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## The Disappearing Fourth Wall: Law, Ethics, and Experiential Theatre

Mary LaFrance

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# The Disappearing Fourth Wall: Law, Ethics, and Experiential Theatre

Mary LaFrance\*

## ABSTRACT

*The cutting edge of experiential theatre blurs the lines between performer and audience. Both the performer and the audience are vulnerable. Audiences may be subject to assaultive or disturbing behavior or images. The performance may take place in an unconventional venue that poses safety hazards. A single audience member may be alone with a performer, who may engage in provocative or shocking behavior, including verbal abuse or touching. The performer may invite similar conduct from the participant. Typically, the participant does not know in advance what will take place and does not sign a waiver. While the performer has a script or a set of instructions, the performer knows nothing about the mental or emotional state of the participants and thus may undertake some personal risk as well. Some audience members have reported anger, hurt feelings, or a sense of violation or betrayal as a result of their experiences. In one instance, a stalker pursued a performer as a result of a particularly intimate production. Another production led to a post-performance physical altercation between a spectator and performers.*

*This Article explores the ethical and legal issues that such boundary crossings raise. It concludes that simply labeling an event as "theatre" does not immunize the performers or promoters from liability for physical or emotional harm that results from the performance. If the safety and well being of the audience, performers, and bystanders is sacrificed in the name of ever-more-daring dramatic experiments, the entire industry may suffer. The challenge for experiential-theatre*

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\* IGT Professor of Intellectual Property Law, William S. Boyd School of Law, University of Nevada, Las Vegas. An earlier version of this paper was presented at the Fourteenth Annual Conference of the Association for the Study of Law, Culture and the Humanities, March 11–12, 2011. The Author would like to thank the participants in that conference for their helpful comments and suggestions. Additional thanks go to Chad Schatzle, my library liaison at the Weiner-Rogers Law Library, for his assistance in locating unusual source material.

*practitioners is to develop a voluntary code of conduct—involving audience screening and advance disclosures, supervision of spectators throughout the performance, and careful consideration of the appropriateness of content and venue—that will reduce the risk of harm to participants without undermining the essential elements of the dramatic experience. The difficulty will be in finding the right balance.*

## TABLE OF CONTENTS

I.	WHAT IS EXPERIENTIAL THEATRE? .....	510
	A. <i>Comparison with Conventional Theatre</i> .....	511
	1. Conventional Theatre .....	511
	2. Experiential Theatre .....	513
	B. <i>Selected Examples</i> .....	517
	1. <i>Internal</i> .....	517
	2. <i>The Smile Off Your Face</i> .....	519
	3. Works by Adrian Howells .....	520
	4. <i>Sleep No More</i> .....	520
	5. <i>The Factory</i> .....	523
	6. <i>En Route</i> .....	525
	7. <i>Rider Spoke</i> .....	526
	8. <i>Accomplice</i> .....	526
	9. <i>Sub Rosa</i> .....	526
	10. The Invisible Theatre of Augusto Boal .....	527
	a. <i>The Liege Piece</i> .....	527
	b. <i>The New York Piece</i> .....	529
	c. <i>The Paris Metro Piece</i> .....	529
II.	BLURRING THE BOUNDARIES: RISKS .....	530
	A. <i>Harm to Audience</i> .....	533
	B. <i>Harm to Performers</i> .....	534
	C. <i>Harm to Bystanders or Property</i> .....	535
	D. <i>Risk of Violating Local Laws</i> .....	535
III.	TRADITIONAL LEGAL DOCTRINES .....	536
	A. <i>General Principles</i> .....	537
	1. Intentional Torts .....	537
	2. Negligence-Based Torts .....	539
	3. "Eggshell" Plaintiffs .....	540
	4. Limits on Liability .....	540
	B. <i>Application to Specific Productions</i> .....	542
	C. <i>Precedents Involving Entertainers and Venues</i> .....	547
	D. <i>First Amendment Considerations</i> .....	551
IV.	ETHICAL CONCERNS .....	554

	<i>A. Ethical Standards and Liability</i> .....	554
	<i>B. In Search of an Ethical Standard</i> .....	555
	1. The Relationship between Drama and Dramatherapy.....	555
	2. The Relevance of Dramatherapy Codes.....	557
V.	AWARENESS WITHIN THE PROFESSION .....	566
VI.	THE EXTREME CASE: INVISIBLE THEATRE.....	571
VII.	THE POTENTIAL FOR SELF-REGULATION .....	577
	<i>A. Screening and Disclosures</i> .....	577
	<i>B. Care in Selecting and Preparing Venues</i> .....	578
	<i>C. Deploying Trained Personnel to Supervise the         Spectators</i> .....	580
	<i>D. Content Regulation</i> .....	580
VIII.	CONCLUSION .....	582

We watch a play the way we dream.

—Christopher Shinn (Playwright)

This is the safest place in the world! Don't you think? . . . I mean, nothing really happens in here, does it? Not really. Nothing real.

—Tim Crouch, *The Author*

Like other forms of entertainment, live theatre constantly evolves. Both practitioners and audiences seek out the new and unconventional. Experiential theatre occupies a blurry realm where the distinction between audience and performer may disappear, and even the distinction between reality and fiction may seem uncertain. In contrast to conventional theatre and other entertainments such as motion pictures and television, experiential-theatre audiences often have no idea what to expect when the performance begins—and, in some cases, may not even be sure when the performance has begun.

Speaking of one such production, which sent audience members on a fictional “date,” critic Lyn Gardner observed:

Such performances are often charged affairs, intense and explosive. This is all part of their appeal. But are they really any more intimate than more traditional shows? In both, it seems to me, the idea of intimacy is an illusion, albeit here one taken to an extreme. At their best, these plays can be exhilarating; at worst, they are emotional porn. What's more, performances that smash down the fourth wall, placing audiences in situations they would never encounter in a traditional theatre, raise ethical issues—both for those making and watching the work.<sup>1</sup>

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1. Lyn Gardner, *How Intimate Theatre Won Our Hearts*, GUARDIAN (Aug. 11, 2009, 5:00 PM), <http://www.guardian.co.uk/culture/2009/aug/11/intimate-theatre-edinburgh>.

This Article explores the ethical and legal issues that the boundary-blurring aspects of experiential theatre raise. While some of these productions present no greater risks than conventional theatre, others have the potential to cause harm to patrons, performers, or bystanders.<sup>2</sup> In such cases, simply labeling an event as “theatre” cannot immunize the performers or promoters from ethical scrutiny or legal liability. If experiential-theatre practitioners give inadequate consideration to the risks their unconventional choices create, the injuries that result could subject them to audience backlash, legal liability, loss of donor support, or excessive government regulation.<sup>3</sup> Their challenge, then, is to consider how to self-regulate in order to reduce these risks without undermining the essential elements of the dramatic experience. The difficulty will be in finding the right balance.

### I. WHAT IS EXPERIENTIAL THEATRE?<sup>4</sup>

Experiential theatre has been described as “the kind of drama, usually put on in studio spaces, that aims to give audiences the experience of actually having lived through the actions depicted on stage.”<sup>5</sup> Compared to conventional theatre, it is “more aggressively aimed at making audiences feel and respond.”<sup>6</sup> Because most experiential theatre takes place in settings other than conventional theatres, the category overlaps with “immersive” theatre, so called because it immerses the audience participant “into a created environment, through the creation of an intimate exchange between performer and audience member, or through the encouragement of active participation of the audience in the action.”<sup>7</sup> Although works of this genre are not always disturbing in their content, their content

2. See *infra* Part II.A–C.

3. See *infra* Parts II.D, IV.A.

4. See Shirley Dent, *Interview: Aleks Sierz*, CULTURE WARS, <http://www.culturewars.org.uk/2003-02/sierz.htm> (last visited Nov. 13, 2012) (crediting playwright Sarah Kane with coining the phrase “experiential theatre”).

5. Aleks Sierz, *New Writing A–Z*, IN-YER-FACE THEATRE, <http://www.inyerface-theatre.com/az.html> (last modified Oct. 5, 2010); see also Kate Adams, *Contemporary Theatre and the Experiential*, 5 INT’L J. ARTS IN SOC. 153, 161 (2010) (“Experiential theatre integrates interaction and often embodied participation into spectator engagements; it involves direct engagement with the world of the performance, rather than solely identificatory engagements through character perspective and thus generates an experience of performance as event.”).

6. Aleks Sierz, *New Writing Overviews*, IN-YER-FACE THEATRE, <http://www.inyerface-theatre.com/archive4.html> (last modified Oct. 5, 2010).

7. Dorothy Max Prior, *Reviews Archive: Edinburgh Festival Fringe August 2009*, TOTAL THEATRE, <http://www.totaltheatre.org.uk/Reviews/archive09.htm> (last visited Nov. 14, 2012) (reviewing the Total Theatre Award Winner for Innovation/Interaction/Immersion: Adrian Howells’ *Foot-Washing for the Sole*).

and their physical setting tend to blur the conventional boundaries between audience and performer, and sometimes between fiction and reality.<sup>8</sup>

### *A. Comparison with Conventional Theatre*

#### 1. Conventional Theatre

Traditional theatre adheres to a number of conventions, although not every show will always adhere to every convention. There is generally clear physical separation between the areas occupied by the actors and the audience during the performance.<sup>9</sup> The audience sits (or occasionally stands) in a designated area, and the performers occupy a separate stage area with at least a small separation from the first row of audience seating.<sup>10</sup> The stage may be elevated or the audience seating raked, or both, to provide good sightlines throughout the audience.<sup>11</sup> A proscenium arch may identify the front of the stage area, although the stage may extend a few feet in front of the arch.<sup>12</sup> If the stage is a thrust stage, it will extend even farther past the proscenium arch, with some audience seating on each side of the extension.<sup>13</sup> Alternatively, in some cases (e.g., theatre-in-the-round) there is no proscenium, and audience members are seated around the entire circumference of the stage.<sup>14</sup> During the performance, most performers enter or exit from the sides or rear of the stage, although they may occasionally enter or exit through the aisles in the seating area. On rare occasions, a small number of audience members may be seated at the sides or rear of the stage.<sup>15</sup>

The actors normally address only one another on stage. On some occasions they may speak directly to the audience, in which case they typically address the audience as a group, rather than an individual audience member.<sup>16</sup> The performance is normally scripted and rehearsed, with no improvisation (after the rehearsal phase), and there is little to no variation in text or stage business from one

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8. See *infra* Part II.

9. See, e.g., Mick Alderson, *Theatre Spaces*, STAGEHAND PRIMER, IATSE LOCAL 470, <http://www.ia470.com/primer/theatres.htm> (last visited Jan. 6, 2013).

10. See, e.g., *id.*

11. See, e.g., *id.*

12. See, e.g., *id.*

13. See, e.g., *id.*

14. See, e.g., *id.*

15. See, e.g., *id.*

16. See generally, e.g., BRIDGET ESCOLME, *TALKING TO THE AUDIENCE: SHAKESPEARE, PERFORMANCE, SELF* (2005).

performance to the next. The actors typically do not invite audience members onto the stage, nor do they enter the audience area except briefly while entering or exiting the stage area. The actors do not usually engage audience members in verbal or physical interaction.<sup>17</sup>

Audience members, in turn, observe certain protocols. They remain in their seats during the performance and do not attempt to join the actors on stage.<sup>18</sup> They do not speak to or touch the actors or other audience members during the performance. Distanced observation is the order of the day: “[H]alf the fun of theatre is sharing this show or that with dozens of other people, all looking the same way in the dark. Theatre is communal, right? It’s about disappearing in a crowd, while the talented folks get on with it on stage?”<sup>19</sup>

This is not to say that the audience in traditional theatre is totally passive or impassive: “As audience we are always active; sometimes more so than others, but we always have some role to play. Even the most conventional theatre depends on our collaboration, our ‘going along with it.’”<sup>20</sup> Performers expect audience engagement, response, and suspension of disbelief but typically not audience *participation*.<sup>21</sup> Furthermore, even a conventional theatre presentation will occasionally jettison one or more of the conventions.<sup>22</sup>

17. *But see generally, e.g.,* JACOB RAZ, AUDIENCE AND ACTORS: A STUDY OF THEIR INTERACTION IN THE JAPANESE TRADITIONAL THEATRE (1983) (examining the intimate interaction between individual audience members and performers in various forms of traditional Japanese theatre, and contrasting that interaction with the lack of audience-performer interaction in traditional Western theatre).

18. Alain Badiou, *Rhapsody for the Theatre: A Short Philosophical Treatise*, 49 THEATRE SURVEY 187, 223 (2008).

19. Brian Logan, *For Your Eyes Only: The Latest Theatrical Craze Features a Single Performer with a Single Audience Member*, INDEP. (June 13, 2010), <http://www.independent.co.uk/arts-entertainment/theatre-dance/features/for-your-eyes-only-the-latest-theatrical-craze-features-a-single-performer-with-a-single-audience-member-1995795.html>. Philosopher and playwright Alain Badiou writes with open disdain of the audience passivity he associates with conventional theatre. See Badiou, *supra* note 18, at 199.

20. Matt Trueman, *Going Back Inside: Internal Revisited*, CAROUSEL OF FANTASIES BLOG (Sept. 6, 2009, 12:40 PM), <http://carouseloffantasies.blogspot.com/2009/09/going-back-inside-internal-revisited.html>.

21. See Nicholas Arnold, *The Manipulation of the Audience by Director and Actor*, in PSYCHOLOGY AND PERFORMING ARTS 75, 76 (Glenn D. Wilson ed., 1991) (describing a “complex reciprocity” between actors and audience in which “an audience actively seeks a ‘passive’ role in the relationship”); see also Sue Jennings, *Prologue to SUE JENNINGS ET AL., THE HANDBOOK OF DRAMATHERAPY 1* (Psychology Press 1994) (“[I]n the theatre, our very responses assist the actors to shape the drama to our expectations and energy, so that indeed we are a part of the performance.”).

22. Many otherwise-conventional shows have brief moments of actor-audience interaction, such as *One Man, Two Guvnors*. See Rosa Prince, *One Man, Two Guvnors: How Did It Play on Broadway?*, TELEGRAPH (Apr. 8, 2012), <http://www.telegraph.co.uk/culture/theatre/theatre-reviews/9193770/One-Man-Two-Guvnors-how-did-it-play-on-Broadway.html> (“One Man,

In conventional theatre, potential audience members often have the opportunity to learn about the content of a production before deciding whether to attend the performance. The scripts for conventional-theatre works are typically published in print form so that potential audiences can read the script beforehand.<sup>23</sup> Also, professional theatre productions in the conventional mode are typically reviewed by critics at the end of a short preview period, with the majority of performances taking place after the reviews come out.<sup>24</sup> Thus, a potential audience member can read the reviews (either of the current production or, thanks to the Internet, of previous productions of the same script) in order to learn more about the show before attending. These observations are less true, of course, in the case of a brand new script that has not yet been published, a nonprofessional production (which critics are less likely to review), or a show that is still in previews. In these cases, however, there may still be sufficient information available via word-of-mouth to enable potential audience members to learn about the content of the show.<sup>25</sup> If an audience member is truly unhappy with the unfolding spectacle, in conventional theatre it is typically easy to get up and leave the venue.<sup>26</sup> Intermissions, which are common though not ubiquitous in conventional theatre, provide an opportunity to distance oneself from the performance, to criticize it in conversation with other patrons, or to escape the proceedings altogether.<sup>27</sup>

## 2. Experiential Theatre

Experiential-theatre performances typically jettison most or all of the theatrical conventions described above. “Stage” and “audience” areas are not necessarily distinct or physically separate from each other.<sup>28</sup> Actors may engage in direct verbal or physical interactions

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Two Guvnors is based on Italian commedia dell’arte, with its tradition of clowning, farce and—in particular—audience participation.”).

23. For an example of a major publisher, see DRAMATISTS PLAY SERVICE, <http://www.dramatists.com> (last visited Dec. 27, 2012) (describing the DPS as “representing the American theatre by publishing and licensing the works of new and established playwrights”).

24. See ROBERT COHEN, THEATRE 439–49 (8th ed. 2007).

25. The Internet has made word of mouth even more influential than in the past. Before official reviews are published in newspapers or broadcast on television, theatre enthusiasts can share their reactions to a production on such sites as Whatsonstage.com in the United Kingdom and Broadwayworld.com or Talkinbroadway.com in the United States.

26. See Badiou, *supra* note 18, at 223.

27. See *id.* at 209.

28. See, e.g., Adams, *supra* note 5, at 153 (describing experiential performances as creating “shared space” between actors and audience members and as “drawing the audience into interaction and participation, where touching the performers and parts of the set, moving around the space” is encouraged).



with audience members.<sup>29</sup> Audience members may not even be able to distinguish the actors from their fellow audience members, or else the distinction may become evident only as the performance progresses. A rough script or outline and rehearsals may partially predetermine the actors' text and movements, but the actors are likely to improvise large portions of the performance based on their individual impulses or audience response.<sup>30</sup> Audiences for experiential theatre tend to be much smaller than audiences for conventional theatre, and each audience member is more likely to receive individual attention from one or more of the actors.<sup>31</sup> Some productions may be limited to only one audience member per performance.<sup>32</sup> The physical performance space is typically small and often confined,<sup>33</sup> although some experiential theatre takes place in uncontrolled public environments, such as public streets.<sup>34</sup> In some cases, no live "actors" are involved; the audience member, either alone or in the company of other audience members, responds to prerecorded instructions or other stimuli received through an iPod, smartphone, or other communication device.<sup>35</sup>

There is typically less opportunity for potential audience members to discover the content of experiential theatre before they attend, for several reasons. First, these shows are less likely to

29. See *id.*

30. See Mark Fisher, *Ontroerend Goed: Close Encounters of the Absurd Kind*, EDINBURGH FESTIVALS (July 26, 2009), <http://www.edinburgh-festivals.com/viewpreview.aspx?id=148> (describing *Internal*).

31. See Sierz, *supra* note 6 (explaining that experiential theatre's aesthetic of having "audiences feel . . . that they have lived through the events shown" is partly achieved by writers having "their work put on in small studio theatres, where this intensity [is] easier to achieve").

32. See, e.g., Dror Harari, *Laotang: Intimate Encounters*, 55 DRAMA REV. 137, 137 (2011) (describing the experiential dance piece *Laotang* as "creating an encounter between just one performer and one spectator"); Deirdre Heddon & Adrian Howells, *From Talking to Silence: A Confessional Journey*, 33 J. PERFORMING ARTS 1, 1 (2010) ("Most recently, [Adrian Howells's] work has tended to be performed for a single spectator at a time. In this form of performance practice—intimate, personal, and interactive—the boundary between performer and spectator dissolves . . .").

33. See, e.g., Harari, *supra* note 32, at 138 (describing an experiential piece that "took place in a conspicuously small white space—approximately 1 x 1.5 meters").

34. See *infra* Part I.B.10.

35. See, e.g., Logan, *supra* note 19 (describing *Etiquette*, performed by Ant Hampton's Rotozaza company, "in which there are no performers, and in which two audience participants act out the 'play' according to instructions delivered over headphones"). Other examples of this genre include *En Route*, Blast Theory's *Rider Spoke*, and David Leddy's *Susurrus*. See *infra* Part I.B.6–7; see also Susan Mansfield, *For a Few Eyes Only*, SCOTSMAN.COM (Aug. 8, 2009, 12:04 AM), <http://living.scotsman.com/performing-arts/For-a-few-eyes-only.5536049.jp> ("To experience David Leddy's 'Susurrus,' you need only don a set of headphones and follow a map around Edinburgh's Royal Botanic Garden.").

involve published scripts.<sup>36</sup> Second, they are often limited to a small number of performances and thus may not be reviewed until after the show has closed, if at all.<sup>37</sup> If critics or patrons review the show at all during its run, they may reveal little detail about the show's content, respecting the convention that reviewers should avoid publishing "spoilers."<sup>38</sup> If the company performs the show again, it is often in a different country for a new audience that has not yet learned about the show's content.<sup>39</sup> Third, because these productions tend to have smaller audiences and fewer performances, there is less potential for word-of-mouth to disseminate information about a show's content in time to forewarn future audiences. Finally, even if word-of-mouth information is available, the content of the show may vary significantly from one performance to the next; thus, one person's experience may not be a good predictor of what another person will experience.<sup>40</sup> There are exceptions, of course, to these generalizations.<sup>41</sup>

In experiential theatre, the audience member is no longer a relatively passive observer as would be typical in conventional theatre. Instead, he or she becomes a participant.<sup>42</sup> As discussed in Part III, this enhances the risk of harm to both performers and the audiences.

The audience participant typically approaches the experiential-theatre experience with much the same mindset as

36. Published scripts are unavailable for most works described in Part I.B. David Leddy's *Susurrus* is available only directly from the playwright. See David Leddy, *Susurrus*, AMAZON.CO.UK, [http://www.amazon.co.uk/Susurrus-David-Leddy/dp/B005DS2KG6/ref=sr\\_1\\_1](http://www.amazon.co.uk/Susurrus-David-Leddy/dp/B005DS2KG6/ref=sr_1_1) (last visited Dec. 28, 2012). The content of *Susurrus* is relatively mild, as it recounts a family's discovery of the father's pedophilia but is not graphic in its descriptions. The Author was unable to locate a copy of Leddy's more graphic and disturbing script, *Sub Rosa*, for purchase.

37. An audience experiencing Augusto Boal's invisible theatre, for example, may not know a performance has taken place until it is nearly over. See *infra* Part I.B.10. Accordingly, it is highly unlikely a theatre critic would be in the right place at the right time to report his experience.

38. See, e.g., Andrew Dickson, *Internal: The Ultimate Test for Edinburgh Audiences?*, GUARDIAN (Aug. 17, 2009, 7:30 PM), <http://www.guardian.co.uk/stage/theatreblog/2009/aug/17/internal-edinburgh-audiences>; Matt Trueman, *Review: A Game of You, One on One Festival at BAC*, CAROUSEL OF FANTASIES BLOG (July 21, 2010, 9:12 AM), <http://carouseloffantasies.blogspot.com/2010/07/review-game-of-you-one-on-one-festival.html>. Even though patrons of the long-running experiential production *Accomplice* have posted many online reviews, they rarely reveal specific details. See *Accomplice*, YELP, <http://www.yelp.com/biz/accomplice-new-york> (last visited Dec. 28, 2012).

39. See *infra* notes 57–63 and accompanying text (tracking the changes in disclaimers used by Ontroerend Goed as the controversial *Internal* moved from one country to the next).

40. See *infra* notes 54–56 and accompanying text.

41. In *Sleep No More*, for example, an individual patron cannot experience the entire show in one visit, which has prompted past attendees to share numerous details online. See, e.g., BROADWAYWORLD, <http://www.broadwayworld.com> (search "Sleep No More is AMAZING") (last visited Dec. 28, 2012).

42. See *supra* notes 28–29 and accompanying text.

conventional theatre, viewing it as a “make believe” experience that has no real-world consequences.<sup>43</sup> The audience participant may therefore engage in or tolerate conduct, in the context of the performance, that he or she would not engage in or tolerate in a real-world setting.<sup>44</sup> Labeling an event as “theatre” appears to give both audience and performer participants the perception that they have “permission” to behave in ways that might be illegal, offensive, or actionable in a different setting.<sup>45</sup>

Audience participants in experiential theatre typically do not execute waivers or consent forms of any kind either before or after participating in the event.<sup>46</sup> Nor does the company provide a detailed disclosure of what might transpire during the performance, so that attendees can make an informed decision as to whether to proceed.

Experiential theatre typically involves small, relatively sophisticated audiences and consequently is rarely staged by major commercial producers motivated by profit potential.<sup>47</sup> Thus, the

43. See Chloe Rae Edmonson, “*Glory, the Grape*: Investigating Theatre, Intoxication, and Theatrical Intoxication” (Jan. 1, 2009) (unpublished thesis, Trinity University) (describing a theatergoer’s “willing suspension of disbelief,” as trading in “real-world experience for . . . make-believe” in order to “engage in, without skepticism, the imaginative world of a piece”).

44. See, e.g., *infra* Part I.B.2 (*The Smile Off Your Face*); *infra* Part I.B.3 (works by Adrian Howells).

45. See *infra* Part I.B.

46. There are, of course, exceptions. Patrons attending the downtown New York production of *Accomplice* are required to execute waivers after purchasing tickets. See PARTICIPANT AGREEMENT, ASSUMPTION OF RISK, WAIVER, INDEMNITY AND AGREEMENT NOT TO SUE, *Accomplice, Inc.* (on file with author). The website does not explain why the company requires a waiver for this production but not for its Greenwich Village, Hollywood, or London productions. The waiver itself was removed from *Accomplice, Inc.*’s website in December 2012, but its waiver on behalf of a minor is still available via The Packer Collegiate Institute. See PARTICIPANT AGREEMENT, ASSUMPTION OF RISK, WAIVER, INDEMNITY AND AGREEMENT NOT TO SUE ON BEHALF OF THE BELOW NAMED MINOR, *Accomplice, Inc.*, [http://www.packer.edu/uploaded/downloads/Upper\\_School/Accomplice\\_Waiver\\_Minor.pdf](http://www.packer.edu/uploaded/downloads/Upper_School/Accomplice_Waiver_Minor.pdf) (last visited Dec. 28, 2012). The waiver is broad and fails to disclose specific risks, stating that the patron “assumes any and all risks involved in or arising from participation in the Event or the negligent or deliberate acts of another person and . . . all other hazards . . . whether occurring prior to, during or after the Event.” Such a broad waiver is likely unenforceable. See, e.g., N.Y. GEN. OBLIG. LAW § 5-326 (McKinney 2012) (waiver of negligence liability by a commercial recreation or amusement facility is void and unenforceable); *Stelluti v. Casapenn Enters., LLC*, 1 A.3d 678 (N.J. 2010) (waiver of liability for intentional or reckless conduct violates public policy); *Lago v. Krollage*, 78 N.Y.2d 95, 100 (1991) (waivers of liability for willful or grossly negligent acts are void under New York law); RICHARD A. LORD, WILLISTON ON CONTRACTS § 19:24 (4th ed. 2012) (waiver of liability for intentional tort or willful or grossly negligent acts is generally void).

47. The La Jolla Playhouse staged David Leddy’s *Susurrus* using grant money from the James Irvine Foundation. See Lonnie Burstein Hewitt, *La Jolla Playhouse’s WoW Project Stages Unique Theatrical Experience in Botanic Garden*, LA JOLLA LIGHT (Sept. 8, 2011), <http://www.lajollalight.com/2011/09/08/la-jolla-playhouse>. The United Kingdom’s Arts and Humanities Research Council funds Adrian Howells’s work. See Heddon & Howells, *supra* note 32, at 1. Arts Council England funded Punchdrunk, the company that created *Sleep No More*. See

content does not need to have broad audience appeal, and it can be riskier and potentially more disturbing than the content of most conventional productions.

### B. Selected Examples

In order to identify the legal and ethical issues that might arise from experiential performances, it is useful to describe some of these theatre events. Some of the details below are based on the author's own experience, while others are based on media reports. Many of these shows have not yet been performed in the United States.

#### 1. *Internal*<sup>48</sup>

Belgian company Ontroerend Goed has described *Internal* as "speed-dating meets group therapy."<sup>49</sup> Five audience members are paired with five actors. Some of the pairings may be same-sex,<sup>50</sup> although not at every performance. The individual pairs enter separate candlelit booths for a "date." Romantic music plays in the background. The actors introduce themselves by their real first names, but no last names. They offer wine or liquor to their "dates." Several actors ask personal questions. One actor shows naked pictures of himself to his date and asks which one she likes best. Another actor asks whether his date has ever wanted to kill someone.<sup>51</sup> One actress speaks hardly at all; instead, she caresses her date and invites him to touch or kiss her. After a time, the actors lead

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Daisy Bowie-Sell, *Arts Cuts: Winners and Losers*, TELEGRAPH (Mar. 30, 2011), <http://www.telegraph.co.uk/culture/theatre/8416336/Arts-cuts-winners-and-losers.html>.

48. See Kate Bassett, *Internal, Mercure Point Hotel, Edinburgh*, INDEP. (Aug. 9, 2009), <http://www.independent.co.uk/arts-entertainment/theatre-dance/reviews/internal-mercure-point-hotel-edinburghbreast-10th-street-traverse-edinburghbrsea-wall-traverse-edinburghbrsusurrrus-royal-botanic-gardens-edinburgh-1769350.html>; Peter Crawley, *I Think We're Alone Now*, IRISH TIMES (Aug. 7, 2010), <http://www.irishtimes.com/newspaper/weekend/2010/0807/1224276363402.html>; Dickson, *supra* note 38; Fisher, *supra* note 30; Mark Fisher, *Theatre Reviews: Internal, Barflies, the Hotel, Luck, Nic Green's Trilogy, Blondes, the School for Scandal*, EDINBURGH FESTIVALS (Aug. 16, 2009), <http://www.edinburgh-festivals.com/viewreview.aspx>; Gardner, *supra* note 1; Elizabeth Kirkwood, *Edinburgh Festival 2009: Internal*, Review, TELEGRAPH (Aug. 11, 2009), <http://www.telegraph.co.uk/culture/theatre/edinburgh-festival/6008936/Edinburgh-Festival-2009-Internal-review.html>; Logan, *supra* note 19; Charlotte Smith, *Ontroerend Goed: Internal*, TOTAL THEATRE <http://www.totaltheatre.org.uk/Reviews/archive09.htm> (last visited Dec. 28, 2012); Yasmin Sulaiman, *Interactive Theatre at the Fringe*, LIST (Aug. 10, 2009), <http://edinburghfestival.list.co.uk/article/19163-interactive-theatre-at-the-fringe>; Time Out Editors, *One-on-One, Theatre: Interview*, TIMEOUT (July 6, 2010), <http://www.timeout.com/london/theatre/article/1319/one-on-one>; Trueman, *supra*, note 20.

49. PROGRAM, EDINBURGH FESTIVAL FRINGE (2009) (on file with author).

50. Trueman, *supra* note 20.

51. Gardner, *supra* note 1.

their dates into a seating area, where they all sit in a circle of chairs facing one another. The actors then express various opinions about their dates, including criticisms, and they rate their dates on a scale of one to ten. They invite their dates to do the same. Some actors disclose personal information that their dates revealed to them. The semi-silent actress removes her panties and offers them to her date, asking, "Is this what you want?" (Alternatively, in some performances, she flashes her breasts at him.<sup>52</sup>) Each actor then invites his or her date to dance and to provide a mailing address. Several weeks after the performance, the audience members receive friendly letters from their actor-dates.<sup>53</sup> According to media reports, some audience members were upset and angered by their experience with *Internal*; some were reduced to tears.<sup>54</sup> Another is reported to have stalked one of the actresses until he was cautioned to stop.<sup>55</sup> Some have described the show as unethical.<sup>56</sup>

The 2009 Edinburgh Fringe program did not specify any minimum age requirement for purchasing tickets to *Internal*.<sup>57</sup> The full program description read:

Five spectators versus five performers . . . looking for a partner. "Internal" explores how intimate you can get within 25 minutes one-on-one. Drinks and mandolins accompany a game of give and take; speed-dating meets group therapy.<sup>58</sup>

One year later, when the same show was performed in Dublin, the program description was similar but included the warning: "Contains nudity."<sup>59</sup> Six months after that, at a festival in Utrecht, the program description was considerably expanded:

52. See Natasha Tripney, *Edinburgh: Internal*, INTERVAL DRINKS BLOG (Sept. 1, 2009, 2:10 PM), [http://intervaldrinks.blogspot.com/2009\\_09\\_01\\_archive.html](http://intervaldrinks.blogspot.com/2009_09_01_archive.html).

53. Trueman, *supra* note 20.

54. See Alan Chadwick, *Internal Is a Unique Kind of Affair*, METRO.CO.UK (Aug. 26, 2009), <http://www.metro.co.uk/metrolife/727028-internal-is-a-unique-kind-of-affair>; Carla Lever, *Acting Out: Men Your Mother Warned You About*, IT'S JUST A STAGE (Sept. 4, 2009, 12:41 AM), <http://cleverblogs.wordpress.com/2009/09/04/acting-out-men-your-mother-warned-you-about> ("I realised that I'd essentially paid £16 for a 25 minute date. Then, I felt a little dirty."); Brian Logan, *A Night at the Theatre and the Star Is—You*, SUNDAY TIMES (Apr. 27, 2010), [http://entertainment.timesonline.co.uk/tol/arts\\_and\\_entertainment/stage/theatre/article7108762](http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/stage/theatre/article7108762).

55. See Chadwick, *supra* note 54 (describing a theatre participant who "became so transfixed with the actress he was paired off with he stalked her through the internet").

56. See William McEvoy, *Theatre—The Art of Seduction*, STAGE BLOG (Aug. 28, 2009, 1:30 PM), <http://blogs.thestage.co.uk/edinburgh2009/2009/08/theatre-the-art-of-seduction>; Trueman, *supra* note 20.

57. Edinburgh Festival Fringe 2009 Program, *supra* note 49.

58. *Id.* No other disclosures were provided. The ticket seller in Edinburgh advised one patron: "You don't know what you're in for, girl." Lever, *supra* note 54.

59. PROGRAMME, DUBLIN THEATRE FESTIVAL (2012), available at <http://www.dublintheatrefestival.com/programme/display.asp>.

We are five performers looking for a partner. We would like to invite you to the next performance of Intern, our individual performance space, where you can get to know us in a warm and relaxed atmosphere. We guarantee an intimate and highly personal treatment. Please warn us in time if you start to lose control over your emotions. We will ensure an elegant and discrete solution.

...

[T]his intimate performance demands a different role from the audience. In one to one scenes the creators will not just put you on the wrong track, but they will mercilessly send you crashing down as well.

Dutch and Flemish spectators appear to be slightly less easily swayed, but in Scotland, 1 in 3 spectators left the performance in tears.<sup>60</sup>

The Utrecht program also included an age recommendation: "Ages 14 and up."<sup>61</sup> Shortly thereafter, when the show moved to Singapore, the festival program warned of a "brief scene of nudity, which may be deemed unsuitable for young audiences."<sup>62</sup> There was no mention of audiences being driven to tears, but the program did warn participants that they would experience "a state of self-questioning which lasts long after the session is over."<sup>63</sup>

One can only imagine what prompted these changes in the program description—a marketing strategy? Audience response, criticism, or complaints? Differences in local laws and community sensibilities?

## 2. *The Smile Off Your Face*

This one-on-one piece by Ontroerend Goed begins with the audience member blindfolded, placed in a wheelchair with hands bound, and wheeled into a darkened room.<sup>64</sup> With the blindfold remaining and hands still bound, the audience member then has a series of physical encounters with unseen performers—fingers stroking hair, chocolate placed in the mouth, whispers in the ear, legs intertwined on a bed, scents under the nose, a lighter flicked close to

60. *Trilogie-Intern: Ontroerend Goed*, TWEETAKT, <http://www.tweetakt.net/#/en/programma-2011/Trilogie-Intern-388/INFO> (last visited Nov. 14, 2012).

61. *Id.*

62. PROGRAMMES, SINGAPORE ARTS FESTIVAL (2011), <http://artsmanagement.buffalo.edu/docs/SgArtsFest2011.pdf>.

63. *Id.*

64. See Misha Berson, *Performance Review: Giant Magnet's Intimate Encounter*, SEATTLE TIMES (May 14, 2009), [http://seattletimes.nwsources.com/html/thearts/2009217650\\_zart13intimate.html](http://seattletimes.nwsources.com/html/thearts/2009217650_zart13intimate.html); Lucy Farmer, *Theatre, Personally*, MORE INTELLIGENT LIFE, <http://moreintelligentlife.com/content/arts/lucy-farmer/theatre-personally> (last visited Dec. 28, 2012); Natasha Tripney, *Review: Smile off Your Face*, MUSICOMH, [http://www.musicomh.com/theatre/smile\\_0508.htm](http://www.musicomh.com/theatre/smile_0508.htm) (last visited Mar. 8, 2011).

the face, a flame brushing the chin, touching someone's face, dancing, being thrown against a wall.<sup>65</sup>

### 3. Works by Adrian Howells

Adrian Howells performs one-on-one shows that involve simple but intimate gestures. In *Salon*, he provides hair washing and a head massage.<sup>66</sup> In *Held*, he holds the participant's hands across a kitchen table, asking personal questions, and offering personal confessions.<sup>67</sup> They move to a sofa, where he places his arm around the participant.<sup>68</sup> Then they move to a bedroom, where they spoon silently for thirty minutes.<sup>69</sup> Before the spooning, he offers to place a pillow between himself and the participant so that there is no body contact.<sup>70</sup> In *Foot Washing for the Sole*, he washes and massages the participant's feet for thirty minutes in a locked room.<sup>71</sup> In *The Pleasure of Being*, the participant is naked, while being bathed, cradled, and fed by Howells.<sup>72</sup>

Howells has noted: "I'm very aware of the parallels between what I'm doing and what a sex worker does."<sup>73</sup>

### 4. *Sleep No More*<sup>74</sup>

In Punchdrunk's reimagining of *Macbeth*, participants can wander the performance space freely for three hours, encountering performers in different rooms enacting different scenes.<sup>75</sup> Audience members are required to wear identical masks; these somewhat restrict peripheral vision, and they can be difficult to fit over

65. See Berson, *supra* note 64; Crawley, *supra* note 48; Farmer, *supra* note 64; Fisher, *supra* note 30; Sulaiman, *supra* note 48; Tripney, *supra* note 64.

66. Heddon & Howells, *supra* note 32, at 4–5.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 5.

71. Gardner, *supra* note 1.

72. Crawley, *supra* note 48. Howells reports that his work is vetted by an ethics committee at Glasgow University. *Id.*

73. *Id.*

74. See Barbara Hoffman, *You Masked For It! Theater Piece Plays with Audience*, N.Y. POST (June 15, 2011), [http://www.nypost.com/p/entertainment/theater/you\\_masked\\_for\\_it\\_F3YwfEWczC1CHoXMhDILuM](http://www.nypost.com/p/entertainment/theater/you_masked_for_it_F3YwfEWczC1CHoXMhDILuM); Erik Piepenburg, *Stage Is Set. Ready for Your Part?*, N.Y. TIMES (Mar. 16, 2011), <http://www.nytimes.com/2011/03/20/theater/sleep-no-more-from-punch-drunk-transforms-chelsea-warehouses.html>.

75. Gia Kourlas, '*Sleep No More*,' But Move Nonstop, N.Y. TIMES (Sept. 6, 2011), <http://www.nytimes.com/2011/09/07/arts/dance/sleep-no-more-is-theater-embedded-with-dancers.html>; Piepenburg, *supra* note 74.

eyeglasses.<sup>76</sup> The action takes place on five floors and approximately one hundred rooms of a converted warehouse building.<sup>77</sup> There are no maps, diagrams, timetables, or programs.<sup>78</sup> Some of the performance spaces, and most of the hallways connecting them, are dimly lit. The floors are uneven in some areas.<sup>79</sup> On some floors, participants must push open heavy metal fire doors to proceed from the fire stairs to the performance areas. In their excitement and haste, they sometimes let the door swing shut on people behind them. The fire stairs are themselves a performance space, as characters leave a scene on one floor and run quickly up or down the fire stairs and down the darkened hallways to get to their next encounter. Audience members race behind them, trying not to lose sight of them in the darkness, the crowds, and the labyrinth of corridors, for fear of missing out on the performers' next scene. In the darkness, some people stumble on the uneven flooring or trip over unseen obstacles. Performers may physically grasp individual participants and lead them to different rooms in the performance space for small group or one-on-one interactions.<sup>80</sup> New spectators are admitted every fifteen minutes during the first hour.<sup>81</sup> As the evening proceeds, the crowds get larger, and some pushing and shoving occurs. Some scenes involve fog machines, lasers, strobe lights, loud music, violent grappling, and nudity. One actress "faints" into the arms of a spectator. Another performer enlists a spectator to help carry the actress's "dead" body.<sup>82</sup> At one point, two or three spectators are ushered into a room with one or more performers who then shut the door, locking out the other spectators while those inside experience a private scene involving violent interrogation techniques. A sizeable contingent of "stewards"—identifiable by their distinctive masks—are scattered strategically throughout the stairwells and corridors.

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76. Piepenburg, *supra* note 74.

77. Britt Aboutaleb, *Sleep No More's Scary Fun*, ELLE (Mar. 29, 2012), <http://www.elle.com/news/culture/sleep-no-mores-scary-fun-18352>; Sarah Kaufman, 'Sleep No More': Part 'Macbeth,' Part 'Hitchcock' and Part 'Haunted House', WASH. POST (Apr. 23, 2011), [http://www.washingtonpost.com/entertainment/theater-dance/sleep-no-more-a-macbeth-full-of-sound-and-fury--and-fear/2011/04/18/AFGndVPE\\_story.html](http://www.washingtonpost.com/entertainment/theater-dance/sleep-no-more-a-macbeth-full-of-sound-and-fury--and-fear/2011/04/18/AFGndVPE_story.html).

78. See Kaufman, *supra* note 77 ("How long you stay, where you go, and what you see is entirely up to you.").

79. The Author offers the details in this paragraph based on her own first-hand experience.

80. See also Benedict Y., *Review: Sleep No More*, YELP (Sept. 1, 2011), <http://www.yelp.com/biz/sleep-no-more-new-york> ("Some actors will stop and pull a single audience member into a room for a private interaction after a 'scene.'").

81. SLEEP NO MORE, <http://sleepnomorenyc.com/tickets.htm> (last visited Nov. 14, 2012).

82. Kourlas, *supra* note 75.



Approximately twenty-four hours before their time of admission, each ticket buyer receives an email message containing pre-show instructions, including:

Wear shoes you can walk in.

...

Given the choice, we recommend contact lenses over eye glasses.

...

Guests under the age of 16 will not be permitted entry[;]

and, under the heading "Safety":

Strobe lights, haze and laser effects will be used in the performance. Audiences may experience intense psychological situations. There are stewards posted throughout for your safety. Guests with special needs should contact us at [info@sleepnomore.nyc.com](mailto:info@sleepnomore.nyc.com).<sup>83</sup>

At the start of each performance, a pitch-dark entry passage funnels the spectators into a bar area, to which the hosts also encourage them to retreat at any point when the show becomes "too much" for them. Both before and during the show, spectators may purchase alcohol in the bar. It does not appear that any member of the company assesses whether a spectator who visits the bar has become too inebriated to rejoin the performance and the growing crowd of participants. Later in the run, the company adds a rooftop bar and restaurant. Messages emailed to ticket purchasers before the show encourage them to spend time there before entering the performance space and to consume large bowls of alcoholic "punch."<sup>84</sup>

Some performers report having been touched inappropriately by members of the audience.<sup>85</sup>

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83. E.g., Email from Jenny Weinbloom, Marketing Assoc., Sleep No More, to Mary LaFrance (Mar. 18, 2011, 10:55 PM) (on file with author).

84. John Del Signore, *Gallow Green Keeps Sleep No More Vibe Alive With Haunted Rooftop Punch Bar*, GOTHAMIST (Oct. 6, 2012), [http://gothamist.com/2012/10/06/gallow\\_green\\_keeps\\_sleep\\_no\\_more\\_vi.php](http://gothamist.com/2012/10/06/gallow_green_keeps_sleep_no_more_vi.php).

85. Hoffman, *supra* note 74; Kourlas, *supra* note 75.

### 5. *The Factory*<sup>86</sup>

This 2008 production by Badac Theatre Company cast its audience members into the role of Jewish prisoners being taken to the gas chambers at Auschwitz.<sup>87</sup> Actors played the prison guards and a few of the prisoners.<sup>88</sup> During the hour-long show, which took place in underground tunnels, the actors subjected the participants to abusive conduct that might satisfy some legal definitions of assault.<sup>89</sup> The guards behaved aggressively toward the prisoners, screaming and making deafening noises by banging metal clubs on sheets of metal, shouting orders at them, approaching them in intimidating ways, and taking them down stairways into a series of smaller rooms.<sup>90</sup> At the end, the actor-guards dragged the actor-prisoners for a distance and ordered all of the prisoners to remove their clothes (although apparently only the actor-prisoners complied); they also ordered all of the prisoners to stand against the wall.<sup>91</sup> Some audience participants reported feeling terrified; some began to cry.<sup>92</sup> Some audience members left, and apparently the actors did not obstruct them (although it is unclear whether all audience members realized that they had this option).<sup>93</sup> Before the performance, Badac members had asked audience members whether they were claustrophobic,<sup>94</sup> and Badac reportedly asked the box office to warn participants about the show's content before issuing tickets, although the details of that warning have not been published.<sup>95</sup> At one performance, the guards

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86. See BADAC THEATRE, <http://www.badactheatre.com/factory.htm>; Laura Barnett, 'Some People Leave, Some People Cry': *The Factory Brings Home the Horror of Auschwitz*, GUARDIAN (Aug. 4, 2008), <http://www.guardian.co.uk/culture/2008/aug/05/edinburghfestival.theatre2>; Peter Lathan, *Fringe 2008 Reviews, The Factory*, BRITISH THEATRE GUIDE, <http://www.britishtheatreinfo.org/otherresources/fringe/fringe08-43.htm> (last visited Mar. 8, 2011); Brian Logan, *Edinburgh Festival: The Factory*, GUARDIAN (Aug. 20, 2008, 12:49 PM), <http://www.guardian.co.uk/culture/2008/aug/20/theatre.edinburghfestival>; Ian Shuttleworth, *Possessed by a Past that Shouts Back*, FIN. TIMES (Aug. 13, 2008, 3:00 AM), <http://www.ft.com/cms/s/0/873a76d4-68ce-11dd-a4e5-0000779fd18c.html>.

87. Barnett, *supra* note 86.

88. *Id.*

89. See *id.*; Lathan, *supra* note 86.

90. See Angie Brown, *Fringe Show Felt Like 'Torture'*, BBC NEWS (Aug. 15, 2008), <http://news.bbc.co.uk/1/hi/7563083.stm>; Logan, *supra* note 86.

91. Barnett, *supra* note 86; *Edinburgh Fringe Diary: Shock and Awe*, MORE INTELLIGENT LIFE (Aug. 18, 2008), <http://moreintelligentlife.com/story/edinburgh-fringe-diary>; Logan, *supra* note 86.

92. Brown, *supra* note 90.

93. Barnett, *supra* note 86; Brown, *supra* note 90.

94. *Strange Brew: The Weirdest Week in Scotland*, ECONOMIST (Aug. 22, 2008), <http://www.economist.com/node/11950948>.

95. Brown, *supra* note 90.

were so aggressive that a critic who was attending the show refused to follow their commands.<sup>96</sup> A week later, he engaged in a bar fight with the show's creator and one of the actors; the critic claimed that the men attacked him because they were angry with him for disrupting the performance.<sup>97</sup> After a second assault two days later, the police had to be called.<sup>98</sup>

According to Dr. Matthias Schwannauer, a clinical trauma psychologist at Edinburgh University, in extreme circumstances such as those created by the actors in *The Factory*, audience members may experience genuine trauma.<sup>99</sup> When an audience member reported feeling terrorized by Badac's production, Schwannauer responded:

If you flood people with noise and move towards them it increases their physical threat as the brain is subjected to a multi-sensory impact. This does not evoke sympathy because there is acute threat and, instead, the reflective part of the brain is shutdown and you can't reason that it is not real. The extreme noise causes the brain to feel confused and I know some people who would be tipped over the edge from this show. Your reaction has been similar to that of a trauma victim.<sup>100</sup>

Badac's founder, Steve Lambert, calls his work the "Theatre of Violence."<sup>101</sup> Although he describes Badac's focus as "human rights issues," he celebrates violence as an essential element of his technique:

To approach this "Theatre of Violence" our work must be extreme. The actors will be led to a point of physical destruction, where they have no more to give, from this exhaustion, this freedom, we will explore their violence, we will pull from them their capacity for destruction and channel this into the play.

The experience this creates for both the actors and the audience will be intense, disturbing, brutal and destructive. This is what we want. If we are to understand both the capabilities and suffering of man then we must expect the experience to be painful.<sup>102</sup>

While Lambert's statement provides information that might have been useful to consumers deciding whether to purchase tickets to

96. See Honour Bayes, *A Man Apart*, FEST (July 16, 2010), [http://www.festmag.co.uk/archive/2010/99483-a\\_man\\_apart](http://www.festmag.co.uk/archive/2010/99483-a_man_apart); Logan, *supra* note 54; Shuttleworth, *supra* note 86; Ian Shuttleworth, *Prompt Corner—Issue 16-17/2008*, THEATRE RECORD (Aug. 2008), <http://theatrecord.org/Archives/2008/archives16-17-2008.html>; Chris Wilkinson, *Edinburgh Festival: Holocaust Show's Theatre of Violence Spills Offstage*, GUARDIAN (Aug. 22, 2008, 10:45 AM), <http://www.guardian.co.uk/culture/theatreblog/2008/aug/22/edinburghfestivalholocausts>.

97. See Bayes, *supra* note 96; Logan, *supra* note 86; Duska Radosavljević, *A Reflection on Internal*, 20 CONTEMP. THEATRE REV. 241, 249 (2010); Wilkinson, *supra* note 96.

98. See Bayes, *supra* note 96; Logan, *supra* note 86; Radosavljević, *supra* note 97; Wilkinson, *supra* note 96.

99. See Brown, *supra* note 90.

100. *Id.*

101. Steve Lambert, *Theatre of Violence*, BADAC THEATRE, <http://www.badactheatre.com/about.htm> (last visited Oct. 15, 2012).

102. *Id.*

*The Factory*, there is no indication that Badac provided such an advance disclosure to its patrons.

### 6. *En Route*<sup>103</sup>

In this solo experience offered by Australian company One Step at a Time Like This, the participant explores the streets and alleyways of a city (either Adelaide or Edinburgh) on foot. The participant listens to recorded music and text and follows instructions received via iPod, mobile phone, texting, and written messages hidden in various locations.<sup>104</sup>

At the start, the recording instructs the participant to be especially careful crossing busy city streets. Not only is the participant likely to be inattentive because he or she is focusing on the instructions (like an inattentive driver absorbed in a cell phone conversation), but the sound of the recording may drown out the sound of approaching traffic, especially if the participant turns up the volume because of noisy surroundings.

At several points, the participant is instructed to open doors and walk through them. But the directions are sometimes confusing, and it is possible to open the wrong doors and enter private spaces occupied by persons or businesses that are not part of the performance. One of these doors opens onto a cluttered construction site.

At one point, the participant is instructed to write graffiti on a public wall.<sup>105</sup> The event's organizers have left pieces of chalk for participants to use, and the wall is already covered with graffiti that previous participants (or perhaps the organizers) left.<sup>106</sup> The police (not actors posing as police) stop one participant and accuse her of violating the local graffiti ordinance. This uncomfortable police encounter ends only when the organizers intervene.

103. Kate Bassett, *Beautiful Burnout, Pleasance Courtyard, Edinburgh, En Route, Traverse Theatre, Promenade, Edinburgh Speechless, Traverse Theatre, Edinburgh, While You Lie, Traverse Theatre, Edinburgh*, INDEP. (Aug. 8, 2010), <http://www.independent.co.uk/arts-entertainment/theatre-dance/reviews/beautiful-burnout-pleasance-courtyard-edinburghbren-route-traverse-theatre-promenade-edinburghbrspeechless-traverse-theatre-edinburghbrwhile-you-lie-traverse-theatre-edinburgh-2046328.html>; Alice Jones, *En Route, Traverse Theatre, Edinburgh*, INDEP. (Aug. 16, 2010), <http://www.independent.co.uk/arts-entertainment/edinburgh-festival/en-route-traverse-theatre-edinburgh-2053382.html>; Joyce McMillan, *Theatre Review: En Route*, EDINBURGH FESTIVALS (Aug. 11, 2010), <http://www.edinburgh-festivals.com/viewreview.aspx?id=1498>.

104. See Bassett, *supra* note 103; Jones, *supra* note 103.

105. McMillan, *supra* note 103.

106. *Id.*

### 7. *Rider Spoke*

In Blast Theory's *Rider Spoke*, participants cruise city streets on bicycles, equipped with an earpiece and a handheld touch-screen computer on their handlebars.<sup>107</sup> They search for a secret place, and record a secret.<sup>108</sup> While cycling, they hear the secrets that others have recorded.<sup>109</sup>

### 8. *Accomplice*

Like *En Route* and *Rider Spoke*, the long-running multi-national production *Accomplice* requires participants to follow a selected route through an urban area (New York, Hollywood, or London). Unlike these other productions, *Accomplice* has a plot as well as characters portrayed by actors who interact with the patrons at several points on their journey.<sup>110</sup> *Accomplice* is a group experience, typically booking eight to ten patrons at a time.<sup>111</sup>

### 9. *Sub Rosa*<sup>112</sup>

David Leddy's *Sub Rosa* has been performed in the dark corners of an aging Glasgow theatre and in the equally dark labyrinth of a masonic lodge in Edinburgh.<sup>113</sup> The small audience moves from one cramped, dimly lit room to the next, meeting a different actor in each room, each of whom recounts the next installment of an increasingly horrific and gruesome narrative.<sup>114</sup> While nothing is visually explicit, the final images created by Leddy's text are sickening.<sup>115</sup> At one performance, an audience member faints during one of the final scenes.<sup>116</sup> After the gruesome denouement is revealed,

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107. Mansfield, *supra* note 35.

108. *Id.*

109. *Id.*

110. See Jason Zinoman, *More Street than Theater, A Mystery of New York*, N.Y. TIMES (Apr. 22, 2007), <http://theater.nytimes.com/2007/04/22/theater/22zino.html>; Danny Groner, *Accomplice: New York Is a Game You Won't Want to End*, HUFFINGTON POST BLOG (June 21, 2011, 12:38 PM), [http://www.huffingtonpost.com/danny-groner/-is-a-game-you-wont-want-\\_b\\_880987.html](http://www.huffingtonpost.com/danny-groner/-is-a-game-you-wont-want-_b_880987.html).

111. See ACCOMPLICE: PART GAME, PART THEATER, PART TOUR, <http://www.accomplicethe show.com> (last visited Jan. 8, 2013).

112. Tom Lamont, *Edinburgh Fringe Theatre*, GUARDIAN (Aug. 15, 2010), <http://www.guardian.co.uk/culture/2010/aug/15/edinburgh-festival-theatre>.

113. See Lyn Gardner, *David Leddy's Sub Rosa*, GUARDIAN (Aug. 10, 2010, 4:31 PM), <http://www.guardian.co.uk/culture/2010/aug/10/david-leddy-sub-rosa-review>.

114. See *id.*

115. See *id.*

116. See Lamont, *supra* note 112.

the ushers lead the audience out through a fire escape and deposit them on a dark unidentified street, with no guidance to help them find their way home.<sup>117</sup>

Here is how the Edinburgh Fringe brochure described the event:

A late-night gothic Victorian promenade for small audiences in a Masonic lodge . . . . A haunting, darkly comic tale of yet another chorus girl burning to death. Meet Flora McIvor and witness her meteoric rise to power in a corrupt music hall. Bloodthirsty coup or red velvet revolution? The management is getting away with murder.<sup>118</sup>

Nothing in this description sounds more challenging than an episode of *Law & Order*. The event was listed as suitable for ages fourteen and up.<sup>119</sup> Yet, to this relatively sophisticated theatre-goer (who has attended two previous David Leddy events), the experience was gratuitously and unexpectedly grotesque and upsetting. Another observer reported feeling that he was “going to implode with the misery of it all.”<sup>120</sup>

## 10. The Invisible Theatre of Augusto Boal

“Invisible theatre,” such as that of Augusto Boal, differs from other experiential theatre in that it takes place in public settings with no warning to bystanders that they are witnessing a theatrical performance.<sup>121</sup> Thus, bystanders typically believe that the events they are experiencing are real.<sup>122</sup> Much of Boal’s work predates the experiential-theatre pieces described above.<sup>123</sup>

### *a. The Liege Piece*

In this invisible theatre work, the performers intended to educate the audience on the problem of unemployment.<sup>124</sup> It began with an actor (Francois) entering a grocery store in the guise of an impoverished man.<sup>125</sup> He then placed grocery items in a cart and

117. See *id.*

118. David Leddy’s ‘Sub Rosa’, EDINBURGH FESTIVAL GUIDE, <http://edinburghfestival.list.co.uk/event/10004427-david-leddys-sub-rosa> (last visited Nov. 2, 2012).

119. *Id.*

120. Lamont, *supra* note 112.

121. Adrian Jackson, *Introduction* to AUGUSTO BOAL, GAMES FOR ACTORS AND NON-ACTORS xx–xxi (Adrian Jackson trans., 1992); Bonnie Burstow, *Invisible Theatre, Ethics, and the Adult Educator*, 27 INT’L J. LIFE LONG EDUC. 273, 273–75 (2008).

122. Jackson, *supra* note 121, at xx–xxi; Burstow, *supra* note 121, at 273–75.

123. Boal’s work began in the 1970s. See Burstow, *supra* note 121, at 274.

124. *Id.* at 275 (“The intent of the piece was to draw attention to and stimulate dialogue on the unemployment crisis in Belgium.”).

125. *Id.*

joined the line at the register.<sup>126</sup> When he reached the front of the line, Francois informed the cashier (who was not an actor) that he could not afford to pay for the items because he was unemployed.<sup>127</sup> Francois then improvised, depending on the cashier's response.<sup>128</sup> Other actors, posing as shoppers, joined the discussion, expressing various opinions on whether the cashier should let him have the food.<sup>129</sup> These actors prodded real shoppers into participating as well.<sup>130</sup> Unable to handle the situation, the cashier called the manager, who called the police and blocked the exit when Francois attempted to pay his bill and leave.<sup>131</sup> Francois was then arrested.<sup>132</sup> At the police station, the police discovered his microphone.<sup>133</sup> When Francois confessed that he was an actor in a performance, he was charged with "having a public performance without a license."<sup>134</sup> This episode generated significant publicity for the troupe, which attracted a large audience for a different event the next day.<sup>135</sup> But when the head of the company arrived at this event, three persons appearing to be police officers surrounded him in an attempt to arrest him.<sup>136</sup> The ensuing disruption delayed the performance for several hours.<sup>137</sup> Boal was later angered to discover that the "police" were actors from

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126. *Id.*

127. *Id.*

128. *Id.* (explaining how the actor "improvises in accordance with how the cashier responds").

129. *Id.* ("To stimulate dialogue, other actors posing as customers soon chime in and express their opinions. One called 'Annie' calls him a bum. Correspondingly, others commiserate with his plight and provide information about the dismal conditions faced by unemployed people.").

130. *Id.* ("The intent was to have onlookers both discuss the larger context and become involved in how the situation before them was handled . . . [P]rodded on by actors playing shoppers, the customers did indeed enter into an important discussion.").

131. *Id.* ("Distraught at this disruption of her business, the manager called the police and blocked the exit.").

132. *Id.* at 276 ("Francois was taken to the police station, where, in the spirit of invisible theatre, he continued on in role, imploring the police to understand his plight as an unemployed man. Invisible theatre eventually came to an abrupt end when the police discovered the microphone and Francois was forced to admit that he was an actor, with a job and good salary.").

133. *Id.*

134. *Id.*

135. *Id.* ("Meanwhile, the entire episode had caused good publicity for the theatre company. The next day, the whole troupe was scheduled to do a public presentation on three forum pieces. To their delight, they arrived to a full audience.").

136. *Id.* ("As Boal arrived at the forum, three 'police officers' tried to arrest him.").

137. *Id.* ("The forum was delayed for hours while a frantic theatre company scrambled to deal with the crisis . . .").

another troupe who had decided to use Boal's own techniques against him.<sup>138</sup>

*b. The New York Piece*

This invisible theatre piece took place in post-9/11 New York.<sup>139</sup> Actors posing as "red-necked tourists" near the Empire State Building called attention to themselves by making racist remarks directed at several Muslim women who appeared to be innocent bystanders (but who were in fact actresses); the actors even suggested that the women might be terrorists.<sup>140</sup>

*c. The Paris Metro Piece*

This invisible theatre piece took place on a subway train in the Paris metro.<sup>141</sup> Male and female actors boarded the train at several stops.<sup>142</sup> At different points in the train's journey, one actor sexually harassed an actress, and another actress sexually harassed a different actor.<sup>143</sup> Several other passengers on the train—bystanders, not actors—tried to intervene or began to argue with one another about whether this conduct was appropriate.<sup>144</sup> Boal reports that a fight nearly broke out when a male actor threatened to molest the wife of a spectator who had intervened; the actor had to make a quick exit at the next stop.<sup>145</sup> At another performance, the commotion became so great that the train had to be stopped, and more onlookers gathered to watch.<sup>146</sup> At this point, the actors ran out of scripted material, and were compelled to improvise while the crowd became increasingly engaged.<sup>147</sup>

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138. *Id.* ("[I]t was perhaps expectable that sooner or later, someone might decide to turn the tables on Boal."). Interestingly, when Boal discovered the "police" were actors, he was "furious." *Id.* ("As [Boal] saw it, unlike his company, whose work had been unconscionably disrupted, this other company had acted shamefully.").

139. *Id.* at 279 (discussing "Invisible Theatre in Code Orange New York' (Anonymous 2003)—a piece enacted in the aftermath of 9/11.").

140. *Id.*

141. *See* BOAL, *supra* note 121, at 6–9.

142. *Id.* at 6–7.

143. *See id.* at 7.

144. *See id.* at 8.

145. *Id.* at 8–9.

146. *Id.* at 9.

147. *Id.*



## II. BLURRING THE BOUNDARIES: RISKS

As the above examples illustrate, experiential theatre jettisons many of the theatrical conventions that delineate the physical or psychological boundaries between audience and performer, and between reality and fiction. As one performer has observed: "[I]t's not necessarily a performance any more than it is a personal service, like a masseuse or a hairdresser or, I suppose, a prostitute."<sup>148</sup> But real activities can lead to real injuries, including physical accidents, unexpected confrontations with police, or psychological or physical harm arising from embarrassment, fear, shock, trauma, or reexperiencing of preexisting trauma.

Some audience participants have described their experiences as similar to therapy, including sex therapy.<sup>149</sup> But in most cases it does not appear that the performers have any training or licensing in therapy.

Audiences accustomed to thinking of the theatre as a safe refuge tend to approach a performance with an open and vulnerable state of mind.<sup>150</sup> Performance artist Adrian Howells takes this vulnerability into account in composing his works: "People are so willing—and that mustn't be abused. But I always make it clear that what I'm doing is art, not therapy."<sup>151</sup> He adds: "It has made me even more aware that you have to make work that is transparent, and that if you are going to lock the door or lie down on a bed with people, you have to get their permission."<sup>152</sup> Unlike most experiential performers, Howells has his work vetted in advance by an ethics committee.<sup>153</sup>

Because participants view their theatrical experience as "make-believe," they may willingly engage in activities to which they would not ordinarily consent (at least not where strangers are involved). They may obey because they feel pressure to follow instructions, they trust the show's creators, they perceive the experience as not real, or they are too intimidated to refuse. This could explain, for example, why audience participants at *En Route* are willing to write graffiti on a public wall, *Internal* participants reveal intensely personal information to strangers, and participants in Adrian Howells's productions are willing to climb into a bed with a

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148. Logan, *supra* note 19 (quoting performer Nicole Blackman).

149. Tripney, *supra* note 64.

150. See Crawley, *supra* note 48 (describing patrons who approach Adrian Howells's works as a form of therapy); Tripney, *supra* note 64 (describing her experience as a patron at an Ontroerend Goed production).

151. Gardner, *supra* note 1.

152. *Id.*

153. See *id.*

stranger or remove their clothes and be bathed by him. Audience participants who become uncomfortable during the performance may be reluctant to voice their objections, to refuse instructions or requests from the performers, or to leave.<sup>154</sup> Howells notes that the reluctance to object may be particularly acute in one-on-one interactions: “[E]ven more in a one-to-one show people feel that they have to go along with things in case they sabotage the piece. It’s about creating a safe space.”<sup>155</sup> This phenomenon recalls Stanley Milgram’s famous 1961 experiment in which human subjects believed they were subjecting other human subjects to increasingly painful electric shocks, but continued to do so because the investigator told them that it was essential to the experiment.<sup>156</sup>

One critic describes the “seduction ritual” in which the creators of *Internal* manipulated audience members during their fictional “dates”:

Everything seems real (including the said seduction, with the twist being here that the audience members are being seduced individually and directly), yet everything is illusory by virtue of being a theatre event. The rules are not redefined for this particular situation, so we assume that we are expected to respond as we usually do in theatre in order to obtain pleasure from the event—that is, “suspend our disbelief,” go with the flow and suspend judgment until afterwards. Yet, how does one go with the flow in an event such as this one which might well end up in a transgression of physical boundaries (and . . . in the question of romantic “in/fidelity” if the audience member happens to be attached). The ambiguity is enhanced by the fact that even after we leave the theatre space, not only do we continue thinking about it and discussing it, we also receive a letter from our date at our home address some days later. Should we reply to it?<sup>157</sup>

One of *Internal*’s creators and performers, Alexander Devriendt, acknowledges this blurring of fiction and reality: “I was baffled that people believed in the reality of it.”<sup>158</sup> A critic who participated in *Internal* responds: “What *Internal* revealed was that, after years of passively receiving theatre, audiences are unpractised in disentangling reality and illusion; and that one-on-one’s exponents

154. Cf. Fisher, *supra* note 30 (“In this performance there’s no choice: you have to talk, you have to open up a little bit.” (quoting performer Joeri Smet of *Internal*)); see also Trueman, *supra* note 20 (“[T]he two most telling moments of my *Internal* experience both involved doing something that, in that present moment, I was consciously unwilling to do.”).

155. Susan Mansfield, *Interview: Adrian Howells, Theatrical Producer*, SCOTSMAN (May 15, 2010, 8:30 PM), <http://news.scotsman.com/entertainment/Interview-Adrian-Howells-theatrical-producer.6297722.jp>.

156. See STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 35 (1974). Consistent results were reported in a similar experiment more than forty years later. See Jerry M. Burger, *Replicating Milgram: Would People Still Obey Today?*, 64 AM. PSYCHOLOGIST 1, 9 (2009).

157. Radosavljević, *supra* note 97, at 250.

158. Logan, *supra* note 19.

have a duty of care towards participants.”<sup>159</sup> David Jubb, co-artistic director of Battersea Arts Centre in London (which sponsored a festival of one-on-one theatre in 2010), has observed: “One-on-one throws up those questions . . . Who is in control? Who’s the author? Who is responsible to whom?”<sup>160</sup>

Felix Barrett, codirector of Punchdrunk’s *Sleep No More*, perceives the audience-response phenomenon differently, as a form of audience empowerment: “It’s important that the audience feels empowered to break all the rules that they’ve been trained in over their lifetime.”<sup>161</sup> In *Sleep No More*, however, audience members (with a few exceptions) are allowed to remain in groups throughout the performance and are free to be as passive as they like, unlike one-on-one performances such as *Internal* or the works of Adrian Howells.<sup>162</sup> *Sleep No More* also takes place on multiple floors of conjoined warehouses, and audiences can (again, with a few exceptions) leave any area where the actors or events make them uncomfortable.<sup>163</sup> Also, the actors in *Sleep No More* interact mostly with one another, only occasionally directing their attentions to individual audience members.<sup>164</sup> In contrast, audiences in Badac’s *The Factory* and David Leddy’s *Sub Rosa* are confined in a small area where disturbing events take place with no obvious means of escape; in *The Factory*, actors directly assault audience members.<sup>165</sup> Thus, the empowerment that some audience members may feel in *Sleep No More* is unlikely to reflect the universal experience of experiential-theatre audiences. Furthermore, the audience empowerment in *Sleep No More* has reportedly subjected some performers to unwanted touching and has led some audience members to complain of unruly behavior (pushing, shoving, etc.), thus indicating that the audience empowerment that Barrett describes may increase the risk of harm to performers and bystanders.

Some of the specific concerns that experiential performances raise include the following:

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159. *Id.*

160. *Id.*

161. Piepenburg, *supra* note 74.

162. *See id.*

163. *See id.*

164. *See* Scott Brown, *Theater Review: The Freakily Immersive Experience of Sleep No More*, N.Y. MAG. (Apr. 15, 2011, 5:30 PM), [http://www.vulture.com/2011/04/theater\\_review\\_the\\_freakily\\_im.html](http://www.vulture.com/2011/04/theater_review_the_freakily_im.html).

165. *See supra* Parts I.B.5 (*The Factory*), I.B.9 (*Sub Rosa*).

### A. Harm to Audience

Experiential theatre typically does not screen audience participants to discover which ones have preexisting emotional or psychological sensitivities or prior experiences of trauma, which may increase their risk of emotional harm.<sup>166</sup> Speaking of one of his company's shows, a member of Ontroerend Goed acknowledged:

In *The Smile Off Your Face* it is really a very small minority that are freaked out and usually it has to do with a personal, maybe traumatic experience . . . . We once had a girl who had been in a hospital for a very long time; she had had cancer, and just being in the wheelchair made her think about this period and she started crying.<sup>167</sup>

In other cases, various aspects of a performance could traumatize audience members who suffer from claustrophobia or other phobias, or who have been the victims of violence or sexual abuse. According to the clinical psychologist who commented on Badac's *The Factory*, a theatrical event by itself is capable of triggering genuine trauma.<sup>168</sup> Physical harm could result if a distressed patron suffered a heart attack or incurred an injury while fleeing the venue.

The physical setting may present additional risks if the venue itself is not appropriate or is not sufficiently safe for the activities in which the audience will engage. In an interior setting, for example, the lighting could be inadequate, or the flooring uneven, or the crowds might become careless or unruly.<sup>169</sup> In an exterior setting, traffic or pedestrians could present hazards.

Many risks will be unique to the nature of the production. In *Internal*, the atmosphere of intimacy can lead participants to reveal personal information based on a false sense that the information will be treated as confidential.<sup>170</sup> Participants report that it was surprisingly easy to find themselves revealing deeply personal information and feelings to complete strangers.<sup>171</sup> As Joeri Smet, one of *Internal*'s creators, acknowledged: "It's . . . very strange how easily people open up. Sometimes you can be talking to them for two minutes and already they tell you something incredibly personal and they just continue going into it."<sup>172</sup> Smet admits that the audience's perception of the event as theatre, rather than ordinary social interaction, is responsible for this vulnerability: "Internal would never

166. See *supra* notes 58–62 and accompanying text (describing the few warnings provided by the Edinburgh Fringe program).

167. Fisher, *supra* note 30 (quoting performer Joeri Smet).

168. See *supra* notes 99–101 and accompanying text.

169. See *supra* Parts I.B.4 (*Sleep No More*), I.B.6 (*En Route*), I.B.7 (*Rider Spoke*).

170. See Fisher, *supra* note 30.

171. See Mansfield, *supra* note 35; Tripney, *supra* note 64.

172. Fisher, *supra* note 30.

work were it not labelled as a theatre event. It could not extract the information and actions that it needs in order for the second act to function.”<sup>173</sup> A critic-participant agrees:

By virtue of its being theatre, we assume certain things about Internal's motives. Where in real life, we might approach it with guarded distrust, here we open up because we assume its motives are grounded in aesthetics rather than ethics, we assume that all it does it does in reverend care of us, ie [sic] for our benefit as audience, rather than for its own gratification or advantage.<sup>174</sup>

But if performers later disclose this personal information to other participants (as happened in *Internal*), this can lead to emotional distress involving feelings of betrayal, anger, or humiliation.<sup>175</sup> In addition, the person who disclosed the information has no way to know whether the performers (or other audience participants) will disclose this information to others after the performance ends. In the excitement (or pressure) of the moment, the audience participant is unlikely to have thought about the possible consequences of the disclosure.

### B. Harm to Performers

While even conventional entertainment can expose performers to harm from spectators, the interactive and often intimate nature of experiential theatre can increase the risk that unanticipated audience reactions will harm performers. Those reactions may involve fear, anger, panic (as in Badac's *The Factory*), emotional fixation (as exemplified by the stalking incident at *Internal*), or other unexpected aggression (such as the unwanted touching in *Sleep No More*, or the intervention of bystanders in Boal's invisible theatre).<sup>176</sup> Because the companies do not prescreen their audiences, performers have no way to know whether they are interacting with spectators who have mental or emotional instabilities.<sup>177</sup> Discussing *Internal*, one critic observed:

I think there is risk on the part of the performers, precisely because of the response that their behaviour could elicit. Sliding a photo of oneself across a table, baring one's chest, kissing a stranger, asking intrusive questions are all actions that carry some element of danger. Yes, there is an imbalance in that the performers have signed up to take those

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173. Trueman, *supra* note 20.

174. *Id.*

175. See Chadwick, *supra* note 54; Fisher, *supra* note 30; Logan, *supra* note 19; Tripney, *supra* note 64; see also Lever, *supra* note 54; Logan, *supra* note 54.

176. See *supra* Parts I.B.5 (*The Factory*), I.B.1 (*Internal*), I.B.4 (*Sleep No More*), I.B.10 (Boal).

177. See Trueman, *supra* note 20.

risks knowingly and willingly, whereas we only discover ourselves to be risking something in the moment or, worse, after having done so.<sup>178</sup>

Or, as one of *Internal's* creators acknowledged: "In *Internal*, people don't really freak out, but I must say, from my experience performing it, there are a lot of strange people around."<sup>179</sup>

### C. Harm to Bystanders or Property

Some experiential performances—especially those staged in public spaces—create a risk of harm to nonparticipating persons or their property. Promenade performances such as *Accomplice*, *En Route* and *Rider Spoke* typically take place in busy urban environments, since that is where most theatre audiences are found. Participants who are engrossed in following instructions delivered by live actors or by telephone, text messages, or iPod recordings (and whose ability to hear ambient sound may be impaired by their use of earbuds or headphones to hear these instructions) may be inattentive to the risks posed by traffic, uneven pavement, or pedestrians, may enter private property or unsafe areas by mistake, may accidentally damage private or public property, or may engage in behavior that causes distress to bystanders or distracts local police authorities from their other duties. Participants in more provocative invisible-theatre events may incite panic or violence among bystanders.

### D. Risk of Violating Local Laws

Experiential-theatre productions sometimes fail to screen audiences for age appropriateness and often fail to disclose to potential audiences whether the performance involves violent, offensive, frightening, or sexually explicit material.<sup>180</sup> Typically, the performance is not subject to a ratings system, voluntary or otherwise.<sup>181</sup> In contrast, the video game, motion picture, and recording industries in the United States utilize voluntary ratings systems.<sup>182</sup> If theatre companies do not properly screen audiences, in

178. *Id.*

179. Fisher, *supra* note 30 (quoting performer Joeri Smet).

180. See *supra* notes 58–62 and accompanying text (discussing the lack of warnings provided by the Edinburgh Festival Fringe program).

181. PROGRAM, EDINBURGH FESTIVAL FRINGE (2009), *supra* note 49.

182. In the United States, the Entertainment Software Rating Board provides ratings for video games, see Joel Federman, *Rating Sex and Violence in the Media: Media Ratings and Proposals for Reform*, KAISER FAMILY FOUND. 17–18 (2002), and the Motion Picture Association of America provides ratings for motion pictures, *id.* at 1–2. For sound recordings, there are no ratings per se, but record companies often place a Parental Advisory label on recordings with explicit lyrics. *Id.* at 13–15.

addition to creating a risk of harm to audiences, those companies that incorporate adult material (or serve alcohol to patrons) may violate local laws for the protection of minors.<sup>183</sup>

Promenade theatre may also run afoul of local police or environmental ordinances.<sup>184</sup> For example, *En Route* required participants to write graffiti on a public wall.<sup>185</sup> Although the company apparently intended to clear this in advance with local authorities, some miscommunication must have occurred, because police confronted at least one participant during one of the early performances.<sup>186</sup>

### III. TRADITIONAL LEGAL DOCTRINES

Like other businesses, theatre companies face potential legal liability if their activities cause injuries to their patrons or to others. The range of injuries that may arise from experiential-theatre events is broad, encompassing not only physical injuries and the emotional distress related to them, but also injuries that are purely emotional or psychological.<sup>187</sup> The circumstances under which purely emotional or psychological injuries may be actionable are particularly ill defined.

Surprisingly few court decisions address the liability of performers and proprietors for emotional or physical injuries arising from conduct that occurs in the course of a theatrical or similar performance. Although a few cases have applied a contracts analysis,<sup>188</sup> the vast majority of cases involve tort claims.<sup>189</sup>

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183. *E.g.*, N.Y. ALCO. BEV. CONT. LAW § 65 (McKinney 2012) (prohibiting serving alcohol to persons under twenty-one); N.Y. PENAL LAW § 260.10 (McKinney 2012) (making it a criminal offense to “knowingly act[] in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old”); VA. CODE ANN. § 18.2-371 (2012) (prohibiting adults from encouraging or contributing to any act that “renders a child delinquent, in need of services, in need of supervision, or abused or neglected”).

184. *E.g.*, N.Y. ADC LAW § 10-117 (2012) (prohibiting graffiti on public and private buildings or other structures).

185. *See supra* note 105 and accompanying text.

186. *See supra* Part I.B.6.

187. *See supra* notes 99–100, 166–175 and accompanying text.

188. Contract claims arising from performance-induced injuries involve an implied contract theory that closely resembles a tort analysis, and these cases seem to be largely confined to Alabama. In *Birmingham Amusement Co. v. Norris*, 112 So. 633, 635 (Ala. 1927), the Alabama Supreme Court held that a theatre owner was liable for injuries sustained by a patron when her seat collapsed. The court held that by accepting compensation from patrons, the proprietor “impliedly undertakes that the premises are reasonably safe for the purpose intended.” *Id.* Even emotional injuries may be compensable under this approach. *See Interstate Amusement Co. v. Martin*, 62 So. 404, 405 (Ala. Ct. App. 1913) (reversing trial court’s finding of liability, due to evidentiary error). The lower court in *Interstate Amusement* held that a proprietor may be liable for an employee-performer’s use of offensive language to a spectator who was invited onto the

Tort claims based on physical or emotional harm arising from theatrical events are most likely to be based on theories of intentional or negligent infliction of emotional distress or general negligence.<sup>190</sup> In appropriate cases, however, claims of intentional physical injury—such as assault, battery, or false imprisonment—could arise as well.<sup>191</sup>

### A. General Principles<sup>192</sup>

#### 1. Intentional Torts

In the context of a conventional theatrical performance, where physical contact between performers and audience is rare, intentional infliction of emotional distress is the intentional tort claim most likely to arise. Even this will be uncommon, however, because performers in conventional theatre rarely address individual audience members directly, unlike performers in more interactive events such as experiential theatre, improvisations, and stand-up comedy.<sup>193</sup>

In experiential theatre, emotional distress claims will still be the intentional tort claims most likely to arise; however, the interactive and often physical nature of experiential performances could, in some cases, give rise to other intentional tort claims, such as assault, battery, or false imprisonment.<sup>194</sup>

According to section 46 of the *Restatement (Second) of Torts* (*Second Restatement*), liability for intentional infliction of emotional distress arises when an actor<sup>195</sup> engages in “extreme and outrageous conduct” that intentionally or recklessly causes severe emotional distress to another.<sup>196</sup> The actor will be liable for the other person’s

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stage to participate in the performance. *Id.* In the court’s view, the ticket gave rise to contractual duties, including a duty to accord civil treatment to the patron. *Id.*

189. See *infra* Part III.A.

190. See, e.g., RESTATEMENT (SECOND) OF TORTS §§ 46, 297, 306, 313, 436 (1965).

191. See *id.*

192. Except as otherwise indicated, this discussion is based on general principles reflected in the *Second Restatement of Torts*. The laws of individual jurisdictions will vary.

193. See *supra* Part I.A.1.

194. See RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (battery); *id.* § 21 (assault); *id.* § 35 (false imprisonment). The *Third Restatement* contains no directly corresponding provisions.

195. In this general discussion of tort claims, the term “actor” refers to the person whose conduct is allegedly tortious, regardless of whether that person is an “actor” in the theatrical sense.

196. RESTATEMENT (SECOND) OF TORTS § 46(1). The substance of § 46(1) has been carried forward largely unchanged in the *Third Restatement*. See RESTATEMENT (THIRD) OF TORTS § 45 (Tentative Draft No. 5, 2007); see also 2 DAN DOBBS, PAUL HAYDEN & ELLEN BUBLICK, *THE LAW OF TORTS* §§ 385–89 (2d ed. 2011).



emotional distress and any resulting bodily harm;<sup>197</sup> in some cases, the actor may be liable to bystanders as well.<sup>198</sup> In either case, the victim's distress must be "so severe that no reasonable person could be expected to endure it."<sup>199</sup> The tort does not apply to "every slight insult or indignity one must endure in life,"<sup>200</sup> or to "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities."<sup>201</sup>

The actor satisfies the intent requirement not only where she desires to inflict severe emotional distress, but also where she knows that such distress is "substantially certain" to occur.<sup>202</sup> Thus, if a performer believes that her conduct toward a spectator will merely entertain, surprise, or challenge the spectator, the performer's conduct may not rise to the level of intentionality or recklessness necessary for liability.

The other intentional tort claims that may arise from experiential-theatre events are battery, assault, and false imprisonment. Under traditional common-law doctrines, a claim for battery may arise from an intentional contact that is either harmful<sup>203</sup>

197. RESTATEMENT (SECOND) OF TORTS § 46(1).

198. The *Second Restatement* outlines when liability to bystanders arises:

[T]he actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.

RESTATEMENT (SECOND) OF TORTS § 46(2); *see, e.g.*, *Craig v. M & O Agencies, Inc.*, 496 F.3d 1047, 1059 (9th Cir. 2007) (liability for emotional distress caused by sexual harassment); *Pollard v. E.I. DuPont De Nemours, Inc.*, 412 F.3d 657, 664, 667 (6th Cir. 2005) (same); *Koutsouradis v. Delta Air Lines, Inc.*, 427 F.3d 1339, 1344 (11th Cir. 2005) (mere insults or indignities are insufficient for liability); *Davis v. City of Hartford*, 601 F. Supp. 2d 488, 494 (D. Conn. 2009) (reasonable jury could find that subjecting employee to harassment and public insults was outrageous); *El Badrawi v. Dep't of Homeland Sec.*, 579 F. Supp. 2d 249, 279 (D. Conn. 2008) (liability for emotional distress could arise where defendants who arrested plaintiff knew or had reason to know that arrest was unlawful); *DiStiso v. Town of Wolcott*, 539 F. Supp. 2d 562, 569–70 (D. Conn. 2008) (jury could find extreme and outrageous conduct by school employees who failed to respond adequately to reports that student was subjected to racial slurs and physical abuse); *Price v. Socialist People's Libyan Arab Jamahiriya*, 384 F. Supp. 2d 120, 134 (D.D.C. 2005) (default judgment against foreign nation for extreme and outrageous conduct while detaining plaintiffs).

199. *Hamaker v. Ivy*, 51 F.3d 108, 111 (8th Cir. 1995); *see also* Robert L. Rabin, *Emotional Distress in Tort Law: Themes of Constraint*, 44 WAKE FOREST L. REV. 1197 (2009).

200. *Travelers Ins. Co. v. Smith*, 991 S.W.2d 591, 595 (Ark. 1999).

201. *McGrath v. Fahey*, 533 N.E.2d 806, 809 (Ill. 1988) (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

202. RESTATEMENT (SECOND) OF TORTS § 46 cmt. i; J.D. LEE & BARRY A. LINDAHL, *MODERN TORT LAW: LIABILITY AND LITIGATION* § 32:4 (2d. ed. 2012).

203. RESTATEMENT (SECOND) OF TORTS § 13.

or offensive;<sup>204</sup> an offensive contact is one that “offends a reasonable sense of personal dignity.”<sup>205</sup> Assault occurs when the tortfeasor intentionally places another “in imminent apprehension” of “harmful or offensive contact.”<sup>206</sup> False imprisonment occurs when the tortfeasor intentionally confines another within fixed boundaries, and the other is either aware of the confinement or harmed by it.<sup>207</sup>

## 2. Negligence-Based Torts

Negligence involves conduct that falls below the standard of care that would be observed by a reasonable person<sup>208</sup> and which subjects another to an unreasonable risk of harm.<sup>209</sup> An act may be negligent if the actor should realize that it involves an unreasonable risk of subjecting another party to harm or emotional distress that is likely to cause illness or bodily harm.<sup>210</sup> Additionally, if the act is likely to cause a third party to act in a way that creates an unreasonable risk of harm to another (e.g., frightening someone whose sudden physical reaction causes harm to another), the act may constitute negligence.<sup>211</sup> Under a negligence theory, a person that unintentionally causes emotional distress to another may be liable for resulting illness or bodily harm (e.g., a heart attack or an injury caused by fainting or attempting to flee) if he should have realized that his conduct involved an unreasonable risk of causing such distress and that it might cause illness or bodily harm.<sup>212</sup>

If the actor’s conduct is intentional but not “extreme and outrageous” enough to support a claim for intentional infliction of emotional distress, liability may still arise under section 312 of the *Second Restatement*, which applies when one person “intentionally and unreasonably” causes another person to experience emotional distress that is likely to result in illness or bodily harm, if such illness or bodily harm in fact occurs.<sup>213</sup> This rule allows for bystander

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204. *Id.* § 18.

205. *Id.* § 19. Comment a notes that an offensive contact “must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity.” *Id.*

206. *Id.* § 21(1).

207. *Id.* § 35(1).

208. *Id.* § 283.

209. *Id.* § 282.

210. *Id.* § 306.

211. *Id.* § 303.

212. *Id.* § 313; see also DOBBS, HAYDEN & BUBLICK, *supra* note 196, at §§ 390–91.

213. RESTATEMENT (SECOND) OF TORTS § 312. Although this tort has elements of intent as well as negligence, and there is considerable overlap with § 46, the *Second Restatement* treats it as a type of negligence. See Russell Fraker, Note, *Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED*, 61 VAND. L. REV. 983, 1006 (2008).

liability as well.<sup>214</sup> Section 312 applies even where (1) the conduct is not “extreme” enough to trigger liability for the intentional infliction of emotional distress (an intentional tort),<sup>215</sup> (2) the actor does not intend to cause physical harm,<sup>216</sup> and (3) the injured party is more sensitive than the average person and thus more likely to experience physical consequences from emotional distress.<sup>217</sup> Whereas section 46 applies only to cases of “severe” distress, section 312 applies when the distress (1) is foreseeable and (2) causes illness or bodily harm.<sup>218</sup>

### 3. “Eggshell” Plaintiffs

Under the “thin skull” or “eggshell plaintiff” rule of the *Second Restatement*, a tortfeasor is liable for all of the harm a victim suffers as a result of the tortious act, even if, due to a preexisting physical condition, the victim’s injury is greater than would have been reasonably foreseeable.<sup>219</sup> Reflecting the recent broadening of this principle in many jurisdictions, the *Restatement (Third) of Torts (Third Restatement)* expands the rule to encompass (1) not only preexisting physical conditions but also mental conditions and “other characteristics” of the victim, and (2) not only those injuries that are greater than could be foreseen, but also those that are “of a different type” than could be foreseen.<sup>220</sup> As discussed in Part III.B, this broadened rule is especially relevant to experiential theatre.<sup>221</sup>

### 4. Limits on Liability

Several doctrines can limit the liability of those who purvey entertainment. One such doctrine—consent—limits defendants’ liability for intentional torts.<sup>222</sup> Traditionally, the “assumption of the risk” doctrine has immunized defendants in cases involving negligent or reckless conduct (in contrast to intentional torts),<sup>223</sup> because the injured party is deemed to have consented, thereby relieving the

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214. RESTATEMENT (SECOND) OF TORTS § 312.

215. *Id.* § 312 cmt. b.

216. *Id.* § 312 cmt. d.

217. *Id.*

218. See LEE & LINDAHL, *supra* note 202, § 32:4; see also *Dickens v. Puryear*, 276 S.E.2d 325, 332 (N.C. 1981).

219. See RESTATEMENT (SECOND) OF TORTS § 461.

220. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 31 cmt. a (2010).

221. See *infra* Part III.B.

222. RESTATEMENT (SECOND) OF TORTS §§ 49–62.

223. *Id.* § 496A.

potential defendant from the otherwise applicable duty of care.<sup>224</sup> The consent may be express<sup>225</sup> or implied.<sup>226</sup> The classic illustration of implied assumption of the risk is the patron who attends a baseball game, knowing that there is a risk of being hit by a baseball.<sup>227</sup>

The *Third Restatement* largely rejects the assumption-of-the-risk doctrine as a complete defense.<sup>228</sup> Instead, a plaintiff's conduct in the face of a known risk (1) may be treated as negligence, resulting in reduction of recovery<sup>229</sup> or (2) may support a conclusion that there is no liability because the defendant has no duty to protect the plaintiff.<sup>230</sup> The *Third Restatement* also recognizes the

224. *Id.* § 496A cmt. c. Courts have held that the risks assumed include only the inherent and foreseeable dangers of the activity; thus, the defense does not insulate a defendant from liability for intentionally or recklessly causing injury. See *Mark v. Moser*, 746 N.E.2d 410, 416–20 (Ind. Ct. App. 2001) (collecting cases). According to the *Second Restatement*, a plaintiff must voluntarily assume the risk, see *RESTATEMENT (SECOND) OF TORTS* § 496E, and the plaintiff must know, understand, and appreciate the risk, *id.* § 496D. However, courts do not always apply the latter requirement; for example, spectators at sporting events and children engaged in playground activities have been deemed to assume the risk of foreseeable injuries inherent in those activities even if they do not fully appreciate those risks. See *Gentry v. Craycraft*, 802 N.E.2d 1116, 1119 (Ohio 2004); Susan M. Gilles, *From Baseball Parks to the Public Arena: Assumption of the Risk in Tort Law and Constitutional Libel Law*, 75 *TEMP. L. REV.* 231, 236 (2002).

225. *RESTATEMENT (SECOND) OF TORTS* § 496A cmt. c(1).

226. See *id.* § 496A cmt. c(2)–(4).

227. *Id.* § 496A cmt. c(2).

228. See *RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB.* § 2 cmt. i. (2010). Many courts have abandoned implied assumption of the risk as an absolute bar to recovery—some have rejected it altogether, while others apply it only to unreasonable conduct and include it in the fact-finder's comparative responsibility findings. See *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871 (Alaska 1979); *Harris v. The Ark*, 810 P.2d 226 (Colo. 1991); *Wendland v. Ridgefield Const. Servs., Inc.*, 462 A.2d 1043 (Conn. 1983). The *Third Restatement* follows this trend. See *RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB.* § 2 reporters' note cmt. In contrast, the *Third Restatement* retains the doctrine of consent as a defense to intentional torts. See *id.*

229. See *RESTATEMENT (THIRD) TORTS: APPORTIONMENT OF LIAB.* § 2 cmt. i (citing § 3 cmt. c). Under traditional doctrine, contributory negligence can prevent or limit recovery, but only if the tortfeasor's conduct is negligent, rather than reckless or intentional, and only if a reasonable person in the plaintiff's position would have known and understood the risk. See *RESTATEMENT (SECOND) OF TORTS* §§ 464, 467, 481, 482. The *Third Restatement*, however, leaves open the possibility of apportioning liability for intentional torts—for example, where a battery plaintiff provoked the attack by verbal abuse. See *RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM* § 5 reporters' note cmt. a; *RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB.* § 1 reporters' note cmt. c. Under the *Third Restatement*, however, apportionment of liability applies also to intentional torts, and while applying comparative liability to intentional torts is not the majority rule, it has growing support in the courts. See *RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB.* § 1 reporters' note cmt. c.

230. *RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB.* § 2 cmt. j. Under this approach, what courts have called “primary assumption of the risk” is actually about the scope of the defendant's liability or duty. *Id.* § 2 reporters' note cmt. j (citing *Ford v. Gouin*, 834 P.2d 724 (Cal. 1992); *Knight v. Jewett*, 834 P.2d 696 (Cal. 1992); *Turcotte v. Fell*, 502 N.E.2d 964 (N.Y.

concept of a contractual limitation on liability, which can be express or implied.<sup>231</sup> While in theory such waivers can apply to intentional or reckless conduct as well as negligence, such contracts are disfavored as a matter of public policy.<sup>232</sup> As a result, in many jurisdictions, a broad waiver of liability for intentional, willful, or grossly negligent conduct will be void as against public policy.<sup>233</sup>

Thus, under both the traditional approach and emerging trends, the liability of entertainers and venues can be limited where the injured party was aware of, and accepted, certain risks inherent in the performance.

### *B. Application to Specific Productions*

Applying the above legal principles to some of the specific productions described in Part I, several types of claims are possible. In Badac's *The Factory*, liability could arise for intentional infliction of emotional distress if the guards' conduct was "extreme and outrageous" and caused a patron to suffer severe emotional distress.<sup>234</sup> Even if the conduct were directed at a third person, the performer might be liable to a bystander who suffers "severe emotional distress," if that distress were to result in bodily harm, such as a heart attack or an injury caused by fainting or by trying to escape from the frightening scenario.<sup>235</sup> If these conditions were not satisfied, a patron at *The Factory* might still have a negligence-based claim for infliction of emotional distress if the emotional distress led to illness or physical injury.<sup>236</sup> The show also presents the potential for claims of assault, false imprisonment, and potentially battery, if there is physical contact.

At *Internal*, the showing of explicit nude pictures in a confined one-on-one setting and the flashing incident might both qualify as "extreme and outrageous" conduct; a sensitive patron might therefore have a claim for intentional infliction of emotional distress. While a

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1986); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 496-97 (5th ed. 1984).

231. RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIAB. § 2 cmts. c, f.

232. *Id.* § 2 cmts. d, e, g. The party assuming the risk by contract must understand and agree to the result. *Id.* § 2 reporters' note cmt. c.

233. See *id.* § 2 reporters' note cmt. c; see also *supra* note 46.

234. RESTATEMENT (SECOND) OF TORTS § 46.

235. *Id.* Under § 46(2), if a bystander's emotional distress results from the fact that the bystander is particularly susceptible to emotional distress, some jurisdictions hold that the person inflicting the distress is liable only if he or she is aware of that susceptibility. See, e.g., *Delise v. Metro-North R.R. Co.*, 646 F. Supp. 2d 288, 292 (D. Conn. 2009); RESTATEMENT (SECOND) OF TORTS § 46 cmt. f.

236. See RESTATEMENT (SECOND) OF TORTS § 312.

negligence claim is also possible, it would require a showing of illness or bodily harm. But the actress's physical touching of certain patrons, with its strong sexual undertones, might, if unwelcome, constitute assault or battery, unless the actress first obtained the patron's consent. Other aspects of the show—the betrayal of confidences, the criticism of “dates” in front of the group—seem to fall short of outrageous conduct. Nor do these actions appear to violate a duty of care. They may offend, embarrass, upset, and anger certain patrons, but these violations raise ethical questions rather than legal ones.

The “eggshell plaintiff” principle significantly increases the risk of liability for emotional harm in some experiential-theatre productions. Because experiential-theatre companies often do little or nothing to prescreen their patrons, there is a substantial likelihood that some patrons will have preexisting conditions that make them more vulnerable to injury—particularly emotional injuries, illness, or physical harm arising from emotional trauma. For example, the producers of *The Factory* could be liable if the assaultive aspect of the show caused severe distress to a patron who had suffered emotional trauma in the past, and the producers of *Internal* could be liable if the nude pictures, flashing, or touching incidents caused severe distress to a patron who was a previous victim of sexual abuse. If the producers admitted minors to these performances—and it appears that some of *Internal*'s venues did not impose age limits<sup>237</sup>—the company could face both civil and criminal liability.

Despite the general rule that assumption of the risk does not preclude an intentional tort claim, one might argue that the degree of advance disclosure is relevant to liability. At *Internal*, if the company warned patrons in advance that the show contained nudity, a warning that was provided in some venues but not others, the warning would seem to undermine the plaintiff's characterization of the nudity as extreme and outrageous and cast doubt on whether the patron in fact suffered severe distress. Disclosures could also help to forewarn patrons in productions such as *The Factory* and *Sub Rosa*, although it could be difficult to craft a disclosure that adequately conveys the kind of distress a patron might experience without completely undermining the element of surprise that is part of the artistic goal of the performance.

In contrast to shows such as *The Factory*, *Internal*, and *Sub Rosa*, which are designed to inflict emotional discomfort, shows such as *Sleep No More*, *En Route*, *Accomplice*, and *Rider Spoke* are unlikely

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237. Compare PROGRAM, EDINBURGH FESTIVAL FRINGE (2009), *supra* note 49, with *Trilogie-Intern: Ontroerend Goed*, *supra* note 60 (highlighting part of the Tweekakt 2011 Program).

to give rise to intentional tort claims. But while these shows do not involve deliberate physical or emotional assaults on patrons, they nonetheless present risks of foreseeable physical injury to patrons, bystanders, and property. In both *Rider Spoke* and *En Route*, patrons were asked to navigate unfamiliar and busy city streets (on bicycles, in the case of *Rider Spoke*) while operating unfamiliar audio gear and responding to audio or texted instructions.<sup>238</sup> In *Sleep No More*, audience members negotiated dark passageways with uneven flooring while wearing rigid plastic masks that limited peripheral vision and were difficult to wear with eyeglasses.<sup>239</sup> Some set pieces and props were in semi-darkness, which caused some patrons to stumble and fall. When actors ran from one scene to the next, a large part of the crowd ran to keep up with them, chasing them up and down narrow metal stairwells. Some audience members have complained of pushing and shoving by other guests.<sup>240</sup> As the evening wore on, more patrons were admitted, which increased the crowding in the smaller performance spaces and stairwells. The producers allowed audience members to purchase alcoholic beverages throughout the performance; although the drinks had to be consumed in the bar area rather than in the performance space, the bar area was immediately adjacent to the performance space, and patrons could enter and exit at will. The producers added a second bar later in the run, enabling patrons to

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238. See *supra* Part I.B.6–7 (describing *En Route* and *Rider Spoke*).

239. See *supra* notes 75–76 and accompanying text. The company advised patrons to wear contact lenses rather than glasses, if possible. See *supra* text accompanying note 83. Since some people cannot wear contacts and others prefer to wear glasses, quite a few attendees wore glasses and struggled to fit them under or over their masks. The Author witnessed one patron having particular difficulty. Publicly available photos show that Punchdrunk used the same style of masks for prior shows, so the company was likely aware of this problem. See, e.g., Lex Leifheit, *Art, Commerce & Layered Participation: Punchdrunk in NYC*, LEX LEIFHEIT (May 3, 2011), <http://www.lexleifheit.com/2011/05/03/art-commerce-layered-participation-punchdrunk-in-nyc> (displaying a photo of a patron at *The Firebird*, another Punchdrunk production, wearing a mask).

240. Several patrons have posted this complaint on Internet discussion boards. See e.g., PReeves2, *Comment: Sleep No More is AMAZING*, BROADWAYWORLD.COM (July 21, 2011, 11:55 AM), <http://broadwayworld.com/board/readmessage.php?thread=1029260&boardname=bway&page=15#4177729> (“Felt like I was in a crowded subway car the entire night and didn’t like getting pushed and shoved around by the actors and audience members. Found the experience mostly annoying.”). These complaints are consistent with the Author’s own observations of performances later in the run of the show (that is, after the first few months). Because the Author observed no such behavior in the early months of the run, it is possible that repeat customers are engaging in increasingly aggressive behavior because they know what is coming next in a particular character’s “track” and are eager to follow that performer to his or her next location in order to stake out a “front row” position for that scene, to obtain a “one-on-one” experience with the performer, or to secure one of the limited audience slots in a scene that takes place in one of the smaller or hidden rooms.

begin drinking well before the performance began.<sup>241</sup> On Fridays and Saturdays, patrons could attend a late-night performance from 11 p.m. to 2 a.m.<sup>242</sup> It is certainly foreseeable that this combination of circumstances could lead to accidental injuries, involving either a single patron or two or more patrons who accidentally injure one another.

While there are no precedents imposing intentional tort liability for conduct by actors in a theatrical performance, a substantial number of cases have imposed liability for intentional infliction of emotional distress where a practical joke causes severe emotional distress or physical injuries.<sup>243</sup> These have included injuries resulting from shock, fear, or efforts to escape.<sup>244</sup> If the outrageous conduct is directed not toward a spectator but toward another actor, as in Boal's invisible theatre, section 46 of the *Second Restatement* may still apply if a spectator's emotional injury causes bodily harm, because section 46(2)(b) does not seem to require the person to whom the outrageous conduct was directed to experience actual emotional distress.<sup>245</sup> However, not all jurisdictions apply section 46(2).<sup>246</sup>

Of course, some defenses will also apply. Although there is no case law directly on point, assumption of the risk or apportionment of liability may play a role in some tort actions arising from entertainers' conduct. For example, if a comedian is widely known for insulting or embarrassing audience members, a court may find that spectators who sit in the front rows during the performance have consented to such treatment or at least assumed the risk that such treatment could occur. But even in the classic context of a spectator injured by a foul ball during a baseball game, assumption of the risk is not a complete defense; under the majority rule, the stadium owner has a duty to

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241. See Garth Johnston, *Sleep No More "Hotel" Adds a Rooftop Bar*, GOTHAMIST (July 12, 2012, 5:21 PM), [http://gothamist.com/2012/07/12/sleep\\_no\\_more\\_hotel\\_adds\\_a\\_rooftop.php](http://gothamist.com/2012/07/12/sleep_no_more_hotel_adds_a_rooftop.php).

242. See *Tickets*, MCKITTRICK HOTEL, <http://sleepnomorenyc.com/tickets.htm> (last visited Nov. 3, 2012).

243. See, e.g., *Great Atl. & Pac. Tea Co. v. Roch*, 153 A. 22, 23 (Md. 1931); *Slaughter v. Slaughter*, 142 S.E.2d 683, 685 (N.C. 1965); *Langford v. Shu*, 128 S.E.2d 210, 211 (N.C. 1962); *Lewis v. Woodland*, 140 N.E.2d 322, 326 (Ohio Ct. App. 1955).

244. See, e.g., *Roch*, 153 A. at 23 (emotional distress and physical injuries caused by practical joke of sending a dead rat in a package); *Slaughter*, 142 S.E.2d at 685 (fright-induced physical injury caused by practical joke of fireworks outside window); *Langford*, 128 S.E.2d at 211 (physical injuries caused while attempting to escape from the practical joke of a released mongoose); *Lewis*, 140 N.E.2d at 324 (emotional distress and physical injuries caused by practical joke of throwing a life-like rubber lizard onto plaintiff's lap).

245. See RESTATEMENT (SECOND) OF TORTS § 46(2)(b) (1965).

246. See, e.g., *Holland v. Islamic Republic of Iran*, 496 F. Supp. 2d 1, 30 (D.D.C. 2005) (applying Kentucky law rather than the *Restatement*).



screen the most dangerous seating areas and to provide screened seats to as many spectators as can reasonably be expected to request them.<sup>247</sup> At many theatrical events, signs are posted prominently in the lobby advising patrons if the performance will utilize strobe lights, smoke, fog, explosives, or other elements that can be harmful to persons with medical sensitivities.<sup>248</sup> Failure to warn of such hazards could potentially lead to liability.<sup>249</sup>

At many, if not most, experiential theatre events, the organizers disclose very little of the show's content to patrons before the show begins; when there is disclosure, it is sometimes deliberately vague and mysterious in an effort to be enticing.<sup>250</sup> Neither assumption of the risk nor implied consent will apply if the spectators are unaware of the specific risks the performance presents, or that certain types of risks are inherent in such performances. For example, if a patron at *Sleep No More* tripped or stumbled due to poor lighting or uneven floors or was injured by a careless actor or fellow patron, assumption of the risk or apportionment of liability would probably not apply because many of the risks in this performance were not apparent to patrons in advance.

Experiential theatre events are not baseball games; the audience cannot be deemed to know what risks are inherent in each

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247. *E.g.*, *Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013, 1015 (Utah 1995); *Thurmond v. Prince William Prof'l Baseball Club, Inc.*, 574 S.E.2d 246, 250 n.4 (Va. 2003).

248. For discussions of such warnings, see *Strobe Warning*, BLUE ROOM, <http://www.blue-room.org.uk/index.php?showtopic=1301> (last updated Jan. 29, 2006); *Topic: Strobe Light Warning in Program*, CMTY. THEATER GREEN ROOM DISCUSSION BD., [http://www.communitytheater.org/forum/forum\\_posts.asp?TID=3555](http://www.communitytheater.org/forum/forum_posts.asp?TID=3555) (last updated Dec. 24, 2008); *Use of Strobes as Risk to Audience?*, CONTROL BOOTH, <http://www.controlbooth.com/forums/lighting-electrics/13559-use-strobes-risk-audience.html> (last updated June 9, 2009). Strobe lights may trigger epileptic seizures. See *Photosensitivity and Seizures*, EPILEPSY FOUND., <http://old.epilepsyfoundation.org/about/photosensitivity> (last visited Nov. 3, 2012). Even at the mild-mannered musical *Gypsy*, the Author observed that producers posted warnings to alert the audience that strobe lights would be used in one scene. Some Actors' Equity contracts require producers to post lobby notices if the performance will include strobe lights or gun shots. See, e.g., *Agreement & Rules Governing Employment in New Orleans Area Theatres*, ACTORS' EQUITY ASS'N (effective Jan. 3, 2011), available at [http://www.actorsequity.org/docs/rulebooks/NOLA\\_Rulebook\\_11-13.pdf](http://www.actorsequity.org/docs/rulebooks/NOLA_Rulebook_11-13.pdf) (addressing strobe-light warnings in section 11(D)(3) and gunshot warnings in section 11(D)(4)).

249. See *supra* note 247. There is no guarantee, however, that warnings will absolve producers of liability:

If the warning is not effective in apprising those imperiled of their danger, such persons, if innocently ignorant of their peril, cannot be contributorily negligent in remaining in the danger area, and therefore the actor is liable to them for any injury caused by his act, even though he has used the utmost care to give an effective warning.

RESTATEMENT (SECOND) OF TORTS § 301 cmt. A.

250. For examples, see *supra* notes 58–63 and accompanying text.

unique production.<sup>251</sup> Experiential-theatre practitioners face a difficult challenge in determining how much advance disclosure they should provide in order to minimize their liability without undermining the element of surprise and discovery that is important to achieving the dramatic impact that they consider necessary for attracting future audiences.

In the theatrical context, intentional tort claims are likely to be less frequent than negligence claims. But if an intentional tort claim were to arise, the assumption of the risk and contributory negligence doctrines would not shelter the defendants because these defenses do not apply to intentional torts.<sup>252</sup> Thus, in a deliberately assaultive performance like *The Factory*, assumption of the risk and implied consent would not protect Badac from claims of intentional infliction of emotional distress. On the other hand, in a theatrical context the line between intentional and negligent torts may be difficult to draw. In *The Factory*, while the prison guards *as characters* intended to inflict distress on the audience members, the intent of the actors playing those roles may be harder to characterize. Perhaps they intended to cause distress, or perhaps they intended only to thrill, entertain, or educate, in which case their failure to anticipate how their conduct would affect particular audience members could be characterized as nothing more than negligence.

### C. Precedents Involving Entertainers and Venues

Negligence claims, including those for emotional distress, against venue operators have most often succeeded when they involve offensive behavior from ushers or other front-of-house staff.<sup>253</sup> In contrast, when one audience member injures another, the performer and venue operator are typically not held liable on the theory that there is no duty to protect patrons against unforeseeable third-party

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251. See Bruce Golding, *Tourists Sue Over "Billy" Clubbing*, N.Y. POST (Feb. 15, 2011), [http://www.nypost.com/p/news/local/manhattan/ouch\\_show\\_smash\\_hit\\_UZN4qsZleOQq3t9b15QpKP](http://www.nypost.com/p/news/local/manhattan/ouch_show_smash_hit_UZN4qsZleOQq3t9b15QpKP) (discussing plaintiffs' argument that patrons of *Billy Elliot: The Musical* who were injured while sitting in the front row did not "assume the risk of getting clobbered in their seats . . . It's not like going to a baseball game or a hockey tournament").

252. See *supra* notes 222–224 and accompanying text.

253. See, e.g., *Planchard v. Klaw & Erlanger New Orleans Theatres Co.*, 117 So. 132, 133–34 (La. 1928) (theater owner liable where usher insulted patron and wrongfully ejected him); *Weber-Stair Co. v. Fisher*, 119 S.W. 195, 197 (Ky. Ct. App. 1909) (theater owner liable for staff members' rude, threatening remarks to patron); *Boswell v. Barnum & Bailey*, 185 S.W. 692, 693 (Tenn. 1916) (circus ushers who insulted patron violated proprietor's "duty of civil treatment"); *Kelly v. Dent Theaters, Inc.*, 21 S.W.2d 592, 593–94 (Tex. Civ. App. 1929) (movie theater manager who insulted and ejected patron violated his "right to civil and respectful treatment").

conduct.<sup>254</sup> Even where a performer encouraged the audience member's conduct that eventually led to the injury, one court found no duty and no causation.<sup>255</sup>

The courts show a strong preference for the general principle that proprietors cannot foresee patron misconduct, as illustrated by cases holding that wrestling promoters are not liable for injuries arising from spectator violence.<sup>256</sup> Nonetheless, courts have been willing to hold a venue operator liable for audience misconduct if the operator either knew the misconduct was taking place or had reasonable grounds to anticipate it.<sup>257</sup> For example, a radio broadcaster was held liable for inducing youthful listeners to drive recklessly in pursuit of prize money.<sup>258</sup> A television talk-show guest was allowed to bring a claim against the show when the host deliberately orchestrated a hostile audience reaction that led an audience member to strike the guest.<sup>259</sup> And in 2011, a Nevada court awarded a \$6.6 million judgment against a Las Vegas casino operator

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254. See, e.g., *Hawkins v. Me. & N.H. Theaters Co.*, 164 A. 628, 629 (Me. 1933); *MacDonald v. PKT, Inc.*, 628 N.W.2d 33, 38–39 (Mich. 2001); *Dickinson v Bizkit*, No. 244021, 2004 WL 1459357, at \*1 (Mich. Ct. App. June 29, 2004). But see *Savannah Theaters Co. v. Brown*, 136 S.E. 478, 478–79 (Ga. Ct. App. 1927) (leaving question of what constitutes ordinary care to jury where patron was injured by young attendees' pushing and shoving); *Murphy v. Winter Garden & Ice Co.*, 280 S.W. 444, 446 (Mo. Ct. App. 1926) (finding skating rink proprietor owed duty of care "commensurate with the circumstances" to protect patrons from injury by other patrons).

255. See *Dickinson*, 2004 WL 1459357, at \*1–2 (performer, concert promoter, and venue operator not liable for injury from crowd surge even though performer encouraged audience to migrate to main floor in violation of house rules).

256. See *Reynolds v. Deep S. Sports, Inc.*, 211 So. 2d 37, 38 (Fla. Dist. Ct. App. 1968); *Stevenson v. Kansas City*, 360 P.2d 1, 5–6 (Kan. 1961); *Whitfield v. Cox*, 52 S.E.2d 72, 73–74 (Va. 1949). In *Whitfield*, the Virginia Supreme Court implied that the patron assumed the risk of violence (in this case, a thrown bottle) simply by attending the match, as "[i]t is generally recognized, and the plaintiff knew from her prior attendance, that these wrestling matches are not quiet and dignified affairs. She and others who attended them knew the usual behavior of the spectators; that their manner was not always gentle, nor their speech always refined." *Id.* at 75. Ironically, this analysis suggests that the *patron* should have foreseen that she would be struck by a thrown bottle, yet the court's refusal to hold the wrestling promoter liable implies that the *promoter* could not have foreseen the very same misconduct. See *id.* The court did not invoke "assumption of the risk." See *id.*

257. See *Mastad v. Swedish Brethren*, 85 N.W. 913, 915 (Minn. 1901) (finding proprietor selling liquor must exercise reasonable care to protect patrons from misconduct of other intoxicated patrons); *Levy v. Jacobs*, 228 N.Y.S. 229, 230–31 (City Ct. 1928) (finding duty to guard against patron conduct that could have been anticipated).

258. *Weirum v. RKO Gen., Inc.*, 539 P.2d 36, 37, 40 (Cal. 1975). Listeners were encouraged to drive to various locations to intercept a broadcast personality who would reward them with prize money. *Id.* at 38. Two listeners raced one another recklessly, forcing another car off the road, and killing the driver. See *id.* at 38–39. Because this injury was foreseeable, the radio station was liable for the motorist's death. *Id.* at 40.

259. *Kaufman v. Downey*, No. L-42205-87, 1991 N.J. Super. Ct. LEXIS 1, at \*11 (App. Div. May 13, 1991) (finding a material issue of fact regarding the foreseeability of physical injury).

for injuries that a patron sustained when another patron stumbled into him while participating in a promotional event.<sup>260</sup> These cases suggest that experiential-theatre companies face potential liability if they induce spectators to take actions that foreseeably cause physical harm to themselves, other spectators, bystanders, or performers, without taking adequate precautions to prevent such harm.

When *performers'* onstage conduct causes a patron's injury, courts vary widely in their willingness to hold the performers or venue operators liable for negligence.<sup>261</sup> But they appear more willing to find liability when both the misconduct and the injury are physical.<sup>262</sup> For example, in *Goldbach v. NCL (Bahamas) Ltd.*, a federal district court held that a cruise line could be held liable for negligence where one of its entertainers, an independent contractor, injured an audience member by throwing an object at her in an effort to be funny.<sup>263</sup> The cruise line was allegedly aware that the performer's act was physical and "highly audience-interactive" as well as "somewhat improvisational," and that he had thrown things at audiences before; thus, his conduct (and the potential for injury) was arguably foreseeable.<sup>264</sup> In 2009, two audience members in the front row of *Billy Elliot* on Broadway, a conventional rather than experiential-theatre piece, were injured by an object that fell from the stage during a dance sequence.<sup>265</sup> In 2011, they filed a \$4 million lawsuit for negligence, alleging "hazardous and dangerous" choreography, failure to properly train the performers, and failure to give adequate warning to the audience.<sup>266</sup>

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260. Complaint at 2, 4, *Rodriguez v. Fiesta Palms, L.L.C.*, No. A531538 (Dist. Ct. Nev. filed Nov. 15, 2006); Findings of Fact, Conclusions of Law, and Order at 3, *Rodriguez v. Fiesta Palms, L.L.C.*, No. A531538 (Dist. Ct. Nev. filed Mar. 10, 2011); Judgment on the Verdict at 2, *Rodriguez v. Fiesta Palms, L.L.C.*, No. A531538 (Dist. Ct. Nev. filed Apr. 12, 2011).

261. Compare cases cited *supra* notes 258–260, with cases cited *infra* notes 272–274.

262. See, e.g., *Goldbach v. NCL (Bahamas) Ltd.*, No. 06-21248-CIV-HUCK/SIMONTON, 2006 WL 3780705, at \*1–2 (S.D. Fla. Dec. 20, 2006); see also *Cavaretta v. Universal Film Exchs., Inc.*, 182 So. 135, 141 (La. Ct. App. 1938) (holding that movie theater operator could be liable for patron injuries sustained during panic caused by film catching fire due to negligent mishandling of film); *Stamp v. Eighty-Sixth St. Amusement Co.*, 159 N.Y.S. 683, 684–85 (App. Term 1916) (finding foreseeability was question for trial where performer's lions escaped and caused panic that injured patron).

263. *Goldbach*, 2006 WL 3780705, at \*1–2.

264. See *id.*

265. See *Injured Audience Members Suing 'Billy Elliot' Musical*, TARSHIS, CATANIA, LIBERTH, MAHON & MILLIGRAM PLLC (Mar. 1, 2011), <http://www.newyorklawyerspersonalinjury.com/2011/03/injured-audience-members-suing-billy-elliott-musical.shtml>; Jeff Labrecque, 'Billy Elliot' Musical Sued by Audience Members Claiming Injury, ENTMT WEEKLY (Feb. 15, 2011), <http://news-briefs.ew.com/2011/02/15/billy-elliott-lawsuit>.

266. Labrecque, *supra* note 265.

Physical injuries and associated pain and suffering can also occur where an audience member becomes frightened or disoriented by the content of a performance and suffers an injury while attempting to escape.<sup>267</sup> According to anecdotal reports, at the *Horror Make-Up Show* at Universal Studios in Orlando, the standard practice as of 2002 was to bring a spectator on stage at the end of the show for an audience-participation segment.<sup>268</sup> At the end of this sequence, a “monster” appeared.<sup>269</sup> According to witnesses, at one performance in August 2002 the monster’s appearance so frightened the audience participant that she dove from the stage, striking her head and losing consciousness.<sup>270</sup> In Louisiana, a haunted-house patron alleged that the experience was so frightening and the venue so poorly lit that she injured herself while trying to escape.<sup>271</sup>

When a performer’s alleged misconduct is nonphysical yet causes a patron or bystander to suffer emotional rather than physical injury, courts are less likely to hold a defendant performer or proprietor liable, even if the misconduct is intentional.<sup>272</sup> For example, when a plaintiff alleged that a comedian’s comments constituted trade libel, the California Supreme Court held that the statements must be considered in the context of the comedy performance.<sup>273</sup> When a country music singer made insensitive and allegedly racially disparaging remarks to a security guard during a performance, the Fourth Circuit held that the comments were not sufficiently “outrageous” to support a claim for intentional infliction of emotional distress, because liability “does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other

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267. See, e.g., David S., *Ten Most Horrifying Theme Park Accidents*, READ THE SMITHS, [http://www.readthesmiths.com/articles/travel/Ten\\_Most\\_Horrifying\\_Theme\\_Park\\_Accidents](http://www.readthesmiths.com/articles/travel/Ten_Most_Horrifying_Theme_Park_Accidents) (last visited Nov. 4, 2012).

268. *Id.*

269. *Id.*

270. *Id.* At later performances, the onstage host “held the hand of the audience member” during the frightening sequence, “leading her to a safe part of the stage” some distance from the monster. Jonathan Almond, *Verified Injury Accidents at Theme and Amusement Parks: Universal Horror Make-Up Show at Universal Studios Florida*, THEME PARK INSIDER, <http://www.theme-parkinsider.com/accidents/list.cfm?start=309> (last updated Aug. 13, 2002). Although there are no records of a lawsuit, and no serious injuries were reported, the park may have offered a settlement to avoid litigation.

271. The Louisiana State Court of Appeals found that the haunted house was not unreasonably dangerous and held that the operator had no duty to protect a patron who reacts in “bizarre, frightened and unpredictable ways.” *Mays v. Gretna Athletic Boosters, Inc.*, 668 So. 2d 1207, 1209 (La. Ct. App. 1996).

272. See, e.g., *Polygram Records, Inc. v. Superior Court*, 216 Cal. Rptr. 252, 253, 260 (Ct. App. 1985).

273. See *id.*

trivialities.”<sup>274</sup> When television host Morton Downey, Jr. told guests on his show that their film was “garbage,” and that it “really suck[ed],” the filmmakers’ emotional distress was held not to be severe enough to support a claim.<sup>275</sup> In contrast, there is substantial case law holding proprietors liable to patrons for insulting remarks or offensive behavior by ushers and other front-of-house staff.<sup>276</sup> The courts’ greater deference to performers’ abusive speech suggests that courts may, consciously or otherwise, treat performers’ speech as privileged over the speech of nonperformers, even where the speaker intends to inflict distress. This privilege may offer less protection, however, in contexts where the line between performer and nonperformer is less clearly drawn.

#### D. First Amendment Considerations

In productions like *The Factory*, where a production company faces a high risk of tort liability, the First Amendment might afford some protection because the event triggering the harm is artistic expression. Badac’s artistic goal, while not a complete defense, might protect the company from liability for intentional infliction of emotional distress because it could be relevant to determining whether the production company’s conduct is sufficiently “extreme and outrageous” to support an intentional tort. But the fact that a performance has an artistic goal does not create blanket immunity under the First Amendment.<sup>277</sup>

The First Amendment’s safeguards for artistic expression are not a complete defense to liability arising from such expression.<sup>278</sup>

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274. *Gaiters v. Lynn*, 831 F.2d 51, 52–53 (4th Cir. 1987) (“[P]laintiffs must necessarily be expected and required to be hardened . . . to occasional acts that are definitely inconsiderate and unkind.” (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. D (1965))); *see also* *Sudore v. SUM 41*, No. 04-CV-6047T, 2005 U.S. Dist. LEXIS 26499, at \*2, \*11–12 (W.D.N.Y. Sept. 12, 2005) (involving concert patron’s intentional infliction of emotional distress claim for band member throwing a hot dog into the audience to incite a confrontation that the band could film for a promotional DVD). The *Sudore* court found the conduct “lamentable,” but not “sufficiently extreme or outrageous so as to be ‘beyond all possible bounds of decency.’” *Sudore*, 2005 U.S. Dist. LEXIS 26499, at \*11–12.

275. *Kaufman v. Downey*, No. L-42205-87, 1991 N.J. Super. Ct. LEXIS 1, at \*4, \*7–8 (App. Div. May 13, 1991); *see also* Complaint for Injunctive Relief and Damages at 2–4, 8, 10, *Kelley v. Tribune Broad. Co.*, No. 10CH26190 (Cir. Ct. Cook Cnty., IL filed June 17, 2010) (involving intentional infliction of emotional distress claim against Chicago talk show by “beauty pageant mothers” who allege they were promised they would be portrayed in a positive light but were then subjected to verbal abuse by the host and audience); Bud, *Bill Cunningham’s WGN TV Show Already Slapped with Lawsuit*, CHI. RADIO, TV, ALL MEDIA DISCUSSION FORUM (June 25, 2010, 7:34 PM), <http://www.chitownradio.com/messages/11362.html>.

276. *See supra* note 253 and accompanying text.

277. *See supra* Part III.A.4, III.B.

278. *See infra* notes 279–284 and accompanying text.

Examples include claims involving indecency,<sup>279</sup> defamation,<sup>280</sup> privacy,<sup>281</sup> the right of publicity,<sup>282</sup> trademarks,<sup>283</sup> and, indirectly, copyrights.<sup>284</sup>

There is little precedent addressing the First Amendment as a defense to claims of physical or emotional harm arising from a live theatrical performance. However, some precedent exists in the context of radio and television.<sup>285</sup> The First Amendment has often precluded tort claims arising from the emotional or psychological impact of an entertainer's performance.<sup>286</sup> But several courts have held that the First Amendment does not categorically preclude claims for intentional infliction of emotional distress arising from abusive speech where the speaker's *immediate intent* is to cause distress to the listener, even if the ultimate goal is to entertain the audience.<sup>287</sup> For example, a court deemed an emotional distress claim "viable" where a talk-radio host insulted a listener on the air, gave her phone number to other listeners, and encouraged them to call and harass her.<sup>288</sup> Because of the context in which the exchange occurred—the listener had written a letter urging cancellation of the show—the First Amendment protected the host and radio station from defamation and emotional distress claims that were based solely on the host's insulting words.<sup>289</sup> But it did not preclude an emotional distress claim based on the host's incitement of others to harass the plaintiff.<sup>290</sup> In another case, where a radio station conducted an "Ugliest Bride" contest that disparaged the plaintiff's appearance, the court held that the First Amendment precluded the plaintiff's defamation claim but not her emotional distress claim.<sup>291</sup> In the television context, the First

279. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 749–51 (1978).

280. See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990) (rejecting wholesale defamation exemption for opinion); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 502–04 (1984).

281. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374, 384 & n.9 (1967).

282. See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578–79 (1977).

283. See Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 SMU L. REV. 381, 413 (2008).

284. In copyright law, the doctrine of fair use is often treated as a proxy for First Amendment protection. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003) (describing fair use as one of copyright law's "built-in First Amendment accommodations").

285. See, e.g., *DeFilippo v. Nat'l Broad. Co.*, 446 A.2d 1036, 1037, 1039 (R.I. 1982) (finding that First Amendment barred tort claims against television broadcaster after plaintiff's son hanged himself while imitating a stunt seen on television).

286. See, e.g., *id.*

287. See, e.g., *State v. Carpenter*, 171 P.3d 41, 56–57, 61 (Alaska 2007).

288. *Id.* at 57.

289. See *id.* at 51–52, 58.

290. *Id.* at 58.

291. See *Espósito-Hilder v. SFX Broad. Inc.*, 665 N.Y.S.2d 697, 699 (App. Div. 1997).

Amendment did not preclude a claim for intentional infliction of emotional distress where television reporters deliberately provoked strong emotional reactions from minor children, on camera, by disclosing to them that their friends had just been murdered in the house next door.<sup>292</sup> The First Amendment may also play a significant role in *Kelley v. Tribune Broadcasting Co.*, a pending Chicago case in which the mothers of several child beauty-pageant contestants, along with their daughters, were invited to appear on a television show.<sup>293</sup> They allege, *inter alia*, that the host publicly accused the mothers of physically and sexually abusing their children.<sup>294</sup>

As the examples in Part I illustrate, some experiential-theatre events are designed to elicit strong emotional reactions from audience participants.<sup>295</sup> Even where this is not the intent, the likelihood of such reactions, and possible illness or bodily harm as a result, may be foreseeable, especially after the company has performed the show several times and has had the opportunity to observe audience reactions. While the First Amendment offers significant protection for theatrical events, case law demonstrates that it does not eliminate the potential for liability.<sup>296</sup> Even if a First Amendment defense ultimately succeeds in any given case, simply mounting such a defense can be costly for defendants.<sup>297</sup> Theatre companies that engage in high-risk activities may find that insurance becomes difficult or costly to obtain. They also risk damage to their reputations and potential loss of funding from government sources and private donors if they are perceived as indifferent to the well being of their audiences. It is also possible that government authorities will respond by imposing stricter regulations, which may interfere with artistic goals.

The uncertain scope of First Amendment protection is one reason for theatre companies to proceed with caution. The freedom of expression will, in some circumstances, protect performers, creators, and venue operators from liability arising from expressive choices. It will not, however, provide complete immunity, nor will it eliminate the costs and burdens of mounting a legal defense. It will offer little or no

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292. *KOVR-TV, Inc. v. Superior Court*, 37 Cal. Rptr. 2d 431, 432–33, 436 (Ct. App. 1995).

293. Complaint for Injunctive Relief and Damages at 2, *Kelley v. Tribune Broad. Co.*, No. 10CH26190 (Cir. Ct. Cook Cnty., IL filed June 17, 2010).

294. *Id.*

295. See *supra* Part I.B.1–10.

296. See *supra* notes 285–294 and accompanying text.

297. Publisher Larry Flynt spent an estimated \$50 million on First Amendment defenses from 1974 to 2001. Clay Calvert & Robert Richards, *Larry Flynt Uncensored: A Dialogue with the Most Controversial Figure in First Amendment Jurisprudence*, 9 COMMLAW CONSPECTUS 159, 166 (2001); see also Seth Goodchild, Note, *Media Counteractions: Restoring the Balance to Modern Libel Law*, 75 GEO. L.J. 315, 322 (1986) (noting costs of \$5 million to \$7 million incurred by television networks defending libel cases).



protection from claims that arise from physical injuries. Furthermore, regardless of whether the First Amendment defense offers protection in any given case, theatre companies should consider whether, as a matter of professional ethics, artistic integrity, reputation, and the future of their industry, they should stage productions that create a significant risk of harm to others, or whether, in the alternative, they can adopt safeguards which reduce those risks without sacrificing their artistic vision.

#### IV. ETHICAL CONCERNS

Although a number of observers have suggested that experiential theatre raises ethical questions, they rarely specify what those questions are.<sup>298</sup> These comments are most often directed at shows such as *Internal* and *The Factory*, where the conduct of the actors may cause spectators to feel betrayed, embarrassed, threatened, or emotionally distressed.<sup>299</sup>

##### A. Ethical Standards and Liability

In analyzing tort claims, courts typically consider the standard of care that applies in a particular situation.<sup>300</sup> If neither legislation, regulation, nor judicial precedent has established a relevant standard, then a court may consider the custom in the industry.<sup>301</sup> If a specialized standard of care does not exist for theatre practitioners, then a court may attempt to derive a standard from precedents addressing endeavors it considers to be analogous.<sup>302</sup> If

298. See, e.g., Crawley, *supra* note 48; Logan, *supra* note 54; Logan, *supra* note 19; McEvoy, *supra* note 56; Radosavljević, *supra* note 97; Trueman, *supra* note 20; Matt Trueman, *Review: Internal, Mecure Point Hotel, CAROUSEL OF FANTASIES* (Aug. 15, 2009, 4:50 PM), <http://carouseloffantasies.blogspot.com/2009/08/review-internal-mecure-point-hotel.html>.

299. See Gardner, *supra* note 1; Logan, *supra* note 19; Radosavljević, *supra* note 97; Trueman, *supra* note 20; see also *supra* Part I.B.1 (*Internal*); *supra* Part I.B.5 (*The Factory*).

300. See DOBBS, HAYDEN & BUBLICK, *supra* note 196, § 121 (noting that at common law, the standard of care in some negligence cases “was implicitly set by accepted community practices and expectations as incorporated in the contract or relationship itself”).

301. See RESTATEMENT (SECOND) OF TORTS § 285 (1965); see also Anita Bernstein, *The Communities that Make Standards of Care Possible*, 77 CHI.-KENT L. REV. 735, 763–64 (2002) (“The concept of ‘custom’ aids the standard of care.”).

302. Cf. *Allred v. Broekhuis*, 519 F. Supp. 2d 693 (W.D. Mich. 2007) (considering whether standard of care for recreational activities or standard of care for motor vehicles should apply to operation of off-road vehicles); *Gates v. Harris*, No. 0466, 1995 WL 1315953 (Pa. C.P. Phila. Jan. 11, 1995) (considering whether physician standard of care should apply to medical residents); *Cox v. M.A. Primary & Urgent Care Clinic*, 313 S.W.3d 240 (Tenn. 2010) (considering whether physician standard of care should apply to physician assistants); *Phelps v. Physicians Ins. Co.*, 698 N.W.2d 643 (Wis. 2005) (considering whether physician standard of care should apply to medical students).

experiential-theatre practitioners were to develop a standard of care, a court might consider that standard when evaluating the scope of a particular defendant's duty. Practitioners that abide by this standard (1) are less likely to cause harm in the first place, and thus less likely to face liability, and (2) may be able to persuade the court that abiding by the standard satisfies their duty to spectators and bystanders, thus shielding them from liability for any harm that does occur. Thus, it may be wise for practitioners of these unconventional theatre experiences to adopt codes of practice. Combining this with more detailed advance disclosures and screening measures will reduce the likelihood of harm to participants and decrease the risk of liability if an injury occurs.

### *B. In Search of an Ethical Standard*

Currently, there is no general code of ethics for theatre, experiential or otherwise. But ethical codes have emerged in the related field of dramatherapy.<sup>303</sup> If there are sufficient parallels between the client's experience in dramatherapy and the spectator-participant's experience in experiential theatre, then dramatherapy's code of ethics may offer useful guidance for experiential theatre. To the extent that the two fields of endeavor diverge, however, dramatherapy codes may impose too high a standard.

#### 1. The Relationship between Drama and Dramatherapy

While there are many definitions of dramatherapy, none of them clearly distinguishes dramatherapy from other forms of drama. A dramatherapy organization in the United States<sup>304</sup> has stated: "Drama therapy is the intentional use of drama and/or theater processes to achieve therapeutic goals . . . . This approach can provide the context for participants to tell their stories, set goals and solve problems, express feelings, or achieve catharsis."<sup>305</sup> Other definitions differ in details but are generally similar.<sup>306</sup>

303. See *infra* Part IV.B.2.

304. The National Association for Drama Therapy (NADT), a member of the National Coalition of Creative Arts Therapies Association, determines the standards for registered drama therapists in the United States. See *About NADTA*, NAT'L ASS'N FOR DRAMA THERAPY, <http://www.nadt.org/about-nadt.htm> (last visited Nov. 6, 2012).

305. *What Is Drama Therapy?*, NAT'L ASS'N FOR DRAMA THERAPY, <http://www.nadt.org/what-is-drama-therapy.html> (last visited Nov. 6, 2012).

306. See *Code of Practice*, BRITISH ASS'N DRAMATHERAPISTS (Sept. 2005), <http://badth.org.uk/code> ("Dramatherapy has as its main forms the intentional use of the healing aspects of drama and theatre within the therapeutic process. It is a method of working and playing which

Given the breadth of these definitions, it is not surprising that some theatre scholars describe the boundary between theatre and therapy as “blurry.”<sup>307</sup> A panel of leading British therapists concluded in 1991 that “drama *as therapy* is not radically different from *drama as drama*.”<sup>308</sup> The primary distinction, they asserted, is that “drama as therapy contains the specific intention to facilitate personal change, whereas drama as drama is about working towards performance, whatever the aims behind that performance may or may not be.”<sup>309</sup> Through the use of dramatic expression, the dramatherapy client “receives permission to behave in apparently uncharacteristic ways . . . .”<sup>310</sup> This observation is consistent with the observations of experiential-theatre artists who have observed that audiences in immersive settings are willing to expose themselves in ways uncharacteristic of everyday behavior.<sup>311</sup>

One dramatherapist in the 1991 study essentially refused to distinguish between drama and reality in the therapeutic context, noting that, “in dramatherapy, you don’t step out of reality into fantasy, but into another sort of reality.”<sup>312</sup> If this is true of dramatherapy, then according to the perceptions of the panelists who found little distinction between dramatherapy and drama in general, the blurring of fantasy and reality that occurs in dramatherapy probably has a parallel in experiential theatre.<sup>313</sup> While conventional

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uses action to facilitate creativity, imagination, learning, insight, and growth.”); *Creative Arts Therapy*, DRAMA THERAPY INST. L.A., <http://www.dramatherapyinstitutela.com/creative/mainframe.htm> (last visited Nov. 14, 2012) (defining dramatherapy as “the systematic and intentional use of drama/theater processes and products to achieve the therapeutic goals of symptom relief, emotional and physical integration and personal growth,” calling it “an active, experiential approach that facilitates the client’s ability to tell his/her story, solve problems, set goals, express feelings appropriately, achieve a catharsis, extend the depth and breadth of inner experience, improve interpersonal skills and relationships, and strengthen the ability to perform personal life roles while increasing flexibility between roles” (citation omitted)); *Standards of Proficiency: Arts Therapists*, HEALTH & CARE PROFESSIONS COUNCIL (Aug. 2012), [http://www.hpc-uk.org/assets/documents/100004FBStandards\\_of\\_Proficiency\\_Arts\\_Therapists.pdf](http://www.hpc-uk.org/assets/documents/100004FBStandards_of_Proficiency_Arts_Therapists.pdf) (defining dramatherapy as “a unique form of psychotherapy in which creativity, play, movement, voice, storytelling, dramatisation and the performance arts have a central position within the therapeutic relationship”).

307. Suzanne Burgoyne et al., *The Impact of Acting on Student Actors: Boundary Blurring, Growth, and Emotional Distress*, 9 THEATRE TOPICS 157, 171 (1999).

308. Lucilia Valente & David Fontana, *Dramatherapy and Psychological Change*, in PSYCHOLOGY & PERFORMING ARTS 251, 254 (Glenn D. Wilson ed., 1991). These dramatherapists did “not see drama as divorced from real life, but as essentially an expression of it.” *Id.*

309. *Id.*

310. *Id.*

311. See *supra* note 44 and accompanying text (highlighting two experiential-theatre productions that invite participants to engage in or tolerate conduct, in the context of the performance, that they would not engage in or tolerate in a real-world setting).

312. See Valente & Fontana, *supra* note 308, at 254 (internal quotation marks omitted).

313. See *id.* at 253–54.

theatre surrounds us with reminders that we are observing something artificial,<sup>314</sup> when experiential theatre is highly interactive or takes place in an intimate or unconventional setting, drama and reality may be more difficult to distinguish. If, as dramatherapists have suggested, drama is “a potent therapeutic agent,”<sup>315</sup> then its effects might be equally potent, though perhaps not as therapeutic, in the hands of practitioners who are not trained therapists and whose goals are non-therapeutic. It would not be surprising, then, if the fictional experience in Badac’s *The Factory* induced psychological trauma in a spectator-participant.<sup>316</sup>

Based on these comparisons, drama and dramatherapy may be sufficiently similar for dramatherapy codes of practice to offer useful guidance for practitioners of experiential theatre whose performances may have strong psychological effects on their audiences.

## 2. The Relevance of Dramatherapy Codes

A number of dramatherapy organizations in the United States and the United Kingdom have adopted ethical codes for their members. In the United States, the ethics code of the National Association for Drama Therapy (NADT) includes the following:

A drama therapist obtains informed consent of the individual(s) or legal guardian(s) when conducting therapy, research, or providing assessment or consulting services . . . .<sup>317</sup>

...

Drama Therapists have a primary responsibility to respect and promote the welfare of their clients and to avoid any multiple relationships that could impair professional judgment or increase the risk of harm to clients.<sup>318</sup>

...

A drama therapist does not engage in sexual solicitation, physical advances, and/or verbal or non-verbal conduct that is sexual in nature, in connection with the drama therapists’ activities.<sup>319</sup>

...

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314. See *supra* Part I.A.1; see also Arnold, *supra* note 21, at 75–76 (“Under normal circumstances, an audience’s view of a live performance is pan-optic. The eye is free to rove over the whole performance space, and even to leave it and examine the environment in which the performance takes place.”).

315. Valente & Fontana, *supra* note 308, at 259.

316. See *supra* Part I.B.5.

317. *Code of Ethical Principles* § 4(a), NAT’L ASSOC. FOR DRAMA THERAPY, <http://www.nadt.org/assets/documents/code-of-ethics.pdf> (last visited Nov. 7, 2012). These excerpts are from the full NADT Code of Ethics. The portions of the code pertaining specifically to research subjects have been omitted here.

318. *Id.* § 5.

319. *Id.* § 5(b).

Drama Therapists are responsible to practice drama therapy techniques in a manner that is professional, maintains[] professional boundaries, and is always based on the individual's therapeutic goals, safety, and best interest.<sup>320</sup>

a) A drama therapist uses physical contact in the context of therapeutic goals with the individual's consent and in a safe and respectful manner.<sup>321</sup>

b) A drama therapist never imposes or requires that an individual make physical contact, and at any point during a session a client can refrain from and refuse physical contact.<sup>322</sup>

c) A drama therapist maintains professional boundaries in the context of the drama therapy session when physical contact, role play, and other drama therapy techniques are employed.<sup>323</sup>

In the United Kingdom, the Institute of Dramatherapy has adopted both a Code of Practice and a Code of Ethics, which include the following provisions:

(i) Code of Practice

Ensure that the client/patient fully understands the nature of dramatherapy or play therapy (that it allows touch and noise, for example).<sup>324</sup>

...

Ensure that the methods used are appropriate for age, gender and limitations of the client/patient and that at no time should a client/patient be made to look foolish.<sup>325</sup>

Protect the client/patient from any behaviours that may be misconstrued, and not enter into a sexual relationship with a client/patient, or indeed a social relationship before or after therapy.<sup>326</sup>

Ensure that the workspace is appropriate for the nature of the work in relation to comfort, lighting and heating and that it ensures privacy.<sup>327</sup>

(ii) Code of Ethics

The interests of the client/patient are put first.<sup>328</sup>

The client/patient is given full instruction as to the nature of the treatment undertaken so that informed decisions may be made.<sup>329</sup>

The client/patient is not abused in any way, either financially, sexually or socially. The dramatherapy or play therapy so offered does not impose particular values, beliefs or ideology.<sup>330</sup>

320. *Id.* § 7.

321. *Id.* § 7(a).

322. *Id.* § 7(b).

323. *Id.* § 7(c).

324. JENNINGS, *supra* note 21, at 210.

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.* at 211.

329. *Id.*

330. *Id.*

The dramathrapy or play therapy does not present material that is inappropriate to client/patient needs or that in any way undermines a client/patient's self-esteem and confidence.<sup>331</sup>

The confidential nature of the treatment situation is clearly understood, i.e. whether material is confidential to the team or to the individual therapist.<sup>332</sup>

The Code of Ethics for the British Association of Dramatherapists (BAD) provides, *inter alia*, that:

Dramatherapists have moral and ethical responsibilities towards clients and must ensure that they practise with integrity. Dramatherapists should monitor their practice to ensure that they are not making discriminatory decisions based upon a client's race, class, culture, nationality, gender, age, marital status, physical or mental ability, physical appearance, religion, political opinions or sexual orientation.<sup>333</sup>

...

Generally, information received from the clients should be treated as privileged and confidential both during and following the completion of therapy.<sup>334</sup>

Clients should consent to Dramathrapy interventions prior to the start of therapy. Dramatherapists working with children must comply with the current legislation relating to consent to therapy. In order to provide informed consent the client must understand the nature of dramathrapy interventions and the relevance of the art form to therapy.<sup>335</sup>

Communications systems relevant to the client's level, scope, and/or method of understanding should be employed.<sup>336</sup>

Dramathrapeutic interventions may involve appropriate touching of other clients and the therapist(s), or touch by the therapist. The nature and purpose of touch must be explained and informed consent sought prior to any physical contact is initiated. A client's expressed wish not to be touched should be respected.<sup>337</sup>

...

Therapy and risk assessments should be completed in order to decide whether it is appropriate to offer therapy to clients.<sup>338</sup>

A clearly written contract that outlines the nature and form of the proposed therapy must be agreed with the client. This contract should be reviewed regularly to ensure that the client's needs and welfare are prioritised.<sup>339</sup>

...

Appropriate time and attention must be given to the conclusion of the therapy. Follow up arrangements should be contracted in a clear manner.<sup>340</sup>

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331. *Id.*

332. *Id.*

333. *Code of Practice*, *supra* note 306 (on "The Client").

334. *Id.* (on "Confidentiality").

335. *Id.* (on "Consent").

336. *Id.*

337. *Id.*

338. *Id.* (on "Contracts").

339. *Id.*

340. *Id.*

...

Dramatherapists should be aware of professional boundaries with all clients. Role awareness is of paramount importance in the therapy relationship. Under no circumstances should a sexual relationship be formed with a client or ex client. Social contact with clients should be avoided.<sup>341</sup>

...

Dramatherapists should recognise that the personal distress that may arise as part of an agreed treatment process is distinct from physical or mental distress occasioned by malpractice or inhumane or cruel behaviour.<sup>342</sup>

Other dramatherapy organizations have adopted similar codes.<sup>343</sup>

If, as some commentators suggest, there is no meaningful difference between dramatherapy and drama in general,<sup>344</sup> then the ethical standards for dramatherapy should apply to other forms of drama as well. Yet at least some of the ethical rules governing dramatherapy seem overly stringent as applied to actors who are not engaged in therapy. For example, actors are not ordinarily expected to affirmatively promote the welfare of their audience or to observe nondiscrimination rules in their interaction with audience members of different ages and sexes. In most cases, actors are supposed to create the illusion that their characters are real people. Real people can be deeply flawed and do not always act in the best interests of those around them. Real people often discriminate based on age, race, ethnicity, sex, or religion. Actors interact with audience members for the purpose of entertainment or intellectual stimulation through the mimicking of reality, including its less pleasant aspects. It is not the actor's job to heal.

To take another example, all of the dramatherapy codes require confidentiality.<sup>345</sup> But this obligation arises from the fact that the therapist's role resembles that of a priest or physician; the therapist's job—healing the client—often cannot be performed without eliciting some private disclosures.<sup>346</sup> Actors do not undertake to heal, yet audience members may consciously or unconsciously enter a theatre experience with some expectation of emotional healing

341. *Id.* (on "Boundaries").

342. *Id.* (on "Professional Conduct").

343. *See, e.g.*, STANDARDS OF ETHICAL PRACTICE FOR REGISTERED SUPERVISORS OF DRAMATHERAPY, BRITISH ASS'N DRAMATHERAPISTS (Oct. 10, 2006); *Standards of Proficiency*, *supra* note 306.

344. *See supra* notes 303–307 and accompanying text.

345. *See, e.g., supra* notes 332, 334 and accompanying text.

346. *See Jaffee v. Redmond*, 518 U.S. 1, 10–11 (1996) (finding that patient-therapist confidentiality is essential to successful treatment); JENNINGS ET AL., *supra* note 21, at 15–16 (noting that the goal of dramatherapy is healing and to "encourage clients and therapists to speak freely, to shed all internal censors and filters save one—the filter of responsibility" (citation omitted)).

through enlightenment or catharsis.<sup>347</sup> Some of those who criticize *Internal* as unethical seem to base their concerns on the fact that, when the performers elicit personal information from audience participants, they do so under circumstances in which some audience participants may consciously or unconsciously believe that their information will be treated as confidential.<sup>348</sup> But the performers in fact often reveal that information to the entire group in the final debriefing.<sup>349</sup> The audience and performers have not entered into a traditional confidential or fiduciary relationship. Although it is possible that an actor might expressly or implicitly give a promise of confidentiality, none of the published reports on *Internal* indicates that such promises were made.<sup>350</sup> Of course, we cannot know exactly what each individual performer said to his or her “date” in teasing out these revelations. Intellectually, of course, it is unreasonable to expect that a total stranger, whose attentions the audience member has paid for, has a duty of confidentiality with respect to any information disclosed. Nonetheless, audience members could, and apparently in many instances did, misconstrue the intimacy of the *mise en scène*—private booths, dim lighting, soothing music, and soft-spoken performers speaking gently in low voices—as implying confidentiality.

Dramatherapy codes regulate the conduct of people who hold themselves out as qualified to confer a particular health benefit on clients, something an entertainer does not ordinarily do. In general, entertainment offers no warranty as to the qualifications of the performers or the quality of the experience, which is why careful consumers of entertainment generally seek out reviews and word-of-mouth before making their choices.<sup>351</sup> In experiential theatre, however, such advance disclosures can be hard to find.<sup>352</sup> Still, audiences seeking entertainment of *any* kind normally understand that there is no guarantee that any particular entertainment offering will meet their expectations, while persons seeking therapy ordinarily expect that the service is subject to some kind of regulatory oversight that ensures it will meet certain minimum standards of quality.

Thus, to the extent that dramatherapy organizations have designed their codes specifically to foster healing, they seem too

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347. See Stefan Meisiek, *Which Catharsis Do They Mean? Aristotle, Moreno, Boal and Organization Theatre*, 25 ORG. STUD. 797, 805–13 (2004).

348. See *supra* note 170–174 and accompanying text.

349. See *supra* note 175.

350. See *supra* Part I.B.1.

351. See *supra* notes 23–27 and accompanying text.

352. See *supra* notes 36–37 and accompanying text.



stringent for experiential theatre. In this sense, the claim that there is *no* difference between drama and dramatherapy cannot be true.<sup>353</sup> From the perspective of the person orchestrating the experience—actor versus therapist—the goal of the enterprise is entirely different.<sup>354</sup> But the two enterprises still bear a close resemblance from the perspective of the spectator-client, who may experience the same psychological reaction to a dramatic situation regardless of whether an actor or a therapist orchestrates that situation. Dr. Schwannauer's observation that an audience member at *The Factory* experienced genuine trauma supports this possibility.<sup>355</sup>

This presents an ethical dilemma. If the *effect* of the dramatic event on the observer is the same regardless of the *intent* of the orchestrator, should the difference in intent—entertainment or intellectual stimulation on the one hand, healing on the other—alter the ethical obligations of the orchestrator? This dilemma may be solvable if we focus on the reasonable expectations of the spectator, which would reflect the spectator's awareness of the intent that underlies the performance. A client seeking the help of a dramatherapist has every reason to expect that the therapist will try to make the client healthier and is qualified to do so. A spectator who chooses to attend an experiential theatre event ordinarily has no reason to harbor the same expectation. Most people attend theatrical events out of curiosity or a desire to be entertained, with no clear expectation that their health will improve or even that the entertainment will be of high quality. This difference in the consumer's reasonable expectation should relieve performers of the therapist's ethical obligation to do only what is in the best interest of the client. But does it relieve performers of *all* ethical obligations to their audience?

In addition to the goal of healing, dramatherapy codes seem to incorporate the injunction to "do no harm."<sup>356</sup> This principle is

353. See *infra* notes 354–362 and accompanying text.

354. See Salvo Pitruzzella, *Theatre and Therapy: A Necessary Dialogue*, in *DRAMATHERAPY AND SOCIAL THEATRE: NECESSARY DIALOGUES* 101, 106 (Sue Jennings ed., 2009) (noting that, while the processes of drama and dramatherapy are similar, the conscious purposes are not: "For theatre, the main purpose is art; for dramatherapy, it is healing").

355. See *supra* text accompanying notes 99–100. The possibility of audience trauma is also supported by psychology research on the effects of horror films on psychologically vulnerable viewers. See Bruce Ballon & Molyn Leszcz, *Horror Films: Tales to Master Terror or Shapers of Trauma?*, 61 *AM. J. PSYCHOTHERAPY* 211 (2007).

356. This principle, which Hippocrates applied to medicine, has been applied to the work of psychotherapists and psychiatrists. See, e.g., Abraham L. Halpern et al., "Enhanced" *Interrogation of Detainees: Do Psychologists and Psychiatrists Participate?*, 3 *PHIL., ETHICS, & HUMAN. MED.* 21 (2008).

implicit, for example, in the confidentiality requirement, the prohibition against sexual contact, and the requirement of informed consent.<sup>357</sup> But the codes do not necessarily *prohibit* inflicting emotional distress. Indeed, BAD's Code of Ethics attempts to distinguish distress that facilitates healing from distress that is gratuitously inflicted: "Dramatherapists should recognise that the personal distress that may arise as part of an agreed treatment process is distinct from physical or mental distress occasioned by malpractice or inhumane or cruel behaviour."<sup>358</sup> Thus, dramatherapy codes do not completely forbid dramatherapists from causing distress if it is in the service of healing.

To what extent, if any, should the same principles apply to dramatic work outside of the therapeutic context? As a general ethical matter, "do no harm" appears to be a principle with broad application, but it also seems to be widely accepted that lesser harms are permissible in order to avert greater harms (e.g., killing in defense of others, punishing children or lawbreakers in order to modify future behavior, or causing a therapy client to experience distress as part of a healing process).<sup>359</sup> Even within the medical profession, its most traditional context, "do no harm" is considered an inadequate ethical guide, since it fails to balance potential harms against potential benefits.<sup>360</sup>

In addition, there are different conceptions of harm. Many forms of entertainment inflict temporary emotional distress—horror films, "spook" houses, or any literary or dramatic work (whether fiction or nonfiction) that depicts the suffering of a sympathetic character. But many ordinary consumers actively seek out this kind of temporary distress, presumably for the cathartic experience or for intellectual enlightenment (e.g., learning about the suffering of others). This could mean that (1) "do no harm" is completely inapplicable to entertainment, (2) literary or dramatic catharsis is not harm at all, or (3) literary or dramatic catharsis should be considered a lesser harm in the service of a greater good. It is difficult to accept proposition (1)—that "do no harm" is completely inapplicable to entertainment—just as it is difficult to exempt any other life activity from this general principle. On the other hand, there is a long

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357. See, e.g., *supra* notes 333–342 and accompanying text.

358. *Code of Practice*, *supra* note 306.

359. See, e.g., Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 720 (1997); Mary Jo Zygmund & Harriett Boorhem, *Ethical Decision Making in Family Therapy*, 28 FAM PROCESS 269 (1989) (noting that some pain can be justifiable in therapy).

360. Cedric M. Smith, *Origin and Uses of Primum Non Nocere—Above All, Do No Harm!*, 45 J. CLINICAL PHARMACOLOGY 371, 375 (2005).

tradition in entertainment of causing audiences some degree of temporary discomfort. Therefore, a standard of practice for experiential theatre should not require complete avoidance of audience discomfort.

In determining what sorts of harm, if any, theatre practitioners should avoid as an ethical matter, it helps once again to focus on audience expectations. Audience expectations in the entertainment context are, or reasonably should be, different from the therapeutic context. A client enters therapy expecting to be helped and willing to be emotionally vulnerable if necessary to reach this goal.<sup>361</sup> Audiences attending the theatre ordinarily do not approach a performance expecting to be helped. They expect to be entertained. If they are willing to be emotionally vulnerable, it is because they expect that this will further the goal of being entertained. If someone expects to be helped, then the person providing the service should adhere to standards that increase the likelihood of helping and eliminate obstacles to that goal. Personal, especially sexual, relationships with clients or patients are typically perceived as obstacles to that goal. In contrast, personal and sexual relationships are not typically obstacles to the goal of entertainment; if anything, they are consistent with that goal. Thus, audiences approaching theatre as entertainment differ from audiences approaching theatre as therapy.

It therefore seems reasonable for the law to assume that audiences approaching theatre as entertainment do not need the same level of protection as audiences approaching theatre as therapy. Proper labeling and disclosure by entertainers should make clear to audiences which type of theatre experience they are entering into. Ordinarily, no explicit labeling is necessary to inform entertainment seekers that a particular theatre experience is intended as entertainment. This is what entertainment seekers expect. Audiences are also aware that the scope of "entertainment" is broad, encompassing not only comedy, music, and dance, but also "serious" drama that can bring audiences to tears or cause them to be frightened. But if the theatre experience will fall outside this broad range of possibilities, then arguably some sort of disclosure is needed.

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361. See *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955); *Zipkin v. Freeman*, 436 S.W.2d 753, 757 n.3 (Mo. 1968) (en banc); Jerome D. Frank, *The Influence of Patients' and Therapists' Expectations on the Outcome of Psychotherapy*, 41 BRIT. J. MED. PSYCHOL. 349, 349 (1968); Linda Jorgenson et al., *The Furor over Psychotherapist-Patient Sexual Contact: New Solutions to an Old Problem*, 32 WM. & MARY L. REV. 645, 652 (1991); Linda Mabus Jorgenson et al., *Transference of Liability: Employer Liability for Sexual Misconduct by Therapists*, 60 BROOK. L. REV. 1421, 1481 n.165 (1995); Brenda Meldrum, *Evaluation and Assessment in Dramatherapy*, in JENNINGS ET AL., *supra* note 21, at 188; Steve Mitchell, *The Theatre of Self-Expression: A "Therapeutic Theatre" Model of Dramatherapy*, in JENNINGS ET AL., *supra* note 21, at 41-56.

Even audiences who are seeking entertainment do not have uniform expectations. One who voluntarily attends a spook house or a horror film is in a different position from one who unknowingly stumbles into one. Providing some degree of disclosure to potential audience members helps to shape their reasonable expectations, and enables them to determine what risks—physical and psychological—they are undertaking in choosing to participate in a performance. Does experiential theatre always—or sometimes—require some sort of disclosure? If a patron enters a theatre experience with a general expectation of being entertained, what happens if the experience differs greatly from this general expectation? Suppose that an actor physically or verbally assaults the audience member? Shows explicit or gruesome photographs? Deliberately frightens or traumatizes the audience member? Presents physical dangers that may injure the participant? Surely these events go beyond the expectations that the implicit promise of entertainment creates. Yet, the majority of plays and other forms of entertainment, such as books and films, involve elements of surprise, which may include plot developments or images that cause distress to emotionally sensitive individuals.<sup>362</sup> A policy of full disclosure would eliminate the very element of surprise that the majority of spectators seek out and that is arguably essential to the dramatic experience.

Thus, dramatherapy codes of conduct do not seem to be the right codes for drama in general or for experiential theatre in particular. But some type of code may be needed nonetheless. For example, disclosures could warn audiences when the experience will fall outside the scope of reasonable expectations. There may be times, however, when disclosure alone is not enough. If the content of the work is highly offensive or traumatic, it may be difficult to adequately convey this in a disclosure. Some audience members with psychological problems may actively seek out situations that will cause them harm. Or they may choose to attend a dangerous event with the intent of causing harm to performers or other spectators. Even with full disclosure, or perhaps because of it, minors may choose to attend an event that includes adult content.

Even if dramatherapy codes are not the right “fit” for experiential theatre, it is appropriate to ask whether the performing organizations themselves should adopt some minimal standards

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362. Shakespeare's *Titus Andronicus* and *King Lear*, for example, both involve graphic mutilations on stage. WILLIAM SHAKESPEARE, *KING LEAR* act 3, sc. 7; WILLIAM SHAKESPEARE, *TITUS ANDRONICUS* act 3, sc. 1. Tennessee Williams's *A Streetcar Named Desire* and Dale Wasserman's *Man of La Mancha* both depict rape. TENNESSEE WILLIAMS, *A STREETCAR NAMED DESIRE* act 1, sc. 10; DALE WASSERMAN, *MAN OF LA MANCHA* act 2.

involving disclosure, labeling, audience screening, and voluntary limits on content.

## V. AWARENESS WITHIN THE PROFESSION

While the ethical rules of dramatherapy seem overly stringent for drama in general, theatre professionals in recent years have begun to consider the risk of harm arising from their activities and possible strategies for reducing these risks. For the most part, they have considered the risks to performers, rather than audiences,<sup>363</sup> perhaps because they have been writing in the context of conventional theatre, where audiences are less at risk. Nonetheless, at least some of their observations are relevant to audiences, especially in experiential theatre where the boundaries are blurred between audience and performer.

Several scholars have described the "psychological fall-out"<sup>364</sup> or "emotional hangover"<sup>365</sup> that actors (both professionals and students) experience after performing in emotionally demanding roles. When director Suzanne Burgoyne incorporated trance-induction techniques into rehearsals, and eventually performances, of *The Crucible* (a play about the Salem witch trials), she found that these techniques "had a physiological effect on actors and audience alike, inducing both into a suggestible state."<sup>366</sup> Some of her actors reported emotional distress, including nightmares.<sup>367</sup> Observing that the techniques she utilized were similar to the relaxation exercises commonly used in training actors,<sup>368</sup> she became concerned that "[a]ctor trainers who guide students in relaxation techniques are actually practicing hypnosis without a license in hypnotherapy."<sup>369</sup>

Burgoyne later undertook a collaborative study of "boundary blurring," a phenomenon in which actors have trouble differentiating their fictional characters from themselves.<sup>370</sup> Consequences of boundary blurring have included emotional distress<sup>371</sup> and, on some

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363. See *infra* Parts V, VI.

364. Suzanne Burgoyne Dieckman, *A Crucible for Actors: Questions of Directorial Ethics*, 1 THEATRE TOPICS 1, 6 (1991).

365. Richard Owen Geer, *Dealing with Emotional Hangover: Cool-Down and the Performance Cycle in Acting*, 3 THEATRE TOPICS 147, 147 (1993) (attributing the term "emotional hangover" to psychologist Susana Bloch).

366. Dieckman, *supra* note 364, at 5-6.

367. *Id.* at 4, 6.

368. *Id.* at 5.

369. *Id.* at 6.

370. Suzanne Burgoyne et al., *supra* note 307, at 157.

371. *Id.* at 159, 161-62, 166.

occasions, physical injury to other actors.<sup>372</sup> Boundary blurring appears to be especially problematic for less experienced performers, such as student actors,<sup>373</sup> for actors playing roles that paralleled distressing personal experiences,<sup>374</sup> and for actors experiencing emotional instability.<sup>375</sup> Emotional distress was most likely to occur when the subject matter of the performance was “demanding, ‘dark,’ violent [or] sexual.”<sup>376</sup> Once actors became aware of their tendency toward boundary blurring, through self-discovery, observation, or training, they developed coping strategies.<sup>377</sup> Burgoyne and her collaborators recommended “developing guidelines for actor safety.”<sup>378</sup>

Other scholars echo the themes of prevention and protection: “Psychologists, social scientists, psychodramatists all agree that the single most powerful means for preventing damage to individuals engaged in any role-playing situation is awareness. Role players need to know in advance how the performance process may impinge on their ordinary lives.”<sup>379</sup>

Theatre professionals have developed several methods to address these concerns. Robert Barton, an academic who specializes in actor training, assigns acting students to work as partners in exercises that could trigger strong emotions.<sup>380</sup> Barton designed this technique to protect not only the performers, but also the observers, “[s]ince unpredictable surges of emotion just as often come from an audience of classmates or castmates as from the actor onstage and in focus.”<sup>381</sup> He also recommends that teachers learn how to recognize the physical signs of emotional distress and perhaps teach students to

372. *Id.* at 163.

373. *Id.* at 160–61, 165, 171.

374. *Id.* at 166–67, 169.

375. *Id.* at 166, 168.

376. *Id.* at 165. Emotional distress could also arise from acting-class activities. *See id.* at 159.

377. *Id.* at 165, 168–71.

378. *Id.* at 169. More recent clinical studies support Burgoyne and her collaborators’ findings. *See* Paula Thomson & S. Victoria Jaque, *Testimonial Theatre-Making: Establishing or Dissociating the Self*, 5 PSYCHOL. AESTHETICS, CREATIVITY & ARTS 229, 234 (2011) (finding that some actors who participated in atrocity reenactments “demonstrate[d] pathological levels of dissociation”).

379. Geer, *supra* note 365, at 156. One academic warns that an acting class that lacks safeguards for participants can have serious consequences:

While all emotions must be respected, if one student’s expression, for example, of rage makes another feel violated, then compromise becomes essential as a natural component of collaboration. Acting classes that do not work often succumb to one extreme of generalized suppression or the other, where emotionally overbearing participants constantly dominate and are allowed to be disrespectful of others.

Robert Barton, *Therapy and Actor Training*, 4 THEATRE TOPICS 105, 109–10 (1994).

380. Barton, *supra* note 379, at 107.

381. *Id.*

recognize those signs as well.<sup>382</sup> Alumni of these exercises return at Barton's request to assuage the fears of new participants.<sup>383</sup> He recommends allowing students to withdraw unobtrusively from an activity they feel emotionally unprepared to pursue.<sup>384</sup> To make such withdrawal easier, "Standard procedure for announcing that one feels threatened or emotionally uncertain may be established."<sup>385</sup> In addition, "Limits of safety and standards of behavior may be laid out and adjusted by group consensus once new situations occur."<sup>386</sup>

Some scholars use the term "emotional hangover" to describe the difficulty of shaking off the emotional state and personality changes that occur during an actor's performance.<sup>387</sup> Such "aftermath effects" may last indefinitely and "can alter the way the performer interacts with others outside the acting situation."<sup>388</sup> An emotion that has not been fully discharged "tends to continue chronically until another episode of the same emotion is strong enough to precipitate a catharsis of the original."<sup>389</sup> Barton notes that actors "can get caught emotionally because all their energies have been devoted to entering and none to exiting."<sup>390</sup> For example, it is possible that such emotional hangover contributed to the altercation between the critic and the performers after *The Factory*.<sup>391</sup> The critic's behavior during the highly charged performance may have provoked the actors, but ordinarily one would expect that the passage of time would enable them to regain their perspective once the performance was over. The actors' heightened state of hostility and agitation, which was central to their roles in the performance, may have persisted as an emotional hangover and interfered with their normal ability to restrain their hostility when they reencountered their provocateur.<sup>392</sup> Studies on the effects of violent video games support this hypothesis; researchers

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382. *Id.* at 110–11.

383. *Id.* at 109.

384. *Id.*

385. *Id.*

386. *Id.* Barton also suggests that acting teachers make sure that university counseling staff are familiar with the demands of the acting program so that they can respond effectively and discourage counselors from sending emotionally fragile students to take acting classes "in order to work out their issues." *Id.* at 110.

387. Geer, *supra* note 365, at 147.

388. *Id.* at 155.

389. *Id.* at 154.

390. Barton, *supra* note 379, at 113. After discovering the level of distress her actors experienced after an emotionally harsh rehearsal exercise, Burgoyne reconvened the group for a closure ritual focused on forgiveness. See Dieckman, *supra* note 364, at 5.

391. See *supra* text accompanying notes 96–98.

392. This would be consistent with boundary blurring and the tendency toward dissociation that researchers have observed in many actors. See *supra* text accompanying notes 370–378.

have reported that experimental subjects experience similar “hangovers,” displaying increased aggressiveness shortly after being exposed to violent video games.<sup>393</sup>

At the end of an emotionally intense performance or exercise, Barton advises that some kind of closure activity may be necessary to signal that the intensity of the performance experience can now be left behind.<sup>394</sup> In various professions that incorporate performance techniques (e.g., psychodrama therapy or anti-terrorist training), participants may be “debriefed” at the end of a performance in order to obtain the necessary closure.<sup>395</sup> Some practitioners see this as an ethical requirement and warn that failure to debrief can lead to “lasting emotional damage.”<sup>396</sup> Theatre directors and teachers increasingly have incorporated such debriefing or “cool down” techniques into their work with performers.<sup>397</sup>

While commentators have addressed these emotional risks with respect to performers, it does not appear that any formal research has focused on the emotional risks to audiences. From one perspective, audiences may be less at risk because they do not experience the prolonged exposure that an actor experiences during the entire rehearsal and performance period. On the other hand, audience members, unlike performers, have generally not had the opportunity to train for this type of emotional experience, and because they have little advance knowledge of the show’s content, they may be unprepared for the emotions that the experience might trigger. Because an audience willingly surrenders a degree of freedom in order to attend a theatrical event,<sup>398</sup> this act of surrender could make the audience especially susceptible to psychological manipulation:

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393. See, e.g., Craig A. Anderson et al., *Violent Video Games: Specific Effects of Violent Content on Aggressive Thoughts and Behavior*, 36 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 199 (2004). The Supreme Court discussed several such studies in *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729, 2768 (2011). The majority and dissent disagreed on whether these studies establish that exposure to violent video games produces long-term effects. Compare *id.* at 2739 (majority opinion), with *id.* at 2768–820 (Breyer, J., dissenting). However, even the majority acknowledged the possibility that the subjects in Anderson’s study experienced more aggressive thoughts and behavior immediately after exposure to violent video games. See *id.* at 2739 (majority opinion).

394. See Barton, *supra* note 379, at 113.

395. See Geer, *supra* note 365, at 149.

396. *Id.* at 149–50. Richard Schechner, a performance-studies scholar, describes post-performance “cool-down” rituals in many different cultures. RICHARD SCHECHNER, BETWEEN THEATER AND ANTHROPOLOGY 12, 18–19, 42, 74–75, 125–26, 247 (1985). Searching for a safer way for actors to summon up strong emotions and then shake them off post-performance, psychologist Susana Bloch developed the “Alba Emoting” technique. See Geer, *supra* note 365, at 151–53; see also Jessica M. Beck, *Alba Emoting and Emotional Melody: Surfing the Emotional Wave in Cachagua, Chile*, 1 THEATRE, DANCE & PERFORMANCE TRAINING 141 (2010).

397. Geer, *supra* note 365, at 153–54.

398. Arnold, *supra* note 21, at 76–77.



[T]he audience . . . enters a social and psychological mode where acquiescence and passivity is experienced as a norm, and autonomous activity is deviant. There is a positive psychological pleasure in entering into, and being in, this state of delightful bondage. Manipulation of the audience may be aided by this subliminal emotional orientation.<sup>399</sup>

In an experiential performance, the "safeguards" that theatre professionals such as Robert Barton have implemented for actors are typically unavailable for audiences, and may also be unavailable (or not fully effective) for performers who are placed in intimate and vulnerable situations with audience members, as is common in experiential theatre. Audiences attending intimate, intense performances such as *The Factory*, *Internal*, and *Sub Rosa* may be reluctant to withdraw from an uncomfortable scene or may not recognize that withdrawal is an option. To the Author's knowledge, no experiential theatre company has provided an advance briefing by performers or past participants that might prepare an audience for the distress that the experience might provoke. To do so would seem inimical to the theatrical experience desired by audiences, which depends to a great extent on surprise and discovery. Yet exercising vigilance over audience members during the performance itself would not compromise surprise and discovery. The Author does not know whether experiential theatre companies ever assign any of their members to exercise such vigilance, and if so, what kind of training the company members receive in order to carry out this task. In *Sleep No More*, Punchdrunk placed stewards throughout the venue, but it is unknown to the Author what training or instructions they received. Even if a company intends to be vigilant, the supervisor's unfamiliarity with the audience member—a stranger, as opposed to a fellow cast member or an acting classmate—will limit the effectiveness of this supervision. It is unlikely that even a well-trained actor or stagehand can accurately perceive which audience members are emotionally fragile or present a danger to others. Furthermore, audience members may not be aware that anyone is supervising them at all. They thus cannot derive any psychological comfort from the supervision.

In addition, experiential-theatre audiences frequently have no opportunity for closure, which Barton suggests is important to avoid "emotional hangover."<sup>400</sup> In *Internal*, after the actors critiqued their "dates," they invited them to dance and asked for their mailing addresses.<sup>401</sup> The patrons were then sent on their way, often confused

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399. *Id.* at 77.

400. *See supra* note 390 and accompanying text.

401. *See supra* note 53 and accompanying text.

and unsettled by the experience.<sup>402</sup> In some cases, they created their own closure, meeting in a nearby pub or elsewhere to compare notes.<sup>403</sup> In *Sub Rosa*, after the play reached its verbally gruesome climax, the audience members were led out through a fire escape and deposited unceremoniously on a dark street, left to their own devices.<sup>404</sup> In *The Factory*, some audience members fled from the performance in a state of agitation, apparently having no further contact with the performers or the company.<sup>405</sup> There is no indication that those who persisted to the end of the show received any type of closure experience.<sup>406</sup> In contrast, at the conclusion of *Sleep No More*, audience members returned to the same bar and the same friendly host with whom they began their evening; they were encouraged to linger, enjoy the music, and compare notes with their fellow spectators. Similarly, *En Route*, the Edinburgh walkabout, ended with a friendly exit interview with a company member. Notably, however, the content of the latter two shows had little or no potential to cause emotional distress for their audience participants.<sup>407</sup> Ironically, closure was nonexistent at the shows where it was most needed—*Internal*, *The Factory*, and *Sub Rosa*.<sup>408</sup>

## VI. THE EXTREME CASE: INVISIBLE THEATRE

The extreme form of experiential theatre known as “invisible theatre,” as practiced by Augusto Boal and others, has received special attention from scholars of experiential theatre and theatre ethics.<sup>409</sup> Professor Bonnie Burstow, a Canadian psychotherapist who has considered the ethical ramifications of experiential theatre, writes about the interaction between the unemployed “shopper” and the grocery-store cashier that Boal staged in Liege, Belgium,<sup>410</sup> as well as some of his more disturbing scenarios.<sup>411</sup> Speculating about the harms this type of theatre might cause, she notes:

[I]n the Liege example, some measure of temporary harm may have been done to the cashier and to certain shoppers. In other [invisible theatre (IT)] pieces, temporary harm

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402. See *supra* notes 54–56 and accompanying text.

403. See Dickson, *supra* note 38; Fisher, *supra* note 30; Radosavljević, *supra* note 97; Tripney, *supra* note 52.

404. See *supra* note 117 and accompanying text.

405. See *supra* note 93 and accompanying text.

406. See *supra* notes 93–98 and accompanying text.

407. See *supra* Parts I.B.4 (*Sleep No More*), I.B.6 (*En Route*).

408. See *supra* Parts I.B.1 (*Internal*), I.B.5 (*The Factory*), I.B.9 (*Sub Rosa*).

409. See Part I.B.10 (Augusto Boal’s Invisible Theatre).

410. See *supra* Part I.B.10.a.

411. Burstow, *supra* note 121, at 277–79.

is far more substantial, with, for example, onlookers taken away by the police, who could not distinguish between troupe members and spectators, and with Boal, significantly, expressing no concern over such outcomes. Additionally, there is often a significant risk of long term harm in IT. Young men screaming homophobic threats at seemingly gay passers-by, for example, as happened in one IT piece, could easily have culminated in retraumatization of any gay-bashing victims who witnessed the event.<sup>412</sup>

Burstow also cites the event Boal staged in post-9/11 New York, where actors posing as tourists made racist remarks to actresses disguised as Muslim women and accused the women of being terrorists.<sup>413</sup> Burstow asks: "What if actual bigots given to physical violence were present? What if an Arab male passerby suddenly became scared and decided to run?"<sup>414</sup> Nor is it unimaginable that a passerby in these circumstances might physically assault the actors out of anger or in an effort to protect the women.

Burstow suggests that the incidence of physical violence at invisible theatre events may be underreported<sup>415</sup> and that practitioners such as Boal are not sufficiently concerned about these risks.<sup>416</sup> Boal brags about a near miss at his Paris metro event: "We were within a hair's breadth of a fight!"<sup>417</sup> At another event, he reports that the disruption his actors created prompted the police to arrest several actors and spectators.<sup>418</sup> While Boal acknowledged the risks to which he subjected his audiences and his actors, he was undaunted by them:

Invisible Theatre almost always comes up against an important problem: safety. Invisible Theatre offers scenes of fiction, but without the mitigating effects of the rites of conventional theatre, this fiction becomes reality. *Invisible Theatre is not realism; it is reality.*<sup>419</sup>

Burstow believes that invisible theatre "could conceivably be managed in ways far less dangerous."<sup>420</sup> Decrying Boal's methods as deceptive, and therefore unethical, Burstow praises another invisible

412. *Id.* at 277 (citations omitted); Burstow describes the "gay-bashing" scenario in more detail. *See id.* at 279.

413. *See supra* Part I.B.10.b.

414. Burstow, *supra* note 121, at 279.

415. *See id.*

416. *See id.*

417. Jackson, *supra* note 121, at 9. At the event in question, male and female actors sexually harassed one another in front of onlookers on the Paris Metro. The "near fight" broke out when a male actor threatened to molest the wife of a spectator. *Id.* at 6-9.

418. *Id.* at 16. Boal refers to this as "an unrehearsed action." *Id.* at 15. He expressed no regret for the consequences to bystanders or the squandering of police resources. Instead, he commented: "One should never explain to the public that Invisible Theatre is theatre, lest it lose its impact. However, in this particular case, we had no option but to explain to the police. But I have a feeling that they still didn't really understand . . ." *Id.* at 16.

419. *Id.* at 15 (emphasis in original).

420. Burstow, *supra* note 121, at 279.

theatre group for pursuing an ethical standard that required “averting danger, ensuring that onlookers would not be scared, and keeping deception to a minimum.”<sup>421</sup> Like Boal, this company staged a volatile scenario and deceived onlookers into believing it was real.<sup>422</sup> But the scenario was less inflammatory. Staged in a Toronto restaurant, it involved a public argument between mother and daughter over the Arab-Israeli conflict.<sup>423</sup> Several of the actors (posing as customers) were prepared to “defuse problems” should they arise.<sup>424</sup> In Burstow’s view, this “genuinely did create safety,”<sup>425</sup> and spectators “[a]re less likely to become violent.”<sup>426</sup>

The ethical—and potentially legal—problems that invisible theatre presents may be more extreme than those presented by other forms of experiential theatre because invisible theatre involves involuntary spectators.<sup>427</sup> At the start of the event, and typically throughout its entire duration, the spectators are unaware that they are part of a theatrical experience.<sup>428</sup> They have therefore not had the opportunity to choose whether to consent to the experience or to opt out.<sup>429</sup> Nor have they had the opportunity to prepare themselves.<sup>430</sup> Compared to a voluntary audience, they may react in more extreme ways to the unfolding events because they believe them to be real, increasing the likelihood that they will cause harm to themselves, the performers, other spectators, or surrounding property. Thus, invisible theatre may create a greater risk of harm than other forms of experiential theatre.

Invisible theatre thus involves deception—tricking audiences into believing that what they are observing is real.<sup>431</sup> Burstow objects to this use of deception, which she describes as “the core of invisible theatre.”<sup>432</sup> In her view, deception lies at the heart of invisible theatre’s ethical problems<sup>433</sup>:

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421. *Id.* at 281.

422. *See id.*

423. *See id.* at 282.

424. *Id.* at 281.

425. *Id.*

426. *Id.* at 282.

427. *See* THE SAGE HANDBOOK OF PERFORMANCE STUDIES 290–92 (D. Soyini Madison & Judith Hamera eds., 2006).

428. *See id.* at 291 (“[I]nvisible theatre has been challenged on ethical grounds . . . . [T]he unassuming spectators (who are *not* acting) are taken unawares . . .”).

429. *See supra* note 46 and accompanying text.

430. *See supra* notes 36–41 and accompanying text.

431. *See* Burstow, *supra* note 121, at 278–79.

432. *Id.* at 279.

433. *See id.*

[Invisible theatre] practitioners typically act as if it were all right to trick people, to circumvent learners' right to choose, to take up their time, to upset them, and even to expose them to possible violence in the name of facilitating learning that the theatre company judges to be important.<sup>434</sup>

But deception alone cannot make a theatre piece unethical.<sup>435</sup> Many forms of entertainment involve deception, and yet we consider them to be ethical, harmless, and enjoyable. The art of illusion (or "magic") is an obvious example. Another is the device of planting a performer in the audience, under the guise of being a spectator, in order to introduce a surprise element in the course of a performance. Still another example is the "red herring" device in storytelling, which leads an audience to expect one resolution, only to be surprised—and typically delighted—when the plot takes a different turn. Deception and revelation also feature in some "drag" performances, and in many plot devices where an audience's key assumptions are proven false at a dramatic turning point.<sup>436</sup>

If audiences appreciate a "good" deception, they probably approach an unknown entertainment experience with the tacit understanding that deception may play a role. So what is different about some deceptions that makes them unethical? Perhaps an ethical violation occurs only when the deceived person experiences some additional harm that can be identified separately from the deception itself. For example, a person who loses money playing three-card monte (a game in which the dealer routinely cheats) is not only deceived but also cheated out of money.<sup>437</sup> If this were an ethical form of entertainment, the dealer-performer would return the money at the end of the game. Simply revealing that deception has occurred does not solve the ethical problem, because the deception also financially harms the patron. In contrast, the magician who fools us into believing that he is sawing a woman in half is behaving ethically. He does not have to return the patrons' money because they paid with the full expectation that they would be fooled in this way. They

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434. *Id.* at 278.

435. Burstow acknowledges theatre's strong "trickster" tradition. *Id.* at 280. The trickster, a common figure in mythology, is a master of "creative deception." LEWIS HYDE, *TRICKSTER MAKES THIS WORLD: MISCHIEF, MYTH, & ART* 17–18 (1998); *see also* Mady Schutzman, *Joker Runs Wild*, in *A BOAL COMPANION: DIALOGUES ON THEATRE & CULTURAL POLITICS* 133, 140 (Jan Cohen-Cruz & Mady Schutzman eds., 2006) (tricksters engage in "lying, deceit, imitation, and magic").

436. The Author offers the following examples from popular cinema: two characters are revealed to be the same person (*Psycho* and *Fight Club*), a character who appears to be living is revealed to be dead (*The Sixth Sense*), the apparent sex of a character turns out to be an illusion (*The Crying Game*).

437. *See People v. Mayers*, 168 Cal. Rptr. 252, 252 (Ct. App. 1980) (describing three-card monte).

received essentially what the magician promised. Indeed, the patrons would be horrified if the illusionist actually committed the murder. If the magic show patron paid for a ticket, entered the theatre, and then found that there was no magic show at all, then the patron would not have received the kind of deception the magician had implicitly promised; the magician's action would be deceptive in the "wrong" kind of way, causing financial harm to the patron. The only cure for the ethical harm the cancelled performance caused would be to return the patron's money. In the same way, it would be unethical to give a placebo to a seriously ill person without disclosing to the patient in advance the possibility that the patient might receive the placebo instead of the real medication.

Burstow believes that invisible theatre practitioners should provide a greater degree of disclosure to their audiences.<sup>438</sup> She suggests, for example, choosing locations and times at which bystanders "would tend to identify with the possibility, however remote, of some kind of performance."<sup>439</sup> This reduces the level of deception because, "while onlookers believe that they are watching something real, at the back of their minds is an awareness that it may not be real."<sup>440</sup> In some cases, a more explicit disclosure may be warranted.<sup>441</sup> At the very least, she argues, disclosure should occur when "extreme danger is spotted; the police have arrived; [or] someone is getting hurt and the group can find no other way to deal with the problem."<sup>442</sup>

In the context of invisible theatre, members of the company may be trained to watch out for potential dangers, such as violence by confused and angry bystanders.<sup>443</sup> Burstow recommends training them also to be on the lookout for ethical problems and to intervene where necessary to resolve such problems.<sup>444</sup> In addition, she considers some forms of deception to be completely out of bounds, regardless of any precautions the company might take:

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438. In contrast to Boal, Burstow argues that, subject to rare exceptions, the fictitious nature of an event should be disclosed to the audience, "for making the invisible visible places an end point on deception." Burstow, *supra* note 121, at 286. Disclosure may lessen the impact of the performance but that does not "justify continued deception." *Id.*

439. *Id.* (suggesting public squares, theater lobbies, and public areas around monuments and government buildings as possible locations and "Mardi Gras, New Years, April Fools, Twelfth Night, and solstice" as possible times).

440. *Id.*

441. *Id.* at 286–87.

442. *Id.* at 287.

443. *Id.* at 284.

444. *Id.*

Examples of the types of impressions which I am suggesting that [invisible theatre] practitioners not create are: the person before them is at imminent danger from the state; the person cannot breathe; the person is starving; the person is about to commit suicide; the person is about to suffer bodily injury; the person is beside themselves with anguish.<sup>445</sup>

In contrast to invisible theatre, audience participants in most experiential theatre events know that they are taking part in a theatrical event. This knowledge, in itself, constitutes a disclosure. But because experiential theatre breaks the rules of conventional theatre, it can be difficult for the spectator to know in advance *which* aspects of what they will experience are fictional. Furthermore, in a traumatic event such as *The Factory*, the brain may experience the event as real even if the spectator knows that it is simulated.

Even if an audience implicitly agrees to be deceived in some way, it can be hard to determine the scope of the deception to which they have agreed. For example, in *Internal*, the audience knows that the "date" is not real. But if the actor asks personal questions and seems to be sincerely concerned and interested—and, indeed, the gifted cast of *Internal* was quite convincing in their displays of sincerity<sup>446</sup>—the audience member may reasonably believe that there is a true meeting of the minds and that they have established a genuine confidential relationship, even though they were strangers to one another a few minutes before.

Just as there can be deception without harm, there can be harm without deception. While there may be no deception in *The Factory* and *Sub Rosa*, in each case there is a risk of emotional or physical injury. If it is true that artificial situations can induce trauma even in voluntary spectators, then even works like these, where audience members know that what they are experiencing is not "real," have the potential to harm vulnerable spectators in much the same way as the invisible theatre pieces involving homophobic or racist aggression. On a more mundane level, in *Sleep No More*, *En Route*, *Accomplice*, and *Rider Spoke*, where there is little risk of emotional trauma but a definite risk of accidental physical injury, close monitoring, in conjunction with other safety measures, may be necessary to ensure that audience members do not come to physical harm (e.g., falling on a stairwell, tripping over uneven floors or objects obscured by darkness, or stepping into traffic while distracted by headphones).

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445. *Id.* at 285.

446. See Gardner, *supra* note 1; Smith, *supra* note 48.

## VII. THE POTENTIAL FOR SELF-REGULATION

Burstow confesses that she almost decided not to publish her critique of invisible theatre, fearing that, among other things, “it would help fuel the ardor for rigid rules and bureaucratization and might even some day be used as justification to try to control theatre from the outside, much as ethics boards now control research.”<sup>447</sup> In the end, however, she decided to “name these problems in the hope that naming them will help guard against them.”<sup>448</sup> While Burstow acknowledges that the ethical concerns she raises may make practitioners “feel as if a damper is being placed on creativity and choice,”<sup>449</sup> she views her ideas “not as the end but as the beginning of a much needed dialogue.”<sup>450</sup>

If purveyors of entertainment do not take steps to reduce the risk of harm to performers and patrons, they face the possibilities of legal liability (and the attendant increase in insurance premiums, or loss of insurance protection altogether), damage to their reputations, loss of access to high-quality talent, and loss of funding sources. Even a few instances of negative publicity could potentially diminish opportunities for the entire genre and chill the creative environment for creators and audiences alike. It seems reasonable, then, to suggest that theatre practitioners operating in a high-risk arena such as experiential theatre should consider some type of self-regulation, perhaps taking the form of a voluntary code of practice. A scheme of voluntary self-regulation should incorporate at least four possible risk-reduction measures. These include: (1) screening and disclosures, (2) care in selecting and preparing venues, (3) deploying trained personnel to supervise spectators throughout the performance, and (4) content regulation.

*A. Screening and Disclosures*

Following the lead of Adrian Howells,<sup>451</sup> experiential theatre companies should subject their new material to scrutiny by individuals qualified to assess such factors as age-appropriateness, risks of psychological or physical injury to audience or performers,

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447. Burstow, *supra* note 121, at 274. Professor Burstow’s focus was on invisible theatre, in which actors, unannounced and not disclosed to spectators as performers, enter a public area (e.g., a grocery store or a restaurant) and provoke a conflict to which the spectators are drawn in. *Id.*

448. *Id.*

449. *Id.* at 287.

450. *Id.*

451. See *supra* Part I.B.3.



ethical problems, and potential violations of local laws. This screening process will help to determine what, if any, precautions the company should take in order to protect the safety of audience and performers, including the use of age limits, advance disclosures, stewards, warning signs, clearance with police authorities, and venue limitations. It can also identify risks that cannot be mitigated through such measures, which might justify rethinking those portions of the material that create such risks.

If screening identifies portions of the material that are not appropriate for all ages, the screeners should recommend a specific minimum age for attendance. The age limit should be prominently disclosed on all marketing materials and tickets and should be strictly enforced at the venue. Screening may also help to determine what types of patrons might be especially susceptible to psychological or physical injury arising from the event and what kinds of precautions, such as disclosures and the use of stewards to supervise, would best protect those patrons.

The screeners should recommend what kinds of disclosures, if any, a theatre company should make to potential spectators before they purchase tickets. Conceivably, companies could adopt a voluntary rating system, similar to those used for motion pictures and video games. But a mere rating, without more, may be inadequate to inform audiences of specific risks. Many theatre productions—both conventional and experiential—already warn audiences if a performance will involve strobe lighting, fog machines, loud noises, nudity, strong language, or smoking. Other specific warnings may be necessary in some cases—for example, where spectators will be verbally assaulted, physically touched, or confined to a small, enclosed space. Even *Internal* might have benefited from an advance disclosure that the performers were not entering confidential relationships with the audience. It is unlikely that this would have detracted from the patron's enjoyment of the fictional date, and it might have avoided some embarrassment and hurt feelings. If the members of *Ontroerend Goed* were unwilling to make such a disclosure, this would indicate that embarrassment and hurt feelings were indeed part of their plan, and the screening process would then have highlighted this as a potentially serious ethical problem.

### *B. Care in Selecting and Preparing Venues*

A thoughtful screening process should also reveal what considerations should go into selecting and preparing a venue for the event. If a confined space is necessary to achieve the artistic goal, exits should nonetheless be available and clearly visible (and their

availability disclosed in advance). If the company will use smoke or fog machines, proper ventilation may be necessary to protect patrons with allergies or respiratory problems.

Producers of promenade performances such as *Rider Spoke*, *Accomplice*, and *En Route* should consider whether a high-traffic urban setting is appropriate in light of the degree of multitasking required of participants; they might either select a different setting or place fewer simultaneous demands on their patrons. They can also include periodic safety reminders in the recorded messages received by the spectators in the course of the promenade.<sup>452</sup> Any instructions relayed to participants should be unambiguous and should aim to avoid mistaken entry into private property or unsafe surroundings. Where the conduct of participants may draw the attention of police or other authorities or be disturbing to bystanders, proper advance arrangements should be made with authorities. This may also include posting signs alerting passersby that a theatrical performance is in progress.

In the case of *Sleep No More*, while Punchdrunk devoted substantial resources to renovating and decorating the warehouses where the performance takes place, the company ignored the potentially hazardous condition of the floors, doorways, and staircases, and acted carelessly in placing props and furniture in dimly lit areas. Crowd control is also an issue. Encouraging spectators to run up and down narrow metal stairwells in pursuit of performers presents multiple opportunities for accidental injuries, especially when the company also encourages spectators to purchase drinks before and during the show and requires all spectators to wear masks that compromise their vision. Admitting large numbers of spectators for each performance further reduces the visibility of hazards and increases the risk of injury from pushing and shoving or other careless-but-foreseeable behavior. There have, in fact, been frequent accidents.<sup>453</sup> Punchdrunk should have given more attention to preparing the venue and maintaining safe conditions throughout the performance.

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452. There was one such reminder in *En Route*'s recorded instructions, but additional reminders could have been included when patrons were instructed to enter areas of heavy pedestrian or vehicular traffic.

453. These have not been reported in the press. In the course of three visits, however, the Author witnessed several collisions between patrons and props or scenery, some of these obviously painful.

### C. Deploying Trained Personnel to Supervise the Spectators

As the efforts of some acting teachers and the more careful practitioners of invisible theatre illustrate, it may be appropriate to train members of the production company to recognize signs of extreme distress, to identify patrons who pose risks to bystanders and performers, and to intervene to prevent further harm from occurring. Members of the *En Route* company shadowed some patrons as they made their way through the streets of Edinburgh, but not closely enough to prevent accidents from occurring.<sup>454</sup> Each patron took the journey alone, rather than in groups, and the start times were staggered; there may not have been enough “shadowers” to observe every patron throughout the promenade.<sup>455</sup> At *Sleep No More*, Punchdrunk deployed a group of stewards, identified by their black masks.<sup>456</sup> Patrons were told at the start of the performance that the stewards could assist them if they had difficulty.<sup>457</sup> But since the spectators were masked as well, the stewards could not see their faces, and thus would have difficulty identifying and assisting a distressed patron who did not affirmatively approach them for help.<sup>458</sup> It is also unknown what kind of training and instructions the stewards received. As the crowds swelled during the night, it would have become increasingly difficult for the stewards to see whether a patron was experiencing difficulty.

### D. Content Regulation

Some experiential works may be so problematic in their content that no amount of advance disclosure, audience supervision, or venue preparation can lower the risks to an acceptable level. The screening process recommended earlier should help to identify such high-risk content. If screening suggests that the material is so dangerous that precautions will not alleviate the risk of harm, company members should give serious thought to why they selected this material in the first place and whether they can modify the

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454. See Jones, *supra* note 103 (describing the experience of traversing the city, knowing *En Route* personnel were present: “I spent the first half hour trying to work out how many people I was being followed by and where they were hiding—they lost me briefly in the rush of Waverley Station and sent a barrage of panicky messages . . .”).

455. See *id.*

456. Borah Coburn, *Diary of a Black Mask*, MY ENTMT WORLD (Jan. 7, 2012), <http://www.myentertainmentworld.ca/2012/01/diary-of-a-black-mask> (“Black Masks are the glorified ushers/stewards of *Sleep No More*.”).

457. See *id.*

458. See *id.* (“[T]he audience wears white masks, the stewards wear black masks, and the actors are bare-faced throughout the play.”).

material to reduce the risks while still preserving the artistic goal. If the company cannot alter the material, the company should consider whether the risks they are undertaking are worth the benefits of the potential artistic achievement, especially if the risks involve potentially ruinous legal liability, loss of donor or audience support, or public outcry for increased legal regulation of creative activities. Some of Boal's invisible theatre events and Badac's *The Factory* may fall into the category of content that is simply inappropriate for a work of entertainment.

Just as advance disclosures can help to prepare and pre-screen an audience, a post-performance closure event can help audiences place their experience in perspective and prepare for "re-entry" into the real world. Far from detracting from the dramatic impact of the performance, a post-performance debriefing could enhance the spectators' enjoyment, while allowing company members to observe and pay particular attention to any patrons who show signs of particular distress. Allowing the audience to talk about their experience with each other and with members of the company could also reduce their risk of experiencing "emotional hangover." In conventional theatre, audiences often congregate at the stage door after a performance, seeking autographs or other interactions with the actors.<sup>459</sup> Some producers offer "talk-backs" after selected performances, where audiences can ask questions of the writer, director, or actors.<sup>460</sup> Even the simple ritual of the curtain call provides an element of closure and transition, allowing actors and spectators to distinguish the actors from the characters they portrayed; in conventional theatre, the absence of a curtain call would be astonishing. The popularity of these post-performance events in conventional theatre suggests that audiences view them as enhancing rather than detracting from the entertainment experience.<sup>461</sup> In experiential-theatre productions that involve disturbing material, there is even more reason to offer such opportunities for closure.

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459. For a thorough discussion of "stage-dooring," see *To Stage Door or Not to Stage Door*, BROADWAY SPOTTED, <http://www.broadwayspotted.com/stage-door> (last visited Nov. 3, 2012).

460. In 2012, audience members praised the talk-backs that followed performances of *Falling*, an intense drama about a family with an autistic teenager. See *Audience Reviews: Falling*, FALLING, <http://fallingplay.com/audience-reviews> (last visited Nov. 3, 2012); *Sunday Review: Falling (A New Off Broadway Play at the Minetta Lane Theatre)*, AUTISM WONDERLAND (Oct. 7, 2012), <http://www.autismwonderland.com/2012/10/sunday-review-falling-new-off-broadway.html>.

461. E.g., *Audience Reviews: Falling*, *supra* note 460; *Sunday Review: Falling (A New Off Broadway Play at the Minetta Lane Theatre)*, *supra* note 460.

## VIII. CONCLUSION

There is a substantial audience for theatrical events that defy convention and "push the envelope" of dramatic experience. The ever-evolving scope of experiential theatre offers something of great value for these patrons and makes it possible for creators and performers to explore new forms of artistic expression. Along with great achievements, however, there will be mistakes of judgment, sometimes causing injury to patrons and performers.

The concerns raised in this Article, and the recommendations for addressing these concerns, are intended not to diminish the opportunities for experiential theatre, but to preserve those opportunities for future audiences. If unbounded artistic expression causes injuries that are too frequent or too serious, audiences and donors may become scarce, insurance coverage may become prohibitive, or the industry may become subject to repressive government regulation. The best way to avoid this is for the creative participants to engage in voluntary self-regulation.

Experiential-theatre practitioners can begin by sharing information about their experiences, the techniques they have employed, and what they perceive to be their successes and failures. Rather than reinventing the wheel with each production, practitioners can benefit from the accumulated wisdom of their peers and use this know-how to avoid serious mistakes.<sup>462</sup> This pooled information can help each practitioner develop a screening process for new work and identify qualified persons who might assist with that screening. Theatre educators and nonprofit organizations could play a vital role in this process.

This initial step of information sharing could someday evolve into a voluntary code of practice. While such a code should be less stringent than dramatherapy codes and would not be enforced by a licensing process, it would provide a measuring stick that theatre practitioners could use in screening their material. It could also have persuasive value in the litigation context for determining whether a theatre company has breached its duty of care to patrons, performers, or bystanders. Most importantly, the process of developing such a code, and widespread voluntary adherence, could reduce the likelihood of harm to all participants in the creative endeavor.

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462. Burstow implies that practitioners of invisible theatre have been "[h]iding mistakes," and urges them to be "more open to sharing mistakes." Burstow, *supra* note 121, at 287.