Obscene Telephone Calls: An Introduction to the Reading of Statutes

Reed Dickerson
Indiana University School of Law

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub
Part of the First Amendment Commons, and the Legislation Commons

Recommended Citation
Dickerson, Reed, "Obscene Telephone Calls: An Introduction to the Reading of Statutes" (1985). Articles by Maurer Faculty. Paper 1531.
http://www.repository.law.indiana.edu/facpub/1531
ARTICLE
OBSCENE TELEPHONE CALLS: AN INTRODUCTION TO THE READING OF STATUTES

REED DICKERSON*

Members of the legal profession continually confront problems of statutory interpretation. Unfortunately, most lawyers have been inadequately trained to read and to draft statutes, resulting in poorly reasoned judicial decisions and policy choices.

In this Article, Professor Dickerson explores common problems associated with statutory interpretation. In exploring these problems, he describes the cognitive process involved in reading a statute and the large fund of tacit assumptions that condition this process. Through a case study analysis, he suggests a method of approaching problems of statutory interpretation.

This Article presents an exercise in statutory interpretation, for the most part as it was presented several years ago to the appellate judges of Florida at their annual educational meeting.¹ The following hypothetical case, which is based on an actual statute from another state,² was submitted to more than twenty-five judges, each of whom was invited to complete an unfinished opinion in advance of the meeting.

I. THE UNFINISHED OPINION
IN THE DISTRICT COURT OF APPEALS OF FLORIDA, SECOND DISTRICT

SAMUEL POLITTE, Appellant v. THE STATE OF FLORIDA, Appellee
 Nos. 80-1690

REED, Judge.

Defendant is a twenty-three year old interstate truck driver who has a citizens band (C.B.) radio with an outside range of

---

¹ The meeting was held at Innisbrook, Tarpon Springs, Florida, on June 18-20, 1981.
ten miles. At about 2:00 a.m. on January 20, 1980, while operating his radio in one of several frustrating attempts to locate vulnerable female companionship to break his boredom on Route 41 between Naples and Miami, defendant made radio contact with a thirty-five year old unaccompanied woman who had an immediate problem of her own.

A resident of Bonita Springs, complainant was driving to be with her husband, who had been hospitalized while on a business trip to Miami Beach. Some miles past Ochopee, she realized that she was running low on gasoline and that, without a map of the area, she had no idea as to where she might refuel. Starting to panic over the possibility of being stranded alone on a dark highway, she turned to her C.B. radio. The resulting coincidence produced an interesting conversation. Irritated at finding trouble rather than release, defendant offered a stream of obscenity and profanity. Then, sensing that the situation might not be all that bad, defendant tried a friendlier tone. He offered to convoy complainant to the Paolita truck stop, where, he said, there was lots of gas, good booze, and a nice place to have sex. After some further agonizing, complainant reluctantly agreed to being tailgated into Paolita. No names were exchanged. The conversation was overheard by the police and, when the two vehicles arrived at Paolita, a squad car was waiting.

Defendant was charged and convicted before the Circuit Court, Collier County, of violating the following Florida statute: "No person shall engage in or institute a local telephone call, conversation, or conference of an anonymous nature and therein use obscene, profane, vulgar, lewd, lascivious or indecent language, suggestions or proposals of an obscene nature and threats of any kind whatsoever." Fla. Stat. § 899.999 (1984).

The applicable federal statute provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." 18 U.S.C. § 1464 (1982).

The case is on appeal on the narrow question of whether, on the facts just recited, the Florida statute was violated. In view of Thigpen v. State, 350 So. 2d 1078 (Fla. Dist. Ct. App. 1977), cert. dismissed, 354 So. 2d 986 (Fla. 1978), no question has been raised about the constitutionality of the statute.
II. APPLYING PRINCIPLES OF STATUTORY INTERPRETATION

Five judges responded with completed opinions that not only raised valuable relevant considerations but, through a number of significant omissions, also confirmed the previously expressed suspicion that American judges need to be further sensitized to problems of meaning.  

At the meeting, the following principles for interpreting statutes were offered. But first there must be a word of caution.

In a search for guiding principles for interpreting statutes, it is tempting to assume that the problem is to unravel a unitary concept called "interpretation." What many lawyers do not realize is that what lawyers call "interpretation" includes, in the case of statutes, more than what that term normally means outside the law, which is finding whatever meaning there is in a writing.  

In litigation, unfortunately, finding whatever meaning there is in the writing does not necessarily resolve the issue being litigated. Suppose a court, after exploring all the resources of meaning, concludes that the statute is invincibly uncertain or incomplete with respect to the case at hand. Unless the statute is so defective as to be unconstitutionally vague or unfair, the court is still faced with resolving the controversy. It must repair the statute, and it can do this only by making new law. Unfortunately, the idea that a court could make law on its own, instead of "discovering" it, was until recently so abhorrent that courts have maintained surface respectability by calling their lawmaking with respect to statutes "interpretation." This Article, however, is concerned only with interpretation in its normal sense of cognition.

Every successful, written communication consists of two factors: the written communication, which may consist of more than one instrument, and its external context. No message is complete without both. Interpretation, conversely, should be limited to both.

The more difficult concept is external context. Figure 1 be-
low, consisting of the well-known Necker cube,\(^7\) exemplifies unresolvable ambiguity.\(^8\) The question is whether the cube is being seen from above or from below.

**Figure 1**

![Ambiguity](image)

The ambiguity is immediately resolved when the same cube appears in a persuasive context (Figure 2). In Context A, the

**Figure 2**

![Ambiguity Resolved](image)

---

\(^7\) Louis Albert Necker first observed perspective reversal, or two ways of seeing, in line drawings of rhomboid crystals in 1832. The same phenomenon occurs in line drawings of transparent cubes, best seen from the perspective exemplified by the figure in the text. Hence, the term “Necker cube” was born. Attneave, *Multistability in Perception*, Sci. Am., Dec. 1921, at 63, 67.

cube is inevitably seen from below. In Context B, it is inevitably seen from above.

Although its usual role is simply to limit the sweep of otherwise overly general terms, context is sometimes strong enough to override otherwise clear express language, as in the following example: "... one (1), two (2), two (3), four (4) ..." In this example, the numeral "3" overrides the word "two" that immediately precedes it.

It is remarkable that a concept as basic as external context has received so little attention from any source. Although there is widespread agreement that external context is a vital ingredient, only a handful of writers have undertaken to explain what it consists of or how it works.

Briefly, the external context of a statute is that part of the total statutory message that is already in the minds of the legislative audience. For the most part, it appears in the form of factual, tacit assumptions that are shared by the author and the audience or, in special instances, that are available to the audience through sources, such as a dictionary, that are customarily consulted. This concept can be clarified by looking at several diagrams.

Figure 3 represents the statutory provision being interpreted.

![Figure 3]

Figure 4 represents the same provision in the context of the rest of the statute, the relevant parts of which provide the statute's internal context. This goes well beyond the part of micro-context called "syntax."

---

9 See, e.g., E. DRIEDGER, CONSTRUCTION OF STATUTES 149–63 (2d ed. 1983); see also R. DICKERSON, supra note 3, at 103 n.2 (compilation of additional authorities that discuss the role of context in communication).

10 See, e.g., R. DICKERSON, supra note 3, at 105, 108–09, 111, 117.
Figure 5 shows the same provision and the statute in the field of relevant word habits and express or tacit assumptions that constitute the external context of the provision and statute.

Figure 6 shows the same concepts in relation to information or material that lies beyond the scope of external context.
The critical question is, how does the reader know what extrinsic material is part of external context and what lies beyond it? All the following questions must be answered affirmatively before extrinsic material can be considered part of external context:

(1) Is it relevant?

(2) Is it reliable and reliably revealed?

(3) Is it shared or readily shareable by the author with typical members of the legislative audience?

(4) Do both author and typical members of that audience rely on it to carry part of the message or to affect it?11

Nonstatutory material that does not meet the standards of context should not be considered, except for confirmatory purposes, while the court is determining what the statute, as en-

11 R. DICKERSON, supra note 3, at 124.
acted, means. Exclusion of such material is necessary to protect the legislative audience against unfair surprise.

Knowing this, how does the reader find the meaning of a statute? The first step is to explicate it. Here are Justice Frankfurter's three famous rules: "(1) Read the statute; (2) read the statute; (3) read the statute!" Unfortunately, most judges, lawyers, and law professors have been inadequately trained to read statutes. Indeed, many are reluctant even to try.

Justice Frankfurter has also admonished the reader that in interpreting statutes "[t]he aids of formal reasoning are not irrelevant; they may simply be inadequate." The ascertainment of meaning is not so much one of deductive logic as it is one of reacting to a total situation, to which that reaction is psychological, immediate, and typical of the legislative audience and results from recognizing established symbols and meanings.

Ascertaining the meaning of a statute is something like answering the question, "Is the picture before me one of Burt Reynolds?" The primary method of cognition is the informed "gut reaction," which is ultimately based on verbal habits. It is one of recognition and perception. Either the reader recognizes the symbols, or he does not. Either he perceives the aggregate message, or he does not. This method falls within the pragmatic dimension of semiotics, providing a fertile field for the psycholinguists.

The main job of statutory interpretation, therefore, is not to discover specific rules for unlocking meaning in specific cases, but to try to react normally to a complex situation. This means developing a wholesome, sympathetic attitude that is sensitive to the appropriate total context.

Constitutionally valid cognition in the case of statutes involves looking at the right materials with the right attitude. Here are some specific recommendations for doing this:

1. Look at all the relevant language of the statute.
2. Look at it from the vantage point of a typical member of the legislative audience. This vantage point is defined by

---

12 Id. at 217-37.
14 Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 529 (1947).
what is generally understood about the meanings of words in that speech community, which is the semantic dimension, and what is taken for granted in that speech community as conditioning this kind of provision, which is the contextual dimension.

(3) Look at it with an attitude of unbiased inquiry, which is a form of empathy. Individual predilections should be saved for the creative phase.

(4) React!

(5) If this does not provide a persuasive answer, balance the respective probabilities using the normal legislative assumptions and principles of deductive logic. This step is roughly analogous to the mathematician’s vector analysis.

This process should handle the resolvable doubts. The unresolvable ones, by hypothesis, can be handled only by an act of judicial lawmaking, which this Article does not consider.

A large fund of tacit assumptions conditions the cognitive process. These assumptions include many rebuttable assumptions of fact that, as part of external context, are based on established tendencies. The force of these tacit assumptions in a particular case must be determined in light of the peculiar circumstances surrounding that case. For example, in a statute it is generally assumed that the draftsman used his words in their normal senses and that he meant what he said. The statistical force of this generally reliable assumption inheres in the nature of language. It is further assumed that the draftsman did not intend to contradict himself. This, too, is a strong assumption. Third, it is assumed that the statute is intended to produce a constitutional result. This assumption is somewhat less reliable. Fourth, it is assumed that “the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.” This assumption is highly tentative. Finally, it is assumed that the draftsman did not include language unless it contributed to the ideas expressed. This assumption is relatively weak.

15 See generally R. DICKERSON, supra note 3, at 13–21 (ascertainment of meaning distinguished from judicial lawmaking).
These assumptions coalesce into a broad and highly tentative assumption that the draftsman followed sound drafting practices. The general strength of this assumption can be tested by inspecting the statute being interpreted. This inspection will disclose the degree of professionalism of the author and thus the general extent to which it can be assumed that he complied with the principles of good drafting.

Professor Elmer Driedger has crystallized these insights by suggesting that, when interpreting a statute, it is useful to reverse the drafting process.\textsuperscript{17} This is a good idea, but to do it the reader must know what legal drafting is and what good legal drafting entails.

Legal drafting, like other sophisticated expository writing, operates not only in the domain of language but also in the domain of concepts. It is a two-level operation in which the two levels interact: substantive concepts shape the author's language, and the disciplined use of language helps shape his concepts.\textsuperscript{18}

If Professor Driedger is right, the surest way to find the meaning of a statute is to rewrite it. This forces the reader to read deeply instead of merely reading what others, usually judges or law professors, have said about it. As an educational exercise, it heightens the lawyer's sensitivity to the trouble zones of language and their matching concepts. Most importantly, systematic writing strategies can greatly improve the substance of the author's message.\textsuperscript{19}

In summary form, the main strategies of good drafting are these:

\begin{enumerate}
\item Be strictly consistent. Always state the same idea in the same way. Always state different ideas differently. As far as possible, arrange similar things similarly.\textsuperscript{20}
\end{enumerate}

\textsuperscript{17} Driedger, \textit{A New Approach to Statutory Interpretation}, 29 CAN. B. REV. 838, 843 (1951).
\textsuperscript{18} See R. Dickerson, FUNDAMENTALS, supra note 8, at 10–13, 46–47, 133; Dickerson, \textit{Legal Drafting: Writing as Thinking, Or, Talk-Back from Your Draft and How to Exploit It}, 29 J. LEGAL EDUC. 373, 374–75 (1978) [hereinafter cited as Dickerson, \textit{Legal Drafting}]; see also R. Dickerson, MATERIALS ON LEGAL DRAFTING, 99–106 (1981) (compilation of additional sources that discuss the two levels of legal drafting) [hereinafter cited as R. Dickerson, \textit{Materials}].
\textsuperscript{19} See Dickerson, \textit{Legal Drafting}, supra note 8, at 377.
\textsuperscript{20} R. Dickerson, FUNDAMENTALS, supra note 8, at 11–12; Dickerson, \textit{Legal Drafting}, supra note 8, at 378–79; see also R. Dickerson, \textit{Materials}, supra note 8, at 168–74 (compilation of additional sources that discuss the importance of consistency).
(2) Arrange so as to clarify structure. As far as possible, arrange ideas hierarchically, and juxta- pose the ideas that share the strongest affinities.\textsuperscript{21}

(3) Follow established usage.\textsuperscript{22} As far as possible, conform to the established usages of the speech communities to which the statute is addressed. In other words, avoid "Humpty-Dumptyism."\textsuperscript{23}

These strategies and the principles already discussed can be used to explicate and improve the state statute that governs the Politte case. That statute provides:

1. No person shall engage in or institute a local telephone call,
2. conversation or conference of an anonymous nature and therein
3. use obscene, profane, vulgar, lewd, lascivious or indecent language,
4. suggestions or proposals of an obscene nature and threats
5. of any kind whatsoever.

Literally, line 1 says that no person is \textit{required} to "engage in." This form of statement is grammatically undesirable, because negating a requirement does not necessarily negate a power or privilege to act, which it is necessary to do in order to imply the prohibition that context clearly calls for here. Literal meaning and context should support each other, not conflict with each other. The statute should read, "No person may . . ." or preferably "A person may [or 'shall'] not . . ." or "A person who . . ."

The inclusion of both "engage in" and "institute" is redundant in this context. How can a person institute a telephone call in which he uses obscene language without "engaging" in the call? The words "or institute" should be omitted.

Lines 1 and 2 pose a potential syntactic ambiguity. Does "telephone" modify only "call" or does it also modify "convers-

\textsuperscript{21} R. Dickerson, \textit{Fundamentals}, \textit{supra} note 8, at 12, 55-72; Dickerson, \textit{Legal Drafting}, \textit{supra} note 18, at 377-78.
\textsuperscript{22} R. Dickerson, \textit{Fundamentals}, \textit{supra} note 8, at 12-13, 103-04; Dickerson, \textit{Legal Drafting}, \textit{supra} note 18, at 379.
\textsuperscript{23} R. Dickerson, \textit{Fundamentals}, \textit{supra} note 8, at 13, 103-04; Dickerson, \textit{Legal Drafting}, \textit{supra} note 18, at 379. The term "Humpty-Dumptyism" stems from Lewis Carroll's tale, in which Humpty-Dumpty tells Alice that a word means whatever he chooses it to mean. L. Carroll, \textit{Alice in Wonderland} 163 (Gray ed. 1971).
sation” and “conference”? Grammatically, if it modifies “conversation,” it must also modify “conference.” A similar question arises for the term “local.” Stated in tabular form, the grammatical alternatives are these:

(1) No:
   (a) local telephone call;
   (b) conversation; or
   (c) conference.

(2) No local:
   (a) telephone call;
   (b) conversation; or
   (c) conference.

(3) No local telephone:
   (a) call;
   (b) conversation; or
   (c) conference.

Syntax fortified by total context suggests that alternative C is what the legislature intended. The syntax is supplied by the concluding modifier, “of an anonymous nature,” which necessarily modifies “conference” and must also modify “conversation” and “call,” because it would make no sense to apply the anonymity requirement to only one of three obviously overlapping concepts. Also, it would be hard to have an anonymous conversation or conference unless it were conducted by telephone.

The next question is whether all three terms are needed. The word “conference” may be dropped as included in the broader word “conversation.” The word “conversation” may then be dropped as included in the broader word “call.” The latter term is needed because the legislature probably intended to include the situation where a caller merely utters a stream of obscenities and hangs up, thus precluding “conversation.” There are also semantic problems, which will be discussed later.

In line 3, the question arises whether some of the modifiers may be dropped as covered by others. “Lewd” and “lascivious” may be dropped as included in the sex oriented “obscene.”
"Vulgar" may be dropped as unconstitutionally vague. Although "obscene" is included in "indecent," the former is needed because it targets one of the two basic evils to which the statute seems to be directed—obscenities and threats. The term "indecent" is presumably needed to cover other, though less significant, forms of indecency.

The most difficult problem of meaning appears in lines 3 and 4, where the syntax does not make immediately clear whether the primary series consists of two main elements, the first of which is a subseries of three, or of three main elements. In other words, are the phrases within the statute properly grouped as:

(1) obscene or profane language, suggestions, or proposals; and
(2) threats;

or as:

(1) obscene or profane language;
(2) obscene suggestions or proposals; and
(3) threats?

The tip-off is "suggestions," which demands a modifier. The most logical modifier is "of an obscene nature." If in addition to modifying "proposals" it modifies "suggestions," it must also modify "language," assuming that the latter is part of the subseries of three under the first alternative reading. But if this is so, it collides with "obscene" and its fellow modifiers in line 3. Conversely, if the modifiers that precede "language" also modify "suggestion," they must also modify "proposals" and thus collide with "of an obscene nature."

If the reader accepts the second alternative reading, reinforced with penultimate commas after "lascivious" in line 3 and "nature" in line 4 but not after "suggestions," and if the reader recognizes that "suggestions" includes "proposals," the various pieces fall into place.

The final problem involves "and" in line 4. Semantically, the word is crystal clear. It means conjunction, not disjunction, and

24 See, e.g., Cohen v. California, 403 U.S. 15, 25 (1971) ("[i]t is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.").
nothing in the syntax suggests otherwise. External context, on the other hand, indicates that the legislature could hardly have meant what it expressly said. It is generally accepted that anonymous harassment by telephone, whether by obscene or profane language, obscene proposals, or threats is a social evil that a legislature may properly try to curtail. But it strains credulity to assume that the legislature did not intend to punish an obscene telephone call unless it also contained both a threat and dirty words. Here, clear context prevails over otherwise clear words. As the last touch up of this provision, therefore, "and" should be changed to "or" in line 4.

In more modern legal language, we finally get something like this:

1. A person who, in a local telephone call and without revealing his identity:
   1. uses obscene, otherwise indecent, or profane language;
   2. makes an obscene suggestion; or
   3. makes a threat of any kind;

2. commits a class C felony and shall be punished as provided in section 775.908.

Clauses (1) and (2) make good substantive sense because the concept of offensive language may appropriately have a broader sweep than that of offensive suggestions.

Along the way, meanings have been assumed based only on probabilities. Although the conclusions are thus only best guesses, this is an unavoidable risk that further checking can usually reduce.

This drafting exercise is also helpful in the much more sophisticated task of applying the statute to the Politte case. That case also presents the semantic problems of whether "local telephone call" includes use of a C.B. radio and whether Politte's call was "anonymous." Finally, the corresponding federal statute raises the ultimate contextual problem of negative implication.

The following opinion, to be added to Judge Reed's statement

---

25 See generally R. Dickerson, supra note 3, at 41–42; R. Dickerson, Fundamentals, supra note 8, at 26–28 (discussions of the concept of negative implication).
of facts set forth at the beginning, is designed to suggest what might go into an ideal judicial exercise in statutory interpretation. It is ideal only in its attempt to exhaust the aspects of meaning that are worth exploring during the law finding phase of the judge’s mission. So limited, it does not necessarily rule out later resort to extrinsic materials, such as legislative history. It implies only that noncontextual materials should not be consulted unless the law finding phase has been completed without satisfactorily disclosing the meaning of the statute.\(^2\) Drawing the line here is not easy, because the two phases shade imperceptibly into each other. One unrealistic aspect of this opinion, which was distributed at the end of the meeting and suggested only as a goal to strive for, is that it benefited from time and other resources that are normally unavailable to most judges. The opinion is also unrealistic in that the semantic and syntactic discussion is overly detailed for the published draft.

Although none of the responding judges voted for affirmance, perhaps correctly, their reasons for reversal, all of which are discussed in the following opinion, were not conclusive. As is often the case, what is ultimately involved here is good faith judgment. The real challenge is to see the relevant legal and factual issues.

III. THE OPINION COMPLETED

OPINION BY JUDGE REED (continued):

* * *

Defendant makes several points in urging that the conviction below be reversed.

His first point is that his use of a C.B. radio did not constitute a “local telephone call,” because a C.B. radio is not a “telephone,” as required by the statute.

This argument assumes several things. It first assumes that “telephone” modifies not only “call,” but “conversation” and “conference.” This is one grammatical possibility, but not necessarily the only one. It is arguable that, instead, it modifies only “call,” in which case defendant’s actions fall easily into

the category of the unmodified "conversation," if not "conference." On the other hand, it is hard to envision a conversation or conference other than a telephonic one that could create the kind of problem to which the statute is directed.

If it is assumed, more plausibly, that "telephone" modifies all three terms, the question arises as to why the last two were used, since both are included in the first. The answer seems to be that the draftsman, following a now indefensible legal tradition, was overgenerous with his words.

Defendant's argument also seems to assume that "telephone" includes only its most common exemplification, the conventional commercial telephone. The underlying fallacy here is the assumption that because something is a radio it is precluded from also being a telephone. The New Encyclopaedia Britannica, for example, tells us that the word "telephone" is assigned to an "apparatus for producing articulate speech and other sounds at a distance through the medium of electric waves." 18 The New Encyclopaedia Britannica 82 (15th ed. 1975).

Radio is a common part of even conventional telephone service, since many segments operate without wires. Even where radio is the main instrument of sending voice messages, it is often referred to as "radiotelephone." Semantically and functionally, a radiotelephone is an established form of "telephone." That C.B. radios are not ordinarily called "telephones" no more challenges the aptness of that designation than the almost universal use of "aspirin" challenges the aptness of "acetylsalicylic acid." There is nothing in the text, or in its broadest context, to make it plausible that the legislature intended to connote an omission or exception based on the absence of wires at any point, on the fact that popular usage has conferred an alternative name on this kind of telephone, or on the fact that the instrument was private rather than commercial or quasi-public.

Defendant reinforces his point by arguing that the limitation to "local" calls assumes the traditional dichotomy between "local" and "long distance," a dichotomy foreign to radiotelephones operating outside the established commercial systems, thus implying their exclusion from the statute. Defendant points out, correctly, that the meaning of a composite term, such as "local telephone call," cannot safely be identified with the sum of the meanings of its respective parts, which in this case would include "any telephone call that is local." Having pointed out that "root beer" is not beer and that the "parol evidence rule" is not
a rule of evidence, defendant contends that "local telephone call," having been used so long to distinguish it from "long distance telephone call" has acquired a composite meaning that is narrower than, if not different from, the broad generic sweep of its constituent language.

Defendant's examples, unfortunately, are inapt, because the established meanings of those composite terms are inconsistent with and therefore exclude a literal reading of the aggregate or the parts. In the present case, there is no inconsistency in expressly referring to what is inherently local in a C.B. radio call as a "local call." At worst, there is harmless surplusage resulting from making one expression do the work of two.

Defendant contends that if the legislature had intended to cover C.B. radios, it could easily have referred to them in the statute. This is, of course, true. Silence in such a case, however, is a weak reed on which to hang a negative implication. It is more likely that the legislature intended to use language broad enough to encompass not only C.B. radios but also any other form of telephone. Specifically mentioning C.B. radios without mentioning other telephonic devices could have set up an unintended negative implication.

Indeed, defendant also argues that in spite of these considerations, it is unlikely that the legislature at any point had C.B. radios in mind. Although this may be readily conceded, it is irrelevant. It would show a serious ignorance of the legislative process to assume that a statute is intended to cover only what the legislature specifically adverted to during the process of enactment. The specifics that move it to action rarely, if ever, encompass the full dimensions of the problem to which the statute is addressed. Statutes are normally intended to control the future, which the legislature can only see in general terms, with the result that it normally intends to cover by such terms aspects of the overall problem that it did not, and even could not, specifically anticipate. The term "electronic devices," for example, readily accommodates electric devices, falling within the general description, that at the time of its enactment in a statute had not yet been invented and could not even have been foreseen.

Rather, with their inherently limited range, C.B. radios fall comfortably within the generic concept of immediacy that helps define the reach of the statute. Certainly, nothing suggests that the legislature had any purpose that would be served by not
giving "local call" its full semantic sweep, however superfluous "local" might be for C.B. radios.

The overriding consideration is the general presumption that a legislature in striking at a disclosed evil intends to strike at all of it. Why would the legislature want to exclude an abuse that differs from the abuses plainly within the statute only in irrelevant technological details? There is nothing to make the abuse de minimis or its prohibition administratively less enforceable. Nor is the generic meaning unconstitutionally vague in its application to C.B. radios, which are inherently local.

Lingering doubts force us to face defendant's contention that he is entitled to the benefit of the time-honored principle that ambiguous or otherwise uncertain criminal statutes should be construed "strictly." Against this contention, the State argues that in this context the term "strict" has no fixed or established meaning and that the best way to resolve the consequent uncertainty is to examine the objectives behind the so-called rule. It further argues that the most plausible objective of the principle is to induce the legislature to give the potential criminal fair warning of the kind of action that the state is proscribing. See R. Dickerson, The Interpretation and Application of Statutes 205–11 (1975). This concept fits comfortably with constitutional due process. Indeed, it inheres in it.

It is our opinion that the obscenity statute adequately warned the defendant, and thus complies with the implied constitutional requirement. That resort to a C.B. radio did not relieve defendant from criminal stigma should not surprise him, especially when there was a confirmatory warning of impropriety in the federal obscenity statute applicable to "radio communication." See 18 U.S.C. § 1464 (1982).

It is of no consequence that such a defendant is likely never to have examined either statute. The requirement of fair warning is fully satisfied if the statute and its context, which assumes knowledge of the normal meanings of words and the access to generally shared assumptions, gave the defendant a decent opportunity to know the legal hazards. And if a defendant has chosen to tread closely to the margins of vague criminal words, he cannot necessarily complain if a court happens to draw the outer boundaries of illegality more broadly than he would have done, especially "where the function of notice and hearing is assisted by common knowledge and understanding of conventional values as in the case of offenses which are malum in se."
Defendant also contends that because the parties arranged to meet and did in fact meet, the statutory requirement of anonymity was defeated. This assertion seems inconsistent with the thrust of the statute, because anonymity is normally determined as of the time of the offending act, not on the basis of what happens later. To conclude otherwise would defeat criminality in every instance in which the call succeeded in luring a weaker party into a sexual liaison.

The defendant makes the additional point that, however obscene or profane his conduct may have been, he had not met the requirements of the statute because it also requires a threat. Semantically, the observation seems sound. On the other hand, it would be the grossest literalism not to recognize the force of total context. This is especially true in a statute that gives evidence of having been carelessly crafted. The significant context in this instance is the obvious immediate purpose of the statute.

It would be highly unlikely that a legislature so clearly opposed to obscene telephone calls would be willing to suffer them if they were unaccompanied by a threat. Conversely, is a serious threat any less serious if it is unaccompanied by obscene or profane language? The same problem arises for obscene suggestions unaccompanied by obscene or profane language. The notion that the statute so conjoins three independent kinds of reprehensible action is so absurd as to make a literal reading highly implausible. Even if the literal meaning had been intended, defendant's conduct in this case might well have implied a threat to abandon the complainant if she did not comply.

Defendant's final contention is that any attempt to apply this statute to C.B. radios would thwart federal supremacy, because the federal obscenity statute applicable to radio communication preempts the field by negative implication, thus precluding state legislative action in that area. He cites People v. Vogler, 90 Misc. 2d 709, 395 N.Y.S.2d 881 (1977), and Phillips v. General Finance Corp., 297 So. 2d 6 (Fla. 1974).

Vogler is hardly impressive authority because it is a New York town court's interpretation of a federal statute. Moreover,
its rationale misstates the accepted concept of statutory preemption, which is a form of negative implication. In that case, the court stated that “[t]he establishment of a regulatory commission . . . plus Federal licensing and enforcement of violations . . . are evidence of a Congressional intent to pre-empt the sphere of radio broadcasting.” Vogler, 90 Misc. 2d at 713, 395 N.Y.S.2d at 884. But it is simply not true that federal occupation of an area of law is by itself sufficient to exclude state legislation in the same area. It is not even evidence of an intent to do so.

It is obvious that no state by its own legislative action can nullify otherwise valid federal legislation. A problem of preemption arises only where express federal action relates to part, but not all, of an area and is silent with respect to the rest. The question may then arise whether federal silence in the residual area means “hands off” to the states by reason of a negative implication or has left the area open to supplementary action by the states. Such questions can be resolved only by total context, not mere federal silence.

In any event, the issue is hardly foreclosed by the views of a minor state court, especially when they are contradicted by those of a court of our own state, which, in Phillips, 297 So. 2d at 6, declared that preemption depends on whether state action frustrates federal action. This statement, unfortunately, fails to indicate whether the state statute must frustrate an express provision of the federal statute or need frustrate only a negative implication from it. If the former, the statement misstates the preemption principle. If the latter, the frustration test cannot be applied until it is determined whether the circumstances surrounding the express federal provisions create a general implication that the federal action was intended to be exclusive. If the federal provisions do create such an implication, the reader need go no further, because any state statute in the area would automatically frustrate the negative implication. The Phillips statement fails in either event.

There being no indication in the federal statute or its context that Congress intended to exclude supplemental state action or that the particular state action otherwise undermined that statute, defendant’s contention has no merit.

Judgment affirmed.