

## CATO INSTITUTE BOOK FORUM

## CHILDREN, ADULTS, AND THE FIRST AMENDMENT

Monday, May 21, 2001

Moderator:

Roger Pilon, Vice President for Legal Affairs, Cato Institute

With:

Philip D. Harvey, Author,

"Government vs. Erotica: The Siege of Adam &amp; Eve";

Marjorie Heins, Author,

"Not in Front of the Children:

Indecency, Censorship, and the Innocence of Youth

With comments by:

Laurence Jarvik, Author,

"PBS: Behind the Screen," and

Publisher, "The Idler"

The Cato Institute

F.A. Hayek Auditorium

Washington, D.C.

## P R O C E E D I N G S

MR. PILON: We are going to hear from Marjorie Heins on her new book, "Not in Front of the Children: Indecency, Censorship and the Innocence of Youth." Then we are going to have comments by Larry Jarvik, who is himself an author of "PBS: Behind the Screen" and other publications. I will introduce Marjorie and Larry as they come before you.

Let me now introduce Phil, who will recount from his book, the experience of having 37 armed Federal and State agents invade his business in North Carolina as he was himself in New York. It was a harrowing experience that lasted altogether eight years and he triumphed and is something of a hero in these areas for having stood his ground against government, and in particular against the Meese Pornography Commission.

Phil is a graduate of Harvard College and also of the University of North Carolina at Chapel Hill. He received his B.A. from Harvard and his master of science in public health from the University of North Carolina. From 1966 to 1969, he served as CARE's representative in Bombay, and Deputy Director of CARE's All India Program in New Delhi, during which time he provided a provision of supplemental foods for school lunches for 10 million Indian children, special nutrition programs for mothers and preschoolers, and related projects in family planning.

He continued his work in family planning as the Executive Director of Population Services International from 1970 to 1977. It is an international organization which manages programs of family planning and child health in developing countries.

From 1977 to the present, he has been in the family planning and international management consultant area as President of PHE, Incorporated, and DKT International.

He is an author and lecturer on family planning. He writes prolifically. In fact, just a couple of weeks ago he had a piece in the Washington Post on his experiences as CARE's representative in India. It was his experience, however, as an entrepreneur in the mail-order erotica business that brought him afoul of the Justice Department in 1987. He is here to recount those experiences in a very brief way from his book.

Would you welcome please, Phil Harvey.  
(Applause.)

PHILIP D. HARVEY, AUTHOR,  
"GOVERNMENT VS. EROTICA: THE SIEGE OF ADAM & EVE"

MR. HARVEY: Thanks very much, Roger. I am particularly happy when an introduction like that sounds so incongruous. I kind of like to be incongruous.

What right does the government have getting into our heads, or trying to get into our heads? By what authority, constitutional, moral or other, does the government enter into our private lives, tell us what we can read, what we can watch on our television screens, and what we can think in the privacy of our own homes?

At bottom, I think that that is the fundamental question addressed in the eight-year struggle described in my book. And it seems a particularly appropriate question to address at this forum at the Cato Institute.

In my 15 minutes, I would like to try to do three things today very quickly. First, I will give you a super fast description of our case, the criminal case against Adam and Eve and against me by State and Federal authorities, from indictment and trial to re-indictment, to counter-suit, from North Carolina to Utah, to Kentucky and Alabama, and back again.

Second, I will address the constitutional implications of the case, particularly the First Amendment implications, and how we were able to come to grips with those issues, and why the resolution of our case, I think, has left the United States just a little bit freer than it would otherwise be.

Finally, I would like to talk about sex. This always makes people a little nervous. "Will he say something gross?" The seven bad words, for example, that are forbidden by the Pacifica Radio case. That is the worrisome part. The good part is that everybody tends to stay awake. No one wants to miss the good stuff. But I am fascinated with the criminalization of sexual images and sexual ideas and why we do that. And I would like to share some of those thoughts with you and get some of your ideas in return.

Now, here is the fast version of the Adam and Eve case. The United States of America and the State of North Carolina versus Adam and Eve and Phil Harvey and, turning the tables, Adam and Eve versus the United States. In 1986, we were running a quiet little company in a rural area of Orange County, North Carolina, seven miles west of Chapel Hill, with about 120 employees, ordinary people making from \$4 to \$40 an hour, nothing high-powered, nothing special. We were selling condoms and lingerie and sex toys through a mail-order catalogue. We were also selling x-rated videos.

We were minding our own business, working very hard to build customer loyalty and satisfaction like any other mail-order business. On May 29, 1986, almost 15 years ago today, exactly, 37 agents, Federal agents from Utah, the Federal District of

North Carolina in Raleigh, and several agents from the State of North Carolina, as well, closed us down, interrogated all 120 employees in separate interviews, searched them all, photographed each one, and issued each employee with a subpoena to appear in front of a grand jury. They ran out of subpoenas. They said, "Oh, that's no problem. We'll Xerox the subpoenas."

And it wasn't lack of knowledge of the law and legal procedure, I think, that led them to think that they could just take a subpoena and start running them off on the copier. They knew better. But because this group and the people behind them and behind this entire operation were so sure they were doing the right thing, were so convinced that what they were doing was so good and true and right, that to be bothered with little necessities like the fact that subpoenas have to be issued in original in order not to get tossed out, simply didn't occur to them.

And it turned out that this was quite symptomatic of the Federal authority's approach to this case throughout. They were doing God's work. In some cases they said and meant that quite literally; in any event, they were doing the right thing. And the idea that they should have to pay attention to constitutional niceties simply didn't often occur to them.

The two Federal jurisdictions that were participating, Utah and the Eastern District of North Carolina, as I mentioned, were accompanied by authorities from Alamance County in North Carolina. Alamance is a very conservative county, bordering on Orange County, where we were located. And the two Federal districts got into a kind of Alphonse and Gaston thing about who should indict us first. Utah said, "Well, you are much closer to Raleigh; why don't you go ahead and indict them there?" And Raleigh said, "Well, you have a better case."

And this was going back and forth in a way that does not reflect well on the expertise of the Federal Government. But the North Carolina District Attorney in Alamance County just got tired of all of this, so he indicted us. We were then very quickly on a fast track to a trial. I was indicted and the company was indicted. There were nine items in the magazines and videos. And when you added up the possible jail time, it came to 47 years.

This was for selling sexual depictions of cheerfully consenting adults to other willing adult buyers. I should say that by that time, and certainly subsequently, we had done a great deal of research and a great deal of work on the impact of explicit sexual images on viewers, on readers, et cetera. A lot of research has been done in this area because so many people want to prove that it is harmful that research with that motivation has been quite extensive. And we have found, based on

an enormous amount of data, that the impact of nonviolent sexual imagery on viewers is slightly beneficial. That is, it is not only not harmful but seems to have some mild beneficial effects. So, that needs to be taken into account when thinking about the 47 years.

We had a relatively fast trial, although probably not quite as fast as the prosecutors had hoped. The jury watched five hours of tapes, looked at a whole lot of magazines and literally took five or six minutes to come to the conclusion that neither I nor the company were guilty of disseminating obscenity.

The Federal authorities were furious about this. In the discovery process in our civil suit later on, we found that the North Carolina U.S. Attorney had pretty well scoured the State trying to convince other State authorities to indict us. He failed in that. The result was about three years in Round One of going back and forth.

We felt quite clearly that having been vindicated in very conservative, rural North Carolina, that we ought to be able to work out some kind of a deal to put the thing behind us. But there was, in fact, deeply religious conservatives, as two FBI agents later testified, who let their religious convictions override their professionalism. So, on and on we went.

The negotiations, plea discussions, back and forth, Utah and North Carolina, threats of other jurisdictions, including Kentucky who we finally, eventually did hear from, and gradually it became clear that the Federal Government wanted to put us out of business. They were working on other companies, indicting other companies. And even if we were to remain in business, it became clear that they were not going to permit us to sell any form of sexually oriented speech, possibly even sexually oriented merchandise not involving speech, like vibrators.

They pretty well admitted, and this was a great mistake on their part as it turns out, that they were comfortable using the obscenity law and using these prosecutions to suppress back issues of *Playboy* magazine, and for us to sell them. They weren't saying that *Playboy* was obscene. Indeed, they were saying *Playboy* is not obscene, but we won't let you sell it. If we are going to agree to this, you can't sell any form of sexually oriented expression.

And it simply didn't occur to them until this thing unfolded further that using the obscenity law to suppress non-obscene speech was a blatant violation of the First Amendment to the Constitution. As a result of watching what was happening to other mail-order sellers, other companies selling sexually explicit material interstate through the mail, we came to realize that we would almost certainly be subjected to a multi-district

simultaneous prosecution strategy that would decimate us financially, and we therefore decided to sue the government on constitutional grounds.

Having done so, just a couple of months later, at long last, after the many years that had gone by, Utah decided that they would indict us. The timing of that indictment clearly showed that it was intended as punishment for our having had the chutzpa to sue them. At this point we were in a classic Sumo match. I and several of my managers and the company were under indictment in Salt Lake City. At the same time, we had sued the DOJ, including the U.S. Attorney in Salt Lake City and the Assistant U.S. Attorney in Salt Lake City, with massive documentation, taking the position that they were and had been abusing their authority and in the process had been depriving us of our First Amendment rights.

We would, as part of our civil suit, be getting copies of internal documents, memoranda, notes, phone conversations, and so on. And I have known for many, many years that one thing the government does not like is giving up its internal correspondence. So, we had some leverage. We were under indictment. They had that big stick. With the leverage of the civil suit, we had at least a medium-sized stick with which to respond.

Now, the constitutional issues here center around what came to be called "the bad faith motivation" of the government, which, as I have already alluded to, meant that they were deliberately and consciously using the law to seek a result that the law had nothing to do with. That is, they were using tactics related to the enforcement of obscenity law that was meant to suppress non-obscene speech. To do this, they were initiating simultaneous, multiple indictments, which we got a TRO to prevent. That was the first step in our civil suit. A district judge right here in D.C. said, "You can go after these guys, but you can only do it in one jurisdiction." So, that was the first victory.

There was one company that was indicted simultaneously in Virginia, two jurisdictions in North Carolina and in Alabama, all at once, and informed by the government, "You are going to go on trial in Virginia on this date. As soon as that trial is over, we go to the next one. As soon as that trial is over, we go to the next one, and so on." And it was that combination of this devastating multi-district simultaneous prosecution strategy, with their clearly stated intent to use this strategy to suppress non-obscene speech, that resulted in eventual decisions that essentially, not definitively and finally, but essentially have said this approach is unconstitutional.

Well, let me get quickly to the subject of sex before Roger tells me I have to sit down. The curious thing to me, and I find it really quite bizarre, is why we should chose to criminalize these particular kinds of depictions; that is, depictions of sexual intercourse and other human sexual activities. Why do we criminalize such depictions?

The sex act, we all agree, is necessary for the survival of the human species. The sex act is pleasurable. The sex act is an integral part of what are usually our most intimate and satisfying relationships with other persons.

Yet, this aspect of our lives which, by any objective criteria it seems to me, are entirely benign and positive and good, we feel anxious about, we feel fear about, we feel embarrassment about, and we feel shame about. Those facts, that is, the shame and the embarrassment and the discomfort and the fear, are manifested in the obscenity laws, which pick out one thing, sex, as something that can be forbidden without any burden of showing harm.

The other incursions, or the other limitations, on free speech have to do with inciting immediate harm or deliberately doing harm to somebody's reputation, which is quite different. These concerns are manifested in our swear words. Why should so many of our swear words have to do with sex? Why don't we have swear words about murder or rape or beheading people? That is the kind of thing we ought to have swear words about.

Of the seven forbidden words in the Pacifica Radio case, five were sexually oriented words, words describing sex acts, including sexual intercourse, and no, I won't use the coarse terms. And the other two are words referring to human waste. You can understand why we would use terms about human waste for swear words, because solid waste, at least, is full of germs and dirty and stuff you have got to get rid of and dispose of. But sex is great. Yet, most of our swear words talk about sex. Why?

I have this fantasy about explaining to a Martian Ph.D. student, or a Ph.D. student from another galaxy, fundamental things about human sexuality and reproductive habits. And I can think of no difficulty in explaining how we all have a strong sex drive, how that has been necessary evolutionarily for the survival of our species. I have no problem explaining that we have been very successful at reproducing. As a species, we reproduce so successfully that there are a good many of us who think perhaps we have overdone it a bit. But I don't think I could explain to some rational person or being from another galaxy why we are embarrassed about our sexuality.

It seems to have no survival value that I can think of. And I will quickly give you the only slender working hypothesis

that I have developed about this, why we are embarrassed about the process by which we reproduce. I think it has something to do with the loss of control. As rational beings, we like to feel that we are in control of our lives and to some extent in control of our environment. And it is in our sexuality that we must relinquish control to a degree that I think many people find scary. There is the literal fact that you have to give up control to achieve sexual climax. That is not only literally true, but I think for a great many people kind of true by extension. So that in our sexual lives, if we are passionately in love, for example, we just don't have as much control over our lives as we would perhaps like. And maybe we are afraid of losing control altogether.

The tension between the rational person and the sexual person is nicely illustrated in an old joke about God and Adam. God says to Adam, "The good news is you will have both a penis and a brain. The bad news is that there will only be enough blood in your system to use one at a time."

I think that nicely sums up this fear that our rational selves have about the somewhat irrational beings that we become as our sex lives are manifested. But I would be very interested in hearing other people's ideas about this because I still find it very bizarre and very hard to explain.

Thank you.

(Applause.)

MR. PILON: Thank you, Phil. That last argument sounded like a proof that dogs are not rational since they are utterly uninhibited in these matters.

Now, we move from prosecution to censorship, and to perhaps an even more provocative thesis, with a new book that has come from Marjorie Heins, "Not in Front of the Children."

The prosecution that Phil spoke about, which he only touched upon, and you must read his book to get a feel for what it is like to be up against 37 armed Federal agents. It is really harrowing. And he does give a very graphic description of that.

Censorship, however, is a somewhat different matter. Whether it is prosecution or censorship, so much of our law in this area is enacted in the name of protecting children. Of course, the State does have a very legitimate interest in protecting children. And that is just what Marjorie Heins has sought to raise some searching questions about. We have no better evidence of this phenomena than what is going on right now, the CPPA, the recent Federal law mandating Internet filters in public schools and libraries, the congressional reauthorization of abstinence until marriage sex education. So

much of what is done in this area is done in the name of children.

Now, what Marjorie has done is taken a firm stand against censorship. Her position, very provocatively, is that direct harm must exist before speech can be suppressed. I am not going to further characterize the book. It will be her job to work us through in 15 minutes this very delicate thesis. I am simply going to introduce her and suggest in doing so that she is certainly qualified to address this thesis. The book, by the way, has over 100 pages of notes to buttress its argument. So, it is not un-authoritative.

Marjorie directs the Free Expression Policy Project at the National Coalition Against Censorship in New York. And from 1991 to 1998, she directed the American Civil Liberty Union's Art Censorship Project, where she was counsel in a number of Supreme Court First Amendment cases, including the National Endowment for the Arts v. Finley, and Reno v. ACLU.

She is the author of two other books and numerous articles on civil rights and civil liberties. In 1999, she was a visiting scholar at Cambridge University Law Faculty. She graduated from Harvard Law School. She clerked for Justice Benjamin Kaplan in the Massachusetts Supreme Judicial Court, and taught advanced constitutional law and Federal courts at Boston College Law School, where she directed the Civil Rights Division of the Massachusetts Attorney General's office.

And as she says in her bio, she spent seven unforgettable years as a staff attorney at the ACLU of Massachusetts.

Would you welcome, please, Marjorie Heins.  
(Applause.)

MARJORIE HEINS, AUTHOR,  
"NOT IN FRONT OF THE CHILDREN:  
INDECENCY, CENSORSHIP, AND THE INNOCENCE OF YOUTH"

MS. HEINS: Thank you, Roger. As Roger said, this was a rather daunting enterprise, and you are going to get the Monarch Notes version of "Not in Front of the Children," in 15 minutes. And this is my maiden outing, so forgive me. I am going to read you some passages, but also I will be resorting to my notes on occasion. After a couple more outings, I will probably be able to do it in my sleep.

This book got its inspiration when I was working at the National ACLU in the 1990's on First Amendment cases. As Roger suggested, repeatedly, we would see the justification, whether it was an extension of the endless litigation involving the broadcast industry and the FCC's policing of the Seven Dirty Words or indecency in general, the same indecency standard then being used for cable television in a subsequent congressional enactment, and then finally in the 1996 Communications Decency Act, or whether it was censorship on the local level of the school library, removing, whether it was "Heather Has Two Mommies," or books by Judy Blume, Maya Angelou, "Huckleberry Finn," the justification was "We have to protect the kids from harm." And I began to become curious about where this came from and what it actually meant.

In the lawsuit challenging the 1996 Communications Decency Act, the law that basically criminalized indecent communications on the Internet, the ACLU lawyers, of which I was one, tried to get the courts to think about this issue in a little more depth. We had plaintiffs who distributed a variety of sexual and potentially indecent information and communications and literature on the Internet to try to get the court to think a little bit about the question of harm -- birth control information, artistic nudes from museum Web sites, card catalogs of public libraries. And we had some success in that regard. But the Supreme Court decision in 1997, in what we call Reno I, *Reno v. ACLU*, as I describe in the book, sort of was Janus faced.

On the one hand, the court did recognize that lots of material that would fall within this broad definition of indecency, it was hard to imagine it would be psychologically harmful to minors, and in many instances, would be beneficial, educational, enhancing their knowledge of health and so forth. But at the same time the court turned around and then went back to rhetoric that we had seen in earlier indecency cases, just saying, without much analysis, that there was clearly a compelling government interest in protecting minors from patently offensive communications.

So, I concluded finally that there would be limited opportunities to really explore this issue in litigation. And eventually I did leave the ACLU and get to work on "Not in Front of the Children."

The motivation really was to explore the issue, to give people information, to get people thinking, and to stimulate more thoughtful debate about harm-to-minors based censorship by providing a kind of historical and political context, and try to stimulate some discussion on whether these various censorship initiatives, whether it is another indecency or harm-to-minors law, school libraries, Internet filters, ratings, does any of it

really help protect kids from bad ideas out there in the world, or in fact might it in some instances even disserve kids?

The example, once I got into the research, the example of that that was most vivid to me, was the abstinence until marriage sex education, which Roger mentioned, which is now official government policy. And up for reauthorization this year is a section of the so-called Welfare Reform Law that funds sex education programs only if they contain an eight-point ideological agenda, including the proposition that any sexual activity outside of marriage is physically and psychologically harmful. And no information about contraceptives or safer sex except false and misleading information such as that condoms don't work.

This is a kind of stark example of how censorship in the name of protecting kids can end up being quite harmful to them.

So, the hopeful goal of the book is to stimulate that kind of thought and maybe move us in the direction of figuring out affirmative, non-censorial ways to address the concerns that are quite common and quite justifiable in society about the barrage of media messages that kids get, not all of which are good.

Anyhow, Roger will stop me if the Monarch Notes go on too long. But during the research I found the idea that censorship is needed to shield impressionable youth from bad ideas goes all the way back to Plato. And over the centuries, notions of childhood, development of an idea of childhood innocence, which certainly was not part of Western culture originally, ultimately, in the late 19th century, the invention of the idea of adolescence as a special phase of development, after childhood, but also to be segregated and protected, or shielded and controlled, the development of these concepts showed that what we consider harmful to minors psychologically is very relative.

Anxieties about sexuality really were a fairly new development in this evolution. And what I found was that it really began to arise in the 18th century, with masturbation myths. And eventually the fears of youthful masturbation became embodied in our obscenity law. And the obscenity standard for both the United States and England, when obscenity laws began to be passed in the 19th century, was defined in an English case called Regina -- Queen -- versus Hickland. And it turned on whether the material would deprave and corrupt those who were impressionable, primarily youth, and, to be even more specific, whether it would suggest to the minds of the young of either sex thoughts of a most impure and libidinous character.

So, the obscenity laws derived from fears about youthful sexuality, which in turn derived from fears about the dire effects of masturbation. So, here is a brief excerpt:

"The publication in 1710 of a lurid English tract entitled 'Onania, or the Heinous Sin of Self Pollution and all its Frightful Consequences in Both Sexes Considered' -- they liked long titles -- "marked the beginning. The frightful consequences, according to this tract, ranged from pimples and lapses of memory to hysteria, impotence, body pains, and itching, tumors and insanity. 'Onania' reportedly passed through 80 editions and it was translated, studied and duly incorporated into medical tomes. By far the most influential of these was the Swiss physician, Samuel-August Tissot's 1758 work" -- and now you are going to have to pardon my French, literally -- "De l'onanisme, ou dissertation physique sur les maladies, produites par la masturbation," which drew on 'Onania' even while acknowledging that the earlier work was a perfect chaos full of moral trivialisms.

"Claiming the authority of science that his predecessor lacked, but also relying on moral and religious exhortations, Tissot reported many dreadful consequences of youthful self-gratification, including consumption, incontinence, jaundice, loose teeth, sallow complexion, and a variety of psychological ills that, to the extent Tissot's secondhand reports were accurate, were probably caused by the overwhelming shame and guilt foisted on youngsters who indulged in the natural, common practice."

The book traces the development of obscenity law. The activities of Anthony Comstock, who most of you heard of, was really the primary censor in the United States for 40 years. He was founder of the New York Society for the Suppression of Vice and, again, somebody who was obsessed with these anxieties and fears about masturbation and the need to suppress any literature that might arouse libidinous thoughts, which of course would not otherwise exist in youthful brains.

Here is a little excerpt from Comstock. And although the prose is very lurid and the prose styles have changed, in many ways it really isn't that different from what we see today in terms of political rhetoric about shielding minors from sexually arousing or explicit material. Comstock's 1880 book, "Frauds Exposed," warned that evil reading "breeds lust, which defiles the body, debauches the imagination, corrupts the mind, deadens the will, destroys the memory, sears the conscience, hardens the heart and damns the soul."

"Like a panorama," he went on, "the imagination seems to keep this hated thing before the mind" -- this has an autobiographical feel to it -- "until it wears its way deeper and

deeper, plunging the victim into practices he loathes." Et cetera.

So, censorship just sort of seemed a natural adjunct to other efforts to protect youth from their own developing sexuality. The book traces how the obscenity law gradually became more rational. The Ulysses case in the 1930's was an important landmark.

Gradually, the Supreme Court also, although announcing an obscenity exception to the First Amendment, did in that same year, 1957, acknowledge that we couldn't have a standard that turned on what was thought fit for children.

I trace the concerns about violent content from gangster movies in the thirties to crime comic books in the fifties. And I had in there congressional hearings on the issue of harm to minors from comic books. And I had a real struggle getting hold of some of these images, "Tales From the Crypt" and "Crime Suspense Stories," EC Comics from the fifties, which were in fact totally suppressed at that time.

One of my favorite parts of the story is "Policing the Airwaves," which traces the FCC's indecency standard for radio and television, finally culminating in the Pacifica Seven Dirty Words case. I will just give you one brief excerpt from a pre-Pacifica FCC indecency case, involving Grateful Dead guitarist, Jerry Garcia. Then I will sit down and we can talk more about this in the question period.

Garcia was interviewed in January 1970 by WUHY Radio, Philadelphia. He held forth on music, ecology, philosophy, and politics in his characteristic, uninhibited style. Four-letter words abounded, mostly either as adjectives or as substitutes for "et cetera," and occasionally as an introductory expletive as in, "I must answer the phone 900 fuckin' times a day, man" and "Political change is so fucking slow."

The FCC ruled the language indecent, which it now defined as -- and the lawyers among you will recognize the beginnings of the Pacifica standard -- the FCC defined it as "patently offensive by contemporary community standards and wholly without redeeming social value." The definition was obviously borrowed from the Supreme Court's then current obscenity test, but the FCC version lacked the requirement that the dominant theme of the material appealed to the prurient interest. And later on, in the development of indecency law, actually with the Pacifica Case, the FCC and the Supreme Court also dropped out the "without redeeming social value" part, so that the indecency standard now is simply "patent offensiveness."

The Garcia interview was clearly not obscene, as the FCC acknowledged. Its dominant theme was not prurient and indeed did not even focus on sex. But in regulating broadcasting, the

FCC said it was not limited to banning only constitutionally unprotected obscenity. Garcia's language was not illegal, but that did not mean there was a right to use it in public arenas. Broadcasting can be regulated because it comes directly into the home, frequently without any advance warning and, in addition, there were very large numbers of children in the broadcast audience.

"No one would ever know, in home or car listening" -- and I am quoting from the FCC opinion now -- "whether he or his children would encounter what he would regard as the most vile expressions."

As in previous and subsequent cases, the Commission did not explain the nature of the harm to minors that it assumed would flow from hearing most vile expressions. But protecting the young continued to be the hook by which it justified its indecency patrols. As in a previous case, so now in this one, there were two dissents from liberal Commissioners on the FCC, Nicholas Johnson and Kenneth Cox.

"What this Commission condemns today is not words but a culture," Johnson lamented, "a lifestyle it fears because it does not understand." Cox added that "People who did not like the ideas or language of the counterculture do not need to listen to programs of this kind. Garcia was not trying to shock or titillate his audience. Apparently, this is the way he talks and I guess a lot of others in his generation do, too."

Cox reminded his fellow Commissioners that they had found WUHY guilty of a crime, "though I suspect," he wrote, "that the U.S. Attorney in Philadelphia has more important matters to occupy his time than to bring criminal charges against a radio stations whose guest complains that `Political change is too fucking slow."

(Laughter.)

MS. HEINS: And if you liked that one, one of the dialogues between Howard Stern and Robin Quivers that the FCC decided was indecent was basically a parody of the FCC indecency police.

I do have a chapter on media effects. Most of that literature is about violence, not sexual content.

To sum it up, I will just say that I really had a sort of "emperor and his new clothes" experience when I got into this because, being a First Amendment advocate, I think that speech does matter and has impact. Art and entertainment have a big impact on us emotionally and in a wide variety of ways. And I fully expected the social science literature, which had been so widely proclaimed to prove harmful effects from violent entertainment, to in fact do so. And like some psychologists who have looked at this with an open mind, but being far less

schooled than they, when you start looking at the material, you really have to shake your head in disbelief that people with Ph.D.'s and people who have professorial positions at major universities have been so disingenuous about the very -- I wouldn't even say "limited," I would say "non-existent" -- proof.

That is not to say that there are not a wide variety of effects from entertainment of all kinds, some of which, for some people, for some children, may be harmful in some circumstances. But it is not something that I think ultimately can be proved by science. And we end up sort of back where we started, that the harm-to-minors concept is not one that is susceptible to scientific demonstration. It is about values and ideologies. And as I mentioned earlier with the reference to abstinence sex education, sometimes it can really get in the way. It can itself be very harmful to kids.

Hopefully, the book will be a resource for people to try to think about affirmative kinds of approaches to these anxieties we have about kids, real sexuality education and media literacy education being primary examples.

Thank you.

(Applause.)

MR. PILON: Thank you very much, Marjorie.

We are going to, as usual, have a reception afterward upstairs. We are going to have some discussion here on the panel and some questions from the floor, as well. Before that, however, to get the discussion going, we are going to have Larry Jarvik give comments on both of the books, which he has had a chance now to read.

Larry, it is good to have you back at Cato. He is the proprietor and publisher of a Web site called The Idler, a Web periodical. Larry is a graduate of the University of California at Los Angeles, where he received his master in fine arts and his Ph.D. in film. He is the author of "Masterpiece Theater and the Politics of Quality," published by Scarecrow Press, and then "PBS: Behind the Screen," published by Prima Press, a book we featured here in a Book Forum a couple of years ago.

His articles have appeared in The New York Times, the Wall Street Journal, the Los Angeles Times, and the Boston Globe, among other publications.

He has produced and directed the documentary film, "Who Shall Live and Who Shall Die?" Will you welcome please, Larry Jarvik.

(Applause.)

LAURENCE JARVIK, AUTHOR,  
"PBS: BEHIND THE SCREEN," AND  
PUBLISHER, "THE IDLER"

MR. JARVIK: Thank you for inviting me, Roger. It is nice to be back at the Cato Institute.

I suppose I was asked to come to give a slightly different perspective on both books -- shall we say a conservative perspective in a libertarian forum. So, what I would like to do is start out by saying that both books are very different. I think Phil Harvey's book is really a personal testimony of a fight with the Federal Government. And it really could be about almost any subject; it happens to be about pornography. But that sort of is not the dispute. Phil Harvey, towards the end, says, "This is vice." And that is okay, because I agree with Lysander Spooner, I think it was, who said, "Vice is a private matter, crime is a public matter, and the government should be concerned with crime and leave vice to individuals."

So, there was no attempt to say what you were doing was necessarily a great public service, although I believe from reading the book that you believe it is part of a public service because, as I can see from your story in family planning and international development, you saw the population explosion as a problem and if people could control their own sex lives, then they control the population, and this all played a role. If you could get satisfaction without children, you can get pornography without sex, and so forth.

So, I think there is an overarching story underlying it which had to do with certain ideals that you believed in, and your business did tie into your other experiences. That is why when the government shut down everybody else, you said, "I'll fight," because there was a bigger cause rather than just making business. Everybody else said, "Okay, I'll go into another business." But for you it was more than a business. It actually was a principle that was involved. And it really is fascinating how somebody who has a principle and sticks to his guns can in fact prevail.

What was most interesting to me was that it reads like a novel because there is court case after court case. And the court case in a tiny little town in North Carolina, where everybody expected the jury to be against you, they started showing the pornography. And at first everybody was very uncomfortable. But then, gradually, people were sort of nodding off and going to sleep and looking at their watches and waiting for it to end.

I thought about that when I read in the Sunday Times Magazine on Sunday, Frank Rich's story about the pornography industry in America, where he expected it would be this, that and the other. And in the end, he said this is just junk and very boring and so forth.

So, that was sort of interesting, just that your book fits with other accounts of the industry. And there is no pretension about it. I think anything who wants to know not only about how the pornography industry works but also how the legal system works in the United States and how you can beat 37 marshals, and also your account of the postal inspectors was very interesting to me, and the Post Office being seen as a law enforcement agency rather than just as people who deliver mail, and postal inspectors coming to your place dressed as mailmen and giving them a tour of the facility, and dealing with all that was equally fascinating.

One of the other things I get from Phil Harvey's book was a sense of openness, because these inspectors would come and say, We want a tour, and, at least according to your account, you would show them whatever they wanted. There were no secrets. Nothing was hidden. You were above board. And you did what you believed in. I think it is a fascinating book, and certainly anybody who is interested in these sorts of issues would do well to read it.

I know several of the people in the book, which was sort of interesting, including Pat Truman, who is with the American Family Association now. And I talked on the phone to Judith Reisman, who is an expert in sexology, or sexual communication, and wrote a book against Kinsey, called, "Kinsey, Sex and Fraud." And it was sort of interesting that in your book Pat Truman is a crusading anti-pornography advocate, and Judith Reisman said, well, he is soft on Playboy and so forth. So, there are all these different distinctions in the world that should be understood when you are going into this.

The people who are against pornography would agree with your definition of pornography. They would differ on the social role of what pornography's effects are or the role of the individual versus the community. I think that is an interesting sort of debate, which has not been worked out and probably will never be fully worked out: Where do an individual's rights end? Where do the rights of the community or the church or the family begin?

I thought yours was an excellent presentation of your views. There are, of course, others. You described the cross-examination of a Baptist minister, I guess, either in a deposition or at the trial, where some juror said that was the biggest hypocrite he ever saw in his entire life. So, there are very amusing elements, I think, and it is a very interesting saga. I certainly think that when we think about these issues we tend to think of them in the abstract, as censorship, free speech, or whatever. But in your book it really was factual, empirical, and very, very informative.

Marjorie Heins' book is a little different. It is sort of a big picture book as opposed to a shotgun approach. My own response to it is that it seemed very confused to me. It reminded me that Marjorie was a lawyer in the case of *Finley v. the NEA*. Karen Findley is one of these performance artists who was denied a grant. The NEA won that case. And the NEA won that case because the government didn't actually see it as a censorship issue. It became an issue of what kind of things merited Federal support.

There is this is whole different set of values that are operational when it is a government or an institution versus an individual. A lot of the issues in "Not In Front of the Children" relate to really who is the best person to decide what is the curriculum going to be in my school. Should it be abstinence education? Should it be showing pornography to children, which is my understanding of one of the things you defend? Should it be classical, scientifically based sex education?

It is not really fully argued who should prevail in questions like that. I think people are concerned in their own lives. I know someone in New York who has an 11-year-old daughter in a very, very prestigious private school. They have a sex education class. Their assignment is to make little clay models of the sexual organs of men and women and then take them home to their parents.

This is a school that costs \$30,000 a year, I think. The ultimate answer which Cato would advocate to an issue like this would be vouchers. So you could go to the Alfred Kinsey School or you could go to the Donald Wildman School, and you could have the curriculum of your choice for sex education. But where public school is involved, and there are issues of science are involved, I do think people ought to be very sure that sex education is truly educational and not an excuse just to show pornography. Because that demeans both the educational content and it also displaces what the meaning of pornography is, which is not really an educational experience.

I think those issues, again, are not resolved and they will be going through the courts. But when Christian groups and pro-family groups say things like, "We don't think the sex education courses our children are getting are accurate," they have their own experts, experts who are omitted from Marjorie Heins' book, who say things like, "Well, if you have a lot of sex, you have sexually transmitted diseases," and "People can get cervical cancer from the human papilloma virus, and that is not stopped by condoms."

And they have other issues of their own which they think people should be made aware of. Maybe abstinence is not

the answer, but maybe promiscuity isn't the answer either. And maybe society needs to find out what a reasonable compromise is, with the best scientific evidence, rather than just having ideological disputes both on the right and left. Because I think reasonable people can usually agree. And we have come to that sort of agreement in our society.

Again, from Phil Harvey's book, the Meese Commission -- and I don't know whether I personally agree with it or not -- but they said that Playboy and Penthouse are not obscene, and what is in them is healthy and doesn't cause you to do anything wrong. That is also a fascinating thing to come out of a very conservative administration.

So, I think both sides really need to look at what the actual evidence is. And the Kinsey case is most interesting, because there is a new biography by Jones about Kinsey, which agrees with the Reisman hypothesis that the data was fraudulent. It is basically based on a table of child sexuality, called Table 34, which was the stopwatched response times of children to various sexual situations, based on the testimony of child molesters.

The argument made by Reisman, and then in this biography, was that for this data to have been accurate it means you have to have an organized research effort molesting a lot of children. And it is highly doubtful that all these people were carrying stopwatches and writing these things down while performing sex acts on infants and toddlers and so forth. So, it is more than likely that this stuff was made up. And if it was made up, it is not reliable as scientific evidence. Basically, what happened was that some people at Indiana University said, "We would like to go and look at the original documents in Kinsey's files." And they were told, "No, you can't see them."

So, unlike Phil Harvey who said, "You can see whatever you want," this creates the sense that there is something to hide. Any time people refuse to give the information, you can't say it is science anymore. Because science is based on replicability and the free flow of information. I think that is why it is very important, especially in these controversial issues, for people to be as open and honest and above-board as possible. That is the way people are going to make progress, rather than simply dismissing either side as out to deprave and corrupt youth.

Because a lot of people sincerely believe showing children pornography is good for them. By the way, it was very interesting in Marjorie Heins' book, she talks about Denmark and the practices in Denmark. In Denmark, it says in your book, they do not show pornography to children. It is a very scientific

type of approach, which is not based on titillation or exploitation.

By the way, Denmark is also a country with no separation of church and state. On your tax form, you have to check a box, like we do for political contributions, whether or not you want to give to the National Church of the People of Denmark, which is the Lutheran Church. So, if you don't go, they know. It's interesting. Nobody goes to church, but people still pay for the church even though they don't go. That is the type of thing that we here in America might not find so salubrious.

So, I will just end on that. Again, I thank Cato for the opportunity to be here. I think they are both fascinating books.

(Applause.)

MR. PILON: Thank you, Larry. Well, as Garrison Keillor would say, "What do you expect of Lutherans?"

(Laughter.)

MR. PILON: Let's now open it up to the panel. Phil, would you like to respond?

MR. HARVEY: Well, I think that Marjorie is probably the right person to respond to this, but in my experience sex education has never -- I mean, there may be a bizarre case somewhere -- but it has never been used as an excuse to show pornography to children. That is just not the way things are. Sex education is about information. I just think that needs to be corrected on the record, that those are unrelated subjects.

MR. PILON: Marjorie?

MS. HEINS: I don't think it is fair, Larry, to say that I defend showing pornography to children. That is not what I do. What I do is ask readers to think about what their concepts of harm are and whether any scheme of censorship can even define what, shall we say, a majority of people might think was harmful pornography or offensive or disapproved or inappropriate pornography versus more salutary or educational sexually explicit material. So, there is a difference between subjecting young children to a diet of pornography, which neither I nor, I imagine, most civil liberties advocates would recommend, and opposing laws without any kind of empirical justification to broadly restrict access.

Because what is the harm? And I talk about this a little in the chapter of the book on Reno 1, where we did put on evidence from a sex educator who was in the mainstream of his field and who really did represent the range of professional opinion in sexual counseling, sexual education, that a child, unless brought up in an extremely repressive and anxiety-ridden environment, is not going to be harmed if, per chance, he or she happens upon a pornographic image.

So, it is more of a question of harm. Again, as Phil says, comprehensive sexuality education is not a matter of an excuse for subjecting children to pornography. I don't think models of the human anatomy are equivalent to pornography. If you think they are, then that only reinforces the difficulty of coming to an agreement about what is pornography. Because many opponents of sex education on the religious right, since the early days, the sixties, and I document this in a chapter of the book, claim that explicit discussions of human anatomy education, not titillating but factual, were pornographic. So, to some extent, it is in the mind of the beholder.

I also talk a little bit in the chapter about sex education about comparisons like the model sexuality education program in Denmark. That starts early, way before puberty. And some sexuality education does grapple with issues of pornography. As we all know, those of us who read the Frank Rich article, it is a multi-billion-dollar industry. So, this is obviously, although it may be very boring, it is widely appealing to lots and lots of people.

And when the hormones start flowing in puberty, kids are going to be interested in this. I think we have an obligation to kids not to simply say, this is bad, this is naughty, don't look at it, you are forbidden, but to try to help them develop an understanding of sexuality so that they themselves can have a more critical approach. If we are afraid there are bad messages in pornography, or as the Meese Commission said, its main objection to pornography was moral because it commercializes sex and takes it outside the context of a loving, committed relationship. Well, those are legitimate questions that need to be addressed in sexuality education classes.

So, yes, I think in an ideal comprehensive sexuality education class the issue of pornography ought to be discussed. That doesn't mean I am in favor of foisting pornography on little children.

MR. JARVIK: One of the interesting things, as a society, we have not really decided what our attitude is. For example, I have an Internet publication, so I always hear stories about the Internet. And in some companies, if you send a pornographic message in an e-mail, you lose your job. It is not even a censure or reprimand; it is a firing offense the first time out. Because of, one, the feeling that it is inappropriate use of company resources, but, secondly, the hostile environment claims in sexual harassment lawsuits that come. And they use the computer records as evidence.

So, it could well be that what is prohibited to be shown or used at work is then part of a curriculum in one of these highly contested school programs. So, I just don't think

we all agree in the country on what exactly our standards are. I think that is why you see this dispute now. There are people who, I am sure in their company, would love to just send pornographic e-mail.

We had a case in Washington, D.C., for people who live there -- and I know this is going out on the Internet -- where the police were found to be sending e-mails with the new computers in their cars. And they were sending pornographic, racist and offensive e-mails back and forth. They lost their jobs, lots of them. It is a serious issue at all sorts of levels that I think certainly we are going to be hearing more of. I don't have any conclusion on it.

MS. HEINS: Would you take the position that the current Federal policy on abstinence unless married sexuality "education," with no practical information about the health benefits of using condoms, would you say that that is wise as educational policy, that that is a service to the young people of this country?

MR. JARVIK: Well, I think in any of these questions you have to do a double-blind study or try and test the hypothesis, rather than basically saying on the face of it that it doesn't work. It is possible that it is a terrible idea. It is possible for some people in some situations it might be a good idea, and for others it might not be. There may not be a one-size-fits-all solution here.

MR. HARVEY: I think the only people who can make those decisions on behalf of children, particularly young children, are their parents. For State-sponsored schools, I am a Libertarian and I would love to see the tax rules adjusted so that parents could move their children to different schools if they wished, but for a State-sponsored school to deliberately withhold important information strikes me as a little bizarre.

In other words, if you are teaching, for example, a biology class, just to back up on this a little bit, and you are studying human beings and human physiology, and you stop teaching human physiology when it reaches the genitals, that seems to me immoral because it is the reverse of education. In other words, if you deliberately withhold useful and important information from children because you are embarrassed about your genitals, that, to me, is an immoral act.

I think that therefore one-size-fits-all, yes, it does, to a reasonable extent, when it comes to informing people in a bona fide, legitimate school-based program on the biology of primates, including humans, you should not leave that out. Why would you want to?

MR. JARVIK: I wasn't arguing that it be left out of a science class. I just think that these are highly personal

issues. As you say, parents generally are the ones who want to decide. But, again, as pointed out in Marjorie Heins' book, sometimes some people feel the parents aren't qualified to decide and that the experts know better. This becomes a question of whose experts do you believe? Do you believe experts such as Judith Reisman and others, or do you believe experts that Marjorie Heins has in her book? The point is there is no agreement that everybody has a consensus on.

MS. HEINS: No, that is not true. That is simply not true. The fact is there have been some studies, all of which are copiously footnoted in the book. And there is no basis to believe that this abstinence approach reduces age of sexual debut, which in fact is lower in the United States than in countries that have comprehensive sexuality education, complete with lots of information about condoms and the importance of using them.

Ages of sexual debut are higher in those countries and rates of teen pregnancy and sexually-transmitted diseases are much lower. So, there is documentation and it is not just me. The information in the Sexuality Education chapter comes from the major advocates for youth, major professional sexuality health organizations that do research. There is the Alan Guttmacher Institute. They are not the equivalent of, yes, you can get somebody to say they are an expert and this is their opinion. But when you are actually looking at empirical research, there is some.

MR. PILON: We need to turn to the audience now. Would you please wait for the microphone to come, identify yourself and any affiliation you may have and who your question is directed to.

MR. STERLING: Thank you, Roger. I am Eric Sterling from the Criminal Justice Policy Foundation. In the 1980's I was counsel to the House Crime Subcommittee, where I worked on child pornography legislation. Child pornography legislation was such a hot topic, we enacted child pornography legislation in 1984, 1986 and 1988.

I was curious, first, that none of the panelists discussed the question of pornographic depictions involving children in the sex acts, which was a very hot topic in the 1980's at the time of the Meese Commission. Secondly, I was curious, is it the case that the Miller v. California standard has been abandoned? I hadn't followed it that closely and I didn't know that.

And I just had a comment, which is that when Mr. Harvey says, "What authority has the government to get into our heads?" I thought we were going to have a Cato discussion about drug policy again.

MR. PILON: Thank you, Eric. We should make it clear that Marjorie's book is not about child pornography. It is about erotica and children. They are not the same subject.

MS. HEINS: And violence and any other entertainment or media content or information, whether at the present time or historically, has been thought inappropriate for minors to access.

MR. PILON: Do you want to respond to Eric's questions?

MS. HEINS: Sure. I often get the child pornography question and that is why, in the very introduction to the book, I say that is a very interesting and difficult topic, but it is not the topic of the book. Child pornography laws or prescriptions, of course, are based on the fundamental social interest in protecting young people from actual sexual abuse. Harm-to-minor censorship legislation is based on a fundamentally different moral or ideological premise that there are some ideas or pieces of information that kids should not have.

The Miller standard, which is the current obscenity standard, which applies not only to the censorship of what kids can read or see or learn about, but adults as well, is not the standard that is used for child pornography laws because of the need to protect actual kids from sexual abuse in the making of child pornography. Child pornography is criminal regardless of whether the resulting image has serious value and other things that would make it not obscene under the Miller test.

Of course, as you probably know, child pornography, probably since you left the legislature, the Federal law has been expanded to cover virtual child pornography, where if the image looks like a minor, even if no minor was actually exploited in the making of the image, that that possession or transmission can subject you to very serious penalties. And whether that is constitutional is now going to be argued before the Supreme Court in the fall.

MR. HARVEY: What was the third part? Miller is still the law of the land and it has been since 1973. That is still the obscenity law. The use of children to create sexual images in any way, shape or form is a form of child abuse and I am unalterably opposed to it.

We forgot the third part of your question.

MR. STERLING: The issue was that in the eighties the rationale for making assaults upon pornography was, in the name of fighting child pornography, that people that you mentioned, such as Truman and the American Family Association and so on, were advancing all of their anti-pornography legislation in the Congress under the guise that this was all about protecting children against being sexually exploited. Even though that was already on the books, there was this repeated effort. In fact,

the Congress three times passed newer, tougher, harsher, more elaborate child pornography laws, which also spilled over into other kinds of areas, particularly in the 1988 legislation.

MR. HARVEY: Well that is good PR. They understood what was originally the National Obscenity Enforcement Unit and which changed its name, miraculously, to the Child Exploitation and something unit, they knew that is good public relations because there is no tolerance in American society for child pornography, whereas people are at least ambivalent about adults-only vanilla sex. So, the more they could dress up their obscenity crusade, their anti-adult -- and we need to read, incidentally, Marjorie's own definition of pornography because it certainly sums up the problem. This is quoting from Marjorie's earlier book:

"Sometimes people try to distinguish between pornography, naughty, ugly, no redeeming value, leering or prurient in character, and erotica, nice, arty, more middle-class, not prurient but open and wholesome. In short, pornography is anything with sexual content that you disapprove of. Erotica is sexual material that is okay."

(Laughter.)

MR. PILON: That is why we used that in the title of our forum.

Next question?

QUESTION: I was interested in the gentleman's statement about child porn. There have been a couple of cases reported here in Washington where parents have taken pictures of their children in the nude and have found themselves in trouble for doing that. It sort of came as a question because I understand the President showed a picture of his brother at the White House Press Correspondents Dinner in full frontal nudity. And I wonder if perhaps we could prepare a bill of impeachment on this charge. And I am just wondering if some of the pressure on child pornography isn't being used in other things.

MS. HEINS: There certainly have been a lot of cases such as you describe. Any censorship law, even a law that has such widespread support as the child pornography law, is going to have definitional problems around the edges. Because prosecution is a judgment that is made in a discretionary way by local officials, police, prosecutors, often social service agencies, there have been numerous, numerous instances where parents, artists who simply have photographed children in the nude, have been subjected to really horrific experiences, with having their kids taken away, subjected to threat of very serious criminal prosecution because somebody who maybe had a dirty mind or a problem about children's bodies interpreted this as an erotic

picture. So, the child porn laws are certainly not free of problems and some very innocent people have been badly hurt.

MR. HARVEY: There is a special trap with those cases of kids in the bathtub and in the shower. Many of the film processors believe that the law requires them to report even mildly suspicious looking photographs. The law requires -- and, Marjorie, you can check me on this -- lewd or lascivious exhibition of the genitals. But who is going to make that judgment as to whether the genitals are just sitting there or being lasciviously shown?

So, the processors feel that there is some law, which there isn't, but they feel that there is some law that requires them to report these things to the police. Once the police get a report, then even fair-minded police often think, well, we have to do something about this. So, these parents get hauled into court for absolutely innocent photographs of their own children. And as Marjorie says, these laws can get abused even by fairly sensible people. They also get abused by prosecutors who want to go get someone, which is much worse.

MR. LEVY: Bob Levy from the Cato Institute.

I am wondering if our panel thinks that there are legal or political principles that sort of transcend the empirical data. Let me ask you to assume that the evidence cuts the other way, that indeed pornography is shown to be harmful. Then I wonder what legal regimen you would each recommend, first, with respect to distribution of pornography to adults and, second, with respect to distribution of pornography to kids, with a further subdivision as to if it is harmful only to the consumer on the one hand, or on the other, if it could also be harmful to innocent bystanders.

MR. PILON: So, that question is 1, 2, A and B.

MS. HEINS: Let me start and you can go down the line. The question is what you mean by "harm," as I think Roger said, or whoever said it. I think you were characterizing my position. And I really do try in the book to be a sharer of information and an asker of questions. But I am obviously skeptical of censorship. Generally speaking, I think it is a good principle to ask for proof of identifiable, direct harm. When you are talking about harm not from an individual piece of speech, like for example, the Hit Man Case -- we may disagree on whether the result in the Hit Man Case was right, but at least it was one book, so we knew what we were talking about.

When you are talking about pornography, you have a multi-billion-dollar industry and you have thousands and thousands and thousands of depictions of all types. So, I don't think you can even specify what the subject matter is that you say might be proven harmful, nor can you prove it. So that the

kind of harm, when you are talking about a large category like that, the kind of harm that you are talking about, at best, can be in terms of predictions of changes in attitudes and possibly changes in behavior.

Frankly, looking at the social science methodologies, just as with violence, a huge category of information in entertainment, I don't think with a huge category like sexual explicitness, erotica or pornography, you can use social science methods to show even changes in attitude or behavior. There are just too many other variables that go into it.

So, what we are really back to is what the Meese Commission was really candid about, and I quote it in my book, both with respect to adults and minors, we are talking about moral attitudes. We think it is harmful. We as a society think it is harmful to be permissive and not to have proscriptions and taboos because of the message that we think pornography conveys, of pleasure without commitment and so forth.

In the 1980's, actually, it wasn't just that the government was using the rhetoric of child pornography. They were also borrowing the rhetoric of Katherine McKinnon and Andrea Dworkin in saying pornography is harmful because it eroticizes the subordination of women. Well, that is possibly true. There are a lot of feminists who disagree, but that is a political and moral issue. And as Judge Easterbrook said in the Indianapolis case that struck down the McKinnon-Dworkin anti-pornography ordinance, this is thought control in its purest form.

It may be a fact that pornography as defined by McKinnon and Dworkin has these harmful societal and attitudinal effects, but that is precisely the type of harm that the First Amendment prohibits the government from stepping in with broad censorship to try to prevent.

MR. HARVEY: Bob, I don't think that harm is necessary or possible or desirable to outlaw something simply because it is harmful. It would also depend, as Marjorie says, on the degree of harm. If pornography was as harmful as cigarettes, I suppose we would have to think about outlawing it. But we don't outlaw cigarettes.

If it was as harmful as automobiles, I suppose we would have to think about outlawing it. But we don't outlaw automobiles. My instinct is that it is so unlikely that visual images of the act by which human beings reproduce themselves could be so harmful as to cause 200,000 deaths a year. It is just a wild idea. So, I am not too worried about it.

MR. JARVIK: I would not want to do any sort of legislating. I am not a lawyer. I am a publisher. But I would say that generally these things, even when Congress does pass a law, are somehow decided in the legal system. They say in

America every political question becomes a legal question. I imagine there would be tort lawyers who would find specific cases where harm was done and bring cases and you could have decisions at that level, where you would have case law, which would evolve over time.

So, I think if it is harmful, just as in the tobacco case, it was done through these big lawsuits. The way people would go after pornography would be to say, well, this is harmful and here we are going to demonstrate it in this big trial and so forth.

MR. HARVEY: The bizarre thing is that we outlaw it when it has been shown not to be harmful. That is weird.

MR. PILON: You don't have tort lawyers here any more than you do in the drug area.

MS. HEINS: I just want to pipe up with an objection to the analogy to physical toxins, whether it is automobiles or cigarettes. This kind of rhetoric and metaphor is used constantly in the censorship debates. I just find it so infuriating. It is not only because the First Amendment protects intellectual freedom and protects the products of our imagination, puts them in a separate category for hands off, it says that the government is not to censor and restrict in this area.

It is not just a question of legal or constitutional law. It is a fundamental question of understanding the very different ways in which information, culture, are absorbed by different people and the ways in which we use the media and art. We are not just totally passive. It is the ways in which we respond as human beings to it and create it as well as interact with it. So, that goes back to my argument that media effects is not something that can be reduced to scientific proof.

MR. PILON: We have time for just one more question. The gentleman in the back had his hand up.

MR. KAHN: I am Dave Kahn. I am an attorney in private practice in Maryland.

First of all, I want to comment in passing that perhaps Mr. Harvey's comparison of the big stick wielded by the Federal prosecutors against the medium-sized stick wielded by the civil plaintiffs is perhaps at the crux of the entire issue of prosecution in your case.

But I had a question for Ms. Heins originally that had to do with the virtual child pornography. But there are two other aspects of expanded definitions of child pornography that perhaps either the panel or the first questioner might wish to comment on. When my children were young and first beginning to explore their own sexuality, I would truck down to the bookstore to buy a copy of "Show Me," which I had seen a couple of years

earlier, which was a picture book that had children models and their genitalia was shown and depicted in what I don't think anyone could consider a lewd or lascivious manner.

And the book had been pulled from the bookshelves because of the legislation that had been passed, not because it was lewd or lascivious, but because it was exploitative -- and this would be of interest to Cato; this is what I was told by the bookstore -- because the models were paid, and therefore it was commercial depiction of naked children and/or because the book was sold, so that was in commerce then, and we were somehow exploiting the children because there was a commercial aspect to this. Whereas had they been just pictures by the parents, presumably, or not in any way commercialized, that the Federal legislation might not therefore apply. I would appreciate some comment on that.

MR. PILON: Can you make this quick, Dave, so we can get to the reception?

MR. KAHN: The other thing is, and I have no idea whether this is part of the law or not, but I have been told that written descriptions of sexuality by children or teenagers has also been brought under this umbra even if it is to be shared between adults. I have just a question as to whether that is indeed illegal or legal and whom we are supposedly protecting if it is illegal. Thank you.

MS. HEINS: I think there was a case involving "Show Me" in New York. Am I right? It is a vague recollection. I can't speak to what the bookstore's rationale was or whether it had any basis in law. One of the problems here is that in addition to the Federal child pornography law, which now includes virtual child pornography, there are laws in most States, each of which is different. Some of them are clearly overbroad and unconstitutional even under the standards the Supreme Court has set forth because they prohibit any depiction of nudity by anyone under a given age, 17 or 18.

Whatever the reason for the bookstore pulling it, and if I am correct about my memory of a case in the Second Circuit, I think "Show Me" is probably commercially unobtainable in the United States at this point. That is a result of the very highly charged cultural politics around child sexuality.

MR. HARVEY: There is no law which implicates books in commerce in any different way, is there?

MS. HEINS: Well, I do think there was a case brought under New York State law against "Show Me," which was lost. I could be wrong about that. It would have been 20 or 30 years ago.

I don't think the virtual child law, the Child Pornography Protection Act, covers text only. It's images.

There has to be a visual depiction. Although there are some countries where descriptions as well as depictions of underage individuals engaged in sexual conduct are criminal.

MR. HARVEY: Can't you have a written depiction legally?

MS. HEINS: In this country, I think you can.

MR. PILON: Let's go have our wine and beer and cheese or what have you. Let's have a warm applause. The books are available outside for sale. I won't tell you which one has pictures.

(Applause.)

(Whereupon, the Cato Book Forum was adjourned.)