SYMPOSIUM

MANIA: THE LIVES, LITERATURE, AND LAW OF THE BEATS

Foreword

_Ronald K.L. Collins* & David M. Skover†_

The only people that interest me are the mad ones,
the ones who are mad to live.

— Jack Kerouac

Contrary to popular opinion, the 1960s really began in ‘50s. Before
there was Bob Dylan, there was Allen Ginsberg. Before there was Ken
Kesey, there was Jack Kerouac. Before there were the hippies, there were
the Beats.

The Beats introduced the counter-culture to twentieth century
America. They were the first to break away from Eisenhower conformi-
ty, from the era of the Man in the Grey Flannel Suit. With them came an
infusion of rebel spirit—a spirit that hearkened back to Walt Whitman—
in their lives, literature, and law.

_Mania: The Story of the Outraged and Outrageous Lives That
Launched a Cultural Revolution_ (Top Five Books, 2013) focuses on the

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apprentice years of the major Beat writers from 1944 to 1957—the years in which they experimented with drink, drugs, sex, and jazz, and succeeded in weaving the madness of their lives into the majesty of their literature. They created some of the twentieth century’s most enduring literary and poetic works, bringing their countercultural ethos into the mainstream and becoming stars in the process.

Moreover, their literature spawned a remarkable chapter in American obscenity law. The prosecution of Allen Ginsberg’s epic poem, *Howl*, was the last of its kind in this nation; and the prosecution of William Burroughs’s *Naked Lunch* is one of the last times that a novel was charged as obscene. The First Amendment victory in the *Howl* obscenity case further secured the freedom of Beat poets and authors to write their life experiences into literature using the vernacular and vulgarity of their times. *Mania* recounts in colorful detail the histories of the government’s attempts to ban those creative works.

Although extensively researched and documented, *Mania* is a narrative telling of the Beat story as it was lived—uninhibited, unapologetic, and unpredictable. Their reality was very much informed by criminals, drug addicts, sexual deviants, and other free-spirited types. That reality could also be very cruel when it came to the lesser lights in their lives, particularly the women in their inner circle. The world of the major Beats was unquestionably male-centered, and the women with whom they consortedit were never the prime movers of their destinies. Along the way, some of those people were killed, some committed suicide, some were institutionalized, some went bankrupt, and some were just made miserable. Unlike other Beat biographies, *Mania* bluntly portrays these cruel and reckless antics, yet its account neither condemns nor glorifies the wild excesses of the Beats.

Four key Beat figures drive the narrative. First and foremost, there is Allen Ginsberg, who penned utopian and dystopian poetic visions of life. His most significant contribution, of course, was his 1956 epic poem, *Howl*, which was unorthodox in its style, its substance, and its cultural message. Stylistically, the poem broke away from rhymed verse and took its expressive cue from freewheeling jazz. Substantively, it introduced themes that were overtly political, psychological, and sexual—and did so with striking candor and vulgarity. Culturally, it traded in taboos: nothing was off the table, whether the violence of war, the brutality of bigotry, or the exaltation of homosexuality.

Second, of course, is Jack Kerouac, who offered his readers a literary roadmap for how to live. His 1957 novel, *On the Road* (with millions of copies sold in at least thirty foreign translations) presented a new vision of America that broke away from the stifling norms of the post-
World War II years. It counseled us to look inward (and discover ourselves) and then move outward (and experience life, literally on the road).

The next central player is William Burroughs, a master of literary realism. The Harvard-educated scion of a famous and wealthy family, he was nonetheless obsessively drawn to the seedy, gritty, and criminal side of life. His first novel, *Junky* (1953), graphically depicted the horrific existence of drug addicts, and his second, *Naked Lunch* (1959), showcased what Burroughs called “the most horrible things I can think of,” revealing the agonies of drug hallucinations and the depravities of sexual deviancy.

Finally, there is Lawrence Ferlinghetti, the poet-publisher and the First Amendment hero of our work. Of all of our subjects, Ferlinghetti is the only one who was truly not maniacal. He foresaw the extraordinary potential of Ginsberg’s *Howl* as early as 1955; transformed that potential into reality by publishing the poem; sold the poem in his now-celebrated bookstore, City Lights; and successfully defended the poem with a glorious First Amendment victory when he was prosecuted in the 1957 *Howl* obscenity trial.

The publication of *Mania* was celebrated by a full-day Symposium, sponsored by Seattle University School of Law on April 5, 2013. The morning panel, titled “Weaving Lives into Literature,” explored the literary side of *Mania*. After introductory comments by Ronald Collins, three distinguished scholars spoke on the contemporary importance of the Beats (Matt Theado, one of America’s most famous Beat scholars), the roles and ruins of the Beat women (Jean Stefancic, a noted writer on law reform, social change, and legal scholarship), and the Beats as the romanticized prototype of reckless male youth (Richard Delgado, the extraordinarily prolific authority on racial justice in America and a recognized figure within the Law & Literature movement). The afternoon panel, “The Law of *Howl*,” examined the legal side of *Mania*. After David Skover introduced this topic, two remarkable presenters spoke about the vicissitudes and victories of poetry on trial (Albert Bendich, who was cocounsel for the defense in the *Howl* trial, *People v. Ferlinghetti*) and the continuing censorship of *Howl* and other works under broadcast indecency regulations (Nadine Strossen, the immediate past president of the American Civil Liberties Union). Their illuminating remarks follow, along with more complete biographical information on them.

We are very fortunate—as are all Beat enthusiasts—to have the printed record of this extraordinary event preserved in the pages of this Symposium issue. Our gratitude goes to Dean Annette Clark, the faculty and staff of the Seattle University School of Law, the board and mem-
bers of the Seattle University Law Review — and, of course, our eloquent colleagues and friends whose erudite presentations contributed to a much fuller understanding of the literary and legal significance of the Beats.
ADVANCE PRAISE FOR MANIA

“Mania is a stunning and chilling portrait of rebellious youth gone mad. The story descends into a nether world of heroes and anti-heroes, killers and creators, junkies and geniuses. Collins and Skover, through a thrilling narrative and unprecedented research, reveal how a misfit band of brothers, dreamers, and vagabonds broke old ties, abandoned families, and lived by their own rules to concoct an ecstatic and uninhibited vision of literary modernism. From the macabre killing that opens the book to the grand free speech victory at its climax, Mania is both a celebratory and cautionary tale of American revolt. A remarkable achievement!”


“Collins and Skover have worked extensively through the available resources that detail the true stories they bring to literary life. In fact, they have put together the most comprehensively researched account that I have seen of the apprentice years of the Beat writers. Their book will become the go-to account of the composition of their key works, the ground-breaking legal issues that resulted, and their continuing cultural aftermath.”

-- Professor Matt Theado, author of Understanding Jack Kerouac and The Beats, and keynote speaker at the 2007 Kerouac Conference.

“This book makes an important and lively contribution to the literature. The authors’ narrative is unique and their amazing attention to detail illuminates many dark areas in Beat history. Mania also solidifies the importance of Allen Ginsberg’s “Howl,” not only for 20th-century poetry but for its impact on America’s political, cultural, and legal climate as well. A book long overdue.”

“The scope and depth of the research in this book is most impressive as is the quality of analysis and understanding of the main issues. Responsibly scholarly, Collins and Skover’s engaging book reveals a full appreciation of their subject.”

-- Al Bendich, ACLU attorney acting as co-counsel for Lawrence Ferlinghetti in the 1957 “Howl” trial.

“Mania is the most detailed, accurate documentation I have so far encountered of the roots and early development of the Beat Generation. Presented in a gripping, easily-readable writing style, the book breaks new ground in its well-documented explanation of the lives and motivations of all the main characters involved in this cultural and literary revolution. Mania makes for an exciting story, exceptionally well told, and the one book I’d recommend to anyone wanting to learn the truth about the Beats and their associates.”

Why Another Beat Story?: The Modern Significance of the Beats

Matt Theado*

First, a Beatnik joke. So, this Beatnik goes into a diner and says, “I’d like a slice of pie,” and the waitress says, “The pie is gone.” He said, “Cool, I’ll take two slices.” Ha ha ha, it’s a Beatnik joke.


The first thing that sets *Mania* apart is that it doesn’t have the word Beat in the title or in the subtitle. I’m guessing the publishers had had it up to here with the Beatniks. But the question remains, why another Beat book? What makes *Mania* different, a story worth telling? What is its place in the telling of the Beat Generation story, and why might readers today be interested in reading it?

I don’t think there has been a Beat story like *Mania*, a dramatic narrative that weaves together the lives and works of the core Beat Generation writers in one volume that draws from every available source. Ron Collins and David Skover did exhaustive and meticulous research by checking and double-checking their sources. In this book, we see the various real-life characters in juxtaposition with events and locations. Collins and Skover have unfurled this tale in the form of dramatic narrative based on facts that reads like a novel. This stylistic approach goes back to what in the 1970s was called “new journalism,” a style associated with Tom Wolfe of *The Right Stuff* and Hunter S. Thompson and Truman Ca-

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Pote, a style that traces its lineage to, well, the Beat Generation and Jack Kerouac with his true-story novels. Today’s writing seminars refer to the current version of this style as “creative nonfiction.” The dramatic development of Mania culminates in the landmark Howl trial, and so all the events that lead up to this, the events that cohere and coalesce in Allen Ginsberg’s explosive poem published in 1956, are built up by these two authors, Collins and Skover, to develop the significance of that trial. What is it that Ginsberg was trying to convey in that poem? Why did he convey it in that manner? Without knowing the history of the poet and his friends, you don’t know the history of the poem’s composition.

The trial had repercussions beyond the decision of that one poem and really beyond the issues of First Amendment rights. Judge Clayton Horn was part of a much larger issue—whether you could drop the F-bomb in a poem and then sell it over the counter. Greater social issues were rolled up in the momentum of that poem and thus in the impetus of the trial. In one sense, the judge was determining the relationship of the poet to society, which is to say, he was in position to clarify and define the transmission of the Beat writer’s own intentions. The Howl trial is now fitted in as a step in an age-old dance, the pas de deux of artists and society, a dance whose steps are more complicated today, performed to a different beat from that of the 1950s. Mania helps us to see where we are by showing us where we’ve been.

In 1948 in New York City, 26-year-old Jack Kerouac was drinking beer and talking with a friend, and he said, “You know, we’re really a beat generation. The immediate reference was to their hip friend, Herbert Huncke, who had used the word “beat” as in, “Man, I’m beat”—tired, cheated, worn down, overburdened by life, spiritless, futureless. And yet paradoxically Kerouac saw in this state also the state of the beatitudes, the declarations of blessedness Jesus delivered in the Sermon on the Mount: blessed are those who hunger. The people Kerouac observed on the cigarette-butt sidewalks and in the dim bars and along the road in his cross-country travels were, to him, the salt of the earth. Hitchhikers, train hoppers, hobos, pickpockets, having no shot at the pie in the sky; they’ve given up only to receive untold blessings. The sense of being at the bottom and looking up was shared by some middle-class college kids. To those who were sympathetic as they, for reasons of their own, sensed that they were societal outcasts. And across the country, then as now, many thousands of sensitive young people feel different and left out of the mainstream and thus out of place, unrecognized and largely unable to express the frustrations that sometimes simmer at a deep and intimate personal level.
Some of the folks of Allen Ginsberg’s generation were beat by circumstance, growing up in the Depression and coming of age during World War II. They sought desperate subsistence on the other side of the atom bomb attacks in the midst of the powerful currents of post-war conformism—the sprawl of suburban life, the glow of mass-media television, the birth of franchise America, the herd instinct for safety in numbers, and the oblivious trust in the big corporations and government as they changed their uniforms from military garb to business suits. It was a time when social memberships, from bowling leagues to the loyal orders of the Elk and Moose, rose to all-time highs. I grew up as a son of Elk and Moose members when individual eccentricities were risky; social liabilities, homosexuality, visionary experiences, even late night, buddy-to-buddy, soul-baring conversations generally were not recognized as part of the new social order.

None of this was lost on Jack Kerouac and Allen Ginsberg, two buddies who met in college at Columbia and who each brashly desired to be the literary voice of their generation. The young men who were to be known as Beat Writers found that their most cherished intimacies were not reflected in contemporary art. These writers of a Beat Generation did what artists do; they set about making it new. Kerouac and Ginsberg, in particular, paradoxically separated themselves from their generation by consenting to speak for it and to do so they needed to find an appropriate voice—the rhythm and conviction; semantics and suggestions; and the bluntness and the frankness demanded by the task.

A decade later, they became, much to Kerouac’s dismay but to Allen Ginsberg’s delight, leaders of a counterculture and labeled as social outlaws. One of the paradoxes was that they wanted to bring this stuff into the mainstream. Instead, this desire set up a kind of labeling of them as teen mutiny: American youth gone amuck. In their out-of-the-mainstream positions, they were in-the-flesh embodiments of the dancing motion, a contra dance, a tango of poet and society.

In The Republic, Plato describes how Socrates banishes poets from the city and why: because poets truck in images, shadows, and reflections not in reality. The objects of their art are, as Socrates put it, far removed from what is. And then there’s the fact that rather than representing the rational part of the soul, poets imitate the appetitive part of the soul, gratifying the desires and emotions with short-lived jibes and jabs. For Socrates, poets are not necessarily subversive or dangerous; they’re merely base course. More than 2,000 years after Socrates, Percy Bysshe Shelley valued poets above all else for their direct involvement with the activities of social life: “Poets are the unacknowledged legislators of the world.”
Consider a beat generation, still lowercase letters; this is a demographic, and whether legitimately described in sociological terms or not, they believed it. A swath of humanity in a place and time. When members of this demographic set about the business of laying down language—artistic articulations, then the designation of Ginsberg and Kerouac and others of like mind and intent became Beat Writers. They didn’t start out by saying we’re going to be Beat Writers. They didn’t know what Beat Writers meant. They didn’t have a capital-B beat. Kerouac said: “You know, this is really a beat generation.”\(^1\) They assumed a historical and cultural literary title, the capital-B Beats that includes a wide-ranging connotation of their art and their lives. In a powerfully romantic sense, these poets saw themselves as dynamic legislators of the world who sought to right the wrongs and usher in a new spiritual age.

In January 1958, Kerouac exchanged letters with Hollywood producer, Jerry Wald, who proposed a movie version of *On the Road*. Jerry Wald had just produced *Peyton Place*, and he also did a monumental production of William Faulkner’s *The Sound and the Fury*, which was a bold kind of thing to make a movie out of. Producers risk great movie critic putdowns. The New York Times movie reviewer said *The Sound and the Fury* was “a tale told by an idiot, full of sound and fury signifying nothing.” In Jerry Wald’s version of the *On the Road* movie, the hero would go out in a fiery car crash finale. Kerouac suggested in a return letter, instead of a fiery car crash finale, the movie might close on the hero at home with his family, saying prayers with his kids and tucking them in bed. Kerouac made clear to the producer his heroes are men of peace and sympathy, who in the movie Kerouac suggests might find their initial bond in the military when they confess to each other that they are unable to kill. “That’s the secret of the Beat Generation, Mr. Wald,” Kerouac wrote, “and that’s the only point I must insist upon. If I had the guts to tell it to the Navy, I have the guts to tell it to Hollywood.”\(^2\)

The hallmarks of the Beat Generation: sympathy, tenderness, piety, relaxation of social hang-ups, openness of thought and emotion, inclusion of everything, hiding nothing, experimenting more, taking drugs, writing freely, and an examination of the costs of doing so. Were they successful? As Gary Snyder, West Coast Buddhist and Beat Poet once said, “We moved the world a millionth of an inch.” Beat Generation writers are new art, but there’s more to the generation than Kerouac, Ginsberg, Snyder, William Burroughs, and Gregory Corso. Although this

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group is generally considered the “daddies” of the Beats, as Corso himself once said: “Four people do not a generation make.” What about the many thousands of people who identified with the positions these guys did, who palpated the pulse of the time, who did not become writers of renown, either because they were denied the avenues of publication, didn’t have the chops, or it just wasn’t their bag? Who are the faceless and voiceless denizens of that Beat Generation who valued spontaneity, elusiveness of life, relaxedness of sexual hung-up-ness, and scribbled their own interior thoughts in secret notebooks and smoked pot, who a decade later said make love, not war? There was a whole demographic of Beat Generation members who didn’t write or were shut down for doing so. As Corso once said, “The men got published, the women got sent to the bug house.”

The complexity of the Beat Generation is its richness and its variety, and 99.9% of that went unpublished. Beat Generation writing, at its root, means self-expression without censorship. That starts with no censorship at the level of initiation. No self-censorship, the absolute first level of honesty. Even today, most of us probably aren’t fully interested in doing this. “To thy own self be true, and it must follow, as the night the day thou canst then be false to any man.” But how do you do that? What aspects am I hiding? Or to be fairer, what aspects do I showcase at the expense of others? Self-examination is a vital first step, thus Beat Art has to be of a particularly intimate variety. One tool toward this accomplishment is attitude, true digging of the mind. Allen Ginsberg spoke of candor: first thought, best thought. Jack Kerouac famously disavowed conscious craft. Craft is crafty. In the mid-to-late 1950s, psychoanalysis was very hip. Honest insight to self, digging through accumulated layers of personality, led to the development of a form of expression to deliver this uncensored honesty—the unlimited outflow without censorship and the soul of Howl. Spontaneous prose can be defined as active writing in which the words on the page flow as directly as possible from the impulses of the mind and spirit. This does not mean it has to be written fast. Kerouac, a fast typist, wrote his best spontaneous prose with pencil on paper. Of course, the method is to write spontaneously without conscience mind intervening. That means the ethos of the method is pure honesty: tell-it-like-it-is compulsion. The technique may be a kind of craft in itself, but that’s a discussion for another time. In any case, the art is now on paper. It’s a pile of words. It’s a novel like On the Road. It’s a poem like Howl.

Writing, especially literary art has, until very recently, been a cottage industry. Writers type away in the privacy and obscurity of their own kitchen tables to model a craft that they then take to the marketplace, in this case the publishing house. In order to be published, writers must navigate a maze of agents, editors, stylists, and advertisers who comprise what we call the literary gatekeepers—the agents of publication, which are many and are beholden to many gods, such as the god of “the bottom line.” Publishing is a business. Publishers are not obligated to starve to death for the sake of art.

The Beat writers shared hundreds of letters between them before their days of fame, discussing their options for and chances of commercial publication. That was the only way to reach a reading audience and to generate an income.

If you’re not published, you’re not read. In order to be published and thus be encouraged to write further works, writers must satisfy the dictates of the literary marketplace. Even during the processes of composition, it’s likely, even certain, that writers make many thousands of decisions, large and small, in regard to the marketplace and the role of the literary gatekeepers well before any process of official submission takes place. So writers adjust their own vision to suit the vagaries of the industry. In exchange, they receive the benefits of capital investors, manufacture, distribution, marketing, accounting, and warehousing—aspects of the business writers traditionally cannot provide on their own. How does a visionary literary artist proceed in the face of this? Publishers are in the business for one purpose: to make money. If they believe a book will sell, they’ll publish it. If they see a category or genre that sells to marketable audience, then they’re taking less risk with a book that fits in that category. Avant garde books go to the avant garde publishing houses. In the 19-teens and 1920s, the Moderns published in the little magazines. T.S. Eliot’s, The Waste Land was published in 1922 in the Dial, which circulated 1,600 copies.

Viking Press, a conventional publisher, tamed Kerouac’s novel On the Road. One reason Kerouac was uncomfortable with the attention afforded to On the Road was that he knew he had copped out in the production of that book. He wanted it to be published; he wrote it that way, and he revised it toward that goal. When Ginsberg typed out certain lines of the poem, he knew that Howl would never be published, and so he felt freed and liberated to write as true and honest as he wanted from his own honest mind.

So, on the one hand, you have artists who are striving for total freedom of expression, and on the other hand you have a publishing industry with a long history that has entrenched them in a certain expectation for
literature, which is why when capital-B Beat Generation became a trend, Beat Generation works could be published.

One of the primary achievements of Mania is the way it sets up Howl’s publication in Lawrence Ferlinghetti’s Pocket Poets Series, published by City Lights Books. Mania outlines how Ferlinghetti established his press as an avenue for the publication of a work such as Howl. It is why the ensuing trial was significant in clearing the publication of this book and in establishing an articulation of the relationship of the poet to society.

Who will read Mania and respond to it? Who is its audience? We’re at the end of the age of the book, moving out of the era dominated by the literary gatekeepers. Today, you can compose a novel on your iPhone, post it to CreateSpace, market yourself on Twitter, and have your sales tracked by PayPal. In the frictionless space of digital networking, there are no censors, and there are no books. Many products of the creative imagination are no longer subject to the channels of the literary gatekeepers. Customers no longer line up in record stores. They can now download any single song they wish. They no longer have to buy it because it’s available on demand from Spotify. Musicians have their own web spaces now where they offer their self-produced music. In addition, the boundaries of permissibility have largely fallen away, and entering a mistaken address in the search bar of your Internet browser can plunge you into pornographic realms far beyond any that Allen Ginsberg attempted to convey in Howl. That’s how I always explained it, anyway. Today’s readers need Mania because it’s an adventure story of the sort they’re not embarking on anymore, in part because of the successful defense of an explosive poem in a San Francisco courtroom in 1956. The heated press of that reality has become history—the answer to a Jeopardy question, First Amendment Freedoms for 400—but the issue of language, books, and broadcast airwaves is far from settled. The Howl trial was one small step in the artist’s dance with society and one giant leap for mankind. But we are leaving the age of print and of broadcast. In the digital spaces ahead, what trials will artists face where there are no gatekeepers, where everyone can be an artist?
On the Road Without a Map: The Women of the Beat Writers

Jean Stefancic*

I. INTRODUCTION

During a tribute to Allen Ginsberg1 at the Naropa Institute in Boulder in July 1994, a woman in the audience asked: “Why are . . . so few women on this panel? Why . . . so few women in this whole week’s program? Why . . . so few . . . among the Beat writers?” Corso, suddenly utterly serious, leaned forward and said:

There were women, they were there, I knew them, their families put them in institutions, they were given electric shock. In the ‘50s if you were male you could be a rebel, but if you were female, your families had you locked up. There were cases, I knew them, someday someone will write about them.”

* Research Professor of Law, Seattle University School of Law, M.A., University of San Francisco, 1989. Thanks to Richard Delgado for incisive comments, never-ending conversations, and high moments. Thanks also to David Skover and Ronald Collins for the invitation to write this paper for the symposium on their book Mania: The Story of the Outraged & Outrageous Lives that Launched a Cultural Revolution (Top Five Books, 2013). Thanks as well to research assistant Philip Chinn for a careful reading of the final draft.


2. BRENDA KNIGHT, WOMEN OF THE BEAT GENERATION: THE WRITERS, ARTISTS AND MUSES AT THE HEART OF A REVOLUTION 141 (1996) (quoting Stephen Scobie’s account of the Naropa Institute tribute to Allen Ginsberg, July 1994). Perhaps the poet Gregory Corso was thinking of his muse, Hope Savage, whose father committed her to a mental hospital for shock treatments to set her on a path to a more bourgeois life. See BILL MORGAN, THE TYPEWRITER IS HOLY: THE COMPLETE, UNCENSORED HISTORY OF THE BEAT GENERATION 90 (2010) (stating that Savage was “the love of his life”). Elise Cowan also comes to mind. Cowan, a brilliant, inward young poet with little confidence who recognized Allen Ginsberg as her “twin soul,” was twice sent to the psychiatric ward of Bellevue Hospital by her parents, and committed suicide in 1962. See KNIGHT, supra, at 141–65; see also JOYCE JOHNSON, MINOR CHARACTERS 51–58, 75–78, 91–92, 163–65, 255–59 (1983) [hereinafter JOHNSON, MINOR] (recounting the life of Cowan, her close friend).
Since that time, a small body of memoirs, books, movies, scholarly papers, and conferences have helped bring to light the women of the Beat Generation—the precursors, the muses and partners, the writers, and artists. I limit this article to the women who lived with or married three of the early major figures: Neal Cassady, Jack Kerouac, and William S. Burroughs. The reader will notice that I have set the framework naming the men first. As it is usually constructed, the story of the Beats is primarily a story of men. One can discuss the men without the women but cannot write about the women without mentioning the men. The men’s stories are about self-definition and developing one’s talent and range of experience as a writer. The women’s stories are about relationships, primarily with the men.

3. On the unreliability of memoir see André Aciman, How Memoirists Mold the Truth, N.Y. Times, Apr. 7, 2013, at 8; see also Epigraph (anonymous) to Joan Haverty Kerouac, Nobody’s Wife: The Smart Alec and the King of the Beats xiii (1990) [hereinafter Haverty] (“Fact is the mother of memory; viewpoint its wayward father.”). Nevertheless, the memoirs of women fellow travelers of the Beats provide additional perspectives not available until after the movement ended. See Carolyn Cassady, Off the Road: My Years with Cassady, Kerouac, and Ginsberg (1990); Haverty, supra; Johnson, Minor, supra note 2; Joyce Johnson, The Voice Is All: The Lonely Victory of Jack Kerouac (2012) [hereinafter Johnson, Voice]; Edie Kerouac-Parker, You’ll Be Okay: My Life with Jack Kerouac (2007).

4. Collins & Skover, supra note 1; Johnson, Voice, supra note 3; Morgan, supra note 2.

5. On the Road (2013), The Beat Hotel (2012), Neal Cassady (2007), The Last Time I Committed Suicide (1997) and before 1996, Heart Beat (1980). Echoing the lives of some of the early Beat women, Terrance Ratigan’s play, The Deep Blue Sea (1952), tells the story of an upper class British woman married to a judge, but seduced by a World War II Royal Air Force veteran. Her sexual excitement and attraction to danger drive her to abandon her staid, empty marriage. After a tempestuous, erotic affair, the veteran abandons her, after which she tries to commit suicide.

6. For papers published by the Beat Studies Association, see, for example, About the B.S.A., Beat Stud. Ass’n, http://www.beatstudies.org/about.html (last visited Aug. 18, 2013).


8. These women are: Carolyn Cassady (wife of Neal Cassady), Edie Kerouac-Parker (first wife of Jack Kerouac), Joan Haverty Kerouac (second wife of Jack Kerouac), Joan Adams Vollmer Burroughs (common law wife of William Burroughs), Joyce Johnson (romantic partner of Jack Kerouac). Car thief, conman, sexual athlete, maniac driver, reader of Dostoyevsky, Proust, and Nietzsche, Neal Cassady became fictionalized as the main character, Dean Moriarty, in Jack Kerouac’s novel On the Road.


12. Morgan, Preface to Edie Kerouac Parker, Kerouac-Parker, supra note 3, at 18–19 [hereinafter Morgan, Preface] (“[T]hey lived for their men and their lives revolved around the men’s needs more than their own.”); see also Morgan, supra note 2, at 155 (“[The male Beats] grew up in
Why should this be so? The notion of the social construction of identity, especially of women's identity, would not catch public attention in the United States until a few decades after the 1940s with the work of Catharine MacKinnon14 and Carol Gilligan.15 But the stories of Carolyn Robinson,16 Edie Parker,17 Joan Haverty,18 and Joan Vollmer19 contain many examples of pre-World War II concepts of what a woman is or should be—i.e., her construction back then. After briefly describing parts of their lives, I turn to some views on womanliness, marriage, children, and careers common at the time.

Not only were the early Beats male, they were white. Only a few black writers identified with them. Two of them, poets LeRoi Jones and Bob Kaufman, were fellow travelers for a time. Kerouac is said not to have known any black Americans well until he served in the merchant marine as a galley-scullion under the supervision of a team of black cooks, one of whom he came to admire.20 Beat historian and archivist Bill Morgan posits that Allen Ginsberg, the glue that held the original group together from beginning to end, knew few black writers during the 1940s, but encouraged their writing and publishing after he himself had become famous.21 And because Ginsberg associated with few women, it did not occur to him that they could be more than wives, mothers, or someone who would work and pay the rent.22 Some of the women, who later published their own work, thought of themselves that way as well.23

15. CAROLYN GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982).
16. Married to Neal Cassady from 1948 to 1963.
17. First wife of Jack Kerouac from 1944 to 1945.
21. Jones later distanced himself from the Beats, changed his name to Amiri Baraka, and became a key participant in the Black Power movement. Hettie Jones, his wife during 1961–1968, became famous in her own right in the late 1950s, publishing with him the newsletter Yugen, a “little magazine” devoted to Beat writing. Her book, How I Became Hettie Jones (1990), established her own credentials as a writer-poet. See MORGAN, supra note 2, at 161. Bob Kaufman, an improvisational jazz-infiled poet, is credited with inventing the word “beatnik,” which Herb Caen, a San Francisco gadabout and reporter for the San Francisco Chronicle, overheard him say in a North Beach bar. Caen used the term pejoratively in an April 1958 column. See id. at 145.
22. MORGAN, supra note 2, at 155.
23. See JOHNSON, MINOR, supra note 2, at 212–13 (describing meeting Hettie Jones standing on a street corner in the snow, handing out leaflets announcing a poetry reading by her husband Leroi Jones, saying that she had never read any of her own poetry in public thinking it was not good enough. Johnson says that Hettie Jones later admitted “fiercely”: “Some of it was good enough.”); see also id. at 214–18 (recounting Hettie’s life with LeRoi Jones). Eileen Kaufman, a budding jour-
The Western world plunged into war in 1939, with the United States entering in 1942, dividing the twentieth century into before and after. Though the war was to transform life in the United States, the accounts of the Beats give little evidence that it was going on. Kerouac served in the merchant marine corps and was later discharged from the Navy because of his unstable personality. Edie Parker, Kerouac’s first wife, describes how the presence of soldiers and sailors training for war changed the mood of New York City, infusing it with patriotic fervor and excitement. But most of the Beats managed to stay home. Some, probably aided by savvy friends, lawyers, and doctors, successfully dodged military service.

Though many American women helped in the war effort either at home or in the armed services, others attended college or worked in low level clerical jobs. Near Columbia University, where Kerouac, Burroughs, and Ginsberg were students, women rented squalid apartments which became magnets for intellectual talk, experimental drugs, and unconventional sex. Many of the women, especially those who were con-
sorts of the Beat writers, suffered penury, abortions, abandonment for long periods when the men were “on the road,” and, in some cases, physical and sexual abuse. Were they then mere passive facilitators and financial supporters of the mooching men—the kind of conformists that they and the Beat men detested?

As the reader will see, this interpretation would not do them justice. Once freed, years later, from the suffocating influence of the frenetic, immature but greatly talented men, some of these early fellow travelers emerged as major talents of their own. During the war years and later, the men broke free from social roles and gray-flannel suit lives, but only on the backs of the hard-working wives and girlfriends who steadied them and brought home the bacon. The men found and reveled in a ready-made social model—the rebel. Having no such model, the women’s road was much longer.\(^{30}\) Consider now the lives of some of the women associated with them.

II. FELLOW TRAVELERS

A. Carolyn Robinson Cassady (1923–Present)

“Standing by Her Man”

Carolyn Cassady was the long-time wife of Neal and a pivotal female character in the lives of Cassady, Kerouac, and Ginsberg. Born to middle class parents, educators of English lineage, she graduated from Bennington, an elite, progressive women’s college in Vermont, then attended graduate school in theater arts, majoring in portrait painting and costume design, at the University of Denver.\(^{31}\) While there she met and was swept off her feet by the charismatic, handsome, and uninhibited Neal Cassady in 1947.\(^{32}\)

Neal, however, thought less highly of her. He confided in Allen Ginsberg that “[h]er lack of cynicism, artificial sophistication and sterility in her creative make-up will recommend her to you. She is just a bit too straight for my temperament; however, that is the challenge.”\(^{33}\) Though they had been living together for a few months, he only initiated sex with Carolyn while Allen Ginsberg, who was visiting them, slept on the couch at the foot of their bed, leaving her shocked, confused, and pain-seared.\(^{34}\) Though his second attempt also proved deeply disappoint-

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30. See infra note 127 and accompanying text.
31. KNIGHT, supra note 2, at 57–59.
32. CASSADY, supra note 3, at 1–7 (describing first meeting).
33. JOHNSON, VOICE, supra note 3, at 244 (positing that Carolyn’s “maternal straightness” may have given Neal, whose mother abandoned him at the age of four, the “sense of peace” he craved).
34. CASSADY, supra note 3, at 19–20.
ing to her, Carolyn agreed to marry Cassady even though he was still married to his child-bride, LuAnne Henderson.\textsuperscript{35} She quickly backed off when she surprised him in their bed with his first wife and Allen Ginsberg.\textsuperscript{36} Though he subsequently broke promises, lied, and stood her up on various occasions,\textsuperscript{37} his charm, good nature, and spontaneity won her over; they married in 1948\textsuperscript{38} and subsequently had three children.\textsuperscript{39} Carolyn longed for permanency and a middle class life, which she later managed to achieve only by separating from Neal.\textsuperscript{40}

Perhaps feeling confined by his new domesticity, Cassady again married someone else while still married to Carolyn\textsuperscript{41} and encouraged her to have an affair with Kerouac, which she did.\textsuperscript{42} Though by then, you would think she would have had enough of Neal, she stood by her man while he was serving time in San Quentin (1960) for a drug charge and remained married to him so that he could get out on probation. Finally, disgusted, and maybe having read Betty Friedan’s \textit{Feminine Mystique},\textsuperscript{43} she divorced him in 1963,\textsuperscript{44} and later wrote her own memoir of her entanglements with three of the major Beats, \textit{Off the Road: My Years with Cassady, Kerouac, and Ginsberg}.\textsuperscript{45}

\begin{itemize}
\item \textsuperscript{35} Id. at 26–27.
\item \textsuperscript{36} Id. at 32–33.
\item \textsuperscript{37} Id. at 31 (observing that Cassady returned home early from a trip they had planned together, leaving her stranded). Id. at 74–77 (describing how he used all their savings to buy a car to make a cross country trip with friends, leaving her alone and penniless with their two month old baby).
\item \textsuperscript{38} Id. at 62–66 (explaining their courthouse wedding).
\item \textsuperscript{39} Id. at 21 (explaining that their relationship was predestined).
\item \textsuperscript{40} MORGAN, supra note 2, at 89.
\item \textsuperscript{41} CASSADY, supra note 3, at 116–21; MORGAN, supra note 2, at 48–49; JOHNSON, VOICE, supra note 3, at 364–65, 386. Neal persuaded Carolyn to divorce so that he could marry the pregnant New York fashion model, Diana Hansen, to legitimize his child with her. After that he would remarry Carolyn (who was having his second child) and move Diana to California to set up a second household for him. Though Carolyn petitioned for divorce, she ultimately stayed with Neal who divorced Diana. Carolyn and Neal had a third child shortly afterward. Id.
\item \textsuperscript{42} CASSADY, supra note 3, at 162–73; MORGAN, supra note 2, at 67–68; JOHNSON, MINOR, supra note 2, at 89–90 (describing this experiment as a period of “temporary domestic harmony” which turned out to be “another failed utopia”).
\item \textsuperscript{43} BETTY FRIEDAN, THE FEMININE MYSTIQUE (50th anniversary ed. 2013) (1963) (positing that women suffered from an unnamed malady—beliefs and institutions that undermined their confidence in their intellectual abilities).
\item \textsuperscript{44} CASSADY, supra note 3, at 371; JOHNSON, VOICE, supra note 3, at 369 (noting that the author later tried to rehabilitate Neal’s reputation in an essay \textit{Danger: Unexploded Myth in Beat Angels} 89, 99 (Arthur and Kit Knight eds., 1982)).
\item \textsuperscript{45} CASSADY, supra note 3.
\end{itemize}
Jack Kerouac’s first wife was a child of a rich family in Grosse Pointe, Michigan. Sent to New York to live with her grandmother while ostensibly attending Columbia, the high-spirited Edie discovered that she preferred nightlife and clubs to school. She met Kerouac through Henri Cru, a boyfriend who was also a merchant seaman, and fell hard for his good looks and charm. When Kerouac shipped out she discovered she was pregnant, but she did not know which of the two men was the father; so, encouraged by her grandmother, she had an abortion. When Edie told Kerouac on his return, he was enraged. Nevertheless, when he helped dispose of the evidence in Lucian Carr’s murder of David Kammerer, Kerouac knew he would face charges of being an accessory and would need bail. Accordingly, he told Edie he would marry her (something she had long hoped for), and they obtained blood test certificates in order to get the marriage license. But before they could enter the state of holy matrimony, the police arrived and took him off to jail. Falling for his con, she borrowed the money from a family trust fund to bail him out and they married in August 1944, all of which she describes in her colorful autobiography, You’ll be Okay: My Life with Jack Kerouac.

After Kerouac’s release, he went to Grosse Pointe and worked with Edie’s father to pay off his debt. But Kerouac deceived Edie yet again by making her think he was out at sea when he had, in fact, returned early to New York and resumed his writing. Edie finally saw the light and

46. KEROUAC-PARKER, supra note 3, at 39–42, 47, 185; KNIGHT, supra note 2, at 76, 78 (describing “fancy people and elegant parties”).
47. KEROUAC-PARKER, supra note 3, at 62, 75.
48. Id. at 70; KNIGHT, supra note 2, at 76–77.
49. KEROUAC-PARKER, supra note 3, at 72; KNIGHT, supra note 2, at 77.
50. KEROUAC-PARKER, supra note 3, at 71–72.
51. Id. at 72–73; KNIGHT, supra note 2, at 77; JOHNSON, VOICE, supra note 3, at 140–41 (noting that decades later when she publicly divulged her abortion Edie expressed certainty that Jack had been the father).
52. See COLLINS & SKOVER, supra note 1, at 3–15 (describing the murder).
53. KEROUAC-PARKER, supra note 3, at 159, 188; KNIGHT, supra note 2, at 78.
54. KEROUAC-PARKER, supra note 3, at 141, 142; KNIGHT, supra note 2, at 78.
55. KEROUAC-PARKER, supra note 3, at 142.
56. Id. at 147, 153.
57. Id. at 156–58, 206–207.
58. Id. at 193–99.
59. KEROUAC-PARKER, supra note 3.
60. Id. at 225; KNIGHT, supra note 2, 78–79.
61. KEROUAC-PARKER, supra note 3, at 241–42.
applied for an annulment. She kept in touch with him, however, through letters, phone calls, and friends and attended his funeral many years later. After they split up for good, Kerouac wrote to Cassady: “My wife, if not Edie again, will be someone like her . . . wild . . . crazy . . . rushing off to mad bars, yet at the same time a sunny housekeeper.”

C. Joan Haverty Kerouac (1931–1990)
“A Smart-Aleck Basketweaver”

Joan Haverty, Kerouac’s second wife and mother of his only child, was not the sunny housekeeper he had hoped to find. Before they met, Joan had been having a soulful but zany relationship with Bill Cannastra, a gay attorney and friend of the Beats, who died suddenly in a freakish accident. Cannastra was the love of her life, though she had concurrently started a brief but passionate affair with Herb Lashinsky, a physics graduate student at Columbia. Joan moved into Cannastra’s apartment not long after his death. Kerouac, remembering his friend Castrana who had told him about Joan, stopped by the apartment on his way to a party being thrown by Lucien Carr. Lashinsky, upset by Joan’s attraction to Kerouac, eventually ended their relationship. Within a few weeks, Joan and Kerouac decided to marry in November 1950 although later neither knew why. Perhaps Joan was on the rebound from her breakup with Lashinsky while Jack longed for domestic stability.

62. Id. at 245–47; Knight, supra note 2, at 79.
63. Kerouac-Parker, supra note 3, at 257–59; Knight, supra note 2, at 79.
64. Kerouac-Parker, supra note 3, at 22 (reporting that even after his subsequent marriages to Joan Haverty and Stella Sampas, Kerouac “persisted in calling me his ‘life’s wife’”); Knight, supra note 2, at 79 (reporting that “Edie ran toward the casket screaming, ‘I’m the wife of Jack Kerouac—the only wife of Jack Kerouac!’”).
65. Kerouac-Parker, supra note 3, at 247.
67. Id. at 51–72, 77–79 (describing how a spark between them ignited into open passion). Lashinsky, frustrated by Joan’s nonlinear thinking, considered her a “primitive” who couldn’t understand his scientific explanations but challenged them nonetheless. He later sent her a postcard with a cartoon picture of an Indian woman weaving a basket on which he wrote, “One thing I can’t stand is a smart-aleck basketweaver.” See Jan Kerouac, Introduction to Haverty, supra note 3.
68. Haverty, supra note 3, at 69, 71, 73.
69. Id. at 95–96, 108, 132–33, 137, 196–97. See Collins & Skover, supra note 1, at 106–07 (quoting Haverty reflecting on their marriage: “We made a commitment to marriage, but none to each other . . . . The whole thing had been Jack’s idea, and I had seen it as his party, and his wedding . . . none of it seemed to have anything to do with the rest of my life.”).
70. Haverty, supra note 3, at 109.
71. See Collins & Skover, supra note 1, at 105 (quoting Haverty: “I was acceptable to his mother . . . . It helped that I could cook and that I was no threat to him, would not upstage him. And it was convenient that we shared a dream of children.”).
Later, when they needed to move in with Kerouac’s mother, Joan realized how much of a momma’s boy he was. They never passionately in love, their marriage began to erode. They broke up after she told him she was pregnant. He demanded that she have an abortion—evidently having changed his Catholic view about the practice—but she refused and gave birth to her daughter, Jan. It took ten years before she was successful in getting a court to award her child support, which Kerouac managed to evade by moving from one place to another. He saw his daughter only twice, never acknowledging that he was her father but letting her use his name. Jan Kerouac became a successful novelist but died young from kidney failure, adoring the father she never really knew.

Taking courage from her daughter’s success and finding the first biographies of Jack to be hero-worshipping and inaccurate, Joan began work on her own memoir to be called Nobody’s Wife: The Smart Aleck and the King of the Beats. Published in 1990 after her death, her recollections are tough-minded and blunt.

Early in their marriage, Jack had criticized her writing after reading it without permission. When she expressed her anger about it, he said, “I won’t read your stuff anymore, as long as you don’t have any high-flown ideas about being a serious writer. I can’t stand women who think they
can write. It’s all just so much sentimental bullshit! But later, in a letter to Neal Cassady in 1950, he acknowledged Joan’s talent as a writer: “She really knows how to write from instinct [and] innocence. Few women can do this. Joan Kerouac . . . a new writer on this old horizon. I see her [and] me cutting around the world in tweeds . . . .

D. Joan Vollmer Adams Burroughs (1924–1951)
“Stand Still, Dear”

Daughter of an economically privileged family, Joan Vollmer had a socially ambitious mother. A precociously intelligent young woman with a questioning mind, she entered Barnard College at the age of fifteen and was married twice by nineteen—all between 1939 and 1943. She and Edie Parker shared an apartment a block away from Columbia University, which became a center for students and hangers-on, including Kerouac, Ginsberg, and Burroughs. Though she was not an artist or a writer, she read widely, sometimes holding court in the bathtub and influencing the direction of many conversations that took place in that apartment.

Though she was attracted to Kerouac, the man she eventually ended up with was William Burroughs, courtesy of Ginsberg who thought they belonged together. Indeed, during a relationship based more on intellect than sex, they studied Mayan Codices and claimed to have a psychic connection, often playing a game for their friends by finishing each other’s sentences. However, by the time she met Burroughs in 1946, she already had a child, felt burdened, and turned to drugs. She took

82. Id. at 146.
83. See Charters, Foreword, supra note 78, at xi; see also Haverty, supra note 3, at 201–02 (describing an evening when she helped get him through a clutch of writer’s block during composition of On the Road during the early months of their marriage).
84. Johnson, Voice, supra note 3, at 142.
85. Kerouac-Parker, supra note 3, at 73; Morgan, supra note 2, at 8, 9; Knight, supra note 2, at 77.
86. Collins & Skover, supra note 1, at 149–50 (describing her probing intellect); Morgan, supra note 2, at 61 (commenting on reactions to Joan’s death and the high regard in which she was held).
87. Johnson, Voice, supra note 3, at 190, 192.
88. Collins & Skover, supra note 1, at 150 (observing that “Burroughs and Vollmer were so intellectually compatible that Ginsberg, like a scheming Yenta, worked to hook them up”). See Morgan, supra note 2, at xvii (describing Ginsberg’s desire to unite his friends in friendships with each other). For Ginsberg’s arrangement of a blind date between Joyce Johnson and Jack Kerouac, see infra note 100 and accompanying text. The poet Allen Ginsberg was homosexual; prodded by psychiatrists early in life, he fooled himself into believing he was bisexual.
89. Johnson, Voice, supra note 3, at 192.
enough Benzedrine, the then drug-of-choice, to cause hallucinations\textsuperscript{90} and ended up in the mental ward at New York’s Bellevue Hospital.\textsuperscript{91}

After rescuing her from Bellevue, Burroughs took her to a small town in Texas where he expected to set up a clandestine marijuana farm.\textsuperscript{92} There, they awaited the birth of Billy Jr., whom they conceived in New York after her release.\textsuperscript{93} Though she already had a child, Burroughs would not let her have an abortion.\textsuperscript{94} Neither Joan nor Burroughs were cut out for parenthood. As one visitor described it, they would both be stoned—she on Benzedrine, he on morphine—and let the kids run around naked in the yard, defecating in pots that she scrubbed out and used for cooking. The little girl, Julie, had a habit of biting herself on her arm.\textsuperscript{95}

While living in Mexico in 1951 to escape Burroughs’ drug trial back in the States,\textsuperscript{96} the couple attended an alcohol-fueled party where they played a game of William Tell, whereupon Joan placed a glass on her head. Burroughs, being an expert shot, took out the gun he always carried, aimed it at the glass but missed, shooting her in the forehead and killing her.\textsuperscript{97}

Joan’s daughter went to live with her parents, while their son went to live with Burroughs’ parents.\textsuperscript{98} At the age of thirty-three, Billy Jr. died from alcoholism and liver failure after having written a book and lived an addicted life somewhat like his father’s.\textsuperscript{99}

\textit{E. Joyce Glassman Johnson (1935–Present)}

“Keeper of the Flame”

The only child of Upper West Side parents, Joyce Johnson attended Barnard in the late 1950s, began a novel at age twenty, worked for literary agents, and met Kerouac on a blind date arranged by Ginsberg, who

\textsuperscript{90} Id. at 207.
\textsuperscript{91} Id. at 221, 259; MORGAN, supra note 2, at 22.
\textsuperscript{92} Burroughs, though a self-professed homosexual, was seemingly a rescuer of women. Before World War II while in Europe, he married a woman to “help her escape fascism.” MORGAN, supra note 2, at 4.
\textsuperscript{93} Id. at 22.
\textsuperscript{94} JOHNSON, VOICE, supra note 3, at 226.
\textsuperscript{95} Id. at 314 (citing Barry Gifford & Lawrence Lee, Jack’s Book 133–34 (2005)).
\textsuperscript{96} COLLINS & SKOVER, supra note 1, at 152.
\textsuperscript{97} Id. at 154–56.
\textsuperscript{98} Id. at 159.
took a lively interest in the sexual fortunes of his heterosexual friends. She later became a professor at Columbia. Though she was quite a bit younger than Kerouac and came into his life at a later stage, her importance lies in her observations about the Beat scene and her recent biography of him, entitled The Voice is All: The Lonely Victory of Jack Kerouac.

Kerouac borrowed money from her for a bus ticket to return to New York from Orlando for the long-awaited publishing debut of On the Road in 1957. Earlier that year, he had hit her up to pay for his coffee at Howard Johnson’s in the Village on their first night out, something he was used to doing with other female admirers. She had confidently established her own bohemian life near NYU at Washington Square before moving uptown. On September 4, 1957, they read Gilbert Millstein’s rapturous review of Road in the New York Times, and afterward spent the night and the next two years together.

III. SOCIAL CONSTRUCTION OF WOMEN

Though the postwar years from 1945 to 1960 seemed to be a period of stability and conformity, it also saw early questioning of women’s roles and their quests for meaningful lives. In France, Simone de Beauvoir had begun mapping out a new way to think about Being and womanhood. In answer to the question “does essence precede existence,” or is it the other way around, she stated that “one is not born a woman but becomes one.”

This led much later to Catharine MacKinnon’s theory on the social construction of woman—“femaleness = femininity = sexual attractiveness = sexual availability” in male terms. “What defines women as such is what turns men on,” wrote MacKinnon. As Bill Morgan noted: “Many of the Beats saw women only as sex objects, providers, and mothers, and rarely did they believe that they could write as well as their male counterparts.” Commenting that the Beat men viewed work as a

100. JOHNSON, MINOR, supra note 2, at 126; KNIGHT, supra note 2, at 168. For Ginsberg’s matchmaking between Joan Vollmer and William Burroughs see supra note 88 and accompanying text.
101. JOHNSON, VOICE, supra note 3.
102. JOHNSON, MINOR, supra note 2, at 180–85; COLLINS & SKOVER, supra note 1, at 282–287.
106. MORGAN, supra note 2, at 155; see also JOHNSON, MINOR, supra note 2, at 170 (describing the depiction of Beat girlfriends as “old ladies,” as in “my old lady”; depicting them, most of them young, as the person who would “clean up the studio, contribute to the rent, have a baby or
series of “brief engagements,” Joyce Johnson wrote: “It was all right for women to go out and earn wages, since they had no important creative endeavors to be distracted from. The women didn’t mind, or, if they did, they never said—not until years later.”

During the late 1940s in post-World War II America, however, women’s roles went largely unquestioned. Privileged white women were pushed by their families to go to college, not so much for education as to meet and marry the right sort of man who would provide the kind of home and life to which the women had been accustomed as children. And to have children of their own, many of them, perhaps two, three or four, as well as to buy the refrigerators, vacuum cleaners, and washing machines produced by the post-war economy. Even a decade or two later, women getting married received no college scholarships. Indeed, they might be asked, “What will you do with a Ph.D. if you’re married?” A married woman could not obtain a credit card until 1974; even if she worked fulltime and her husband part time, he would get the card. Once in the marriage, she could read a column called “Can This Marriage Be Saved?” in her monthly copy of the Ladies Home Journal. If she worked she might have to disclose to employers that she was not pregnant, or that she did not plan to have a baby while on the job.

Women writers had to fight against stereotypes that cast them as...
sexual adventurers, or against interpretations of their work as little more than the autobiographical record of their neurotisms.

The Beats, especially the men, bought into that dream—hook, line, and sinker. Kerouac’s second wife, Joan Haverty, recalls him telling her:

Marriage isn’t the same for a man as it is for a woman. For a woman it’s her whole life, but a man has other things to do. His home and marriage serve as a pivot point. . . . A woman gets her view of the world from the information her husband brings back to her. It’s in her own best interest to keep him comfortable and satisfied in the place he emanates from. He goes out into the world and does things in it and brings the results back to her.

When she asked him what Bill Cannasta had told him about her, he replied:

I told him what kind of girl I was looking for, and he said I had described you perfectly . . . . A sweet little, nice little home-type girl, just like you. Not clever or witty, not worldly or jaded, and . . . not forward, you know? Not a manchaser . . . he said you were a great cook! If I were married to you, I wouldn’t be in places where I’d need an excuse, I’d be home with you.

Though Kerouac never achieved his dream marriage and family, Cassady, according to his wife, seems to have been “a wonderfully loving father” whose children adored him and said they’d rather have had him as father than anyone they knew of and that the knowledge of his behavior away from home had done nothing to diminish their love.

By the same token, Ginsberg (then in a bisexual period), rhapsodized to Neal Cassady:

When I get married, I want everybody I know to be there and watch including all regiments of family, in synagogue, where there will be great groaning choirs of weepers, sacraments, everybody in flowers

117. See Dwight Garner, Seeking the Ardent Life. Finding It and Sharing It. N.Y. TIMES, Apr. 30, 2013, at C3 (noting Irish author Edna O’Brien’s relishing “dismissals from the blockheaded critics who said . . . that her ‘talent resided in my knickers.’”) Somewhat reminiscent of what Kerouac said to Haverty after reading her journal, O’Brien’s writer-husband is reported to have told her, “You can write and I will never forgive you,” after reading her first novel. Id. For Kerouac’s comment to Haverty, see supra notes 82–83 and accompanying text.

118. See Liesl Schillinger, Seeing Sylvia Plath with New Eyes, N.Y. TIMES, May 5, 2013, at 2 (Sunday styles section) (noting that after Plath’s death her husband, poet Ted Hughes, chose and ordered her poems in Ariel, directing the shape that her fame would assume).

119. Haverty, supra note 3, at 142–43.

120. Id. at 89–90, 94–95.

121. CHRISTOPHER FELVER, BEAT: PHOTOGRAPHS, COMMENTARY xii (2007); see also Cassady, supra note 3, at 73 (Carolyn describing Neal’s complete rapture with their first baby and quoting a glowing letter from Neal to Kerouac about her).
and dress clothes, slightly awed by the presence of eternal vows, chastened by tradition and individuality of marriage.”

The Beats were not the only males to hold these views. One need only recall Henry Miller in France, his wife June, and his lover Anais Nin; or American cultural critic Paul Goodman, whose 1960 book, Growing up Absurd, brought him a coterie of young students, mostly male, doting on his every word; or the bad boys of British literature. Clive James, a premier Australian cultural critic, when asked by an interviewer: “Why were there no women in your famous lunch group with Amis, Hitchens, Julian Barnes, and others?” responded: “It was a male chauvinistic culture. It’s a reprehensible answer. And we wanted to talk about them. It wasn’t the main subject, but it was one of them. I have no excuse, and nobody who was there has an excuse. Times have changed. Thank god.”

But to picture the women as dumb and passive partners to the men does them no justice. They commiserated with each other over being the sole financial supporters in their marriages while their husbands indulged in infidelities, excessive drinking, and male bonding. Many marriages broke apart.

Joyce Johnson, Kerouac’s lover in 1957, and a half a generation younger than the first wives and lovers discussed above, reflected on what drove women to the Beats:

Those of us who flew out the door had no usable models for what we were doing. We did not want to be our mothers or our spinster schoolteachers or the hard-boiled career women depicted on screen. And no one had taught us how to be women artists or writers . . . . Naturally, we fell in love with men who were rebels. We fell very quickly, believing they would take us along on their journeys and adventures. We did not expect to be rebels all by ourselves; we did

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122. COLLINS & SKOVER, supra note 1, at 180 (citing letter written on Nov. 18, 1950).
124. See Documentary: PAUL GOODMAN CHANGED MY LIFE (Zeitgeist Films 2011); see also MORGAN, supra note 2, at 52 (listing names of “intellectual hipsters”, including Goodman (all male except for Judith Malina, cofounder with her husband Julian Beck of the Living Theatre, and one other woman) who formed a loose subgroup of Greenwich Village Beats that Ginsberg called the subterraneans).
125. Dwight Garner, Up Late with Clive James, THE NEW REPUBLIC, Feb. 25, 2013, at 34, 37, available at http://www.newrepublic.com/article/112363/dwight-garner-interviews-clive-james; see also JOHNSON, MINOR, supra note 2, at 79 (quoting a letter from novelist John Clellon Holmes: “The social organization which is most true of itself to the artist is the boy gang.”).
126. CASSADY, supra note 3, at 105–15 (describing how she and Helen Hinkle shared all their grievances against their husbands and against men in general); JOHNSON, VOICE, supra note 3, at 402 (describing similar conversations between Joan Haverty and Marian Holmes).
not count on loneliness. Once we had found our male counterparts, we had too much blind faith to challenge the old male/female rules. We were very young and we were in over our heads. But we knew we had done something brave, practically historic. We were the ones who had dared to leave home. 127

During the Beat era, the old order started to crumble. 128 Many white males from the educated, privileged class rode trains to corporate offices in big cities while others hit the open road in the new cars of the post-war era. Men who had gone to war and the women who had waited for them couldn’t wait to put it all behind them. They settled down quickly, took advantage of the GI bill, saved a little money, got married and had babies—one, two, three, four. But some of the women who had worked during the war missed the freedom and independence they had enjoyed before.

Soon Betty Friedan’s Feminine Mystique would land like a bombshell in the suburban backyards of America, giving legitimacy to the intuitions, feelings, and desires of women to make their own maps for their lives, and the road began to open for them. Less than a decade later, young women were striking out on their own with less trepidation. Still, the old dilemmas remain but in a different form. 129

IV. CONCLUSION

Many women gravitated to the early Beat writers like moths drawn to a flame. And for good reason: they themselves were rebels and the writers were talented, charismatic men. But the women paid a price for

127. KNIGHT, supra note 2, at 177 (quoting an excerpt from Minor Characters).
128. Though the conformity of the 1950s is usually taken for granted, changes came more swiftly than most acknowledged at the time. The Beat Generation of the early post-war period of the 1940s quickly morphed into the Silent Generation of the 1950s, during which an undercurrent of nonconformity laid the groundwork for the racial and social reform movements of the 1960s. See JOHNSON, MINOR, supra note 2, at 70–71 (noting the quick transition between her generation and the one before).
129. See Anne-Marie Slaughter, Why Women Still Can’t Have It All, THE ATLANTIC (July/Aug. 2012), http://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020/ (discussing her frustrations at attaining a career-family life balance); Gail Collins, At a Time When Women Can Be Free, Finally, to Move on to Something More, N.Y. TIMES MAG., Jan. 27, 2013, at 42 (reviewing the history of women’s progress in the U.S. on the fiftieth anniversary of the publication of The Feminine Mystique); Katha Pollitt, Who’s Afraid of Sheryl Sandberg?, THE NATION, Mar. 25, 2013, at 10 (discussing the controversy over Sheryl Sandberg’s new book Lean In, encouraging women to assert themselves more in the workplace); Dan Nakaso, Uproar over Firing of Female Techie Who Tweeted About Slurs, SEATTLE TIMES, Mar. 23, 2013, at A6 (reporting on vicious backlash against a woman who posted a picture of men making sexual slurs about women at a male-dominated tech industry conference); Katharine Q. Seelye, School Vote Stirs Debate on Girls as Leaders, N.Y. TIMES, Apr. 12, 2013, at A12 (lamenting defeat of a girl who ran for school president of prestigious Phillips Andover Academy. Only four girls had been elected in the school’s 235-year history.).
the excitement of living through a turbulent period. The men railed against conformity while protected by tolerant professors, psychiatrists, creditors, judges, and parents. A few of the women rebelled too, but for them the road was harder. They had fewer allies, less-supportive parents, and their partners clung to traditional views of women’s roles. Fewer job opportunities came their way, most of them as waitresses, seamstresses, and low-level clerks. It was only many years later that some of them emerged as writers and memoirists in their own right.

But not all did. One was shot to death by her drug-addled husband. Others dropped out of college. Some had to raise children on their own without resources. Society thus missed out on many of the contributions that these talented women could have offered.

Today we believe that women deserve equal opportunities. The tale of the women of the Beats is a stark reminder of how important this task continues to be, both for women and for society at large.
BOOK REVIEW

Two Narratives of Youth


Review by Richard Delgado*

I. INTRODUCTION

This well-written volume tells, in 319 fast-paced pages, the story of the early Beat writers, beginning with youthful pranks, brushes with the law, and experimentation with drugs, crime, and sex.1 The main characters are Jack Kerouac (novelist), Alan Ginsberg (poet), and William Burroughs (essayist), although many lesser figures—girlfriends, wives, camp followers, anguished parents, publishers, booksellers, lawyers, and dotting professors—figure in as well. After recounting a harrowing story of youthful forays into various forms of netherworld activity, many of them amusing, others dangerous and illegal, the book tells how the young writers grew up (more or less), published books such as Howl (Gins-

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1. RONALD K.L. COLLINS & DAVID M. SKOVER, MANIA: THE STORY OF THE OUTRAGED & OUTRAGEOUS LIVES THAT LAUNCHED A CULTURAL REVOLUTION (Top Five Books, 2013). Other books, such as Joyce Johnson, The Voice Is All: The Lonely Victory of Jack Kerouac (2012); Brenda Knight, Women of the Beat Generation (2010); Lynn Zott, The Beat Generation (2003); and James Campbell, This Is the Beat Generation (2001), recount many of the same episodes, as do a handful of movies. See, e.g., BEAT (Lions Gate Productions, 2000); NEAL CASSADY (IFC Films, 2007). Mania differs from other books on the Beats because of its attention to legal issues, including the obscenity trial of Allen Ginsberg’s bookseller, Lawrence Ferlinghetti, for advertising and selling his poem Howl. See COLLINS & SKOVER, supra, at 189–320 (describing the trial, the personae that took part in it, and the court’s opinion exonerating the bookseller and upholding freedom of speech). For biographies of the main writers of this generation, see BILL MORGAN, THE TYPEWRITER IS HOLY: THE COMPLETE, UNCENSORED HISTORY OF THE BEAT GENERATION (2010).
The book opens with the murder of a cloying hanger-on on the banks of the Hudson River in August 1944 by Lucien Carr, an inner-circle drug-taking product of Andover and elite colleges. After escaping a long prison sentence with the aid of crack lawyers who concocted a homosexual-panic defense, Carr became one of the few to withdraw from the cadre. Other chapters cover the group’s high-speed escape to avoid the consequences of a traffic accident, the young Ginsberg’s compulsively thieving roommate who stashed his loot in the poet’s closet, and Ginsberg’s rescue from a criminal conviction by his Columbia University professors, Lionel Trilling, Mark Van Doren, and David Wechsler, who contrived an insanity defense that sent him to an asylum in lieu of prison. Along the way, the reader learns that Ginsberg’s mother, Naomi, had been committed to a New York asylum for the insane, where she suffered delusions and underwent shock treatment and a lobotomy. Ginsberg’s mental commitment may thus have been less contrived than most of his friends thought at the time.

The reader learns about William Burroughs, a brilliant writer whose suicidal antics, drinking, and risk taking were legendary. Burroughs,

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2. See COLLINS & SKOVER, supra note 1, at 325–56.
4. COLLINS & SKOVER, supra note 1, at 10–15. The homosexual-panic defense required that Carr testify that he was “heterosexual all the way down the line,” and so would naturally flee from homosexual contact, when he was not exclusively straight at all. Id. at 12.
5. Id. at 36–41, 345–46.
6. Id. at 19–24.
7. Id. at 25–38, 41, 44, 47–55.
8. Id. at 57–79; 87–93. Prominent historian Jacques Barzun also rode to his recue. Id. at 63. On another occasion, Mark van Doren, who was Ginsberg’s mentor, did him and Kerouac a favor by helping Kerouac publish his second novel. Id. at 42. On a different occasion, Lionel Trilling got Ginsberg readmitted to Columbia after a one-year suspension for a prank in a dorm room. Id. at 60. Many of the Beat writers received their education at elite schools. See MORGAN, supra note 1, at 2 (Ginsberg and Carr, educated at Columbia), 4 (Burroughs, educated at Harvard), Kammerer at Washington University), 8 (Kerouac, educated at Columbia).
9. COLLINS & SKOVER, supra note 1, at 80–86. Ginsberg himself was afflicted by many demons, including his fear of homosexuality (which tortured him until he accepted and stopped struggling against it). See MORGAN, supra note 1, at 21, 91 (noting Ginsberg’s Benzedrine addiction).
who was fixated on guns and carried pistols at all times.\textsuperscript{11} ended up killing his wife in an incident patterned after William Tell.\textsuperscript{12} Like the others, he escaped a long prison term with the aid of influential friends and a forgiving Mexican penal system.\textsuperscript{13}

The reader also learns of Jack Kerouac’s quickie marriage to Joan Haverty,\textsuperscript{14} and his slow descent—from a fit football player who wrote a famous novel, in a fever on a continuous roll of paper, while charged up by drugs, coffee, occasional cross-continental driving trips, and pep talks from an even more wired Neal Cassady—to a paunchy, twice-divorced “drunken ghost,” in the words of his friend, Allen Ginsberg.\textsuperscript{15}

\textit{Mania}, then, tells the story of a hard-partying group of young men straining, as they saw it, against the conformity of their time while struggling righteously to develop their talents as writers and poets.\textsuperscript{16} It is apt to be popular with many of the same audiences who find \textit{On the Road} irresistible. The Kerouac book, of course, is a mainstay of high school reading lists, assigned reliably year after year, along with \textit{Catcher in the Rye}, by teachers eager to prove their anti-establishment credentials. Both books are full of the same kinetic energy, lean, propulsive writing,\textsuperscript{17} and disdain for convention. \textit{Mania} is apt to attract a legal readership as well, because of its thorough description of the obscenity trial of Allen Gins-
berg’s bookseller for his role in publishing *Howl*. The trial takes up the final 150 pages of the book and, with dueling lawyers and narratives, makes a good story of its own.\(^{18}\)

The first\(^{19}\) and second half\(^{20}\) of the book are connected in a way that may not be obvious at first glance. The first half, in recounting the activities of the young writers in and around New York in the late forties and early fifties while they were getting their college education at elite schools and hanging out in boozy bars and apartments in their spare time, sets the stage for the second part that centers around the trial. It does so not merely through introducing its cast of characters, although it does this vividly and well. It does so also by inducing the reader, gradually and by degrees, to identify with the young risk-takers who are at the center of it. In his mind’s eye, the reader sees a band of struggling youths valiantly broadening their range of experiences by taking risks and generally living on the edge. One roots for them, hoping they will turn out well and not badly, and is relieved when most of them survive to the age of adulthood, in some cases publishing serious works of fiction or poetry. One eagerly awaits the result of the obscenity trial, hoping that it comes out in Ginsburg’s favor. It does, and when the famous poem avoids the censor’s axe, the reader (this one, at least) experiences a sense of relief.

The first half of the book, in short, presents a slightly disturbing but sympathetic portrait. These young men may not be perfect, one thinks, but they are doing what all young men do. So we wish them well and hope they do not kill themselves, or too many others, in the process. Neal Cassady perhaps tries the reader’s patience the most, with his drug-taking and frenetic hopping from one woman to another. Eventually, he leaves his wife and child after blowing their savings on a car, which he intends to take “on the road.”\(^{21}\) He promptly destroys it, and nearly himself, in an accident.\(^{22}\) In between car crashes, he commits a number of ordinary crimes, including auto theft (500 times), bank fraud, and drug sales.\(^{23}\)

Many adult readers will cheer when the young men, many of whom are well born and well educated, show little inclination to become gray-flannel suited clones of the previous generation. No boring job as an ed-

\(^{18}\) The book culminates in an Epilogue offering short bios of each of the Beats, explaining, among other things, how each one ended up. Lucien Carr, for example, the “fallen angel” of the Beats and the wildest of them all, murderer of David Eames Kammerer who sidled up to him in a homosexual advance, ended up as an assistant editor at United Press International.

\(^{19}\) COLLINS & SKOVER, *supra* note 1, at 3–188.

\(^{20}\) *Id.* at 190–319.

\(^{21}\) *Id.* at 118–24.

\(^{22}\) *Id.* at 124–28.

\(^{23}\) *Id.* at 113, 129, 323.
tor or publisher, working from nine to five in a New York office, for them. No assistant professorships of English at a middling liberal arts college for Kerouac or Ginsberg. Many high-school age readers will cheer for less laudable reasons—they would like to be like the Beats, taking drugs, experimenting with sex and late nights, and not getting caught.

All these emotions, which the book summons up, require analysis, of course, which, in turn, entails a look at two narratives of youth.

II. TWO NARRATIVES OF YOUTH

A casual calculation discloses that a small group of Beat writers, writers-to-be, and close fellow travelers were responsible for two homicides (one, a murder), an automobile theft, a number of high-speed car crashes, and several unplanned pregnancies. They aided and abetted many ordinary crimes, including theft, fraud, and drug use and sales. Much of their story resembles a criminal law exam, with multiple issues to analyze and parse. They married many women and deserted them serially, often after having fathered children with them. One marriage may have skirted bigamy when a young writer (Kerouac) neglected to secure proof of annulling his previous marriage before marrying his new girlfriend. Later he pressured the new wife to have an illegal abortion, which ended their 200-day marriage. Another inner-circle figure, Neal Cassady, entered bigamous marriages at least twice. This part of the story resembles nothing so much as a family law exam.

Yet, as mentioned, reading about these exploits evokes something close to sympathy. One learns about the Beats’ frantic, adventure-filled lives and smiles indulgently, perhaps remembering one’s own youth. The two authors, Ronald Collins and David Skover, betray their own identification with the Bad Boys about whom they are writing in passages that describe them as admirable, yearning for the impossible, or possessed of a “vast . . . creative spirit” or sense of adventure. Their lives are “fast and fantastic,” with a “spirit and spontaneity” that are contagious. They are “a remarkable group . . . that strained against the conformity of post-war America and yearned to be heard . . . who lived by their own rules to

24. See, e.g., COLLINS & SKOVER, supra note 1, at 113 (noting that Neal Cassady may have stolen as many as 500 cars and been convicted for six felonies).
25. Id. at 323.
26. Id. at 102–06.
27. Id. at 138–39.
28. See CASSADY, supra note 3, at 146.
29. COLLINS & SKOVER, supra note 1, at x, 321.
30. Id. at xi.
concoct an ecstatic and uninhibited vision of literary modernism.” They exuded a “sense of adventure,” and one, Ginsberg, is “bold and unavering” in his spirit.

Collins and Skover are not alone. Responsible real-world adults, some in high stations, cut them a great deal of slack, including the professors at Columbia who rallied around their precious brainchildren, judges who gave them short sentences or none at all, and social workers and psychiatrists who saw them as only mildly ill—just enough to avoid going to jail, but not enough to stay in the loony bin for a long time. And of course, as Jean Stefancic chronicles elsewhere in this issue, women, some of them highly educated and from good families, flocked to them and bore their children, many emerging seriously damaged as a result.

Why such an indulgent attitude? Two reasons (“narratives”) account for why society cut the young Beats so much slack when they engaged in conduct that by ordinary standards is seriously reprehensible. These narratives are: (1) boys will be boys, and (2) genius is closely connected to insanity. As we shall see, these two ideas shaped much of the tolerant reaction the young Beats received when their escapades brought them to the attention of the authorities. It also accounts for acceptance of their misadventures by authors and readers who might otherwise receive them with at least mild disapproval.

These narratives are not merely observations about society’s disposition toward wayward youth. They have legal consequences, as well. As critical legal studies taught us years ago, legal dispositions often turn on an actor’s identity, character, and social potential. Judges almost never decide a case without being influenced by background factors including sympathy for a party and his or her cause. Thus, understanding how the

31. Text from backcover of Mania.
32. Id. at 321.
33. Id. at 346.
34. See Jean Stefancic, The Women of the Beats, 37 Seattle U. L. Rev. xv (2013); see also Knight, supra note 1 (describing the fortunes of the women of the Beats); Johnson, supra note 1 (same); James Campbell, Book Review, Road Ready: Joyce Johnson Explores Jack Kerouac’s Heritage and Early Career, N.Y. Times, Jan. 20, 2013, at 18 (describing how Neal Cassady overslept after a night of sex games with Luann Henderson, whom he had married when she was 15 because he found her “easy to get . . . into bed.”). Two days later Kerouac called on Ginsberg and found Luanne covered with bruises from a beating Cassady had given her. Campbell, supra.
36. See, e.g., Robert Gordon, Critical Legal Histories, 36 Stan. L. Rev. 57 (1984) (discussing the indeterminacy thesis that much of legal reasoning does not take the form of logical deduction from precedent but is often a product of pragmatic judgment and ideological preferences).
37. Id. at 76–77.
twin narratives played out and shaped both reader response to the story of the young renegades and the reactions of authority figures when they were brought up before them to account for their actions is a relevant inquiry for legal readers. Consider, now, the two narratives and their role in the world of the young Beat writers and society at large.

A. Boys Will Be Boys

1. Groups, Roles, and Social Construction

Most roles are social constructs. Composed of a set of expectations and responses that we wish to elicit from a group (such as minorities, women, or youth), the constructs play pivotal roles in how we define the group itself. Membership in a group and the roles those members will play are mutually constitutive. We decide first what we want from, say, women, then we decide when womanhood starts and ends and who is or is not a woman.38

The driving forces behind the social construction of a group will often turn out to be material, having to do with the self-interest of those in power. Catharine MacKinnon, for example, has shown how men define women to suit the men’s convenience. They like women pliable, cooperative, and sexually receptive (but not too receptive). That is what men mean by femininity, and they are in a position to reward and enforce that kind of behavior and social construction.39

Minorities, too, are a social construction. Although many lay people resist this notion at first, most social scientists today hold that races, such as blacks and Latinos, correspond to nothing objective and real.40 Various minor external features, such as skin color, hair texture, and the shape of the nose or eyes, mark certain populations. But the differences between persons who identify themselves as white and black, for example, are relatively small compared to the differences the groups exhibit within themselves.41 That is, the lightest and the darkest whites differ more in skin color than average members of each group do from each other. And scientists know that the relatively few genes responsible for the observable differences among races cannot possibly mark anything

38. See, e.g., CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 14 (1987) (noting that the definition of women is a function of what men find convenient and attractive). On the function of social roles in organizing implicit patterns of expectation and belief, see Delgado & Stefancic, supra note 35; see also Symposium, Legal Storytelling, 87 MICH. L. REV. 2411 (1989) (discussing the role of stories and narratives in legal discourse).
39. MACKINNON, supra note 38, at 14.
41. Id. at 12–16.
important about them, such as intelligence, musical ability, or criminality.42

A visitor from another planet, on arrival, would probably fail to note the differences between African Americans and whites, at least until they were pointed out to them by others. The average American, of course, can tell them apart readily. But that is because we are trained to do so and realize that a great deal rides on it. I am told that in Northern Ireland, a typical local resident observing passersby on the sidewalk can pick out which ones are Catholic and which ones Protestant with a high degree of accuracy. To your and my eyes, the passersby look the same—they wear the same clothes, walk the same way, have been interbreeding for thousands of years, and come from the same gene pool. Only about half the time would we guess right. To the local, however, a great deal rides on being able to detect who is a Catholic and who is a Protestant. And so they learn how to do it with near-perfect accuracy.

2. Young Males As Social Constructions: The Case of Teenagers

   a. How Old Are You?

As we shall see, much the same applies to certain groups defined by age. Consider an easy case: teenagers (young males will come in for examination soon). Society created teenagers at a certain recent point in history—about 1947, to be exact. Before then, teenagers did not exist. Of course, young people between the ages of about 12 and 19 who stood between about four and six feet in height existed. But they had no special term or category that marked them as unique and special any more than people between the ages of 4 and 9 or 27 and 61 or 60 and 73 ½ did.

They existed, in short, without any identity or category to mark them as special. They merely went through life like anyone else. Many of them worked in the family, doing chores or helping raise younger siblings. Others helped on a farm or held part-time jobs. Many went to school. They went through puberty and adolescence.

But until recently, they did not have a special in-group solidarity or group consciousness, much less an oppositional culture that saw itself as entitled, even encouraged, to see itself against the adults, who are dumb, slow, and out of it. The primary role of a teenager today is to have fun and spend money. Teenagers command sizeable allowances (as formerly they did not)—they expect them and have the leisure time to spend them. Shops, brands, and marketers cater to them. They have a special music,
argot, slang, and ways of standing, walking, dressing, and expressing themselves.

This group identity is a social construction and a fairly recent one at that. It probably results from a tacit marketing decision, soon after World War II, to invent a new category of human being whose main purpose was to consume and expend resources on themselves. Before that time, most societies did not recognize teenagers or have any special role for them. 43 Today, subsistence societies or ones in the developing world do not, either. I doubt very much that Afghan, Congolese, or Bolivian society has anything corresponding to a teenager. 44

Teenagers are the product of choice, marketing, and fabrication, and arise only under certain circumstances and in response to certain social needs, principally those of a corporate economy for an ever-increasing supply of consumers. The interested reader may wish to recall how the category of “preteen” or “tweener” came into use only in the last few years or so, and for similar reasons. 45 Now, preteens are beginning to form an identity, a group consciousness, and consider themselves different and special with their own mission in life, specifically to buy certain brands and behave in certain group-normed ways.

(b). Two Thought Experiments:

(i) GoogleBooks and Other Measures of Public Discourse

The skeptical reader who, until now, thought of teenagers as real, objective, fixed, and “out there” may wish to perform an experiment. Type the word “teenager” into any database, say GoogleBooks NGram, which gives you a graphic display of how often certain terms appear in the world’s library. Enter a wide time range, say 1800 to the present. You will see a nearly flat line, barely above the bottom of the graph (i.e., zero), sloping up steeply beginning in 1947, just when the nation’s factories, department stores, and malls needed a new class of consumption-minded shopper to buy clothes, records, shoes, and other paraphernalia of “typical teenagerhood” to decorate their rooms, wear to school, impress their friends, and slenderize their father’s wallets.

You can do the same with any other database, such as newspapers, journals, and law reviews. The same graph will stare you in the face: Teenagers, and all cognate terms for them, are a recent invention. Before

43. See GoogleBooks NGram described infra Part II.A.2(b).
44. At least until they encounter American TV, movies, and videos, that is.
45. For a discussion on how the “tween” arrived in response to a marketing demand, see Tweenagers Market Assessment, RES. & MARKETS (Jan. 2001), http://www.researchandmarkets.com/reports/3915/tweenagers_market_assessment.
mid-twentieth century they did not exist. They were invisible in national discourse. They were not special. They existed, of course, as human beings between four and six feet tall, and between the ages of 12 and 19. But their social construction, like that of the black or Latino race, corresponds to nothing objective apart from the social wishes, strategies, uses, and needs that call them into being. Your teenage brother or sister, in other words, does not exist.

(ii) Ask Grandpa or Grandma

The second experiment is, simply, to ask your parent, grandparent or practically anyone else who was alive in the period before the one I mention (roughly beginning in 1947) whether they considered themselves a teenager when they were growing up. Make sure to ask them whether they thought of themselves that way at the time—that is, not today in retrospect. (“I was a really unusual teenager back in 1931. All I did was work on the farm and deliver the morning newspaper on my route.”). If your informant is at all like the ones I have queried, they will reply something like this: “Yes, I was of course a teenager, but I wasn’t at all like the ones you hear about today. I helped around the house and baby-sat for the neighbors. But I didn’t have a car and didn’t go to many parties. Money was tight, so Mom and Dad needed me to help at home. My sister and I shared a room, and we didn’t have real boyfriends until much later.”

In short, teenagers as a self-conscious category did not exist in the U.S. in the 1930s, war years, or before. No self-referential term, no ingroup feeling, no special music, mission, or buzzwords: “Girls just want to have fun.” “It’s time to party.” “Adults just don’t understand.” All this came later. In some parts of the country, e.g., poor inner-city neighborhoods, Appalachia, or the colonias that line the U.S. border with Mexico, it has not even arrived, at least not fully, as of this date.46

3. A Slightly Older Group: Young Adults

To this point, we have considered an artificial group, namely teenagers. In fact, demonstrating that they are a social creation is like shooting fish in a barrel—it becomes self-evidently true once one thinks about it. It is easier to get someone to sign on to the constructedness of teenagers than it is to get naïve observers (such as students in race classes) to

46. During the Roaring Twenties, this country created flappers. See, e.g., F. Scott Fitzgerald, The Great Gatsby (1925). Great Britain has always had bored, upper-class youth who exhibited fashionable ennui. See, e.g., EVELYN WAUGH, BRIDESHEAD REVISITED (1945). But these social constructions describe only an elite few and seem not to have been fueled by the same consumerist forces that created teenagers and road-hungry American young adults a few decades later.
accept the notion that races are social constructs, as every serious social scientist now believes.

What, though, about their slightly older brothers and sisters? Young adults, too, are a social construction. And this in turn brings us to the era of the Beats—the period about five or ten years after the time when teenagers first appeared—namely, the very late forties and early and mid-fifties. It also brings us to the book under review, which is about the antics, misadventures, and exploratory behavior of a group of unusually high-spirited, self-important young Ivy Leaguers, who benefited from lots of friends in high places and thus managed to escape with their hides largely intact. This in turn brings us to the two narratives of youth mentioned earlier (boys will be boys and genius is closely allied with insanity).

As a marker of youth and an excuse for wild behavior, boys will be boys has enjoyed a somewhat longer association with young males than has the term “teenager,” which is of relatively recent vintage. But it goes back only so far. One did not hear “boys will be boys” about young people in the Middle Ages, for example. Dickens did not use the term, so far as I have been able to find, in his novels about the children of desperately poor factory workers. These youths struggled with poverty and ill fortune. They had little time to have fun or allowances to enable them to go on spending sprees. They did not drive horses, buggies, or other vehicles wildly around town, or kill people and roll their bodies in the river when they found their company tiresome. GoogleBooks NGram will show you as much. The maxim, “boys will be boys,” then justifies a type of exploratory, risk-taking, rascal-like behavior that we began associating with relatively young males, like Tom Sawyer, then gradually expanded to young adults. When the maxim reached them, it did so selectively. Only upper class young men of European heritage were permitted to be boys—to gamble, take chances, play fast and loose with social convention, to kick up their heels a bit before settling down, perhaps in their late twenties, to a gray job in a corporate office somewhere.

Notice that we do not allow black men to be carefree and footloose. The maxim that “boys will be boys” does not apply to them. If they commit murder, as Lucien Carr did, no prestigious university professor is likely to take up their cause. If they impregnate a woman out of wedlock, as many of the young Beats did, we do not smile indulgently. We label

47. See generally CHARLES DICKENS, A CHRISTMAS CAROL (1843) (discussing the fortunes of a poor family in industrial England in the nineteenth century); CHARLES DICKENS, OLIVER TWIST (1838) (same).
them irresponsible fathers and shake our heads knowingly about the breakdown of the black family.\(^48\) No “boys will be boys” for them.

The narrative of the irresponsible but lovable young adult, then, caught on only relatively recently—my guess is around 1950 or so—and only with certain wellborn youths whom we thought worth cutting some slack, like the characters in \textit{On the Road} or \textit{Mania}.

**Material Basis for Boys Will Be Boys**

Like the category teenager, which serves important functions in a capitalistic society and arose in response to implicit commercial imperatives, boys will be boys served material needs as well.

\textit{Boys Will Drive Cars}

I posit that those needs concerned, principally, those of the automobile industry, which was, at the very period with which I am concerned (the late 1940s), retooling from wartime production of tanks, armored vehicles, and amphibious assault vehicles to civilian cars, jalopies, station wagons, and other vehicles that it expected to sell to the returning soldiers, sailors, and draft dodgers and, a little later, to the generation of baby boomers they would create.

The title of Jack Kerouac’s book, after all, is \textit{On the Road} (not \textit{On the Trail}, \textit{On the Production Line}, or \textit{On the Job}, much less \textit{On the Dole}). Joy riding, taking your girl on a date, driving around with your friends in your own car or, at least, that of your parents was a prime activity necessary to keep America’s marketplaces (of pizzas, Dairy Queen cones, used cars, condoms, and neon-painted buses) perking along nicely.\(^49\) A mischievous, adventure-loving, carefree generation of careening youth speeding along America’s highways, lover’s lanes, and byways was exactly what the economy (or, more precisely, Detroit) ordered.\(^50\)

\(^{48}\) See \textit{e.g.}, \textit{DANIEL PATRICK MOYNIHAN, U.S. DEP’T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION} (1965) (the classic work sounding this alarm).

\(^{49}\) Neal Cassady preened over his brand-new “beautiful, full throttled Hudson.” \textit{COLLINS & SKOVER, supra} note 1, at 118. In fact, Hudsons were among the ugliest automobiles ever made. Cassady needed the car for an adventure-seeking trip, leaving Carolyn with a newborn baby. \textit{Id.} at 120–21. He later crashed the car in the Midwest. \textit{Id.} at 125. On his many car thefts, see \textit{supra} notes 8–9, 27 and accompanying text. He also tried his hand at racing cars. \textit{See MORGAN, supra} note 1, at 14.

\(^{50}\) See \textit{COLLINS & SKOVER, supra} note 1, at 122–23 (noting how the young Beats celebrated movement as such). Even meaningless, agenda-less roaming tugged at them. Cassady, for example, felt a compulsion to sacrifice even his wife and her feelings for the joy of travel and would frequently use up their grocery money by spending it on gas for a trip. According to his friends, “Neal must move,” noting that Kerouac, too, felt “most alive” during his various road trips, even if others were doing the driving. \textit{Id.} at 122. \textit{See MORGAN, supra} note 1, at 82; \textit{KEROUAC, ON THE ROAD, supra} note 7, at 123–24. A dream apparition, representing Death, once told Kerouac’s alter ego, Sal Para-
young drivers would predictably run into things, crash, turn the car over, and get the girl in the back seat pregnant, but some understanding adult would help them through the crisis.\textsuperscript{51} Boys will be boys became the new watchword, especially if they were gifted and well born. Recall that America was building the interstate highway system right around then. Drive-in restaurants and movies to neck in were becoming popular. Drive-in banks were not far behind, either.

\textbf{B. Genius and Insanity (Eccentricity, Idiosyncrasy, etc.) Are Closely Related}

You can’t have the one without the other, or so the maxim goes. But then again, it did not always go that way. Shakespeare would probably have been shocked to hear that anyone of his era thought he was insane. Beethoven may have been moody and, later in life, deaf, but to my knowledge, none of his friends or neighbors made efforts to have him committed to a nearby asylum for the insane. Even today, most serious students of mental disease believe it has little, if any, association with genius.\textsuperscript{52} And the incidence of certifiable craziness (that is, schizophrenia or other extreme mental impairments) among Nobel Prize winners, Booker winners, and MacArthur “genius” award recipients is very low. If the Beats—or at least some of them—benefited from the excuse that some of their behavior stemmed from sheer wackiness,\textsuperscript{53} this probably cannot be true in any clinical sense, at least of the ones who later turned into respected writers.

dise, that he would catch up with him if he did not keep moving. \textit{Id.} at 123–35. Popular movies during this period also romanticized cars. \textit{See, e.g., Rebel Without a Cause} (Warner Brothers, 1955) (discussing the life and loves of an alienated loner); \textit{American Graffiti} (1973) (depicting teenagers cruising in search of fun and romance).

\textsuperscript{51} Recall that Neal Cassady, a central character, stole cars (500 to be exact), not pianos, stereo sets, or diamonds. \textsc{Collins & Skover}, supra note 1, at 113.

\textsuperscript{52} \textit{See, e.g.,} Michelle Roberts, \textit{Creativity Closely Entwined with Mental Illness}, \textsc{BBC News Health} (Oct. 17, 2012), http://www.bbc.co.uk/news/health-19959565 (finding little correlation); Simon Kyaga et al., \textit{Mental Illness, Suicide, and Creativity}, \textit{47 J. Psychiatry Res.}, 83 (2012) (finding that persons in creative professions are no more likely to suffer from psychiatric problems than others in the general population, but that they are somewhat more likely to have a close relative with a disorder, such as anorexia or autism).

\textsuperscript{53} \textit{See supra} notes 3–5, 8–12 and accompanying text. Kerouac seems to have cultivated a “mad” persona. \textit{See Collins & Skover}, supra note 1, at 44 (noting that he worshipped “madness”), 71 (noting that camp-follower Carl Solomon believed that genius and madness were linked); \textit{see also} \textsc{Collins & Skover}, supra, at 72 (observing that Ginsberg, like Dostoyevsky, celebrated crime as an existential act that conferred meaning on one’s life). Ginsberg seemed intrigued by the poet Ezra Pound’s commitment to a mental hospital in lieu of a trial for treason. \textit{See Morgan}, supra note 1, at 80. Note that we tend to equate genius with eccentricity mainly in connection with the young, who alone get a free pass. If a person of advanced years exhibits bizarre behavior, we apply uncomplimentary terms such as coot, curmudgeon, or mad as a hatter. If the senior citizen is merely slightly off the norm, we may call him or her an eccentric.
A small number of such writers have, to be sure, led lives that we might call disorganized and dissolute. But this probably does not account for those writings of theirs that were fairly good. Rather, the contrary. Most of them probably would have been better and created more if they had exercised more discipline with respect to their everyday choices.

Writing about his Beat friends, Jack Gilbert, a prominent American poet of that period, wrote: “[T]heir intellectual crudity helped them break through the impasse of sophistication and establish some contact with subjects that mattered in a real world.” He added:

Why did all that talent and opportunity come to so little? . . . Because of inadequate character and the repudiation of intelligence. Most of the poets in the movement are incapable of maturity. Any examination of the work of, say, Ginsberg and Corso (and Kerouac in prose) shows a failure to grow. In fact, they are dedicated to the opposite . . . impulsiveness, resentment of discipline, incapacity for self-discipline, short attention span . . . mistrust of authority and order, egocentricity, and all the rest. At first this gave their work the freshness and energy that’s usual when gifted children start out in any field: poetry, tennis . . . chess, whatever . . . It’s sad and rather frightening to see people of such great native talent ending up in such juvenility. . . . I think intelligence has produced almost everything that is noble in man. . . . (But) they want to rely on primitive, clumsy impulsiveness also.

. . . .

They talk about love, but they experience almost none. . . . A man who delights in the world isn’t so dependent on drugs and alcohol and novelty. . . . The poems just don’t wear well.

Other serious writers have dismissed any connection between good writing and reckless living. Balzac, for example, wrote that one should “be regular and orderly in your life like a bourgeois, so that you may be violent and original in your work.” Many of the Beats, of course, remained firmly convinced of the direct opposite. While in the madhouse, Ginsberg treated his incarceration as a huge joke, pounding on a piano and wailing as though insane, causing the staff to come running to see what was the matter. Perhaps feeling sexually deprived from his long commitment, he instigated a three-day long affair with a female fellow

54. Poetry Is the Art of Prejudice: An Interview with Jack Gilbert, GENESIS WEST, Fall 1962, at 82, 91–92.
55. Id. (discussing his Beat contemporaries).
56. Letter to Gertrude Tennant (Dec. 25, 1876), in MOBILE REFERENCE, FAMOUS QUOTES FROM 100 GREAT PEOPLE (Google eBook, 2011).
57. COLLINS & SKOVER, supra note 1, at 78.
traveler, Helen. Ginsberg, a long-time committed homosexual, apparently thought seeking out a little variety in his partners would broaden his range of experience.\footnote{Collins \& Skover, supra note 1, at 89.} Helen evidently did not.

\section*{III. Narratives and Their Legal Consequences}

What, then, are we to make of all this madcap activity that Collins and Skover describe in great detail in the first half of the book, followed by a rather conventional second half that describes a trial and its place in legal history, complete with footnotes and a description of what the attorneys and courtroom spectators were wearing? We can, and should, look for underlying narratives explaining the disjunction between the two parts. This is a useful task irrespective of whether the authors embraced the two narratives or not. In fact, they did not, at least in so many words—they merely tell a tale with relish and a kind of detached amusement. Thus, although they did not say, “Boys will be boys” or “Look at what these young geniuses were doing—it’s mad, insane, but after all, they were geniuses”—in fact, they do little moralizing at all; they don’t have to. The attitude is plain, coming out in a certain tone and in certain telltale passages and expressions.\footnote{See supra notes 10–11 and accompanying text (listing some of these passages).}

Moreover, we may well (and probably do) feel it in ourselves, as readers. When we read about the next ill-planned adventure and practically grit our teeth, wondering how it is going to come out and who is going to get hurt, we practically write these two narratives (boys will be boys, and let geniuses be geniuses) into the text themselves. And, of course, certain minor adult figures, including cops, social workers, judges, professors, friends, well-wishers, and certainly many of the young women, otherwise sensible and world-wise, who appear in the book\footnote{See Stefancic, The Women of the Beats, supra note 34, at xix–xxvi (describing the fortunes of the women of the Beats); Johnson, supra note 1 (same); Knight, supra note 1 (same).} acted as though they thought so, too. They may have shaken their heads a little, but they made excuses for and tolerated the often self-absorbed and socially dangerous behavior of the young Beats, lying down with them, releasing them back into society, getting them a lawyer, letting them back into Columbia or otherwise giving them the benefit of the doubt. Boys will be boys. Genius is a little crazy. Cut them some slack—look how much promise they have.\footnote{Collins \& Skover, supra note 1, at 103 (recounting Kerouac’s excitement over novelty-seeking trips around the U.S. and Mexico), 110 (explaining his larger-than-life image of the road and noting that he did not seek anything in particular during his frequent automobile journeys—no Holy Grail—but merely new sights and sounds for their own sake).}
We owe it to ourselves to be skeptical of that attitude, particularly if it seems to be emerging as a way of understanding social reality. As mentioned, attitudes and roles operate in close tandem. They are mutually constitutive. They influence legal judgments. With that in mind, what can we say about young men like those in this story who take chances, get hurt, and often hurt others, including people like us?

First, we should note that both narratives (and, by the same token, both social groups) are contingent, not necessary.

A. Contingent, Not Necessary

The first thing to notice is that boys will be boys, like its companion (geniuses are nuts) is not universal or necessary. As mentioned, other societies do not endorse it or anything like it, and it emerged at a certain period in ours, probably when an industrialized society needed to sell a lot of things, mainly cars, to young men. A socially permitted, indeed expected, prolonged adolescence coupled with a new imperative—explore the world because you are only young once—would serve this purpose admirably. During depression years; the Middle Ages; in poor, subsistence-level societies; Bedouin culture; and many other times and places, we see nothing like those narratives, attitudes, or group-formations. We find, in fact, the exact opposite.

Realizing, perhaps, that the late-adolescent brain is not yet fully formed and inclined to be irresponsible, many societies invent ceremonies and rituals to convey to a youth in late adolescence that it is time for him to become a man. Time to assume adult roles, learn to hunt, fight, kill prey, ward off the enemy, take a wife, and raise children. In Australia, aborigines send their youth on a walkabout—a time when they go into the desert, foraging and looking for water—precisely to drive home to them that they are now about to become men. They are to give up playing, hanging out with their friends, and doing youthful things and get down to the business of being a man and helping the tribe survive in its

62. See supra notes 15–17 and accompanying text.
63. See supra notes 12–14 and accompanying text.
64. See supra notes 26–28 and accompanying text.
67. See, e.g., JAMES VANCE MARSHALL, WALKABOUT (1959); see also WALKABOUT (Twentieth Century Fox, 1971) (describing the story of two white Australian children abandoned by their father in a desert, who are found by a young aborigine who saves them from death by starvation and dehydration).
daily encounter with a withering sun, scarce food, and other daunting conditions and challenges.\textsuperscript{68}

In short, many other societies do not believe that boys will be boys—that young men need to and should charge maniacally around the world gaining experience and creating carnage in a heedless fashion. They should, instead, grow up as quickly as possible and begin contributing to society. In many societies, then, boys will not be boys—they will be men.\textsuperscript{69}

\textit{B. Not Worth a Legal or Quasi-Legal Privilege?}

As mentioned earlier, young black males do not enjoy the presumption that boys will be boys. On the contrary, we want them to shape up as quickly as possible, go to school, stop wearing baggy pants, and (above all) stop belonging to gangs and committing crimes, whether major or minor. We do not want black men going on the road. If they do, we profile them and stop them to look for drugs, see if they have been drinking or driving a stolen car and, in general, let them know we have our eyes on them.\textsuperscript{70}

We don’t want young Latino males engaging in too much youthful experimentation, either, not in our neighborhoods or schools,\textsuperscript{71} and certainly not on our highways. If they pile into a car, we wonder what is going on. Perhaps they are some of those undocumented aliens we have been reading about. Maybe somebody, perhaps the sheriff, ought to look into that. Maybe we ought to report, even deport, them. “Papers, please.”\textsuperscript{72}

\textsuperscript{68} See sources cited supra notes 65–67.

\textsuperscript{69} Note that a different narrative—“youth will be served”—summons up an entirely different set of preferences and is entirely defensible. Rooted in a theory of adolescent development, it holds that the young deserve sympathy and nurturance in order to grow up healthy and strong and with a wide range of opportunities (not just with cars). A society that subscribed to this theory would allocate resources, such as education and health care, accordingly.

\textsuperscript{70} See DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (The New Press, 2002). Compare the free pass society apparently extended to Neal Cassady, who seems to have exemplified both the footloose youth and genius is mad narratives to an unusual degree. While driving over the Donner Pass on one of his many road trips, it began to snow heavily. Gleefully, Cassady writes his new wife back home how he floored the accelerator so as to not lose speed and make if over the summit. Nearing the top, he encountered two large snowplows on opposite sides of the road. Instead of slowing, he roared through the narrow space between them, emerging on the other side. Later, the windshield wipers froze, so that he had to crane his head out the window at night in freezing temperature to see where he was going. His letter home describes the incident in excited, near-rapturous terms. It seems to have been a highlight of his early married period. See CASSADY, OFF THE ROAD, supra note 3, at 57.


In certain well-known legal settings, judges and other authority figures cut members of a group slack when they come before them, charged with doing something that would otherwise require an explanation. Sometimes we call these practices privileges or quasi-privileges. Other times we call them a presumption of regularity or a hands-off attitude (say, about prison officials or authorities). In other situations we presume expertise, as we do when a university department votes to confer or deny tenure to a fellow faculty member.

What these settings have in common is that for various reasons, society has decided to cut someone (or some group) slack, to let them get away with behavior that would otherwise bring them under examination.

We started doing this with teenagers at a certain time for, as I have shown, reasons of commercial necessity. With young males in their twenties, we began doing so a few years later, issuing them prolonged adolescence cards and licenses to drive (figuratively) for a second, related set of reasons that few of us have examined. Books like Mania let us reconsider permissions like these. The books trace the behavior in question and invite us to consider what we see. Those are such lovable characters, we think. But why, and why just them? The first half of a well-written and engaging book draws us in so that we read the second half with a hopeful eye, wishing that it will come out a certain way. But the book also allows us to step back and think about our reactions in the cold light of day.

IV. CONCLUSION

Good literature allows us to examine our own manias and try to discern what creates and who benefits from them. It gives us the opportunity to dissect the characters, roles, and social groups we are creating and have created, as writers, and enjoyed, as readers, and take a close look at them.

We may well conclude that, commercial necessity aside, endowing young males with a quasi-privilege to take chances and create havoc

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73. See Univ. of Cal. v. Tarasoff, 551 P.2d 334 (1976) (the well-known privilege against compelled testimony by psychotherapists and other professionals).
74. Judges have long been reluctant to intervene into the details of policing or prison administration. See, e.g., Fred Cohen, The Limits of Judicial Reform of Prisons, 40 No. 5 CRIM. L. BULL. 1 (2004) (discussing the hands-off doctrine in these areas).
76. See supra notes 20–23 and accompanying text.
77. See supra notes 24–27 and accompanying text.
78. See Kerouac’s On the Road, supra note 17, at 125, where Lucille, the main character’s girlfriend, tells him that she disapproves of his frenetic traveling and partying. (“Ah, it’s all right, it’s just kids,” he answers. “We only live once.” “No,” she answers. “It’s sad, and I don’t like it.”).
makes little sense. Unlike with judges, we do not believe that, as a group, they have good judgment. Unlike with university professors or law enforcement agents, we do not believe that they possess unusual expertise. Few of the reasons that call forth privileges, quasi-privileges, hands-off doctrines, or broad discretion for certain public officials or professionals argue for anything similar for young males like those in *Mania*. Quite the contrary, neuroscience shows that adolescents and young adults suffer from incompletely formed cortices and generally lack the capacity for foresight, prudence, and good judgment. These are scarcely the attributes that warrant free rein or a tolerant attitude.

*Mania* and other altered states may, on occasion, enable a writer like Kerouac to compose an entertaining novel. But we should not forget the price he paid for his lifestyle, or the fate of many of those who came into contact with him and his friends. In many respects, *Mania* is a cautionary tale that invites attention to the role commercial forces play in constructing narratives of youth and our own complicity in the system that feeds that narrative.

Books like *Mania* allow us to examine our own manias, fixations, and preconceived ideas and narratives. Some social products—such as art, music, or a Gothic cathedral—are manifestly worth preserving. Other constructions may not be, particularly if they turn out to be foisted upon us by commercial forces and add little to our lives. It behooves us, from time to time, to slow down and think about what we are doing, what characters, roles, and social groups we are creating, and examine closely what we might call our children.
Poetry on Trial

Albert Bendich*

The description of the legal history in *Mania* is very beautifully and correctly done. It’s not my role to venture a comment on the literary merit of the rest of the book, but even though it’s not my role, I appreciate the effort that went into it, the honesty, and I must say that as someone who regarded himself as a friend of Allen Ginsberg and Lawrence Ferlinghetti and who came to know both of them rather well, I might add a little background to some of the discussion that has gone on. I think that perhaps one of the best ways of appreciating Allen Ginsberg’s own thinking about *Howl* is to read a letter that he wrote in 1955 to Richard Eberhart who was going to review the work for the New York Times. And I’ll just read some of this by way of giving you an introduction to what I think is a fuller portrait of the man and the character, Allen Ginsberg:

> You heard or saw *Howl* as a negative howl of protest. The title notwithstanding, the poem itself, is an act of sympathy, not rejection. In it, I am leaping out of a preconceived notion of social “values.” Following my own heart’s instincts, allowing myself to follow my own heart’s instincts, overturning any notion of propriety, moral “value,” superficial “maturity,” trillingesque sense of “civilization,” and exposing my true feelings of sympathy and identification with the rejected mystical individual, even mad. I am saying that what seems mad in America is our expression of natural ecstasy as in Crane, Whitman, which suppressed finds no social form, organiza-

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tion, background, frame of reference or rapport or validation from the outside, and so the “patient” gets confused, thinks he is mad, and really goes off rocker. I am paying homage to mystical mysteries in the forms in which they actually occur here in the U.S., in our environment. I have taken a leap of detachment from the artificial preoccupations and preconceptions of what is acceptable and normal, and given my yay to the specific type of madness listed in the who section, the leap in the imagination is safe to do in a poem. A leap to actual living sanctity, it is not impossible but requires more time for me. I used to think I was mad to want to be a saint, but now what have I got to fear? People’s opinions? Loss of a teaching job? I’m living outside this context. I make my own sanctity. How else? Suffering and humility are forced on my otherwise wild ego by lugging baggage in Greyhound. I started as a fair-haired boy in Columbia. I have discovered a great deal of my own true nature, and that individuality which is of value, the only social value that there can be in the Blake worlds. I see it as a “social value.” I have told you how to live if I have awakened any emotion of compassion and realization of the beauty of souls in America through the poem.

The effect is to release self and audience from a false and self-denying, self-deprecating image of ourselves, which makes us feel like smelly shits and not the angels, which we most deeply are. The vision we have of people and things outside us is obviously a reflection of our relation to ourself. It is perhaps possible to forgive another and love another only after you forgive and love yourself. This is why Whitman is crucial in the development of American psyche. He accepted himself, and from that flowed acceptance of all things.¹

He then discussed his own struggle to develop his craft as a poet. This is in response to the possibility that Howl can be read only as an act of spontaneous writing:

I’m saying people who by repeating et cetera are exhibiting no technical sensitivity at all but merely a depthness that using already-formulated ideas and this is historically no time for that, or even if it were, who cares? I don’t. I’m interested in discovering what I do not know in myself and in the ways of writing, an old point. The long line, you need a good ear and the emotional ground swell on technical and tactical ease facility and a freedom spree to deal with it and make of it anything significant. And you need something to say, i.e., clear, realized feelings, same as any free verse. The lines are the result of long thought and experiment as to what constitutes one’s speech, breath, thought.

I have noticed that the unspoken visual verbal flow inside the mind has great rhythm and have approached the problem of strophe, line and stanza and measure by listening and transcribing. To a great extent, the coherent mental flow, taking that for the model for form as Cezanne took nature. This is not surrealism. They made up an artificial literary imitation. I transcribe from my ordinary thoughts, waiting for extra exciting or mystical moments or near mystical moments to transcribe.2

I will skip some of the rest, noting only that he states that he has worked on developing this form for over seven years. In a section of the letter called “Values,” Ginsberg summarizes:

Howl is an affirmation of individual experience of God, sex, drugs, absurdity, et cetera. Part I deals sympathetically with individual cases. Part II describes and rejects the Moloch of society, which confounds and suppresses individual experience and forces the individual to consider himself mad if he does not reject his own deepest senses. Part III is an expression of sympathy and identification with Carl Solomon who is in the madhouse saying that his madness basically is rebellion against Moloch, and I am with him and extending my hand in union. This is an affirmative act of mercy and compassion, which are the basic emotions of the poem. The criticism of society is that society is merciless. The alternative is private individual acts of mercy. The poem is one such. It is therefore clearly and consciously built on the liberation of basic human virtues. To call it work of nihilistic rebellion would be to mistake it completely. It offers no constructive program in sociological terms. No poem could. It does offer a constructive human value, basically the experience of the enlightenment of mystical experience, without which no society can long exist.3

These excerpts give a flavor of the kind of mind that Ginsberg had. More background information will perhaps help in understanding the struggle that was characterized as the “Battle of the Books” and described as described as “Big Brother entering our San Francisco” in the San Francisco Chronicle. This was a time when San Francisco was undergoing what was called the “San Francisco Renaissance.”

What is a renaissance? A renaissance is a rebirth. It represents a clash of cultural values and views. And if one goes back to the European renaissance and asks how the church dealt with Giordano Bruno or Galileo, one becomes instantly aware of the stakes that were being fought for. On the one hand, science and enlightenment, on the other hand conserva-

2. Id.
3. Id.
tism, the protection of established values, and a fear of the new. That’s what the renaissance represented. There was a renewed interest in the works that had been produced classically—sculpture, architecture, philosophy, and history—because much of it had been lost and dogma instead had taken over. We saw something of that kind emerging from the San Francisco renaissance.

What was going on? What was the historical background? The Korean War was hardly a year and a half over. It ran from 1950 to 1955. The Vietnam War was going on. The French had been defeated at Dien Bien Phu in 1954. Also in 1954, the Supreme Court decided Brown vs. Board of Education, a momentous decision, the end of separate but equal, and an opening for an oppressed segment of our population to become more fully equal and entitled to the exercise of citizenship.

Coming back to the question of what this situation, this renaissance struggle, confronted us with in San Francisco at the beginning of the trial: What in the world is this trial about? Constitutionally speaking, what in the world is it about? Where under our Constitution is there power to suppress thought not brigaded with any action which there has been a delegation of power to regulate? Well, that was what I was crucially concerned with in looking at the law of the First Amendment. But we had a very practical job to do. We had two defendants to defend, to keep from going to jail. We were able to dismiss the case against Shigeyoshi Murao because California criminal law requires intent, and since there was no evidence that Shigeyoshi Murao had ever read the poem or knew anything about it, he could obviously have had no intent with respect to selling it in terms of what it contained.

But what in the world was it that the poem was supposed to contain that rendered it subject to a criminal prosecution? I started working on the case in September of 1957. In June of 1957, the United States Supreme Court had issued its Roth opinion. Justice Brennan wrote the majority opinion, and what Justice Brennan was considering was the constitutionality of obscenity statutes punishing obscenity. And what he said remarkably, astonishingly, was that obscenity is not protected speech. Where did that come from? Where before had anyone heard the proposition that we had two kinds of speech—speech protected by the First Amendment and speech not protected by the First Amendment? Where did the government get the power to regulate thought and speech? That was the question. This was a practical trial, and we had to follow the law to see how far we could go. So, we studied the law very carefully, and one of the things we knew was that what was held to be obscene was that which appealed to prurient interest. Well, what in the world is prurient interest? Prurient interest, according to Lenny Bruce, is that which “gets
you horny.” It has to arouse a lustful thought. You’ve heard that there was a slogan about make love, not war? How in the world are you going to make love without being aroused? It’s a contradiction in terms. And yet lewdness was being prosecuted in the context of the most horrendous wars the planet had ever seen involving our own government heavily, such that, for example, we were the first country in the world to use atomic weapons to obliterate cities. But that wasn’t prosecuted as obscene. Where did the idea come from that thought, mere thought, could be prosecuted?

I think the best way I can illustrate where that came from is by reading something from a recent issue of the New York Review of Books. This is the issue of February 7th of 2013. It’s by Tim Parks entitled, Why So Popular?, and it’s a review of Fifty Shades of Grey. Parks writes:

Touching yourself was strictly forbidden in the Parks family. My father was an evangelical clergyman, my mother his zealous helper. The hand mustn’t stray below the belt because such pleasures were always accompanied by evil, lascivious thoughts. Yet, as Dusty Springfield memorably sang in Son of a Preacher Man, “being good isn’t always easy no matter how hard I try,” and at thirteen, for this son of a preacher man, it was impossible. To get around this conflict—the sexual imperative and the fear of falling into sin—I would imagine going through the entire Anglican marriage ceremony with whatever girl was the object of my desire before allowing the hand to move to its inevitable destination; in this way, I hoped, my fantasies would be conjugal rather than lecherous and any sin much diminished.4

Fifty Shades of Grey has sold something on the order of 70 million copies, according to this review. So times are changing. Standards, community standards are changing. Today, what would have been referred to as “hardcore pornography” is freely available. You can buy it. You can get it for free on the internet. An interesting example, in our changing attitudes towards sex, is the fact that we have just had two very important cases on same-sex marriage argued in the United States Supreme Court. What a sea change. When I was working for the ACLU back in 1957, I was representing the Mattachine Society and the Daughters of Bilitis. People would be arrested in public restrooms because there were cops hanging out in the stalls next door with a hole drilled through the wall between them. That’s unimaginable today. We’ve gone far beyond that.

There’s an evolutionary aspect to social thought, and if that is the case, how were we to deal with the suppression of thought characterized as obscene by Justice Brennan and the Supreme Court back in 1957? One of the things we thought was that *Howl* obviously isn’t the kind of work that appeals to prurient interests. It doesn’t have that character. And we would demonstrate that by getting expert witnesses who would talk about what the poem contained. That required an analysis, and it required understanding. It required some degree of sophistication, and if you’ve got a battle of the books, then you’ve got a question of educational standing with respect to the ability to understand and discuss the books. Unfortunately, the prosecutor came nowhere near beginning to understand *Howl*. He kept asking questions like: What does this word mean? What does this phrase mean?

We knew that we were going to be able to mount a very, very robust defense against the charge of prurience, prurient interest, and we also knew that we could also add evidence that nothing in the poem really went beyond contemporary standards for the average man in the average area that the poem was likely to reach.

But then we had to ask ourselves: Is there anything else here? Is this simply a question of whether we’re going to say this is not an obscene poem, and therefore there is no guilt, because after all, there’s no constitutional issue? The Supreme Court had said obscenity does not fit within the area protected by the First Amendment, and so if a defendant’s guilty on the basis of writing a lecherous, lustful, lascivious, prurient poem, well, the First Amendment wouldn’t protect him. What was the renaissance about? What was the protection of poetry and literature? What was the evolution of free thought? What was the question of honesty culturally about? And fortunately, there was something in Justice Brennan’s opinion that opened that door for us. After saying that obscenity was not the kind of speech that fell within the area protected by the First Amendment, he also said that since free speech is necessary to a free society, to the operation of a democratic society, to the evolution of social thought and change, the First Amendment protected every kind of speech except that which was utterly without redeeming social significance.

So, now here we were faced with this question: If this poem is not prurient, if it isn’t lascivious, if it doesn’t incite sexual excitement, what are we dealing with? That would be the end of the case. But if it is obscene it can only be so if it is utterly without the slightest redeeming social significance. Does it have social significance? What is a court doing deciding whether words—whether a poem, an argument, a book—has social significance? That’s censorship, pure and simple, and yet that’s
what we had to deal with. That was the hand that was dealt to us. And so we argued that this poem, by definition, could not be obscene if the work had any redeeming social significance. And so the expert witnesses talked about the kind of social significance contained in the poem and expressed thoughts very similar to the kind that Ginsberg himself had expressed in his letter to Eberhart.

And we knew whom we were dealing with as a judge, Judge Clayton W. Horn, and we knew that we had a big hill to climb to be able to get him to see what we thought was the truth about where we were and where we should go. The essence of what we would have liked to tell him was that the Constitution barred obscenity prosecutions. But the best we could do was to tell him that if he found that there was the slightest social significance in the poem, he could not go any further and that was the end of the case. And indeed, that’s what he did. He followed that instruction, as it were. We also were able to invoke some of the thinking of Justice Douglas who said that you can’t have censorship in America. You can’t go after thought. You can’t punish somebody for thinking or expressing an idea or an opinion. It has to be brigaded with some kind of social action that the government has a power to deal with. And so, what we were able to do was persuade Judge Horn that although he was sitting in judgment, he had to come to the conclusion that there was no obscenity case here. I particularly was very concerned at the end of this trial because the question necessarily remained: What would happen in the next case? What if we weren’t able to persuade the judge that there was some slight redeeming social significance in the message of a poem or an essay or a novel or a movie or what have you? And then he would be able to say in his judgment: No, you don’t have any First Amendment protection for obscene work.

Dissenting in *Roth*, Justice Douglas said:

The tests by which these convictions were obtained require only the arousing of sexual thoughts. Yet the arousing of sexual thoughts and desires happens every day in normal life in dozens of ways. Nearly 30 years ago a questionnaire sent to college and normal school women graduates asked what things were most stimulating sexually. Of 409 replies, 9 said ‘music’; 18 said ‘pictures’; 29 said ‘dancing’; 40 said ‘drama’; 95 said ‘books’; and 218 said ‘man.’

And then Justice Douglas continued:

The test of obscenity the Court endorses today gives the censor free range over a vast domain. To allow the State to step in and punish mere speech or publication that the judge or the jury thinks has an

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undesirable impact on thoughts but that is not shown to be a part of unlawful action is drastically to curtail the First Amendment.\textsuperscript{6}

He added that “[i]f we were certain that impurity of sexual thoughts impelled to action, we would be on less dangerous ground in punishing the distributors of this sex literature. But it is by no means clear that obscene literature, as so defined, is a significant factor in influencing substantial deviations from the community standards.”\textsuperscript{7}

That enabled us to argue, as we did and as Judge Horn agreed, that the First Amendment required the application of the clear and present danger test to something declared to be obscene before it could be punished. That is to say, if all you’re doing is stimulating thought and there’s no action, what clear and present danger of a substantive evil exists? It’s a silly, self-contradictory proposition. But that’s what we’re dealing with here. We’re dealing with the kind of silliness that has to do with prejudice; with dogma; with an overconfident, self-righteous assumption that one is living correctly as opposed to how otherwise people choose to live. We’re dealing with the proposition that government has a right to prescribe how people should live, that it has a right to say that we have now discovered the truth about how society should be organized, and we should go no further. But that’s not where we are although we face the danger of getting there, and the price of freedom is eternal vigilance. We have to keep fighting, because as Professor Strossen will tell you, we’ve gone backwards from the constitutional test in \textit{Roth}—a good deal backwards.

\textsuperscript{6} Id.
\textsuperscript{7} Id. at 510.
Obscenity & Indecency Law: Why *Howl* Is Still Silenced

*Nadine Strossen*

I’m delighted to celebrate this important new book by the Dynamic Duo, Ron Collins and David Skover. Not only are David and Ron longtime colleagues of mine, but that’s also true of the other speakers today. However, on every prior occasion when Richard Delgado and I have shared the podium, we have debated each other, so it’s a nice change to be advocating on the same conclusion today—namely, the importance of *Mania*!

I so admire Al Bendich’s pioneering work on the landmark *Howl* First Amendment case, which is especially impressive given that he was a recent law school graduate at the time. For all of the law students and young lawyers in the audience, this should be very inspiring, showing that you can have a profound impact on the law from the very outset of your legal careers.

As an activist, I’m necessarily an optimist, so let me start with the positive aspect of Al’s remarkable achievement in this case way back in 1957. Judge Horn’s speech-protective decision, which drew so extensively from Al’s brief, was a high-water mark of First Amendment protection for sexually-oriented expression. Just that year, in the *Roth* case,¹ the Supreme Court had for the very first time addressed the status of sexual expression under the First Amendment’s Free Speech Clause. *Roth* was written by the then-new Justice William Brennan, who has gone down in history as ultimately becoming a great defender of freedom of speech, but that was not yet true at the outset of his Supreme Court career. It’s an interesting juxtaposition. Here’s Al, at the outset of his legal career, real-

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ly being a pioneering leader and trailblazer in defending First Amendment rights. When he wrote the majority’s opinion in Roth, Justice Brennan had been on the Supreme Court for a very short time, less than one year. He didn’t yet have the courage of his convictions or the experience that would shortly thereafter start leading him in a speech-protective direction.

There’s no exception in the First Amendment for sexual expression. Moreover, Justice Brennan begins his Roth opinion by extolling the importance of sexual expression: “Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages.”2 Probably the least controversial pronouncement the Justices have ever made, right? But, they then, nonetheless, proceeded to read into the First Amendment’s unqualified language an exception for a vaguely-defined subset of sexual expression that was labeled “obscenity.” The Howl case was the first major case to actually implement this newly-authorized exception. Thanks to Al’s scholarly advocacy, Judge Horn did great damage control, construing that exception as narrowly as plausible. So, that’s the good news.

But, it’s also the bad news, because to this date, almost 60 years later, this case remains a high-water mark of freedom for sexual expression. The Supreme Court still hasn’t even cut back on the scope of the obscenity exception that it laid down in Roth, let alone eliminated it altogether, as First Amendment experts overwhelmingly advocate. To the contrary, since 1957, the Court has issued multiple decisions that increase government power to suppress sexual expression. I’m going to note the two lines of such decisions that are most directly on point for Howl.

First, the Court expressly reaffirmed the obscenity exception in 1973 in companion cases called Paris3 and Miller.4 It did this by deeply-split, five to four votes, with the dissent written by none other than Justice Brennan, who had written the majority opinion in Roth, but who confessed error based on his 16 years of actual experience in enforcing this inherently subjective concept. Worse yet, in its 1973 rulings, the Court actually broadened the obscenity exception in one respect. Roth had held that the Free Speech Clause protects any expression with even the slightest redeeming social importance. Rather, to be unprotected obscenity, the expression had to be “utterly without redeeming social value.”5 In contrast, in 1973, Miller ramped up this social value requirement substantial-

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2. Id. at 487.
Al understandably complained during his remarks that he had to show that *Howl* had any value, but any value is no longer enough after 1973. Now the Court says the speech must have serious value, which is even more contrary to the fundamental First Amendment principles that Al talked about. In general, the First Amendment means that it is up to each of us as individuals to determine which expression has value for us; we are not confined to only that expression that the government certifies as having serious value. However, in the area of obscenity, that’s what we are relegated to since 1973.

Now I’ll turn to the second pertinent line of Supreme Court decisions suppressing sexual expression: rulings upholding the ban on so-called “indecent” broadcast expression between 6:00 a.m. and 10:00 p.m., on the ground that children are most likely to be in the audience then. The Court first made this holding with respect to broadcast indecency in the famous—or infamous—1978 *Pacifica* case, when it upheld an order by the Federal Communications Commission (FCC) sanctioning a broadcast of comedian George Carlin’s satirical “Seven Dirty Words” monologue.6 Indecency is a far broader concept than obscenity. To come within the Court’s obscenity exception, material has to satisfy all three prongs of the definition that the Court laid down in the 1973 *Miller* case. First, picking up one of the requirements from *Roth*, the expression must appeal to the so-called “prurient interest in sex”; in other words, it has to be sexually arousing. I should note that the Supreme Court later clarified that a prurient interest in sex is a “sick and morbid” interest in sex, as opposed to a “normal and healthy” one.7 Second, the expression has to be patently offensive.

Kathleen Sullivan, a former professor at Stanford Law School who is now practicing law in New York, went through this definition of “prurient interest in sex” in her constitutional law class. She explained to her students that there’s a contradiction here. Because if you put it in lay terms, what does it mean that something appeals to the prurient interest in sex? Well, that means that it turns you on. But what does it mean that the material is patently offensive? Well, that means that it grosses you out. So, how can the same thing both turn you on and gross you out? Here’s the answer: It’s because one person’s turn-on—that is, the person who read it or the person who wrote it—grosses out somebody else—namely, the police, the prosecutor, the jury, and the judge. And there in a nutshell is one of the many fundamental contradictions between the whole concept of illegal obscenity and a free society. The majority, as

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represented by the prosecuting and convicting authorities, is making a negative determination about the sexual pleasures and expressions of the individual who’s on trial.

The third requirement that also has to be satisfied, in addition to the prurient interest and patently offensive criteria, is that the material has to lack serious value. Now, on that definition, I would like to share an anecdote about one of my judicial heroes whom Al has already mentioned. He is Justice William O. Douglas, who of course hails from right here in Washington State. Justice Douglas always opposed the obscenity exception, consistent with his staunch First Amendment absolutism in general. While the other Justices would watch screenings of films that were alleged to be obscene to determine whether they satisfied Miller’s criteria, Justice Douglas always refused to participate. He repudiated the role of official censor.

Anyone who has read The Brethren might recall that it contains quite amusing descriptions of the Justices watching these screenings. At my law school, New York Law School, one of our claims to fame is a Supreme Court Justice who graduated from our law school, Justice Marshall Harlan. The Brethren recounts how Justice Harlan had become near blind later in his life, so he would bring one of his law clerks down to the screening room with him and the law clerk, in front of all the other Justices, would have to give a blow-by-blow oral description. One line in The Brethren is from Harlan upon hearing his clerk’s description of a scene in an allegedly obscene film. He says: “By Jove, extraordinary!”

The story I wanted to share about Justice Douglas’s views of the Miller test comes from a lawyer colleague who saw Douglas in the Supreme Court cafeteria and struck up a conversation with him that included the Court’s obscenity exception. Here’s what Justice Douglas said to my friend:

The longer I’ve sat on the Court, the more I oppose the doctrine. Some people think it’s because I’m getting more tolerant in my older age, but here’s the real reason. The Court has said that to find something obscene, it has to be sexually arousing, and the older I get, alas, the harder it is for me to become sexually aroused.

In contrast with the three-pronged Miller test for obscenity, broadcast expression will be deemed indecent and hence banned until late at night merely by satisfying the single offensiveness prong. In Pacifica, the Court upheld the FCC’s definition of broadcast indecency, which is still in effect: patently offensive depictions or descriptions of sexual or excretory organs or activities. So broadcast expression can be indecent even if it’s not sexually arousing, and even worse, it doesn’t matter how valuable the expression is. Serious value, even very serious value, is
completely irrelevant and will not save broadcast expression once it has been deemed patently offensive.

There are many instructive parallels between these rulings I’ve described, which set the First Amendment standards for obscenity and broadcast indecency. Amazingly, here in the twenty-first century, we’re still governed by the 1973 *Paris-Miller* rulings on obscenity and the 1978 *Pacifica* case on broadcast indecency. In these cases, the decisions were 5–4 over very strong dissents, and the lower courts had struck down the speech restrictions at issue as inconsistent with the Supreme Court’s general First Amendment jurisprudence. These facts underscore that these Supreme Court rulings were really outliers, based on the narrow majority’s selective squeamishness about sexual expression in particular. In that sense, the Court simply reflects American’s general fear of anything sexual consistent with our Puritan heritage. And here I would like to cite my fellow Minnesotan, Garrison Keiller, who said: “My ancestors were Puritans from England who arrived here in 1648 in the hope of finding greater restrictions than were permissible under English law at the time.”

And now, let me mention two more parallels between the Court’s speech-suppressive obscenity and broadcast indecency decisions from the 1970s. In both situations, the Court’s decisions have been strongly criticized since then by many justices from across the ideological spectrum, but never again has the Court revisited the basic issue of whether obscenity or broadcast indecency should be constitutionally unprotected. As for broadcast indecency, the Court ducked this issue twice in the past few years, even though it was squarely presented in a case called *FCC v. Fox*, in which the lower courts held that the FCC’s broadcasting-indecency regime violates the First Amendment, but the Supreme Court both times decided the case on a narrower issue.8

That leads to one final important parallel between the obscenity and broadcast indecency doctrines. In both, the current law is actually more speech restrictive than it was decades ago. I already noted that the 1973 *Miller* decision broadened the obscenity exception in a key respect by extending it to material that admittedly does have value but whose value, the courts say, is not sufficiently serious. And in the past decade, both the FCC and Congress have broadened the broadcast indecency ban in several ways. For one thing, the FCC diametrically changed the position it

had advocated and the Court had upheld in the 1978 *Pacifica* case, banning only specific words that were repeated many times, as in the Carlin monologue at issue, what the majority called a “verbal shock treatment.”

Now though, in contrast, the FCC bans even what it calls a “fleeting” or “isolated” four-letter word or a similar brief episode of partial nudity. Therefore, a whole broadcast can be condemned just because of a single F-word or S-word, and likewise for a mere glimpse of a breast for 9/16 of one second, as in the infamous 2004 Super Bowl wardrobe malfunction. My favorite description of that was, “a tempest in a B-cup.”

Worse yet, in 2006, Congress increased the fine for each indecency violation, literally by a factor of ten, from $32,500 to $325,000 per word that is deemed to be indecent. Finally, the FCC used to treat each broadcast network and all of its affiliates as a single entity, so a program with a forbidden word would constitute a single violation, even if it was aired on multiple affiliates. But under the George W. Bush administration, the FCC began to assess separate fines on every network affiliate that carried the program. In sum, you multiply each four-letter word times each affiliate, times $325,000, and you can understand why the FCC’s fines reached record-breaking levels with an enormous chilling effect. This brings us very sadly and ironically to the connection to *Howl*.

In 2007, to commemorate the 50th anniversary of the great free speech victory in the *Howl* trial, the Pacifica affiliate in my hometown, New York, WBAI, thought what better way to celebrate this great First Amendment landmark than airing the historic recording of Allen Ginsberg reading his own poem? But guess what? In light of the FCC’s ramped-up broadcast indecency rules, on advice of counsel, the plug was pulled on that. Just think of the number of four-letter words in *Howl*, multiply them times $325,000, and you understand that the proposed broadcast could have bankrupted WBAI many times over. Al, when you won your great First Amendment victory, vindicating *Howl* as constitutionally protected expression, would you have dreamt that a half century later, it couldn’t safely be read even on Pacifica radio, even in Manhattan? This episode really crystallizes the overall point that I’ve been making, how the First Amendment law in this specific area has regressed rather than progressed since 1957.

Sadly, Pacifica’s pulling the plug on *Howl* is only one of many concrete examples of expression with very serious, important value that have been chilled by the recent ratcheting up of the broadcast indecency regime. Let me cite a few other examples. A PBS station cancelled a historical documentary about Marie Antoinette because it contained sexual-

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ly suggestive drawings. CBS affiliates pulled a documentary about the 9/11 terrorist attacks, which showed actual footage of police and firefighters bravely trying to rescue people, and as the Twin Towers came crashing down, they were exclaiming in horror and not surprisingly, some of the horrified words had four letters. Therefore, CBS decided it could not air this. A Vermont public radio station barred the airing of a live political debate between state senate candidates. Notably, there is no news exception for the ban on indecency, and news programs have been sanctioned. Therefore, the manager for that Vermont radio station feared that one candidate might do again on air what he had done during a previous live debate—he lost his temper and called two audience members “shits.” So much for that political debate.

To recap what I’ve covered so far, from a free speech perspective, the legal standards applicable to *Howl* have backslid substantially since 1957, allowing more restrictions on obscenity and broadcast indecency.

Now I want to underscore how inconsistent these developments are with the Court’s free speech jurisprudence in other areas. There is both a negative and a positive perspective here. The negative is how unjustifiably the Court has discriminated against sexual expression and also broadcast expression, but here’s the corresponding positive: The unprincipled nature of these rulings makes me confident that when the Court does finally revisit them, it will overturn them. Let me start by just listing the core free speech principles that the Supreme Court has consistently enforced in other areas, which are diametrically different from its rulings concerning obscenity and broadcast indecency.

First, the Court has stressed that “the bedrock principle underlying the First Amendment is that government may not restrict speech based on disapproval or dislike of its content.

Second, the Court has said that no criminal law may be based merely on the majority’s sense of morality. Therefore, even assuming that even the majority of our fellow citizens might be morally offended by obscene or indecent expression, that’s no justification for punishing it.

Third, in all other contexts, the Court has held that adults may not be denied access to expression for the sake of protecting children.

Fourth, in every other medium other than over-the-air broadcasts, the Court has held that indecent expression is constitutionally protected.

Fifth, the Court has protected all manner of expression that most people consider deeply offensive, harmful to children, and dangerous to society overall.

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Now I would like to expand a bit on the fourth and fifth points. The fourth point, again, is that in every other medium, other than over-the-air broadcasts, the Court has held that indecent expression is constitutionally protected. It has so held regarding expression transmitted by writing, in person, telephone, Internet, and cable. *Pacifica* and a couple of even older cases allowed more restriction of broadcasts on the ground that it is uniquely pervasive and accessible to children. That rationale was strongly contested even at the time. Moreover, since then, given the many technological changes, it has become even less persuasive, thus prompting calls to reverse *Pacifica* from wide-ranging critics, including even past FCC officials who previously supported it and Supreme Court Justices as ideologically diverse as Clarence Thomas and Ruth Bader Ginsburg. So far, though, these calls have been to no avail.

The fifth point, again, was that the Court has protected all manner of expression that most people consider deeply offensive. Examples include: hate speech, even cross burning; speech advocating crime and violence; speech that endangers national security; speech that is deeply insulting and upsetting, such as burning the American flag and strident anti-gay, anti-military, and anti-Catholic protests near military funerals. Some recent examples include: speech that depicts violent crimes, such as the depiction of torture of small animals; virtual child pornography; tobacco ads that are deliberately aimed at children; and violent video games sold to children. In every single one of these cases, the Court has consistently, and in my view correctly, held that government may censor expression only as a last resort, when the speech will inevitably cause great harm and no other measure, which is less speech suppressive, can avert that harm. The Court has consistently demanded evidence both that the speech does actual harm and that no less censorial measure will avert that harm.

In contrast, when it comes to indecency and obscenity, the Court has acknowledged that there is no evidence of harm. So, for example, in the 1973 *Paris* case, the narrow majority conceded, “[T]here are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men or women or their society.”\(^ {11}\) Nonetheless, these five Justices asserted that such material could still be banned based on what they unabashedly called “unprovable assumptions” about its negative impacts on the moral “tone” of “a decent society.”\(^ {12}\)

And finally, in addition to flying in the face of the Court’s free speech rulings in all other areas, this approach is also squarely incon-

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12. *Id.*
sistent with the Court’s landmark 2003 decision in *Lawrence v. Texas*. In that case, the Court overturned an anti-sodomy law that singled out same-sex sodomy. Even more fundamentally, *Lawrence* held that criminal laws may not constitutionally be based only on majoritarian views about morality. That holding provoked the fiercest tirade in Justice Scalia’s strident dissent. He rightly recognized that logically it would doom a whole host of laws, far beyond the discriminatory anti-sodomy law in *Lawrence* itself, and his list of endangered laws expressly included anti-obscenity laws. In fact, soon after the *Lawrence* decision, a federal judge did hold that it did spell the death knell for anti-obscenity laws, and while an appellate court overturned that ruling, it did not do so because it disagreed with this application of *Lawrence’s* rationale. Rather, the appellate court said that only the Supreme Court itself could directly apply its *Lawrence* holding to the obscenity context. And I’m cautiously optimistic that, before long, the Supreme Court will do just that.

I would like to briefly discuss the core problem with concepts such as obscenity and indecency, which is their inherent vagueness and subjectivity. In our wonderfully diverse society, we all have widely divergent views, ideas, and values, especially about what sexual expression is positive or negative for ourselves and for our own children. Therefore, we can’t responsibly delegate these inherently personal choices to anyone else, neither government officials nor our fellow citizens.

I want to describe a cartoon that well captures this reality. It shows three people in an art museum looking at a classic nude female torso, a fragment of an ancient sculpture, minus limbs. Each viewer’s reaction is shown in an air bubble. The first one thinks, “Art.” The second one thinks, “Smut.” And the third one thinks, “An insult to amputees.” In such an inescapably subjective, value-laden area, it’s inherently impossible to come up with clear guidelines. Accordingly, after its 1957 *Roth* decision, which carved out the obscenity exception from the First Amendment, the Supreme Court repeatedly tried and failed to come up with an objective standard for defining constitutionally-protected obscenity. The most famous line in the Court’s many unsuccessful efforts came from former Justice Potter Stewart, when he candidly confessed: “I cannot define it, but I know it when I see it.” Of course, the problem is that each and every one of us sees a different “it.” We individuals even have different perspectives about whether any particular expression has

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any sexual content at all. That fact is captured by the old joke about the man who sees every inkblot his psychiatrist shows him as wildly erotic, and when his psychiatrist says to him, “You’re obsessed with sex,” the man answers, “What do you mean I’m obsessed? You’re the one who keeps showing me all these dirty pictures.”

The problem with these irreducibly vague concepts—obscenity and indecency—is that enforcing officials will necessarily exercise their unfettered discretion according to their own subjective tastes or those of politically-powerful community members. This means that the enforcement patterns will be arbitrary at best, discriminatory at worst. At best, which particular expression will be deemed off limits will be completely unpredictable, which causes a chilling effect because no one wants to run the risk of punishment. As a result, people self-censor by not engaging in expression that might be deemed unacceptable to the powers that be. That self-censorship not only violates the free speech rights of all those who were deterred from speaking, but it also deprives the rest of us of the chance to hear valued, constitutionally protected speech.

Let me illustrate the arbitrary, unpredictable nature of obscenity and broadcast indecency enforcement by citing some recent FCC rulings. All of these were issued in one single order in which the FCC exercised its newly asserted power to punish even an “isolated” or “fleeting expletive.” However, the FCC has stressed that it won’t always punish such a word, because it has to exercise its discretion to take into account the entire context. Accordingly, the FCC held that “bullshit” was indecent, but that “dick” and “dickhead” were not. It held that “fuck ‘em” was indecent, but that “up yours” and “kiss my ass” were not. The FCC held that blues musicians’ use of “fuck” and “shit” in Martin Scorsese’s documentary film about them were indecent. But it held that actors’ uses of the very same words in the fictional film Saving Private Ryan were not. In response to these inevitably erratic rulings, no wonder we have seen so much self-censorship in broadcasting lately, including of material that most parents would probably consider valuable at least for their older children.

Whenever the government has this kind of essentially unfettered discretion, it will likely exercise that discretion in a manner that’s not only arbitrary but, even worse, discriminatory. Government officials will often single out expression that is produced by or appeals to individuals or groups who are relatively unpopular or powerless. It’s no coincidence that recent obscenity prosecutions have targeted expression of lesbian and gay sexuality as well as rap music by young African-American men. Likewise, the FCC’s crackdown on broadcasting indecency has disproportionately singled out non-mainstream, countercultural expression—
for example, the song *Your Revolution* by feminist rap artist Sarah Jones, not to mention the African-American blues musicians in the Scorsese documentary.

In conclusion, I’d like to again quote one of Washington State’s own preeminent defenders of freedom for sexual expression—along with David and Ron—Justice William O. Douglas. I’d like to quote a portion of Douglas’ dissent from the Court’s 1973 *Paris-Miller* cases upholding the obscenity exception. He captures the general First Amendment philosophy that should also apply to sexual expression in particular. He wrote:

“Obscenity”... is the expression of offensive ideas. There are regimes in the world where ideas “offensive” to the majority... are suppressed. There life proceeds at a monotonous pace. Most of us would find that world offensive. One of the most offensive experiences in my life was a visit to a nation where bookstalls were filled only with books on mathematics and... religion. I am sure I would find offensive most of the [material] charged with being obscene. But in a life that has not been short, I have yet to be trapped into seeing or reading something that would offend me.... [O]ur society... presupposes that... the individual, not government, [is] the keeper of his tastes, beliefs, and ideas. That is the philosophy of the First Amendment[.]


In closing, I would like to thank and salute Ron Collins and David Skover, as well as Al Bendich, for their valued and invaluable efforts to turn that philosophy into a reality.