David Roberts

'As Rude As You Like – Honest': Theatre Criticism and the Law

In 2001, when David Soul sued the *Daily Mirror* for printing a defamatory review of his West End show, *The Dead Monkey*, questions surfaced about the critic's rights and responsibilities under the law. There have been numerous accounts in recent years of the relationships between law and literature, and the general assumption is that critics can claim the defence of 'fair comment'. However, very little work has been done on the history, rationale, and implications of that defence, or on the actions before Soul's in which aggrieved theatre people have attempted to bring critics to account. David Roberts evaluates individual cases from legal history in which the critic's rights have been tested, and considers what they have to tell us about the way our society conceptualizes critical activity. Bourdieu's history of taste is invoked, but modified to show how the law's concern with formalism in its own processes has endorsed a matching version of the critical process. David Roberts is Head of English at the University of Central England, Birmingham.

I OUTLINED in a previous issue of NTQ the linguistic boundaries within which theatre criticism operates.[1] Such a study, I argued, helped to define generic features which tend to be obscured if we think of theatre criticism only as a source – reliable or, more probably, otherwise – of information about performance. The encoding of author and reader, the rhetoric of presence, and the core conceptual vocabulary of recent newspaper criticism define a distinctive kind of textual work, one which influences readers' understanding not just of the individual performance, or of the past performances with which it is often compared, but of the cultural impact of theatre itself.[2]

Armed with linguistic philosophy and its theoretical offspring, it is easy to believe that genre is alone the province of language. Yet the way genres function in a given society is the product of many other forces, whether of material production, reception, or official legitimation, and it is the latter which is at issue here. The relationships between fiction, interpretation, and the law have been the subject of a number of recent studies, and excellent work has been done on the legal context for live performance and documentary forms.[3] Thanks to the monumental labour of Geoffrey Robertson and Andrew Nicol, there is also a definitive introduction to media law which covers everything from censorship and copyright to defamation and obscenity.[4]

Among such works, the most ambitious, perhaps, aim to show not only how the law regulates literary and dramatic production, or how writers and actors have evaded regulation, but the ways in which the conceptual categories of the law may be used to interpret literature and drama, and how literature and drama in turn reinterpret those categories. In the process a blurring of domains has taken place. Literature subtly legislates by borrowing legal concepts in order to modify them, while the law acquires features of aesthetic experience – a linguistic turn, rival schools of interpretation, the limits of formalism – and like the aesthetic it serves as a manifestation of ideology.

Powerful and in some sense invisible, we may not know it is there until we bump our noses against it, and its intricacies often claim the backing of a 'reasonableness' we do not question. At the same time, its influence is at once formally codified and sufficiently elusive to require imaginative exegesis.[5]

Could it be as interesting as that when theatre criticism is at issue? Even in a

  DOI: 10.1017/S0266464X03000162

medium so blatantly legislative, there may appear to be little that needs saying – no more, perhaps, than the three largely anecdotal pages devoted to 'legal hazards' in John E. Booth's recent study of the American critical scene.[6] For obvious reasons the reporting of potentially obscene, blasphemous, or defamatory productions has enjoyed little of the limelight given to their enactment; moreover the critic's very performance of his job can seem (at least to those outside the profession) sufficient explanation of its legitimacy.

Ludicrous lapses such as the failure of the *Daily Mirror* man Matthew Wright even to attend a performance he subsequently panned indicate that some of the basic questions here are matters of common sense.[7] With or without David Soul's three-year libel action against Wright, most of us would know or could deduce that somewhere in the background are two major obstacles to any performer who desires legal redress for adverse criticism.

The Defence of 'Fair Comment'

First, there is the critic's defence of 'fair comment' or 'honest opinion', persistently cited in UK law and formally codified in the First Amendment to the US Constitution, the latter having been interpreted as meaning that

> there is no such thing as a false idea. However malicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.[8]

This has made it possible for reviewers to indulge themselves to the lengths of the following extreme example, in which a song-and-dance act, the Cherry Sisters, incurred the wrath of a journalist in Iowa:

> Their long skinny arms, equipped with talons at the extremities, swung mechanically, and anon waved frantically at the suffering audience. The mouths of their rancid features opened like caverns, and sounds like the wailing of damned souls issued therefrom.[9]

The Supreme Court of Iowa insisted that this was fair comment or opinion. Unless, it declared, a distinction was observed between matters of fact and matters of opinion, the 'liberty of speech and of the press guaranteed by the constitution is nothing more than a name'.[10] It should be added, however, that US courts 'have divided as to whether the vituperative nature of criticism alone can remove the fair comment privilege'.[11]

The second obstacle to redress is the very publicity which the performer has sought in the first place: the matter of 'public interest' which has it, in Robertson and Nicol's words, that: 'Anyone who throws a hat into a public arena must be prepared to have it mercilessly, though not maliciously, trampled upon.'[12] Robert Sack includes among such people 'artists . . . entertainers . . . authors of all kinds . . . those who mount a rostrum for any purpose', and (ominously for anyone working in the subsidized theatre) 'those who seek possession of public funds'.[13]

One way to gain some protection would be to work in Australia, where the freedom to publish potentially defamatory material is more restricted. In one important case, a critic alleged that the actor and director of a play had deliberately curtailed the opportunities of his fellow performers so that he could be seen to best advantage. When the actor sued, it was determined that the review was fair comment; on appeal, however, the High Court found that parts of the review went beyond fair comment, and that allegations of dishonesty became, in the absence of adequate evidence, statements of fact.[14]

The two obstacles are related in that the same values which secure rights of expression by performers also secure the right of critics to be rude about them. Combined, they are sufficiently robust to ensure that critics who suffer retribution for their comments are more likely to do so outside the law than through it, whether in the form of a glass of wine in the face (Tom Sutcliffe), a death threat (Nicholas de Jongh), or a punch on the nose (Richard Edmonds and not a few others).[15]

The dearth of recent occasions, the unusual case of Soul apart, when performers have sought legal redress for adverse comment is only emphasized by the fact that the publications concerned have tended to

occupy the fringes of what we recognize as formal criticism. It is fair to say, however, that this state of affairs whereby the place of theatre criticism in the law has become almost invisible is testimony to the care of critics and copy-editors in making it so. As Robertson and Nicol put it, to 'steer round' the law has become one of the critic's most exercised skills.[16]

Questions to Answer

But if we all know in essence why theatre critics are not pursued for libel more often, some more elusive questions remain to be answered; and in any case, in so far as the relationship of law to criticism may appear 'natural' we should be the more wary of it. Five questions present themselves:

1. What exactly are the legal concepts which offer protection to the critic and what is distinctive about their interpretation in UK law?

2. What cases are there where those concepts have been tested in relation to theatre criticism?

3. What do the judgments involved tell us about the law's encoding of the theatre critic's role and responsibilities?

4. How has the law drawn on developments in theatrical practice in order to arrive at the present position?

5. How does the law's protection of critical comment affect its reception among readers?

The last and certainly the most elusive of these questions is arguably also the most important. Josette Feral has neatly pointed out in another recent issue of NTQ that as far as theatre is concerned it is the written word of the critic rather than the spoken word of the actor that communicates performance to its widest audience.[17] This is common sense, provocative in its simplicity, underscoring the need for a study of the review which assumes not its pale subordination to the live event, but its impact among the majority of readers who of course were never there. If reviewers are, literally or otherwise, constitutionally protected in their right to be rude about actors and directors, what is in it for those of us who read them?

A word of caution is, in the circumstances, unavoidable. This account is not to be taken as an exhaustive or legally watertight guide to what reviewers can and can't get away with, and its author accepts no liability for actions arising from it. Readers in need of specific advice might consult the excellent Legal Eagle pages of *The Stage* online, where a qualified lawyer, Michael Rose, answers such nice questions as 'Can I sue an uninvited critic?'[18]

1. The Legal Concepts

It is necessary first to establish the meaning of some basic terms.[19] Anyone who publishes criticism of another person enters a field in which he might, given certain conditions, be charged with defamation.[20] That has been variously defined as 'lowering someone in the estimation of right-thinking people generally', 'injuring someone's reputation by exposing him to hatred, contempt, or ridicule', or 'tending to cause someone to be shunned and avoided'. All these definitions apply to the person's reputation not just as a human being, but as a worker: to call someone a lousy actor is as potentially defamatory as to call them a lousy shit.

The chief problem with this area of the law has been thoroughly examined by Jill Cottrell, who finds that the tests of 'lowering in reputation', 'exposing to hatred', and 'causing to be shunned' are equally imprecise and even, in plural societies, fictitious.[21] Cottrell suggests that the associated charge of malicious falsehood be used where it is the person's professional qualities which are at issue; there, a statement known to be untrue is made 'spitefully, dishonestly, or recklessly' such as to cause financial loss.

In general the test of whether a comment is defamatory is not directly in the intention of the writer, but in the apprehension of the reader (although that reader's construction of the writer's intention is highly relevant),

https://doi.org/10.1017/S0266464X03000162 Published online by Cambridge University Press

and for that purpose the reader is by no means unsophisticated. He will read 'between the lines in the light of his general knowledge and experience of worldly affairs' and may belong to a group, such as regular theatregoers, with more specialized knowledge. In defamatory innuendo,

> where the sting is not a matter of general knowledge, its defamatory capacity is judged by its impact upon ordinary readers who have such knowledge – if the plaintiff can first prove that such persons were among the actual readership.[22]

UK law still distinguishes between libel (defamation by print) and slander (by the spoken word). Plays themselves, like theatre criticism, might be deemed libellous, whereas taunts from the audience such as used to be the *lingua franca* of the popular critical tradition would be treated as slander. In the latter case, proof of monetary loss would be required for a successful prosecution unless there was the imputation of one of five attributes, including (interestingly for the theatre at least in the seventeenth and eighteenth centuries) professional incompetence, adultery or unchastity, and carriage of a contagious disease. Even if none of them was personally named, a whole cast might seek redress if such circumstances arose, following such cases as the damages awarded in 1971 to journalists attending the Old Bailey, whom *The Spectator* described as a group of 'beer-sodden hacks'.[23]

A key consideration in determining defamation is the concept of malice, which in its legal sense means the publication of known falsehoods or of opinions not genuinely held, usually with the intention of pursuing some ulterior purpose. Authorities cite the Victorian reformer Parkinson, whose zeal against public dancing prevented him from exercising the critic's most basic duty, that of noticing what was going on in front of him.[24] Parkinson denounced a performance at the Royal Aquarium on the grounds that it showed a Japanese woman catching a butterfly in her genitalia. The theatre sued, pointing out in evidence that the performer was neither Japanese, female, nor dressed in such a way as would permit him to perform the act Parkinson alleged. Parkinson replied that he had not had a good seat, which stands comparison with Mary Whitehouse's counsel in the *Romans in Britain* case, forced to admit that from the circle of the Olivier Theatre he could easily have confused an actor's thumb with the same actor's adjacent penis.

Facts, Parkinson argued, were irrelevant in view of his legitimate object – to have the Royal Aquarium's licence revoked. The court took a different view, that it was precisely Parkinson's moral crusade which was irrelevant. He had wilfully distorted facts in pursuit of an ulterior motive, and by the exhibition of such 'malice' had foregone the privilege of 'fair comment' which would normally have been used in a critic's defence.

The opposite of 'malice' is 'honest belief', of which the law takes an extremely latitudinarian – indeed, almost novelistic – view. Belief may be honestly held whether or not it has been arrived at by rational process; in what Robertson and Nicol describe as a 'classic exposition', Lord Diplock observed:

> In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence, and fail to recognize the cogency of material which might cast doubt on the validity of the conclusions they reach.[25]

We might drily infer that the view of critical process implied here is one that many actors and directors would share. What is significant, however, is that for legal purposes the critic appears to be both protected by his profession and as idiosyncratic as he or she likes: a specialist who, over and above his specialism, is in his merely human individuality and fallibility *one of us*. This, I suggest, is one area where the law reinforces a particularly English concept of critical activity, evident both in the stylistics of the contemporary form and in formal pronouncements on its conduct by practitioners.

Leading the field is Irving Wardle's entertaining guide to the subject, which offers us

the English empiric, mistrustful of European intellectual systems and reliant on the opportunities of the moment, at once reconciling what he knows in advance with what he sees on the night and purifying his mind of all such foreknowledge.[26] While we may look to theatre criticism for the 'temperaments . . . training . . . [and] education' conducive to mature judgment, we are also accustomed to enjoy in it what the critic presents in self-defence: a belief as intuitive, inadequate, and partial as the law deems it 'honest'.

2. Test Cases

Searches of the electronic *Westlaw* legal database show, not surprisingly, that the majority of cases in which theatre people have in their professional capacities had resort to the law concern business or contractual arrangements.[27] None the less there are three areas in which critics and their subjects have been tested in English courts of appeal during the past century, and those areas map neatly onto different provinces of the critic's task: first, as a representative of criticism with whom the general public may well disagree, tested in McQuire *v*. Western Morning News Company Ltd (2 KB 100, 1903 CA); second, as a publicist whose views may affect box-office takings, tested in Fielding and another *v*. Variety Incorporated (2 QB 841,1967 CA); and third, in Eric Bentley's terms, as someone whose chief aim is 'contact with the live actor',[28] and who in consequence treads that difficult ground in which professional and personal comment may be hard to distinguish. Here a variety of disputes are relevant. The best known is probably Charlotte Cornwell's 1985 run-in with the Sunday *People*, whose account of her physical appearance need not be repeated,[29] but a more recent and legally significant case was Berkoff *v*. Burchill and another (Court of Appeal, 31 July 1996).[30]

Test Case 1: Is the Critic 'One of Us'?

On 24 June 1901 a touring company led by T. C. McQuire opened their latest show at the Theatre Royal, Plymouth. It was a musical by McQuire himself called *The Major*, and the next day's issue of the *Western Morning News* carried the following notice:

> A three act musical absurdity entitled *The Major*, written and composed by Mr T. C. McQuire, was presented last evening before a full house by the author's company. It cannot be said that many left the building with the satisfaction of having seen anything like the standard of play which is generally to be witnessed at the Theatre Royal. Although it may be described as a play, *The Major* is composed of nothing but nonsense of a not very humorous character, whilst the music is far from attractive. This comedy would be very much improved had it a substantial plot, and were a good deal of the sorry stuff taken out of it which lowers both the players and the play.
>
> No doubt the actors and actresses are well suited to the piece, which gives excellent scope for music-hall artistes to display their talent. Among Mr McQuire's company there is not one good actor or actress, and, with the exception of Mr Ernest Braime, not one of them can be said to have a voice for singing. The introduction of common, not to say vulgar, songs does not tend to improve the character of the performance, and the dancing, which forms a prominent feature, is carried out with very little gracefulness.[31]

Indignant, T. C. McQuire sued. The paper, he claimed, had libelled him and his company by claiming that his play was 'dull, vulgar, and degrading', that his performers were 'incompetent as actors, singers, and dancers', that they were mere 'music-hall artistes', and that he himself was 'incompetent both as an actor and composer'.

The case duly came to court, where the outcome was to prove more surprising than the newspaper's defence, which was that the review had been published 'in the ordinary course of their business as public journalists' without personal malice to McQuire, and that they had simply offered 'fair and bona fide criticism' on a matter of legitimate public interest. The Master of the Rolls agreed that no malice had been involved on the part either of the newspaper or of the reviewer, but left it to the jury to decide whether the offending notice was libel or fair comment. Taking account of the debate which had arisen during the trial as to the nature of the performance, and making a careful study of the dull, vulgar, and degrading script, the

jury found in favour of McQuire, who was awarded one hundred pounds in damages.

His triumph was short lived. In the Court of Appeal on 29 and 30 April 1903 the original judgment of Justice Ridley and jury was brought into question. What, after all, was the meaning of 'fair' criticism? Bona fide comment on the work without malice to its author or performers? Or criticism which a reasonable person – represented by the jury – would deem justified? Case law suggested the former. Publication of a book or work was in itself an invitation to comment, and as long as the commentator did not 'step aside from the work' or 'introduce fiction for the purpose of condemnation', was exercising a legitimate right – an important one, too, for truth and interpretation were also at issue. As Lord Ellenborough put it in passing judgment on Carr *v*. Hood, authors and their works

> should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous; otherwise the first who writes a book on any subject will maintain a monopoly of sentiment and opinion respecting it. This would tend to the perpetuity of error.[32]

Reflection on personal character, Lord Ellenborough concluded, 'is another thing'. Justice Ridley had, therefore, misdirected the jury when he had invited them to consider whether the review was fair criticism or libel, since he implied that they could exercise their own judgement in respect of *The Major*. As long as he was satisfied that there was no personal malice, he should have directed the jury to decide in favour of the newspaper company or withdrawn the case from them altogether.

McQuire's counsel protested that such a construction of 'fair criticism' allowed no room for one of unfair criticism. He cited previous rulings to the effect that fair comment was what 'an ordinary set of men with ordinary judgement' would deem fair, and that such bodies were legitimately represented by juries. In the words of Chief Justice Cockburn, it was insufficient to cite 'honest belief' as a defence in offering criticism, since such honesty 'might originate in the blindness of party zeal, or in personal or political aversion'. Criticism must also be tempered by 'a reasonable degree of judgement and moderation' if it was to be distinguished as fair rather than libellous.

But McQuire's efforts were in vain. Summing up, Lord Collins stated that juries had 'no right to substitute their own opinion . . . for that of the critic, or to try the "fairness" of the criticism by any such standard'. So much for the man on the Clapham omnibus; on the contrary, it was 'of the highest importance to the community that the critic should be saved from any such possibility'. To be 'fair' was to be 'honest' and 'relevant', to act in a way agreed to be free from malice. Since McQuire had never claimed that the *Western Morning News* had acted maliciously, the original judgment was overturned, with Collins observing that his colleague's summing up 'may have helped the jury to apply the standard of their own taste to the appreciation of the thing criticized, and to measure the rights of the critic accordingly'.

However, if this removed from the courtroom judgements about aesthetic value, these re-emerged briefly in Collins's dry peroration, which threatened to give the game away:

> We have had excerpts from the play, including the songs and the stage directions, read to us; and I think it is right to say that, in my opinion, it would be a matter of regret for all well-wishers of the stage if an honest critic were debarred from commenting in the sense of this criticism upon such a production.[33]

It is not difficult to imagine a judge today commenting in the same manner.

Test Case 2: What's the Damage?

On 15 December 1965 the impresario Harold Fielding mounted the premiere of the musical *Charlie Girl* at the Adelphi Theatre.[34] It was an instant success, greater even than Fielding's earlier *Half a Sixpence*, which had gone on to make serious money on Broadway. The impresario foresaw a similar future for the new work, and he took out advertising space in the New York-based *Variety* magazine to celebrate its impact and prepare the way for a US transfer.

To Fielding's alarm the 9 March 1966 issue of *Variety* carried an article under the name of Harm Schoenfeld which lamented the state of the musical in Britain, France, and the United States. Alarm turned to anger as he came to the following passage:

> The London musical theatre is a story of failure this season. . . . Both the American imports and the locally originated shows, such as *Twang* and *Charlie Girl*, have been disastrous flops.[35]

What was in the commercial sense true of *Twang* (a hapless title for a musical about Robin Hood) was certainly not true of *Charlie Girl*, and Fielding, on a visit to New York at the time, contacted the editor of *Variety* to protest. The editor laughed the matter off, as subsequently did Schoenfeld himself, but they did offer to put a note in *Variety* to say that Fielding was in New York with a view to negotiating a deal to stage the new work on Broadway. Fielding declined, insisting on a double-spread article apologizing for the misrepresentation of facts which the magazine, by virtue of having carried Fielding's advertisements, must have known.

But Fielding had no joy and no apology, and on his return home went to court on the basis that the article had both blackened his name and compromised his chances of mounting *Charlie Girl* in New York. Variety Incorporated offered no defence against the claim for damages for libel and injurious falsehood, and a judgment was entered for the relevant amounts to be assessed. Fielding was awarded £5,000 for injury to his personal reputation, and his company £10,000 for pecuniary damage.

Slow in their own defence, Variety Incorporated were quick to appeal. They asked for the judgment to be set aside or for a new assessment to be ordered on the grounds that (a) the £5,000 awarded to Fielding personally was excessive given the alleged injury to his reputation; (b) there had been no malicious intent in Schoenfeld's article; (c) there was no evidence that *Charlie Girl* had suffered at the box office as a result of it; and (d) that £10,000 for pecuniary damage was an arbitrary figure based on no evidence and which took no account of the tax which Fielding's company would have had to pay on profits.

The appeal was broadly successful in that the amounts awarded were reduced to £1,500 and £100 respectively. The difference in proportion reflected the judges' view that Fielding's reputation had been impugned and his 'feelings . . . grievously wounded without any justification', but that the article had clearly had no effect whatever on takings for the show at the Adelphi. Whether or not harm had been intended, none was inflicted. Fielding's claim that his chances of success in New York were compromised was regarded as lacking 'any concrete evidence at all'; indeed, he was damaged by his own admission that the show would need extensive adaptation before it could work in the US.

It was evidently, thought the judges, a highly uncertain venture in the first place. Fielding's best chance of success on appeal would have been some evidence that he had been negotiating over the show at the time Schoenfeld's article appeared, and that those negotiations had suffered as a result, but there was no such evidence.

The *Variety* article was clearly not criticism, but it committed an error of fact of which critics should be mindful, even though the consequences of the error were eventually less serious than at first appeared. The case engages a common, and limited, construction of the critic's role as someone who in Lionel Bart's words conveys information at the basic level of 'Go see it or don't go see it'[36] – in legal terms, as someone capable of inflicting pecuniary damage on theatre people. Of all the activities in which critics are said to indulge, this is arguably the one where the freedom to speak unfettered by anxiety is perhaps the greatest, at least until the reforms advocated by Jill Cottrell come into force.

Test Case 3: 'Who Are You Calling Hideous?'

Like the case cited above, Berkoff *v*. Burchill and another (4 All ER 1008, 1996), does not concern theatre criticism directly but does involve an activity which theatre critics are in constant danger of committing. Twice in

https://doi.org/10.1017/S0266464X03000162 Published online by Cambridge University Press

1994 the then *Sunday Times* journalist Julie Burchill made disparaging remarks about the personal appearance of Steven Berkoff. Reviewing the film *The Age of Innocence*, Burchill quipped that, 'Film directors, from Hitchcock to Berkoff, are notoriously hideous-looking people'; in a later review of *Frankenstein* she described the creature in the film as being 'a lot like Steven Berkoff, only marginally better-looking'.[37]

Berkoff sued, and an attempt followed by Burchill and Times Newspapers to dismiss the action on the grounds that her words could not be construed as defamatory. The attempt failed, but another was made on appeal in July 1996, when it was decided by majority verdict of the appeal judges that 'to call someone hideously ugly was capable of being defamatory', but that this depended, of course, on the circumstances.

Lord Justice Neill found that the tests of defamation (lowering in public standing, making an object of ridicule, causing to be shunned or avoided) were particularly relevant to someone who made his living at least in part as an actor, although it is doubtful whether Berkoff would ever have wished to audition for DiCaprio roles. But the actor's appearance was part of his market value, and that could be damaged by words such as Burchill's.

His point proven, Berkoff declined to take the case further, perhaps wisely given the dissenting voice of Lord Justice Millett, who observed that the ultimate test of defamation was in demonstrable effect: you could be as rude as you liked about someone, but if there was no chance of your being taken seriously there could be no case. In making 'a cheap joke' Burchill had demeaned herself but had not defamed Berkoff, although it wasn't only Burchill who had emerged from the exercise without credit. In the words of *The Times* Law Report,

> His claim was as frivolous as Miss Burchill's article and the court's time ought not to be taken up with either of them.[38]

That is the ultimate warning for any performer wishing to take up legal cudgels against an over-personal critic; but what is interesting about the case is that we might have expected, in view of Lord Ellenborough's old distinction between the public persona and 'private character' of a performer, Berkoff's appearance to have been represented as standing at the intersection of the two; alternatively, as in the Cornwell case, Burchill's words might have been construed as mere personal abuse. In fact Berkoff's face was judged only as public attribute, part of his professional profile. No one would be more likely to shun Berkoff personally as a result of Burchill's comments, but there was a chance that his career would suffer. In a precise legal sense, then, the actor surrenders his body to the gaze of the critic, who is in part its custodian.

3. The Law Encodes the Critic

The obvious conclusion to be drawn from these cases is that critics may say what they like about performances as long as they maintain some respect for truth, but 'truth' in a specific sense. Focus on the performance in itself, divorced from the personal and institutional contexts which may lie behind it, is the best defence; for that, it can be urged, is the culturally desirable business of criticism. This would seem to be a case of the law's concern with its own 'formalism' leading to its construction of a formalism proper to other activities such as theatre criticism.[39]

That defence has wider ramifications. It endorses the critic's professionalism and, by association, the narrowly aesthetic orientation of his task, which is valid because it is, in the legal sense of the term, *formal.* This supposes precisely the model of cultural consumption we find in Bourdieu's history of taste, in which the 'pure gaze' of the educated spectator objectifies the aesthetic experience, promoting form above function, style over content.[40]

Here the critic, expert in the adjudication of the occasion's significance, is produced as arbiter and model individual, communing with nothing other than the work and its value. Yet the means by which that value is transmitted complicate Bourdieu's assertion that the function of such criticism, which

enacts the 'cultural consumption' of art, is to 'fulfil a social function of legitimating social differences'.[41] For although such value judgements may, in Tony Bennett's words, become 'legislative within a particular valuing community',[42] criticism endeavours after all to redefine that community by presenting it with the illusion of greater participation not just in the event, but in the sensibility which has mediated it. This, I suggest, is the most interesting implication of T. C. McQuire's ultimate failure in court.

Although it concludes emphatically in favour of the rights of the critic, the case of McQuire *v.* Western Morning News is ambiguous regarding his social construction. To understand this we need to return to Lord Diplock's tolerant view of the limits of critical process, on which basis the critic might be as unreasonable or impulsive as he likes as long he does not, like Parkinson, distort the truth of what he sees in pursuit of an ulterior motive. Indeed, in Josette Feral's lapsarian reading of the history of criticism, the production of just such an unpredictable 'individuality' is the chief function of the form today.[43]

But, as we have seen, Diplock implies a still more deleterious model for criticism: that it must be accepted less as a professional task with developed codes or procedures than as a manifestation of common human failings. In practice, as I have attempted to show elsewhere, developed theatre criticism (at least of the broadsheet variety) seeks to blur that distinction: its fictions of human representativeness are part of its professional code.[44] One reason why it has been so difficult to pursue critics for libel is that they commonly, in that sense, have their cake and eat it.

It is certainly true that it is in the critic's legal interest to project the 'distinctive individuality' condemned by Feral. The defence of fair comment concerns expressions of opinion, not of fact – 'the most important, and most difficult, distinction in the entire law of libel', in the words of Robertson and Nicol.[45] It is a distinction which tends to be decided according to two criteria: the context of the utterance and the author's self-characterization. If the very genre of theatre criticism seems here to present an excellent defence, so does the overt citation of critical views as matters of personal opinion. The critic who, like Michael Billington, habitually signals a production's deficiencies with 'What I missed was . . . ' is not being merely polite, but tactically aware.

Again, professionalism and the formal production of human idiosyncracy go hand in hand; the classical appeal of theatre criticism to its readers is defined again in terms of its ability to offer perspectives and standards which we can readily inhabit as normative and human. We may not buy Billington's view that something had been missed, but his way of saying it is reassuring and persuasive.

There are similarities between this construction of the reader's role and that of a jury in deciding what was or was not fair comment. The case of McQuire *v.* Western Morning News Company confirmed that the jury's task was not to determine whether critical views were in themselves fair or otherwise, but whether they could have been held by a fair-minded person at the time of utterance and based on facts reasonably ascertainable. The distinction formally guarantees the inevitability – indeed, the democratic desirability – of diverse interpretation, again by appearing to divest the critic of any superior professional credentials: for this purpose he is simply another 'fair-minded person'.

But McQuire *v.* Western Morning News also implies the opposite, since the critical views in dispute there were decidedly patrician in tone and content. Far from being on a par with us, the critic may exercise a distinctive social role in pointing out what is 'common' or 'vulgar' about performances which others might enjoy.

There is not necessarily a contradiction between this and the idea that critics are like the rest of us, since the production of the connoisseurial mode – the critic-as-gentleman – is intended from its early manifestations in the writings of Cibber, Thomas Davies, and other fathers of English theatre criticism to be sufficiently inclusive as to embrace rather

than alienate its reader. Whether as readers we succumb to that sometimes patronising embrace or, like the jury in McQuire *v.* Western Morning News, are faintly repelled by it, we should acknowledge that the double role of the theatre critic – as professional and as everyman – is encoded not just in a critic's carefully habituated discourse but in the case law which has tended to protect him. If, in the words of Nigel Smith, 'genres are always engaged in the social relations in which they originate',[46] the law has been an active force in ensuring the continuity of that engagement well beyond the term in which its social presumptions might appear valid.

4. Law and the Status of the Profession

Berkoff's case against Julie Burchill was that she had damaged his future credibility as a performer: his face, a public rather than a private commodity, would lose some of its potential value. There is arguably a tension here with the fact that actors lose most of their protection through voluntary publicity: the more familiar the face, the greater the potential loss. But that tension is one indication of how the law has begun, very late, to engage with the operations of the phenomenon we call stardom; and if Jill Cottrell is right, future performers will be advised to pursue claims for malicious falsehood rather than libel, since this stresses the economic commodification of the performing body rather than its social standing – an indication, it would seem, of how the law has accommodated itself to broader social trends.

I suggested at the start of this article that the recent alignment of legal and literary study has brought out the literary qualities of the law and the legislative capacities of literature. One illustration of this is that the cusp on which, as Jill Cottrell argues, the law now stands in respect of performing bodies is the same as the one on which the earliest recognizable theatre criticism stood. Legal procedure and theatre criticism, legislative in complementary ways, depend on abandoning the notion of the performer as a private person displaying himself in public in favour of recognizing and authorizing a set of professional attributes. In theatre criticism as in the law, however, that cusp is problematic to define.

Research into English Restoration theatre has shown that the emergence of a 'star' system produced distinct but complementary fields of interest in individual performers: in their private (i.e., sex) lives, and in the 'brand' or type of part with which they had become associated. In either case the audience would make judgements as to an actor's fitness for a role.[47] Perceived disjunctions in either field could be disastrous: even the great Elizabeth Barry was unable to deliver Beaumont and Fletcher's line, 'A maidenhead, Amintor, at my years!', without raising a laugh; and Samuel Sandford, whose stock-in-trade was stocky villains, failed miserably as a decent confidant.[48] Each, in its own way, is as limited a basis for criticism as the other.

What was needed for the first recognizable piece of theatre criticism to appear in such circumstances was an actor for whom such questions never arose. When Colley Cibber extolled Thomas Betterton's vocal restraint in Act I, Scene iv, of *Hamlet*, he was recommending a performance of a part that was at the same time a performance of social virtues manifestly shared by the actor himself, his critic, and by Joseph Addison, who once sat with Cibber through a performance by an inferior actor (though not, it must be said, by the herd who liked their passion torn to rags).

It is as if criticism needed to co-opt actors to its league of gentlemen if it had itself to be legitimized as a gentlemanly occupation rather than a collection of tittle-tattle; just, perhaps, as the discursive habits of critics continue to co-opt actors as critical 'readers' of parts who serve up neatly defined, recyclable paradigms of performance. If Cibber could not in the circumstances give us a criticism which dismissed the private person as irrelevant, he had the luck to see and write about the next best thing: a performance in which the private and public selves were one. Criticism begins, by such default, when there is nothing to be libellous about.

5. Criticism, the Law, and the Reader

It remains, even so, a common pleasure of reading theatre criticism that it treads a fine line between personal and professional commentary, and however we may deplore it there is a certain cultural value in the vicious elegance with which critics appear to plant an occasional toe on the wrong side. The popular BBC Radio 4 show, *Quote Unquote*, regularly features snippets from dyspeptic theatre critics and treats the rest of us to the live laughter which greets them.

Diana Rigg has collected some of the choicest specimens in an anthology.[49] There we find Ivor Brown pronouncing that John Gielgud possessed 'the most meaningless legs imaginable', that John Mills was held to wander the stage 'looking like a bewildered carrot', or that Alec McCowen played John Osborne's Luther as 'a frail schizoid pixie'.[50] All too readily these *bon-mots* simply declare the class, gender, or other prejudices of a critic who is ready to see Cedric Hardwicke's Faustus as 'a grocer selling a pound of cheese', Anthony Hopkins's Coriolanus as 'a Welsh rugby captain at odds with his supporters' club', or Glenda Jackson's face as likely to 'launch a thousand dredgers'.[51]

But it is also the audience's capacity to enjoy such downright incivilities which is important. Thus, the critic's protection of fair comment creates a zone for his reader where unreconstructed fantasies of superiority may be indulged, and access to the critic's mediating sensibility brings entitlements similar to those of the crudest construction of satire, which, in Fredric Bogel's words, defends 'a readerly ego that is coherent, flattering, and disastrously alienated'.[52] That these comments come in quotable form is significant. Just as the acting tradition is partly 'produced' by critical recycling of performance paradigms, so these bite-sized critical nasties serve as convenient, portable proof of cultural belonging and critical acumen. Where evident, the metaphysical dexterity of their similes rubs off on the purveyor.

Ultimately this suggests another function for Bourdieu's 'pure gaze'. Authorized by the law, that gaze is also the vessel for manifest impurities of attention which have permitted the critic a patrician stance in matters social as well as aesthetic. Here, if anywhere, is the form of journalism which dares to be as rude as it likes as long as it remains, as the law has it, 'honest'.

Notes and References

1. David Roberts, 'Making the Word Count: towards an Analytic Database of Theatre Reviews', *New Theatre Quarterly*, Vol. XV, No. 4 (November 1999), p. 332–8. I am grateful to Derek Paget for reading a draft of the present article, and for his support for all my work on theatre criticism. I also thank Katy Lancaster for her assistance with citations.

2. My article for *Shakespeare Quarterly* (Fall 2002), 'Shakespeare, Theatre Criticism, and the Acting Tradition', addresses the way in which readers access the concept and components of tradition through Shakespearean theatre criticism past and present.

3. On censorship, see Richard Findlater, *Banned! A Review of Theatrical Censorship in Britain* (London: MacGibbon and Kee, 1967); Nicholas de Jongh, *Not in Front of the Audience: Homosexuality on Stage* (London: Routledge, 1992); on documentary TV and libel, Derek Paget, *No Other Way to Tell It: Dramadoc/Docudrama on Television* (Manchester: Manchester University Press, 1998). The recent juxtaposition of legal and literary study is evident in such books as John P. Zomchick, *Family and the Law in the Eighteenth Century: the Public Conscience in the Private Sphere* (Cambridge: Cambridge University Press, 1993); Randall Craig, *Promising Language: Betrothal in Victorian Law and Fiction* (New York: State University of New York Press, 1999); Kostas Myrsides and Linda S. Myrsides, ed., *Undisciplining Literature: Literature, Law, and Culture* (New York: Peter Lang, 1999); Jan-Melissa Schramm, *Testimony and Advocacy in Victorian Law, Literature, and Theology* (Cambridge: Cambridge University Press, 2000); and Paul W. Kahn, *Law and Love: the Trials of King Lear* (New Haven: Yale University Press, 2000). *Critical Quarterly*, XLIII, No. 4 (Winter 2001), edited by the lawyer-critic Anthony Julius, is devoted to literature and the law.

4. Geoffrey Robertson and Andrew Nicol, *Media Law* (Harmondsworth: Penguin Books, 3rd ed., 1992).

5. An excellent introduction to social and ideological dimensions of the law is Rosemary Hunter, Richard Ingleby, and Richard Johnstone, ed., *Thinking about Law. Perspectives on the History, Philosophy, and Sociology of Law* (St Leonards, NSW: Allen and Unwin, 1995).

6. John E. Booth, *The Critic, Power, and the Performing Arts* (New York: Columbia University Press, 1991), p. 112–15. I am grateful to Paul Prescott for this reference.

7. In 2001 David Soul sued Matthew Wright for a number of damaging claims about *The Dead Monkey*, including the number and behaviour of the audience, the sales of promotional CDs, and Soul's alleged financial contribution to the production. Verdict reported on the BBC News website, at http://news.bbc.co.uk/1/hi/entertainment/shobiz/1703894.stm (at 25.9.02).

8. Robert D. Sack, *Libel, Slander, and Related Problems* (New York: Practising Law Institute, 1980), p. 178.

9. Cited in Sack, op. cit., p. 178. The case was Cherry *v.* Des Moines Leader, 1901 (114 Iowa 298, 86 NW 323). A note on legal citation conventions seems necessary. The citation consists of the party names followed by the reporter volume number (114), the abbreviated reporter (in this case the Supreme Court of Iowa), and the first page of the case (323).

10. Ibid., p. 178. The case was Cherry *v.* Des Moines Leader, 114 Iowa 298, 86 NW 323 (1901).

11. Ibid., p. 174.

12. Robertson and Nicol, op. cit., p. 85.

13. Sack, op. cit., p. 171–2.

14. Sally Walker, *The Law of Journalism in Australia* (Sydney: Law Book Company, 1989), p. 174. The case was O'Shaughnessy *v.* Mirror Newspapers Ltd [1970] 125 CLR 166.

15. Tom Sutcliffe of *The Guardian* had a glass of wine thrown at him by the soprano Anne Evans, who objected to his comments on the conducting by Sir Reginald Goodall of Wagner's *Tristan and Isolde* at the London Coliseum (his review had appeared in The Guardian of 17 March 1986). Nicholas de Jongh, also of *The Guardian*, was threatened by Steven Berkoff following a review of the latter's Hamlet (de Jongh had remarked that Berkoff would have made a compelling Claudius. For details of the incident, see Nicholas de Jongh, 'Hello Nick, I'm Going to Kill You', *The Guardian*, 11 August 1989, p. 21). Richard Edmonds of the *Birmingham Post* was struck in the face at a Shakespeare Institute party by an aggrieved actor.

16. Robertson and Nicol, p. 39.

17. Josette Feral, '"The Artwork Judges Them": the Theatre Critic in a Changing Landscape', *New Theatre Quarterly*, Vol. XVI, No. 4 (November 2000), p. 313.

18. Available at http://www.thestage.co.uk/connect/eagle/08.shtml.

19. On UK law I am heavily indebted in this section to Robertson and Nicol, op. cit., and to Colin Duncan and B. Neill, *Duncan and Neill on Defamation*, (London: Butterworths, 2nd. ed., 1983); on US law, to Robert D. Sack, op. cit.; on Australian law, to Sally Walker, op. cit. The key statute in UK law is the Defamation Act of 1952. I am grateful to my wife, Fiona Shaw Roberts, Lecturer in Law, for her comments on drafts of this section.

20. In the words of P. F. Carter-Ruck and R. Walker, indeed, 'no combination of words, no publication, and no sphere of activity entirely escape the possibility of proceedings for defamation. See their *Carter-Ruck on Libel and Slander* (London: Butterworth, 5th ed., 1997), p. 4.

21. Jill Cottrell, 'What Does "Defamatory" Mean? Reflections on Berkoff *v.* Burchill', *Tort Law Review*, VI, No. 2 (1998).

22. Robertson and Nicol, op. cit., p. 49, 59.

23. Ibid., p. 57.

24. Ibid., p. 73; also Sack, op. cit., p. 333. The case is Royal Aquarium v. Parkinson [1892] 1 QB 431 (Court of Appeal). I have been unable to discover further information about Parkinson, but I am grateful to Derek Paget, George Taylor, Steve Nicholson, and Miriam Handley for helpful suggestions.

25. From Horrocks *v.* Lowe [1975] AC 135, p. 150, cited in Robertson and Nicol, p. 72.

26. Irving Wardle, *Theatre Criticism* (London: Routledge, 1992), p. 48–9.

27. *WestlawUK* (London: Sweet and Maxwell, 2002).

28. Eric Bentley, *What is Theatre? Incorporating 'The Dramatic Event' and Other Reviews, 1944–1967* (London: Methuen, 1969), p. 8.

29. Details may be found in Booth, op. cit., p. 114.

30. The case sparked a flurry of interest in legal journals. In addition to Cottrell, op. cit., see John O'Keefe, 'In Defence of Luvvies: Ridicule and Context in Libel Law – Time for a Re-think?', *Entertainment Law Review* 1999, X, No. 6, p. 167–9; and Eamonn Hall, '"Hideously Ugly": Defamation or Mere Ridicule?', *Gazette Incorporated Law Society of Ireland*, XC, No. 8 (1998), p. 7. The verdict proved key to determining the outcome of a later action, Norman *v.* Future Publishing Ltd [1999] EMLR 325 (CA), in which the soprano Jessye Norman objected to a magazine description of her physique.

31. *The Western Morning News*, 25 June 1901. Miriam Handley has kindly supplied me with the following information about McQuire. There is a copy of *The Major* in the Lord Chamberlain's Collection (LCP MS 53533 E), licensed in September 1893 (clearly the show had been on the road for some time before the critics really got their teeth into it). Other pieces by McQuire include *Eugene Aram*, a romantic comedy performed at Margate on 4 July 1901, and *A Wandering Minstrel*, another musical comedy, performed at Eastbourne on 8 February 1904. In Allardyce Nicoll's compendious handlists of English plays there appears a T. C. McGuire who was presumably the same person; his burlesque *Robin the Rover* was performed in Brighton in 1897 and *Perils of Life* at East Hartlepool in 1899.

32. Carr *v.* Hood (1808) 1 Camp.354; 10 R.R. 701.

33. McQuire *v.* Western Morning News, p. 843.

34. Fielding, originally a professional violinist, began his career as a producer in 1942. His first major London production was Rogers and Hammerstein's *Cinderella* (Coliseum, 1958). *Charlie Girl* (music and lyrics by David Heneker and John Taylor, book by Hugh Williams, Margaret Williams, and Ray Cooney) ran for 2,202 performances at the Adelphi.

35. [1967] 2 Q.B. 841, p.5. *Twang* (music and lyrics by Lionel Bart, book by Bart and Harvey Orkin, directed by Joan Littlewood) opened on 20 December 1965. It included such numbers as 'Welcome to Sherwood', 'Follow Your Leader' and 'I'll Be Hanged', and starred, among others, Barbara Windsor, Ronnie Corbett, and Bernard Bresslaw. Further details of this neglected classic may be found via http://www.eur.com/musicals/index.htm; recollections of the event by its director may be found in *Joan's Book: Joan Littlewood's Peculiar History as She Tells It* (London: Methuen, 1994).

36. Cited in Wardle, op. cit., p. 5.

37. Cited in *The Times*, Law Report Section, 4 October 1996. A full account of the case is available via the Butterworth on-line legal database at www.butterworths.co.uk/aller/index.htm.

38. Paul Magrath, '"Hideously Ugly" Tag Could Be Defamatory', *The Times* 4 October 1996.

39. For a sustained critique of 'legal formalism', see Hunter, Ingleby, and Johnstone, op. cit.

40. Pierre Bourdieu, trans. Richard Nice, *Distinction: a Social Critique of the Judgement of Taste* (London: Routledge, 1994). p. 4.

41. Ibid, p. 7.

42. Tony Bennett, 'Really Useless "Knowledge": a Political Critique of Aesthetics', *Literature and History*, XIII, No. 1 (Spring 1987), p. 54. I am indebted for this reference to Claire Cochrane, 'The Pervasiveness of the Commonplace: the Historian and Amateur Theatre', *Theatre Research International*, XXVI, No. 3 (Autumn 2001), p. 233–42.

43. Feral, op. cit., p. 314.

44. See the articles cited in Notes 1 and 2.
45. Robertson and Nicol, op. cit., p. 80.
46. Nigel Smith, *Literature and Revolution in England, 1640–1660* (New Haven: Yale University Press, 1994), p. 4.
47. See Peter Holland, *The Ornament of Action: Text and Performance in Restoration Comedy* (Cambridge: Cambridge University Press, 1979); Elizabeth Howe, *The First English Actresses: Women and Drama, 1660–1700* (Cambridge: Cambridge University Press, 1992).
48. Colley Cibber, *An Apology for the Life of Mr Colley Cibber . . .* , ed. R. W. Lowe, 2 vols. (London: Nimmo, 1889), I, p. 162; the Beaumont and Fletcher play was *The Maid's Tragedy*; Sandford was miscast as Daring in Behn's *The Widow Ranter*.
49. Diana Rigg, *No Turn Unstoned: the Worst Ever Theatrical Reviews* (London: Elm Tree Books, 1982). Other examples of the genre are Bill Henderson, ed., *Rotten Reviews: a Literary Companion* (New York: Penguin Books, 1987) and Nicholas Slonimsky, *Lexicon of Musical Invective: Critical Assaults on Composers since Beethoven's Time* (Seattle; London: Washington University Press, 2nd ed., 1969).
50. Ibid., p. 28, 37, and 36.
51. Ibid., p. 29, 31, and 32.
52. Fredric V. Bogel, 'The Difference Satire Makes: Reading Swift's Poems', in Brian A. Connery and Kirk Combe, ed., *Theorizing Satire: Essays in Literary Criticism* (Basingstoke: Macmillan, 1995), p. 51.