



DATE DOWNLOADED: Sat Apr 6 20:46:40 2024

SOURCE: Content Downloaded from [HeinOnline](#)

Citations:

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.

10 B.U. PUB. INT. L.J. 360 (2001).

ALWD 7th ed.

, , 10 B.U. Pub. Int. L.J. 360 (2001).

APA 7th ed.

(2001). Boston University Public Interest Law Journal, 10(2), 360-365.

Chicago 17th ed.

", " Boston University Public Interest Law Journal 10, no. 2 (Spring 2001): 360-365

AGLC 4th ed.

" (2001) 10(2) Boston University Public Interest Law Journal 360

OSCOLA 4th ed.

" (2001) 10 BU Pub Int LJ 360

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Provided by:

Fineman & Pappas Law Libraries

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

BOOK REVIEW

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

BY MARJORIE HEINS

*Reviewed by David Greene**

In his majority opinion in *Reno v. ACLU*, ruling unconstitutional certain provisions of the Communications Decency Act ("CDA"), Justice John Paul Stevens wrote that "we neither accept nor reject the Government's submission" that the First Amendment to the U.S. Constitution allows "a blanket prohibition on all 'indecent' and 'patently offensive' messages communicated to a 17-year-old." Thus even in what many free speech advocates consider to be one of the most important victories in American jurisprudence, the Court refused to go so far as to state unequivocally that minors have First Amendment rights to access non-obscene materials. Further, the Court struck down the CDA provisions because Congress's restrictions on Internet communications were not the least restrictive alternatives to fulfilling the government's "legitimate purpose." The purpose identified by Congress, and thus perhaps tacitly approved by the Court, was to protect minors from supposed harm caused by others' expression.

The CDA case is the subject of a whole chapter in Marjorie Heins's engrossing exploration of the harm-to-minors epistemology, *Not in Front of the Children: "Indecency," Censorship, and the Innocence of Youth*. For Heins, the case is a potent example of how courts, lawmakers, and even some scientists have blindly accepted as fact the postulate that children may be harmed by exposure to sexual, violent, or other conventionally "adult" content in art, literature, and other media. As Heins explains, there is little evidence to support the acceptance of such a far-reaching conclusion. And the "harm" articulated most often is a concern that a

* Executive Director and Staff Counsel, The First Amendment Project, Oakland, California; Project Director of the Free Expression Network-West; Adjunct professor, Golden Gate University, Former Program Director of the National Campaign for Freedom of Expression; Duke University School of Law, J.D., 1991.

young person will question and perhaps reject the prevailing morality. However, as Heins contends, that government play any role in establishing a national morality is antithetical to the First Amendment and the whole of our constitutional democracy.

Heins's book could not be more timely. "Harm-to-minors" has become the primary justification for censorship and classification schemes in the United States. Legislatures across the country are currently considering and enacting laws restricting minors' access to video arcade games, Internet web sites, musical recordings and live performances. Current efforts to give the movie industry's ratings system the force of law are emblematic. And the focus of harm-to-minors proponents has expanded from sexual and generally "deviant" content to include "violent" expression. In addition, recent highly publicized occurrences of youth violence, most notably the tragic student shooting at Columbine High School, have caused a reactionary rush to support wide-ranging censorship and identify, in the media, an explanation for those young persons' inexplicable acts.

Heins knows this firsthand. As a former director of the American Civil Liberties Union's Arts and Censorship Project, Heins participated as counsel in several of the cases she discusses in the book. Currently the director of the National Coalition Against Censorship's Free Expression Policy Project, she has been a leading advocate and defender of the First Amendment for over a decade.

Heins admits that it is difficult to be a free speech advocate when it comes to harm-to-minors. The difficulty lies not in a waning of the First Amendment values of intellectual freedom and pluralistic democracy, but rather in the complexity of the socio-psychological factors involved in the harm-to-minors issue, as well its unpopularity both in political and cocktail party settings. Heins helps the reader to overcome the complexities of the issue by providing a thorough and meticulously referenced study of the historical origins, legal applications, and scientific and political theories underlying the act of censorship in the name of child protection. As such, *Not in Front of the Children* is much more than a legal text and written for an audience much wider than legal professionals. Providing the reader with a comprehensive overview of the artistic, sociological, political and legal issues involved, *Not in Front of the Children* is essential reading for anyone on either side of the harm-to-minors debate. Indeed the greatest value of the book may be its ability to spark a dialogue that, as Heins contends, has far too often lacked an intellectual bearing.

Heins has clearly considered the issue in tremendous depth and not taken the arguments of her philosophical opponents lightly. She invites disagreement but concludes quite strongly that intellectual protectionism is detrimental to young people. As she asserts, without access to information and ideas, instead of "indoctrination and ignorance of controversy" and shielding from "dangerous ideas," young people are ill-equipped to function as adults in a democratic society.

The overarching question Heins raises is shouldn't we be sure that harm to minors is real, not just symbolic, before we mandate indecency laws, Internet filtering and other restrictions on minor's access to others' expression?

Heins's search for an answer begins with an exploration of the origins of the assumption that children may be harmed by sexual, and other "offensive,"

expression. She discusses Plato's notion that expressions to children must be models of virtuous thought, Aristotle's theory of catharsis according to which viewers of dreadful acts are purged of violent and unruly emotions, and Christianity's radical alteration of attitudes about sexual knowledge by its proclamation that sexual desire is sinful. Interestingly, Heins notes that there is no record of denying young people information about sexuality, outside of monastic settings, until the 15th century. Even then, restrictions were placed on the population as a whole, not minors particularly.

Contemporary views on protecting children from sexual material can be traced to the 18th century concern surrounding youthful masturbation, particularly those of the Swiss physician Samuel-Auguste Tissot, who chronicled the many dreadful consequences of the practice. Heins's survey of English and American legal history reveals few obscenity laws or prosecutions until the 19th century. The first federal censorship law in the United States, which authorized the Customs Service to confiscate and seek destruction of "obscene or immoral" pictures, was passed in 1842, expanded to apply to use of the mails in 1865, and expanded again in 1873 (the Comstock Act) to include information about contraception, abortion, or "any indecent or immoral use." The law was indicative, Heins writes, of a confluence of new social pressures including rapid urbanization and immigration as well as a renewed Puritanism.

Pointing to the 1868 landmark English case of *Regina v. Hicklin*, Heins shows that even adult censorship laws were premised on the perceived need to prevent youthful libidinous thoughts. *Hicklin*, which would dominate English and American obscenity law for the next century, involved an obscenity prosecution of distributors of an anticlerical pamphlet. The court's decision established an obscenity standard focused on material tending to "deprave and corrupt those whose minds are open to such immoral influences," including specifically "the minds of the young." The *Hicklin* standard was soon adopted throughout the United States, due in large part to the prosecutions by Anthony Comstock, who served as special agent of the U.S. postal service to enforce the eponymous obscenity law. Comstock's belief that obscenity "steals upon our youth" was well known and documented in his book, *Traps for the Young*. Applying *Hicklin*, U.S. courts confirmed that literary and artistic works did indeed tend to "deprave and corrupt" the vulnerable.

Heins is careful not to present the evolution of legal concepts in an historical vacuum. She examines literary and other artistic works which served to bring the issues of sexuality and morality into sharper focus. The works of Joyce, Edmund Wilson, D.H. Lawrence, and William Faulkner, among others, all were influential. The censorship, and eventual lifting of censorship, of these and other works brought the issue of access to expression before the courts and steered public opinion toward a re-acceptance of erotica. Heins also examines the evolution of psychological and anthropological thought on sex and sexuality with respect to both adults and young people. The works of Sigmund Freud and Havelock Ellis were influential in American society, and ultimately the American courts, in removing some of the stigma surrounding discussions of sexuality. Other theorists,

such as G. Stanley Hall, were instrumental in creating the category of adolescence and helped to maintain the belief that young people needed protection from immorality. In the 1950s, while Professor Alfred Kinsey's work served to liberalize general attitudes about sexual communications, the psychiatrist Fredric Wertham was waging a pseudo-scientific campaign against youth media, namely comic books, as a contributor to juvenile delinquency. Gradually, amidst these influences, courts began softening the *Hicklin* standard of obscenity by shifting their focus to whether the "average adult" would find a work to be obscene. However, as Heins explains, the courts preserved the idea that a separate obscenity standard needed to exist for minors.

By the 1950s, the Supreme Court could no longer stay away from the obscenity issue. In the 1957 case *Roth v. United States*, it formally rejected the *Hicklin* standard and attempted to define obscenity. Heins's careful analysis of this landmark decision is enlightening. She explains the confluence of forces, for example, various amicus briefs, the proposal from the American Law Institute, and others, acting on the Court's decision, which ultimately straddled the political fence and created a category of expression – obscenity – that was outside the protection of the First Amendment. The Court neither determined the actual behavioral effects of exposure to sexual communications, nor considered whether children needed special protection from sexual materials.

After *Roth*, the Court promulgated a three-part test for obscenity: whether the material considered as a whole appealed to "a prurient interest" in sex, described sexual matters in a "patently offensive" way, and whether it was "utterly without redeeming social importance." Yet all incarnations of the test proved unworkable. The Court seemed ready to bring obscenity within the ambit of the First Amendment, but all readiness was abandoned with Warren Burger's ascension to Chief Justice. For a much realigned Court, Chief Justice Burger pronounced a new obscenity test in *Miller v. California*, which substituted the looser "serious literary, artistic, political, or scientific value" for "utterly without redeeming social importance." The new test also measured "prurient interest" and "patent offensiveness" according to community, not national, standards, thus allowing for geographical disparities in what was considered to be obscene.

As Heins shows, the legal doctrine for material deemed harmful to minors evolved from *Roth* on a separate, but frequently intersecting, track with the cases dealing primarily with adult readers and viewers. In *Ginsberg v. New York*, the Supreme Court adopted a theory of variable obscenity, finding that material could be legal for adults, yet obscene as to minors. The Court's distinction was limited to sexual materials, and, as Heins explains, the First Amendment rights of minors continued to be read broadly in most other contexts.

Although the Court had stated in numerous cases that it was improper to limit materials available to adults to those fit for children, the adult-minor distinction proved problematic when applied to media whose audience might unavoidably include both adults and young people, for example, radio broadcasts. Throughout the 1960s and 70s, the Federal Communications Commission ("FCC") fined radio broadcasters for transmitting programming that was "indecent," which was defined

as patently offensive descriptions of sexual or excretory matters. Although, "indecent," unlike "obscenity," was constitutionally protected speech, the FCC asserted that it could prohibit indecent broadcasts because radio "invaded" the home where it could reach unsuspecting children. The Supreme Court approved the FCC's approach in the 1978 case *FCC v. Pacifica*, a decision that Heins decries as "intellectually indefensible." A plurality of the Court held that the FCC could restrict the broadcast of George Carlin's comedic monologue to only those hours when children were not likely to be part of the listening audience. Without explaining why minors needed the FCC to protect them from Carlin's show, the Court allowed restrictions on expression that was non-obscene as to both adults and minors. Four dissenting justices questioned whether the FCC and the Court were motivated by personal moral values instead of the alleged psychological harm to minors. Interestingly, the FCC did not find a single violation of its indecency standard during the nine years following *Pacifica*. But in 1985, the pornography commission convened by Attorney General Edwin Meese ushered in what Heins calls the "Reign of Decency." Shortly after release of its 1986 report characterizing pornography as pedagogical material rather than sexual fantasy, the FCC resumed its enforcement against indecent broadcasts, expanding its crusade from radio to cable television and telephone transmissions.

Although rejecting many of the medium-wide restrictions proposed by Congress, the Court solidified its thinking on the harm-to-minors issue. In *Sable Communications v. FCC*, it struck down Congress's ban on "indecent" commercial phone services. But it found, despite the absence of any proof, that Congress had a compelling interest in protecting minors from indecent speech, thereby expanding the harm-to-minors standard announced thirty years earlier in *Ginsberg*. Moreover, the judicial disapproval expressed in *Sable* and cases that followed, instead of discouraging further legislation, merely motivated legislators to draft such legislation more craftily. As Heins notes, although several judges questioned the unproven assumptions underlying harm-to-minors, their reservations were most often relegated to dissenting opinions.

Heins also analyzes the indecency debate as it has moved to the Internet. She provides an extensive insider's view on the strategizing and maneuvering that culminated in *Reno v. ACLU*, the suit challenging the CDA's prohibition of indecent material over the Internet to persons under 18 years of age. Because the Internet is equally available to persons above and under 18 years, the CDA radically restricted an entire medium under the harm-to-minors banner. Although the Court's rejection of the CDA provisions in *Reno* was a resounding victory for adult free speech, its affect on minors' free speech rights is less clear: expressing doubt that all indecent material was actually harmful to adults, the Court generally confirmed its assumption of the existence of harm-to-minors.

Completing her historical analysis, Heins examines the current efforts to shield youth from indecency: Internet filtering programs, v-chips on televisions, and ratings and classifications schemes. As Heins projects, it is in the debate surrounding these on-going efforts that future legal examinations of the harm-to-minors rationale will occur.

Heins's chapter on Media Effects, that is, whether and to what extent young people are influenced by what they see, hear and read, may be the most enlightening for the reader more accustomed to legalese. Her work on the topic is exemplary. Employing the opposing views of Plato and Aristotle, she frames the debate on media effects as one between catharsis (perception of indecent media cleanses and purifies one of bad thoughts) and imitation (one will incorporate the indecent content perceived into one's behavior). She is careful to emphasize that the debate is not susceptible to an either/or resolution. Indeed, Heins does not dismiss the contention that exposure to particular media may cause an imitative effect in some young people. However, she questions whether these "vast and various" unpredictable and distinctly individual effects justify systems of censorship.

Heins's survey of the social science research conducted with regard to media effects is comprehensive and succeeds in bringing some coherence to a complex and technical field. She argues that despite the widely-publicized claims of scientific evidence of media effects, the studies are ambiguous, disparate and modest in their findings. For example, many of the studies measure "aggression" without examining or postulating the correlation between aggression and violence. Others fail to consider crucial variables such as a child's predisposition to violent conduct. Still others fail to isolate media exposure from other potential influences and variables. Few studies provide statistically consistent results. Assaying the field of study, Heins explains that harm-to-minors is more of a collective intuition, and a relatively recent one, than a demonstrated phenomenon.

Heins concludes with her most powerful argument in opposition to harm-to-minors censorship: the harmful effects of "intellectual protectionism" in inhibiting young people's ability to cope with their environments and the stimuli that surrounds them. Advocating strongly for minors' First Amendment rights as a means for the preparing youth to become active participants in a democratic society, she supports media literacy, that is, the teaching of critical thinking skills, to address concerns about "harmful" information.

Not in Front of the Children succeeds in raising many questions, and for many readers, will likely answer a few as well. It is surely going to be part of the ongoing debate over the regulation of sex and violence and other "offensive" content in movies, music, video games, on television, and over the Internet. What is certain is that restrictions designed to prevent harm-to-minors will continue to be proposed. What remains to be seen is whether such proposals will be received, considered, and debated in an intellectual and thoughtful manner. *Not in Front of the Children* is an important contribution to the realization of the latter.