the Civil War—to expand citizenship, to define individual rights—the creation of blue words and their subsequent regulation would become vital to the task of defining and endorsing a recognizable legal authority.

I. A COMMON LAW OF FILTH

By the end of the nineteenth century, blue (filthy) language existed as a statutorily defined category. But, before that—and for much of American history—it was not. Instead, judges used the common law to describe and punish obscene words.[8] In his famous *Commentaries on the Laws of England* (1769), William Blackstone rejected the prior restraint of filthy words, but welcomed the public punishment of immoral and mischievous ideas, explaining analogically, "A man may be allowed to keep poisons in his closet, but not publicly to vend them as cordials."[9] As American judges largely embraced Blackstone's distinction—that the context of the words may be dangerous, but not necessarily individual words themselves—they also embraced a view of the common law as a repository of the moral authority.

As a result, throughout the Nation's founding period the common law regulated speech by focusing on context, rather than the words

8. It was not until the twentieth century that courts began to consider the First Amendment as a legitimate defense. Indeed, the First Amendment, like the rest of the Bill of Rights, had been held in 1833 to only apply to the federal government. *See* Barron v. Mayor of Baltimore, 32 U.S. 243, 247 (1833) and WILLIAM DAVENPORT MERCER, DIMINISHING THE BILL OF RIGHTS: BARRON V. BALTIMORE AND THE FOUNDATIONS OF AMERICAN LIBERTY (2017).

9. American jurists in the early nineteenth century frequently invoked Blackstone for the idea that obscene words were offenses against God and religion. See Missouri v. Appling, 25 Mo. 315, 371 (1857); Bell v. State, 31 Tenn. 42, 44 (1851). Quoted in BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: BOOK THE FOURTH - CHAPTER THE ELEVENTH: OF OFFENSES AGAINST THE PUBLIC PEACE 87 (Lonang Institute 2005) (1769).

themselves. Most commonly, foul language would find its way into court through a private civil suit for slander or as a public nuisance.[10] In this sense, courts would judge the danger of certain utterances in much the same way as public drunkenness or public nudity—the context, rather than the activity, was the offense.[11] For instance, in *Commonwealth v. Sharpless*, an 1815 Pennsylvania case noted as the first obscenity prosecution in the U.S., six men were indicted for charging people to look at an image of a man and woman having sex. The defendants claimed that this was not a crime and noted that English law considered these sorts of acts matters for the ecclesiastical authorities. In *Sharpless*, Pennsylvania Supreme Court Justice William Tilghman cemented the Blackstonian view of obscenity into American law and gave courts jurisdiction over obscenity cases by announcing that anything that had a tendency to corrupt society was indictable as it constituted a breach of the peace.[12] In Mississippi a decade and a half later, a defendant, Chace, entertained an audience with a dirty song, possibly about a particular local woman. The court found the song libelous but added that it was not clear the song was about the women.[13] And, fifteen years later, in *Edgar v. McCutchen* (1846), Edgar challenged his

10. We might consider a suit for slander to be a cause of action that existed at common law, though it had been codified into the statutes of some states. *See* Warren v. Norman, 1 Miss. 387 (1831); Walton v. Singleton, 7 Serg. & Rawle 449 (Pa. 1821); Edgar v. McCutchen, 9 Mo. 768 (1846). When foul language was prosecuted by the state, the court could consider the speech a public nuisance, or more generally as offending the common law's role as protecting public morals. *See* State v. Baldwin, 1 Dev. & Bat. 195 (N.C. 1835).

11. *Bell*, 31 Tenn. at 44.

12. Commonwealth v. Sharpless, 2 Serg. & Rawle 91, 102 (Pa. 1815). While the defendants were mostly correct in their assertion, there was a case from 1727 that held otherwise and, unfortunately for the defendants, the court relied upon it. The 1727 case, *Dominus Rex v. Curl*, 2 Str. 788, was described by Geoffrey Stone as an outlier in English obscenity jurisprudence. While the publication in question was certainly provocative—a reprint of a French anti-Catholic screed from the 1680's that described monks and nuns having sex in all sorts of ways, and using all kinds of tools—the rule lied dormant until Justice Tilghman seized upon it in 1815. According to Stone, the 1727 prosecution had less to do with stopping obscenity and more to do with punishing Curl, a local printer that had long angered local officials with his other writings about their activities. Geoffrey R. Stone, *Sex, Violence, and the First Amendment*, 74 U. CHI. L. REV. 1857, 1861–63 (2007); Albert B. Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U. PA. L. REV. 834, 836 (1964).

13. State v. Chace, 1 Miss. 384 (1830).

conviction for claiming that McCutchen had sex with a horse; since the word "fuck" was not part of the English language, as Edgar argued, it lacked a universal meaning. The Missouri Supreme Court found the meaning "universal" enough and rejected this argument.[14] As these rulings would suggest, in the early nineteenth century, American judges asserted a very open-ended jurisdiction over obscenity cases that was warranted, as Judge Tilghman claimed in *Sharpless*, because the "courts are guardians of public morals."[15] However, though courts assertively declared their broad authority under their common law jurisdiction to punish filth, it was the tendency to disrupt the public peace that would land someone in court during this period. Words were not in-and-of themselves dangerous.[16]

At midcentury, state statutes began to replace common law regulation, placing filthy words alongside criminal conduct such as murder, burglary, and arson.[17] These statutes, which made some words criminal, combined concerns about local anxieties with an overarching

14. Edgar v. McCutchen, 9 Mo. 768 (1846).

15. *Sharpless*, 2 Serg. & Rawle at 102.

16. Indeed, the most incendiary speech of the pre-War era, abolitionist speech, was routinely shut down under the common law doctrine of nuisance, equating anti-slavery words and texts as inherently dangerous to the good order of a community. By falling under the courts' common law jurisdiction, however, many of these cases were dismissed by judges solicitous of the rights of criminal defendants. Though some states did pass statutes prohibiting "profane swearing" in public, these tended to be deployed against defendants making blasphemous rather than vulgar or obscene statements. *See, e.g.*, State v. Baldwin, 1 Dev. & Bat. 195 (N.C. 1835); Ex Parte Frail, 3 Ark. 561 (1841). North Carolina, for example, passed a law prohibiting profane swearing. State v. Jones, 9 N.C. 38 (1848); Richard Kielbowicz, *The Law and Mob Law in Attacks on Antislavery Newspapers, 1833-1860*, 24 L. & HIST. REV. 574–75 (2006).

17. Post-war legal treatises recognized that common law felonies—murder, burglary, arson—no longer existed due to state codification, though the definition of the elements of those felonies remained with the common law. *See, e.g.*, 15 THE AMER. L. REG. 324–25 (1867). In the first half of the nineteenth century, as a part of legislation incorporating or re-chartering municipalities, some states grated as a part of their power the ability to restrict "profane swearing or other obscene or unlawful language." However, these prohibitions against language were included less out of a concern of stifling specific speech, and more as a function of granting cities the abilities to govern and abate nuisances. *See* An Act to Incorporate the Town of Decatur, 1833 Ala. Laws 81–84; An Act to More Fully Provide for the Incorporation of the City of Fort Smith, 1853 Ark. Acts 215; An Act to Amend and Consolidate the Several Acts Relative to the Village of Potsdam, 1859 N.Y. Laws 197.

legal commitment to shielding people from offensive speech. States began to punish not just the possession of obscene writings and books, a trend normally associated with the Comstock Era (after the Civil War), but also began to criminalize the verbal expression of words. While these statutory prohibitions differed by state, they were united by a shared interest in policing public spaces. Some states punished obscene or indecent language if uttered in the presence of women.[18] Alabama was in the vanguard when in 1860 it criminalized the willful use of "profane, vulgar, or obscene language" to disturb a group made up either entirely or partially by women that was meeting for the "purpose of amusement, recreation, or instruction."[19] The penalties included fines of up to $2,000 and imprisonment of up to six months.[20] Ohio in 1883 and Minnesota in 1889 followed suit with similar statutes, though with lessened penalties, that made it a criminal offense for anyone over fourteen years of age to use "any obscene or licentious language or words in the presence or hearing of any female."[21]

Elsewhere, state law made obscenity site specific. Illinois placed the use of obscene language on the same plane as disorderly conduct or gambling when it banned all three activities from trains within the state in 1877. While Illinois empowered the train conductor with the ability to stop the train and eject passengers who used filthy language, Massachusetts in 1883 made it a criminal offense to use obscene words in any "steamboat, railroad carriage, or other public conveyance."[22] Some southern jurisdictions took this further by even

18. To Protect Females from Insult and Injury at Public Assemblages, 1859 Ala. Laws 73–74; Chapter 100, § 28 General Statutes of the State of Minn. in force January 1, 1889 (St. Paul: West Pub. Co., 1889), 817-818; Chapter IX, §7026, Criminal Code of Ohio (Cincinnati: R. Clarke & Co., 1883), 215.

19. To Protect Females from Insult and Injury at Public Assemblages, 1859 Ala. Laws 73–74.

20. *Id*.

21. Ohio set penalties for such an offense at no more than $20 and twenty days in jail, while Minnesota laid out fines not to exceed $100 (but not less than $5) and capped jail time at thirty days (but no less than ten days). Chapter IX, §7026, Criminal Code of Ohio (Cincinnati: R. Clarke & Co., 1883), 215; Chapter 100, §28 General Statutes of the State of Minn. in Force January 1, 1889 (St. Paul: West Pub. Co., 1889), 817–18.

22. An Act for the Protection of Passengers on Railroads, 1877 Ill. Laws 166; An Act to Punish Persons Guilty of Disorderly Conduct on Steamboats and Other Public Conveyances, 1883 Mass. Acts 404.

investing conductors with police power to act in the name of the law to enforce clean speech. For instance, Alabama in 1883 and Florida in 1891 gave railroad conductors the same powers enjoyed by police officers in the state; if a passenger was disorderly, used foul language, or gambled on the train, the conductor could remove the person at the next stop, and use reasonable force in doing so. Moreover, the conductor could demand the assistance of other passengers; in the event they refused, it would be considered tantamount to refusing the lawful order of a police officer.[23] Still other states criminalized obscenity more broadly by punishing it in all public spaces. Astonishingly, Arizona, Idaho, California, and Utah—all western states and territories—used an identical five-part statute to criminally punish as a misdemeanor anyone who "[s]ings any lewd or obscene song, ballad, or other words, in any public place." These statutes criminalized the singing of dirty songs in the same category with other activities such as the exposure of one's "private parts" in public, or any exhibition, artistic or otherwise, that is "offensive to decency, or is adapted to excite vicious or lewd thoughts or acts."[24] It is not surprising that vaudeville would become one of these sites.

With the emergence of vaudeville in the mid-1870s, it is reasonable to attribute these developments to the changing composition of public space in the post-war years.[25] As unescorted women, freed slaves, and immigrants now sought to claim their places in the public venues of the day, a new focus on regulating those spaces arose in law. On one hand, law helped to define these spaces. By enacting statutory

23. An Act to Confer Police Powers on All Conductors in Charge of Passenger Trains on the Railroads in this State, 1891 Fla. Laws 114–15; To Confer Police Power upon the Conductors of Passenger Trains in this State, 1883 Ala. Laws 172–73. In some ways, the act of investing railroad conductors with state police power presages the notorious Louisiana separate railroad car act of 1890, upheld in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

24. Chapter VIII, § 283(5), Ariz. 21st Legislative Assembly (1901), Revised Statutes, 1234–35; Chapter VIII, § 6840(5), Revised Statutes of Idaho Territory. Enacted at the Fourteenth Session of the Legislative Assembly. In force June 1, 1887, 737–38; Chapter VIII, § 311(5), Penal Code of Cal. (Sacramento: T.A. Springer, state printer, 1872), 77–79; Chapter VIII, § 4527(5), Compiled Laws of Utah (Salt Lake City, Utah: Herbert Pembroke, 1888), 597; and Title 31, Chapter 269, § 2 General Laws of the State of N.H. (Concord: J.B. Sanborn, 1878), 608–09.

25. ARTHUR FRANK WERTHEIM, VAUDEVILLE WARS: HOW THE KEITH-ALBEE AND ORPHEUM CIRCUITS CONTROLLED THE BIG-TIME AND ITS PERFORMERS 10 (2006).

penalties for simply uttering words deemed obscene, language was increasingly used as a critical marker of defining legitimate public space, or space that conformed to the middle-class norms of the day.[26] Consider an example from the railroads. An 1881 Tennessee law prohibited railroads from charging African American passengers first-class fares, relegating them to second-class accommodations. How did the statute differentiate between first- and second-class? Second-class allowed smoking and tolerated vulgar or obscene language: here, words distinguished spaces and marked status.[27] On the other hand, courts also left the regulation of private spaces to private actors. For instance, the Supreme Court notoriously regulated public space in the *Civil Rights Cases* (1883),[28] using the state action doctrine to evade the Fourteenth Amendment and allow "private" business to discriminate based on race. However, it was these state statutes that helped govern the everyday interactions that took place in the nation's theaters, department stores, and railroad cars.

The state-led statutory regulation of obscene speech found a national outlet in the early 1870s. In 1873, Congress passed the "Act of the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use."[29] Known colloquially as the Comstock Act in honor of the nation's leading anti-smut zealot Anthony Comstock, it likewise grew out of statutory decrees. Under the Comstock Act, the mails could be used to bar content deemed obscene, lewd, lascivious, or otherwise indecent—legally, it erected a big tent for material

26. By the end of the century, a black vaudeville circuit emerged where patrons could listen to comics perform material that spoke to their experience without the need to satisfy the expectations of a white audience. Contemporary accounts seem to indicate that you could perform material in these theaters that would not be possible in the white vaudeville circuit. LYNN ABBOTT & DOUG SEROFF, THE ORIGINAL BLUES: THE EMERGENCE OF THE BLUES IN AFRICAN AMERICAN VAUDEVILLE 3 (2017).

27. An Act to Prevent Discrimination by Railroad Companies, 1881 Tenn. Pub. Acts 211–12.

28. The Court held that the Fourteenth Amendment only applied to actions taken by the states; as such, ostensibly private entities like theaters, inns, and railroads were not state actors and did not have to comply with the Amendment. Civil Rights Cases, 109 U.S. 3 (1883).

29. Comstock Act, ch. 258, 17 Stat. 598 (1873)

identifiable as sexual in nature.[30] The Act might also be understood to reflect three critical legal developments. For one, it would signal a turn in national law toward the regulation of vice, or victimless crimes, including gambling or lotteries.[31] In fact, Justice Harry Blackmun pointed out in his opinion in *Roe v. Wade* that it was not until after the Civil War that states began to replace common law rules on abortion with statutes barring them—an historical development that, he might have added, tracks the regulation of filthy words.[32] Second, it demonstrated that the major post-war legal transformations were not limited to questions of rights and citizenship—as suggested by the passage of the Thirteenth, Fourteenth and Fifteenth Amendments—but were similarly concerned with regulating the public conduct of the scores of people now claiming citizenship. And third, it reflected undercurrents in the formal attempts to regulate words that ran through the nineteenth century. For instance, in the 1830s, Congress repudiated Andrew Jackson's attempt to bar abolitionist materials from the mail.[33] By the mid-1860s, when senators sought to regulate the mails they thought were being used to transport racy images to servicemen, such regulation had become more tolerable—making the regulation of obscenity an issue of national security.[34]

After the Civil War, the statutory turn in the regulation of filthy words was embroidered back into the common law. It began with an 1868 English opinion *Regina v. Hicklin* which found that obscenity could be identified by its "tendency" to "corrupt and deprave those whose minds are open to immoral influences and into whose hands a publication of this sort may fall;" the opinion exerted enormous influence in the United States.[35] The *Hicklin* rule was adopted in the United

30. In addition, the Act specifically prohibited the transmission of any "article or thing designed or intended for the prevention of contraception or procuring of abortion." *Id.*

31. FRIEDMAN, *supra* note 4 at 134–35.

32. Roe v. Wade, 410 U.S. 113, 139 (1973).

33. CURTIS, *supra* note 7, at 174-75.

34. Postmasters also barred the mailing of abolitionist tracts in the antebellum era. JAMES PAUL & MURRAY SCHWARTZ, FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL 6–8, 17–18 (1961); CURTIS, *supra* note 7, at 402–403.

35. The English had been at work on the problem of censorship for a while. *Regina v. Hicklin* built on The Obscene Publications Act, which Lord Chief Justice John Campbell steered through England's House of Lords in 1857. *See* PAUL & SCHWARTZ, *supra* note 34, at 12–13, 16.

Stated in *U.S. v. Bennett*, a federal circuit court case from New York in the late 1870s when notorious crank D. M. Bennett inadvertently mailed Anthony Comstock—posing as "G. Brackett"—a copy of *Cupid's Yokes*, a pamphlet that promoted free love and equated marriage with prostitution. In *Bennett*, the judge instructed the jury to disregard Bennett's motives, along with their feelings for Anthony Comstock, and the context of the pamphlet, and to focus instead on whether the words in passages preselected by the district attorney were obscene; in this case the judge defined obscenity—like *Hicklin*—as a tendency to "deprave the minds of those open to such influence."[36] The effect of the case was to make the *Hicklin* opinion and the Comstock Act the definitive standard in interpreting obscenity; it was a position the U.S. Supreme Court formally accepted in 1896 in *Rosen v. U.S.*[37] By the last third of the nineteenth century, statutory and common law converged in a shared finding that filthy words were dangerous and illegal, regardless of context or effect. This new emphasis on certain words as illegal would likewise help define the acceptability of the spaces of leisure. Though the era saw the rise of department stores and baseball stadiums, no space was more popular than the theater and its newest sensation—vaudeville.

II. EARLY AMERICAN LEISURE

American theater in the colonial era was largely an ad hoc affair. Not only was the population small, but most of it was rural, leaving towns and cities without the resources to maintain a full-time venue. As a result, shows were usually mounted by traveling performers. However, it was not simply a lack of resources—financial and human—that limited the numbers of colonial theaters. When opposition to theaters was cast in moral terms colonial authorities often banned theatrical performances altogether.[38] The evidence suggests that this began to change after the founding era when new, large venues—many

36. PAUL & SCHWARTZ, *supra* note 34, at 25–26; United States v. Bennett, 24 F. Cas. 1093, 1102 (S.D.N.Y 1879).

37. Rosen v. United States, 16 S. Ct. 434 (1896).

38. Allen specifically notes the early theater prohibitions enacted by Pennsylvania and Massachusetts. ROBERT C. ALLEN, HORRIBLE PRETTINESS: BURLESQUE AND AMERICAN CULTURE 46–47 (1991). *See also* HUGH F. RANKIN, THE THEATER IN COLONIAL AMERICA 2–4 (1960).

hosting ribald entertainments—would survive the regional prejudices that shut down their predecessors.[39] These entertainments would become a durable and visible part of Antebellum life, particularly in American cities.

Theaters were chaotic leisure spaces that also reflected the political changes in the early-national era. In the age of President Andrew Jackson—the 1820s and 1830s—the theater became accepted as a profoundly white, male public space where actors and audiences together replicated the tenets of the "common man," and where alcohol-fueled audiences exercised control over performances.[40] Historian Richard Butch describes how audiences wrestled for control of plays, by shouting down actors, throwing whatever was handy at the stage, and even rioting; this theater, he adds, was more akin to "a tavern with entertainment."[41] Alongside food and drinks, a patron entering a typical theater in the 1820s would find peanut shells strewn across the floor, with benches or removable seats that might be easily rearranged; the balcony was a haven for prostitution, understood and indeed encouraged by most theater operators.[42] Far from unitary and communal sites, the spaces of the theater were controlled by the appetites historians have assigned the figure of the common man.

In the antebellum era, the spaces of leisure began to shift and break down along class lines into sites distinguished by off-color spectacle on one hand and genteel pleasure on the other. For example, in New York beginning in the 1840s, many of the elite, seeking to command deference in public spaces like the theater, claimed the opera, the new philharmonic, or a range of "respectable" theaters, as their preferred entertainment.[43] But these venues were badly outnumbered by

39. FELICIA HARDISON LONDRE AND DANIEL J. WATERMEIER, THE HISTORY OF NORTH AMERICAN THEATER FROM PRE-COLUMBIAN TIMES TO THE PRESENT 113 (1998). Any sense that these new theaters would serve to display wholesome morals to the populace quickly dissipated. ALLEN, *supra* note 37, at 51.

40. ALLEN, *supra* note 38, at 51; Richard Butsch, *Bowery B'hoys and Matinee Ladies: The Re-Gendering of Nineteenth Century American Theater Audiences*, 46 AMER. QUAR. 374–77 (1994).

41. Butsch, *supra* note 40, at 379.

42. ALLEN, *supra* note 38, at 52–55; Butsch, *supra* note 40, at 379–80.

43. DALE COCKRELL, DEMONS OF DISORDER: EARLY BLACKFACE MINSTRELS AND THEIR WORLD 30–31 (1997); Gillian Rodger, *Legislating Amusements: Class Politics and Theater Law in New York City*, 20 AM. MUSIC 383 (2002); ALLEN, *supra* note 38, at 61–62.

venues like concert saloons.[44] Dale Cockrell noted that in New York in this era, for example, the elite might attend the Park theater in Midtown, while the lower classes would go to the Cheatham or the Bowery, theaters further downtown that specifically promoted entertainment for the working class.[45] Working class patrons were increasingly lured to concert saloons that offered a wide range of acts; however, alcohol was typically the headliner.[46] Like the whisky served by scantily clad "waiter girls" and entertainments packed with enticing chorus girls—often encouraged to mingle with the crowd to increase drink orders—sex accessorized the saloon, extending the spaces of entertainment well beyond the stage.[47] As historians have pointed out, this antebellum-era bifurcation between the leisure sites of the wealthy and working were also expressing themselves in housing and in relationships to the means of production.[48]

The bifurcation of leisure was quickly followed by efforts to use law to formalize these new distinctions by reforming the spaces of working-class leisure; in New York City they would come under more intense scrutiny at midcentury. By 1862, a New York state law, dubbed the "Anti-Concert Saloon Bill," prohibited an owner of a theater from also holding a liquor license, effectively making a "concert saloon" a legal impossibility in the state.[49] Though some working-class theaters closed, others pivoted and sought out a new audience. Similar state

44. A concert saloon is a precursor to vaudeville that prospered in American cities in the mid-nineteenth century. Characterized by alcohol, gambling, women and violence, they were typically male-only spaces. *See* BROOKS MCNAMARA, THE NEW YORK CONCERT SALOON: THE DEVIL'S OWN NIGHTS 156 (2007).

45. Dale Cockrell notes that in New York in this era for example, the elite would attend the Park theater, the lower classes would go to the Cheatham, and the Bowery theater occupied a place in between; however, other scholars describe the New York theater hierarchy with the Park at the top and the Bowery at the bottom. COCKRELL, *supra* note 43 at 30–31; Rodger, *supra* note 43 at 384–86.

46. Rodger, *supra* note 43, at 383–84.

47. WERTHEIM, *supra* note 25, at 9.

48. Rodger, *supra* note 43, at 387. For separation at the workplace, see PAUL E. JOHNSON, A SHOPKEEPER'S MILLENNIUM: SOCIETY AND REVIVALS IN ROCHESTER, NEW YORK, 1815-1837 (2013).

49. While not every city followed New York's lead in using its police power to remove alcohol from theaters in the early 1860s, concert saloons in other cities were generally tolerated to the extent that local government allowed. ALLEN, *supra* note 38, at 76; Rodger, *supra* note 43, at 390, 392.

laws were passed down the east coast and across the Midwest in the 1870s and into the early 1880s.[50] These laws drew from the same well as those that began to punish obscene words, as many states began to envision public spaces that allowed alcohol and theater performance as inherently dangerous, especially to minors. For example, in 1878, Delaware made it illegal for an owner of any theater, concert saloon, or similar venue where alcohol was sold to allow minors on the premises.[51] Colorado took this one step further in 1885 when it passed a statute that equated saloons, billiard halls, bowling alleys, gambling dens, and houses of prostitution with *any* place that allowed performances of obscene plays.[52] From the perspective of bawdy leisure, statutory law presented a dangerously effective tool that promised to chase vulgarity out of working class spaces.

Concert saloons were also transformed by social concerns about the status and presence of unescorted white women. In fact, in the 1840s museum owners like P.T. Barnum were already targeting female customers who would never attend the theater by creating "lecture rooms" that offered educational performances and melodramas that emphasized middle class morals, values, and reforms.[53] Theater owners picked up on the trend and, by the 1860s, white women began attending daytime matinees at theaters unescorted as it became more socially acceptable. Soon, many theaters were focusing on the quality and quantity of these matinee performances to ensure continued attendance by women who could now take their pick of daytime entertainments.[54] Rowland Macy began to diversify his dry goods store in New York in 1868; within ten years, Wanamaker's, Macy's, and Jordan March made their marks as the first true American department stores.[55] Like the changes in theater, innovations in consumer and shopping culture—like taking goods from behind the counter to encourage browsing, widening aisles, replacing utilitarian lighting with ornate fixtures, or covering the walls with mirrors—indicated that women were an

50. Rodger, *supra* note 43, at 396.

51. An Act for the Prevention of Cruelty to Children, 1887 Del. Laws 444–46.

52. An Act to Prevent the Sale of Intoxicating or Malt Liquors to Minors, 1885 Col. Sess. Laws 174–75.

53. Butsch, *supra* note 40, at 383–84; WERTHEIM, *supra* note 25, at 10–11.

54. Butsch, *supra* note 40 at 384, 389–90.

55. JAN WHITAKER, THE WORLD OF DEPARTMENT STORES 22–25 (2011).

important market that had yet to be fully recognized.[56] Even some of the more respectable concert saloons sought to get in on the action, as some would specifically advertise shows for women and children and would close the bar for the performance.[57]

The bifurcation of live entertainment, which animated statutory initiatives to reform working class sites by making them friendly to white women and unfriendly to alcohol, would lead many theaters to shift to a variety format consisting of one or two actors at a time.[58] This new format allowed more space for comedic performers, given that the comics no longer had to compete with clanking glasses and boisterous drink orders, common in the days when the saloon was the prime attraction.[59] This new turn to safe leisure would be epitomized on vaudeville stages and circuits where it would define the leading sanitized entertainment of post-war America.

III. POSTWAR: VAUDEVILLE AND FILTHY WORDS

In post-Civil War America, the test for filthy words emerged from the common law to find new expression in statutes that clustered deep anxieties around speech, and, by the last third of the century, in the vast and powerful, but untrained, hands of the United States postal service. Over the course of the nineteenth century, legal language defining filthy words as criminal and unsafe, distinguishing them from clean words, became more precise. The rise of vaudeville after the Civil War reveals how these concepts took root in, defined, and were defined by rules regulating filthy words—imputing legal distinctions into social practices.

Vaudeville reflected shifts in post war consumerism that saw women and children invited into the public spaces of theaters, circuses, baseball stadiums, and department stores.[60] One effect of the sanitation

56. WILLIAM LEACH, LAND OF DESIRE: MERCHANTS, POWER, AND THE RISE OF A NEW AMERICAN CULTURE 72–75 (1993).

57. Butsch, *supra* note 40, at 388.

58. Rodger, *supra* note 43, at 392.

59. *Id.*

60. For example, a random 1897 edition of the *Boston Daily Globe* gives us insight into the available entertainment options. On that Sunday, May 2, the paper laid out that week's choices. Bostonians could see a comic play at the Boston Museum or a dramatic play at the Bowdoin, attend a vaudeville show at Keith and Albee's new

of public spaces facilitated by the moralizing of the Comstock Act was to fasten new class and sexual sensibilities to spaces previously occupied by working class men.[61] According to historian Kathleen Casey, audiences were willing to deal with a fair amount of transgression, including the crossdressing sensation Julien Eltinge, but obscenity was verboten.[62] Even the minstrel shows, which fashioned entire sequences of demeaning racial caricature, were "clean" of sexual content.[63] So was "vaudeville," a term increasingly adopted by theaters in the 1870s to distinguish their entertainments from the more pedestrian sounding "variety" shows of the past.[64] Unlike the modern emphasis on the solitary stand-up comic, the most popular vehicle for comedy in vaudeville was more often part of a comic song or a farce play. These plays typically featured several songs and a schmaltzy ending, and regularly peddled stereotypical ethnic characters who commanded big—and clean—laughs. For example, in "The City Directory," a clearly Irish character rambles onto the stage and grabs a lamp from a table to the dismay of the actors nearby, prompting the following exchange:

> What are you going to do with that lamp?
> I'm going to throw it out.
> Why, does it smoke?
> Sure, I dunno whether it smokes or chews, but out it goes.[65]

As the new name indicates, vaudeville remained connected to and distinct from its raucous past. For instance, theatrical entertainments that had begun in the "lecture rooms" of museums were expanded to the vaudeville stage. And the figures that built vaudeville, like Tony Pastor, who came up as an entertainer in the racy concert saloons, witnessed how the theater owners that eliminated obscene or

theater, take in a burlesque show, listen to the Boston Women's Symphony Orchestra, or take their pick of several baseball games. BOSTON DAILY GLOBE, May 2, 1897, 19.

61. WERBEL, *supra* note 5, at 67–68.

62. KATHLEEN CASEY, THE PRETTIEST GIRL ON STAGE IS A MAN: RACE AND GENDER BENDERS IN AMERICAN VAUDEVILLE xvii (2015).

63. RUSSEL B. NYE, THE UNEMBARRASSED MUSE: THE POPULAR ARTS IN AMERICA 164 (1970).

64. WERTHEIM, *supra* note 25, at 10.

65. *Farce Comedies*, BISMARCK DAILY TRIB., Dec. 9, 1890, 2.

suggestive material to lure in women and children secured greater financial success.[66] Pastor adhered to this code when he opened his first theater in New York City in 1865.[67] Meanwhile, Benjamin Franklin Keith and his business partner Edward Albee likewise followed this approach, but expanded upon it. From a single theater in Boston in 1883, Keith and Albee created not only opulent theaters, but also a national vaudeville circuit where all their theaters scrupulously followed a similar blueprint.[68] [**Figure 1**]

As they ushered vaudeville into an era of big business, entrepreneurs like Pastor or Keith and Albee made vaudeville more uniform and brought it into compliance with emerging state statutes defining and regulating obscene words. In the process, vaudeville became less about generating artistic innovation and more about commodifying entertainment into acts that could be performed, transported, and reproduced elsewhere.[69] With vaudeville, this uniformity would stretch across the American landscape. For instance, Keith and Albee carved up the country into territories and created closed shop vaudeville circuits that rigidly enforced the rules for performers. Ultimately, the country was divided into two major circuits: the Keith/Albee circuit, which controlled the majority of theaters in the east, and the Orpheum circuit, founded by Gustav Walter and named for his famous San Francisco theater, which controlled the west.[70] From pay and hours, to bookings across the country, and even to the content of the acts, performers were subject to the control of the vaudeville managers.[71]

During the last third of the nineteenth century, when states were creating new statutes to regulate obscene words, vaudeville was creating an expansive new national platform upon which new legal

66. WERTHEIM, *supra* note 25, at 68.

67. *Id.* at 67.

68. *Id.* at 12–18.

69. In its pursuit of profit, it resembled other major industries of the day. Like the transportation and manufacturing sectors, vaudeville, like other entertainment industries—professional baseball or the circus for instance—operated under similar guidelines when producing their commodities: industry norms were introduced; creating a uniform product and controlling labor costs were as important as was muscling out your weaker competitors and achieving détente with the stronger ones. *See* WILLIAM LEACH, LAND OF DESIRE: MERCHANTS, POWER, AND THE RISE OF A NEW AMERICAN CULTURE 17 (1993).

70. WERTHEIM, *supra* note 25, at 35.

71. *Id.* at xvii.

distinctions between words—clean and dirty, safe and unsafe, moral and dangerous—could unfold. [**Figure 2**] These statutes focused less on defining which words were unspeakable—generally outlawing "vulgar" or "obscene" speech—and instead concentrated on punishing public utterances of these words. While most state statutes varied, they tended to punish words deemed obscene if spoken (or sung) in public, and especially if done so in front of women or children or on public transports like railroads or steamships. The national uniformity of the Comstock Act concealed a patchwork of state laws that regulated and defined obscenity differently.

These statutes authorized vaudeville managers to punish transgressions—obscene material—either preventatively or afterwards. At Keith and Albee's Union Square theater in New York, managers would assign performers a specific dressing room. On the back of the room assignment sheet was a warning against "all vulgar, double-meaning and profane words and songs." While not an exhaustive list, the warning specifically prohibited words like "'liar,' 'slob,' 'son-of-a-gun,' 'devil,' 'sucker,' 'damn,'" as well as words that were "unfit for the ears of ladies and children." Performers were also informed that they could not even refer to "questionable streets, resorts, localities and barrooms." Any doubt as to the appropriateness of the content in a performer's act could be directed to the resident manager, who would make the final call.[72] Once again, obscenity on the stage was not about ethnic or racial stereotypes or gender and sexual difference; it was about using "blue," or filthy, words.[73] In the event a performer did material that the manager felt was too risqué, they would receive a note in their mailbox backstage. The warning was usually delivered in a blue envelope, likely giving us the origins of the term "blue comedy" or "working blue."[74]

72. *Id.* at 74; *see also* Edwin Milton Royle, *The Vaudeville Theater, in* AMERICAN VAUDEVILLE AS SEEN BY ITS CONTEMPORARIES 24 (Charles W. Stein, ed., 1984).

73. Scholars chalk this up to a variety of reasons, notably its assimilationist functions in a society where immigrants and women were part of an urban society. After 1910, this began to change as slapstick, ethnic humor and circus type juggling/comedy acts fell out of favor. NYE, *supra* note 62, at 168, 170–71; JENNIFER MOONEY, IRISH STEREOTYPES IN VAUDEVILLE, 1865-1905 (2015).

74. WERTHEIM, *supra* note 25, at 166.

Off stage, blue envelopes recall the era's industrial bearing in the late nineteenth century. Railroad bosses used blue envelopes to break strikes by firing employees implicated by "spotters" in labor activities.[75] Elsewhere, journalists described a railroad baron berate a conductor for keeping the change given to him by passengers for train fare before handing him a blue envelope; the *New Orleans' Picayune*, likely recalling the same encounter, explained that "When conductors first began to get them they used to demand an explanation. Never was one gratified. 'The blue envelope' has its meaning was the only reply."[76] Industrial employers used them to promote sobriety, as testified to by a North Dakota newspaper account of workers who "received the blue envelope this morning" after they failed to embrace the Keeley Cure for alcoholism, and separately by New York coal workers "detected using liquor or beer;" in these scenarios, the "money due him is placed in a blue envelope and handed him. The receipt of the blue envelope is notice that the man is discharged."[77] Finally, journalists described blue envelopes that contained formal instructions or decrees.[78] As journalists' accounts illustrate, the blue envelope had entered the national lexicon by the 1880s as the color of transgression; their application to scenarios involving labor actions, customer service, and alcoholism are readily applicable to the regulation of filthy words in Vaudeville—where they were also used to discipline. In fact, as the shade of transgression, it would expand into the twentieth century when

75. According to Chicago's *Inter Ocean*, "there is not one of the remaining conductors who knows when his blue envelope may not be placed in his hand." *See Will Start To-Day*, DAILY INTER OCEAN (Chi.), June 28, 1886, at 3.

76. For railroad barons see *The Blue Envelope*, HARTFORD DAILY COURANT, Feb. 15, 1884, at 1; *Vanderbilt's Blue Envelope*, DAILY PICAYUNE (New Orleans), Feb. 17, 1884, at 5. Both accounts, published in the 1880s, appear to recall an episode from the 1860s involving Vanderbilt, who died in 1877. "I see that several have been distributed lately" the *Picayune* added in its coverage. *Id.*

77. For promoting sobriety, see, for example, GRAND FORKS DAILY HERALD, Aug. 25, 1892, at 5, and New York coal workers reported in *They Must Not Drink*, KANSAS CITY STAR, Mar. 3, 1886, at 2.

78. Upon his suicide, Cornelius Jeremiah Vanderbilt (son of the railroad magnate) was discovered with "a large blue envelopes, such as businessmen use, in which to carry papers." *See Vanderbilt's Suicide*, CHI. TRIB., April 4, 1882, at 6. The governor of Pennsylvania's secretary drew "from his pocket a blue envelope containing Executive nominations. He proceeded, in a distinct voice, to read the Executive message." *See The Row at Albany*, PHILA. ENQUIRER, Apr. 26, 1887.

blue laws prohibited liquor sales on Sundays and blue discharges denoted both the dishonorable release of servicemembers after World War II and their exclusion from GI benefits.[79]

Concerns about filthy, blue words were authorized by state and federal anti-obscenity statutes. But they were also adhered to by theater performers driven to comply—possibly—by the grisly conditions of alternative stages. Comics who quit, or were blacklisted from, vaudeville circuits faced limited options. A visit by a *Washington Post* journalist to the Globe Theater in Washington, D.C. in 1891 gives us a glimpse of life outside the circuits. Mocked by the reporter for its low admission prices, one of the first observations the reporter made about the Globe, besides the cloud of thick tobacco smoke that hung over the audience, was about the composition of the crowd itself: there were no white women. Instead, he complained, management had not even bothered to racially segregate their theater; the reporter sardonically noted that "white men and boys were sandwiched in between colored men and women in the true spirit of American democracy. Nearly everyone wore their hat."[80] Besides the three boxing contests between poorly matched opponents—designed no doubt to elicit savage pleasure—the loudest applauses for the night occurred whenever the performers used the words "damn fool" or other similar utterance. But for the use of the word "damn," the reporter explained, it was "difficult to see how the dramatist for the Globe could have properly rendered his production."[81] As with the 1881 Tennessee Railroad Statutes, words helped to identify and distinguish spaces, and to define the people occupying them.[82]

79. For blue envelope entering the lexicon by 1880s, see *Jim Wood and '110'*, DETROIT FREE PRESS, December 25, 1880, 6; *The Blue Envelope*, *supra* note 76; *Shreds and Patches*, WKLY. TEL. (Macon, Ga.), Dec. 15, 1885, at 6; *They Must Not Drink*, *supra* note 77; *Will Start To-Day*, *supra* note 75. For other applications of blue, see THE BLUE LAWS OF THE NEW HAVEN COLONY (1838); DAVID LABAND & DEBORAH H. HEINBUCH, BLUE LAWS: THE HISTORY, ECONOMICS, AND POLITICS OF SUNDAY-CLOSING LAWS (1987). For blue discharges, see Margot Canaday, *Building a Straight State: Sexuality and Social Citizenship Under the 1944 G.I. Bill*, 90 J. AMER. HIST. 935–57 (2003). Margot stresses the ways that accusations of homosexual conduct demolished servicemembers' claims to benefits. *Id.*

80. *A Night at the Globe*, WASH. POST, Feb. 6, 1891, at 8. Historian Kathy Peiss makes a similar point about the rise the heterosocial working class leisure spaces, such as Coney Island. *See* PEISS, *supra* note 6, at 137–39.

81. *A Night at the Globe*, *supra* note 80.

82. An Act to Prevent Discrimination by Railroad Companies, *supra* note 27.

As vaudeville was defined largely by its strict policing of language, filthy words were forced, as the Globe example suggests, into new sites and spaces of entertainment created by anti-obscenity statutes. The phonograph, brainchild of Thomas Edison in 1877, began to appear in public venues in the 1890s, where the technology would facilitate new sites of blue comedy. Especially popular following the 1893 Chicago World's Columbian Exposition, phonograph parlors sprung up across the country.[83] At first, these performances were essentially theater style, where patrons would attend a theater or opera house, pay admission, and listen to a show much in the same way as customary.[84] Very quickly, however, listening to phonographs became a more private experience. For a nickel, a listener could slip on a pair of ear tubes—rudimentary headphones—and transform the saloon, pharmacy, store, or wherever the phonograph was located into a filthy listening experience. As long as the nickel lasted, the demands of propriety expected in public space could be transgressed at will.[85] In 1893, comic Russell Hunting recorded a number of "comic recitations."[86] Realizing the enormous opportunities presented by private listening, by mid-decade Hunting had created a character he called Dennis Reilly, to whom he attributed all-too-common ethnic exaggerations.[87] In one such recording, Hunting had Reilly portray a policeman testifying in court. After asking officer Reilly about the details of the first case on the docket, the judge quickly realized he couldn't understand Reilly's slang, and grew exasperated,

> Judge: What was this other man arrested for?
> Reilly: The other man is a sonofabitch, this other man, God da—

83. There was a spike in the years immediately following the 1893 Chicago World's Columbian Exposition. *See* Patrick Feaster & David Giovannoni, *Actionable Offenses* (Archeophone Records, 2007), liner notes, 5; Giles Slade, *The Bubble of Solitude*, 39 ALTS. J. 47 (2013); *The 'Edisonia'*, PHILA. INQUIRER, Sept. 17, 1893, at 8; *Phonographic Entertainment*, IDAHO DAILY STATESMAN, Oct. 27, 1893, at 3.

84. *Phonographic Entertainment*, *supra* note 83.

85. Feaster & Giovannoni, *supra* note 83, at 5.

86. Michael was an earlier character of Casey's, known for bits including "Casey at the telephone" or "Casey Listening to the Hand Organ." *Phonographic Entertainment*, *supra* note 83.

87. Feaster & Giovannoni, *supra* note 83, at 26, 28.

> Judge: Watch'er, Mister Reilly.
> Reilly: Damn it, I can't hardly control me angry feelings toward this man. I was—I was beatin' up and down, sir, and when I, when I noticed that this man here committin' a nuisance in the laurels, "What're you doin' there?" says I. "Shittin'," says he. "Sure you can't do it there," say I. "Well I've done it fuckin' well already," says he. "Come out o' that," says I. "I'm not in it," says he. "I'll not have it done," says I. "Well you can eat it raw," says he. "It's agin the law," says I. "You're a liar, it's agin the bushes," says he. Upon that, your honor, I struck him a blow, sir, and I nicked him, when I struck again, sir, and he let a fart, your worship, that would crack a plate, and as I stepped back for fear I'd be shot he wiped his ass on the tail of me coat, and he says, "A friend in need is a friend indeed." God damn it.[88]

The bit concludes with the judge sentencing Reilly, and not the man, to thirty days in jail.

After making his first seizure of a phonograph and the accompanying recordings in a New York City cigar store, Anthony Comstock eventually caught up with Russell Hunting—the person who made the "vile" phonograph tubes—in 1896.[89] A judge set bail at the exorbitant amount of $1,000 and he was sentenced to three months in prison.[90] But the restraint of obscene speech is not the only legacy to emerge from the anti-obscenity crusaders, as their enthusiasm for regulation and single-minded pursuit of words also generated new spaces—like the Globe—for filthy speech. Comic Cal Stewart, who also made a clueless character the centerpiece of his act, was willing to move into those spaces.[91] By 1897, Stewart began working solely for the

88. Drawing on the tropes of the Irish both as policemen and as hayseeds, Hunting added a healthy dose of sex and scatological humor to this bit. *See* Feaster & Giovannoni, *supra* note 83, at 28–29.

89. WERBEL, *supra* note 5, at 248–49.

90. *Sang Vile Songs to a Phonograph*, N.Y. TRIB., June 26, 1896, at 10; Feaster & Giovannoni, *supra* note 83, at 8–9.

91. Stewart's act revolved not around a lampooning of the Irish, but of the American rube, the Yankee. Stewart began his entertainment career in vaudeville,

phonograph companies.[92] For the next twenty years, his "Uncle Josh" character made Stewart into one of the country's most popular comics, as the recording of his act allowed listeners to memorize it.[93] In one recording, Stewart plays two male farmers discussing a recent visit by a woman from the city. As a part of her summer board, one of the farmers was trying to teach her how to milk a cow. After the girl takes the cow's teat in her hand, the farmer noticed that she didn't move or otherwise attempt to milk the cow. When the farmer told her she would never get milk that way, "She said, 'Well, I will when it gets ready.' I said, 'Well, what're you waitin' for?' She said, 'Why, I'm a-waiting' for it to get hard.'"[94]

As Anthony Comstock and Cal Stewart suggest, Vaudeville's free speech legacy is twofold. On the one hand, federal and state obscenity statutes punished filthy words. But, as Cal Stewart's popularity and longevity suggest, obscenity statutes also defined and created new spaces for filth to exist. By distinguishing between safe and unsafe words, law—emboldened by its capacity to define rights and citizenship in the years after the Civil War—also hitched its authority to words. In the process of embargoing proscriptive words, these same statutes also helped to create spaces where obscene, filthy, blue words flourished. One result of classifying familiar words anew, as verboten, was to strengthen the authority of the institution doing the classifying—American law.

CONCLUSION

In 1907 Sophie Tucker stumbled on the performance that would allow her to transition from blackface singer to comedic performer, when she sang "There's Company in the Parlor, Girls, Come on Down"

generally playing characters of the country come to market type. See *At the Theaters*, ARIZ. REPUBLICAN, Aug. 24, 1897, at 3.

92. Feaster & Giovannoni, *supra* note 83, at 18.

93. For memorized bits, see Scott Higgins & Sara Ross, *Archival News*, 46 CINEMA JOURNAL 145 (2007). Stewart's good-natured depiction of Uncle Josh and the rest of his neighbors in "Punkin Center" seemed to have no end, as Uncle Josh drove in an automobile and a Fifth Avenue bus, visited Coney Island, went to a department store, and visited "society." *See At the Theaters*, *supra* note 91, at 3; Feaster & Giovannoni, *supra* note 83, at 18.

94. Feaster & Giovannoni, *supra* note 83, at 19.

at her first vaudeville stint in Chicago.[95] As Tucker would discover, when a crowd hailed "There's Company in the Parlor," the audience was more than a judge of taste; its support for that speech could override a ban on filthy words. "'The audience likes them,' she reportedly told one manager. 'Listen to them laugh. So long as folks like those songs they stay in my act. My job is to entertain.' And the box office continued to show how right I was about this."[96] In fact, an altercation following her performance of another of her raunchy favorites—"Angle-Worm Wiggle"—at a show in Portland, Oregon, in 1910 reiterates the role box office receipts and audience response could play in the regulation of filthy words.

> Oh, babe, tell it to me,
> Can you do the angle worm wiggle with me?
> When I dance that wiggling dance, I simply have to giggle with glee.
> So hold me tight, don't you let me fall;
> Sway me round the hall, to that angle worm crawl.
> Oh, babe, tell it to me,
> Can you do the angle worm wiggle with me?[97]

When an anonymous member of the Department of Safety for Women swore out a warrant against Tucker, despite the audience's and chief of police's opinion that Tucker's double entendre was not so filthy as to be "blue," it fell to the local district attorney not to prosecute.[98] [**Figure 3**]

95. Tucker immigrated to the U.S. as a child with her Russian Jewish parents. TUCKER, *supra* note 1 at 21–27, 33, 94–95. Sophie Tucker was reportedly the inspiration for Bette Midler's infamous "Soph" character, a fantastically foul-mouthed older woman who tormented her boyfriend "Ernie" with non-stop one-liners. See Jennifer Vinyard, *Bette Midler on Soph, Janis Joplin, and Her Early Years in New York City,* VULTURE (Apr. 8, 2014), http://www.vulture.com/2014/04/bette-midler-on-her-early-years-in-new-york-city.html (last accessed March 12, 2018).

96. TUCKER, *supra* note 1, at 94–95.

97. *The Angle Worm Wiggle*, Words by I. Maynard Schwartz, Music by Harry S. Lorch (Copyright 1910, Victor Kremer Music Publisher, Chi.).

98. According to Tucker, the chief of police came to the next performance and declared the song as less racy that many of the other acts at the theater that day. Nonetheless, the woman swore out a second warrant and Tucker was again taken into custody. Tucker would boast that the manager extended her run for two weeks. *See*

As Tucker's experience demonstrates, box office receipts in vaudeville could override the very laws that were intended to help them generate profits and secure their prominence. This prerogative was bolstered by federal decree—the Comstock Act—criminalizing words and products associated with sex, the human body, and reproduction; it was a law that made it impossible for some words and images not to be criminal, subversive, or dangerous. But, at the same time, words described in this paper are not solely the domain of the pious; they also belonged to ordinary people, like Sophie Tucker and Cal Stewart, whose imaginations generated the puns, double-entendres, and quips that defined their sets and routines. In effect, the legal, statutory construction of "blue" language described in this article outlines a process in which ordinary people were separated from their words; in which the legal merits of the words they assembled was made contingent on the capacity of those words to protect, and even generate, the profits of owners, managers, and investors. This distinction seems particularly important at the present moment. As a twenty-first century Supreme Court assembles interpretations of speech that appear to diminish the liberties of ordinary people to speak, while articulating robust protections of the words of the rich, the nineteenth century legal transformation of filthy words from common law to statute described in this paper reminds us that the right to speak had long been subject to an economic hierarchy in which the interests of the wealthy are made paramount.[99] As vaudeville would reveal, in modern America access to this right has been strongest when words reinforced this hierarchy and weakest when they threatened it. It was fine to work blue when it was profitable.

TUCKER, *supra* note 1, at 104; *One Arrest Not Enough*, VARIETY, Nov. 10, 1910; *Censor Is Opposed*, OREGONIAN (Portland, Or.) Mar. 18, 1911, at 11; Mary P. Erickson, *"In the Interest of the Moral Life of the City": The Beginning of Motion Picture Censorship in Portland, Oregon*, 22 FILM HIST. 150–51 (2010). The district attorney ultimately dismissed the case. TUCKER, *supra* note 1, at 104.

99. For an example of punishing the speech of ordinary people see *Morse v. Frederick*, where in 2007 a reactionary Supreme Court allowed an innocuous statement "bong hits for Jesus" to be punished, but three years later endorsed the ambitions of the ultra-rich to flood the political system with money in ways that might severely diminish that system's responsiveness to the needs of ordinary people in *Citizens United*. *Compare* Morse v. Frederick, 551 U.S. 393 (2007) *with* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

The years in between Tucker's legal troubles in 1910 and Carlin's in 1973 might also be understood to frame the rise and fall of a legal authority based on words. In these years, proponents of censoring filthy words were bolstered by, among other things, the regulation of motion pictures through a code, the regulation of comic books, and the regulation of obscenity.[100] These distinctions used speech to recast space as either respectable or disreputable, marking some spaces as safe and sanitized and others as vulgar and possibly criminal. In the span of three decades in the late-nineteenth century, filthy speech was recast as a marker of the difference between legal and illegal, between respectable and disreputable. The law in this era did not simply transform speech that addressed themes of a sexual or scatological nature into the category of "obscene." American law transformed as well, as local, state, and Federal authorities all passed specific legislation to tackle the problem of speech. In so doing, speech was recast, from an element of good order policed by common law judges to a problem in and of itself—a problem that required specific legislation to eradicate. Moreover, spaces were considered disreputable or marginally criminal based upon whether they allowed comics to perform blue material. By the last third of the twentieth century, roughly one full century after vaudeville emerged nationally on a sanitized stage for all, the inspired filth of comic showmen confronted the vaudeville era prohibitions on filthy words. Comics performing edgy material paid the price, some by physical arrest—Lenny Bruce multiple times in the early 1960's and George Carlin following his performance of "Seven Dirty Words" at Milwaukee's Summerfest in 1972.[101] Comics also faced retribution outside the

100. For motion pictures, the Production Code Administration (PCA), established in 1934, mandated review to ensure a script "contained nothing that could offend." *See* Jerold Simmons, *The Censoring of Rebel Without a Cause*, 23 J. POP. FILM AND TELEVISION 57 (1995), at 57. For comic book censorship, see FREDERICK WERTHAM, SEDUCTION OF THE INNOCENT (1954). For obscenity, see *Roth v. United States*, 354 U.S. 476 (1957). *Roth* combined *Alberts v. California* and *Roth v. United States.* Alberts published photos of scantily clad women and unlike Roth made no claim of literary merit. He was convicted of violating a California obscenity statute, and the Supreme Court consolidated his and Roth's cases under Roth's name. Alberts v. California, 352 U.S. 812 (1956). For mid-century obscenity, see also Joel E. Black, *Ferlinghetti on Trial: The* Howl *Court Case and Juvenile Delinquency*, 2 BOOM: J. CAL. 27 (2012).

101. The actual circumstances surrounding Carlin's arrest are more nuanced than Bruce's. While Bruce's arrests were often well-planned affairs by the police,

criminal courts: the Smothers Brothers lost their show in 1969 for political speech, Richard Pryor's 1977 primetime network television show lasted only four episodes, while Bill Hicks' entire 1993 performance on the Late Show with David Letterman was cut due to its treatment of religion.[102] While their extraordinary bits, talents, and routines have reached semi-canonical status in the histories of twentieth century comedy, art, and First Amendment jurisprudence, we should recall the circumstances that led to the creation of a legal order so heavily invested in the regulation of filthy words and ideas in the first place.[103]

Carlin's set was on late and by all accounts, the audience was enjoying the routine, with the notable exception of Milwaukee Police Officer Elmer Lenz who was patrolling the fair. Incensed that his wife and son, also at the fair, could have heard the act, Lenz took it on himself to arrest Carlin. As Lenz failed to convince the state district attorney to press charges, the city attorney cited Carlin on disorderly conduct, of which he was acquitted. RONALD K. L. COLLINS & DAVID M. SKOVER, THE TRIALS OF LENNY BRUCE: THE FALL AND RISE OF AN AMERICAN ICON 47–50, 98–104 (2002) and SULLIVAN, *supra* note 2, at 132–37.

102. DAVID BIANCULLI, DANGEROUSLY FUNNY: THE UNCENSORED STORY OF THE SMOTHERS BROTHERS COMEDY HOUR 307–08; Scott Balcerzak, *"Thinking White": Performing Racial Tension in Blue Collar*, *in* REFOCUS: THE FILMS OF PAUL SCHRADER 79 (Michelle E. Moore & Brian Brems eds., 2020); BILL HICKS, LOVE ALL THE PEOPLE: LETTERS, LYRICS, ROUTINES viii–ix, 277 (2004).

103. *See Comedy and the Constitution: The Legacy of Lenny Bruce*, BRANDIES LIBRARY (Sept. 23, 2016), https://blogs.brandeis.edu/library/2016/09/23/comedy-and-the-constitution-the-legacy-of-lenny-bruce (evidencing that these incidents have reached canonical status because Brandeis University held a two-day conference in October of 2016 about Lenny Bruce).

LIST OF FIGURES

Figure 1: "Cover page of pamphlet advertising B. F. Keith's Theatre in Boston." Source: American Vaudeville Museum Collection (MS 421), MS 421 Box 61, azu_ms421_b61_f5_001_pg015a001_m.jpg, University of Arizona Libraries, Special Collections.

Amusements.

THE BIJOU.

SAY, YOUNG MAN!

"I'm a stranger in the city and have been seeing the sights. I've been to Fairmount Park, Independence Hall, looked over the city from the City Hall tower, seen them making money in the Mint, visited Girard College and all the big institutions, and now I want to know what to take in next."

"Well, my friend, it would never do for you to leave Philadelphia without spending an afternoon or evening at the Bijou, up here on Eighth street, just above Race. It is the greatest place of amusement in the city. Continuous performance and the best entertainment I ever saw. If you want to see the best feature of Philadelphia go at once to

Mr. B. F. Keith's New and Elegant Theatre,

THE BIJOU

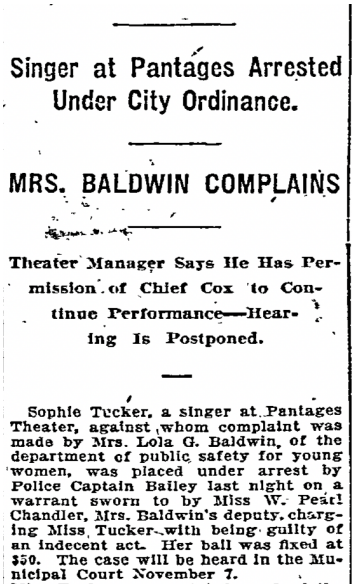
EIGHTH STREET, ABOVE RACE.

CONTINUOUS PERFORMANCE,

FROM 12.30 TO 10.30 P. M.

The Leader in Refined Amusement. Patronized by the Best People of Philadelphia. Clean, Bright and Sparkling Performances. Arranged Especially to Please Ladies and Children. Refinement and Cleanliness the Trade-mark. Performance Continuous. Without Wait or Delay.

Figure 2: Advertisement for the Bijou promising "Clean, Bright and Sparkling Performances. Arranged Especially to Please Ladies and Children. Refinement and Cleanliness the Trademark." Source: *The Philadelphia Inquirer*, September 7, 1890, 6.



Singer at Pantages Arrested Under City Ordinance.

MRS. BALDWIN COMPLAINS

Theater Manager Says He Has Permission of Chief Cox to Continue Performance—Hearing Is Postponed.

Sophie Tucker, a singer at Pantages Theater, against whom complaint was made by Mrs. Lola G. Baldwin, of the department of public safety for young women, was placed under arrest by Police Captain Bailey last night on a warrant sworn to by Miss W. Pearl Chandler, Mrs. Baldwin's deputy, charging Miss Tucker with being guilty of an indecent act. Her bail was fixed at $50. The case will be heard in the Municipal Court November 7.

Figure 3: "Tucker accused of indecent act in Portland. Source: Singer at Pantages Arrested Under City Ordinance," *Oregonian*, November 5, 1910.