

# LAW MEMO

## Lenny Bruce's Belated Pardon

Americans embrace freedom of speech with some misgivings

There is never a wrong time to do the right thing. That's the message Gov. George E. Pataki delivered on Dec. 23, 2003, when he posthumously pardoned comedian Lenny Bruce for a 1964 obscenity conviction. Bruce was busted for performing a raunchy, irreverent monologue at a Greenwich Village nightclub. He was sentenced to four months in jail, but did not serve because he overdosed on heroin in 1966. He was 40 years old.

This issue of *Arts Law Memo* describes Bruce's free speech struggles and George Carlin's "Seven Dirty Words" Supreme Court case. It outlines four theories on why freedom of speech is regarded as a fundamental right. This issue also presents the findings of two recent polls on the American public's commitment to the First Amendment. Finally, it summarizes the proposed Broadcast Decency Enforcement Act of 2004.

I hope this pardon serves as a reminder of the precious freedoms we are fighting to preserve as we continue to wage the war on terror.

— Gov. George E. Pataki

### COMEDY AS COMMENTARY

Hardly a saint, Lenny Bruce is generally viewed as a ground-breaking performer who changed the stand-up comedy business. He paved the way for Richard Pryor, Robin Williams, George Carlin, Margaret Cho, and Bill Maher and is credited with turning comedy clubs into free-speech zones.

Bruce came out of the Borscht Belt and the hipster world of improvisational jazz. His anything-goes material was raw, even

vulgar. And it was socially, racially, religiously, politically, and sexually incorrect. Sprinkled with profanity, Bruce did shocking bits about taboo subjects — the Catholic Church, Eleanor Roosevelt, Jackie Kennedy, bigotry, oral sex, and the Holocaust.

Bruce insisted that his words were vehicles for ideas and insights. One of his favorite techniques was to vocalize hateful words and epithets. By repeating them over and over again, he sought to defuse their power to shock or offend.

### THE BUST

Bruce got in trouble with the law ostensibly because of obscenity. But most observers agree that he was busted for his acerbic social satire, which authorities found dangerous. He was arrested nine times, tried six times, and convicted twice. The Illinois conviction was overturned by the state's Supreme Court.

Bruce's legal troubles soon became the subject of his act. At his best, routines like "Blah-Blah-Blah" lampooned hypocrisy. When describing the trial following the bust in San Francisco for saying the word "cocksucker," he described how the prosecutor, police, and the judge repeated the word a few extra times. "Then I dug something," Bruce said, "they sort of liked saying blah-blah-blah."

But at his worst, Bruce's act became dark, boring, rambling, self-absorbed, and just not funny.

Lenny Bruce's New York conviction was based upon a comedy performance at Café Au Go Go in New York City. When the license inspector who was sent to the club to observe and record Bruce's act testified at the trial in a monotone — in effect, performing Bruce's material — the comedian reportedly leaned over to his lawyer and whispered: "This guy's bombing, and I'm going to jail for it."

The New York prosecutors pursued

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This issue was written by VLAA Executive Director Sue Greenberg.

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Bruce's case with unprecedented zeal: the trial lasted six months; thirty witnesses testified; and the proceedings generated more than 2,000 transcript pages. All this effort was for a misdemeanor charge involving a nightclub performance attended by consenting adults.

Bruce was sentenced to serve four months in jail. By then he had become distrustful of the law and lawyers. Acting as his own attorney, a depressed and bankrupt Bruce never appealed his conviction. His co-defendant, club owner Howard Solomon, had his conviction reversed in 1970.

### SYMBOLIC VICTORY

Ronald K.L. Collins and David M. Skover, co-authors of *The Trials of Lenny Bruce* (2002) led the campaign to pardon Bruce. They enlisted the support of comedians such as Robin Williams, Margaret Cho, and the Smothers

Brothers as well as a score of First Amendment lawyers and scholars, including Floyd Abrams, Marjorie Heins, and Nadine Strossen.

Robert Corn-Revere, drafted the eloquent petition to Gov. Pataki. A partner in the Washington, D.C. law firm of Hogan & Hartson, Corn-Revere served as counsel in litigation involving the Communications Decency Act, the Child Online Protection Act, Internet content filtering in public libraries, public broadcasting regulations, and export controls on encryption software.

Corn-Revere urged the governor to set the record straight by making a noble gesture: "It is never too late to correct an injustice, especially when the 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."

Gov. Pataki's pardon of Lenny Bruce was the first posthumous pardon granted in New York state. In his announcement, the governor said the pardon "is a declaration of New York's commitment o upholding the First Amendment."

### FREE SPEECH ZONES

Bruce's case never made it to the Supreme Court. But the case involving comedian George Carlin's "Filthy Words" monologue, a social commentary satirizing taboos on common four-letter words, made it clear that nightclub routines in the Bruce tradition were protected by the First Amendment.

In the Carlin case, *FCC v. Pacifica Foundation* (1978), the Court narrowly upheld the Federal Communications Commission's authority to channel broadcasts containing "patently offensive" words to late-night broadcast hours.

The primary justification, said Justice John Paul Stevens for the Court's 5-4 majority, was to protect children who, he assumed, would be harmed by Carlin's bawdy language. In any case, said Stevens, the government wasn't really banning vulgar speech; it was only requiring that it be aired late at night, when children are unlikely to be listening.

The Court stressed that the *Pacifica* sanctions applied only in the special context of broadcasting, that they were non-criminal in nature, and that the performance was perfectly acceptable in other settings. According to the justices, "adults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words."

## Why is speech protected?

While there is no universally accepted view as to why freedom of speech is regarded as a fundamental right, legal scholars cite four major theories. All promote certain societal values, and they are not mutually exclusive:

**Self-governance.** There is a direct link between speech and democracy. Open discussion is essential to the democratic process. Voters need information to make informed decisions, to influence government policies, and to hold elected officials accountable.

**Marketplace of Ideas.** The marketplace theory is most dominant in explaining why speech merits special protection. First articulated by J.S. Mill in 1859 and grounded in our irrepressible national optimism, the marketplace metaphor expresses the notion that the truth is most likely to emerge from the clash of ideas and that truth will triumph over falsehood.

**Self-fulfillment and Autonomy.** As Justice Thurgood Marshall noted, "the First Amendment serves not only the needs of the polity but also those of the human spirit — a spirit that demands self expression. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity." Freedom of expression permits and encourages individualism. The right to express one's thoughts and to communicate freely allows each individual to realize his or her full human potential. Thus, freedom of expression is an end in itself — and as such, deserves society's greatest protection.

**The Tolerant Society.** The more recent tolerance theory maintains that the special value of freedom of speech lies in its ability to promote and teach tolerance. The tolerance theory emphasizes self-restraint as the appropriate response — even to ideas that we personally may hate. Protecting unpopular or distasteful speech serves as a model that encourages more tolerance throughout society.

## How Supportive are Americans of Freedom of Expression?

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

While the public is strongly supportive of the freedom of expression in the abstract, findings from the State of the First Amendment 2003 survey show that significant members of Americans — in some case, a majority — would impose restrictions on particular forms of expression.

According to the survey, which was conducted by the First Amendment Center ([firstamendmentcenter.org](http://firstamendmentcenter.org)), 95 percent of American adults agreed that “people should be allowed to express unpopular opinions.” But that support is not without misgivings. A significant number of Americans surveyed would impose restrictions on particular forms of artistic expression:

- 55% thought people should not be allowed to display potentially offensive art in a public place.
- 36% thought musicians should not be allowed to sing songs with offensive lyrics. Nearly four in 10 indicated they would be less likely to patronize entertainers who made controversial political remarks that were contrary to the respondent’s views.

A 2002 survey on Comedy and Freedom of Speech, also conducted by the First Amendment Center, found that a significant percentage of Americans are reluctant to give full First Amendment protection to comedic speech or performances that could potentially insult or offend others. Among the findings:

- 39% of those surveyed said they favor government restrictions on public performance of comedy routines that might make light of or trivialize tragedies like the World Trade Center attacks or the Oklahoma City bombing.
- 37% favored government restrictions on the performance of these comedy routines on television. However, 78% of those surveyed said that comedians should be able to perform potentially offensive comedy routines on subscription channels like HBO, Cinemax, and Showtime.

The survey also asked about the right to exercise the right to free speech in print:

- 62% agreed that people should be allowed to publish material intended as humor on the Internet, even though many may consider the material offensive.
- 72% agreed that people should be allowed to publish material intended as humor in books, even though many may consider the material offensive.

Perhaps the most significant finding of the 2003 State of the First Amendment survey concerns the degree to which the First Amendment goes “too far” in the rights it guarantees. In the 2002 survey, conducted after 9/11, nearly half of the respondents said it went too far. The 2003 survey found that, 34 percent thought the First Amendment goes too far, which brought the response closer to the more moderate 1999, 2000, and 2001 findings. Additional 2003 findings included:

- 61% of respondents thought people should not be permitted to publicly express opinions that might offend racial groups
- 50% felt that individuals should not be permitted to publicly express opinions that might offend religious groups
- 62% rated the job that the American educational system does in teaching students about First Amendment freedoms as fair or poor.

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## Vagueness encourages silence instead of robust debate

While Janet Jackson's Super Bowl "wardrobe malfunction" did not create the Broadcast Decency Enforcement Act (BDEA) of 2004, it may propel the legislation's passage. The BDEA would increase by ten-fold the fines for the transmission of "obscene, indecent, or profane" language over television or radio — to \$275,000 for each individual violation, and a total of \$3 million for a continuing violation.

In a letter to the House Subcommittee on Telecommunications and the Internet, the American Civil Liberties Union cautioned that the bill would send "a widening chill into the atmosphere of free expression protected by the First Amendment." The heart of the ACLU's objection to the bill is that "it relies upon the FCC's definition of 'indecent' which is already vague. Because of the vagueness, speakers must engage in speech at their peril, guessing what the FCC will determine to be prohibited. Increasing fines merely exacerbates the problem, particularly for small broadcasters. Rather than face a potentially ruinous fine, smaller broadcasters are more likely to remain silent."

Radio is said to be the most vulnerable. There are more independent radio than television stations; a higher percentage of radio programming is live; and there are few television counterparts to adventurous college radio stations.

The FCC's heightened focus on indecency has already caused a chilling of free speech. In 2001, for example, a noncommercial community radio station in Oregon was fined \$7,000 for playing a Sarah Jones song that includes profanity. Although the case was dropped, the process took two years.

A House of Representatives subcommittee recently passed the BDEA. Increased fines are clearly in the air.