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The Heroes of the First Amendment

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THE HEROES OF THE FIRST AMENDMENT

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THE TRIALS OF LENNY BRUCE: THE FALL AND RISE OF AN AMERICAN ICON. By *Ronald K.L. Collins* and *David M. Skover.* Naperville: Sourcebooks, Inc. 2002. Pp. x, 562, plus CD audio appendix (narrated by Nat Hentoff). $29.95.

In 1950, Felix Frankfurter famously observed that "[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."[1] The circumstances of Justice Frankfurter's observation were hardly atypical, for his opinion arose in a Fourth Amendment case involving a man plainly guilty of the crime with which he had been charged — fraudulently altering postage stamps in order to make relatively ordinary ones especially valuable for collectors. Indeed, Fourth Amendment cases typically present the phenomenon that Frankfurter pithily identified, for most of the people injured by an unlawful search are those whose unlawfully searched premises contained actual evidence of the actual crime they actually committed. Other dimensions of constitutional criminal procedure present the phenomenon in a more attenuated way, because liberties like the rights to confront and cross-examine witnesses and to be free of compelled self-incrimination are ones in which it is more likely that the procedural defects will bear on the defendant's guilt. But it is still the case that almost all of the American constitutional law of criminal procedure has been built by those whose underlying guilt could not seriously be questioned.

Just as the guilty have shaped our liberties in the realm of criminal procedure, a similar rhetoric identifies the distasteful individuals who have been at the center of the development of the First Amendment. Indeed, some of these individuals have been considerably more distasteful than the "shabby defrauder,"[2] to use Justice Frankfurter's words, who was at the center of the *Rabinowitz* case. Clarence

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1. United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

2. *Id.* at 69 (Frankfurter, J., dissenting).

Brandenburg was a local leader of the Ku Klux Klan.[3] Jay Near's not totally inaccurate observations about the "Jewish gangsters" in Minneapolis stemmed from a much deeper-seated anti-Semitism.[4] Larry Flynt[5] thinks it amusing and harmless to celebrate gang rape[6] or to portray women as pieces of meat.[7] The protagonists in the Skokie litigation[8] comprised much of the membership of the American Nazi Party. The most recent important case involving public marches involved a group who appeared to believe that one could not be simultaneously gay and Irish.[9] Indeed, even some of the less evil figures at the center of the First Amendment's history have hardly inspired genuine affection. Zechariah Chafee took pains to comment on the Jehovah's Witnesses "astonishing powers of annoyance";[10] we suspect that Paul Cohen[11] may have been inspired as much by a juvenile desire to annoy his elders as by deep antiwar conviction; most of commercial speech doctrine has developed through litigation launched by such luminaries as the Coors Brewing Company[12] and the chain drugstores[13] that anchor so many of our strip malls; and numerous other prominent First Amendment litigants could best be described as "cranks."[14]

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3. Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); *see also* Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123 (1992).

4. *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931). The full background of the case is documented in FRED W. FRIENDLY, MINNESOTA RAG: THE DRAMATIC STORY OF THE LANDMARK SUPREME COURT CASE THAT GAVE NEW MEANING TO FREEDOM OF THE PRESS (1981).

5. Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

6. HUSTLER, Jan. 1983, at Cover.

7. HUSTLER, June 1978, at Cover.

8. Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977) (per curiam); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978). The entire controversy is recounted in DONALD A. DOWNS, NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT (1985); ARYEH NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM (1979); Lee C. Bollinger, *The* Skokie *Legacy: Reflections on an "Easy Case" and Free Speech Theory*, 80 MICH. L. REV. 617 (1982) (reviewing NEIER, *supra*); and David Goldberger, Skokie*: The First Amendment Under Attack by Its Friends*, 29 MERCER L. REV. 761 (1978).

9. Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group, 515 U.S. 557 (1995).

10. ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 399 (1948). The contributions of the Jehovah's Witnesses to the development of First Amendment doctrine include *Wooley v. Maynard*, 430 U.S. 705 (1977); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Cox v. New Hampshire*, 312 U.S. 569 (1941); and *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

11. Cohen v. California, 403 U.S. 15 (1971).

12. Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).

13. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

14. Texas v. Johnson, 491 U.S. 397 (1989); United States v. Grace, 461 U.S. 171 (1983); Feiner v. New York, 340 U.S. 315 (1951); Kunz v. New York, 340 U.S. 290 (1951); Terminiello v. City of Chicago, 337 U.S. 1 (1949).

Despite the prominence of such a sorry array of First Amendment litigants, there is a parallel story in which there are genuine heroes of the First Amendment — reasonably good people saying important things, at considerable risk to themselves, whose claims were ultimately (even if not in their own cases) vindicated, and whose vindication advanced the cause of the First Amendment. Daniel Ellsberg would fit this characterization,[15] as would the signers of the advertisement in *New York Times Co. v. Sullivan*,[16] and perhaps also the *New York Times* itself. Much the same can, and should, also be said about the vast number of civil rights demonstrators,[17] Vietnam protesters,[18] World War I protesters,[19] labor agitators,[20] harmless anarchists,[21] and innocuous Communists,[22] among others, who no less than the Brandenburgs, the Collins, the Flynts, and the Nears have been central figures in the development of the First Amendment.

Because so much of the First Amendment literature has been produced by some of its most illustrious celebrants, it turns out that there is almost always a hero. Sometimes it is a speaker, sometimes it is a lawyer, and sometimes it is a judge, but the literature of the First Amendment, like the literature of epic battles, always has a hero. The First Amendment's most prominent good guys and bad guys have frequently been featured in books and articles,[23] and that literature has

15. New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam). For a complete account, see DAVID RUDENSTINE, THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE (1996).

16. 376 U.S. 254 (1964).

17. Carey v. Brown, 447 U.S. 455 (1980); Gregory v. City of Chicago, 394 U.S. 111 (1969); Carroll v. President & Comm'rs of Princess Anne County, 393 U.S. 175 (1968); Brown v. Louisiana, 383 U.S. 131 (1966); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); *cf.* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (organizing economic boycott of Black citizens against White merchants).

18. Spence v. Washington, 418 U.S. 405 (1974) (per curiam); Hess v. Indiana, 414 U.S. 105 (1973) (per curiam); Watts v. United States, 394 U.S. 705 (1969) (per curiam); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); United States v. O'Brien, 391 U.S. 367 (1968); Bond v. Floyd, 385 U.S. 116 (1966).

19. Frohwerk v. United States, 249 U.S. 204 (1919).

20. Thornhill v. Alabama, 310 U.S. 88 (1940); Fiske v. Kansas, 274 U.S. 380 (1927).

21. Stromberg v. California, 283 U.S. 359 (1931); Schenck v. United States, 249 U.S. 47 (1919).

22. Noto v. United States, 367 U.S. 290 (1961); Scales v. United States, 367 U.S. 203 (1961); Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494 (1951); Herndon v. Lowry, 301 U.S. 242 (1937); De Jonge v. Oregon, 299 U.S. 353 (1937); Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919).

23. *See supra* notes 4, 8, 15; *see also* CORYDON B. DUNHAM, FIGHTING FOR THE FIRST AMENDMENT: STANTON OF CBS VS. CONGRESS AND THE NIXON WHITE HOUSE (1997); EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS (1992); ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991).

been invaluable in helping us to understand the politics and the sociology of the First Amendment's development.[24]

The latest addition to the tradition of books celebrating the First Amendment's heroes is Ronald Collins[25] and David Skover's[26] story of the 1950s and 1960s battles between the outrageous comedian Lenny Bruce and the last throes of vigorous American obscenity law. The book tells an important and engaging story in full and appropriate detail, but even more, it may tell us something about the role that individuals and their stories have played in the development of the law and the culture of the First Amendment.

I.

Lenny Bruce may not be particularly well-known to those generations that did not experience the 1950s or the 1960s, and if nothing else this book is an important account of an important figure. It would be hard to capture fully all that was Lenny Bruce, but this book goes a long way in that direction. Aided by an audio CD including many of his comedy routines, and accompanied by liberal and valuable lengthy quotations from letters and contemporary accounts, Collins and Skover present a Lenny Bruce who was, on the one hand, an extraordinarily talented and genuinely funny and insightful comedian and social critic, but was, on the other hand, just as much a narcissistic and self-indulgent drug addict with little sense of himself or his limitations. Indeed, just as the book's material from Bruce's routines make his talent and incisiveness clear, so too do the book's detailed accounts of Bruce's numerous legal and personal battles make obvious the ultimately fatal flaws in his personality. His ability to irritate audiences was part of his talent and had much to do with his fame, but his ability to infuriate police, prosecutors, judges — even sympathetic ones — and especially his own lawyers, whom he fired with some frequency in the wildly mistaken belief that things would go better were he in charge, is a large part of the Lenny Bruce story.

The focus of this book, however, is not on the totality of Lenny Bruce, but on Bruce's engagements with the obscenity laws and with those who enforced them, and it is here that Collins and Skover see Bruce as a hero, precisely the word they use on multiple occasions to describe his relationship with the First Amendment (pp. 1, 7, 10, 359, 404, 431, 449). For Collins and Skover, Lenny Bruce is someone who was persecuted because of the way in which his humor challenged conventional values and powerful people, who endured years of legal

24. *See* L.A. Powe, Jr., *Situating Schauer*, 72 NOTRE DAME L. REV. 1519, 1519-22 (1997).

25. Resident Scholar, Freedom Forum First Amendment Center.

26. Professor of Law, Seattle University School of Law.

battles for daring to take on the sacred cows of our society, and who became a "martyr" (pp. 8, 447) to the First Amendment because he refused to let himself be censored. As Collins and Skover tell their story, Bruce continued with his outrageous assault on popular sensibilities even in the face of grave legal — and therefore personal — risk.[27]

Collins and Skover's book is simultaneously an easy and a hard read. Easy because the authors tell an important story with an impressive attention to carefully researched detail and with a good balance between extensive quotations from primary materials and their own comprehensive account. Hard because they tell their story, engaging enough on its own terms, with a heavy-handed sense of outrage, a too simple view of the vices and virtues of the major players, and an extraordinarily liberal use of adjectives, adverbs, italics, exclamation points, and all of the other verbal devices that, on a printed page, substitute for pounding one's fist on the table or grabbing the reader by the lapels. Even more irritating, however, is the book's voice, which, in an attempt to get partly inside Bruce and his culture, refers to Bruce only as "Lenny," which far too often uses the "hip" language of the 50s and the 60s, and which comes across as more the behavior of the outcast trying to ingratiate himself with the "in-crowd" than as a successful attempt to tell a story as perceived by the primary players.

The reader who is willing to put up with these stylistic quirks, however, will be rewarded with a fount of information about a genuinely important episode in modern cultural history and with an account of how the law — in this case the law of obscenity — often plays out not only in the Supreme Court of the United States, but also in the behavior and attitudes of police, prosecutors, lawyers, judges, and of course defendants. Even more important, the reader will come away from this book with the best picture we have so far of American obscenity law in transition, for the period of Bruce's legal difficulties was also the period of obscenity law's transformation. When we look carefully at the relationship between Bruce's legal troubles and this period of transition, however, we may see that Bruce was somewhat less of a hero than Collins and Skover make him out to be and is thus better characterized as someone who both used and was used by law in this transitional period. In truth, Bruce might have emerged as even more of a hero had he been somewhat more concerned about the First Amendment and somewhat less concerned about himself.

27. A similar theme can be found in DE GRAZIA, *supra* note 23, at 444-79.

II.

The law of obscenity, long an easy target for academic commentators,[28] achieved much of its dismal reputation in the first half of the twentieth century. Although obscenity prosecutions in the United States date from the early part of the nineteenth century, and although such prosecutions were common in that century, most of those prosecutions were directed at "French postcards," at so-called police magazines that described crimes in lurid detail, and at various other publications largely at or beyond the margins of literary merit.[29] It was not until the twentieth century that, for a complex array of political and cultural reasons, obscenity law focused on works now accepted as being literary masterpieces, or, even if not those, serious works of enduring literature. Although *Ulysses* was ultimately determined not to be legally obscene in New York in 1934,[30] the very fact that this was considered a close case is ample evidence of the aggressiveness of American obscenity law in the first half of the twentieth century, an aggressiveness that also produced criminal convictions for the distributors of works such as Arthur Schnitzler's *Casanova's Homecoming*,[31] Radclyffe Hall's *The Well of Loneliness*,[32] D.H. Lawrence's *Lady Chatterley's Lover*,[33] Henry Miller's *Tropic of Cancer* and *Tropic of Capricorn*,[34] and Theodore Dreiser's *An American Tragedy*.[35] Even as late as the early 1950s, the Supreme Judicial Court of Massachusetts found the "realistic detail" of the "sexual episodes" in Erskine Caldwell's *God's Little Acre* too much for it to bear, concluding that the book was legally obscene and subject to forfeiture.[36]

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28. *See, e.g.*, Amy M. Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499 (1996); David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111 (1994); Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963); Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1; Peter Magrath, *The Obscenity Cases: The Grapes of* Roth, 1966 SUP. CT. REV. 7; Henry P. Monaghan, *Obscenity, 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 YALE L.J. 127 (1966); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974); Amy Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359 (1990).

29. *See* FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 8-23 (1976).

30. United States v. One Book Entitled "Ulysses" by James Joyce, 72 F.2d 705 (2d Cir. 1934), *aff'g* 5 F. Supp. 182 (S.D.N.Y. 1933).

31. People v. Seltzer, 203 N.Y.S. 809 (Sup. Ct. 1924).

32. People v. Friede, 233 N.Y.S. 565 (Magis. Ct. 1929).

33. People v. Dial Press, 48 N.Y.S.2d 480 (Magis. Ct. 1944).

34. United States v. Two Obscene Books, 99 F. Supp. 760 (N.D. Cal. 1951), *aff'd sub nom.*, Besig v. United States, 208 F.2d 142 (9th Cir. 1953).

35. Commonwealth v. Friede, 171 N.E. 472 (Mass. 1930).

36. Attorney Gen. v. Book Named "God's Little Acre," 93 N.E.2d 819 (Mass. 1950).

As social values changed, the aggressive use of obscenity law began to recede, however, and within not much more than twenty years, the conflicts between obscenity law and serious art and literature came almost to an end. Arguably assisted by the line of Supreme Court cases starting with *Roth v. United States*[37] in 1957 and ending with *Jenkins v. Georgia*[38] in 1974,[39] American obscenity prosecution became almost entirely focused on works that, to put it charitably, were unlikely to find themselves in the literary canon. Although there are serious arguments over whether the state has any business restricting people from enjoying the pleasures of *Sorority Girls Stringent Initiation* and *Dance with the Dominant Whip*,[40] the argument that such works deserve to engender the same literary or artistic esteem as *An American Tragedy* and *God's Little Acre* is hard to make with a straight face.

The narrowing of American obscenity predated its constitutionalization.[41] Even in the pre-1957 years when obscenity remained a topic doctrinally untouched by First Amendment concerns, not only was *Ulysses* vindicated, but important state and federal decisions had concluded that a free society was not one in which James T. Farrell's

37. 354 U.S. 476 (1957).

38. 418 U.S. 153 (1974).

39. Also relevant is *Smith v. United States*, 431 U.S. 291 (1977), making clear that the determination of "serious literary, artistic, political, or scientific value," Miller v. California, 413 U.S. 15, 34 (1973), was to be made on the basis of national and not local standards. *Jenkins* had earlier emphasized that even with regard to the "appeal to the prurient interest" and "patently offensive to contemporary community standards" prongs of the *Miller* test, as to which local and not national standards applied, the effect of regional variation was to be small when compared to the importance of First Amendment considerations, considerations that in *Jenkins* produced a unanimous Supreme Court ruling striking down a Georgia determination that the motion picture *Carnal Knowledge* was legally obscene. After *Jenkins* had made clear that the effect of so-called local standards was to be small, and that the Supreme Court had meant what it said in describing the reach of obscenity law as limited to "hard core" materials, *Miller*, 413 U.S. at 36, prosecutions of anything even nearing serious art or literature became rare. Such prosecutions were not nonexistent, as is shown by the (unsuccessful) Cincinnati prosecution of an exhibition of Robert Mapplethorpe photographs (jury acquittal following the decisions in *Contemporary Arts Center v. Ney*, 735 F. Supp. 743 (S.D. Ohio 1990), and *City of Cincinnati v. Contemporary Arts Center*, 566 N.E.2d 207, 214 (Hamilton County Mun. Ct. 1990). See WENDY STEINER, THE SCANDAL OF PLEASURE: ART IN AN AGE OF FUNDAMENTALISM 9-59 (1995)) and the (ultimately unsuccessful) prosecution of the rap group Two Live Crew in Florida (Luke Records, Inc. v. Navarro, 960 F.2d 134 (11th Cir. 1992) (per curiam)). But there is no indication that such plainly misguided prosecutions were any more common than misguided prosecutions of innocent people are under any other part of the criminal law.

40. *See* Mishkin v. New York, 383 U.S. 502 (1966).

41. In this sense, the history of the narrowing of American obscenity law is consistent with the themes in GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN THE COURTS BRING ABOUT SOCIAL CHANGE? (1991), for the social and legal movement that separated obscenity law from serious art and literature was one that substantially predated any of the Supreme Court decisions on the topic.

Studs Lonigan trilogy,[42] William Faulkner's *Sanctuary*,[43] and Kathleen Winsor's *Forever Amber*,[44] for example, could be branded obscene and consequently unsellable. Indeed, even *Roth* was preceded by a series of Supreme Court cases in the late 1940s and early 1950s that had signaled the arrival of an era in which obscenity law, whatever its merits or demerits, could not be used against serious literature or political commentary.[45]

III.

Lenny Bruce thus found himself perched on the law in transition, and perched on it in two different ways. First, his comedy act focused on sexual language and sexual imagery at a time when, as just noted, the use of sexually explicit language alone (absent pictures or performances) was on the way out as the basis for an obscenity prosecution. Although it is still the case that material containing only text can be legally obscene,[46] in practice the demise of obscenity prosecutions based entirely on words, whether printed or spoken and whether literary or not, started in the early 1950s and was largely complete by the late 1960s. In addition, the offensiveness (to some people) of Bruce's act also fell between two possible meanings of the word "obscene." The first, reflected in obscenity law, is the one under which "obscenity" refers to explicit and offensive portrayals of sex. But the second is that in an ordinary language sense, one occasionally reflected in the law of earlier generations, an "obscenity" is a dirty word, and one whose offensiveness need not relate to sex at all, and certainly not to sexual stimulation. When Justice Harlan in *Cohen v. California*[47] observed that "Fuck the Draft" on the back of Paul Cohen's jacket was unlikely to create sexual stimulation in anyone,[48] he merely reflected the fact that an "obscenity," or even "obscene"

42. Commonwealth v. Gordon, 66 Pa. D. & C. 101, 104 (Phila. County Ct. Quarter Sess. 1949), *aff'd per curiam sub nom.*, Commonwealth v. Feigenbaum, 70 A.2d 389 (Pa. Super. Ct. 1949).

43. *Id.* at 106.

44. Attorney Gen. v. Book Named "Forever Amber," 81 N.E.2d 663 (Mass. 1948).

45. Butler v. Michigan, 352 U.S. 380 (1957); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Winters v. New York, 333 U.S. 507 (1948); *cf.* Doubleday & Co. v. New York, 335 U.S. 848 (1948) (obscenity determination of Edmund Wilson's *Memoirs of Hecate County* affirmed by an equally divided Court, with Justice Frankfurter, a friend of the author's, not participating), *aff'g by an equally divided Court* People v. Doubleday & Co., 77 N.E.2d 6 (N.Y. 1947) (per curiam).

46. Kaplan v. California, 413 U.S. 115 (1973).

47. 403 U.S. 15 (1971).

48. *Cohen*, 403 U.S. at 20. John Hart Ely puts it better: "[A]nyone who finds Cohen's jacket 'obscene' or erotic had better have his valves checked." John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1493 (1975).

language, includes the full range of language on the FCC's list of prohibited words,[49] and pretty close to the full range of language that people of my generation would not have used in the presence of their grandparents.[50] Although Lenny Bruce was prosecuted in New York (pp. 189-313) and in California (pp. 37-137) for obscenity, it is plain that part of the impetus for his prosecution was more based on vulgarity than on obscenity, and was thus the same impetus that led to prosecutions of others for breach of the peace or other offenses involving the use of what in technical constitutional terminology is the language of "fighting words."[51]

In this respect, prosecuting Lenny Bruce for obscenity was significantly a function of the unusual, at least in the doctrinal sense, setting for his act. Had he walked the streets calling people "motherfuckers," he would likely have been prosecuted, as was Cohen and as were his contemporaries and their forebears, for breach of the peace or some offense of that ilk.[52] And had he used the same language in the privacy of his own home, or in the workplace or in the barracks, it is almost certain that he would have been prosecuted for nothing at all. Only because a live-comedy club hovered between the public and the private did those with a mind to deal with Bruce, and there were many, find themselves with no fully satisfactory legal avenue, and thus they settled on obscenity as, to them, the least inapt among a number of inapt alternatives.[53]

IV.

Because Lenny Bruce was being both scatalogically and sexually outrageous (and hilarious) at a time when the law was in transition in these two quite different ways, it is conceivable that he would not have

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49. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978).

50. People of today's generation find that their grandparents are people of my generation.

51. *E.g.*, Brown v. Oklahoma, 408 U.S. 914 (1972), *vacating mem.* 492 P.2d 1106, 1107 (1972) (Okla. Crim. App. 1972) ("mother fucking fascist pig cops"); Lewis v. City of New Orleans, 408 U.S. 913, 913 (1972) (mem.) (Powell, J., concurring in the result) ("god damn mother fuckers"); Rosenfeld v. New Jersey, 408 U.S. 901 (1972), *vacated and remanded mem.*, 303 A.2d 889, 891 (N.J. 1973) ("motherfucking"); Gooding v. Wilson, 405 U.S. 518, 520 n.1 (1972) ("son of a bitch").

52. On the First Amendment dimensions of criminal prosecutions for the use of "dirty" words, see, in addition to Papish v. Bd. of Curators, 410 U.S. 667 (1973) (per curiam); Cohen, Kois v. Wisconsin, 408 U.S. 229 (1972) (per curiam); Kristen C. Nelson, Note, *"Offensive Speech" and the First Amendment*, 53 B.U. L. REV. 834 (1973); and Ellen K. Thomas, Note, *Purging Unseemly Expletives from the Public Scene: A Constitutional Dilemma*, 47 IND. L.J. 142 (1971).

53. On the relationship between obscenity and obscene language in two of the three states (Illinois was the third) in which Bruce was prosecuted, see People v. Price, 84 Cal. Rptr. 585 (Cal. Dist. Ct. App. 1970), and People v. Casey, 67 N.Y.S.2d 9 (Utica City Ct. 1946).

been prosecuted at all. In the same year that Bruce was convicted on obscenity charges in New York (p. 294), the New York Court of Appeals had found *Memoirs of a Woman of Pleasure* (*Fanny Hill*) not obscene,[54] and a county court in New York had a year earlier dismissed an obscenity prosecution based on *Tropic of Cancer*.[55] Bruce was prosecuted on obscenity charges in Los Angeles in 1962 (pp. 79-137), but at roughly the same time the California Supreme Court was also finding *Tropic of Cancer* not obscene,[56] and only a few years later the California courts concluded that the California lewd-conduct statute was not even applicable to theaters.[57] And several years before Bruce encountered the obscenity laws in Chicago (pp. 139-88), the Seventh Circuit had invalidated as an unconstitutional prior restraint the Chicago film-licensing statute.[58] More broadly, numerous American state and federal courts, in New York, in California, in Illinois, and elsewhere, had since the late 1940s been dismissing obscenity prosecutions and striking down censorship statutes in the name of the First Amendment.[59]

As noted above, there were, of course, during roughly the same period also numerous obscenity convictions, although at the time of Bruce's legal difficulties the obscenity convictions in New York, at least, appear to have been largely restricted to far less mainstream material.[60] Still, the overwhelming direction of the law throughout the country, added to the fact that multiple prosecutions produced no final convictions for Bruce himself,[61] reinforces the conclusion that the law

54. People v. Bookcase, Inc., 201 N.E.2d 14 (N.Y. 1964).

55. People v. Fritch, 236 N.Y.S.2d 706 (Onandaga County Ct. 1963), *rev'd*, 192 N.E.2d 713 (N.Y. 1963).

56. Zeitlin v. Arnebergh, 383 P.2d 152 (Cal. 1963).

57. Barrows v. Mun. Court, 464 P.2d 483 (Cal. 1970). And see the parallel proceedings in *Barrows v. Reddin*, 301 F. Supp. 574 (C.D. Cal. 1968) (per curiam).

58. Zenith Int'l Film Corp. v. City of Chicago, 291 F.2d 785 (7th Cir. 1961).

59. *See, e.g.*, United States v. Klaw, 350 F.2d 155 (2d Cir. 1965) (finding work not obscene on its face); Grove Press, Inc. v. Christenberry, 276 F.2d 433 (2d Cir. 1960) (*Lady Chatterley's Lover* not obscene); New Am. Library of World Literature v. Allen, 114 F. Supp. 823 (N.D. Ohio 1953) (injunction against censorship); Attorney Gen. v. The Book Named "Tropic of Cancer," 184 N.E.2d 328 (Mass. 1962) (*Tropic of Cancer* not obscene); People v. Douglas, 202 N.Y.S. 160, 168 (St. Lawrence County Ct. 1959) (dismissing obscenity charge with judicial observation that "You Cannot Legislate Morals!"); People *ex rel.* Kahan v. Creative Age Press, Inc., 79 N.Y.S.2d 198 (Magis. Ct. 1948) (dismissing obscenity prosecution); People v. Vanguard Press, 84 N.Y.S.2d 427 (Magis. Ct. 1947) (*End As a Man*, by Calder Willingham, not obscene); People v. London, 63 N.Y.S.2d 227 (Magis. Ct. 1946) (holding that works of literary merit cannot be barred in the name of protection against obscenity).

60. *See, e.g.*, People v. Cohen, 205 N.Y.S.2d 481 (Queens County Ct. 1960); People v. Bunis, 198 N.Y.S.2d 568 (Buffalo City Ct. 1960).

61. This is technically untrue. The last of his convictions remained unappealed at the time of Bruce's death in 1966 because of the incompetence of Bruce as pro se counsel. Pp. 325-31. But because Bruce's co-defendant Howard Solomon prevailed on appeal, pp.

was proceeding along a moderately clear line toward deregulation even without Lenny Bruce's intervention. In that respect, it is not entirely clear why we would want to think of Bruce as a hero to the First Amendment. As any good negotiator knows, when you have gotten what you want you should change the subject. Bruce did not understand this basic lesson, and thus under circumstances in which he might well have remained legally invisible — even with the same act — he felt it necessary to draw attention to himself. And under circumstances in which the law might have been persuaded to leave him alone, Bruce did his best to provoke the law into action. Anyone so insensitive as not to realize the effect on then Second Circuit Judge Thurgood Marshall of using the word "nigger" as part of an oral argument (p. 304) was unlikely to have seen the steps, none inconsistent with his pursuing his art in an uncensored way, that might have left him less vulnerable to the clutches of the law.

Now it is possible, indeed probable on Collins and Skover's account, that Bruce's baiting of the law and of authority was not unrelated to his contemporaneous and subsequent fame. Dying[62] and being censored[63] are both good career moves, and if Bruce had been ignored instead of prosecuted it is quite possible that his humor would have had less of a sting and his name less of a place in history.[64] Throughout the book, Collins and Skover make clear that Bruce recognized this, and thus he had a complex relationship with his oppressors. Once Bruce was prosecuted, it became clear that he wanted to be vindicated, but it was equally clear that on repeated occasions he recognized the advantages of having been prosecuted in the first place. It is a vast understatement to note that Bruce did little to minimize the prospects of attracting police and prosecutorial attention. In addition to going out of his way to attract legal notice, Bruce also did his best to bungle his legal defenses. He fired a large number

342-49, it is a fair conclusion, shared by many of Bruce's lawyers over the years, that this was the constructive equivalent of an appellate victory for Bruce himself. Pp. 346-49. At the time of this writing, Collins and Skover, with the media lawyer Richard Corn-Revere, are at the forefront of an effort to secure a posthumous formal pardon for Bruce from Governor George Pataki of New York. *See* Clyde Haberman, *Absolution for a Martyr to the Profane?*, N.Y. TIMES, May 23, 2003, at B1.

62. P. 353 (quoting Artie Shaw as saying that "[d]eath is the best publicity agent").

63. Would the photographer Robert Mapplethorpe, the artist Andres Serrano, the journalist Myron Farber (*see* Ronald Dworkin, *The Rights of Myron Farber*, N.Y. REV. BOOKS, Oct. 26, 1978, at 34), or the author Henry Miller be what they are remembered as today without having been the targets of what turned into free speech and free press controversies?

64. As quoted by Collins and Skover, Harry Kalven, Jr., who in addition to being a great scholar of the First Amendment was one of Bruce's lawyers in Chicago, said that "[i]n order to give value to his gestures of defiance, [Lenny] did need a lot of opposition. . . . If you are going to break a taboo, it has to be a taboo." P.1 (alteration in original).

of very good lawyers,[65] interfered with the ones he did not (or had not yet) fired (pp. 61-62, 73, 168-69, 287), and often wound up ineptly representing himself (pp. 157-59, 301-11). As Collins and Skover document in great detail, Lenny Bruce pro se had both a fool for a client and a fool for a lawyer.

All of this suggests that Collins and Skover's portrayal of Bruce as a largely innocent victim of the law is far from self-evident. He died from a drug overdose (pp. 336-42) at the age of forty, but he was a heroin addict before his legal difficulties started, and forty is probably not too far from the average life expectancy of even noncensored heroin addicts who have been addicted for well over a decade. He spent a great deal of money on his legal defenses, but he most likely squandered much more on drugs, and long before he was first prosecuted he was the kind of person who spent more on the payments and insurance on his Cadillac than he did on food and housing combined (p. 86). Several of his trials and hearings produced first-instance judgments against him, but in light of the fact that Bruce won on a number of occasions and others were winning obscenity cases at the same time, it is hard to say whether the results would not have been different with more competent lawyering from good lawyers unrestrained by their client's ego.

Moreover, although Bruce was prosecuted under the obscenity laws, it is again at least an open question whether his crimes were not more political (or religious) than sexual. Even under the controversial assumption that there is a sharp demarcation between the two,[66] Bruce's offense may well have been mostly that of taking aim at various icons — Eleanor Roosevelt (p. 387), the Catholic Church (pp. 145-46), African Americans (pp. 146, 304), Hiroshima (p. 145), and many others. We do not know for sure whether those he most irritated would have come up with some other method of prosecuting him had the obscenity laws been unavailable, but it is hardly inconceivable that such would have been the case.

It is thus far more murky than Collins and Skover make out that Bruce was a hero of the First Amendment. Even they acknowledge that his multiple legal controversies "had virtually no formal impact on the state or national law of obscenity," (p. 349) and they recognize as well that the law was already on Bruce's side by the time he was alleged to have broken it (p. 404). Moreover, the trends in the law of the time leave open the substantial possibility that different defendant behavior even with the same act would have produced few if any

65. Examples abound throughout the book, but the best flavor comes from the statements of Maurice Rosenfield, pp. 328-29, and from the bitter end of his relationship with the distinguished civil liberties lawyer Ephraim London, pp. 288-89.

66. *See, e.g.*, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987).

prosecutions and a much larger percentage of legal victories, and at lower cost. Indeed, it is even possible that different defendant behavior would have produced earlier and clearer legal victories for Bruce, and thus it is possible that Bruce impeded rather than fostered the further emergence of a world in which Bruce's language, imagery, social satire, and political commentary would remain, except in rare cases, well outside the purview of the law.

In important respects, therefore, Collins and Skover present data and a history inconsistent with the lesson that they draw from them. It would have been better for society, even if not for Bruce, had he not been prosecuted at all, and it would have been better for both Bruce and for society if his prosecutions had produced earlier and clearer defense victories. But much of the blame for this failure must lie at Bruce's own feet, and the same can be said about Bruce's death and the personal and financial failings that preceded it. And although Lenny Bruce joins the list of those whose prosecution would have been less likely were the law different, there is little indication that Bruce did much, doctrinally or politically, to hasten such a state of affairs. Bruce was a victim of an unfortunate state of the law, but there is a difference between a victim and a hero, and what emerges from Collins and Skover's account is a Bruce who was at best a victim, and who by their own account, even if not by their own conclusions from that account, was hardly a hero.

V.

The characterization of Bruce as a hero, however, whether accurate or not, at least invites us to speculate on the relationship of the First Amendment's heroic figures to the development of First Amendment doctrine. Although it is undoubtedly correct that a motley crew of undesirables has achieved First Amendment prominence, the standard account that First Amendment doctrine has been *built* on the foundations of the likes of Collin, Brandenburg, Near, and Flynt appears to be a misleading oversimplification. If we examine the cases in which the First Amendment has been taken in a genuinely new direction, or been brought into a new arena, the chief protagonist has rarely been as unappealing as those on the foregoing list. More often, the litigants at the forefront of genuine First Amendment breakthroughs have either been individually sympathetic or at least have been parties that the courts — and some of the public — are likely to perceive as having been unduly or unfairly persecuted. Not only was libel brought into the First Amendment on the shoulders of the very sympathetic litigants in *New York Times Co. v. Sullivan*,[67] but

67. 376 U.S. 254 (1964).

the same phenomenon exists in other areas of First Amendment expansion. The early commercial speech cases did not involve tobacco and liquor advertisers seeking to employ the best of Madison Avenue techniques in order to increase the market for their products, but generally involved upstarts frozen out by entrenched professional oligopolies such as the "independent" pharmacists in *Virginia Pharmacy* and the established lawyers and law firms in *Bates v. State Bar of Arizona*.[68] The litigants in the breakthrough fighting-words cases were people whose primary crime was backtalk to bullying police officers,[69] and the significant breakthroughs even in obscenity law came largely as a consequence of serious publishers attempting to promote serious works of literature.[70]

Conversely, most of the genuinely bad people at the center of the First Amendment's history have been people who did not so much create new doctrine as they enjoyed or crystallized the benefits of earlier doctrinal breakthroughs. *Brandenburg* merely put the capstone on an edifice constructed by *Yates*,[71] *Scales*,[72] *Noto*,[73] and the changing values of the post-McCarthy era.[74] Larry Flynt won his case[75] easily because of the precedent of *New York Times Co. v. Sullivan*.[76] Jay Near's victory[77] was ensured less by his own case than by a centrality that the aversion to prior restraint possessed dating to Blackstone[78] and which was never doubted even in the early years of the First Amendment.[79] And Frank Collin and his band of neo-Nazis prevailed[80] without even the necessity of a Supreme Court opinion, for by 1977 and 1978 the *Brandenburg* and *Cohen* precedents were sufficient to make "Skokie" an easy case. More recently, when First Amendment

68. 433 U.S. 350 (1977).

69. *See supra* note 51.

70. *See, e.g., supra* notes 42-44 and accompanying text.

71. Yates v. United States, 354 U.S. 298 (1957).

72. Scales v. United States, 367 U.S. 203 (1961).

73. Noto v. United States, 367 U.S. 290 (1961).

74. *See* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975); *see also* Hans A. Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163 (1970); Frank R. Strong, *Fifty Years of "Clear and Present Danger": From* Schenck *to* Brandenburg *and Beyond*, 1969 SUP. CT. REV. 41.

75. Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

76. 376 U.S. 254 (1964).

77. Near v. Minnesota *ex rel.* Olsen, 283 U.S. 697 (1931).

78. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *151-52.

79. Patterson v. Colorado, 205 U.S. 454 (1907) (Holmes, J.); LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985).

80. *See supra* note 8.

breakthroughs have been urged by telemarketers,[81] computer "spammers,"[82] workplace gropers,[83] and even music pirates,[84] for example, the results have generally been negative. A totally Legal Realist account of the development of First Amendment doctrine is undoubtedly excessively reductionist,[85] but it would be equally reductionist to ignore the extent to which sympathetic litigants far more than the standard list of heroic villains have been the major figures in the actual expansion and strengthening of First Amendment doctrine. Had Lenny Bruce been more sympathetic he might have done more for the First Amendment, but given Bruce's personality, the best we can say about him is that he was a victim of an earlier age who at least did the First Amendment little harm.

VI.

Although I disagree with the conclusions that Collins and Skover reach, and although I wish they had written a less stylistically irritating book, there should be no underestimating the importance of the data that they have impressively amassed. The heroic tradition of the First Amendment reflects an insight, largely correct, that particular individuals with particular things to say in a particular way have played an important role in the development of free speech doctrine, likely larger than the role that particular individuals have played in the development of constitutional doctrine in many other areas. In addition, the effect of First Amendment doctrine once crystallized, as the cases of *Brandenburg, Collin, Flynt, Near*, and many others demonstrate, is to abstract away from individuals and their context,

81. *See* U.S. West, Inc. v. Fed. Communications Comm'n, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000); Moser v. Fed. Communications Comm'n, 46 F.3d 970, 975 (9th Cir. 1995); Fed. Election Comm'n v. Int'l Funding Inst. Inc., 969 F.2d 1110, 1118 (D.C. Cir. 1992) (en banc); Michael Shannon, Note, *Combating Unsolicited Sales Calls: The "Do Not Call" Approach to Solving the Telemarketing Problem*, 27 J. LEGIS. 381 (2001).

82. *See* ACLU of Ga. v. Miller, 977 F. Supp. 1228 (N.D. Ga. 1997); Compuserve Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015 (S.D. Ohio 1997); Michael A. Fisher, *The Right to Spam?: Regulating Electronic Junk Mail*, 23 COLUM.-VLA J.L. & ARTS 363 (2000).

83. Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993), *discussed in* Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, *and* Frederick Schauer, *The Speech-ing of Sexual Harassment*, *in* NEW DIRECTIONS IN SEXUAL HARASSMENT LAW (Catharine MacKinnon & Reva Siegel eds., forthcoming 2003).

84. Eldred v. Reno, 239 F.3d 372, 375 (D.C. Cir. 2001), *aff'd sub nom.*, Eldred v. Ashcroft, 123 S. Ct. 769 (2003).

85. As is demonstrated persuasively in Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002).

for this abstraction[86] is a key feature in explaining just why it is that bad people with harmful things to say have so often been First Amendment victors. If there is a hero in this book, it is less likely to have been Lenny Bruce himself than people like San Francisco Municipal Court Judge Clayton Horn (pp. 61-78), for it was Judge Horn who in the face of appalling courtroom conduct by the defendant nevertheless gave the jury instructions that facilitated Bruce's acquittal. In the face of such genuinely heroic behavior, it says much about the history and entrenchment of the First Amendment that even the nonheroic antics of Lenny Bruce were ultimately unavailing, and that the development of the modern First Amendment, rather than being assisted by Lenny Bruce, was, ironically, able to resist him.

86. *See* Frederick Schauer, *Justice Stevens and the Size of Constitutional Decisions*, 27 RUTGERS L.J. 543 (1996); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 84-85 (1998).