"SPEAK THE SPEECH, I PRAY YOU": THEATRE, LAW, AND RIGHTS – A STUDY

by

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ABSTRACT

This thesis examines how English law acts on, and in, the site of conflict between protestor and artist (referring, collectively, to the artist/producer/manager) in the context of controversial (or potentially controversial) theatrical performances i.e. those which engender moral outrage, or religious or political protest. This question is used as an umbrella under which to consider: (a) the framework within which the theatre operates and to investigate the restrictions imposed or enshrined freedoms provided by English law on theatre and performance; (b) how, if at all, the law can help to ameliorate the tension identified above.

The project expressly renounces any prescription that would substantially fetter the arts, or attempt to substantially limit freedom of expression. Instead, the thesis investigates why theatre is important, the many connections between law and the theatre, and the overarching link between law, theatre and culture. The thesis begins by providing several exemplars, referred to throughout the work, before recording the development of the law regulating censorship of the theatre in England, beginning with the Theatres Act of 1737 – chosen as a starting point by virtue of it being the first time the theatre was regulated by statute (in England). The analysis reveals a (largely unsurprising) reflection of modern, liberal, Western democratic tolerance.

In order to establish a framework within which the competing interests of the offended and the artist can be compared – with a view to making normative suggestions – the thesis adopts the language of rights. It notes the post-war freedoms of the second half of the twentieth century, culminating in the rights revolution of the 1960s, and, in the 1970s, the political liberalism of John Rawls and his theory of justice as fairness.

Finally, using the principles of therapeutic jurisprudence – developed out of mental health law in an attempt to analyze the fit between law and psychology – and discourse analysis, the thesis suggests that the role of law can be to act therapeutically, reducing community friction and mediating between disputing parties. Using Rawls' theory of justice as fairness with the gloss of law's role as therapy (and set against the background of a breakdown in communication between opposing parties in a conflict situation), the role of law, it is suggested, should be to provide a framework for dialogue. Such a dialogue could involve optional adherence to a best practice code, or simple workshops at which those who oppose and those who promote controversial plays could consider the work in question together.

The thesis concludes that this would be useful for playwrights (and theatre managers/producers), who would be seen to have attempted to engage the protestors, and defend the work, hopefully limiting self-censorship. At the same time, those in moderate opposition who are willing to engage will feel that their complaints have been, at the very least, considered. It also suggests that such a dialogue might filter through the relevant community, potentially reducing the anger felt even by those in the most vehement opposition.

TABLE OF CONTENTS

ABSTRACT .... **ii**
TABLE OF CONTENTS .... **iii**
LIST OF KEY ACRONYMS AND ABBREVIATIONS .... **v**
ACKNOWLEDGEMENTS .... **vi**
DEDICATION .... **vii**
CHAPTER 1: Introduction **1**
  In the beginning… 1
  Roadmap 5
CHAPTER 2: Methodology **8**
  Exemplars, assumptions, and the line in the sand 8
  The crucial tenet of "freedom of speech" in democracy 12
  A final word on methodology 16
CHAPTER 3: Jerry Springer, the importance of theatre, and the role of law **21**
  Controversy…and a defence of *Jerry Springer: The Opera* 21
  Why theatre matters 25
  The relationship between theatre and law 27
  Culture and the law 33
CHAPTER 4: Depravity, corruption, and the Lord Chamberlain's imprimatur **36**
  'Regulation' of the theatre 36
  The wisdom of Solomon – censorship and British theatre 36
  Obscenity, blasphemy, and a comment on the attempted prosecution of the producers of *JStO* 47
  Where are we now? 51
CHAPTER 5: Rights, the universe and everything **53**
  The rights revolution 53
  Rights and enjoyment 55
  Rawls and the social contract 60
  A political currency? 72
CHAPTER 6: Law as therapy and analyzing discourse **74**
  The role of law 74
  Law as a therapeutic agent 75
  Discourse Analysis: What to mediate? 82
  Therapeutic discourse 87
CHAPTER 7: Preparing the community – law and managing sensibilities **89**
  The centrality of communication 89
  Justice as fairness 92
  A therapeutic outcome 94
  A prescription 96
  Code of best practice 100
  Suggestions for further work 103
CHAPTER 8: Conclusion **105**

BIBLIOGRAPHY **109**
Articles 109
Books 118
Legislation (UK) 122
Hansard references (UK) 122
Cases (UK) 123
Cases (EU) 123
Reports / Codes 123
Websites 124

LIST OF KEY ACRONYMS AND ABBREVIATIONS

Jerry Springer: The Opera....................JStO

Theatres Act 1968....................1968 Act

Theatres Act 1843 or Act for Regulating Theatres ....1843 Act

Theatres Act 1737 or Theatrical Licensing Act....................1737 Act

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Note: The quotation contained in the title of this thesis is taken from *Hamlet*, Act III, Scene II.

For Mum, who gave life everything and everything life

CHAPTER 1: Introduction

In the beginning...

"[O]ur job in the theatre," observed Nick Hytner, the artistic director of the National Theatre in London,[1] in 2008 "is to put on shows that will provoke, ridicule and offend"[2]

In 2003, a theatrical production arrived in London's theatreland that was either "a piece of art...essentially confusing and opaque...[but]...a genuine piece of work, created by artists"[3] or "filth and blasphemy",[4] depending on who you spoke to. The sung-through musical theatre production in question reimagined the biblical portrayal of Jesus' confrontation with the devil, presenting on stage the meeting of a sharply dressed Satan with a dysfunctional holy family. In hell. As a fantastical version of the *Jerry Springer Show*. With Jesus wearing a diaper.[5]

This is the third Act of *Jerry Springer: The Opera ("JStO")*,[6] a musical vision of the US talk show that attained infamy with its stories of deviancy and racism, sandwiched between (rehearsed?) brawls. Wonderfully described as a "one-hour syndicated slugfest [that] debases all of us,"[7] it is perhaps no surprise that *JStO* elicited criticism from

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[1] 2003 – present.
[2] Anthony Burton, 'A Disgusting Feast of Filth' *The Times* (18 September 2008), online: <http://business.timesonline.co.uk/tol/business/law/article4775754.ece>.
[3] Stewart Lee, *How I Escaped My Certain Fate: The Life and Deaths of a Stand-Up Comedian* (London: Faber and Faber, 2010), at 29.
[4] Christian Voice website, online: <http://www.christianvoice.org.uk/springer8.html>.
[5] He is not, in fact wearing a diaper. The same actor plays a character called Montel in the first Act, who likes to dress as a baby. Jesus is wearing a loincloth. But this was one of the – rather more far-fetched – grounds on which complaints were made: that the loincloth looked like a nappy (see *ibid.*).
[6] Music by Richard Thomas; book and lyrics by Stewart Lee and Richard Thomas.
[7] Allison Waldman, 'American Pie; The In-Your-Face Success of *The Jerry Springer Show* (Special Report: 'Springer' Hits 3,000)' *TelevisionWeek*, online: <http://www.highbeam.com/doc/1G1-145700582.html>. The quote is attributed to Grant Tinker, former Chairman and CEO of NBC.

Christian groups for its perceived iconoclasm. In the UK, initially angry rhetoric from groups such as Christian Voice,[8] an ultra-conservative Christian group, rapidly morphed into protests outside theatres where the show was being performed, and culminated in an attempted private blasphemous libel action against the Director General of the British Broadcasting Corporation (the "BBC") and the producers of *JStO*.[9] The claim failed at the first hurdle: English magistrates refused to agree to authorise the summons, presumably subscribing to the idea that '[i]t would...be unwise...to load too much theological freight on any dramatic vehicle in which God appears as a superannuated Elvis crooning "It ain't easy being me."'[10]

"It ain't easy." While sounding flippant, this admirably sets the scene for the problem this thesis addresses. This project is a study of how (if at all) the law might act on, and in, the site of conflict between protestor and artist[11] in the context of controversial (or potentially controversial) theatrical performances[12] i.e. those which engender moral outrage, or religious or political protests. The idea is to use this question as an umbrella under which to consider: (a) the framework within which the theatre operates and to

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[8] Christian Voice, online: <http://www.christianvoice.org.uk/springer12.html>.

[9] Pinsent Masons, online: <http://www.out-law.com/page-8752>.

[10] Kevin Gustafson, 'Review: Jerry Springer The Opera. By Richard Thomas and Stewart Lee' (2003) 55 Theatre Journal 726, at 727.

[11] This is used as an umbrella term for the creative team, technical production crew, producers and theatre staff involved in a work.

[12] In using the word "theatre" or "theatrical" in this thesis I am following the Theatres Act 1968 definition of 'play', at sub-section 18(1)(a), namely "any dramatic piece, whether involving improvisation or not, which is given wholly or in part by one or more persons actually present and performing and in which the whole or a major proportion of what is done by the person or persons performing, whether by way of speech, singing or action, involves the playing of a role." Here, I am choosing to ignore the rather niche distinction some theatre studies academics make between theatre and, say, opera. As Steve Tillis notes, "Opera is distinguished from theatre owing to its emphasis on music and (very often) dance. While this distinction is plausible in principle, it must be applied consistently throughout its history if it is to be taken seriously. If one really insists on this distinguishing basis of music and dance, one must also exclude Greek tragedy and comedy from realm of theatre...but who in their right mind would want to do this?" (see Steve Tillis, 'Remapping Theatre History' (2007) 17 Theatre Topics 1, at 9). I do not want to do this.

investigate the restrictions or enshrined freedoms imposed/provided by English law on theatre and performance; and (b) how, if at all, the law can help to ameliorate the tension identified above. In essence, this thesis is an exploration of the tension between groups that feel marginalized and attacked by a contentious work, and the freedom of expression that artists, producers and members of the viewing public now take for granted in Western democracies. Such an exploration brings in to play a number of emotive subjects: freedom of expression, individual rights, tolerance, exclusion and inclusion. As such, the approach of this thesis is firmly heuristic – the work is intended as an inquiry into what role if any law can play in resolving the area(s) of tension identified, while remaining cognizant of the fact that there is almost certainly not a right or wrong answer, and that views will differ on whether law should be involved at all. In this sense it is intuitive – testing the water. To further this heuristic method, I use examples of the types of controversy I wish to address throughout this thesis. This method is intended to illustrate the sphere of conflict more accessibly than by way of description in the abstract.

The suggestion, in brief, of this thesis is that law can provide a useful framework within which (or at least "within the shadow"[13] of which) promoters, managers, and artists can if they wish enter into a dialogue with (representatives of) the section of society offended by the relevant work. The purpose of such a forum would be, essentially, to encourage and facilitate acts of diplomacy. It would allow the producers (and the artist, should he/she wish) to participate in the explanation of a work to an offended segment of the public. It would hope to encourage both sides of a potentially polarizing debate to consider the position (tradition?) of the other through dialogue. It

[13] See note 387.

would have a commercial benefit, reassuring theatre managers that the piece has been thoroughly 'aired' and that steps have been taken to address offence that might be caused. Overall, this attempt at countering the ill-feeling generated by such a play would – I hope – be a way of simultaneously upholding freedom of speech and expression whilst considering the communal dignity of those offended and offering them a chance to vocalise their grievance. In many ways I am suggesting a refined version of the anachronistic "indignation meeting"[14] whereby groups to whom offence has been given protest by attending meetings designed to highlight and air the grievance.[15] This was a semi-formal action with greater significance than simply noting the problem: particularly for "antebellum Americans, indignation enjoyed additional political might when expressed in the formal ritual of the so-called "indignation meeting"...[which] formalized the public expression of emotion in a ritual consistent with ideals of representative democracy and self-government."[16] I want to highlight the therapeutic aspects of such a forum, but to develop this into a dialogue, not simply a unilateral expression of frustration.

Even at this early stage, however, the reader should be aware that I do not offer concrete answers in the conclusion to this thesis. Instead, the reader should assess the relative success of this work against two linked aims: one very modest, the other,

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[14] Thanks to Professor Liston for pointing this out.

[15] Consider, for example, the meetings held by Japanese migrant workers from the US who, in 1909, had come to Vancouver's Fraser River for the salmon season, but were subsequently prevented from returning to the US because of a quirk of US immigration law. "Denied the privilege of returning to their homes and with their future plans in doubt, the men held "indignation meetings"..." (see Kornel Chang, 'Enforcing Transnational White Solidarity: Asian Migration and the Formation of the U.S.-Canadian Boundary' (2008) 60 American Quarterly 671, at 671).

[16] Michael Woods, '"The Indignation of Freedom-Loving People": Emotion, Politics, and the Brooks-Sumner Affair' (2009) Theses and Dissertations, University of South Carolina, Paper 112, online: <http://scholarcommons.sc.edu/etd/112>, at 13.

perhaps, extremely ambitious. Starting with the latter, the aspiration (presumption?) is that the dialogue proposed in this thesis will, if implemented, lead to change – an amelioration of the tension between the offended and the artist. The modest version of that same hope is this: the tension identified is very real (see the discussion about *Behzti*, below) and the pragmatic proposal of creating a forum at which the two sides communicate (or attempt to) cannot make the situation worse. In that sense, even if the hoped for amelioration does not occur, nothing is lost.

Roadmap

This thesis is structured in the following way. Chapter 2 is devoted to a renewed commitment to freedom of expression and an expression of my methodological position, explaining the ways in which this thesis is intended to be a heuristic, intuitive, exploratory work.

Chapter 3 details the creation of and controversy over *JStO* in further detail, and then investigates why theatre is important, the many connections between law and the theatre, and the overarching link between law, theatre and culture. I conclude that there is a demonstrable link between the power of the theatre to be an interactive and holistic experience, acting as a microcosm of society (a mirror to life, perhaps), and the fact that law is informed by cultural norms.

Given this important link, Chapter 4 investigates the development of the law regulating censorship of the theatre in England, beginning with the Theatres Act of 1737 – chosen as a starting point by virtue of it being the first time the theatre was regulated by statute (in England). This exposition of the law is given in pursuit of the idea that, in the

words of Sir Walter Scott, "[a] lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."[17] Before making any comment on the way in which the identified dispute can be ameliorated, it is crucial to understand the situation as it pertains today. The analysis reveals a (largely unsurprising) reflection of modern, liberal, Western democratic tolerance: an 'anything goes' attitude, which generally precludes legal opposition to (perceived) slights or offence. Does this leave – to the mind of the deeply offended – vociferous protest, sometimes violent, as the only (perceived) option?

In order to establish a framework within which the competing interests of the offended and the artist can be compared – with a view to making normative suggestions in later chapters – I turn in Chapter 5 to the language of rights. The post-war freedoms of the second half of the twentieth century, culminating in the rights revolution of the 1960s were followed by the political liberalism of John Rawls and his theory of justice as fairness. Rawls' theory is useful as it is a political theory, intended to have substantive rather than purely formal effects, and provides a mechanism for assessing competing rights. The question remains, however, why should law step into the breach and intervene in the dispute?

To answer this, in Chapter 6, the principles of therapeutic jurisprudence – developed out of mental health law in an attempt to analyze the fit between law and psychology – are used to show that the role of law can be (arguably should be) to reduce community friction and to mediate, if possible, between disputing parties. This is law's role in this thesis. In addition, I make a very brief foray into critical discourse analysis –

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[17] Walter Scott, *Guy Mannering* (Boston: Boston Publishing Co., 1886), at 251.

pioneered in applied linguistics. This is an attempt to identify more specifically the conflict on which the law could act, using the example of *JStO*. The analysis of statements made by key players in the debate, reveals that there is a frustration at the lack of understanding shown by the other party. Not wholly unexpected, perhaps, but this at least suggests that there is a mediatory role to be played.

Finally, in Chapter 7, using Rawls' theory of justice as fairness with the gloss of law's role as therapy, set against the background of a breakdown in communication between opposing parties in a situation such as that of *JStO*, I revisit the site of conflict. I suggest that law does have a role to play, in a similar manner, for example, to the educational and cathartic nature of 'pre-legal' mechanisms such as truth and reconciliation commissions, in providing a framework for dialogue. Such a dialogue could involve optional adherence to a best practice code, or simple workshops at which those who oppose and those who promote controversial plays could consider the work in question together. I conclude that this would be useful for both playwrights/managers – who would be seen to have attempted to engage, and defend the work, hopefully limiting self-censorship – and those in moderate opposition who are willing to engage, who will feel that their complaints have, at least, been considered (with a corresponding benefit to their community at large).

CHAPTER 2: Methodology

Exemplars, assumptions, and the line in the sand

As Nick Hytner's comment that opened this thesis shows, many in the arts world see it as their duty to expand the human experience by using, among other techniques, the power they have to shock, offend and dismay. And the consequences of the exercise of that power can be extreme. 2004 saw members of the local Sikh community protesting outside the Birmingham Repertory Theatre (Birmingham, England) against a production of the play *Behzti* (Dishonour).[18] Written by playwright Gurpreet Kaur Bhatti, a practicing Sikh, the play included a rape scene that takes place in a Gurdwara (a Sikh temple). Violent demonstrations during the first week of the play's run led to its cancellation when theatre staff felt that the public could not be protected in the face of increased threats.[19] [20]

I had tickets to see *Behzti*, but was never fortunate enough to get to see what was, by most accounts, a very good play. However, I began to consider the relationship between law, the stage and those members of society genuinely offended by a portrayal of religion, politics, other, in theatre. In that overlapping zone of interests – the desire of a writer / performer / director / producer to see the work survive, pitched against the (it is

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[18] Gurpreet Kaur Bhatti, *Behzti (Dishonour)* (London: Oberon Books, 2005).
[19] Burton, 'A Disgusting Feast of Filth'.
[20] Interestingly, Stewart Lee, co-librettist of *JStO*, makes the connection between *JStO* and *Behzti – How I Escaped*..., at 122. Eric Stoddart also remarks on the timing of the attacks on *JStO*: "[a]t a time when Sikh protesters, through intimidation, successfully brought an early end to the play *Behzti*...it is no surprise that Christians would try to flex their muscles and attempt to bring about a similar outcome to defend their own understanding of their faith and its place in a liberal democracy" (Eric Stoddart, 'Jerry Springer – The Opera: Its Unintended Message' (2007) 154 Practical Theology and Pastoral Care 32, at 33).

assumed in this paper) very real offence given to a section of the public – there is a conflict. This paper is an attempt to examine the role of the law in that sphere of tension.

Against this background, it is worth noting that this project is not intended as an exercise in semantics: it is an attempt to find a way of diffusing tension in a practical way; to engage – rather than alienate – people in situations like that of *JStO*, using law as a tool to do so. Of course, it may be the case that a dialectic approach is simply impossible: in the case of *Behtzi*, for example, it has been suggested that a fundamentalist group hijacked a legitimate protest.[21] The law must provide robust protection from intimidation. However, I believe that there is a real issue to be addressed here: namely, when a theatrical work offends a section of society, can the ensuing tension be diffused (even if only to a small extent) by dialogue between the creative team and those offended,[22] either directly or indirectly.

JStO is the primary exemplar used in this study. It is, I think, a useful illustration of the problem precisely because the conflict between the Christian right and the show emerged as a surprise to many involved. *JStO* was, as a report into the dispute over broadcast of the show eventually opined, intended "to satirise modern fame and the culture of celebrity"[23] rather than the holy family. Given the use of *JStO*, it is important to recognize at the outset of this piece that the Christian right often feels marginalized in an increasingly secular (Western) society. Indeed, in a recent speech in the United

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[21] Sean O'Neill and Nicola Woolcock, 'Extremists hijacked play protest' *The Times*, 22 December 2004, online: <http://www.timesonline.co.uk/tol/news/uk/article404969.ece>.

[22] Here I refer to those moderates for whom it is possible to discuss the situation. In the case of Christian Voice, it is unlikely that discussion would have made the slightest difference to its stance. But its portrayal of the system being "against it" would have been significantly weakened if criticisms of the production were shown publicly to be without foundation.

[23] Ofcom Broadcast Bulletin: Issue 34, 9 May 2005, online: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/pcb61/issue34.pdf>, at 12.

Kingdom the Pope voiced his concern "at the increasing marginalisation of religion, particularly of Christianity, that is taking place in some quarters, even in nations which place a great emphasis on tolerance."[24] Because of this sensitivity, the reaction of many Christians to 'poking fun' is – perhaps understandably – to see it as an attack, eliciting a response in kind. In the case of *JStO*, the particularly vocal protestors against the show – Christian Voice – felt marginalised by their inability to persuade the Director of Public Prosecutions in the UK of the seriousness of the offence caused. On the other side, frustration felt by an artistic team that could not relate on any level whatsoever to the complaints of those offended; the Christian complainants were on the perjorative 'right' and were 'killing the show'[25] – they were the enemy. Yet Christian Voice were not alone. Some moderate Christians saw the show as offensive: "contrary to *popular* Christian perception," wrote Eric Stoddart in the journal *Contact: Practical Theology and Pastoral Care*, "this piece of musical theatre warrants appreciative study."[26]

Situating myself, I think *JStO* is a very clever idea, wonderfully executed. I admire the writers; I have seen the show and thoroughly enjoyed it. I am also firmly of the belief that it should have been allowed to be produced (and shown on the BBC) and that the magistrates (briefly referred to above) were correct not to react to a clearly humorous, although admittedly edgy production. The show was a parody of a farce and should have been, and was, taken as a piece of ridiculous genius by most people. And against this background, I bring certain assumptions to, and ringfence certain

[24] BBC News, 'Pope says Christianity 'being marginalised', 17 September 2010, online: <http://www.bbc.co.uk/news/uk-11347073>.
[25] Stewart Lee, 'Christian Voice is outside, praying for our souls ... ', *The Guardian*, 15 February 2006, online: http://www.guardian.co.uk/stage/2006/feb/15/theatre2 (accessed 10 April 2010).
[26] Stoddart, at 32. Emphasis added.

fundamentals in, this thesis.

I begin from the position that the liberal democratic tradition, including the centrality of freedom of speech[27] and the right of art[28] to shock and offend, is of value and should be protected; that art – and the cultural shocks it provides – is worth protecting. I do not mean that I believe such rights to be absolute – for example, I refer in the discussion of freedom of speech, starting at page 12, to the limits to that freedom imposed by the Public Order Act in the UK, prohibiting the incitement of racial hatred. However, for the purposes of this discussion, I consider the right of artists to shock, and the right to freedom of expression as sacrosanct (whilst acknowledging that this is not, and should not, always be the case). I acknowledge that this is not a culturally neutral position. However, the aim of this piece is not to challenge that view and the rest of this thesis should be read in light of that assumption. I do not want to fetter the arts, or attempt to limit in any way freedom of expression. More fundamentally, perhaps, I do not want to be *thought* to be making such an attempt.

Do these excisions from the scope of the work leave the project entirely toothless? It is perhaps a glib proclamation – that I do not want to fetter the arts; that I consider art 'important' – one which could benefit from some unpacking.[29] In many ways, the debate raging in the background to this thesis is precisely whether art should be fettered – whether art that is considered offensive to a segment of society should be prohibited, as (de facto) happened in *Behtzi*. Such a restriction is, however, closed off as an option in

[27] For further discussion of the centrality of freedom of expression, see "The crucial tenet of "freedom of speech" in democracy" (page 12).
[28] Here I am using 'art' "as a collective term for a wide variety of aesthetic products including literature, the visual arts, and music, as well as the combined forms of drama and opera." (Milton Albrecht, 'Art as an Institution' (1968) 33 American Sociological Review 383, at 383).
[29] I elaborate below on the social importance of art – theatre, in this context – in "Why theatre matters" (page 25).

the substance of this thesis which assumes that Nick Hytner's view of the role of theatre is one many artists would share, and, as discussed in Chapter 4, is a function that the law of England and Wales permits. In other words I assume, for the sake of the exploration that follows, the social value of allowing artists to 'push the envelope' and to develop shocking work. The tentative prescription – the proposed forum – is instead designed to *manage* the presentation of a controversial play, not to contribute to its prohibition either by discouraging an artist from producing the work in the first instance, or by placing onerous burdens (regulatory or artistic) on its eventual production and / or performance. In the same way that "Art [can be said to] lead...practitioners toward increasing self-awareness...knowledge of self is revealed in the judgments and choices they make in their own work and in their preferences for certain subjects and the work of other artists..."[30] I hope to encourage self-reflection on the part of both protestor and artist. This will, however, necessarily be a reflection on the work but *removed* from the work, which will remain unchanged.[31]

The crucial tenet of "freedom of speech" in democracy

Freedom of speech, or freedom of expression, is "one of the most universally prominent rights in all democratic legal systems."[32] It is found in the First Amendment of the US Constitution, and in the European Convention of Human Rights, at Article 10. In legal philosophy freedom of speech is what Professor Dworkin calls a "fundamental" right (in

[30] Stuart Richmond, 'Art's Educational Value' (2009) 43 The Journal of Aesthetic Education 92, at 104.
[31] This would not, of course, prevent an artist from changing a work following public discussion. But this would absolutely not be on the table in the forum I propose.
[32] Guy Carmi, 'Dignity – The Enemy From Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification' (2006-2007) 9 University of Pennsylvania Journal of Constitutional Law 957, at 960.

his work, a "strong" right): the point at which a liberal democracy can say that "it respects the fundamental rights of the citizen."[33] John Rawls sees freedom of speech as a basic liberty,[34] one which is characterized by being "permissible for an individual to do or not do…[and where]…government and other persons…have a legal duty not to obstruct."[35] I do not intend, here, to address the often heated debates between the positivist and natural law traditions – although even Hart noted that, "there is at least one natural right, the equal right of all men to be free"[36] and freedom of speech must be subsumed within that – but rather to emphasize at the outset of this paper that freedom of speech is regarded as a crucial limb of a modern democracy, and the use of words 'fundamental' and 'basic' corroborate this centrality. Of course Dworkin, Rawls and Hart, despite having differing reasons for why this is the case, would agree that fetters can be placed on the right of freedom of expression to ensure that other rights or liberties are not encroached on. So, an incitement to racial hatred,[37] in the UK, is prohibited under threat of criminal sanction; the restriction of freedom of speech justified on the ground that the "action is…designed to injure."[38]

As mentioned above, I am deeply concerned with the right to freedom of speech in this project. It is not my aim to – in any way – prescribe limitations to the right, or to

[33] Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), at 191.
[34] Rawls' basic liberties are: liberty of conscience and freedom of thought; freedom of association; equal political liberties; rights and liberties that protect the integrity of the person; and rights and liberties covered by the rule of law (in other words, the pillars of a modern liberal democracy). See further note 281.
[35] John Rawls, *A Theory of Justice (Revised Edition)* (Cambridge, MA: Harvard University Press, 1999), at 177-178.
[36] H. L. A. Hart, 'Are There Any Natural Rights?' (1955) 64 The Philosophical Review 175, at 175. See also Alan Haworth, *Freedom of Speech* (London: Routledge, 1998), at 172.
[37] Public Order Act 1986 (as amended by the Racial and Religious Hatred Act 2006), section 29B: "A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred."
[38] Hart, at 175.

impose additional burdens on the arts, at the risk of stifling creativity. Indeed, the reader may consider that there should be absolutely no question of this: that no balancing of rights should or could be made in the context of, specifically, *JStO*, and broadly, controversial theatre; that freedom of expression must be allowed to rule the day; that distress to a religious sector or offence to the morals of a segment of society is a tolerable collateral impact of preserving this fundamental pillar of modern democracy. This may indeed be the case. Yet, some commentators have suggested that "measurement of the harms, costs, and benefits of unrestrained freedom...often lacks methodological rigour...mak[ing] it difficult to distinguish between disingenuous claims about the harms experienced and valid liberty-limiting justifications."[39] The claim here is not, to be clear, that research is deliberately misleading, but that the harms, costs and benefits of unrestrained freedom are hard to measure given the difficulty of identifying the level of freedoms or prohibitions enjoyed or suffered and, subsequently, grading the harms and benefits that ensue. In other words, it may be trite to assume that a greater level of freedom of expression is for the best. While, as I have said, this thesis is not going to prescribe freedom of expression, its arguments are perhaps within the penumbra of this debate over rights 'grey areas'.

It is, therefore, worth looking more closely at some of the justifications made for the primacy of freedom of speech. In an article that bears careful reading, Guy Carmi argues that, although "[i]n recent years, human dignity has increasingly become a prevailing justification both for the protection and limitation of human rights

[39] Michael Hamilton, 'Freedom of Assembly, Consequential Harms and the Rule of Law: Liberty-limiting Principles in the Context of Transition' (2007) 27 Oxford Journal of Legal Studies 75, at 78.

internationally"[40] the idea of 'human dignity' is vague, with "different possible interpretations."[41] Nevertheless, it has been taken up with alacrity and "...dignity's increasing influence [has led]...to a growing tendency to evaluate rights, including freedom of expression, through its lens." [42] Carmi is really concerned with the fact that "human dignity may be used as a justification for both protecting speech *and* restricting it."[43] Instead, he compares well-known justifications for freedom of speech: the discovery of truth – classically proposed by John Stuart Mill – the demands of democracy, and respect for autonomy.[44] All these justifications go more to the heart of the matter, Carmi suggests, than the use of dignity which "is mistaken, for although speaking is sometimes a manifestation of the dignity of the speaker, speech is also often the instrument through use of which the dignity of others is deprived."[45]

> For Mill, speech is an essential element of individual development: "[Man] is capable of rectifying his mistakes, by discussion and experience. Not by experience alone. There must be discussion, to show how experience is to be interpreted." In other words, Mill values dissenting speech in part for its instrumental role in a selection process at the individual level in which the best opinions survive.[46]

The point I want to make is this: I have some sympathy with the idea that there may be flaws in the use of dignity as a justification for freedom of speech as it paves the way for restrictions and taboos; however, the attraction of the idea is plain and, given the

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[40] Carmi, at 958.
[41] *Ibid.*, at 959.
[42] *Ibid.*
[43] *Ibid.* Emphasis added.
[44] *Ibid.*, at 970-974.
[45] *Ibid.*, at 997, quoting Frederick Schauer, 'Speaking of Dignity' in Michael Meyer and William Parent, (eds.), *The Constitution of Rights: Human Dignity and American Values* (Ithaca: Cornell University Press, 1992) 178, at 179.
[46] Irene Ten Cate, 'Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses' (2010) 22 Yale Journal of Law and the Humanities 35, at 46, quoting John Stuart Mill.

number of scholars who have adopted the idea, widespread. Why is it attractive? Because, and this is exactly the reason given for why Carmi is against it, "dignity considerations do not suggest that either free speech or equal protection concerns should...override the other...[u]ltimately...resolution of conflicts between free speech and equal protection claims is based on a largely intuitive process including reflection on matters of dignity."[47] But it is not obvious that dignity should be dismissed in its entirety: by considering the impact of free speech, and the potential for loss of dignity for one person or sector after the exercise of another's liberty, it is possible to consider whether there is any way in which to address that loss of dignity while ensuring that the freedom to express oneself remains. In other words, one should care whether one's freedom of expression does cause a loss of dignity (or perceived loss of dignity) elsewhere, and be prepared to defend that position. It is a good way to begin to think about the argument in this thesis.

A final word on methodology

Dignity links rather neatly to a list of words important to this thesis: 'intuition', 'drama' and 'wellbeing'. Intuition is important given the delicate path between the centrality of freedom of speech and the attempt to manage offence that I am attempting to tread, but also because, as will be discussed further below (see Chapters 4 and 5), our intuitive understanding of rights, of liberal democracy, of the role of law to manage disputes, are all integral parts of the work. There is also a duality to my use of drama: in the obvious

[47] R. George Wright, 'Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection' (2006) 43 San Diego Law Review 527, at 529.

sense that this is a thesis about the theatre, but also because I will use the idea of dramatism as a methodological lens – that any argument is a narrative construction, including a cast of actors and a plot. Finally, wellbeing points the way to a prescription, providing an aim for law in the idea of limiting harm in a therapeutic sense. Given this introduction, it is clear that this is a qualitative thesis.

John Creswell[48] suggests that rather than seeing qualitative and quantitative methodologies as being starkly different – words and social study versus numbers – they are better understood as a reflection of the basic psychological position that the researcher wishes to take. Creswell sees qualitative research as inductive and flexible; quantitative as deductive, based around measuring identified variables. This concept of an 'inductive and flexible' method is helpful (as an overview) for my project because I hope to investigate a site of conflict which cannot be statistically analyzed or deductively described.

Yet, 'inflexible and deductive' is a rather nebulous phrase (although useful as a starting point) and a firmer conceptualisation of qualitative is needed to orientate the work. Peter Wood, in his helpful introductory handbook to qualitative research suggests that the role of the qualitative researcher is to "...seek...to discover the meanings that participants attach to their behaviour, how they interpret situations and what their perspectives are on particular issues."[49] 'Participants' here include both the researcher and those observed for research purposes. This is a useful, though basic, definition for the social scientist, the anthropologist, but, while I am interested in behaviour, I am also

[48] John Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (Thousand Oaks: Sage, 2009).
[49] Peter Woods, *Successful Writing for Qualitative Researchers* (London: Routledge, 1999), at 3.

interested in the action of law and the role of that external force on a situation of conflict (Creating it? Separating warring factions? Encouraging the adversarial?). As Pushkala Prasad notes, the leap from the 'soft' distinctions between qualitative and quantitative research to a concrete set of rules for qualitative research is a large one.

> Any reference to qualitative research conjures up images of diverse perspectives, techniques, and styles of presentation. Ethnography, narrative analysis, participant observation, deconstruction, and focus group interviews, to name a few, are all subsumed under this label. Does qualitative research imply a state of mind, the use of specific field methods, or the employment of certain data collection and writing conventions? That the answer to all of these questions is "yes" does not make the practice of qualitative research any easier.[50]

The idea of basing the methodological approach around 'state of mind' i.e. the set of assumptions I (as researcher) bring to the project is appealing. Prasad goes on to argue that positivism – and here Prasad uses the term not in its specifically legal sense (although the similarities are clear), but in the social science / natural science understanding of "tak[ing] only verifiable statements as meaningful"[51] – is "unable to offer meaningful guidelines for qualitative researchers"[52] on the basis that questions about the human condition are best answered (following Weber) by drawing from "history, philosophy, jurisprudence, rhetoric, and literary theory,"[53] i.e. those interpretive elementals that allow a reflection of the human condition rather than from principles developed "from the study of largely inanimate or biological phenomenon that lack the capacity for self-reflection,"[54] i.e. the "traditions of the "hard" sciences."[55]

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[50] Pushkala Prasad, *Crafting Qualitative Research: Working in the Postpositivist Traditions* (New York: M.E. Sharpe, Inc., 2005), at 3.
[51] Kei Yoshida, 'Defending Scientific Study of the Social: Against Clifford Geertz (and His Critics)' (2007) 37 Philosophy of the Social Sciences 289, at 296.
[52] Prasad, at 5.
[53] *Ibid.*
[54] *Ibid.*

Self-reflection is an attractive high-level position to take – in the same way that Monet filtered *Water Lilies*, it would be helpful to justify observations and insights as simply the action of the world on a researcher (me). However, Prasad is alive to this: "[i]n their efforts to bypass positivism,' he writes, 'some researchers adopt an excessively casual approach to...analysis, arguing that a completely open-ended and open-minded stance is the best way to conduct qualitative inquiry."[56] He continues:

> Theoretical preconceptions are studiously avoided, and little effort is made to develop a sharp research focus grounded in theory...such a lackadaisical approach is not likely to advance our understanding of social phenomena in meaningful ways. The absence of theoretical grounding, the lack of a theoretical driven focus, the failure to develop careful and well-structured methodologies...are more likely to result in a piece of work that is closer to a shabby and pedestrian form of journalism.[57]

So, an awareness of one's own point of view is important, but must be supported by a thorough theoretical grounding and, rather elliptically, a 'well-structured' methodology. This position is echoed by Edward Rubin (also following Weberian theory):

> According to most modern theories of knowledge, there is no such thing as pure description. We cannot achieve unmediated contact with reality, or indeed, even conceive of what such contact would consist of. Rather, all our descriptions are theory-laden; they emerge from a vision of the world in which our norms and beliefs are deeply embedded.[58]

Rubin is using 'theory-laden' to express the fact that we each have an individual response to the world; but it is equally applicable when constructing a methodology: one must be self-reflexive not only in the context of the research decisions, observations, and

[55] *Ibid.*
[56] *Ibid.*
[57] *Ibid.*, at 5-6.
[58] Edward Rubin, 'Law and the Methodology of Law' (1997) Wisconsin Law Review 521, at 542.

interpretations one makes, but also of the theory used to put these 'results' in to some sort of order or overarching framework.

In this thesis, I intend to use the idea of drama as a method, channeling the theory in the body of the work – namely Rawls' justice as fairness, rights theory, and therapeutic jurisprudence. The notion of culture or social life "as theat[re] and stage"[59] is used relatively often in "sociology, communication and organization studies...all embrac[ing] different components of "the drama" to make sense of intricate social situation."[60] The basis of "the dramatistic tradition is the idea that individuals construct and establish their identities through a continuous process of dramatic narration."[61] This fits in well with the idea that law, as a series of rules within which schemes of negotiation, evasion and compromise are developed, is "a very particular form of play."[62] More specifically, using dramatism as a methodology accounts both for the self-reflexive (I am part of a performance) and for project-reflexivity (the actions of legal actors have shaped law in a certain way – they have brought us to this point).

It is, then, in the spirit of identifying a dramatic narrative, and key actors in that narrative, that I turn to *JStO* and the controversy surrounding it.

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[59] Prasad, at 43.

[60] *Ibid.* 'Dramatism', Prasad adds, 'is...rooted in the humanities and influenced by the philosophy of Kenneth Burke'. Burke is an acknowledged influence on Geertz – see Joseph Gusfield, *Kenneth Burke: On Symbols and Society* (Chicago: University of Chicago Press, 1989), at 5.

[61] Prasad, at 53.

[62] Nicole Rogers, 'The Play of Law: Comparing Performances in Law and Theatre' (2008) 8 Queensland University of Technology Law and Justice Journal 429, at 430. See further page 28 *et seq*.

CHAPTER 3: Jerry Springer, the importance of theatre, and the role of law

Controversy...and a defence of *Jerry Springer: The Opera*

Jerry Springer – The Opera:

> grew out of [composer] Richard Thomas's one-man show *How To Write an Opera about Jerry Springer*, which was performed at the Battersea Arts Centre in February 2001. Thomas teamed up with Stewart Lee and together they wrote what has become *JStO*...The first fully staged production was at the National Theatre in London in April 2003, closing in September that year to reopen in the West End at the Cambridge Theatre that November. *JStO* ran there until February 2005 before starting a UK tour in January 2006...It won Best New Musical and other accolades in the Olivier Awards 2004...and numerous other industry awards and nominations.[63]

This straightforward précis of the life of *JStO* fails to capture the furore surrounding, in particular, the UK tour of the show and the decision made by the BBC to broadcast it in January 2005.[64] As noted, the show grew out of an idea by Richard Thomas that there was "tragedy and comedy in Springer Show dialogue, which had previously just sounded profane."[65] After a critically acclaimed run at the Edinburgh Festival (an annual international comedy and arts festival) in 2001,[66] money was found to take the show to a full run at the National Theatre, and subsequently to an ill-fated commercial run in London's West End and on tour.

The show:

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[63] Stoddart, at 32.
[64] The BBC received 63,000 complaints (see 'TV Watchdog Clears Springer Opera', online: <http://news.bbc.co.uk/2/hi/entertainment/4530815.stm>). Ofcom confirmed that it received 16,801 complaints when it published its response to the broadcast (see Ofcom Broadcast Bulletin: Issue 34, 9 May 2005, online: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/pcb61/issue34.pdf>, at 13)
[65] Lee, *How I Escaped...*, at 27.
[66] *Ibid.*, at 28.

> ...is a musical play in two acts. In the first act, Springer's television chat show is parodied and lampooned. The act ends with the host being shot by one of his guests and the second act focuses on Springer's imagined descent into hell. In it his original guests appear as Satan, Christ, God, Mary, and Adam and Eve.[67]

With the shift from 'art' to 'entertainment' – characterized by Lee in the move from the "cocoon"[68] of the National Theatre where it was understood, or at least appreciated as an artistic endeavour, "to the bloody commercial reality of its West End run"[69] – the show faced objections as a result of its higher profile. These came slowly. But when the BBC chose to broadcast the show in early 2005, complaints flooded in.[70] The subsequent theatrical tour was derailed when "a whole slew of venues that were lined up to take the show...pulled out after [Stephen Green, head of Christian Voice] wrote to them and said they'd be prosecuted [under pending incitement of religious hatred laws]."[71] Objections were made to scenes including:

> an argument between the Satan and Christ characters during which the Christ character tell Satan to talk to the stigmata and accepts an accusation that he's gay; Eve sitting alongside the Christ character and fondling his genitals under his loincloth;[72] and a song in which it is suggested that Mary has been tricked by God and in which there are references to a failed condom."[73]

Following the BBC broadcast in January 2005, Ofcom, the UK's communications industry regulator, and the BBC received tens of thousands of complaints.[74] Given that Christian Voice's membership at the time of its very vocal protests was in the region of

[67] Neil Parpworth, 'Hell and Damnation' (2008) 158 New Law Journal 197, online: <http://www.newlawjournal.co.uk/nlj/content/hell-and-damnation>, at para. 3.
[68] Lee, *How I Escaped...*, at 28.
[69] *Ibid.*
[70] See note 64.
[71] Lee, *How I Escaped...*, at 122.
[72] According to Stewart Lee, this was a spontaneous action on the night of recording of the DVD (audio commentary, *Jerry Springer – The Opera (DVD)*, Pathé Distribution Ltd, 2005).
[73] Parpworth, at para. 3.
[74] See note 64.

600,[75] this marked either a significant number of complaints from the public at large or a concerted campaign by Christian Voice and its sympathizers (which, at least in terms of advertising the issue, was definitely mounted – see below). Whatever the actual breakdown, a large number of these complaints were – an educated guess here – from people who had not watched the broadcast, or seen the show, but were encouraged to complain by way of an internet campaign by a prominent Christian publisher.[76] That these complaints were made suggests that: (a) more moderate Christians were moved to protest;[77] and (b) that an attempt to communicate might have helped to counter a campaign for complaints possibly based on misapprehensions about the work.

It should be noted that there was an immediate technical defence to the idea that *JStO* was intent on disrespecting Christianity. As Ofcom put it,

> ...in Ofcom's view, serious thought had been given to the material, its production and its transmission. The subject of the Opera was 'The Jerry Springer Show' and the society it reflects. The show was created as a caricature of modern television. Importantly, in Ofcom's view the Opera did not gratuitously humiliate individuals or any groups and in particular the Christian community. Its target was television and fame.[78]

The show is about the cult of celebrity, and the 'bear baiting' format of talk shows such as *Jerry Springer*, that glory in the distress and failure of a certain element of society. The focus was not Christianity, as Ofcom made clear:

> In considering offence against religious sensibilities, Ofcom took into account the clear context of the Opera. The fictional Jerry Springer lay dying in a delusional state. As he hallucinated, this character was asked to pitch Jesus against the Devil in his own confessional talk show. This '*dream*' sequence was emphasized by the

[75] Estimated by the BBC at the height of the *JStO* controversy in February 2005, see Stephen Tomkins, 'A Voice in the Wilderness', online: <http://news.bbc.co.uk/2/hi/uk_news/magazine/4303965.stm>.
[76] Ofcom Broadcast Bulletin: Issue 34, 9 May 2005.
[77] Corroborated by Eric Stoddart's article.
[78] Ofcom Broadcast Bulletin: Issue 34, 9 May 2005, at 15.

> fact that the same actors, who played guests on his show in the first act played the characters in the second act. What resulted was a cartoon, full of grotesque images, which challenged the audience's views about morality and the human condition. The production made clear that all the characters in the second act were the product of the fictional Springer's imagination: *his* concepts of Satan, God, Jesus and the others and modeled on the guests in his show.[79]

Looked at in a certain light, of course, this could be seen to make the use of *JStO* as an exemplar weaker as the offence caused was arguably imagined rather than real; no genuine insult was intended. However, this is not fatal to the piece, far from it. It illustrates the use a mediating role could have in such a situation in the context of the theatre. Ofcom praised BB2 for its "clear pre-transmission warnings about the content of the programme....contextualising the material and explaining the background to the Opera"[80] (incidentally, Ofcom is a regulator, not a mediator or ombudsman, and deals only with broadcasts, not the theatre).

This idea of communication, of dialogue, is really what this thesis is all about. However, before dealing with this more fully, it is useful to consider why it is that theatre, in distinction to other art forms, is capable of stirring such passion and is so important in the cultural landscape. What is its role (if any) "in preventing and alleviating social problems and in facilitating social cohesion",[81] and how has the relationship altered in the *JStO* (and analogous) situation?

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[79] *Ibid.*, at 16.
[80] *Ibid.*, at 15.
[81] Hye-Kyung Lee, 'Uses of Civilising Claims: Three Moments in British Theatre History' (2008) 36 Poetics 287, at 287-288.

Why theatre matters

Thornton Wilder – the American novelist and playwright – once said: "I regard the theatre as the greatest of all art forms, the most immediate way in which a human being can share with another the sense of what it is to be a human being."[82] This poetic suggestion, which incidentally I share, finds some support in theatre studies literature, which refers to theatre in the complexity science terminology of a "complex adaptive system".[83] "At the most basic level," James Miller and Scott Page write, "the field of complex systems challenges the notion that by understanding the behaviour of each component part of a system we will then understand the system as a whole."[84] In other words, the relationship between audience and artists in the context of theatre is greater than the sum of its parts:

> In the theatre, complexity manifests itself in the writing, rehearsal, and performance processes of the playwright, designer, and actor. Watching a performance, the spectator – drawing on evolutionary, neuro-anatomical, and cultural imperatives – has a similar response repertoire that can even include hair-raising moments.[85]

This idea of theatre being an interactive and holistic experience/practice provides a bridge to Wilder's suggestion that theatre is a mirror to life and, as such, able to portray a microcosm of society. As Maria Delgado puts it, in the context of a discussion of the work of Peter Sellars (director and Professor at UCLA): "theatre has a significant social

[82] Jackson Bryer (ed.), *Conversations with Thornton Wilder* (Jackson: University Press of Mississippi, 1992), at 72.
[83] Gordon Armstrong, 'Theatre as a Complex Adaptive System' (1997) New Theatre Quarterly 277.
[84] John Miller and Scott Page, *Complex Adaptive Systems* (Princeton: Princeton University Press, 2007), at 3.
[85] Armstrong, at 280.

function, and...culture... [has] a key role to play in shaping both how we see and, crucially, how we act."[86]

An excellent example of this mutual influence is set out in Steven Field's article on the political playwright David Hare.[87] Field discusses a (relatively) recent play by Hare – *Gethsemane*[88] – said to be an excoriation of the UK's 'New Labour' government. Field's position is that political discourse (between, in theatre terms, playwright/audience or actor/audience) such as Hare's, is hugely important; he points out that "academics have become increasingly interested in the inter-relationship between political fiction and political reality."[89] The thrust of Field's argument is that *Gethsemane* – which features a thinly veiled Tony Blair character – is part of a longstanding British tradition of censure and ridicule of politicians, a trail blazed by comedy but not far off equalled on the stage. This perfectly captures theatre's intense relationship with 'issues of the day'.

The interplay between theatre and culture – not simply in terms of symbiosis, but in a truly reciprocal way – is found repeatedly in theatre studies literature. Instances of theatre representing its people, of being one with a community, abound, both at a personal and a societal level: for example, criminal reformation after participation in community dance theatre;[90] theatre acting as the first line (along with cinema) of

[86] Maria Delgado, ''Making Theatre, Making a Society': an Introduction to the Work of Peter Sellars' (1999) 15 New Theatre Quarterly 204, at 205.
[87] Steven Fielding, 'David Hare's Fictional Politics' (2009) 80 The Political Quarterly 371.
[88] David Hare, *Gethsemane* (London: Faber & Faber, 2008).
[89] Fielding, at 371.
[90] Sara Houston, 'Participation in Community Dance: a Road to Empowerment and Transformation?' (2005) 21 New Theatre Quarterly 166. It should be noted that Houston's article considers whether the involvement of a criminal in a community dance project, and his subsequent claim to reformation, can be used to make any subsequent wider claim to effectiveness for such projects. The conclusion is that it cannot, but that it may be evidence of a 'potential road to empowerment and transformation...' (p. 176).

ideological defence in the second world war;[91] and helping – as a transitional mechanism – to ease the path of democracy in Nigeria by encouraging participants in local theatre to consider the meaning of citizenship (considering that, if you are "deemed a foreigner…[you are]…discriminated against in the provision of employment, access to education, and other basic entitlements").[92] The impact of cultural flow is felt in an intensely practical way: in the choice of plays to put on and the associated issue of how to attract new audiences; the way in which audiences interact with a theatrical work and the choice of presentational format (linear vs non-linear story lines, for example); and changes in methods of congregation with the advent of the internet, for example.[93]

If theatre and society are, as I have argued, intrinsically linked, law should have a relationship with theatre that is of more depth than purely, and perfunctorily, regulatory.

<u>The relationship between theatre and law</u>

That there is sympathy between law and the arts is well established:

> 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.[94]

Ostensibly, the intellectual traffic between law and the theatre is in one direction: the law is regularly used as a theatrical device, the court room proving particularly apt for

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[91] Anselm Heinrich, 'Theatre in Britain during the Second World War' (2010) 26 New Theatre Quarterly 61.

[92] Samuel Kafewo, 'Discussion, Intervention, Processing: Theatre and Citizenship in Nigeria' (2009) 25 New Theatre Quarterly 178, at 182.

[93] Ben Cameron, 'Keynote address – How the Show Goes On: Law and Theater in the 21st Century' (2005-2006) 29 Columbia Journal of Law & The Arts 385, at 397.

[94] David Roberts, ''As Rude As You Like – Honest': Theatre Criticism and the Law' (2003) 19 New Theatre Quarterly 265, at 265.

dramatic purposes. Less obvious elements of the law have also been appropriated by the creative community: "W.S. Gilbert of the operatic partnership of Gilbert and Sullivan...[wrote a]...relatively little known opera, *Utopia Limited*, which appeared at the Savoy Theatre in 1893"[95] and which "delivered a sharply satirical assault on business corporations...particularly on the basic corporate concept of limited liability."[96] In a pleasing continuation of the legal theme, the Savoy is currently housing a colourful production of *Legally Blonde: The Musical*.

There is, however, a deeper, much more fundamental connection between the theatre and the law.

According to Aristotle, "Law is order, and good law is good order."[97] The idea of law as a series of rules within which schemes of negotiation, evasion and compromise are developed has prompted some commentators to see law as "a very particular form of play."[98] 'Play' in this sense is addressing metacommunication and the way in which we as humans experience life not necessarily just by way of experience and behavioural corrections, but by reading signals and understanding subtext. Conceptually, it has been argued, play is daily life – the roles we perform are chosen as part of a tacit agreement to play within the strictures of society. Within semiotics, the suggestion is that "[i]n daily life, the messages, *This is play*, *This is practice*, *This is performance*, *This is professional*, loop around each other in recursive knots of Feedback...Is this play? Dare we play?

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[95] Albert Borowitz, 'Gilbert and Sullivan on Corporation Law: *Utopia, Limited* and the Panama Canal Frauds' (1973) 59 American Bar Association Journal 1276, at 1276.
[96] *Ibid.*
[97] Popular phrasing. See Jeff Chuska, *Aristotle's Best Regime* (Oxford: University Press of America, 2000), at 65 for support.
[98] Nicole Rogers, 'The Play of Law: Comparing Performances in Law and Theatre' (2008) 8 Queensland University of Technology Law and Justice Journal 429, at 430.

Where are the lines that separate play, acting, storytelling, and lying?"[99] If we accept that there are a "number of contexts and context-markers that need to be understood as *meta* to behavior, *meta* to language"[100] in order to fully describe the human experience of communication, then "ritual...scholarship, [and] theater"[101] are all part of the make believe that is the essence of life. This links back, neatly, to the idea of theatre as a complex adaptive system – the signals of human interaction building, in the context of both law and theatre, to actually create rather than simply facilitate. That act of creation is a shared experience of law and theatre.

More specifically, what is perhaps unique about the relationship between theatre and the law is the common use of performance.[102] The tradition of the theatre could be said to be the "retrospective look at...human beings, the craft, the [h]istory that has preceded"[103] the actors in any given play. This tradition shapes performance because theatre either utilizes or rejects the techniques, interpretation and methods of interpretation of theatre of the past. In a similar way, lawyers use a process of selection (acceptance or rejection) in relation to past performances in order to regulate present behaviour. In law, "the originality of each performance derives from the distinctive characteristics of each case. While norms or legal precedents may be applied, they must be re-read, re-created or re-constructed for each new set of circumstances."[104]

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[99] Stephen Nachmanovitch, 'This is Play' (2009) 40 New Literary History 1, at 7. Nacmanovitch utilises the work of Gregory Bateson extensively: see, e.g., 'The Message, 'This is Play,'' *in Group Process: Transactions of the Second Conference*, Bertram Schaffner (ed.) (New York: Josiah Macy, Jr. Foundation, 1955).
[100] *Ibid.*, at 2.
[101] *Ibid.*
[102] Rogers, at 431. See also Margaret Davies, *Delimiting the Law: 'Postmodernism' and the Politics of Law* (London: Pluto Press, 1996).
[103] Eugenio Barba, 'The Essence of Theatre' (2002) 46 The Drama Review 12, at 12.
[104] Rogers, at 431.

Tangentially, this is not to suggest a defeat of positivism or a victory for deconstructionism. All I am suggesting is that law is performed in the same way that theatre is: by way of recourse to tradition.

Noting that law and theatre are linked by a common thread is not the same as suggesting that theatre can be read jurisprudentially. I believe it can be, and that the well documented relationship between law and literature helps to further illustrate the general relationship between the arts and law.

William MacNeil, in his accessible and groundbreaking book, *Lex Populi*, argues for a "recontextualization of jurisprudence from the specialist to the generalist interpretive community."[105] Such a 'recontextualization' is found in "the popularization of jurisprudence and the jurisprudence of popular culture"[106] and is:

> …predicated on the production of a new intertext, one that enables a rethinking of the culture of law and the law of culture. Producing that intertext is…a unique mode of analysis, of interpretation, and of reading, and what this book in part proposes is nothing less than a practical demonstration of how to read jurisprudentially.[107]

A second aim of MacNeil's is to "not only read popular culture jurisprudentially, but also to fully examine the extent to which jurisprudence is read "otherwise" by popular culture."[108] One way of looking at MacNeil's work, and the preferred view in this paper, is to see his argument as being one about overlapping discourses: the discourse *of* law and lawyers (specialist) and the discourse *about* law in wider society (generalist). While often separate conversations, the link between the two is circular: a society's views on social

[105] William MacNeil, *Lex Populi: The Jurisprudence of Popular Culture* (Stanford: Stanford University Press, 2007), at 2. Emphasis omitted.
[106] *Ibid.*
[107] *Ibid.*
[108] *Ibid.*, at 9.

norms will influence the letter of the law; subsequently, discussion of that law, perhaps most often in hard cases, will occur in society, sometimes leading to changes in the law or an amended (popular) reaction to a law.

John Hartley sees this dialogue most clearly in the relationship between reading and writing: "Popular culture is another name for the practice of media readership in modernity...reading is a social, communal, productive act of writing, a dialogic process which is fundamental to (and may even be) popular culture."[109] Threadgold picks up on this suggested relationship and applies it in the context of legal judgments:

> The intertextual and subjective complexities of these judgments perform the tensions between stasis and change that characterise the law as a social process...a reminder that the body at the scene of writing, even if the scene is legal, is always produced and formed in the circuits of communication that formulate and reformulate both subjectivities and the aestheticisations of everyday life...[110]

Threadgold is responding to the contradistinction of popular culture and 'high' culture; she rejects it on the basis, crudely, that it is the shared frame of reference of a method of communication that creates *a* culture (or *the* culture). And it is this shared reference that is the centre of MacNeil's 'venn diagram' of overlapping discourses.

MacNeil describes this as a "[m]ediati[on] between two types of inquiry – the legal and the cultural – bringing them into dialogue with each other and creating a cultural legal intersection."[111] Addressing jurisprudence through the general or the 'popular' provides a legal alternative "to the array of interpretive paradigms available in

[109] John Hartley, *Popular Reality: Journalism, Modernity, Popular Culture* (New York: St. Martin's, 1996), at 47 and 51, quoted in Margaret Thornton (ed.) *Romancing The Tomes: Popular Culture, Law and Feminism* (London: Cavendish, 2002), at 23.
[110] Terry Threadgold, 'Lawyers Reading Law/Lore as Popular Culture: Conflicting Paradigms of Representation' in Margaret Thornton (ed.) *Romancing The Tomes: Popular Culture, Law and Feminism* (London: Cavendish, 2002), at 46.
[111] MacNeil, at 156.

the humanities and the social sciences."[112] It allows legal scholars to make efforts to analyze the discourse 'about law' in order to make normative suggestions in the discourse 'of law', and, as MacNeil concludes:

> [a]fter all, think of how general opinion on a range of gender issues (single parenthood, gay sexuality, a woman's right to choose) has been affected significantly by TV shows such as Murphy Brown, Queer as Folk, and Sex and the City. Why not jurisprudential issues? Why shouldn't such issues as the law's morality, the nature of rights, and the notion of a "higher justice" – each of urgent (and abiding) interest to us all – be subject to the same kind of open questioning, the same type of public debate?[113]

And this is a wonderful opportunity to examine popular perceptions of law in an (arguably) empirical way; the legal academic should find 'jouissance'[114] (in MacNeil's words) in the exercise: "[an] enjoyment…as necessary as it is desirable because it points a way forward, beyond the stale palliatives of either the economy or sociology of the law, toward a reimagined legality."[115]

This lengthy digression into law and literature is of use because it is one way of reversing the intellectual traffic from law to theatre. Law's analysis of popular culture and the arts allows the legal academic to make normative suggestions about law. While a jurisprudential reading of *JStO*, if possible, is beyond the scope of this thesis, the idea that this is possible in some cases tells us that art and law enjoy a relationship and confirms that law has a central role in the management of art. That art inserts itself into the discourse of law invites law to insert itself into the discourse of the arts.

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[112] *Ibid.*
[113] *Ibid.*, at 157.
[114] *Ibid.*, at 10.
[115] *Ibid.*

Culture and the law

Indeed, law must, to retain its authority, keep abreast of culture in a way that religious beliefs or strong political affiliations will (by definition) not. Law is a regulator of societal norms, but also informed by them. Theatre, interestingly, has been seen in the same light: as an inherently 'civilizing' force – a claim made by many "during the second part of the nineteenth century [where]...the idea of the theatre's civilizing and moral missions was ardently promoted...gradually accepted by society and consequently the theatre's status began to be elevated to that of a reforming agency and the home of an art."[116] Arguably, this view has now changed with the twentieth century rise of commercial theatre which has "...attracted money, has dazzled the patron of the arts by its glamour and its habit – so unlike that of all other arts and so akin to games of chance – of turning investment into immediate profit or loss."[117] An edgy, potentially controversial avant-garde production is, presumably, much less likely to get the big funding that a megamusical might receive.

Still, having looked at the links between law, theatre and culture, it is important to consider the significance of legal culture. To understand more about the role law might play in the prescriptions of this thesis it is necessary to understand its prevailing "mood". What is meant by 'legal culture'? "Are legal doctrines and legal institutions," G. Edward White asks, "the equivalent of cultural artefacts, embodying and reflecting the context in which they are situated, or do they possess some intrinsic professional features that

[116] Hye-Kyung Lee, at 290.
[117] Jason Cooper et al, 'Money Makes the World Go 'Round: the Economics of Commercial Theater' (2005-2006) 29 Columbia Journal of Law & The Arts 423, at 423.

endow them with a degree of autonomy and insulation from that context?"[118] The concept of 'culture' to which one subscribes, it is submitted, is the methodological choice which (David Nelken suggests) a researcher must 'buy in' to. And Nelken has a suggested answer. "The main reason for resorting to the concept of legal culture," he writes:

> is the way it reminds us that aspects of law normally come in "packages" of one sort or another. This means we must go beyond the "family of law" links identified by comparative lawyers, the discussions of institutional characteristics of different legal traditions...or even valuable insights into the politico-legal frameworks which have an "elective affinity" with ideal types of "hierarchical" and "co-ordinate" types of legal procedure... Instead the various elements of legal culture are...given the widest definition possible – legal norms, salient features of legal institutions and of their "infrastructure"..., social behaviour in using and not using law, types of legal consciousness in the legal profession and in public – all can and must be shown to be in some way interrelated.[119]

Utilising 'legal culture' is to appreciate the full gamut of the aspects of law: essentially, accounting for the attitude towards law by society and its perceived strengths or weaknesses in solving a particular problem. This is controversial:

> For some writers...the issue is not just what is true of a given legal culture...but whether the term is one worth holding on to at all. The objections have to do with the use of the term 'culture' in legal culture. What is involved in describing a given set of ideas and behaviour as 'culture'? For many critics culture has too wide a variety of meanings for it to be a serviceable concept.[120]

I do not intend, here, to enter into the debate about the emptiness or otherwise of the term 'culture'. But it is important to recognise, especially in the context of the doctrinal analysis in Chapter 4, that (and for reasons of its subtle beauty I will adopt the

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[118] G. Edward White, 'Logical Reasoning and Historical Change in Law: The Regulation of Film and Radio Speech', in Sarat and Kearns, *History, Memory and the Law*, at 283.
[119] David Nelken and Johannes Feest, (eds.), *Adapting Legal Cultures* (Portland: Hart Publishing, 2001), at 25.
[120] David Nelken, 'Defining and Using the Concept of Legal Culture', in Örücü and Nelken, *Comparative Law: A Handbook*, at 114.

concept of culture suggested by Clifford Geertz) the idea of 'culture' is "...essentially a semiotic one...that man is an animal suspended in a web of significance he himself has spun...culture [is]...those webs, and the analysis of it...[is] therefore not an experimental science in search of law but an interpretive one in search of meaning."[121] In other words, one's position on the nature of legal culture is (while the debate as a whole is an ongoing dialectic) arguably a matter of viewpoint and, therefore, its methodological use is in raising awareness of issues the researcher may wish to consider rather than proscribing or describing a position.

I mention this because, in taking account of the changing culture (both in terms of society as a whole, and specifically in legal culture) of the UK between the eighteenth and the twenty-first century, one can attempt to appreciate the changes in both societal norms and the perceived role of law in the context of theatre regulation.

[121] Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, Inc., 1973), at 5.

CHAPTER 4: Depravity, corruption, and the Lord Chamberlain's imprimatur

'Regulation' of the theatre

A discussion of 'regulation of the theatre' is, in some ways, euphemistic (unless that conversation is about health and safety legislation or bar opening hours, perhaps). For present purposes, it is tolerably clear that what I am really looking at is censorship. It is 'regulation' in the sense, really, of prohibition. This has always been an issue for British theatre – with the longstanding British tradition of censure and ridicule of politicians, pointed out by Steven Fielding[122] and raised to an art form by Henry Fielding, largely responsible. This thesis is not about censorship – its normative goals are not to limit the theatre – but any worthwhile conclusions or prescriptions proposed in Chapter 7 must be informed by the development of regulation of the theatre during modernity.

The wisdom of Solomon – censorship and British theatre

On 20 February 1948, the UK's Secretary of State for the Home Department was asked, in the spirit of post-war liberalism,[123] whether his government intended to "introduce legislation to amend the Theatres Act, 1843, with a view to abolishing the censorship of the theatre."[124] He[125] replied: "I cannot hold out any prospect of legislation on the

[122] See note 87.
[123] The beginning of what Tim Newburn calls 'permissiveness', coming to a head in 1960 (and continuing through that decade) with the prosecution of Penguin Books for obscenity following the publication of D.H. Lawrence's *Lady Chatterley's Lover.* See T. Newburn, *Permission and Regulation: Law and Morals in Post-war Britain* (London: Routledge, 1992), at ix.
[124] House of Commons debate, 20 February 1948, Hansard vol 447 c 275W.
[125] James Chuter Ede, Home Secretary 1945-51.

subject."[126] Twenty years later, with the passing of the Theatres Act 1968 (the "1968 Act"), censorship of the theatre was abolished in its entirety. Theatre in the UK now enjoys an unprecedented freedom over content of performance: but how did it get to that point? Where from? And are there any prohibitions remaining?

A whistle-stop précis of the role of the state in controlling what could and could not be shown on stage was provided (by Lord Annan) during a House of Lords debate on theatre censorship in the early days of the discussions that eventually led to the 1968 Act.

> I have always been puzzled to know how the censorship of plays became one of the Lord Chamberlain's duties. Apparently censorship goes back to Tudor times, but it was Sir Robert Walpole who placed censorship of the theatre firmly in the Lord Chamberlain's lap. The reasons, I think, were political. The Court and Walpole's Administration were satirised by Henry Fielding in his plays, and also in The Beggar's Opera, which suggested that Walpole's dealings with his friends and with public money were indistinguishable from those of highwaymen and thieves. Sir Robert Walpole did not like this satire and, as a result, the Act of 1737 was passed.[127]

Noel Annan was, at various times, "a director of the Royal Opera House, Covent Garden; chairman of the board of trustees of the National Gallery; a trustee of the British Museum; and president of the London Library."[128] In addition, and amongst other professional activities, he was vice-chancellor of the University of London in the late 1970s / early 1980s.[129] He was subsequently to author the 1977 *Report of the Committee on the Future of Broadcasting*,[130] which helped to ensure the independence of the BBC by concluding – in essence – that "the Authorities should censor less and censure

[126] *Ibid.*
[127] House of Lords debate, 17 February 1966, Hansard vol 272 cc 1151-68.
[128] Douglas Johnson, Obituary of Lord Annan, *The Guardian*, 23 February 2000, online: <http://www.guardian.co.uk/news/2000/feb/23/guardianobituaries>.
[129] *Ibid.*
[130] Command Paper, 6753 (1977),

more".[131] In 1966, however, he was an powerful advocate for the reform of regulation of the theatre, noting that:

> [a]t the beginning of this century [censorship] worked so severely and absurdly that there was a public outcry. At that time three plays of George Bernard Shaw, Ibsen's Ghosts, Granville Barker's Waste, La Dame aux Camélias, and even, on the visit of a Japanese Prince, The Mikado, were banned…It is very easy to argue that all this was long ago and that such decisions, so ludicrous to us, would never be made to-day. But the principle that was then invoked is still invoked to-day.[132]

George Bernard Shaw, in his day, railed against the censorship of the theatre, describing it as "a permanent proclamation of martial law with a single official substituted for a court martial."[133] (The 'single official' in question being the Lord Chamberlain – see below.) Annan succeeded, in 1968, in bringing about change where Shaw had failed – but travelled in Shaw's footsteps. In his signoff to a 1997 piece in *The New York Review of Books* Annan commented that "Bernard Shaw sowed confusion by mocking every institution that the Victorians venerated and saying the real joke was that he was in earnest."[134] Annan, too, took the problem of antiquated regulation of the theatre very seriously.

The Theatrical Licensing Act 1737 (the "Act of 1737" to which he refers),[135] gave "the Lord Chamberlain statutory powers of theatre censorship against which there [was] no appeal"[136] by the simple expedient of requiring the "text of any play to be performed before a public audience in the United Kingdom…to be submitted to the Lord

[131] Colin Munroe and G.R. Sullivan, 'The Committee on the Future of Broadcasting' (1977) 40 The Modern Law Review, 460, at 462.
[132] See note 127.
[133] George Bernard Shaw, *The Shewing-Up of Blanco Posnet* (San Diego, CA: Icon Classics, 2008), at 30.
[134] Noel Annan, 'Between the Acts' (1997) The New York Review of Books (April 24), online: <http://www.nybooks.com/articles/archives/1997/apr/24/between-the-acts/>.
[135] Also referred to as the Theatrical Licensing Act.
[136] David Thomas, David Carlton, and Anne Etienne, *Theatre censorship: from Walpole to Wilson* (Oxford: Oxford University Press, 2007), at iii.

Chamberlain".[137] The Lord Chamberlain "is a senior court functionary"[138] and "head of the Royal household"[139] in the United Kingdom. The 1737 Act effectively gave the Lord Chamberlain – on behalf of the Royal household – opportunity to review (as it were!) the text of each play before it was performed, "[t]he intention [being] that every word and action to be played out upon the...stage had to have the Chamberlain's sanction in advance of...performance."[140]

As Lord Annan pointed out, Fielding was at least partly responsible for the 1737 Act – acting perhaps as a catalyst rather than the sole actor. His plays were full of "vitriolic barbs...aimed at contemporary politicians, notably Walpole...link[ing] accusations of bribery against Walpole with claims of crass stupidity aimed at well-known figures in the theatrical world..."[141] It is somewhat ironic that Fielding, who was called to the bar in 1740 and would later become a justice of the peace; who had an active role in and passionate views on justice as meted out by the English courts; and in so many ways became an establishment figure, was the trigger for a clamp down on freedom of expression.

The key section of the 1737 Act was Section IV:

> It shall and may be lawful for the said Lord Chamberlain for the time being, from time to time, and when, and as often as he shall see fit, to prohibit the acting, performing or representing any Interlude, Tragedy, Comedy, Opera, Play, Farce or other Entertainment of the Stage, or any Act, Scene or Part therefore, or any Prologue or Epilogue.[142]

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[137] Nicholas De Jongh, *Politics, Prudery, and Perversions: The Censoring of the English Stage 1901-1968* (London: Methuen, 2000), at ix.
[138] Jonathon Green and Nicholas Karolides, *The Encyclopedia of Censorship* (New York: Facts on File, Inc., 2005), at 330.
[139] *Ibid. See also* The Official Website of the British Monarchy: <http://www.royal.gov.uk/TheRoyalHousehold/RoyalHouseholddepartments/TheLordChamberlain.aspx>.
[140] De Jongh, at ix.
[141] Thomas *et al*, at 28.
[142] *Ibid.*, at 41. Statute reference: 10 Geo. II, c.28 (1764).

This gave the Lord Chamberlain, part of the ruling elite and answerable only to the Royal family,[143] freedom to ban or edit any production he wished in whatever manner he wished. As mentioned above, "[t]he Lord Chamberlain's judgement was final and he would not enter into discussion with playwrights. There was no Court of Appeal and no questions about his decision could be tabled in the House of Commons or the Lords."[144]

It is interesting to note that this clampdown on theatrical freedom was exactly that – the imposition of a restriction on previously unregulated territory. Although the 1606 Act to Restrain the Abuses of Players had been passed, "threaten[ing] any person...with severe financial penalties...if in any play or stage entertainment they 'jestingly or prophanely speak or use the holy name of God or of Christ Jesus, or of the Holy Ghost or of the Trinity...',"[145] and censorship had been a constant factor in the performance of plays from the time of Shakespeare, exercised by various officials under the Royal prerogative,[146] a complex system of licensed and unlicensed theatres engendered sufficient confusion to allow for creative freedom – de facto, even if not by design.

David Thomas, David Carlton, and Anne Etienne corroborate this, noting that it was "the new found freedom of the stage"[147] which prompted "Walpole's administration to introduce draconian legislation to curb this".[148] Concerns about this newly discovered freedom stemmed from the threatened:

[143] This, of course, changed over time. By the 1960s the idea of the Royal family having any role in the decision-making process would have been absurd; even in the eighteenth century, as already mentioned, Walpole was the key mover in the enactment of the 1737 Act.
[144] De Jongh, at x.
[145] Thomas *et al*, at 11.
[146] *Ibid.*, see 6-23.
[147] I*bid.*, at 23.
[148] *Ibid.*

> [a]rrest of John Harper, a player of the Little Theatre in Haymarket...accused...of being a vagrant under the terms of the statute passed in the reign of Queen Anne.[149] At his trial the jury found him not guilty. Harper's acquittal meant that in future...the Government...could [not] use the vagrancy laws as a means of keeping unlicensed theatres and players under control.[150]

This lack of control – given the power and importance of theatre as a means of shaping and influencing culture (as discussed in Chapter 2) – not only led to routine censorship but maintained it: "legal uncertainties and confusion",[151] so the argument went, would ensue in the event of a retreat from the "clearly defined [but]...completely restricting framework of statute law"[152] established by the 1737 Act. It was, as Thomas *et al* conclude: "an effective and blunt instrument to suppress, on the English stage, any expression of serious thought on religious, moral, or political issues that might offend contemporary sensibilities."[153]

This is not to say, however, that there were not challenges to censorship prior to its abolishment with the 1968 Act; the first significant milestone being the Theatres Act 1843. In 1993 the Secretary of State was asked by written question in the House of Commons whether there were plans to commemorate the sesquicentennial of the 1843 Act.[154] He responded that: "although [there are]...no particular plans to mark this

[149] An act passed "in the twelfth year of Queen Anne, included players, who acted without legal settlement in the places where they performed, among vagrants, and subjected them to the same penalties as rogues and vagabonds." (*The Scots Magazine Vol 60* (Edinburgh: James Watson, 1798), at 518). Walpole tactically sold the 1737 Act as an amendment to this act as "the opposition hailed every new law as an attack on liberty; by amending an old act so as to moderize it, Walpole was thus enabled to obviate much criticism." (P.J. Crean, 'The Stage Licensing Act of 1737' (1938) 35 Modern Philology 239, at 252, note 44).
[150] Thomas *et al*, at 23.
[151] *Ibid.*
[152] *Ibid.*
[153] *Ibid.*
[154] House of Commons, Written Answers, 25 January 1993, Hansard vol 217 c556W.

anniversary...the Theatres Act 1843 greatly liberalised the provision of theatre in London in the last century."[155] [156]

The 1843 Act loosened the strings binding the dramatist to the Lord Chamberlain by, at Section 14, decreeing that the Lord Chamberlain could censor, but only where "in the opinion of the Lord Chamberlain it was necessary for the promotion of good manners and decorum, or of the public peace, to forbid the performance..."[157] This had the effect of "for the first time since 1737, providing the Lord Chamberlain with working guidelines to the exercise of his powers of censorship."[158]

It is interesting to note that the 1843 Act was really a reaction to copyright problems and monopoly issues of the time;[159] the censorship provision was an after thought which came from an amendment proposed by a lawyer – Lord Campbell of St Andrews – who told the House that:

> He was quite ready to invest the Lord Chamberlain with full powers to prevent any performances which were calculated to offend public decency, or to peril the public peace; but beyond this he did not think that officer ought to interfere...[160]

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[155] *Ibid.*

[156] The Theatres Act 1843 is also sometimes referred to as the Act for Regulating Theatres 1843.

[157] Thomas *et al*, at 59: "...it was the playwrights who took the initiative in pressing for reform of theatre legislation. Their grievances...namely, the lack of copyright protection in respect of performances of their work, and...the fact that only two patent theatres in London could legitimately perform new plays."

[158] *Ibid.*, at 62.

[159] The problems revolved around the right to perform new plays and publish work performed outside licensed theatres. See Thomas *et al*, 59 - 64. As John Montgomery explains: "Following the Restoration, theatres were once more permitted but subject to a strict regulatory system of Patents [licenses] restricting performances to 'legitimate theatre'... For over a hundred years, from the late eighteenth century, there followed a procession of new theatres opening up, putting on plays, being closed by the authorities...Eventually, in 1843, the Theatre Regulation Act abolished the Patent monopoly, so that all manner of theatres could now apply for a...licence..." ('Café Culture and the City: The Role of Pavement Cafés in Urban Public Social Life' (1997) 2 Journal of Urban Design 83, at 90-91).

[160] House of Lords debate, 15 August 1843, Hansard vol 71 c 689. See also Thomas *et al*, at 61-62.

In limiting censorship to performances which "offend public decency" Campbell was anticipating the Theatres Act 1968, which, as will be shown shortly, prohibits obscenity, but little else.

By 1968, which is the next time the censorship issue was considered (with meaningful results),[161] the words "decorum" and "good manners" were being decried as "gorgeous Victorian terminology!"[162] by Lord Stow Hill (formerly Attorney General). "How on earth," he asked,

> can anybody, in the context of 1968, amid the controversies which now raged as to what is good art, what is bad art, or ought to be allowed, or ought not to be allowed, even if he possesses the wisdom of Solomon, arrived at judgement and decisions which are banned to provide violent dislike on the part of large numbers of members of the community on one side or the other?[163]

This went even deeper than an objection to the power of censorship over the theatre. The Lord Chamberlain, by the 1960s, was seen as the guardian of society's morals, not just in the theatre; although, given the crossover between theatre and culture discussed in Chapter 2, this is unsurprising. Commenting on a letter sent to the Lord Chamberlain in response to a stage version of D.H. Lawrence's infamous novel *Lady Chatterley's Lover*, entitled *Lady Chatterley*, Poonam Ganglani notes that:

> [c]onsidering that the letter[164] has very little to do with the play itself or even with the theatre in general it may seem rather curious...to address [the]...letter to the

[161] An attempt to force abolition was made in the "atmosphere of extensive political change initiated by the post–World War Two Labour government...The first ever British Theatre Conference in 1948 called for the abolition of theatrical censorship, and a private member's bill was introduced in 1949. But the bill was badly drafted, the theatrical profession divided (with commercial managements supporting censorship), and the socially conservative Labour government had other and more pressing priorities. So...the bid failed." See Jeffrey M. Richards, Book review (2008) 42 Comparative Drama 523, at 525.

[162] House of Lords debate, 28 May 1968, Hansard vol 292 cc 1044 – 104.

[163] *Ibid.*

[164] The contents are immaterial for present purposes, but the issues raised were "indignation about Lawrence's novel...and [generally]...bewail[ing] the loss of Christian principles." – Poonam Ganglani,

> Lord Chamberlain. However, it...reveals the extent to which the Lord Chamberlain was perceived by a section of the public as the custodian of morals not only of the stage but...of society at large.[165]

The role of the Lord Chamberlain had, in many peoples' eyes, become an anachronistic and dangerously unaccountable infringement on the liberty of not only the arts, but society as a whole. The argument was clinched, at least for Lord Stow Hill, by the primacy of Parliament:

> It is for Parliament, surely, after mature deliberation...after listening to public discussion on the subject in the Press and elsewhere in the course of the great public debate, to formulate deliberately and after careful reflection on what it regards in its judgement, objectively, as the tests which should be imposed to limit the complete freedom of the author. This is what the Bill does, in clauses 2, 5 and 6.[166]

The Theatres Act 1968 came about as a result of the recommendations of a Joint Committee on the Censorship of the Theatre (initially proposed by Lord Annan, chosen for his lifelong interest in the arts).[167] Lord Annan was concerned not only that censorship[168] impinged on the "freedom of expression"[169] of the playwright, but also that

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'Piecing Together the Lady Chatterley Puzzle: An Uncensored Investigation' (2010) 26 New Theatre Quarterly 71, at 73.

[165] *Ibid.*

[166] See note 162.

[167] See note 127. The following amusing story illustrates Lord Annan's strong support for the arts. "In 1970...he forcefully expressed his opposition to the plans of the Conservative government of Edward Heath to allow public museums and galleries which had hitherto been free, to charge for admission. Why, Annan asked, should someone who worked in a shop be unable to spend some of the lunch break looking round the British Museum or the National Gallery? The prime minister angrily claimed that this was a small matter which had got completely out of hand, and there were those who mocked - and Annan encountered many such in the course of his career - by asking how many shopgirls did Lord Annan know? But the protests succeeded. And for Annan this was not a small matter. His indignation was part of a process in which he devoutly believed: that of civilising people." (Douglas Johnson, Obituary of Lord Annan, *The Guardian*).

[168] The point is as much that the Lord Chamberlain retained the power to arbitrarily censor, as a realistic fear that this power was being abused. As Lord Annan put it: "it is very easy to argue that all this was long ago and that...decisions, so ludicrous to us, would never be made today. But the principle[s]...[invoked at the beginning of the 20th century are]...still invoked today." (see House of Lords debate, 17 February 1966, Hansard vol 272 cc 1151-68).

his "work and properties – that is to say, the playwright's play – can be destroyed without recompense and without appeal".[170] The Committee consisted of Lords and MPs and interviewed theatre managers and playwrights; afterwards "the collective view of investigators was emphatic":[171]

> The Committee are convinced that the case for removing the powers of the Lord Chamberlain over stage plays is compelling and outweighs the administrative convenience of the present arrangements. Accordingly they recommend that these powers should be abolished as soon as possible.[172]

In accordance with the spirit of permissiveness of the time, noted at the beginning of the Chapter, censorship was effectively over.

The 1968 Act was granted Royal Assent on 26 July 1968. The very first section abolished censorship of theatre in the following terms:

> (1) The Theatres Act 1843 is hereby repealed; and none of the powers which were exercisable thereunder by the Lord Chamberlain of Her Majesty's Household shall be exercisable by or on behalf of Her Majesty by virtue of Her royal prerogative.
>
> (2) In granting, renewing or transferring any licence under this Act for the use of any premises for the public performance of plays or in varying any of the terms, conditions or restrictions on or subject to which any such licence is held, the licensing authority shall not have power to impose any term, condition or restriction as to the nature of the plays which may be performed under the licence or as to the manner of performing plays thereunder...[173]

The only general limitation was that a performance could not be obscene, although even if it was, the punishment would be post-facto by way of a brief period of imprisonment or

[169] House of Lords debate, 17 February 1966, Hansard vol 272 cc 1151-68.
[170] *Ibid.*
[171] Dominic Shellard and Steve Nicholson, *The Lord Chamberlain Regrets...: A History of British Theatre Censorship* (London: The British Library, 2004), at 172.
[172] *Report from the Joint Committee on the Censorship of the Theatre* (London: HMSO, 1967), section vi. (quoted in Shellard *et al*, at 172).
[173] Theatres Act 1968, section1(1) and (2).

a fine;[174] "obscenity" was found where "taken as a whole, [the effect of the play] was such as to tend to deprave and corrupt persons who were likely, having regard to all relevant circumstances, to attend it."[175] This is very close to the wording Lord Campbell suggested, back in the 1840s. From 1968, therefore, it has been the position that a playwright and producer may present any play they so wish, with the only proviso being that it must not contravene the obscenity provisions.[176]

There is a certain prescience to some of the House of Lords debates on the matter. There was a limited but definite concern expressed that with the system of approval from the Lord Chamberlain, at least, a playwright (or manager) was "covered" – the play had been approved.[177] Indeed, as Johnathan Green and Nicholas Karolides have noted: "Lord chamberlains…were rarely malicious: their supporters, [included]…managers who felt that someone had to state what was acceptable on stage, and actors who had no desire to suffer the caprices of a provincial magistrate…"[178] Lord Annan voiced (although did not subscribe to) the real concern that, should "official" censorship be removed, then:

> unofficial censorship might well have a much more debilitating effect on the theatre than the present official censorship. [Management and local committees]…could be influenced by common informers who would be able to ruin or embarrass theatre managements, because they would induce the police to bring prosecutions, or to issue injunctions, to stop productions, at enormous cost to managements.[179]

This is striking in its pre-emption of the situation that *JStO* found itself in. Lord Annan summed up his position (and it is one I share) by saying: "In my view, the serious author

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[174] Theatres Act 1968, section 2(2).
[175] Theatres Act 1968, section 2(1).
[176] The wording tracked that of the Obscene Publications Act 1959, section 1.
[177] See the comment from Lord Stow Hill, note 162, addressing these concerns.
[178] Green and Karolides, at 330.
[179] House of Lords debate, 17 February 1966, Hansard vol 272 cc 1151-68.

must be given freedom of choice as to what to say and how to say it. I'm afraid this means that the language or theme or treatments may very well shock. But can one have art without shocks?"[180]

Obscenity, blasphemy, and a comment on the attempted prosecution of the producers of *JStO*

In this context, arguments about censorship are really arguments about "pre-censorship,"[181] as Viscount Dilhorne put it, speaking after Lord Annan in the same debate. "The question..." Viscount Dilhorne said, "is not whether anybody should be free to put on any play he likes...[t]he question is: should theatres, like most things in our country, be subject to the rule of law, of the courts, in the ordinary way; or is there to be pre-censorship?"[182] The argument goes that depraved plays – those which are likely to corrupt public morals – would be effectively prohibited because of the criminal deterrence of other laws of the land. In effect, this reduces to three main areas: laws against libel, obscenity, and blasphemy.

Libel is really concerned with the unjust persecution of an individual or limited class, whereas this thesis is intended to address rather more widespread affront to a section of society. Blasphemy, pertinent for present purposes because of the attempted action against the producers of *JStO*, is actually a very specific common-law crime of blasphemous libel, involving publication of: (a) contemptuous, reviling, scurrilous or ludicrous material relating to God, Christ, the Bible or the formularies of the Church of

[180] *Ibid.*
[181] House of Lords debate, 17 February 1966, Hansard vol 272 cc 1169-248.
[182] *Ibid.*

England, and (b) the publication has to be such as tends to endanger society as a whole, by endangering the peace, depraving public morality, shaking the fabric of society or tending to cause civil strife.[183]

When the court considered this in the case of *JStO*, it found that the performance of the musical was protected by the 1968 Act, subsection 2(4) which states that:

> No person shall be proceeded against in respect of a performance of a play or anything said or done in the course of such a performance – for an offence at common law where it is of the essence of the offence that the performance or, as the case may be, what was said or done was obscene, indecent, offensive, disgusting or injurious to morality.

The court also found that the requirements of the crime must be read in conjunction with the European Convention on Human Rights ("ECHR"); Article 10, specifically, protects freedom of speech especially in the case of "unpopular, tasteless or offensive"[184] material unless interference with that right can be justified.[185] Given that the 1968 Act was passed to abolish censorship, Parliament had made clear that interference with the right to stage a play was not intended other than according to that Act.[186]

The 1968 Act deliberately included a reference to just one other Act – the Obscene Publications Act 1959 (the "1959 Act"). The 1968 Act tracked the wording of the 1959 Act, as mentioned above, in its sole remaining prohibition: that of giving an

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[183] *R. v Lemon (Denis)* [1979] AC 617 HL. See also R. *(on the application of Green) v Westminster Magistrates' Court* [2007] EWHC 2585 (Admin).
[184] Article 10(2), ECHR.
[185] And the threshold for such a justification for interference is very high. As the European Court has put it: "Freedom of Expression constitutes one of the essential foundations of a democratic society. It is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any section of the population. Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society" (see *Vereinigumg Bildender Kurnstler v Austria* [2007] E.C.D.R. 7, at para. 26).
[186] The common law offence was therefore both incompatible with the wording of the 1968 Act and the spirit of the ECHR. Note that blasphemy was abolished as a criminal offence in 2008, repealed by the Criminal Justice and Immigration Act 2008, section 79.

obscene performance of a play.[187] There is a safety net if it can be shown that "the giving of the performance in question was justified as being for the public good on the ground that it was in the interests of drama, opera, ballet or any other art or literature or learning."[188] Whether it is obscene or not is a matter for the jury,[189] although expert evidence can be adduced as to the artistic value of the work.[190]

Obscenity, then, is only not permitted on stage when there can be said to be no artistic merit to the potentially obscene act(s). This is often seen as subjective – as Abraham Kaplan writes at the beginning of his admirable paper from the mid-50s: "many people anxious to defend freedom of expression in the arts attack the suppression of obscenity on the grounds that it has no objective existence, but is found only in the mind of the censor."[191] With perfect logic, however, Kaplan goes on to note that "language has no content at all, obscene or otherwise, without *mind*...obscenity is no more subjective than is any esthetic quality whatever."[192] Kaplan identified three types of obscenity: what he called "conventional obscenity...[a]...quality of any work which attacks established sexual patterns and practices";[193] "Dionysian[194] obscenity...what society regards as "excessive" sexualism";[195] and, finally, "the obscenity of the perverse...a rebellion

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[187] See note 175.
[188] Theatres Act 1968, section 3(1).
[189] *R. v Calder and Boyars Ltd.* [1969] 1 QB 151.
[190] Theatres Act 1968, section 3(2).
[191] Abraham Kaplan, 'Obscenity as an Esthetic Category' (1955) 20 Law and Contemporary Problems 544, at 544.
[192] *Ibid.*, at 545. Emphasis added.
[193] *Ibid.*, at 551.
[194] After the Greek god of fertility.
[195] Kaplan, at 554.

against convention which at the same time acknowledges the authority of received standards...calculated obscenity".[196]

The point, here, is that obscenity, and the moral discussion that goes with it, is not an important factor for present purposes. It is more pertinent, for example, to the debate around the British 'in yer face' theatre movement, associated with Sarah Kane, Joe Penhall, Patrick Marber – a 1990s phenomenon, either "an extraordinary burst of energy and inventiveness"[197] or responsible for at least one "play which appears to know no bounds of decency yet has no message to convey by way of excuse",[198] depending where you stand (Kane's *Blasted*, with its scenes of rape and cannibalism). These overtly and deliberately obscene (and, to many people, deeply offensive) productions pushed the boundaries of acceptability (whether or not that was their purpose). In contra-distinction, this thesis is concerned with those productions which, as in the case of *JStO*, cause deep and resounding upset to a particular section of society. In other words, shock tactic theatre i.e. where much (if not all) of the impact of the work is in the shock factor, is not the focus. Instead, situations where real offence is given: *Behzti* being the best case so far mentioned.

JStO is not concerned, primarily, with sexual mores or taking pleasure in perversity. It is toying with cultural expectations – the grotesque nature of the *Jerry*

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[196] *Ibid.*, at 556.
[197] Mark Ravenhill, 'A Tear in the Fabric: the James Bulger Murder and New Theatre Writing in the 'Nineties' (2004) 20(4) New Theatre Quarterly 305, at 310.
[198] De Jongh, at 250, quoting the *Daily Mail* journalist Jack Tinker.

Springer Show and the success it obtained. The salient point being that this paper is not concerned with obscenity, per se.[199]

Where are we now?

The situation is, therefore, one of more or less unfettered freedom. This is something I believe in and it dovetails, in a European context, with the freedoms enshrined in the ECHR. But does this freedom bring its own problems?

As noted at the beginning of this section, the clampdown engineered by Walpole in 1737 – the first time theatre censorship was put on a statutory footing – was in reaction to a period of unprecedented theatrical freedom. As noted in Chapter 2, freedom of expression is a fundamental liberty that has found intuitive resonance with the population of today, at least in the West. Nevertheless, there is a nagging feeling that, perhaps, there is more that could be done to assuage the hurt caused by performances that cause significant offence, without limiting artistic endeavour or the ability of art to thrill and push boundaries.

Were a compromise found, this would – potentially – be of benefit to both sides: the artist/producer not just the protester. One of the consequences of the protests about *JStO* being broadcast on the BBC was to, in Stewart Lee's words, "cost the show whatever live commercial future it had."[200] The threats from Christian Voice of further protests were sufficient to make some theatres pull out of an ill-fated UK tour. This is a new beast: what Anthony Burton, writing in *The Times* refers to as the problem of "self-

[199] It could, of course, be the case that an affront to a section of society comes from something deemed obscene, although, obscenity qua obscenity is unlikely to offend deeply without being in conjunction with something held dear – something of perhaps religious, political or perhaps kindred importance.
[200] *How I Escaped…*, at 226.

censorship"[201] – the stifling of creative risk, avoided as a result of concerns over potential controversy. Indeed, this was the very concern voiced during the debates preceding the 1968 Act: that "unofficial censorship might well have a much more debilitating effect on the theatre than the present official censorship."[202]

Is there a role for law to play here, balancing the competing rights of opposing factions whilst maintaining artistic freedom? Could the law provide reassurance – a safe haven – to ensure protection of a controversial work from commercial destruction by pressure groups, while also balancing the competing right of an offended party to register its offence (other than by simply protesting),[203] all the time maintaining artistic freedom of expression? Before an attempt at answering this question can be made, some consideration should be given to the legal content and context of the word 'rights'.

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[201] Anthony Burton, 'A Disgusting Feast of Filth?' *The Times*, online: <http://business.timesonline.co.uk /tol/business/law/article4775754.ece>.

[202] See note 179.

[203] The reason that protesting is not, of itself, deemed sufficient in this thesis is that the attempt is to find a way to ameliorate the tensions between the offended section of the public and the offending work. Saying that there is a right to protest, so nothing more needs to be done, seems to the equivalent of shrugging one's shoulders and allowing the fight to continue.

CHAPTER 5: Rights, the universe and everything[204]

The rights revolution

The spirit of permissiveness of the 1960s, described in the previous Chapter, was followed in the 1970s by the legal academy's efforts to explain it. Yet there was another, more fundamental impact of this change in social norms. The law school was itself infected by the spirit of liberation, seen in the move towards interdisciplinary and increasingly theoretical work and away from purely doctrinal scholarship (as one legal academic put it, law "move[d] towards adolescence and show[ed] signs of waking up").[205] With this 'awakening' came the revitalizing of legal philosophy with John Rawls' publication of *A Theory of Justice* in the early part of the decade,[206] and a reconsideration of the role of individual rights (sometimes called the rights revolution)[207] – both heavily influenced by the US civil rights movement, and quickly filtering through the legal academy all over the common law world. "It is important that we should take rights seriously," William Twining wrote in 1974,

> not only at the level of day to day public debate, but more fundamentally at the level of philosophy. We need a general theory of individual rights which is more convincing than those provided by the natural law tradition.[208]

At the turn of the twenty-first century, Austin Sarat and Thomas Kearns, in their collection of papers on legal rights, note in their introduction that "[t]he language and

[204] With apologies to Douglas Adams.
[205] William Twining, 'Some Jobs for Jurisprudence' (1974) 1 British Journal of Law and Society 149, at 149.
[206] Published first in 1971.
[207] See Charles Epp, *The Rights Revolution* (Chicago: University of Chicago Press, 1998).
[208] Twining, at 173.

practices of legal rights have, for a long time, had particular resonance in this culture, and never more so than today."[209] This accords, I suggest, with the common experience of most people: the language of rights permeates life and law – "during this century, the meaning and reach of traditionally recognized rights has been dramatically expanded; new rights have been recognized; and rights have been extended to previously marginalized groups."[210] Yet, with increased centrality in the discourse on the space within which an individual in a modern democracy is granted autonomy, "[i]t is a commonly expressed anxiety that looseness of rights-talk can lead to invocation of rights being rendered worthless."[211] The problem is that the concept is nebulous:

> One can find "right" being used to signify some position of benefit or advantage that has been determined as applying to a particular individual, but one can also find it employed to signify a claim to show such a position that has yet to be determined, and even to signify a claim to such a position that has failed to be established.[212]

It is not just the spread in usage that has called the meaning of rights into question. The rise of postmodernism has also queried the primacy of rights; more accurately, postmodernism has encouraged scholars to consider whether or not there is substance to rights, or whether it is a word often bandied about, but with little (or no) inherent significance: "Postmodern legal scholars have...been skeptical about the coherence and integrity of rights talk and the legal rights that give rise to it."[213]

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[209] Austin Sarat and Thomas Kearns, (eds.), *Legal Rights: Historical and Philosophical Perspectives* (Ann Arbor: University of Michigan Press, 1999), at 2.
[210] *Ibid.*
[211] Andrew Halpin, *Rights and Law: Analysis and Theory* (Oxford: Hart Publishing, 1997), at 3. note 2.
[212] *Ibid.*, at 3.
[213] Sarat and Kearns, *Legal Rights*, at 3.

Queried or not, rights, as Thomas Haskell argues, seem to be "a set of practices so amply supported by the prevailing form of life that our ability to formulate an entirely satisfying theoretical justification for it has no bearing on its staying power."[214] In other words, "[s]kepticism about the objectivity or rational grounding of rights has not undermined their political significance."[215]

It is from this position that this thesis takes its starting point: it is not the intention here to record the debates about the existence, or substance and meaning, of rights – instead, this thesis assumes that rights "do have a robust and generally recognized ontological identity."[216] The purpose of addressing 'rights' discourse in this thesis is to establish a currency, a way of balancing the competing interests of those who are offended by a play, and the play's creators and disseminators. Nevertheless, assuming that rights exist is not the same as being able to describe what a right is. Therefore, given that it is "[o]ne of the most orthodox injunctions of bourgeois-liberal legalism: that we enjoy our rights...,"[217] how does one identify a 'right'?

Rights and enjoyment

Towards a practical discussion of rights in this context, three questions suggest themselves. First, how do we identify a 'right'? Second, but inherently connected, how do we balance competing rights? Third, can this abstract conception of rights – or alternatively its language or normative power – be applied helpfully in the heat of the

[214] Thomas Haskell, 'The Curious Persistence of Rights Talk in the 'Age of Interpretation'' (1987) 74 Journal of American History 984, quoted in Sarat and Kearns, *Legal Rights*, at 5.
[215] Sarat and Kearns, *Legal Rights*, at 5.
[216] Pierre Schlag, 'Rights in the Postmodern Condition', in Sarat and Kearns, *Legal Rights*, 263, at 266
[217] William MacNeil, 'Taking Rights Symptomatically' (1999) 8 Griffith Law Review 135, at 135.

debate in question. After all, while "the arts can provide a space for the discussion of questions which politicians have failed to grapple with,"[218] in its deliberate guise as 'outlaw' – after Nick Hytner – it also incites and provokes. Will rights have a role to play?

MacNeil's Gallic-tinged conception of 'jouissance' is instructional once more. MacNeil, taking a postmodern approach to rights, argues for a "re-functionalis[ation] of rights discourse, making it workable for postmodernity by predicating it upon something other than modernity's rights-fetishism."[219] 'Jouissance" – 'enjoyment' – is his answer. MacNeil's article – a fascinating read for its romp through Marxism, 'FemCrit', critical race theory, Freud and castration anxieties – provides the argument with a departure point:

> Positivism, inter alia, conceives of the language of the Law as full rather than formal, as a writing system infused by a 'metaphysics of presence': ...[MacNeil], however, sees the language of the Law – and its privileged idiolect, 'rights' – in terms of an absence rather than a presence...[220]

'Enjoyment' has been displaced by the letter of the law rather than the spirit; rights discourse has been replaced by a discussion of what is missing i.e. 'I know my rights!' in protest at a perceived denial of them, rather than a recognition of a benefit actually enjoyed.[221] I agree that rights discourse – in the sense of conversation centred around "what might be called an 'honorific' sense of the term right,"[222] where something being called a right somehow has power over things not called rights, simply by virtue of a

[218] Delgado, at 221.
[219] MacNeil, 'Taking Rights...', at 135.
[220] *Ibid.*, at 140. Emphasis omitted.
[221] *Ibid.*, at 139.
[222] Saladin Meckled-Garcia, 'Moral Methodology and the Third Theory of Rights' (2008) School of Public Policy Working Paper Series, Working Paper 28, online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1282208 (accessed on 10 April 2010), at 3.

name – is empty. I am not, however, so much of an anti-positivist that I align myself with MacNeil here, in the sense that I think positivism could imbue an empty right with value by way of delimitation. A positivist would argue that:

> Formally good legislation not only identifies goals but lays down how and to what extent those goals be pursued, by establishing clear rules that are designed to capture the parameters of the right that the legislature intended to enact.[223]

There may be merit to such an argument, although the problem of the moral substance of rights protection would remain. This paper, however, steers clear of an outright legal philosophical debate, and, instead, considers the rights of the protagonists in the particular conflict. How best, in the context of this paper, can the absence MacNeil identifies be given substance?

Saladin Meckled-Garcia proposes a methodology of moral concepts, interestingly both grounded in rights theory and *of* rights theory. Meckled-Garcia suggests that in order to correctly identify a moral concept, one must identify the value of that particular concept in a non-redundant way – in other words, what is the "judgment which the concept allows us to make, and which we want to be able to make because [moral concepts] capture ideas, in the form of principles, that would otherwise be in need of expression"[224] that is not expressed elsewhere. This, in turn, gives the proposition: 'What can we do with a right that we could not do without one?' The methodology proposed is called the 'distinctiveness approach' and is a form of 'morality plus' where, the argument runs, "[i]f rights simply reduced to moral obligations which advance autonomy…then no

[223] Tom Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (London: Cavendish, 2004), at 311.
[224] *Ibid.*, at 9.

contrast could be established between moral duties and what is distinctive to rights."[225]

Meckled-Garcia's chosen approach is to apply a contractual model to the rights issue – a theory of accountability and responsiveness. She dismisses a wellbeing model of rights – "duties...necessary for the protection or securing of elements of someone's wellbeing"[226] – as being unable to point to where the right is responsive (she gives the example of "the rights held be executors of a will...in th[is] case...the objects of the duties are persons whose interests are central to the justification of the right...whilst the rights themselves are held by others")[227] and therefore unable to tell us anything about the distinctive nature of rights.

But what is really required is a theory of rights which fully recognises the plurality of rights, and identifies them as political currency. Stuart Scheingold does just this, from a political angle, noting:

> In...[a]...conflict, a right is best treated as a resource of uncertain worth, but essentially like other political resources...The value of a right will therefore depend...on the circumstances and the manner in which it is employed...This political approach to rights departs from conventional legal and philosophical usage. My intention is to convey the idea that all official rules imply legal rights (as well as obligations)...[228]

The politicized nature of rights is also found in the exploration of:

> citizenship as a concept for understanding social and economic equality, [and] it is clear that the idea of rights has...been associated with the sense of a shared political duty to provide a place for each individual in the fabric of common life.[229]

[225] *Ibid.*, at 8.
[226] *Ibid.*, at 18.
[227] *Ibid.*
[228] Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (New Haven: Yale University Press, 1974), at 7.
[229] Jeremy Waldron, 'The Role of Rights in Practical Reasoning: "Rights" versus "Needs"' (2000) 4 Journal of Ethics 115, at 127. See also T.H. Marshall, 'Citizenship and Social Class' in *Class, Citizenship and Social Development* (New York: Doubleday, 1964).

Citizenship is here used to denote the possibility of involvement in society – in this sense a right is teleological, aimed at providing a(n) (alienable) space for engagement in the concerns of wider society. A chance, in other words, to invest in the broader concern of humanity.

Drawing this together, it is submitted that a case for a wellbeing model of rights can be made. First, a right that is distinguishable from a general duty is discovered in the liberal idea of toleration and the space to participate in society. MacNeil's 'absence' in the rhetoric of legal rights is filled by the idea of a right as political currency with which the individual can participate in society. Rights are therefore alienable because they are tradeable or exchangeable, in the sense of setting off for compromise.

By trading rights, I do not meaning anything dramatic or draconian: the idea is to find a mechanism within which conflict can be defused. As such, the search is for a 'fair' outcome. Indeed, fairness is why "[t]he framework of rights is fundamental in a liberal polity because it empowers individuals as free and independent persons (or right-bearers) to arrive at the ends or purposes of life (such as they see them)."[230] It is with this in mind that John Rawls' work is so useful. Rawls, of course, would not countenance the 'trading of rights'; instead, for Rawls, rights can only be 'balanced'.[231] But balance is exactly what we are searching for.

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[230] Iris Goodwin, 'Ask Not What Your Charity Can Do For You: *Robertson v Princeton* Provides Liberal-Democratic Insights Into the Dilemma of *Cy Pres* Reform' (2009) 51 Arizona Law Review 75, at 112.

[231] 'Balancing' is, however, crucial in Rawls' theory. His First Principle is that "each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others." See *A Theory of Justice (Revised Edition)*, at 53. Thanks to Professor Mary Liston for pointing this out.

So can Rawls' theory provide a theoretical background which may be used to design a forum, or at least identify the utility of such a forum, whereby these competing rights are managed? In short, it can. Rawls' theory of 'justice as fairness' begins with "the idea that…the concept of the "right" is fundamental."[232] Rawls also accounts for the plurality of rights by arguing that "[o]nce government has empowered individuals through the regime of rights to arrive at and live out their own conceptions of the good, government in its role as promulgator and defender of the right must take a neutral position vis-à-vis those conceptions of the good…"[233] (the conception of the good is discussed further below, but for immediate purposes it means the needs and wants of any particular person in a society). He also finds basic liberties necessary for protection – such as the freedom of speech (see Chapters 1 and 2) – and so using his theory helps to avoid the pitfall of inadvertently fettering freedom of speech. Finally, Rawls' theory is based in the social contract tradition, notably of Kant, and so the link between society and the rights of individuals is inherent.

<u>Rawls and the social contract</u>

The work of John Rawls is generally accepted as having revitalised philosophical thinking on justice. His theories have been utilized by legal academics working in the interdisciplinary areas of (amongst others): law and race;[234] law and technology;[235] law

[232] Goodwin, at 112.
[233] *Ibid.* One exception to this neutrality is "for Rawls…the priority of the right…with all that this entails for the system of justice." (at 113).
[234] Martin Carcieri, 'Rawls and Reparations' (2009-2010) 15 Michigan Journal of Race & Law 267.
[235] Amit Schejter and Moran Yemini, '"Justice, and Only Justice, You Shall Pursue": Network Neutrality, The First Amendment and John Rawls's Theory of Justice' (2007) 14 Michigan Telecommunications and Technology Law Review 137.

and the environment;[236] and law and charity.[237] The versatility, and perhaps the attraction, of Rawls' theory stems from the first principles nature of his thesis. In summary: "[t]he ultimate test for Rawls' theory of justice is the test of reflective equilibrium…persuading us that the more contentious conclusions flow naturally and reasonably from weaker assumptions that we are initially inclined to accept."[238]

Rawls' seminal work was written against the background of the US civil rights movement[239] and his concern was to "…show…that certain political ideas such as free speech, the right to vote, and anti-discrimination laws could be justified universally by political philosophy".[240] It follows that ones' work is influenced by the prevailing debates of the day; indeed,

> [a]ll the great political philosophies of the past – Plato's, Hobbes's, Rousseau's – have responded to the realities of contemporary politics, and it is therefore not surprising that Rawls' is penetrating account of the principles to which our public life is committed should appear at a time when these principles are persistently being obscured and betrayed.[241]

"Of course," as Norman Daniels points out, "it would be quite wrong to conclude that, because Rawls' work has this timely, ideological significance, he is merely a polemicist for the status quo."[242] Rawls expressly intended to produce a practical theory – with real world utility: both explaining the observable political world, but also (and as a result of

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[236] Todd Adams, 'Rawls' Theory of Justice and International Environmental Law: A Philosophical Perspective' (2007) 20 Pacific McGeorge Global Business & Development Law Journal 1.
[237] Iris Goodwin, 'Ask Not What Your Charity Can Do For You: *Robertson v Princeton* Provides Liberal-Democratic Insights Into the Dilemma of *Cy Pres* Reform' (2009) 51 Arizona Law Review 75.
[238] N.E. Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (2nd ed.) (London: Sweet & Maxwell, 2002), at 49.
[239] See Adams, at 1.
[240] *Ibid.*
[241] Norman Daniels, (ed.), *Reading Rawls: Critical Studies on Rawls' 'A Theory of Justice'* (Stanford: Stanford University press, 1989), at xxxv, quoting from Marshall Cohen, 'The Social Contract Explained and Defended' (1972) *New York Times Book Review* 1, at 1.
[242] Daniels, at xxxv.

that explanation) allowing us to change it.[243] As such, his theory of justice, already flexible, can be *applied* (as in this paper) because it is "a political theory…[attempting to provide] a practical resolution to a dispute based on an agreement of fairness."[244] It is, therefore, both a political theory – in line with the search for a political currency of rights proposed earlier in this paper – but also a practical one, which purports to have real-world implications.[245]

Frank Michelman, refers to Rawls' first proposition of his theory in his book, *A Theory of Justice*, as "like [a]…cathedral…depth, subtlety, richness and complexity may retard comprehension however much they reward it ultimately."[246] While this thesis does not attempt (and would not presume to try) to capture the vast intellectual thesis that Rawls presented, the working version of the theory can help to shed light on the competing rights of the opposing parties under consideration – those offended by a play and those presenting it.

It is useful to begin by briefly noting the intellectual background against which Rawls situated his theory. Rawls was "aim[ing] to redress the predominance of utilitarianism in modern moral philosophy…drawing on the social contract tradition."[247]

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[243] Rawls changed his position (to what extent is hotly debated between critics and disciples) over the thirty years from the publication of *A Theory of Justice* to his death in 2002. It seems fair to say that, at the very least, Rawls repositioned the theory "in his…[later]...work to re-emphasize that …the real motivation for adopting 'justice as fairness' is provided from individuals' comprehensive moral perspectives, and to recast his theory as a political rather than a full ethical theory." (David Boucher and Paul Kelly, (eds.), *The Social Contract From Hobbes to Rawls* (London: Routledge, 1994), at 9.) In other words, the theory is one which explains liberal democracy as we know it in the West, and specifically in North America.

[244] Daniels, at xx.

[245] Schejter and Yemini, at 171.

[246] Frank Michelman, 'In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice' (1972 – 73) 121 University of Pennsylvania Law Review 962, at 962.

[247] Samuel Freeman, (ed.), *The Cambridge Companion to Rawls* (Cambridge: Cambridge University Press, 2003), at 1.

Kant – having developed social contract theory in the tradition of Hobbes[248] – left political philosophy in a deadlock between the ruthlessness of utilitarianism and the vagaries of intuitionism:

> Kant thought that the failure to provide some philosophical justification for the matter or content of theoretical reason would reduce us to the barren skepticism of David Hume...[249] we would have no objective rational grounds for choosing one system of ends or goals rather than another, and we would therefore possess nothing resembling substantive, objective moral principles. So, he concluded, we would either be forced to retreat to the subjectivity of prudence, as utilitarianism…ultimately does; or else we would, in desperation, simply have to posit substantive objective moral principles without a suggestion of rational argument, as does intuitionism.[250]

Kant also suggested that the social contract be seen "as an intellectual construct with moral and practical significance…a notion that should affect our motives and intentions in acting rather than one which arises from observing the world."[251] In other words the contract does not exist; it is simply a way of describing the interaction of citizens with each other and with the state or, in other words, "merely an idea of reason that generates the basis of a normative standard for testing laws and social arrangements"[252] – a concept that Rawls adopted.

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[248] See Robert Ginsberg, 'Kant and Hobbes on Social Contract' (1974) 5 The Southwestern Journal of Philosophy 115.

[249] Hume rejected rationalism on the basis that the human condition does not allow for deduction from cause and effect because "[h]e argues…our faculties lead to contradictory beliefs about the existence of matter." (See Louis Loeb, 'Psychology, Epistemology, and Skepticism in Hume's Argument about Induction' (2006) 152 Synthese 321, at 322). Hume rejects reasoning because "causation involves no "connexion" or "tie" outside the mind." (Loeb, at 323).

[250] Robert Wolff, *Understanding Rawls: A Reconstruction and Critique of 'A Theory of Justice'* (Princeton: Princeton University Press, 1977), at 20.

[251] David Boucher and Paul Kelly, (eds.), *The Social Contract From Hobbes to Rawls* (London: Routledge, 1994), at 125.

[252] *Ibid.*, at 51. Emphasis and reference omitted.

Crudely, the social contract sees "individuals give up some liberty to government in return for security and other such goods"[253] that would otherwise be denied to them. As Benedetto Fontana puts it "[t]he basis of modern civil society, whether as conceived by Hobbes, Locke, Rousseau, or Hegel, is the contract. It is the contract that expresses the liberty of the individual and that establishes and guarantees the right of property."[254] Rawls follows Hobbes and Locke in "[t]he best-known tradition…[of the social contract which] approaches the social contract in terms of rational decision. It asks what sort of contract rational decision makers would agree to in a preexisting 'state of nature'."[255] [256]

Rawls' *A Theory of Justice* was an attempt to use this 'preexisting state of nature' tradition (in a highly refined version) to account for liberal democracy – to show why this structure of society was logical. (This is a slight mischaracterization as, for Rawls, reason and logic (the link with Hobbes and Locke) were at the heart of his thesis – not the natural state.) Liberty was central to Rawls,

> …the priority of liberty articulat[ing] Rawls's obviously deep conviction that the mutual respect of equal citizenship expresses men's recognition of one another's moral personality. It is…Rawls's way of embodying in his theory the Kantian injunction to treat humanity...always as an end and never merely as a means.[257]

Given this, his version of the social contract becomes "crucial…because it…accommodates this conception of individuals as free and equal. Such a conception…is…more likely to be consistent with our fundamental intuitions about the priority of the person, and it was precisely its ability to make sense of these intuitions

[253] Adams, at 2.
[254] Benedetto Fontana, 'Liberty and Domination: Civil Society in Gramsci' (2006) 33 boundary 51, at 65.
[255] Bryan Skyrum, *Evolution of the Social Contract* (Cambridge: Cambridge University Press, 1996) at ix.
[256] Boucher and Kelly (at 1): "…challenge one of the assumptions of similar commentaries on the social contract, namely that there is a single unified tradition or a single model or definition of the contract." They agree, however, that there are differing, but thematically linked, schools of thought.
[257] Wolff, at 4.

which lead Rawls to reject utilitarianism.[258] So, by "embracing Kant's moral imperative to treat the individual person as an end in itself, not a means to collective ends,"[259] Rawls founded his theory on the rejection of utilitarianism this implied: "each person possesses an inviolability founded on justice that even the welfare of society as a whole can not override"[260] he notes at the beginning of *A Theory of Justice*. "I do not believe," he continues, "that utilitarianism can provide a satisfactory account of the basic rights and liberties of citizens as free and legal persons, a requirement of absolutely first importance for an account of democratic institutions."[261]

Turning to the contents of the theory itself, Amit Schejter and Moran Yemini provide a useful summary of Rawls' basic thesis:

> Rawls's theory of justice regulates the procedures under which a society determines the rules that pertain to what [Rawls]...calls the basic structure of society...Rawls assumes that these 'first principles of a conception of justice', the principles that are to regulate all further agreements, should create the conditions for all decisions to be reached in a rational manner. To arrive at a rational discussion, the participants in the discussion must participate unaware of their own circumstances and how they themselves will fare as a result of the decision reached. This hypothetical situation, which Rawls refers to as the 'original position' is reached under a 'veil of ignorance'."[262]

Those in the 'original position' are not entirely in the dark about their circumstances, however. First, they are rational: reason being the "main tool for finding agreement...[with]...most emotional, cultural, and spiritual values count[ing] for little" in the original position.[263] Secondly, they have "a sense of justice".[264] Importantly, this does

[258] Paul Kelly, 'Justifying 'Justice': Contractarianism, Communitarianism and the Foundations of Contemporary Liberalism' in Boucher and Kelly, at 227.
[259] Carcieri, at 273.
[260] Rawls, *A Theory of Justice (Revised Edition)*, at 3.
[261] *Ibid.*, at xii.
[262] Schejter and Yemini, at 144. References omitted.
[263] *Ibid.*

not mean that they have a conception of 'good'[265] – it is key that "the theory of justice [is]…neutral between different conceptions of the good…Since the persons in the original position do not know what their own conception of the good is, they will choose principles that do not seek to reflect or embody any one particular conception"[266] – instead, the idea is that fair conditions (i.e. the veil of ignorance) will lead rational people to make fair choices with the result that "principles of justice are those that would be chosen in [such] conditions of fairness."[267] In sum, Rawls proposes:

> …a non-zero-sum cooperative game, whose aim is for the players to arrive at unanimous agreement on a set of principles that will henceforth serve as the criteria for evaluating the institutions or practices within which the players interact.[268]

Rawls conception of 'justice' is found in "…the role of [these]…principles in assigning rights and duties and in defining the appropriate division of social advantages. A conception of justice is an interpretation of this role."[269] And it is in this sense that Rawls' theory is one of distributive justice:[270] because individuals do not have the necessary information to make entirely self–interested choices, Rawls' theory says that they would instead adopt "the maximin rule, which establishes that inequalities in income and wealth that might result from a strategy of efficiency or maximization are permissible

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[264] *Ibid.*
[265] Indeed, this is one of the factors for which Rawls rejects utilitarianism.
[266] Simmonds, at 52.
[267] *Ibid.*, at 51.
[268] Wolff, at17.
[269] *A Theory of Justice (Revised Edition)*, at 9.
[270] Or, looking at it in another way, Rawls' concept of 'justice' is driven by the idea that "[a] set of principles is required for choosing among the various social arrangements which determine…[the] division of advantages and for underwriting an agreement on the proper distributative shares. These principles are the principles of social justice. They provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burden of social cooperation…A conception of social justice, then, is to be regarded as providing in the first instance a standard whereby the distributive aspects of the basic structure of society are to be assessed." (*A Theory of Justice (Revised Edition)*, at 4 and 8).

only if they maximally benefit the least advantaged."[271] Why would they do this? Because those behind the veil of ignorance in the original position are asked to choose principles of justice knowing nothing about themselves other than "that they have a conception of the good (an idea of what is valuable and worth pursuing in life)...[although]...they do not know its content."[272] Rational people in such a position, Rawls posited, would "choose to be governed by two fundamental principles, one securing equality where it is essential (in the political and legal spheres) and the other regulating inequality where it is inevitable (in the social and economic spheres)."[273] In this way, "'[t]he veil of ignorance' is designed to bridge the gap between an individual's self-interested motivation and the requirements of impartiality which are built into the principles of justice.[274] This is "[t]he solution proposed by Rawls to [his]...bargaining game...the now-famous Two Principles of Justice."[275] These are:

> First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.
>
> Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.[276]

In addition, Rawls stresses that "[o]ne is not allowed to justify differences in income or in positions of authority and responsibility on the ground that the

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[271] Schejter and Yemini, at 146.
[272] Simmonds, at 56. To circumvent the argument that without any idea of what those in the original position hold to be 'good' they will be unable to choose principles to live by, Rawls relies on his 'thin theory of the good'. This holds that "there are certain things which it is rational to want whatever else one may want, because of the role that they can play in the pursuit of any particular conception of the good. Liberty, opportunity, income and wealth would all be examples, according to Rawls, for they will help me to carry out (or will not hinder) any plan of life that I may have in mind." (Simmonds, at 57).
[273] Carcieri, at 277.
[274] Kelly, 'Justifying 'Justice'', in Boucher and Kelly, at 228.
[275] *Ibid.*, at 18.
[276] *A Theory of Justice (Revised Edition)*, at 53.

disadvantages of those in one position are outweighed by the greater advantages of those in another."[277] Crucially, liberty is absolutely prohibited from being "counterbalanced this way":[278]

> Throughout [*A Theory of Justice*]...Rawls emphasizes the distinction between liberty and other social goods, and his principal of greatest equal liberty...is accompanied...by a priority rule which assigns to liberty a priority which forbids the restriction of liberty for the sake of other benefits: liberty is only to be restricted for the sake of liberty itself.[279]

So, as mentioned above, while those in the original position are unaware of what their conception of the good is, Rawls argues that it is rational for them to agree to live by the principle that liberty can only be overridden, or limited, for the sake of greater liberty. This does not mean a utilitarian trade-off of liberties, but rather a limitation of individual liberty where it impinges (or may impinge) on the individual liberty of others. So, for example, Rawls suggests that "[j]ustice as fairness provides...strong arguments for an equal liberty of conscience...[but] liberty of conscience is limited...by the common interest in public order and security."[280]

'Liberty' was clarified for Rawls, as M. Victoria Costa notes, as a result of "...Hart [amongst others]...point[ing] out that there was a tension in *A Theory of Justice* between some passages that refer to liberty in general terms and some that refer to the basic liberties of citizens. Rawls acknowledged this criticism and revised his theory

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[277] *Ibid.*
[278] *Ibid.*, at 56.
[279] Daniels, at 233. This is Rawls' special conception of liberty, where liberty cannot be traded for other basic goods.
[280] *A Theory of Justice (Revised Edition)*, at 186. This is derived from social contract theory and, argues Rawls, would be derived from the original position on the basis that "...in this position each recognizes that the disruption of these conditions [that have been agreed] is a danger to the liberty of all. This follows once the maintenance of public order is understood as a necessary condition for everyone's achieving his ends whatever they are..." (at 187).

accordingly, focusing only on the distribution of basic liberties."[281] Rawls' basic liberties are: liberty of conscience and freedom of thought; freedom of association; equal political liberties; rights and liberties that protect the integrity of the person; and rights and liberties covered by the rule of law[282] (in other words, the pillars of a modern liberal democracy).

Many commentators have criticized – respectfully – Rawls' theory. One of the most telling critiques is that the social contract basis for the theory is misguided and that it, in fact, leads to circularity: "[m]any contend that the idea of a social contract does no genuine work in Rawls, since…the parties' ignorance of facts in the original position prevents them bargaining and renders them all, in effect, the same person."[283] An alternatively criticism, but on very similar lines, is that Rawls uses:

> …a sleight of hand…[in] treating the people beyond the veil of ignorance as the people who stood behind it…[I]f the force of rational self-interest can be conditioned by the circumstances prevailing on one side of the veil in order to artificially create concern for other people's positions, it can equally be operated to different effect by the circumstances on the other side.[284]

This, arguably, misses the point, as "the way in which Rawls's justice as fairness is a social contract position has far more to do with his idea of a well-ordered society as one in which all reasonable persons accept the same public principles of justice…"[285] In

[281] M. Victoria Costa, 'Rawls on Liberty and Domination' (2009) 15 Res Publica 397, at 398, note 1. See *A Theory of Justice*, at 171-180.
[282] *Ibid.*, at 399.
[283] Samuel Freeman, *Justice and the Social Contract* (Oxford: Oxford University Press, 2007), at 4. Freemen rejects this criticism, arguing that those in the original position are not bargaining. Instead, they are agreeing principles in a system of social co-operation based around "the social nature of practical reasoning…[recognizing that]…what we accept as reasons in both public and private life is largely influenced by a shared public culture, primarily, the basic institutions we create and sustain." (*Justice and the Social Contract*, at 43).
[284] Halpin, at 236.
[285] Freeman, *Justice and the Social Contract*, at 4.

other words, Rawls is utilizing the idea of the social contract not at the initial stages where the principles to govern the post-original position society are agreed, but in the commitment to live by those principles subsequently ("for all time").[286] It is the commitment to live by these principles that Rawls sees as being crucial to the 'bargain' made. Kelly notes that "Rawls's theory is contractarian in the sense that the terms of association in a just or liberal polity are those that individuals would agree to as fair, because they are principles that would have been chosen in a hypothetical fair original agreement."[287] Still, this does not do an awful lot to dispel the suspicion of circularity. The issue remains that:

> Unless they [those in the original position] are already inclined to adopt an impartial perspective then the contract will not work. This has led Rawls in his recent work to re-emphasize that the contract is only a model…and that the real motivation for adopting 'justice as fairness' is provided from individuals' comprehensive moral perspectives, and to recast his theory as a political rather than a full ethical theory.[288]

Recasting as a political, rather than a full moral theory, does not, however, reduce its use in the context of this thesis, although it does dilute its power somewhat as the answer to Kant's dilemma. Rawls had "[f]rom the outset…[been] guided by the question "What is the most appropriate moral conception of justice for a democratic society?","[289] and his later work simply clarified that "justice as fairness *is* framed for a democratic society. Its principles are meant to answer the question: once we view a democratic

[286] *Ibid.*
[287] Kelly, 'Justifying 'Justice'', in Boucher and Kelly, at 227.
[288] Boucher and Kelly, at 9.
[289] Freeman, *The Cambridge Companion to Rawls*, at 1.

society as a fair system of social cooperation between citizens regarded as free and equal, what principles are most appropriate to it?"[290] Robert Wolff notes that:

> [t]he brilliance of Rawls's idea lies in its promise of a way out of the impasse to which Kant had brought moral theory...through the device of [the]...bargaining game, Rawls hopes to derive substantive principles from premises that, though not purely formal, but not manifestly material either.[291]

The game is both 'formal', in that it is an idea but nothing more, potentially devoid of substance, yet also 'material', in that it could have real world application – but not wholly one or the other.[292] It appeals to the rational individual, but the rational individual steeped in the liberal democratic tradition. This may be problematic for political philosophers, but as a framework for approaching a problem firmly within the liberal democratic tradition, it can be extremely useful. Indeed, as Peter van Schilfgaarde points out: although a "purely procedural conception of justice can at best provide a rationalization of a sense of justice that is always presupposed"[293] (and van Schilfgaarde suggests that this "'presupposition' is evident in the basic idea of 'justice as fairness'..."[294] because Rawls' basic contrivance – the original position and the veil of ignorance – "is not possible without a notion of what fairness means"),[295] this is not necessarily problematic: it simply reaffirms the grounding of Rawls' theory in democracy with the result that "the built in circularity is an essential validating device and not necessarily a methodological affront."[296]

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[290] John Rawls, *Justice as Fairness, A Restatement* (Cambridge, MA: Harvard University Press, 2001), at 4.
[291] Wolff, at 20.
[292] After Descartes, it is presumed.
[293] Peter van Schilfgaarde, 'Rawls and Ricoeur: Converging Notions of Empowerment to Justice' (2009) 15 Res Publica 121, at 126.
[294] *Ibid.*, at 127.
[295] *Ibid.*
[296] *Ibid.*, at 135.

For our purposes, it is also worth dealing with the criticism that has been made of Rawls' theory that "satisfying the two principles of justice is not the most appropriate or plausible way to respect the status of citizens as free and equal."[297] This is important because "Rawls takes this ideal to play an important role in explaining and justifying the design of the original position. He also holds that the ideal is implicit in the public culture of contemporary democratic societies…"[298] Some critics argue that Rawls' theory fails to take account of the existence of competing interests and that, when taken to the 'nth' degree, his conception of liberty is only sustainable where there is no interference from anyone else – perfect liberty. Costa argues that the true distinction should be between "freedom as non-interference and freedom as non-domination…[where the]…concern with freedom as non-domination leads to a distinctive focus on inequalities of power as something that compromises freedom…"[299] rather than interference with liberty per se, which clearly does occur in democratic societies. Rawls, Costa states, safeguards citizens from domination by ensuring that "the theory of justice as fairness guarantees the fair value of political liberties."[300] So, the right to vote and to participate in democracy limits the threat of despotism.

<u>A political currency?</u>

What Rawls provides, therefore, is a comprehensive theory that we can turn to when we "consider choices between courses of actions that may have a good effect on some people

[297] Costa, at 397.
[298] *Ibid.*, at 398.
[299] Costa, at 405.
[300] *Ibid.*, at 407. Costa find this in the fact that "Rawls thinks that a society cannot be just unless it is a democracy, the central social and political institutions of which embody the ideal of citizens as free and equal. Granting all citizens the right to vote, to express their political views…serves to ensure that citizens are not dominated by the state." (at 407).

but a bad effect on others…[a method of] distributive justice relat[ing] to decisions between conflicting interests."[301] It is a practical political theory, which seeks to reason its way to a sequence of rules by which it is rational to live – subject to the caveat that those people making the commitment to the initial rules value the liberal democratic position. In making those rules – crudely akin to the mother's words to her children over the birthday cake, "You cut, he chooses" – the individuals reach a fair system, and in this "appropriate division of social advantages"[302] is justice. The application of this trade-off of liberties is identified by Todd Adams, as he applies Rawls' theory in the context of environmental law:

> Those in the original position…will not know when they are born…[they] must decide, therefore, the minimum access to natural resources and environmental conditions necessary for every generation to agree to a social contract. Rational individuals may prefer a pristine environment and abundant natural resources, but they also understand some pollution inevitably occurs from human activities.[303]

This thesis uses the theory of justice as fairness as a way of looking at the conflict in question and making some suggestion about the way in which fairness – or a sense of it – can help to limit a potential dispute. But to apply the theory there must be a mechanism, a framework, within which "the assign[ation of] rights and duties"[304] can take place. That framework in the modern democracy is the legal system.

[301] George Ikkos, Jed Boardman and Tony Zigmond, 'Talking liberties: John Rawls's Theory of Justice and Psychiatric Practice' (2006) 12 Advances in Psychiatric Treatment 202, at 202.
[302] See note 269.
[303] Adams, at 3.
[304] Rawls, *A Theory of Justice*, at 9.

CHAPTER 6: Law as therapy and analyzing discourse

The role of law

Having moved from the discourse of 'rights' to a more defined theory of 'justice', it would be possible to begin to analyze the site of conflict between the two sides set out in Chapters 1 and 2. Yet before getting to that stage, it is worth considering why the law should be involved at all. What is it about the law that qualifies it for service in this instance? It might be "uncontroversial to note that 'the settling of disputes is recognized as one of the oldest tasks of law'," [305] but it would be naïve indeed to assume that law will necessarily improve a volatile situation. Incidentally, the question is not why should law *qua* law intervene – this paper assumes the law's role as society's regulating mechanism – but what does it offer by way of potential for easing the situation?

Here, the search is not for appropriate dispute resolution methods – the traditional alternative dispute resolution literature is (generally) focused on agreement and settlement between parties which is not quite what is required given the relative abstraction and scale of the dispute in question. Instead, to answer this question I turn to the therapeutic jurisprudence movement, which suggests that law can be a process that "empower[s] participants" [306] and focuses on examining the law's "effect on the wellbeing…of its subjects." [307] If one argues that the law as a whole can act to affect

[305] Graham Hughes, (ed.), *Law, Reason, and Justice: Essays in Legal Philosophy* (New York: New York University press, 1969), at 75.
[306] Michael King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32 Melbourne University Law Review 1096, at 1115.
[307] *Ibid.*, at 1097-98.

wellbeing, then the power of law to manage disputes can be harnessed in order to ameliorate the tension between those offended, and those producing a controversial play.

Law as a therapeutic agent

Therapeutic jurisprudence – "the study of the role of law as a therapeutic agent"[308] – is exceptionally flexible and, in a similar way to Rawls' theory, has been utilized by legal academics in a variety of situations, from the role of forensic psychology in correctional facilities,[309] through suggesting appropriate responses by the judiciary in Scottish drug courts,[310] to analysis of the law's role in managing international relations.[311] Its origins are found in mental-health law where it developed as an effort to 'explore ways in which, consistent with principles of justice, the knowledge, theories, and insights of the mental health disciplines can help shape the development of the law';[312] however, its analytic use was rapidly recognized and it expanded beyond the rather limited horizon of the mental-health law sphere. As Astrid Birgden puts it, "...therapeutic jurisprudence analysis has moved well beyond mental-health law to utilize psychology, sociology, anthropology, political science and economics to examine the law..."[313] David Wexler, Professor of law at the University of Puerto Rico and widely credited with pioneering the therapeutic

[308] David Wexler, 'Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence' (1992) 16 Law and Human Behavior 27, at 32.
[309] Astrid Birgden and Michael Perlin, '"Where the Home in the Valley Meets the Damp Dirty Prison": A Human Rights Perspective on Therapeutic Justice and the Role of Forensic Psychologists in Correctional Settings' (2009) 14 Agression and Violent Behaviour 256.
[310] Gill McIvor, 'Therapeutic Jurisprudence in and Procedural Justice in Scottish Drug Courts' (2009) 9 Criminology & Criminal Justice 29.
[311] Roberto Toro, 'Sanity in International Relations: An Experience in Therapeutic Jurisprudence' (1999) 30 The University of Miami Inter-American Law Review 659.
[312] Wexler, at 32.
[313] Astrid Birgden, 'Crime-Prevention Jurisprudence? A response to Andrews and Dowden' (2009) 51 Canadian Journal of Criminology and Criminal Justice 93, at 95.

jurisprudence viewpoint in the late 1980s, sums it up concisely: "...therapeutic jurisprudence is no longer merely a special way of looking at mental health law. Instead it is now a therapeutic perspective of the law in general."[314]

Such an overarching – and ambitious – approach must be (and is) intended to be "thoroughly inter-disciplinary"[315] in nature. Wexler sees this as, predominantly, a relationship between the law and psychology:

> In traditional doctrinal analysis, the creative/analytical process typically revolves around analogical reasoning: Why has the Supreme Court held that there was a right to jury trial in criminal cases but not juvenile cases? Is a civil commitment hearing more similar to a criminal case or a juvenile case? In therapeutic jurisprudence, by contrast, the process revolves around relating a body of therapeutically relevant psychology to a body of law and exploring the fit between the two.[316]

However, the popularity with which therapeutic jurisprudence has been received, and the large number of fields in which its ideas have been subsequently utilized, would suggest that its ideas have found homes away from the mix of law and academic psychology and the term is here used in its "purposefully broad...[sense], suggesting the consideration of any way the system might affect psychological well-being".[317] Or, put another way, it is a way of looking at dispute resolution where "the central tools will be intervention for helping offenders, victims, communities and officials manage each others' emotions to

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[314] *Ibid.*, at 101, quoting David Wexler, 'The Development of Therapeutic Jurisprudence: From Theory to Practice' (1999) 68 Revista Juridica University of Puerta Rico 691, at 696.
[315] Wexler, at 32.
[316] *Ibid.*, at 32.
[317] Lauren Cattaneo and Lisa Goodman, 'Through the Lens of Therapeutic Jurisprudence: The Relationship Between Empowerment in the Court System and Well-Being for Intimate Partner Violence Victims' (2010) 25 Journal of Interpersonal Violence 481, at 482.

minimize harm"[318] Michael King sees this as "descriptive of a wider trend that is gaining momentum not only in the justice system as a whole, but [specifically] in dispute resolution processes…"[319]

Supporters of therapeutic jurisprudence focus on the way in which "substantive rules, legal procedures, or the behavior of legal actors"[320] produce a "social force that, like it or not, may produce therapeutic or anti-therapeutic consequences."[321] Indeed, therapeutic jurisprudence "posits that…[a]…court system has far-reaching impact on those who become involved with it…one that goes far beyond traditional notions of deterrence and behavior change."[322] It is said to represent:

> a new model by which we can assess the ultimate impact of the law on…[participants], studying the role of the law…as therapeutic agent…, recognizing that substantive rules, legal procedures, and roles may have either therapeutic or anti-therapeutic consequences…[323]

Yet, as proponents of this generalized form of the concept are at pains to emphasize, therapeutic jurisprudence is not about subjugating justice to therapy or raising the needs of a defendant above those of a victim, rather it "is concerned with law *as* therapy…not law *and* therapy."[324] As Wexler puts it, "…therapeutic jurisprudence asks us to be clear about the therapeutic consequences of legal arrangements, but it does *not* suggest that

[318] King, at 1097, quoting in part Lawrence Sherman, 'Reasons for Emotion: Reinvesting Justice with Theories, Innovations and Research – The American Society of Criminology 2002 Presidential Address' (2003) 41 Criminology 1, at 6.
[319] *Ibid.*, at 1097.
[320] Wexler, at 32.
[321] *Ibid.*
[322] Cattaneo and Goodman, at 482.
[323] Birgden and Perlin, at 257.
[324] Birgden, 'Crime Prevention Jurisprudence?', at 100.

therapeutic consequences should trump other considerations."[325] Indeed, as Wexler continues:

> Therapeutic jurisprudence assumes that, other things being equal, the law should be restructured to better accomplish therapeutic values. But whether other things are equal in a given context is often a matter of dispute. Therapeutic jurisprudence, although it seeks to illuminate the therapeutic implications of legal practice, does not resolve this dispute, which requires analysis of the impact of alternative practices and other relevant values.[326]

The work is not without its critics and detractors, some of those particularly emphatic. Given its roots in mental health law, and psychology proper, problematic in the extreme is the meaning of 'therapeutic' – how can one ever really know (or even agree) whether a particular approach is therapeutically effective as compared to another?[327] Similarly, given the huge number of actors in the legal process, where is the focus of the therapy intended to lie? In the criminal context: for the offender or the victim? Or, in the alternative, should the law look to have some sort of holistic effect, healing society after whatever rift has called legal institutions in to arbitrate? As Robin Mackenzie notes:

> Both adherents and the critics of therapeutic jurisprudence are aware that...[its] approach is problematic...[e]ven supposing that agreement on what constitutes a therapeutic outcome can be reached, there is every reason to suppose that social science investigations will fail to provide incontrovertible proof that one legal procedure is superior to another...[328]

This criticism falls a little flat, however: although, as noted above, there is some basis for the query about what a 'therapeutic outcome' would be, the idea that therapeutic

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[325] Wexler, at 32. Emphasis added.
[326] *Ibid.*
[327] Robin Mackenzie, 'Feeling Good: The Ethopolitics of Pleasure; Psychoactive Substance Use and Public Health and Criminal Justice Governance: Therapeutic Jurisprudence and the Drug Courts in the USA' (2008) 17 Social & Legal Studies 513, at 516.
[328] *Ibid.*

jurisprudence is intended to rank legal procedures misrepresents the aims of those who support it. It is an attempt to encourage jurists and practitioners to consider the least harmful way in which the powerful institutions of law can interact with the public – "therapeutic jurisprudence does not assert that wellbeing promotion should be the law's paramount role. However, it asserts that...the law should as far as possible do no harm."[329]

Taking a common sense approach, then, the therapeutic jurisprudence movement may be summed up as a relatively modest – but, it is submitted, useful – way of finding creative solutions to the difficult problem of the impact of institutions with inherently draconian powers on the individual. While there may be a "... concern that a lack of specificity may lead [therapeutic jurisprudence] to become marginalized as 'happiness jurisprudence': seen as incoherent, inchoate and insufficiently academically rigorous"[330] this seems an overreaction to what is at heart an attempt to fully inform decision-making by, in essence, respecting the individual by balancing competing rights.[331]

This seems a reasonable point of view, to me. Some commentators have criticized the spread of 'therapeutic' language beyond the discipline of psychology itself and see it as a reflection of the idea – woolly, in their opinion – that there is always benefit in the act of 'talking out' problems. This is perhaps a particularly American trait (and,

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[329] King, at 1113. There are, of course, extended philosophical debates to be had about the meaning of 'harm'. The common sense usage is intended in this thesis – reducing injury or damage in any given situation as far as possible.
[330] Mackenzie, at 518.
[331] Birgden and Perlin, at 260. Emphasis omitted.

admittedly, this is generalisation), but travels the world along with US culture generally, and James Nolan Jr. and Saundra Westervelt call it the 'therapeutic ethos'.[332]

> In speaking of the therapeutic ethos we do not mean the psychoanalytic tradition within the discipline of psychology...Instead we use it...to describe a more widespread cultural system or code of moral understanding.[333]

This manifests in the "elevation of the self,"[334] "the ethic of emotivism...which refers to subjectivized understandings of truth based on emotions rather than reason or logic"[335] and, finally, the "rise of a new priestly class of psychologists and psychiatrists who have been given the social status and cultural authority to make sense of the complex emotions emanating from the authoritative self."[336] However, therapeutic jurisprudence is, I think, more than this. It is logical to attempt to ensure that the interactions of the public with the officers of the law, and with the legal institution generally, are as harmless as *they need to be*. The qualification here is that justice must still be served, but that where law can act in a therapeutic or cathartic nature it should. Further, the critique of Nolan Jr. and Westervelt, while justified in certain contexts, is actually useful in the context of this thesis. The US culture they identify is one of self-reflection and ambiguity where there is no moral right and wrong, but only moral relativism whereby the emotional wellbeing of the individual, or, if extrapolated, to a section of society, is of overriding concern, and expressing and analysing emotions is the only way to fix a ruptured whole. This, ultimately, is what both sides of the debate in question would, ideally, consider – the

[332] James Nolan Jr. and Sandra Westervelt, 'Justifying Justice: Therapeutic Law and the Victimization Defense Strategy' (2000) 15 Sociological Forum 617, at 618.
[333] *Ibid.*
[334] *Ibid.*, at 619.
[335] *Ibid.*
[336] *Ibid.*, at 620.

perspective of the other side, not in terms of right and wrong, but in terms of intent. Indeed, this *almost* takes us back to Rawls' original position, and the blind choices being made, forcing people to consider base levels of fairness.

This thesis is concerned, ultimately, with a normative vision of law's role on the identified conflict. As such, the idea that "law can affect wellbeing"[337] and can be studied to "see how it affects the wellbeing of those involved in its operation"[338] – the therapeutic aspect of what King calls the 'rise of emotionally intelligent justice'[339] – is clearly a fundamental part of the conceptual background. "As with human rights law and ethics codes,"[340] Birgden and Perlin write, "[therapeutic jurisprudence] supports dignity, freedom and well-being.[341] And as discussed in Chapters 1 and 2 of this thesis, the idea of dignity is useful. Dignity – in the Kantian sense of "entitlement to equal respect"[342] – can only be arrived at following understanding of the position of others (empathy, perhaps). One way of appreciating the position taken by two parties in dispute is to take the statements those parties have made and investigate what exactly each person is trying to say, which might, of course, be quite different from the words they use. Linguistics provides, among other theories, two apposite ways of carrying out this investigation: critical discourse analysis and narrative analysis. The latter is particularly useful as we try to get to the bottom of the *JStO* story: we have identified a conceptual background to build the forum upon; a legal system which can be read sympathetically; now we need to understand the difficulties of the debate.

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[337] King, at 1097.
[338] *Ibid.*, at 1111.
[339] *Ibid.*, at 1096.
[340] Birgden and Perlin, at 259.
[341] *Ibid.*
[342] Stephen Darwall, *Philosophical Ethics* (Oxford: Westview Press, 1998), at 163.

Discourse Analysis: What to mediate?[343]

For law to act as arbitrator, it must attempt to assert itself into the grey, into the discourse. One way that it might do so, it is suggested, is by way of narrative analysis. As discussed in Chapter 2, the idea of story, play and dramatism are all bound together in both the action of law, the action of dispute, and the intuitive response ("This is dramatic!") to a public furore like that over *JStO*. In that sense this seems a wholly appropriate place to start.

In general terms, the importance of narrative is that it "helps to bring out not only the properly linguistic characteristics of the story...but also a great deal of sociology hidden behind a handful of lines."[344] Narrative is built from story: "[i]t is the story – the chrono-logical succession of events – that provides the basic building blocks of narrative. Without story there is no narrative."[345] As much of our communication is made through stories – through narrative – narrative analysis holds that discourse can be analyzed to understand the importance an individual places on certain events by way of a distinction between 'foregrounding' and 'backgrounding'. As Paul Hopper puts it:

> Users of a language are constantly required to design their utterances in accord with their own communicative goals and with their perception of their listeners' needs...That part of a discourse which does not immediately and crucially contribute to the speaker's goal, but which merely assists, amplifies, or comments on it, is referred to as BACKGROUND. By contrast, the material which supplies the main points of the discourse is known as FOREGROUND.[346]

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[343] This thesis will not go in to great depth of linguistic analysis. This section is simply indicative of an approach that could be taken to gain greater understanding of the (true?) position of the parties.
[344] Roberto Franzosi, 'Narrative Analysis Or Why (And How) Sociologists Should be Interested in Narrative' (1998) 24 Annual Review of Sociology 517, at 519.
[345] *Ibid.*, at 520.
[346] Paul Hopper and Sandra Thompson, 'Transitivity in Grammar and Discourse' (1980) 56 Language 251, at 280.

Using this as an analytic tool, one should be able to indentify the emphasis that the individual wishes to present: "To put the matter simply, stories are about someone trying to do something, and what happens to her and to others as a result."[347]

Against this background, let us consider one of the texts that Christian Voice's Stephen Green provides on its website, just in an exploratory exercise.

> **Worse will come if we do nothing:** The law of the land is a statement of what is permissible and what is not. It we allow this blasphemy to pass, worse will come, even though at the moment it is difficult to see how any blasphemy could be worse than that in 'Jerry Springer the Opera.' Our blasphemy law, so detested by secularists, is a statement that the United Kingdom sees God, not as a private lifestyle choice, but as the Almighty Creator of heaven and earth, and Jesus Christ as King of kings and Lord of lords. It protects what remains of our sense of the sacred.[348]

Green foregrounds the idea that 'the law of the land is a statement of what is permissible and what is not' and that 'if we allow this blasphemy to pass, worse will come'. The backgrounding – so non-central statements, but those which amplify the ultimate goal – is found in the statement that 'it is difficult to see how any blasphemy could be worse…' and 'so detested by secularists', to identify just a few. The narrative that emerges, one might argue, is that Green sees himself – and by extension, Christian Voice – as defenders of the faith who are persecuted by the 'secularist' society that allows the ultimate blasphemy to be portrayed on stage. This is a narrative constructed out of an internal view: Green's own view of what he is doing. And even if we take a

[347] Karin Johansson, Margareta Lilja, Melissa Park and Staffan Josephsson, 'Balancing the Good – A Critical Discourse Analysis of Home Modification Services' (2010) 32 Sociology of Health & Illness 563, at 569. (Quoting: Cheryl Mattingly, *Healing Dramas and Clinical Plots: the Narrative Structure of Experience* (New York: Cambridge University Press, 1998), at 7).
[348] Christian voice website: <http://www.christianvoice.org.uk/springer12.html>.

critical view, the same answer is found: we can investigate, using critical discourse analysis.

Critical Discourse Analysis ("CDA"). CDA is said to "combine...traditional discourse analysis' attention to the details of language with rhetoric's attention to the social uses of language, thus bridging these two sometimes disparate approaches to discourse..."[349] CDA is the attempt not just to analyze the discourse – by using the techniques of linguistics, for example, or literary criticism – but to critically analyze that data: viewing "discourse as the instrument of power and control as well as with discourse as the instrument of social construction of reality."[350]

CDA was originally a product of the work of Norman Fairclough, Professor of Linguistics at Lancaster University in the UK, although it has now developed legs of its own. Christopher Hart and Dominik Lukes noted in 2007 that although "the label 'Critical Discourse Analysis'...has come to refer to a particular branch of applied linguistics associated with scholars such as...Norman Fairclough,"[351] there is now a broader conception of 'critical discourse analysis' (lower case).[352]

What is CDA – how does one go about it? Stewart describes Fairclough's practice of CDA as being constructed by way of three layers of analysis:

> Text, discursive practice, and social practice...First, the text layer comprises the details of 'vocabulary, grammar, cohesion, and text structure'. Second, the discursive practice layer 'involves processes of text production, distribution, and

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[349] Craig Stewart, 'Socioscientific Controversies: A Theoretical and Methodological Framework' (2009) 19 Communication Theory 124, at 125.

[350] Michael Toolan, 'What is Critical Discourse Analysis and why are People Saying Such Terrible Things About it?' (1997) 6 Language and Literature 83, at 85.

[351] Charles Hart and Dominik Lukes (eds.) *Cognitive Linguistics in Critical Discourse Analysis* (Newcastle: Cambridge Scholars Publishing, 2007), at ix.

[352] Terry Threadgold, 'Cultural Studies, Critical Theory and Critical Discourse Analysis: Histories, Remembering and Futures' (2003) 14 Linguistick Online, <http://www.linguistik-online.de/14_03/treadgold.html> (accessed 10 April 2010).

> consumption, and the nature of these processes varies between different types of discourse according to social factors'...And third, the social practice layer examines ideology, hegemony, and discursive change within and across orders of discourse.[353]

From this précis, it is apparent that the "'critical' in critical discourse analysis...acknowledges that judgement needs to be exercised when deciding which interpretation to take [of a discourse]."[354] This proved incredibly controversial in lingusitics and social science where it was felt to be a move too far towards the humanities – it was (is?) seen as 'unscientific'. Indeed, even within the discourse of CDA one can see subtextual themes in the debate – critical analysis of Critical Discourse Analysis is a delicious irony. On one hand, there is the acknowledgement by many, in a range of social science fields, that discourse must be thought of as "embodied, located in space/time, tied into institutional and community practices and knowleges...[and] mediating power relationships";[355] on the other hand, as Hugh Tyrwhitt-Drake puts it: "the really worrying thing about [CDA] is its assumption of the high ground on moral issues,"[356] presumably by way of its claims to discover the 'hidden meaning' of a particular discourse: "with language no longer seen as a reflection of situational-contextual variables, but more dynamically as also shaping context."[357] Criticism of CDA – that it tries to find a particular answer and ignores alternatives[358] – is misguided, so

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[353] Stewart, at 130.
[354] Hugh Tyrwhitt-Drake, 'Resisting the Discourse of Critical Discourse Analysis: Reopening a Hong Kong Case Study' (1999) 31 Journal of Pragmatics 1081, at 1083.
[355] Threadgold, 'Cultural Studies, Critical Theory and Critical Discourse Analysis', at 21.
[356] Tyrwhitt-Drake, 1088.
[357] Stef Slembrouck, 'Explanation, Interpretation and Critique in the Analysis of Discourse' (2001) 21 Critique of Anthropology 33, at 37.
[358] Norman Fairclough, 'A Reply to Henry Widdowson's 'Discourse Analysis: A Critical View' (1996) 5 Language and Literature 49, at 50.

argues Fairclough, and in turn ignores the 'transdisciplinary frame'[359] of the CDA project, which simply attempts to "establish the case for…linguistic analysis having a substantial role in social scientific analysis."[360]

In the legal realm, CDA has been used, although mainly in the criminal context, to give accounts of discourse in light of subtextual power dynamics – Penelope Pether, for example, has used discourse analysis and CDA to attempt to explain jury behaviour in a sexual assault trial.[361] What can CDA reveal about the conflict in question in this paper? A CDA analysis of the furore over *JStO* might reveal, it is also suggested, that Christian Voice played upon its perceived marginalization by suggesting their inability to persuade the DPP in the UK to prosecute the producers of the show was as a result of him not appreciating the scale of the insult. The source text – again from the Christian Voice website – states that they "do not think the DPP would have prepared a convincing enough case anyway. He [*the DPP*] would not understand the Christian faith well enough, nor would the DPP have appreciated the scale of the insult…"[362] Here one might again conjecture that Christian Voice are playing on their perceived role as protectors of the faith – the only ones who truly understand. I do not mean that they deliberately mischaracterized the debate, but that they have a clear, and specific, conception of the role they are playing in the drama. On the other side, Stewart Lee, British comedian and co-librettist of *JStO*, wrote a brief diary of his experiences while touring the infamous show in 2006.

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[359] *Ibid.*, at 55.
[360] *Ibid.*
[361] Penelope Pether, 'Critical Discourse Analysis, Rape Law and the Jury Instruction Simplification Project' (1999) 24 Southern Illinois University Law Journal 53.
[362] See: http://www.christianvoice.org.uk/springer12.html (accessed 10 April 2010).

> Public relations people at Plymouth Theatre Royal discuss how to rescue the show from the Christian right and restate its artistic credentials. Next I hear the theatre house manager's plans for dealing with any violent protestors. This doesn't happen on the *We Will Rock You* tour.[363]

The use of 'rescue' – while correct in the sense that the show was almost forced to close on several occasions and the tour cancelled, before being reinstated – is symptomatic of the frustration felt by an artistic team that could not relate on any level whatsoever to the complaints of those offended. The Christian complainants were on the perjorative 'right' and were 'killing the show' – they were the enemy of freedom, but also (if it all were not so serious), figures of fun.

This section does not purport to be a detailed CDA analysis of the problem – at best it is a sketch. However, the point I wish to make is that both sides played upon their self-appointed roles – one as put upon but angry defenders of the faith, the other as defender of freedom of expression. This was their self-told, self-appointed narrative. The suggestion is that the entrenched positions, and the way the two sides talked about the other in print, offer a role for dialogue to play before the accusatory stage is reached. That it almost certainly would not have worked in the case of Christian Voice is no barrier to suggesting that in other situations, it may be of use.

Therapeutic discourse

In sum, this thesis has so far shown that the development of regulation of the theatre in English law has moved from (i) regulation only at the monarch's behest, by way of the Royal prerogative, to (ii) a statutory footing which allowed censorship by the Lord

[363] Stewart Lee, 'Christian Voice is outside, praying for our souls ... '.

Chamberlain, to (iii) the current position where, to all intents and purposes, there is free reign on the English stage, subject only to the risk of prosecution for presenting a "theatrical obscenity"[364] (something tending to deprave and corrupt). For Nicholas De Jongh, this is now an unlikely, but nevertheless offensive, restriction on freedom of speech. Despite the fact that the 'in yer face' theatre of the 1990s[365] "suggested that the English theatre had at last achieved an unfettered freedom to show and do what it liked," De Jongh writes, "[t]his supposition was wrong."[366] It is not part of this thesis to comment on whether this final prohibition should be removed. De Jongh suggests that "[t]he British theatre has been liberated; the chains and handcuffs...put away; but the power and the temptation to bring them out again remain";[367] I do not want to bring them out again. However, the use of law as a therapeutic agent, and the characterization of the two sides in our example as creating entrenched positions for themselves[368] suggests a role for law as a forum for increased dialogue and communication. And the way in which law, or legal style mechanisms, could do this is the subject of the final chapter of this thesis.

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[364] De Jongh, at 251.
[365] See note 197.
[366] *Ibid.*
[367] *Ibid.*, at 252.
[368] I do not think Christian Voice would have been amenable to dialogue, nor do I think the creators of *JStO* have anything to explain away. Nevertheless, the central nature of communication can be emphasized in the hope that in a future example, where the offence given is based on an accurate portrayal of a show and is largely unintentional (in the sense that the play is not simply for shock value) or, if intentional, the offensive nature of the play is thought out and deliberate, so communication would not be unwelcome, i.e., the creators could at least explain what they hope to convey by presenting the work, the normative comments in Chapter 6 are perhaps useful.

CHAPTER 7: Preparing the community – law and managing sensibilities

The centrality of communication

When discussing methodology at the beginning of this thesis, I said that I would be creating a dramatic narrative. Methodological questions, as discussed at the outset, are as much to do – in the qualitative research spectrum – with the researcher's state of mind as with objective truth. That I am consciously constructing a narrative – a story – is, if I use the methodological concept of dramatism and the idea of life as 'play', not only wholly appropriate to the subject matter, but integral to the assessment of the situation I am analysing. Using these terms signposts my ambition to create a metanarrative with a literary impressionistic bent and, I submit, this has perfect validity as long as I am clear about my intentions. Good historical legal work, for example, is done in paying close attention to the actions and disagreements of legal actors in tracing the development of law. This ties directly into this model of life – and law – as drama. As Lawrence Rosen puts it: "Like art and literature, through law we attempt to order our ties to one another."[369]

The story so far, then: a play that offends a segment of society is produced; the offence leads to protest, to injury, to its commercial future; both sides feel wronged – both, perhaps, feel unjustly targeted; the matter is left there. How, without infringing on the right of freedom of speech, can the law intervene?

[369] Lawrence Rosen, *Law as Culture* (Princeton: Princeton University Press, 2006), at 199-200.

Another narrative: In 2006, the play *My name is Rachel Corrie*[370] was due to open at the New York Theatre Workshop. The play presents the story of a US student who was killed by an Israel Defence Force bulldozer while protesting about the destruction of Palestinian homes in the Gaza strip. Controversy followed when the New York Theater Workshop postponed opening night while it "prepare[d] the community for the encounter with the play."[371] In Canada one can also reference Toronto's Canadian Stage Company's ("TCSC") decision not to stage the play, also in 2006, against a similar background of political controversy (although it should be pointed out that TCSC says that this was as a result of the play's lack of merit / economic pulling power, rather than politics).[372] In the case of the New York Theatre Workshop, this was seen as a capitulation, with "[t]he playwrights Harold Pinter and Tony Kushner and the actress Vanessa Redgrave, known for her longtime support of Palestinian rights, criticiz[ing] the workshop...saying it had caved in to political pressure."[373]

Whether the New York Theatre Workshop did intend to postpone – rather than bury – the play, is unclear. Its artistic director was reported as saying that "...the workshop decided to postpone the show to the next season "when we discovered how deeply ingrained the attitudes were on all sides and what a marketing and contextualizing challenge this posed"."[374] This statement received a predictably unfavourable reception

[370] Hereafter, *Rachel Corrie*.
[371] Ben Cameron, 'Keynote address – How the Show Goes On: Law and Theater in the 21st Century' (2005-2006) 29 Columbia Journal of Law & The Arts 385, at 400. Largely in response to protests from the local Jewish community.
[372] CBC News, online: <http://www.cbc.ca/news/story/2006/12/22/corrie-toronto.html>.
[373] Campbell Robertson, 'Play About Gaza Death to Reach New York' (2006) New York Times, online: <http://www.nytimes.com/2006/06/22/theater/22corr.html?_r=1&ref=rachel_corrie>.
[374] *Ibid.*

from supporters of the play.[375] *The New York Times* reported the measures that had been taken in the following manner:

> Neither Mr. Nicola [artistic director of the NYTW] nor Ms. Moffat [managing director of the NYTW] had seen the play in London and neither would say exactly who they spoke to before they decided to delay the show. Mr. Nicola originally said that he had spoken to "religious leaders" in making his decision; this week he said that the workshop did a "wide reaching out into the complexity of the community of New York" that included reading Palestinian views on Websites. Mr. Nicola did say he had had a conversation with one board member who said that his rabbi had concerns about the play. An old friend, who is Jewish, also questioned the play's message.[376]

In the meantime, the play opened at the Minetta Lane Theater in Greenwich Village[377] – the creator of the play, Katharine Viner saying "I'm just really looking forward to engaging people on it, an engagement which can only happen, obviously, if the play is on."[378]

Two particularly important phrases can be highlighted from this tale. First, the idea that the New York Theatre Workshop wanted to postpone the play in order to take into account the high level of feeling about the production, to prepare the community, and the measures they purportedly undertook. Second, that one can only engage with a production when it *is* a production – dialogue and education, pursuant to freedom of speech, is the way to work through a controversy, not censorship. This follows, perhaps, from the deep connection between theatre and culture, discussed at the beginning of this thesis. Again, dignity is important here – treating the subject matter, the work, and the

[375] Jesse McKinley, 'Theater Addresses Tension Over Play' (2006) New York Times, online: <http://www.nytimes.com/2006/03/16/theater/newsandfeatures/16corr.html>.
[376] *Ibid.*
[377] Robertson, 'Play About Gaza Death to Reach New York'.
[378] *Ibid.*

offence taken seriously and as worthy of dialogue, even if at the end of that engagement you respectfully disagree. And it is in these two ideas that a prescription emerges.

Justice as fairness

This thesis has been an attempt to build up to the idea both that the law can do something to ameliorate tension in the context of controversial plays, but also that there is a jurisprudential basis for this suggestion of intervention. Returning to the (intuitive) 'reflexive equilibrium' of Rawls' theory is a good place to begin to bring the argument together – the idea that from simple and relatively uncontroversial propositions that we feel to be true, we can build up to an argument that is not necessarily obvious or palatable (from the basis of reason, alone).

As noted in Chapter 5, Rawls' theory is an attempt to create a practical response to disputes, based on fairness. This theory has as its conceptual background the idea of the social contract, which, also as explained in Chapter 5, is (following Kant) a theoretical way of testing normative arrangements. The theory therefore lends itself to direct application to the problem at hand.

Recapping, in brief, Rawls asked us to imagine a group of individuals with a sense of justice – the idea that there should be principles governing the "assign[ment of] rights and duties and in defining the appropriate division of social advantages"[379] – but with an uncommitted conception of the good. They are in the original position. Rawls' theory is based around recognition of the importance of the individual, the recognition of

[379] See note 269.

one another's moral personality.[380] Rawls thinks that freedom of speech – one of his basic liberties[381] – would be one of the principles that those in the original position would agree to, given that the original position bridges the gap between self-interested motivation, and the requirement for impartiality.[382] Once basic liberties are established, they cannot be overridden for the sake of society as a whole – that is utilitarianism – but can be limited for the sake of the protection of other liberties.[383] The idea is that each person should be entitled to the most comprehensive suite of basic liberties possible. Freedom is protected post-veil of ignorance, by ensuring that government, and law, is neutral to conceptions of the good (other than liberty), what Costa calls non-domination (rather than utterly unfettered freedom).

Against this background, one might argue that were those in conflict over a controversial play – *JStO*, *Behzti*, *Rachel Corrie* – in the original position, they might agree a different set of standards (only in the very limited area of controversial theatre plays, obviously – the concept is here being used in the Kantian sense as a test for normative ideas): they might, for example, not knowing whether they will be offended by the content of stage productions or not, agree to compromise in some way. Were this conception of the good given to our original position participants, what would they decide? Well, they would, Rawls suggests, be concerned to give the most extensive suite of liberties possible to each other. But would they perhaps want to ensure that some level of dialogue is possible (and made probable?) over plays that really offend, after the veil of ignorance is lifted? This, it is submitted, is not incompatible with Rawls' theory, the

[380] See note 257.
[381] See note 282.
[382] See note 274.
[383] See note 280.

liberal democracy we live in, or the fundamental importance of freedom of expression. How would this dialogue be created?

A therapeutic outcome

As discussed in Chapter 6, the role of law has been reconsidered in recent years by the therapeutic jurisprudence movement. The suggestion is that law can act as therapy. This is particularly efficacious, it is argued, in the less formal areas of legal intervention – so, for example, in alternative dispute resolution, or the holding of enquiries. One perhaps pertinent example is the use of truth and reconciliation commissions in newly established democracies after the move from a totalitarian regime. The contribution law makes in such a situation is to provide therapy by the provision of a framework in which the truth about acts of terror or repression under previous regimes can be told, often by way of truth and reconciliation commissions. Commentators see the airing of grievance as being crucial to recovery – "[w]e believe that, during the transitional process, both survivors and perpetrators must have an opportunity to relate their experiences in a culturally supportive, official, and dignified setting sanctioned by the state or an international body'[384] – and it is the law that provides this opportunity.

It might seem incongruous to mention truth and reconciliation commissions – concerned with healing an entire society – in the context of a really small but impassioned debate about the arts and religion or politics; but it is useful to consider the flexible nature of law and the various ways in which it can be used other than in the sense

[384] Alfred Allan and Marietjie M. Allan, 'The South African Truth and Reconciliation Commission as a Therapeutic Tool' (2000) 18 Behavioral Sciences and the Law 459, at 463.

of black letter rules enacted via regulation. The material collected at truth and reconciliation commissions, for example, goes on to live a second and grander life where: "the transcripts of hearings can serve as material for an education in the sense of injustice, an education that would introduce a new and challenging element into public culture."[385]

In the same way, law in the current problem should act in a sensitive manner to educate both in terms of freedoms enjoyed in a liberal democracy, emphasizing why those freedoms are and should be enjoyed, but also providing space for discussion of the reasons for offence. Why is this dialogue important? Because, as noted in Chapter 6 when the discourse of the two sides in *JStO* was very briefly analyzed, part of the problem was a willingness to take entrenched positions and a frustration (assumed or not, it is immaterial) with the system which did not include or protect (depending which side you are on). Surely a way forward – and this is a very modest suggestion – is to institute some form of discursive process, akin to the New York Theater Workshop's idea of 'preparing the community'?

Such a proposal is absolutely not without risk. As the New York Theater Workshop found out, in some ways you can be 'damned if you do, damned if you don't'. Again, from the New York Times on the postponement of *Rachel Corrie*:

> The surprise, though, is that there was so much surprise on the theater's part: surprise, first, that the play might cause controversy, then surprise that the postponement actually did...But what made it a more volatile act was that by declining for now to offend with the play, the theater violated the most sacred principles of our artistic temples. Those principles are: Thou shalt offend, thou shalt test limits, thou shalt cause controversy. If there is an artistic orthodoxy in the West, it is that good art is iconoclastic and provocative, and that any pull back

[385] Jonathen Allen, 'Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission' (1999) 49 The University of Toronto Law Journal 315, at 337.

> from this orthodoxy is cowardly and craven. In this distended context, the New York Theater Workshop's act was heretical.[386]

By entering the fray of (attempted) diplomacy, there is always the chance that the perception of supporters of the play will be that producers and managers have retreated from the work in an act of cowardice, that they are self-censoring. As discussed in Chapter 4, this was one of the fears in England and Wales when the Lord Chamberlain's power to censor was abolished. It is for this reason that the law is a useful framework within which to consider creating a forum for discussion of controversial works: it would provide a legitimate mandate for such a forum protecting participants from accusations of 'heresy'.

A prescription

This thesis has been an attempt to show that, (a) there is a real area of tension between producers, managers, artists and those who are offended by a theatrical work; (b) that the law is the most appropriately placed institution to intervene in such a dispute; and (c) that such an intervention would not make the situation worse and may, in the guise of law's therapeutic role, ameliorate the situation.

'Law' however is a nebulous term. What I am really advocating is an intervention in that shady place Robert Mnookin termed "(bargaining in) the shadow of the law."[387] Mnookin's groundbreaking suggestion – in the late 1970s – was that arrangements in the context of divorce should be made between the couple themselves rather than being court

[386] Edward Rothstein, 'Too Hot to Handle, Too Hot to Not Handle' (2006) The New York Times, online: <http://www.nytimes.com/2006/03/06/theater/newsandfeatures/06conn.html>.
[387] Robert Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 The Yale Law Journal 950. Thanks once more to Professor Liston for the suggestion.

imposed (subject always to a court check on inequality of bargaining power, best interest considerations for children etc.). The proposal – exploratory in nature, as is this thesis – was that a "private ordering"[388] should become the norm, with the court ready to review "cases falling outside what is ordinarily thought reasonable."[389] So, while the law is the "social glue that offers cues for behaviour consistent with respect for the community and the persons it subsumes...much of law's social value lies not in resolving disputes but in [the more passive role of] preventing them from arising..."[390] The forum I envisage, therefore, is not really a directly legal one. Instead, it is a pre-legal construct that is nevertheless informed by the spirit of the law. It is a private enterprise (not organized by the state) – probably operating at a local level – and is a process of legitimization, necessary to combat the self-censorship fears identified.

In Chapter 4, reference was made to a speech made by Lord Stow Hill in the debate that preceded the Theatres Act 1968, who said that Parliament should only act "...after listening to public discussion on the subject in the Press and elsewhere in the course of the great public debate..."[391] The fact that there is public debate about the arts is encouraging to this project – it confirms that the arts are used as a way to discuss, analyze, and generally make sense of matters of public importance. Indeed, as Nick Hytner noted, (one view of) theatre's raison d'être is to provoke controversy and debate. But public debate is very general. This thesis tentatively proposes a more focused dialogue.

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[388] *Ibid.*, at 996.
[389] *Ibid.*, at 993.
[390] Gary Melton, 'The Law is a Good Thing (Psychology Is, Too): Human Rights in Psychological Jurisprudence' (1992) 16 Law and Human Behaviour 381, at 384. Melton quotes from Richard Posner, *The Problems of Jurisprudence* (Cambridge, MA: Harvard University Press, 1990).
[391] See note 162.

Various rather nebulous ways of progressing a dialogue occur – predominantly, asking the producers of a play to publish a justification of their production and its treatment of a controversial subject. This, however, would have exactly the effect that is anathema to this paper – namely, fettering the arts. It is also intuitively incompatible with freedom of expression. A prescription such as this is therefore rejected. Referring back to the comments of Lord Dilhorne (see page 47) on pre-censorship: his point was that the debate about censorship of the theatre was really about whether plays needed to be preapproved (the argument is deeper than this, but this is the pertinent point), as the existing laws of the land will prevent real offence. Lord Annan noted that some theatre managers and playwrights were actually in favour of the system as it stood pre-1968, because the approval of the Lord Chamberlain meant a play received "a green light" (see page 46). The concern then – as it is in a revised form in this thesis – was that "unofficial censorship might well have a much more debilitating effect on the theatre than the present official censorship"[392] as theatre managers and playwrights fall victim to the individual outrage of members of the public rather than the moralizing of the state. Might the conclusion be that a pre-emptive justification of the position would have the same effect as the Lord Chamberlain's 'imprimatur' [Hansard 28 May 1968] without allowing for a return to censorship? This could have the dual benefit of allowing a playwright and / or manager to be comfortable that they have done everything possible to ease the play into society – and therefore less liable to be brow-beaten by protests – and would advance the therapeutic philosophy by offering a chance for dialogue and education – not too far removed, perhaps, from the idea of the truth and reconciliation

[392] House of Lords debate, 17 February 1966, Hansard vol 272 cc 1151-68.

commission hearings that (possibly) heal the community.[393]

The problem remains that this might have the effect of fettering the arts – any legal framework of information distribution (not consultation, which implies that the public would have any right of veto, or even any input) in respect of the theatre would have to be optional in order to maintain the freedom this thesis is committed to. Is there any point in prescribing such an optional framework? It is submitted that there is: in the practical sense that it would reassure theatre managers that a play is 'ok' in the same way that Lord Chamberlain's 'imprimatur' did, but without the risk of censure; and in an emotional way, helping to eliminate (in part) that frustration that there is no opportunity to put a point of view across (seemingly felt by both the offender and the offendee). Incidentally, the opportunity to do so is probably as important, for both sides, as the actual taking up of that opportunity.

So what, more precisely could the pre-legal forum look like? The idea of communicating with the audience has been fully explored by broadcasters. In the case of *JStO*, for example, Ofcom referred extensively to a broadcasting code, effectively issued by Ofcom, with which the BBC had to comply.[394] Given an obligation on the BBC to

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[393] It is acknowledged that this is controversial: one problem being that transitional justice mechanisms can reopen old wounds by revisiting evidence of atrocities if not forgotten at least dormant. Reawakened memories, it is argued, lead to a renewal of violence. (See David Mendeloff, 'Trauma and Vengence: Assessing the Psychological and Emotional Effects of Post-Conflict Justice' (2009) 31 Human Rights Quarterly 592, at 594). Further discussion of this point is, however, beyond the scope of this paper.

[394] "Ofcom had to consider whether *Jerry Springer: The Opera* contravened the provisions of the ex–Broadcasting Standards Commission Code on Standards ("the Code") with which the BBC has to comply. This Code takes effect under the Communications Act 2003 ("the Act") as if it were a code issued by Ofcom (paragraph 43, Schedule 18 of the Act)." (see, Ofcom Broadcast Bulletin: Issue 34, 9 May 2005, at 14).

"give accurate information about the nature and content of programmes in order to allow the audience to make an informed choice,"[395] Ofcom concluded that:

> BBC2 gave clear pre-transmission warnings about the content of the programme. It also clearly prepared the audience for what was coming up, by contextualising the material and explaining the background to the Opera. The likely strength of the material was also clear from the pre-programme publicity and surrounding controversy, although some of it was exaggerated.[396]

Context is key. An optional contextualization, such as a workshop, could be offered to explore a controversial work. And the basis for this contextualization? A code of best practice, perhaps. Such a dialogue might help to get all parties involved to reflect upon their own position – exactly as Rawls' reflective equilibrium suggests. In sum,

> ...one should not shy away from considering negotiation, arbitration and mediation...as "therapeutic" processes...[o]pen discussions, as well as academic and political critiques...frequently help...leaders to reflect over their own values and actions.[397]

Code of best practice

As noted on page 91, in the context of the discussion of *Rachel Corrie*, the New York Theatre Workshop carried out what might be called a community relations exercise when preparing to produce the play. This, however, would seem to have been a rather rudimentary attempt at contacting the relevant community, consisting as it did of "reading Palestinian views on Websites...a conversation with one board member who said that his rabbi had concerns about the play...[and the appreciation that] [a]n old friend, who is

[395] *Ibid.*, at 15.
[396] *Ibid.*
[397] Toro, at 679.

Jewish…questioned the play's message."[398] A code of best practice could, it is submitted, provide a more robust set of suggested rules to help a theatre to deal with such a situation in the future.

A useful place to start creating such a code would be the Ofcom Broadcasting Code and, more particularly, its principles and guidance notes (given the pre-legal, private, nature of the proposed forum). Combined, the principles and guidance notes offer a set of general guidelines ensuring, for example, that religious programmes should "not involve any abusive treatment of the religious views and beliefs of those belonging to a particular religion or religious denomination"[399] This nevertheless provides the scope for Ofcom to say, in its response to complaints about the broadcast of *JStO*, that "the outstanding artistic significance of the programme outweighed the offence which it caused to some viewers and so the broadcasting of the programme was justified."[400]

The forum would need to be theatre-led. There is a professional body – the Theatrical Management Association (the "TMA")[401] – which might be minded to take a role in setting up such a forum. The chairmen of any public meeting could be professionally appointed mediators or facilitators. Community leaders could be invited to express concerns, bridging the divide between the particular community and the art world. There would be a commercial impetus for establishing this cathartic body – it is

[398] See note 375.
[399] Ofcom Broadcasting Code, Section 4: Religion, online: <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/religion/>.
[400] Ofcom Broadcast Bulletin: Issue 34, May 2005, at 14. This is, in fact, not the correct comparison because the Broadcasting Code has been amended. However, it is submitted that the decision by Ofcom would remain the same under the new, broader code.
[401] "TMA is the pre-eminent UK wide organisation dedicated to providing professional support for the performing arts. Our members include repertory and producing theatres, arts centres and touring venues, major national companies and independent producers, opera and dance companies and associated businesses." (See: <http://www.tmauk.org/>)

not simply for reasons of ameliorating tension. Given the commercial death that Lee saw *JStO* suffering – the withdrawal of theatres following threats, the uncertainty over a DVD production[402] – any such effort to converse with those offended would provide reassurance to those managers *even* if those who were offended remained so. The reassurance would be similar in kind, as mentioned above (page 98), to the 'green light' that the Lord Chamberlain's imprimatur provided. In this sense, the process of 'consultation' is a success in itself even if the upshot is renewed or continuing protest.

This is subject to some strong caveats. The process is intended to be more than a controlled 'indignation meeting' where the grievance is aired. It is meant to be an engagement between the two sides. If it is a sham procedure, a bad faith effort to 'show' all has been done to engage with the offended segment of the community, this will only make the situation worse. That said, this thesis has committed itself to upholding freedom of speech and the freedom of expression – and so in that sense this would not be a consultation exercise. There would be no change imposed on the work itself; the purpose of the forum would not be to seek a consensus about how the work *ought* to be. Similarly, an artist would not (could not, surely) be compelled to defend a work which must meet the world alone. He/she could chose to participate in the forum, but that would be a question for them. Instead the purpose of the forum is to manage the presentation of the play. It is an effort to encourage tolerance on both sides – on the side of those offended, to accept the play (or to 'come back in kind' with their own production, perhaps!); on the side of the producer/manager/artist, to take the time to explain the work's purpose/meaning or the choice of venue or timing – whatever is the particular problem.

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[402] See note 200.

Does there remain a problem that – given this line in the sand that the play will not be amended (at least it will not be compelled to be amended – which would simply be a reversion to censorship by committee) – that those offended, especially where religion is concerned, will see the forum as a sham? No, I think not. Although this would be of concern, it is not fatal to the project. The idea is to mitigate the harm caused by protest to the community and to the play; recognizing that there is a tension is intuitively better than ignoring, or worse, becoming bellicose towards the opposition. It is proposed as an exercise in diplomacy. And it is in this way that the dialogue will, indirectly, include those sections of a community too extreme in view to participate; it *must* be harder to rail against a play which is being discussed with your community leaders. There should, it is suggested, be some filtration through the community, of the efforts being made. It is in this sense that the forum might help to transform relationships in a dignified manner.

Suggestions for further work

I am still undecided whether such a code of best practice would be entirely useful. Even if it did not limit freedom of expression, would it limit the theatre's power to shock? That is not the intention. It is offered as a tentative solution in this thesis, as a result of an intuitive approach – where the conflict over controversial theatrical works is the result of a particularly keenly felt hurt being identified as a problem that may be ameliorated. (Not where shock is intentional – deliberate graphic violence, perhaps). Further work might take the opposing view, beginning from the premise that the right to protest is sufficient. Alternatively, work could be done developing the specifics of a framework or code of best practice within which theatre could present its productions for public debate, all the

while conscious of its role in developing the human condition. The spirit of the work in this thesis is that real life disputes, to use the language of therapeutic jurisprudence, "...generally do not take place...on neutral ground. There is no[...] objective neutral figure channeling the encounters..."[403] This, then, could be law's role.

[403] Toro, at 682.

CHAPTER 8: Conclusion

Discourse, in the end, was a central part of this paper. The discourse between law and the arts generally; between law and theatre specifically; of rights; critically analyzed. "As is often the case in the emergence of a new school or paradigm," Roberto Toro writes, "it engages people with different degrees of interest ranging from the most total conviction to those simply curious about it."[404] I am not claiming anything as grand as this, but to some, the ideas of therapeutic jurisprudence, dignity and dialogue, are rather vacuous and are too indeterminate for comfort. As I stated at the beginning of the work, this thesis was written as a heuristic effort to understand what, if any, role law could play in the dispute I identified. Aided by Rawls' theory of justice as fairness, "the acclaim for [which]...testifies to [Rawls']...success in formulating an approach that imputes to some conceptions of justice and right a very considerable measure of objectivity...,"[405] I have attempted to show that there is a role for it to play, albeit without detailing its precise functional mandate. The benefit law brings to the situation is to engage the two sides to a debate and, perhaps counter-intuitively, to protect the playwright/manager by giving them, effectively, a stamp of approval for adopting a best practice approach. All this is intended to enhance the situation without limiting free speech in the slightest – it is, in fact, encouraging speech.

But of course you cannot please, or engage, everyone. Cameron positions the debate as a rather too straightforward snapshot of seemingly "polarized

[404] Toro, at 661.
[405] Haskell, at 1009.

audiences…people love things or hate things' in current theatre."[406] Yet, with an unprecedented level of freedom, there are clearly going to be nuances beyond this. He does, however, make a very interesting point about theatres engaging with the community and preparing the way for a sensitive play – smoothing the way for a public debut of the work rather than censorship (self-imposed or otherwise) seems to be his preference. And, as described above, suddenly, this rather simple point takes on a new significance when dovetailed with (a) the idea of a wellbeing based, politically engaged system of legal rights; (b) legal rights which are construed against a background of therapeutic jurisprudence, where the law is to have the least harmful impact it can on participants (whilst upholding justice); and set against (c) a (sketched) discourse analysis where the two sides plainly could not relate to one another at any level.

Writing in the context of rights analysis, Hamilton sets out the central conception of what he calls 'the argument for tolerance'. This "recognises…the value of certain liberties. At its core is the proposition that certain rights have value, in and of themselves, and require no further teleological justification."[407] He describes the argument for tolerance as "hold[ing] that there are certain inviolate principles that cannot be sacrificed even in the pursuit of democratically determined politics and aims."[408] This is distinguished from 'the argument for recognition' which "sets out as its goal the achievement of positive 'recognition' between members of opposing groups."[409] Non-communitarian behaviour is therefore harmful because: "it impairs…a person in their positive understanding of self – an understanding acquired by intersubjective

[406] Cameron, at 401.
[407] Hamilton, at 86.
[408] *Ibid.*
[409] *Ibid.*, at 88.

means...[rather than simply]...because it constrains the subjects in their freedom from action."[410] Furthermore, the argument for recognition requires subjects to be recognized as individuals because this "constitutes the internal tension of sociality,"[411] meaning that individuals interacting with other individuals will be forced to consider competing rights and will '"become conscious of their own subjectivity."[412] In this way, the concept of community – and the need to have a stake in society being the distinctive feature of a right – is accounted for. Rawls gives us the best of both of these worlds, ensuring the communitarian through his use of the social contract, but elevating the self, setting inviolable rights. Yet with these rights come responsibility, and if entering into a dialogue over controversial theatre does help to ease tension – and that is an empirical question for another day – then why not adopt the method?

There are limitations to this work – my conclusions are based on a review of several exemplars and I am extrapolating, some would say wildly. Similarly, there are critics of Rawls, some of which I briefly dealt with, whose critiques hit home – in particular the argument about circularity and the ability of those beyond the veil of ignorance to change their commitment to the principles formed in the original position. Nevertheless, it appears to me that Rawls' theory is of use, especially when confined to use in the context of a liberal democracy. Finally, the discourse analysis was not – and did not purport to be – a detailed narrative or CDA review; instead, it was intended as a snapshot of the way in which law could critically review discourse in an attempt to discover the heart of the dispute between players in the *JStO* situation (and, perhaps, in

[410] *Ibid.* Hamilton is paraphrasing Axel Honneth, *The Fragmented World of the Social: Essays in Social and Political Philosophy* (Albany: New York Press, 1995), Charles Wright (ed.), at 249.
[411] *Ibid.*
[412] *Ibid.*

analogous situations).

Mary Bucholtz, in her essay 'Reflexivity and Critique in Discourse Analysis' states that a "critical and reflexive discourse analysis must...be...one that is cognizant of power, context, history and agency."[413] If the picture of conflict that I have painted in this thesis is true, this would support a conclusion that a dialogue should help to ease tension when a production that is anticipated to be controversial is to be performed. The argument of recognition suggests that, in theory, people forced to interact – in dialogue? – with others will be more likely to acquire the "positive understanding of self"[414] required by that interaction. And this is the role of law in this instance: to encourage that therapeutic process. In other words, the hope is that a conversation between the interested public and the relevant producers/managers/artists will be sufficient to ward off protests by legitimately outraged members of the public; both sides, ideally, reflecting on the rights of the other. The law could have a role in coordinating this. The exact manner in which it would go about it is, however, the subject of a paper for another day.

[413] Mary Bucholtz, 'Reflexivity and Critique in Discourse Analysis' (2001) 21 Critique of Anthropology165, at 181.
[414] Hamilton, at 88.

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