

EXHIBIT 1

People v. Bruce, Unpublished Trial Court Opinion,
New York Criminal Court, November 4, 1964.

People v. Bruce

Unpublished Trial-Court Opinion
New York Criminal Court
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Chief Justice John M. Murtagh,
Justice James R. Creel, &
Justice Kenneth M. Phipps

reversed as to Howard Solomon in
People v. Solomon, 26 N.Y.2d 621, 255 N.E.2d 720 (1970)

Criminal Court Opinion per Curiam

(MURTAGH, P.J., and PHIPPS, J.)

[followed by dissenting opinion of CREEL, J.]

By an information filed on April 3, 1964, the defendants Lenny Bruce and Howard L. Solomon were charged in two separate counts with giving an indecent performance in violation of Section 1140-a of the Penal Law at the Cafe Au Go Go in New York County at 12:01 a.m. and 10 p.m. on April 1, 1964. By an information filed on June 2, 1964, the defendants Ella Solomon and Lenny Bruce were charged with a similar violation on April 7, 1964. The performances are hereinafter referred to as the first, second, and third performances, respectively. The two informations, by consent, were consolidated and tried together, commencing on June 16, 1964 and ending on July 28, 1964.

At the beginning of the trial, motions were made to dismiss the informations on the ground that Section 1140-a of the Penal Law is unconstitutional. At the end of the trial, these motions were renewed and appropriate motions were made to dismiss the informations on the ground that the People had failed to prove the defendants guilty beyond a reasonable doubt. After having considered all of the evidence and after due deliberation, all of these motions are denied as to each count, and the Court, Judge Creel dissenting, finds the defendants Lenny Bruce and Howard L. Solomon guilty as charged. The Court by unanimous vote finds the defendant Ella Solomon not guilty.

All three performances of the defendant Lenny Bruce were obscene, indecent, immoral, and impure within the meaning of Section 1140-a of the Penal Law. While no tape is available as to the first performance, this monologue, according to the testimony, was essentially the same as that of the second and third performances. In the latter

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two performances, words such as "ass," "balls," "cock-sucker," "cunt," "fuck," "mother fucker," "piss," "screw," "shit," and "tits" were used about one hundred times in utter obscenity. The monologues also contained anecdotes and reflections that were similarly obscene. For example:

1. Eleanor Roosevelt and her display of "tits." (1st performance; transcript of 3rd performance at p. 27)
- ✓ 2. Jacqueline Kennedy "hauling ass" at the moment of the late President' sassassination. (transcript of 2nd performance at p. 22; transcript of 3rd performance at p. 13)
3. St. Paul giving up "fucking." (1st performance; transcript of 2nd performance at p. 12; transcript of 3rd performance at p. 19)
4. An accident victim—who lost a foot in the accident—who made sexual advances to a nurse, while in the ambulance taking him to the hospital. (1st performance; transcript of 2nd performance at p. 25)
5. "Uncle Willie" discussing the "apples" of a 12-year old girl. (transcript of 2nd performance at p. 20; transcript of 3rd performance at p. 12)
- ✓ 6. Seemingly sexual intimacy with a chicken. (transcript of 2nd performance at p. 25)
- ✓ 7. "Pissing in the sink" and "pissing from a building's ledge. (transcript of 2nd performance at p. 24; transcript of 3rd performance at p. 15)
8. The verb "to come" with its obvious reference to sexual orgasm. (1st performance)

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9. The reunited couple discussing adulteries committed during their separation, and the suggestion of a wife's denial of infidelity, even when discovered by her husband. (1st performance; transcript of 2nd performance at p. 29)
10. "Shoving" a funnel of hot lead "up one's ass." (transcript of 2nd performance at p. 22; transcript of 3rd performance at p. 13)
- ✓ 11. The story dealing with the masked man, Tonto, and an unnatural sex act. (1st performance)
12. Mildred Babe Zaharias and the "dyke profile of 1939." (transcript of 3rd performance at p. 27)

During the first performance Bruce fondled the microphone stand in a masturbatory fashion. In the second performance, while telling of an act of exposure, Bruce turned his back to the audience and moved his hand outward and upward from below his waist in an obvious and crude pantomime of an act of exposure and masturbation.

The dominant theme of the performances appealed to prurient interest and was patently offensive to the average person in the community, as judged by present day standards. The performances were lacking in "redeeming social importance."

The monologues were not erotic. They were not lust-inciting but, while they did not arouse sex, they insulted sex and debased it. Chief Judge Desmond of the Court of Appeals observed in *People vs. Fritch*, 13 N.Y. 2d 119, 127 (1963):

"Surely, 'prurient' has not the limited meaning of lust inciting, otherwise a picture or film could escape the ban by being so disgusting as to make sex seem nauseating and vile. Indeed, the first and oldest meaning of 'obscenity' is filthy and disgusting."

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And Ephraim London, Esq., who represented the defendant Bruce during the trial, has said:

"It's not always what arouses sexual desires that is considered obscene. One of the opinions of our court here has been that what is obscene is what insults sex and debases it, not what arouses it. That's a rather important distinction." (see New York Post Magazine of July 5, 1964, page 6, column 3)

Professor Louis Henkin of Columbia Law School, writing in 63 Colum. L. Rev. 391, 392 (1963), on "*Morals and the Constitution: The Sin of Obscenity*," states that not only the eroticism but filth is actionable obscenity:

"For one instance—too often concealed by the emphasis on sex in discussions about obscenity—the accepted definition of obscenity includes not only the sexual but the scatological. Surely the latter does not lead to any unlawful act: it may be emetic; it is not aphrodisiac."

The Bruce performances clearly insulted and debased it. They were obscene, indecent, immoral, and impure. The monologues contained little or no literary or artistic merit. They were merely a device to enable Bruce to exploit the use of obscene language. They were devoid of any cohesiveness. They were a series of unconnected items that contained little of social significance. They were chaotic, haphazard, and inartful. The Supreme Court of the United States in *Roth v. United States*, 354 U.S. 476 (1957) said at p. 488, footnote 20:

"We perceive no significant difference between the meaning of obscenity developed in the case law and

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the definition of the ALI Model Penal Code Sec. 207.10 (2) (tent. draft no. 6, 1957) viz.: 'a thing is obscene if, considered as a whole, its predominant appeal is to purient interests i.e., *a shameful or morbid interest in nudity, sex, or excretion*, and if it goes substantially beyond customary limits of candor in description or representation of such matters.' '' (emphasis supplied)

Section 1140-a of the Penal Law is not unconstitutional as contended by the defendants. The statute was before the Court of Appeals in *People v. Wendling*, 258 N.Y. 451 (1932), and though the conviction there involved was reversed, the Court did not declare the statute unconstitutional.

The defendant Howard L. Solomon is equally guilty with the defendant Lenny Bruce. As an officer and director of the Cafe Au Go Go, he *actively participated* in the presentation of the performances. His guilt is no less than that of the performer.

The defendant Ella Solomon's participation was more limited, being essentially confined to assisting her husband. The Court has a reasonable doubt as to her guilt and therefore finds her not guilty.

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("Unrevised and Uncorrected. Not for Publication")

Two informations charging the defendants with giving obscene shows on April 1st and April 10th at Au Gogo, owned and operated by the defendants Howard and Ella Solomon, were joined for trial alleging violation of Section 1140A of the Penal Law which provides in part: "A person who in any capacity gives, etc. any obscene, indecent, immoral or impure exhibition, show or entertainment or

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any portion thereof which would tend to the corruption of the morals of youth or others shall be guilty of a misdemeanor." It should be noted there was no proof of the presence of any youths or minors at either of the performances in question, and the prosecution based its case upon the contention that the said performances tended to the "corruption of others," presumably adults.

During this trial we received and heard testimony as to the monologue performances of the defendant, Lenny Bruce, which are the subject matter of this proceeding, not only by the conventional past recollection recorded method of the pre-electronic era, but also tape-recordings and stenographic transcripts thereof were heard and formally received into evidence.

Throughout this trial we heard much testimony from many sources in an effort to ascertain the "contemporary community standards" as to obscenity, as indeed the directives of higher courts required. (People vs. Finklestein, 1961, 11 N.Y. 2d 300. People vs. Roth, 354 U.S. 476). But in a total absence of any guideposts or other directives from such higher courts, I fear we have proceeded not unlike an explorer plunged into a vast uncharted virgin area in pursuit of a mirage or some fabled lost golden city. In this quest, the time honored rules of evidence proved to be something of a highly unsuitable encumbrance, and the judicial process revealed itself as a most limited and inadequate, if not improper, tool for this task. We have received, in spite of uncertainty and doubt as to competency, *all* expert testimony offered by either side on the matter of "community standards", although we were not insensitive to the fact that each such expert was qualified to testify as to standards of only a comparative small, even minute, segment of the vast, varied and diverse overall community. Nor were counsel able to advise from the directive opinions of higher courts whether the "community

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standard'' we sought was that of metropolitan New York or of the nation. In the matter of cross-examination of this mass of expert testimony so liberally received, in spite of doubtful competency, we decided that it would be well to allow most liberal cross-examination, with the result that the doubt became a near certainty. We have done the best that we collectively could, but may I suggest that the state of this record cogently proves that trial courts which will be required to inquire into the matter of "community standards" will be in great need of guideposts and directives from the higher courts, as well as some definition of just what that phrase really means.

From the mass of this testimony we unanimously find the following to be the facts: 1. That in each of the public performances herein involved the defendant, Lenny Bruce, made a studiedly offensive and deliberately insulting use of a mass of most vulgar and erotic words of the English and Yiddish vernaculars in an attention and publicity seeking effort to profit by his insults to the standards of the many portions of the New York community as to decency, propriety, decorum, good manners and good speech. 2. That the manner and methods of expression used by the defendant, Lenny Bruce, in the public performances herein involved is unique among all performers known to any of the many witnesses presented as experts, in that he not only made an unequaled use of vulgar and erotic words but also a nonerotic use of such erotic and vulgar words. 3. That all the witnesses presented as experts, as to those segments of the community in which they qualified as experts, agreed that the standards thereof would not condone the use of a style or manner of vulgarity for vulgarity alone nor shock for the sake of shock alone. That even the most sophisticated and/or jaded tastes would condemn vulgarity and shock if the only end was vulgarity and shock (and profit). 4. That the defendant, Lenny Bruce, in the performances in question, after open public discussion of

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the present state of law as to obscenity, made a calculated use of vulgarity for vulgarity's sake alone, and pitched these public performances to the very lowest marginal boundary of the presently legally protected areas of expression. 5. That the said performances of Lenny Bruce were lacking in any artistic, literary, scientific, educational or other value or merit; but nonetheless some critics, writers, publishers, teachers, etc. of stature, testified that the said performances did have some critical value. To these unanimous findings of fact I for myself and myself alone do most earnestly believe that there should be added some questions as to the suitability and propriety of attempting to set community standards as to obscenity by the judicial process and by judges. It should be clearly understood that which follows are questions I put, and should there be any judicial indignation from higher sources it should not be directed at my fellow judges in this case.

I would suggest that it is most doubtful that there is in fact such a thing as "a community standard" as to obscenity in such a diverse and varied metropolitan areas as New York, or in the even more diverse and varied national community, unless it exists in the predilections of such jurists as have laid down such a precept and have also laid down such predilection as such precept. A very large measure of judicial subjectivity is inherent in the determination of obscenity by the judicial process and by judges, and it is suggested that this phrase "community standard" is most probably but another robe to cloak the extent to which the judiciary, which has been forced to reshape and mold the law as to obscenity, exercise the powers of super-legislators as indeed of absolute monarchs.

I suggest that Bench and Bar should not be unmindful that there are grave limitations in the two-sided judicial process (and in the judiciary who can properly function only through that process) in dealing with such many and

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multiple-sided social problems, of which obscenity is but of very minor stature among those graver social-policy problems, with which the judiciary to today is required to deal. The limitations of the judicial process do not permit of adequately informing the judiciary of many facets of such social problems; the process does not permit the judiciary to call and examine all witnesses who are best informed as to the particular problem presented, nor make any provisions for adequate notice, nor an opportunity for those effected to be heard (in what is only a *private litigation*), though the decision and opinion of that private litigation may profoundly effect hundreds of thousands of persons, and indeed even alter or amend the basic law, the Constitution. I take the liberty of suggesting that periodic Constitutional Conventions provided for in Article 5 of the Constitution of the United States affords a much more appropriate, adequate and articulate means of solving all such social-policy problems or of ever changing society, than does the judicial process, which even in this small matter of the determination of what is obscenity and community standards relating thereto has on the record of this trial demonstrated most grave limitations.

The failure of our society to make any use of the Article 5 Constitutional Convention means of meeting change, during an era of rapidly developing problems, coupled with the failure or refusal of all branches of government, other than the judiciary, to move to meet the need for change, have placed upon the limited judicial process not only gravely inappropriate strains, but have brought about a most ironic evolution in the Federal Constitution. That Constitution started as the end product of a Revolution against the Tyrant George III. But it has now developed so as to place the judiciary in much the same position of ultimate power once held by that Hereditary Magistrate in Colonial times, or not unlike that held by the Delphic Oracle in the ancient Greek world. And most ironically

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the voice of the Sovereign People is muted into inarticulate impotence once the judiciary has rendered an opinion declaring the matter before it of constitutional import, whether it is obscenity or other vastly more vital social policy problems. This evolution has forced the judiciary out of the realm of pure law where it is strong, into the arena of policy and politics where it is weak, but yet where its decisions have tremendous force on politics; i.e. the Dred Scott decision (Scott vs. Sandford, 1857. 19 now 393) wherein the holding and dicta "cut off the hope of a settlement by the authority of Congress of the pending disputes over slavery and its extension and did much to precipitate the Civil War." Lord Bryce, *The American Commonwealth*, Volume 1, Page 351. While the judicial process is a very finely finished instrument for the solution of purely legal controversies for which it was fashioned, it is suggested it may be a dangerous or at best a most clumsy tool when used to solve problems of policy or politics. Can there be rational doubt that there is a better method of finding a community standard as to obscenity (or solving other graver social problems) than this limited judicial process and Judges, who are subjected to an almost endless stream of gaseous hot air and some smoke from counsel's arguments, briefs, records, etc., which swirl around judicial benches not unlike those gaseous volcanic emissions which enveloped the Delphic Oracle of old? Has not human knowledge, science and the art of self-government made more substantial progress? The currently prevailing and controlling law as to obscenity has been laid down in two very recent decisions of the Court of Appeals, and in a series of United States Supreme Court decisions handed down during the hearing of testimony in this case. These decisions are clearly interrelated and collectively they have materially changed and lowered the legal standards as to obscenity which heretofore were recognized by the law.

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The Court of Appeals decisions are *People vs. Bookcase, Inc.*, N.Y. Leo Larkin, Corporation Counsel, et al vs. Putmans' Sons N.Y. The decision of the United States Supreme Court are *Grove Press, Inc. vs. Gerstein*, June 22, 1964. *Tralins vs. Gerstein*, U.S. June 22, 1964. *Jacobellis vs. Ohio*, U.S. June 22, 1964. It is noted that to the majority holdings of the Court of Appeals there were strong cogent dissents by Chief Judge Desmond, Trial Judges Burke and Scileppi. The stinging, scalding and caustic dissenting opinion of Chief Judge Desmond (*Larkin vs. Putnams' Sons*) to the effect that "into the law itself there has come from nowhere a new constitutional theory which licenses the most unrelieved sexual filth" did not deter the majority of his court from holding that "we are bound", "we must respect", "must follow", the decisions of the Supreme Court of the United States.

Would it be too highly unseemly, at this level, to make some factual inquiry as to whence came this "new constitutional theory" which, as it is alleged, licenses unrelieved sexual filth and "has come from nowhere"? Is it founded upon such a firm foundation as to compel that compliance which the majority of the Court of Appeals has rendered; or is it based upon such fallacy, mathematically demonstrable fallacy, if not fraud, apparent upon the face of the public record, as to call its validity in to most serious question, as indeed having "come from nowhere"? Did not this new constitutional theory find its earliest pronouncement in the dicta of Chief Justice Hughes some thirty-five years ago to the effect that "It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process of the 14th Amendment from invasion by state actions" (*Near vs. Minnesota*, 483 U.S. 697, 707) and is it not in the words of the August Tribunal, "Too familiar for citation that such has been

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the doctrine of this Court (United States Supreme Court) ever since." *Smith vs. California*, 361 U.S. 147.

If this "new constitutional theory which licenses sexual filth" is based upon the assumed validity of the 14th Amendment, may a lowly Judge inquire if as a matter of public record, on the very fact of the certification by William H. Sewart does it not appear that the states of Ohio and New Jersey withdrew and rejected ratification of this proposed amendment, and does it not appear as a mathematical certainty that the amendment failed of that ratification by three-fourths of the States as required by the Constitution of the United States; and does it not appear that said certification of ratification is therefore false, if not fraudulent? (See 15 Statutes at Large, 706-7 with which compare 15 Statutes at Large, 709.) May it be asked, if this defect in the ratification of the 14th Amendment can be cured by unilateral action of any one of the various departments of government; or can this defect be remedied only by one of the two methods outlined in Article 5 of the Constitution of the United States? Are judicial decisions such as *Leser vs. Garnet*, 258 U.S. 130 (1922), *Georgia vs. Stanton*, 6 Wall 50 (1867) which have treated of the invalidity of the alleged ratification of the 14th Amendment not only self-serving but an effort to raise by its own boot straps this questioned validity, i.e. exercising the very power in question to solve the issue of the validity of that power? Can judicially declared doctrines as to "historic precedent" as a type of statute of limitations, or "political action" cure a fraudulent defect in ratification appearing as a matter of mathematical certainty on the face of the official record? Is it not better that the issue as to the validity of the ratification of the 14th Amendment be raised and resolved in connection with the mild bland subject matter of obscenity rather than with subjects which arouse passion and violence? If the questionable constitutionality of the course being pursued by the Judiciary has been un-

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derstood, is it not hence forth the duty of the Judiciary to declare it, and is it not also the duty of all departments of governments and of the sovereign people to take prompt actions to shore up the foundations of much that is beneficial law based upon this questionable foundations? And, finally, may it be suggested that the heretofore never yet used provisions of the Constitution of the United States, namely, the convoking of the Constitutional Convention as the Founding Fathers suggested in Article 5 of the Constitution of the United States would not be the most appropriate means of shoring up the faulty foundations of the questionable validity of the 14th Amendment?

If the 14th Amendment is of questionable validity then the Federal Court decisions as to obscenity may well have no more compelling binding force upon the courts of New York or any other State than that comity which one court usually gives to the wisdom of another. But in any determination of obscenity in this case, we of this court are most certainly bound and must follow the decisions of the Court of Appeals of New York.

As stated above the two decisions of the Court of Appeals handed down during the hearing of testimony in this case have reshaped and remoulded the law of this state as to obscenity. In *Larkin vs. Putman's Sons* that Court held that because "some critics, writers and teachers of stature testified at the trial" that the alleged obscene matter "has merit, and the testimony as a whole showed differences of opinion as to its value—it does not warrant suppression" and apparently it was not obscene as a matter of law. By this standard the performances of Lenny Bruce which are the subject matter of this trial cannot be held to be obscene, since indeed a number of critics, writers, publishers, etc. did testify that these performances did have merit, though there was the greatest diversity of opinion as to its critical values or indeed as to its comprehensibility, aside from its vulgarity.

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In the second very recent decision of the Court of Appeals, *People vs. Bookcase, Inc.* it was held that a very recent statutory enactment designed to protect minors under eighteen years from the purveyors of pornography for profit of that "which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality", namely Penal Law 484B, was unconstitutional, as too vague for enforcement, the majority opinion used the words "so broad and so obscure in its coverage as to abridge the constitutionally protected freedom." That statute, thus stricken down, was the result of a very long, most intensive, and careful legislative study by the Legislature of New York State, and it was far more precise and definite statute in its terms and provisions than the older broader termed and less explicit statute on which the prosecution of these defendants is based. If that most precisely drafted statute is thus unconstitutional it must follow that the far less precise provisions of Penal Law 1140A are likewise unconstitutional. It must be so held.

Accordingly the performances of Lenny Bruce here in question are found to be not obscene, and the demurrers and motions to dismiss made by defense counsel at the inception of this case, and renewed periodically throughout the trial, based on the grounds that Penal Law 1140A is unconstitutional, are sustained and granted. If this nihilistic state of Judge-made-law as to obscenity is found unsuited to the needs of the citizenry in their efforts to establish a more perfect society, that citizenry should not be unmindful of the fact that under the Constitution of the United States it is the citizenry who are the ultimate and final sovereign, *not* the judiciary; and that under the procedures provided in Article 5 of the Constitution, and particularly by occasional Constitutional Conventions, the citizenry have the right and the power and the duty to find a more perfect expression of the law.