2013

# Obscenity & Indecency Law: Why Howl Is Still Silenced Symposium - Mania: The Lives, Literature, and Law of the Beats: Session 2: The Law of Howl: Transcripts

Nadine Strossen
*New York Law School*



Recommended Citation
37 Seattle U. L. Rev. lxi (2013-2014)

# 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 long-time 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-

---

* Professor of Law, New York Law School. Strossen is the immediate past president of the American Civil Liberties Union (1991–2008). She has written, lectured, and practiced extensively in the areas of constitutional law, civil liberties, and international human rights. Among her more than 300 published works, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* was named by the *New York Times* as a "Notable Book" of 1995, and her co-authored work, *Speaking of Race, Speaking of Sex* (1995), was deemed an "outstanding book" by the Gustavus Myers Center for the Study of Human Rights in America. The National Law Journal has named Strossen one of "The 100 Most Influential Lawyers in America." For assistance with the footnotes, Professor Strossen gratefully acknowledges Julie Nociolo (NYLS '14).

1. Roth v. United States, 354 U.S. 476 (1957).

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 *Paris*[3] 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-

2. *Id.* at 487.
3. Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).
4. Miller v. California, 413 U.S. 15 (1973).
5. Memoirs v. Massachusetts, 383 U.S. 413, 419–20 (1966).

ly. 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

6. FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

7. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 492, 498 (1985).

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, ban-

8. *In re* Complaints Regarding Various Television Broadcasts Between February 2, 2002, and March 8, 2005, 21 FCC Rcd. 2664 (2006), *vacated in part*, 21 FCC Rcd. 13299 (2006), *vacated and remanded sub. nom.* Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007), *rev'd and remanded*, 556 U.S. 502 (2009), *on remand* 613 F.3d 317 (2d Cir. 2010), *vacated and remanded*, 132 S. Ct. 2307 (2012).

ning only specific words that were repeated many times, as in the Carlin monologue at issue, what the majority called a "verbal shock treatment."[9] 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 sexually suggestive drawings. CBS affiliates pulled a documentary about the

9. *Pacifica*, 438 U.S. at 761 (Powell, J., concurring).

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"[10] 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.

---

10. Texas v. Johnson, 491 U.S. 397, 414 (1989); *see also* United States v. Eichman, 496 U.S. 310, 319 (1990).

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-

11. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60 (1973).
12. *Id.*

sistent with the Court's landmark 2003 decision in *Lawrence v. Texas.*[13] 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,[14] 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.[15] 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-unprotected 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."[16] 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

13. 539 U.S. 558 (2003).

14. United States v. Extreme Assocs., Inc., 352 F. Supp. 2d 578, 595–96 (W.D. Pa. 2005), *rev'd*, 431 F.3d 150 (3d Cir. 2005).

15. *Extreme Assocs.*, 431 F.3d at 161–62.

16. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

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—

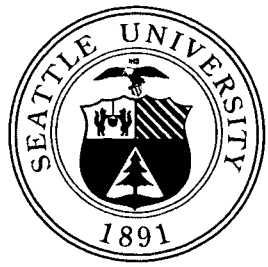
for example, the song *Your Revolution* by feminist rap artist Sarah Jones, not to mention the African-American blues musicians in the Scorsese documentary.

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[.][17]

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.

17. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 71–73 (1973) (Douglas, J., dissenting).




SEATTLE UNIVERSITY LAW REVIEW
901 12TH AVENUE
SULLIVAN HALL
BOX 222000
SEATTLE, WASHINGTON 98122-1090
PHONE: (206) 398-4275
FAX: (206) 398-4272
E-MAIL: SULAWREV@SEATTLEU.EDU
HTTP://LAWPUBLICATIONS.SEATTLEU.EDU/SULR

The *Seattle University Law Review* is published four times each year (fall, winter, spring, and summer) by the students of the Seattle University School of Law.

Unsolicited manuscripts, including responses, are welcome. Please address all submissions to the Editor in Chief at the above address.

The Law Review generally follows citation guidelines from *The Bluebook: A Uniform System of Citation* (19th ed. 2010).

*Subscriptions*

The subscription rate for four issues is $28 per year (plus tax for Washington residents). For a subscription, contact the Law Review office at the above address or telephone number. Subscriptions are automatically renewed at the end of each year.

*Back Issues*

Back issues of the Law Review are available on either a single issue or volume basis.

Order back issues directly from William S. Hein & Co., Inc., 2350 North Forest Rd., Getzville, New York 14068. Phone: (800) 828-7571.

---

*Host, National Conference of Law Reviews 2003*

THIS PUBLICATION WAS PREVIOUSLY KNOWN AS
THE UNIVERSITY OF PUGET SOUND LAW REVIEW (VOLS. 1–17)

# SEATTLE UNIVERSITY LAW REVIEW

VOLUME 37 FALL 2013 NUMBER 1

# Seattle University School of Law

*President of the University*
STEPHEN V. SUNDBORG, S.J., S.T.D.

*Executive Vice President*
TIMOTHY P. LEARY, PH.D.

*Provost*
ISIAAH CRAWFORD, PH.D.

*Chief Financial Officer/Vice President for Finance & Business Affairs*
CONNIE KANTER, M.B.A.

*Vice President & University Counsel*
MARY SAVILLA PETERSEN, J.D.

*Interim Vice President for Student Development*
MICHELE MURRAY, PH..D

*Vice President for Mission & Ministry*
PETER ELY, S.J.

*Vice President for University Advancement*
MARY KAY MCFADDEN, M.B.A.

*Vice President for University Planning & Vice Provost*
ROBERT DULLEA, PH.D.

*Vice President for Enrollment Management*
MARILYN CRONE, M.B.A

*Vice President for Human Resources & University Services*
GERALD HUFFMAN, B.A.

*Assistant to the President*
KATHY K. YBARRA, M.ED.

*Board of Trustees of the University*

MOHAMED ALABBAR
RODNEY A. BENCH
ROBERT H. BLAIS
MARK G. BOSCO, S.J.
DAVID W. BURCHAM
PETER W. CHIARELLI
THOMAS A. ELLISON
ANNE V. FARRELL, *Emeritus*
MARTA DALLA GASPERINA
ALLAN C. GOLSTON
DONALD J. HOROWITZ
W. CRAIG JELINEK
PATRICK M. KELLEY, S.J.
MAUREEN LEE, *Secretary*
THOMAS M. LUCAS, S.J
MICHAEL C. MCCARTHY, S.J.
GORDON A. MCHENRY, JR.
JOHN W. MEISENBACH, *Emeritus*
CAROL K. NELSON
WILLAM A. OWENS
NICOLE W. PIASECKI
ROBERT A. RATLIFFE
RICK C. REDMAN
STUART T. ROLFE, *Vice Chair*
PETE J. ROSE
DAVID SABEY
JAMES D. SINEGAL, *Emeritus*
STEPHEN V. SUNDBORG, S.J., *Ex Officio*
STEVENS U. TRAINER
JOHN H. VASSALL, II
JILL A.WAKEFIELD
ERIC WATSON, S.J.
BETTY WOODS, *Chair*
JEFFREY J. WRIGHT
ANN WYCKOFF, *Emeritus*

*Board of Regents*

MARY LOU AMEN
MARIA BARRIENTOS
MARY HELEN BEVER
ROBERT BRENNAN
MAUREEN BROTHERTON
PATRICIA BUCHSEL
BRIAN L. COMSTOCK
CHRISTOPHER J. CORR
JOHN J. COSTELLO
JOYCE M. COX, B.V.M.
HON. ANITA CRAWFORD-WILLIS
SALAH DANDAN
MICHAEL G. DANIELS
PETER ELY, S.J. , *Ex Officio*
MICHAEL O. EVERED
RONALD J. GIUFFRE
JEFFREY C. GRANT
TIMOTHA HOLLOMON
STEVEN D. HULING
JAMES P. JORGENSEN
ADAM B. JUSSEL
DIANE SIDERIUS KOCER
WELDON L. LEONARDSON, *Chair*
MARY KAY MCFADDEN
MAURICE J. MCNAMEE
CAROL V. PENNY
JUDY L. ROGERS
KATHLEEN H. SCHAFER
PAUL A. STOOT
STEPHEN V. SUNDBORG, S.J., *Ex Officio*
VENERRIA LUCAS THOMAS
MARK R. WESLEY
DEBORAH WILDS

*Dean of the School of Law and Professor of Law*
ANNETTE CLARK, B.A., J.D., M.D.

*Associate Deans*

*Associate Dean for Academic Affairs*
PAUL HOLLAND, B.A., J.D., LL.M

*Associate Dean for Finance & Administration*
RICHARD BIRD, B.B.A., M.B.A.

*Associate Dean for Strategic Planning & Mission*
JOHN B. KIRKWOOD, A.B., M.P.P., J.D.

*Associate Dean for Student Affairs*
DONNA CLAXTON DEMING, B.A., J.D.

*Associate Dean for Research & Faculty Development*
NATASHA MARTIN, B.S., J.D.

*Associate Dean for Library & Educational Technology*
KRISTIN A. CHENEY, B.S., M.L.S., J.D.

*Assistant Deans*

*Assistant Dean for Admissions*
CAROL COCHRAN, B.A., M.N.P.L.

*Assistant Dean, Center for Professional Development*
SHAWN LIPTON, B.A., J.D.

*Assistant Dean for Student Financial Services*
KATHLEEN KOCH, B.A., M.A.

*Professors of Law*

JANET AINSWORTH, B.A., M.A., J.D.,
*John D. Eshelman Professor of Law*
STEVEN BENDER, B.S., J.D.
MARILYN J. BERGER, B.S., J.D., *Emeritus*
JAMES E. BOND, A.B., J.D., LL.M., S.J.D., *Emeritus*
ROBERT S. CHANG, A.B., M.A., J.D.
MARK A. CHINEN, B.A., M.DIV., J.D.
MARGARET CHON, A.B., M.H.S.A., J.D.,
*Donald & Lynda Horowitz Professor for the Pursuit of Justice*
ANNETTE CLARK, A.B., J.D., M.D., *Dean*
SIDNEY DELONG, B.A., J.D., *William C. Oltman Professor of Teaching Excellence*
JOHN EASON, B.S., J.D., LL.M.
DAVID E. ENGDAHL, A.B., LL.B., S.J.D., *Emeritus*
SHELDON S. FRANKEL, B.A., J.D., LL.M., *Emeritus*
CARMEN G. GONZALEZ, B.A., J.D.
LILY KAHNG, A.B., J.D., LL.M.
JOHN B. KIRKWOOD, A.B., M.P.P., J.D.
W.H. (JOE) KNIGHT, B.A., J.D.
PAULA LUSTBADER, B.S., J.D., *Director, ARC Program*
TAYYAB MAHMUD, B.A., M.SC., M.A., J.D., PH.D.
HENRY W. MCGEE, JR., B.S., J.D., LL.M.
JOHN B. MITCHELL, B.A., J.D.
LAUREL CURRIE OATES, B.A., J.D.
CHARLES R.T. O'KELLEY, B.A., J.D., LL.M.
CATHERINE O'NEILL, B.A., J.D.
MARK REUTLINGER, A.B., J.D., *Emeritus*
RICHARD SETTLE, B.A., J.D., *Emeritus*
JULIE SHAPIRO, B.A., J.D.
DAVID M. SKOVER, A.B., J.D.
*Frederic C. Tausend Professor of Law*
RONALD C. SLYE, B.A., M. PHIL., J.D.
JOHN W. WEAVER, A.B., J.D.
KENNETH R. WING, B.A., M.P.H., J.D., *Emeritus*

*Associate Professors of Law*

BRYAN ADAMSON, B.S., PH.B., M.A., J.D.
J.D.DEBORAH AHRENS, B.A., M.P.P., J.D.
THOMAS ANTKOWIAK, B.A., J.D.
DAVID BOERNER, B.S., LL.B., *Emeritus*
DEIRDRE BOWEN, B.A., J.D., PH.D.
MELINDA J. BRANSCOMB, B.A., J.D., *Emeritus*
LISA BRODOFF, B.A., J.D., *Director*
*Ronald A. Peterson Law Clinic*
BROOKE COLEMAN, B.A., J.D.
CHRISTIAN MUKUNDA HALLIBURTON, B.A.,
PAUL HOLLAND, B.A., J.D., LL.M.
WON KIDANE, LL.B., LL.M., J.D.
NATASHA MARTIN, B.S., J.D.
RUSSELL A. POWELL, B.A., J.D., M.A.
ANDREW SIEGEL, B.A., M.A., J.D.
GREGORY M. SILVERMAN, A.B., M.A., J.D., M. PHIL.
DEAN SPADE, B.A., J.D.
JOHN A. STRAIT, B.A., J.D

*Assistant Professors of Law*

CHARLOTTE GARDEN, B.A., J.D., LL.M.
ANNA ROBERTS, B.A., M.A., J.D.
DIANE LOURDES DICK, B.A., J.D., LL.M.

*Clinical Professors*

BETSY HOLLINGSWORTH, B.A., J.D., *Emeritus*
RAVEN LIDMAN, B.A., J.D., *Emeritus*

*Professors of Lawyering Skills*

ANNE M. ENQUIST, B.A., B.S., M.A.T.,
*Director, Legal Writing Program*
J. CHRISTOPHER RIDEOUT, B.A., M.A., PH.D.,
*Associate Director, Legal Writing Program*
LORRAINE K. BANNAI, B.A., J.D.

*Associate Professors of Lawyering Skills*

GILLIAN DUTTON, B.A., M.A., J.D.,
*Director, Externship Program*
CONSTANCE KRONTZ, B.S., J.D.
MARY BOWMAN, B.A., J.D.
JANET K.G. DICKSON, B.A., J.D., LL.M.
SARA RANKIN, B.A., J.D., M.ED
MIMI SAMUEL, A.B., J.D.

*Access to Justice Institute*
DIANA SINGLETON, B.A., J.D., *Director*

*Alumni Relations*
FE LOPEZ, B.A., J.D., *Director*

*Adolf A. Berle, Jr. Center on Corporations, Law & Society*
CHARLES R.T. O'KELLEY, B.A., J.D., LL.M., *Director*

*Center for Global Justice*
TAYYAB MAHMUD, B.A., M. SC., M.A., PH.D., J.D., *Director*

*Fred T. Korematsu Center for Law & Equality*
ROBERT S. CHANG, A.B., M.A., J.D., *Executive Director*
LORRAINE K. BANNAI, B.A., J.D., *Director*

*Center for Indian Law & Policy*
DOUGLAS NASH, B.A., J.D., *Director*

*Professional Librarians*

KRISTIN A. CHENEY, B.S., M.L.S., J.D.,
TINA S. CHING, B.A., J.D., M.L.I.S.
KERRY FITZ-GERALD, A.B., M.A., J.D., M.L.I.S.
KELLY KUNSCH, B.A., M.L.S., J.D.
ROBERT MENANTEAUX, A.B., M.A., M.L.S.
KENT MILUNOVICH, B.A., M.L.I.S., J.D.
KARA PHILLIPS, B.A., M.A., M.L.S., J.D.
BARBARA SWATT ENGSTROM, B.A., M.L.I.S., J.D.
STEPHANIE WILSON, B.S., M.L.S., J.D.

*Visiting Faculty*

SARA AINSWORTH, B.A., J.D.
DENISE KNAPP, B.A., J.D.
KARENA RAHALL, B.A., M.A., J.D.
TRACEY ROBERTS
WILLIAM SHERMAN, B.A., J.D.
DENIS STEARNS, B.A., J.D.
TARA URS, B.A., J.D.
GEORGE VAN CLEVE, B.A., J.D., PH.D.

*In Residence*

JOAQUIN AVILA
*Distinguished Practitioner*
HON. TERRENCE CARROLL
*Distinguished Jurist*
RONALD CLARK
*Distinguished Practitioner*
ERIC D. EBERHARD
*Distinguished Practitioner*
HON. CHARLES JOHNSON
*Distinguished Jurist*
MARGARET FISHER
*Distinguished Practitioner*
THOMAS FISCHER
*Distinguished Academic*
HON. MARY I. YU
*Distinguished Jurist*