



Davis Wright Tremaine LLP

ANCHORAGE BELLEVUE HONOLULU LOS ANGELES NEW YORK PORTLAND SAN FRANCISCO SEATTLE SHANGHAI WASHINGTON, D.C.

ROBERT CORN-REVERE
Direct (202) 508-6625
bobcornrevere@dwt.com

SUITE 450
1500 K STREET, NW
WASHINGTON, D.C. 20005-1272

TEL (202) 508-6600
FAX (202) 508-6699
www.dwt.com

May 20, 2003

The Honorable George E. Pataki
Governor, State of New York
State Capitol
Albany, New York 12224

Dear Governor Pataki:

Pursuant to Article IV, Section 4 of the New York Constitution, Ronald K.L. Collins and David M. Skover,¹ First Amendment scholars and co-authors of *THE TRIALS OF LENNY BRUCE* (Sourcebooks, Inc. 2002), respectfully request that you issue an order posthumously pardoning comedian Lenny Bruce for his November 4, 1964 conviction for violating Section 1140-A of the New York Penal Law. Mr. Bruce never perfected an appeal of his conviction, and the possibility of his doing so was forever cut off by his untimely death on August 3, 1966. This petition asks the State of New York to correct this historical anomaly and to proclaim its support for freedom of expression as guaranteed by the First Amendment to the United States Constitution and Article I, Section 8 of the New York Constitution.

INTRODUCTION

On November 4, 1964, Leonard Alfred Schneider – known to the world as Lenny Bruce – was convicted of violating a New York obscenity law for giving an “indecent performance” during three stand-up comedy performances the previous Spring at the Café Au Go Go in New York. These were not “sex shows” and Bruce was

¹ Ronald Collins is a scholar at the First Amendment Center in Arlington, Virginia. David Skover is a law professor at Seattle University. Both have taught and written on First Amendment law, with publications in the *Harvard*, *Stanford* and *Texas Law Reviews*, among other scholarly journals.



not charged with committing sex acts on stage. Nor did the court find the comic's routines to be "lust-inciting" or "erotic." Quite to the contrary, a majority of the presiding judges held that Lenny Bruce should be convicted for the mere use of language that they believed "insulted sex and debased it."² In all of New York's history, this is the only criminal conviction concerning *spoken words* in a nightclub.

Such a criminal case is as unthinkable today as are the prosecutions of popular books that occurred during the same era. Even more unfathomable is the zealotry with which the State of New York pursued the case. The three performances resulted in six criminal counts against Lenny Bruce and the club owners and a trial that was spread over six months – from June 16 to December 21, 1964. Thirty witnesses testified at the trial, and the proceedings generated over 2,000 transcript pages, counting the pretrial phase. All of this to prosecute a *misdemeanor* offense involving a nightclub performance before an audience of consenting adults.

Today, comedy clubs are considered free speech zones, and the monologues that prompted New York to prosecute and convict Lenny Bruce would never be considered obscene. The fact that this conviction remains on the books is an affront to cherished constitutional protections, even as they were being defined in the 1960s, and it is inconceivable under current law. This Petition for a posthumous pardon for Lenny Bruce asks only that the State of New York officially correct this past mistake, and put itself on the right side of history in a society dedicated to freedom of speech. As the United States Supreme Court made clear over three decades ago, "the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us" because it is "often true that one man's vulgarity is another's lyric." *Cohen v. California*, 403 U.S. 15, 25 (1971).

WHY THIS PETITION IS IMPORTANT

It has been 39 years since the State of New York convicted Lenny Bruce for his performances at the Café Au Go Go, and 37 years since the comedian's death, yet the need to vindicate his innocence is now as compelling as ever. At this moment in history, as the United States seeks to instruct the rest of the world about what it means to be a free society, it is vital to demonstrate our commitment to the principles enshrined in the First Amendment that "Congress shall make no law . . . abridging the

² *People v. Bruce*, Unpublished Trial-Court Opinion, New York Criminal Court, November 4, 1964, attached as Exhibit 1. Judge James R. Creel dissented from the decision.



freedom of speech,” and in Article I, Section 8 of the New York Constitution that protects the right of every person to “freely speak, write and publish his or her sentiments on all subjects.” We as a nation can provide an important example not only by demonstrating that the press is free to report on all subjects, but by protecting what some people might denigrate as “a trifling and annoying instance of individual distasteful abuse of a privilege.” *Cohen*, 403 U.S. at 25.

As the Supreme Court has reminded us time after time, “fundamental societal values are truly implicated” in cases such as this because “the Constitution leaves matters of taste and style . . . largely to the individual.” Freedom of expression “is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the area of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us.” *Id.* at 24-25. It is not just what we say but how we choose to say it that is protected, because “words are often chosen as much for their emotive as their cognitive force.” *Id.* at 26. As the Supreme Court more recently observed,

When a student first encounters our free speech jurisprudence, he or she might think it is influenced by the philosophy that one idea is as good as any other, and that in art and literature objective standards of style, taste, decorum, beauty, and esthetics are deemed by the Constitution to be inappropriate, indeed unattainable. Quite the opposite is true. The Constitution no more enforces a relativistic philosophy or moral nihilism than it does any other point of view. The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.

United States v. Playboy Entertainment Group, Inc., 520 U.S. 803, 818 (2000).

In the day-to-day exercise of free expression, few examples tap the American psyche better than comedy. Like jazz, stand-up comedy is a uniquely American art form, and, thanks to the likes of Lenny Bruce, it is not just about telling jokes on stage. Much contemporary American humor is topical; it takes on cultural

trends, news events, and important public issues. Politicians and other public figures ignore the monologues on late-night talk shows only at their peril, because their actions and foibles can be exposed in these venues more powerfully than in any editorial or position paper.

Lenny Bruce was in the vanguard of the transformation of the stand-up comic from jokester to social critic, and his routines covered a wide range of topics including racism, organized religion, homosexuality, and social conventions about the use of language. He became an American cultural icon through his development of a raw, free-form comedic style and his extraordinary ability to recognize and articulate the hypocrisies and paradoxes of our society. Bruce has been accurately described as “one of the culture-makers of the modern age.”³ As the Petitioners chronicle in their recent biography of Lenny Bruce, “[o]n Broadway, on the big screen, on a Beatles album cover, on records (by Miles Davis, Bob Dylan, Grace Slick, Nico, Tim Hardin, and R.E.M.), in books and documentaries, in reissued recordings, CDs, and posters, in comedy clubs, in college classes, in the Columbia University archives, in the Museum of Television and Radio, and on the Internet, America continues to honor its unabashed hero of free speech.”⁴

To some, Lenny Bruce was simply a “dirty comic” because of his prominent use of vulgar language in his bits. But most of his contemporaries understood that his use of colorful language was essential to the effectiveness of his satirical style and social critique. Nat Hentoff, a noted social critic who testified at the comedian’s New York trial, has correctly observed: “Lenny Bruce delighted in exploring why certain words were forbidden – and then demystifying them.”⁵ “Lenny Bruce understood,” noted Martin Garbus, one of Bruce’s New York trial lawyers, “that imposing taboos on language had the unintended consequence of mythologizing the very terms that were prohibited. Lenny, who often satirized about our obsession with words considered obscene, probed the use of language with the devotion of a linguist.”⁶

³ Albert Goldman, Journalism of Lawrence Schiller, *Ladies & Gentlemen, Lenny Bruce!!* (New York, Random House, 1974).

⁴ Ronald K.L. Collins and David M. Skover, *THE TRIALS OF LENNY BRUCE* (Sourcebooks, Inc. 2002) (“Collins & Skover”), p. 4.

⁵ Nat Hentoff, *The Humorist as Grand Inquisitor*, *LIBERATION*, May 23, 1968, p. 28.

⁶ Martin Garbus with Stanley Cohen, *TOUGH TALK* (Times Books, 1998), p. 120.



Music critic Ralph Gleason wrote that Lenny Bruce “utterly changed the world of comedy.” Bruce, he wrote, “saw through the pretense, hypocrisy, and paradoxes of our society.”⁷ As NEWSWEEK reported during the 1964 New York trial:

Bruce hits his audiences where they live – or think they do – in their religion, their sex lives, their politics, their prejudices and prevarications. And he does this by using many of the same techniques of language and behavior that modern writers, artists, and even musicians are using to cut through the crust of custom and apathy.⁸

Supporters of Lenny Bruce came from unexpected quarters as well. In an unsolicited letter to Bruce shortly before his New York arrest, the Reverend Sidney Lanier of St. Clement’s Church wrote:

I emphatically do NOT believe your act is obscene in intent. The method you use has a lot in common with most serious critics (the prophet or the artist, not the professor) of society . . . Clearly your intent is not to excite sexual feelings or to demean but to shock us awake to the realities of racial hatred and invested absurdities about sex and birth and death . . . to move toward sanity and compassion.⁹

In addition, at the beginning of Bruce’s New York obscenity trial, a public protest was waged on his behalf by scholars, entertainers, novelists, poets, and critics – only some of whom were ardent Bruce fans – including such noted figures as Woody Allen, Susan Sontag, Paul Newman, Richard Burton, Dick Gregory, James Baldwin, Allen Ginsberg, Norman Podhoretz, Reinhold Niebuhr, John Updike, and Gore Vidal, among many others.¹⁰ The signed petition explained that Bruce’s performances were a form of “social satire in the tradition of Swift, Rabelais, and Twain.”¹¹

⁷ Ralph J. Gleason, *Obituary of Lenny Bruce*, <http://members.aol.com/dcspohr/lenny/obgleas.htm> (last modified July 3, 1997).

⁸ *Bruce’s Trial*, NEWSWEEK, July 20, 1964.

⁹ Letter from Rev. Sidney Lanier to Lenny Bruce, January 13, 1963.

¹⁰ *Petition on behalf of Lenny Bruce*, <http://members.aol.com/dcspohr>



Lenny Bruce has been called “the patron saint of stand-up,” and for good reason. Arthur Gelb of the *NEW YORK TIMES* wrote that Bruce “set the stage for every comedian to follow him.” George Carlin described Lenny Bruce as “a revolutionary comedy figure because he brought honesty into a form which previously had been little more than an empty crowd-pleasing truth, and he took it down the path that led to acceptance of the complete English language.”¹² “Lenny opened all the doors,” he said, “or kicked them down.” This is true for both men and women in comedy. Joan Rivers described Lenny Bruce as “the turning point for me,” while the more contemporary comedian Margaret Cho said that “Lenny Bruce gave me the permission to do what I do.”¹³

A pardon for Lenny Bruce would be important even if he had not had a major impact on comedy and American culture. The 1964 petition supporting him explained that “[w]hether we regard Bruce as a moral spokesman or simply as an entertainer, we believe he should be allowed to perform free from censorship or harassment.” As the Supreme Court once put it, “[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats’ poems or Donne’s sermons.”¹⁴ This is because the constitutional protections for free speech are designed as bulwarks against the abuse of government power, not as a prize to be awarded for literary or artistic merit. This petition should be granted, therefore, to publicly acknowledge that New York should never have tried to use its laws in a vain attempt to sanitize the culture.

The importance of a posthumous pardon for Lenny Bruce is also supported by the attached letters signed by noted First Amendment scholars and prominent First Amendment lawyers (including attorneys who represented Bruce in his

/lenny/petition.htm (last modified Apr. 22, 1997).

¹¹ Thomas Buckley, *100 Fight Arrest of Lenny Bruce*, *NEW YORK TIMES*, June 14, 1964.

¹² George Carlin, <http://members.aol.com/dcspohr/lenny/comonlen.htm> (last modified July 21, 1997).

¹³ Collins & Skover at p. 431.

¹⁴ *Cohen*, 403 U.S. at 25, quoting *Winters v. New York*, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting).

obscenity trials),¹⁵ and by comedians, writers, and entertainers who depend on our nation's protection of free expression in order to do their work.¹⁶ These letters of support attest to the fact that a pardon would be an important reaffirmation of the basic principles upon which a free society is based.

WHY NOW?

There is never a wrong time to do the right thing. Admittedly, a posthumous pardon by definition cannot alter the plight of a deceased person. In that narrow sense, such a pardon comes too late to save a living person from the acknowledged wrongs of the State. Nonetheless, a posthumous pardon does have other salutary and socially-beneficial effects:

- It corrects the *institutional record* by publicly expunging the guilt associated with the unlawful or unconstitutional actions of the State.
- It has *precedential value* as an official declaration that such unlawful or unconstitutional action will not be repeated in the future.

¹⁵ See Exhibit 2, Letter from Constitutional Scholars and First Amendment Lawyers. This letter has been endorsed by constitutional scholars (including Jerome Barron, Norman Dorsen, Marjorie Heins, Robert M. O'Neil, Edward Rubin, Steven Shiffrin, Rodney Smolla, Nadine Strossen, Laurence Tribe, and Eugene Volokh), noted First Amendment attorneys (including Floyd Abrams, Sandra Baron, Seth D. Berlin, Thomas C. Goldstein, Bruce E. H. Johnson, Burton Joseph, Lee Levine, Donna Lieberman, Bruce W. Sanford, and David Vladeck), and lawyers who represented Lenny Bruce or who served as counsel in companion cases (including Albert Bendich, Martin Garbus, Edward de Grazia, William Hellerstein, and Maurice Rosenfield).

¹⁶ See Exhibit 3, Letter from Artists, Writers, and Entertainers (signed by Margaret Cho, Phyllis Diller, Nat Hentoff, Penn Jillette, Lisa Lampanelli, Paul Provenza, Tom Smothers, Dick Smothers, Teller, and Robin Williams). Thus far, this letter has been circulated only to a relatively small group of people in the entertainment field. Petitioners anticipate further support as the request for a Lenny Bruce pardon becomes publicly known.



- It corrects the *reputational memory* of the deceased person by clearing his or her name in the historical record.
- And finally, it serves as a *public apology*, an admission by the State that it once exerted its powers in ways that cannot be reconciled with the supreme law of the land.

A posthumous pardon for Lenny Bruce would further the free-speech values embedded in the federal and state constitutions, and would recommit the State of New York to honoring its own constitutional charter that “no law shall be passed to restrain or abridge the liberty of speech or of the press.” It would also represent an ongoing commitment by the State that it will respect the rights of *living* entertainers; that it will not do to them what it did to Lenny Bruce in 1964 when it abridged his right to speak his mind freely and by the light of his own reason. In this sense the past is not prologue, but is instead a reminder of what can go terribly wrong when rights are sacrificed to official orthodoxy. That reminder, memorialized in an official pardon, would help protect the “breathing space” that is so vital to candid, creative, and socially-conscious communication by entertainers in particular and the public in general.

Pardoning Lenny Bruce would be more than a symbolic statement. It would be a real and robust commitment to *change* the wrongs of the past by respecting the rights of the living, of the Lenny Bruces of today and tomorrow. The history of social entertainment – dating back before the time of the Greek-comic poet Aristophanes – is a record of performers taking creative chances with “acceptable” norms of communicative behavior. The legacy of entertainers – including irreverent poets, ribald comedians, gadfly satirists, innovative dancers, and protest singers – can be found in the laws of blasphemy, seditious libel, and obscenity – laws that have receded in recognition of an ever-emerging societal commitment to freedom. The American system of freedom of expression, rooted in the great principles of free speech and self-realization, operates best when it encourages experimentation, invites diverse views, and prompts people to reconsider the boundaries of what is socially acceptable in the communicative realm. To keep the mind’s eye static is to blind it.

New York is the one of the world’s great capitals of artistic expression, broadly understood. It is therefore fitting that New York should stand firm in its commitment to artistic freedom and in its opposition to censorship, which destroys inspiration and invites subordination. By posthumously pardoning Lenny Bruce, the State of New York declares to the world that it is a safe harbor of liberty for creative

minds of all bents. Such an official act would do more than simply honor Bruce's personal commitment to freedom; it would serve as a public monument to liberty.

FACTUAL BACKGROUND

New York was not alone in prosecuting Lenny Bruce for his nightclub acts, although it is the *only* state in which a conviction remains on the books. Between 1961 and 1964, Bruce was brought to trial in California, both in San Francisco and Los Angeles, as well as in Illinois and New York. He was acquitted by a jury in San Francisco, while a deadlocked jury in Los Angeles could not convict him. Bruce was found guilty of obscenity in Illinois, but his conviction was overturned on appeal to that state's high court. In each of these cases, the factual scenario was very much the same: One or more policemen or investigators would attend a nightclub performance, and, on the basis of parts of what they heard, would bring charges under local law.¹⁷ No patrons of the nightclubs ever filed a formal complaint about the shows they came to see.

On October 4, 1961, Bruce was arrested for his performance at The Jazz Workshop in San Francisco, but on March 8, 1962, the jury returned a verdict of not guilty. Seven months later, on October 24, 1962, Bruce was arrested for a performance at The Troubadour in Los Angeles. This was followed by another arrest, on February 13, 1963, for a performance at The Unicorn in Los Angeles. The two cases were consolidated and on February 15, 1963, the jury deadlocked 7-5 in favor of acquittal. Local officials declined to re-prosecute the case. In the midst of the Los Angeles trial, Bruce was arrested and charged with violating Illinois law for his performances at The Gate of Horn in Chicago. This time, however, on February 28, 1963, the jury rendered a verdict of guilty. But the Illinois Supreme Court overturned the conviction, applying the still-developing obscenity jurisprudence of the time. It found "that some of the topics commented on by the defendant are of social importance" so that "the entire performance is thereby immunized" under the First Amendment.¹⁸

The New York case arose in much the same way as the others. In the spring of 1964, Bruce was slated to perform a series of shows at the Café Au Go Go in Greenwich Village. The New York Police Department learned of these performances

¹⁷ These cases are described in great detail in Collins & Skover, a copy of which is being submitted with this petition.

¹⁸ See *Illinois v. Bruce*, 31 Ill. 2d 459 (1964), attached as Exhibit 4.

and sent several officers to attend the shows that took place on March 31, 1964, and April 1, 1964. Based on the officers' sketchy reports of what they heard, Lenny Bruce and the owners of the Café Au Go Go, Howard and Ella Solomon, were charged with violating New York Penal Law 1909 § 1140-A, which prohibited "obscene, indecent, immoral, and impure" entertainment.

The trial required thirteen separate court sessions during the six months beginning June 16 and ending December 21, 1964. During this time, thirty witnesses were called to testify – twelve for the state and eighteen for the defense. At the end of the proceedings, the court found Lenny Bruce and Howard Solomon guilty of the charges. Ella Solomon's participation was more limited, and the court acquitted her. But with respect to the convictions, the judges' brief conclusory opinion read more like a critic's review than a court decision. The unpublished per curiam opinion for the 2-1 majority concluded that Lenny Bruce's performances "clearly insulted and debased" sex:

The monologues contained little or no literary or artistic merit. They were mainly 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.¹⁹

Lenny Bruce was sentenced to four months in the state workhouse on each of the three counts against him, and Howard Solomon was sentenced on each of two counts to \$500 or thirty days incarceration.

The brief opinion studiously avoided citing the most recent decisions of the U.S. and New York Supreme Courts that had strengthened First Amendment protections. Most notably, the court did not cite *Jacobellis v. Ohio*, 378 U.S. 184 (1964), decided less than five months earlier (and argued in the Supreme Court by Lenny Bruce's lead New York trial counsel Ephraim London), which found that constitutional protection for expression cannot "be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance."²⁰ It was on the strength of this opinion that the

¹⁹ See *People v. Bruce*, Exhibit 1.

²⁰ *Jacobellis*, 378 U.S. at 191. It was in this case that Justice Potter Stewart famously wrote, "perhaps I could never succeed in intelligibly [defining obscenity, b]ut I know it when I see it."

Illinois Supreme Court reversed Lenny Bruce's conviction in that state, yet it went unmentioned by the New York trial court.

Predictably, Howard Solomon's conviction was overturned on appeal. The intermediate appellate court, in an unpublished opinion, applied the relevant Supreme Court decisions and reversed the lower court's finding that the monologues were obscene. It noted that "integral parts of the performance included comments on problems of contemporary society" adding that "[r]eligious hypocrisy, racial and religious prejudices, the obscenity laws and human tensions were all subjects of comment." Accordingly, it rejected the trial court's finding "that the performances were without social importance."²¹ The appellate decision was reaffirmed without opinion two years later. *People v. Solomon*, 26 N.Y.2d 621 (NY 1970).

Because Howard Solomon's conviction was reversed, it is widely believed that Lenny Bruce was legally exonerated as well. Indeed, in 1968 the NEW YORK TIMES reported the *Solomon* decision under the headline, "Appeals Court Voids Conviction in Lenny Bruce Obscenity Case," and the lead mistakenly said that "[t]he conviction of the late Lenny Bruce for giving obscene monologues in a Greenwich Village coffeehouse was reversed yesterday by the Appellate Term of the State Supreme Court."²² But this was not the case; Lenny Bruce, acting as his own counsel, had failed to perfect his appeal. His years of legal battles had left him destitute, and by October 1965 he was declared bankrupt. To make matters worse, the Manhattan District Attorney's office that year opposed Bruce's motion for an extension of time to appeal the New York criminal court conviction and for authorization to proceed *in forma pauperis*. It bears noting that Robert Morgenthau, New York's District Attorney since 1974, was later openly critical of the "harshness with which [the Bruce case] was tried." It was a case, he added, that was tried "against the advice of the obscenity experts in the [prosecutor's] office, who [argued] there was no case."²³ Against that backdrop, Lenny

²¹ *People v. Solomon*, Unpublished Memorandum Decision of the Intermediate Appellate Term, First Judicial Dept. (Feb. 19, 1968) (unpublished), attached as Exhibit 5.

²² *Appeals Court Voids Conviction in Lenny Bruce Obscenity Case*, NEW YORK TIMES, February 20, 1968.

²³ *Morgenthau-Kuh Debate Flares into Accusatory Argument*, NEW YORK TIMES, September 3, 1974, p. 37; see also Deirdre Carmody, *Morgenthau Says Record Backs Him on Bruce Trial*, NEW YORK TIMES, September 4, 1974, p. 31.



Bruce filed a number of unsuccessful federal civil rights claims against the New York prosecution and the threats of prosecution in other states. *E.g., Bruce v. Hogan*, 381 U.S. 946 (1965) (denial of petition for certiorari).

Lenny Bruce died in the midst of these legal maneuverings, and his appeal from the New York trial never went forward. By the time New York's appellate courts reversed Howard Solomon's conviction for sponsoring the words of Lenny Bruce, the comedian's voice had been forever stilled. It is an end from which there is no appeal, and so Bruce's conviction remains on the books.

LENNY BRUCE'S CONVICTION VIOLATES BASIC CONSTITUTIONAL PRINCIPLES

The 1960s were a time of cultural upheaval and great legal change. During this period courts across the country, no less than the Supreme Court itself, struggled to interpret and apply the High Court's 1957 decision in *Roth v. United States* that obscenity is unprotected by the First Amendment, but that "[a]ll ideas having even the slightest redeeming social importance – unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion – have the full protection of the [First Amendment] guarantees." *Roth v. United States*, 354 U.S. 476, 484, 489 (1957). The law of obscenity is inherently complicated, and while courts might not have developed a legal test that is much more precise than Justice Stewart's claim that "I know it when I see it," one thing is patently clear: Lenny Bruce's routines should never have been declared obscene under the law as it was understood then, and certainly would not be branded as such now.

Throughout the 1960s and beyond, courts emphasized that the category of expression that can be condemned to First Amendment purgatory must be strictly limited to avoid empowering the state to censor ideas. Thus, the Supreme Court explained in *Jacobellis*, 378 U.S. at 191, that the constitutionality of material cannot be determined by weighing the social importance of expression against its prurient appeal, and any material dealing with sex in a manner that advocates ideas, or has literary, scientific, or artistic value, or any other form of social importance, is protected under the First Amendment. These principles were reaffirmed in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U.S. 413, 418-419 (1966), where the Court held that no expression can be declared obscene, and therefore placed outside the First Amendment's protective umbrella, unless it is found to be "utterly without redeeming social value."

Much of the debate between the Supreme Court Justices in the early obscenity cases centered on how to define and apply community standards. But they generally agreed that state power to penalize free speech must be strictly limited. Two Justices, William O. Douglas and Hugo Black, never accepted the proposition that obscenity was beyond constitutional protection. *E.g.*, *Jacobellis v. Ohio*, 378 U.S. at 196 (Black, J., and Douglas, J., concurring). Justice Potter Stewart took the position that only “hard core pornography” could be suppressed, while others concluded that material short of the hard core could be banned, but only if it was patently offensive and lacked any redeeming value. *See Memoirs*, 383 U.S. at 418 (Brennan, J., joined by Warren, C.J., and Fortas, J.); *Jacobellis*, 378 U.S. at 193-195 (Brennan, J., joined by Goldberg, J.); *id.* at 197 (Stewart, J., concurring); *Ginzberg v. United States*, 383 U.S. 463, 497 (1966) (Stewart, J., dissenting). One measure of how the Justices viewed the standard came in *Manual Enterprises, Inc. v. Day*, a 1962 case in which the Court held that certain magazines could not be considered obscene when “the most that can be said of them is that they are dismally unpleasant, uncouth and tawdry.” 370 U.S. 478, 488-490 (1962).

Decisions of New York courts applied these same principles. As early as 1961, the New York Court of Appeals had held that the State’s obscenity law “should apply only to what may properly be termed ‘hard-core pornography.’” *People v. Richmond County News, Inc.*, 9 N.Y.2d 578, 586 (Ct. App. 1961). Mindful of the then recent Supreme Court rulings, the New York Court noted that entertainment is entitled to the same constitutional protection as the “exposition of ideas,” and it added: “‘Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.’” *Id.* at 582, quoting *Winters v. New York*, 333 U.S. at 510.

This is not to suggest that New York courts did not falter along the way. In 1963, for example, a divided Court of Appeals held that Henry Miller’s *Tropic of Cancer* was obscene under Section 1141 of the Penal Code. *People v. Fritch*, 13 N.Y.2d 119 (Ct. App. 1963). Within the year the result was overruled by the U.S. Supreme Court in *Grove Press v. Gerstein*, 378 U.S. 577 (1964), and by the time Lenny Bruce went to trial, it was plain that the First Amendment did not permit the prosecution of such literary works. Indeed, in July 1964 the New York Court of Appeals dismissed an obscenity complaint against the publisher of the book *Fanny Hill* on First Amendment grounds. It reviewed the applicable Supreme Court precedent and observed “[i]t ha[s] become increasingly clear in a long line of decisions . . . that State obscenity statutes would no longer afford a constitutionally sound basis for the suppression of a book of the type of ‘Fanny Hill.’” *Larkin v. G.P. Putnam’s Sons*, 14 N.Y.2d 399, 404-405 (Ct. App. 1964).



Today, the prosecution of literary works under obscenity law seems not just wrong, but completely alien to our system of free expression. In 1973 the Supreme Court decided *Miller v. California* in which it set forth the current three-part test for obscenity: (1) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24 (1973). The *Miller* test did not include the requirement that a work must be “utterly without redeeming social value,” but it nonetheless noted that obscenity is limited to depictions of hard core sexual conduct. The Court subsequently confirmed that judgments regarding serious literary, artistic, political or scientific merit cannot be based upon local whims or prejudices. Thus, in *Pope v. Illinois*, 481 U.S. 497, 500-501 (1987), the Court held that the test for serious value of a work did not hinge on the vagaries of local tastes, but instead must be judged by reference to the hypothetical reasonable person.

Even before the Supreme Court adopted its current test for obscenity in *Miller v. California*, it issued numerous decisions explaining that the mere use of “bad words” could not be criminalized. In *Cohen v. California*, for example, the Court reversed the conviction of a California man who had been arrested for wearing a jacket emblazoned with the slogan “Fuck the Draft.” It ruled out the possibility that the words could be considered obscene, pointing out that “such expression must be, in some significant way, erotic.” 403 U.S. at 20. This was just one of a series of decisions in which the Supreme Court held that the use of four-letter words in a variety of contexts could not be considered obscene. E.g., *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) (university newspaper); *Kois v. Wisconsin*, 408 U.S. 229, 231-232 (1972) (“sex poem” in underground newspaper); *Cason v. City of Columbus*, 409 U.S. 1053 (1972); *Rosenfeld v. New Jersey*, 408 U.S. 901, 910 (1972) (Rehnquist, J., dissenting) (school board meeting); *Lewis v. City of New Orleans*, 408 U.S. 913 (1972) (confrontation with police); *Brown v. Oklahoma*, 408 U.S. 914 (1972) (political rally).

The Supreme Court never ruled on the question of whether Lenny Bruce’s monologues were obscene, but if it had, the answer would have been obvious. Indeed, in the one case in which it examined a nightclub routine in the tradition of Lenny Bruce – George Carlin’s “Filthy Words” – the Court confirmed that the performance was protected by the First Amendment. In *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978), the Court held that the FCC could require that such a

monologue be “channeled” to a late night time slot because children might be in the radio audience, but it also confirmed that such “indecent” speech is otherwise protected by the First Amendment. *Id.* at 746-747. *See also Reno v. ACLU*, 521 U.S. 844, 874-875 (1997). The Court stressed that the sanctions in *Pacifica* applied *only* in the special context of broadcasting, that they were non-criminal in nature (e.g., a letter of admonition to the station’s file), and that the performance was perfectly acceptable in other settings.²⁴ In particular, the Court pointed out that “[a]dults who feel the need may purchase tapes and records *or go to theaters and nightclubs to hear these words.*” *Pacifica*, 438 U.S. at 750 n.28 (emphasis added).

Lenny Bruce’s New York conviction cannot be reconciled with the body of First Amendment law, either as it existed in 1964 or today. Every appellate court that got to the merits of this question agreed with this conclusion that the prosecution was unconstitutional. The Illinois Supreme Court, after *Jacobellis* was handed down, reversed Bruce’s conviction for his Chicago performance on First Amendment grounds, holding that “the entire performance [was] immunized.” *People v. Bruce*, 31 Ill.2d 459, 461 (1964). More to the point, the New York Court of Appeals reversed the conviction of club owner Howard Solomon for hosting the same performances for which Lenny Bruce is still branded a criminal. *People v. Solomon*, 26 N.Y.2d 621 (NY 1970).

Because Lenny Bruce died, it is beyond the power of courts to reopen the appeal he never perfected. But it is not too late for the Executive Branch to set the record straight, particularly where, as here, the constitutional principles at issue are so clear. Accordingly, the Petitioners ask the Governor to do what is possible and constitutionally permissible: to issue a posthumous pardon from a verdict that should never have been rendered.

A POSTHUMOUS PARDON FALLS SQUARELY WITHIN THE GOVERNOR’S POWER

Unlike the courts, the Governor has the power to correct past wrongs, even after the death of the person involved. The broad authority of the New York Governor to issue pardons even predates the U.S. Constitution, as noted by Alexander Hamilton in the Federalist Papers.²⁵ This power, set forth in Article IV, Section 4 of the

²⁴ Even in its limited context, the continuing vitality of *Pacifica*’s narrow holding is questionable today, since the Supreme Court has held that the “indecent” standard is inherently vague. *Reno v. ACLU*, 521 U.S. at 870-873.

²⁵ *See* Alexander Hamilton, *The Real Character of the Executive*, NEW YORK PACKET,

New York Constitution is unlimited; it cannot be restricted by statute or decision. *People ex rel. Page v. Brophy*, 289 N.Y.S. 362, 364 (1936). Moreover, the fact that Lenny Bruce is not alive to request or consent to apply for a pardon is irrelevant. Generally speaking, a pardon does not have to be “accepted” in order to be effectuated. *Schick v. Reed*, 419 U.S. 256, 261 (1974). Specifically, New York courts have held that a pardon may be requested by anyone, even without the subject’s knowledge. *E.g., Andrews v. Gardiner*, 224 N.Y. 440, 447 (1918).

Pardons have been granted for many reasons throughout history, but the Supreme Court has stated that one of the primary purposes of a pardon is to “afford relief from . . . [an] evident mistake in the enforcement of the law.” *Ex Parte Grossman*, 276 U.S. 87, 120 (1925). As former California Governor Pete Wilson explained in granting a posthumous pardon, “a just society may not always achieve justice, but it must constantly strive for justice.” Quoted in Dave Leshner, *Dead Man’s Name Finally to Be Cleared*, L.A. TIMES, Apr. 15, 1996. The Supreme Court has also described pardons as an essential mechanism for promoting the public welfare. For example, in *Biddle v. Perovich*, 274 U.S. 480, 486 (1927), it pointed out that “a pardon in our days is not a private act of grace . . . it is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.”

Consistent with this Petition, New York has exercised the pardon power in other cases of great First Amendment significance. In 1923 and 1925, Governor Alfred E. Smith issued a number of pardons to labor leaders and others described at the time as “political” prisoners for their convictions for “criminal anarchy.” On January 17, 1923, Governor Smith pardoned James Joseph Larkin, an Irish labor organizer, cutting short his five-year sentence for criminal anarchy,²⁶ and he followed this immediately thereafter by pardons for Minnie Kolmin and Anna Leissman. All of those pardoned had been convicted for signing the Manifesto of the “Left Wing” of the

March 14, 1788 (Federalist #69) (“The governor of New York may pardon in *all* cases, even in those of impeachment, except for treason and murder.”) (emphasis added).

²⁶ See Executive Pardon for James Joseph Larkin, attached as Exhibit 6. See also *Larkin Pardoned, Leaves Sing Sing; Others May Follow*, NEW YORK TIMES, January 16, 1923, attached as Exhibit 7.

Socialist Party, which advocated violent revolution.²⁷ Although Governor Smith condemned the political agenda of the Left Wing, he nevertheless proclaimed:

[Larkin's] offense was nothing more than the issuance of a misguided opinion that in the remote future our system of Government should be changed by a process abhorrent to our institutions.

* * *

Political progress results from the clash of conflicting opinions. The public assertion of an erroneous doctrine is perhaps the surest way to disclose the error and make it evident to the electorate.

* * *

Stripped of its legalistic aspects, this, to my mind, is a political case where a man has been punished for the statement of his beliefs.

As Governor Smith's proclamation explained, the pardon power has a special role to play where free-speech freedoms are abridged owing to the invocation of "erroneous doctrines" and where this occurred in order to justify prosecuting a person for his or her "political . . . beliefs." Accordingly, Governor Smith issued the pardons based upon his conclusion that the jail sentences were too severe and because "the safety of the State is affirmatively impaired by the imposition of such a sentence for such a cause."²⁸

Almost two years later, on December 11, 1925, Governor Smith pardoned Benjamin Gitlow, a former New York State Assemblyman, who also had been convicted of signing the Left Wing Manifesto.²⁹ The Gitlow pardon followed his unsuccessful

²⁷ See Executive Pardons for Minnie Kolmin and Anna Leissman, attached as Exhibit 6. Others may have been pardoned as well. Petitions for executive clemency also were filed on behalf of Paul Manko and Ignatz Mizher.

²⁸ See Statement of Governor Alfred E. Smith, reprinted in NEW YORK TIMES, January 16, 1923, Exhibit 7.

²⁹ Executive Pardon for Benjamin Gitlow, attached as Exhibit 8. See *Gitlow is Pardoned By Governor Smith as Punished Enough*, NEW YORK TIMES, December 12, 1925, p.1; *Gitlow Set Free Rejoins Radicals*, NEW YORK TIMES, December 13, 1925, p. 18, attached as Exhibit 9.



appeal to the United States Supreme Court, which upheld the constitutionality of New York's criminal anarchy law. This landmark case nonetheless established the proposition that freedom of speech and of the press "are among the fundamental personal 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Gitlow v. People of the State of New York*, 268 U.S. 652, 630 (1925).

Governor Smith's courageous actions in the name of freedom of speech are particularly notable in that they came years before the U.S. Supreme Court upheld a First Amendment claim in *any* case. See *Stromberg v. California*, 283 U.S. 359 (1931). In fact, the Court had rejected Benjamin Gitlow's constitutional challenge to the New York law just six months before Governor Smith pardoned him. In the case of Lenny Bruce, by contrast, the trial court convicted him *in spite of* the great weight of First Amendment precedent both at the state and federal levels, and the disparity between the law and the verdict has only grown wider with the passage of time.

One difference between Governor Smith's pardons in the 1920s and the current situation is that those pardons were issued, in part, to reduce the severity of punishments, while here the State can punish Lenny Bruce no more. But reducing individual hardship was not the sole reason the pardons were given, as Governor Smith's proclamation in the *Larkin* case made clear. Importantly, he also acted to vindicate basic free speech principles. Such a purpose would be well-served by a posthumous pardon for Lenny Bruce.

While our research has not turned up a previous example of a posthumous pardon in New York, there is nothing in the law that precludes granting such relief. Indeed, at least nine other states have granted posthumous pardons, three of which have pardon provisions almost identical to those of New York.³⁰ For example, Maryland – like New York – gives the governor full authority to grant pardons. In 2001, then Governor Parris Glendonning pardoned John Snowden, who was

³⁰ See Darryl W. Jackson, et al., *Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 IND. L.J. 1251, 1276-88 (1999). In addition, on February 19, 1999, President Bill Clinton issued a posthumous pardon to Lt. Henry Ossian Flipper, the first African-American graduate of West Point, and the first African-American commissioned officer in the regular United States Army. Flipper was dismissed from the Army in 1881 after a court-martial, for conduct unbecoming an officer. The case had long been considered a miscarriage of justice *Id.*

erroneously convicted of murder and hanged in 1919.³¹ Governor Glendenning explained that “[w]hen [we are] faced with a possible miscarriage of justice, even one from the distant past, our values compel us to take a second look. . . . [W]hile it is too late to prove the innocence or guilt of Mr. Snowden, we can conclude that the hanging may well have been a miscarriage of justice.”³² In a similar situation, former California Governor Pete Wilson pardoned Jack Ryan, the supposed “Coyote Flat killer” who was convicted of murdering two men in 1925. The pardon stemmed from the discovery evidence demonstrating that Ryan had been coerced into pleading guilty for a crime he did not commit. Governor Wilson granted the pardon to preserve the integrity of the state’s justice system.³³

One of the more famous examples of executive clemency involved Nicola Sacco and Bartolomeo Vanzetti, Italian immigrants who were executed in 1927 after being convicted of theft and murder. Then Massachusetts Governor Michael Dukakis acted to vindicate Sacco and Vanzetti in 1977 because the judge in their case had refused to grant a new trial despite the discovery of exculpatory evidence and because of the pervasive anti-immigrant sentiment that existed at the time. In his statement announcing his action, Governor Dukakis declared, “[t]he stigma and disgrace should be forever removed from the names of Nicola Sacco and Bartolomeo Vanzetti, from their families and descendants.”³⁴

In addition to these examples, posthumous pardons have been granted in Arizona, Pennsylvania, Oklahoma, Nebraska, Nevada, and Georgia. See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power From the King*, 69 TEX. L. REV. 569, 586 (1991). In one case, the State of Georgia pardoned Samuel Worcester and Elihu Butler, two Christian missionaries who were illegally imprisoned for

³¹ See Md. Const. art. II, § 20. See also Press Release, *State of Maryland Governor’s Press Office, Governor Glendenning Grants Posthumous Pardon to John Snowden* (May 31, 2001) (<http://www.gov.state.md.us/gov/press/2001/html/snowden.html>).

³² *Id.*

³³ Dave Leshner, *Dead Man’s Name Finally to Be Cleared*, L.A. TIMES, Apr. 15, 1996. California’s system of pardons parallels that of Maryland and New York in giving the pardon power solely to the governor. See Cal. Const. art. V, § 8(a).

³⁴ Darryl W. Jackson et al., *supra*, at 1282. See Watt Espy, *Leo Frank’s Due-Process Pardon Raises Concern for Others’ Rights*, ATLANTA J. & CONST., Mar. 29, 1986, at A11.



protesting the seizure of Cherokee land in Georgia in 1831. As one member of the Georgia Board of Pardons and Paroles explained the decision, "[t]his is one of many injustices done, but it's something that we could do something about."³⁵ Likewise, the injustices done to Lenny Bruce and to the First Amendment by the State of New York are wrongs that a posthumous pardon would help to correct.

CONCLUSION

It is indeed true that "the search for justice has no statute of limitations."³⁶ By that equitable measure, Lenny Bruce should be posthumously pardoned. It is never too late to correct an injustice, especially when that injustice involved the persecution and prosecution of a man because he spoke his mind freely. Regrettably, an intolerant mindset could not then forgive Lenny Bruce for his trespasses against orthodoxy. Today, however, we should know better; we should know that an open mind is the best antidote to a closed society, and the right to express one's thoughts freely precludes the movement toward an authoritarian world in which people keep their words and ideas to themselves. To pardon Lenny Bruce posthumously is to affirm that principle of tolerance that is central to American freedom.

For the foregoing reasons, Petitioners Ronald K.L. Collins and David M. Skover respectfully request that you officially pardon Lenny Bruce for his 1964 New York obscenity conviction.

Respectfully submitted,

Robert Corn-Revere
Counsel for Petitioners

³⁵ Tom Watson, *160 Years Later, Georgia Apologizes*, USA TODAY, Nov. 25, 1992, at 02A.

³⁶ Quoting Governor Parris Glendening, Press Release, *State of Maryland Governor's Press Office, Governor Glendening Grants Posthumous Pardon to John Snowden* (May 31, 2001) (<http://www.gov.state.md.us/gov/press/2001/html/snowden.html>).

EXHIBITS

1. *People v. Bruce*, Unpublished Trial Court Opinion, New York Criminal Court, November 4, 1964
2. Letter of Support from Constitutional Scholars and First Amendment Lawyers
3. Letter of Support from Artists, Writers and Entertainers
4. *Illinois v. Bruce*, 31 Ill. 2d 459 (1964).
5. *People v. Solomon*, Unpublished Memorandum Decision of the Intermediate Appellate Term, First Judicial Dept. (Feb. 19, 1968).
6. Executive Pardons for James Joseph Larkin (January 17, 1923), Minnie Kolmin (February 13, 1923) and Anna Leissman (February 13, 1923)
7. *Larkin Pardoned, Leaves Sing Sing; Others May Follow*, NEW YORK TIMES, January 16, 1923
8. Executive Pardon for Benjamin Gitlow (December 11, 1925)
9. *Gitlow is Pardoned By Governor Smith as Punished Enough*, NEW YORK TIMES, December 12, 1925; *Gitlow Set Free Rejoins Radicals*, NEW YORK TIMES, December 13, 1925.