GIGS

JAZZ AND THE CABARET LAWS IN NEW YORK CITY

■ PAUL CHEVIGNY

Second Edition

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

GIGS

Praise for the First Edition:

> **"The book proves that lawyers can swing too—at least lawyers like Paul Chevigny. This is public service law come alive."**
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> **Nat Hentoff,** Columnist, *The Village Voice, Washington Post*

> **"Chevigny has a wonderful story to tell about the precarious world of New York City jazz clubs, and his own role in the story as well as this book do him great credit. He weaves together a complex and revealing tale of jazz musicaians and their music, legal rights activism and New York City politics."**
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This book provides a fascinating account of a unique victory for musicians against repressive entertainment licensing laws. It provides a much-needed study of the social, political, cultural and legal conditions surrounding a change in law and public attitudes toward vernacular music in New York City.

This second edition includes a new preface by Hamish Birchall and an introduction by the series editors, Guy Osborn and Steve Greenfield, as well as an afterword, bringing the book up-to-date, by the author.

This book will be essential reading for all those interested in the history of social attitudes toward the popular arts and the use of constitutional litigation for social change.

P**aul Chevigny** is Joel S. and Anne B.Ehrenkranz Professor of Law at New York University. He has a long-standing interest in jazz music and civil rights and has worked on problems of international human rights. He is the author of *More Speech: Dialogue Rights; Modern Liberty and Police Power: Police Abuses in New York City;* and *Edge of the Knife: Police Violence in the Americas.*

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The Series Editors are interested in receiving proposals and manuscripts for this series, please contact Dr Guy Osborn or Steve Greenfield at the University of Westminster (G.Osborn@wmin.ac.uk or S.Greenfield@wmin.ac.uk).

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1. Cricket and the Law: The Man in White is Always Right
David Fraser

2. Gigs: Jazz and the Cabaret Laws in New **York City**
Second Edition
Paul Chevigny

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First published 1991 by Routledge

This edition published 2005 by Routledge
2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
270 Madison Avenue, New York, NY 10016

Routledge is an imprint of the Taylor & Francis Group

This edition published in the Taylor & Francis e-Library, 2005.

"To purchase your own copy of this or any of Taylor & Francis or Routledge's collection of thousands of eBooks please go to www.eBookstore.tandf.co.uk."

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data
A catalog record for this book has been requested

ISBN 0-203-32343-2 Master e-book ISBN

ISBN 0-415-34700-9 (Print Edition)

This book is dedicated to
Thelonious Monk, J.J.Johnson, Billie Holiday, Buell Neidlinger and all the other good musicians who had a problem with the cabaret laws.

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I'd rather drink muddy water, sleep out in a hollow log,
I'd rather drink muddy water, Lord, sleep out in a hollow log,

Than be up here in New York, treated like a dirty dog.

—Jack Teagarden

SERIES EDITOR'S PREFACE

At first glance it might be thought that Paul Chevigny's wonderful account of the cabaret laws has little relevance to the era of contemporary public entertainment regulation. If this were in fact true, the work would still be admired for its historical description and analysis alone. However, the whole question of the role and extent of state regulation of public entertainment is an ongoing one. There is a whole host of different issues and interest groups to be accounted for and, curiously, there is pressure for both more, and less, legislation to tackle the often conflicting policy agendas. For example, there may be political pressure to deregulate in the hope that a thriving night-time economy emerges, and which in turn contribute to a broader idea of urban renewal or regeneration. However, in what might be termed "mixed-use" areas there is the question of the impact and consequences of late night public entertainment upon residents and other parties. These may in fact be overstated, and difficult to link to anything more than a general increase in the number of visitors in an area which is itself a consequence of living in a city centre. This dichotomy was spelt out by Jack Straw MP, then Home Secretary, in the foreword to the Government White Paper "Time for Reform" the pre-cursor of the *Licensing Act 2003;*

> "Modernising licensing laws should not put unnecessary obstacles in the way of the industry's further development, but this must not be at a price of weakening its social responsibilities. Our proposals will provide industry with greater freedom and flexibility to meet the needs of its customers, but balance that with tough and uncompromising powers for the police to control any disorderly premises and for local authorities to protect residents from disturbance".[1]

Chevigny raises other important questions that challenge the policy behind the desire for regulation, and further argues that cultural issues may play an important role. Interestingly, with respect to domestic licensing law the Government was keen to stress the cultural dimension to our use and abuse of alcohol, and the extent to which the legal regulation had contributed to a cultural regime of alcohol abuse. This package included a trend towards allowing "24 hour licensing", and a related belief that cultural drinking patterns could be altered by legislative change.[2] It is therefore perhaps somewhat curious that while the tenor of the government rhetoric, and indeed the legislation, was one of deregulation and an "opening up" of the night time economy, many of the provisions were in fact having the opposite effect. Outside of liquor licensing, the Government proposals also had implications for entertainment licensing generally, that is to say the regulation of music and dancing. Hamish Birchall, in his extended preface to *Gigs* details some of the effects that this would have on live music, and in particular asks whether the avowedly deregulatory Bill did in fact have this effect in terms of live music:

> "So, how could the government call their Licensing Bill deregulatory when it actually increased local authority licensing control over virtually all forms of live music? Among other things the Bill proposed the licensing of all public

> concerts in churches (other than religious services); it criminalized performers who failed to take every precaution to check venues held the appropriate license, and even criminalized landlords providing a piano in a bar for customers to entertain themselves unless licensed".[3]

To Hamish Birchall, a professional musician and promoter of small jazz ensembles, Paul Chevigny's text was both a clarion call for activists, and a sign of hope that individual action can make a difference. The "two in a bar" rule in England and Wales that Birchall campaigned against in many ways mirrored the "three in a bar" rule in New York—Chevigny's story of the struggle to strike down this provision, the story charted in this book, was inspirational to Birchall for his own campaign. Chevigny's book is, however, much more than merely a story about the successful attempt to change New York's "cabaret laws". Chevigny's book is a powerful reminder of the power of both individual and collective action, and of the need to defend areas of popular culture against external attempts to regulate, or indeed censor. Witness for example within the United Kingdom the attempts of the government to censor rave culture in the late 1980s and early 1990s, and the grass roots efforts to prevent an overly prescriptive regulatory framework being enacted.[4] As Chevigny puts it in terms of jazz;

> "Like other arts, jazz and popular entertainment generally have provoked a strong impulse to control by the government, one that is easily translated, in the case of live vernacular music, into licensing and zoning policy for the clubs. The cabaret laws were a form of censorship of those arts, as well of a seductive life that went with them, that were thought to be corrupting".[5]

Paul Chevigny's book is a crucial work for the field of law and popular culture and for the law and society movement more generally. It is, as Steve Redhead put it, "…most significantly a book which helps to contribute to research and policy and at the same time takes popular culture seriously."[6] We are delighted that we have been able to secure a new home for this text, and to be able to recontextualise this with Hamish Birchall's account of his own experiences in the UK which we feel illustrates beautifully its contemporary relevance. We hope that this will provide further inspiration for both academics and activists, and serve as a timely reminder of the importance and relevance of the burgeoning field of law and popular culture

Steve Greenfield and Guy Osborn
Series Editors: Studies in Law, Society and Popular Culture

Notes

1. Home Office (2001) *Time for Reform: Proposals for the modernisation of our licensing laws* (HMSO: London).
2. See generally on this research we conducted as part of a study into licensing across four Northern European capital cities (Dublin, Copenhagen, London and Berlin) in M.Roberts et al. (2002) *Licensing Reform: A cross cultural comparison of rights, responsibilities and regulation* (Central Cities Institute: University of Westminster).
3. Birchall, p. xvii.
4. See for example, M.Collin (1997) *Altered State. The Story of Ecstacy Culture and*

Acid House (Serpents Tail: London).
5. *Gigs*, see p. 169.
6. S.Redhead (1995) *Unpopular Cultures. The birth of law and popular culture* (Manchester University Press: Manchester, p. 26).

FOREWORD

Hamish Birchall

Hamish Birchall is a professional jazz musician and was adviser to the British Musicians' Union 2001–2003 on the government's licensing reforms.

This remarkable book deserves to be read by all musicians and anyone who enjoys live music. It addresses fundamental questions about the right of the law to interfere with musical self-expression. This might be a somewhat academic debate, were it not for the fact that *Gigs* vividly describes a unique legal victory for New York jazz musicians. Invoking 1st Amendment rights, they overturned more than 60 years of repressive legislation that severely restricted performance outlets in New York City. And, far from being a parochial spat, the positive outcome has important implications for musicians in the UK and beyond.

This reprint is particularly well timed, coming as it does in the wake of controversial new entertainment licensing law for England and Wales. The Licensing Act 2003 received Royal Assent on 10 July 2003, although it will not come into full effect until late 2005. The Act proposes, in effect, a "none in a bar rule". Bars, clubs and restaurants, indeed most premises, will need to be licensed explicitly as entertainment venues if they are to make a feature of live music, even if the performance is by one musician without amplification. Notoriously, this reverses a long-standing exemption in liquor licensed venues for one or two live performers, known to musicians as the "two in a bar rule". According to the government, this is necessary to ensure public safety, control noise, curb crime and disorder, and to protect children from harm.

The rationale for regulation may be unarguable, but musicians and lawyers regard the actual legislation as over-prescriptive, open to abuse by enforcing authorities, and discriminatory. If broadcast entertainment with big screens and powerful sound systems can be exempt, what is the justification for criminalizing the provision of even solo un-amplified performance, unless licensed?

New York's "cabaret laws" originated during the Prohibition era, imposing draconian entertainment licensing control over jazz venues and performers. At that time there was a link between some clubs, drug abuse and organized crime. But, unbelievably, as recently as 1990, cabaret laws remained in force even for the smallest bar or restaurant. A bizarre exemption, created in 1955, allowed bars, clubs and restaurants in certain areas of the City a maximum of three musicians without a "cabaret licence". But the restrictions went further: the performers could be strings and piano players only!

"Would you believe it's illegal to have a saxophone in here?" one hapless bar owner tells the author, jazz loving law professor Paul Chevigny. Understandably his response was incredulous: "I didn't believe it. Literally. I thought someone must have been pulling her leg". In order to lift the restrictions, a cabaret licence had to be obtained. But this was bureaucratic and costly—the perfect deterrent, in fact, for city authorities anxious to keep

live jazz out of “respectable” areas.

In *Gigs* Chevigny demonstrates that the cabaret laws had been used as a cover for institutional racism and a “fear of bohemian mores”. The authorities had sufficient powers to regulate public safety and noise—the stated rationale for cabaret licensing. But, at a deeper level, what makes this book particularly significant and deserving of a wide readership is that it also documents what could be described as an archetypal conflict between artistic self-expression and forces of cultural repression. As UK jazz musicians know, under the guise of entertainment licensing enforcement, this conflict has been simmering in the UK for decades.

By the early 1980s, New York jazz musicians had had enough of the cabaret laws. After a long period of vacillation, the Local 802 Branch of the American Federation of Musicians threw its full weight behind a lawsuit against the City on the basis that the licensing regime violated musicians’ 1st Amendment rights—the right to freedom of expression. Many lawyers, including Chevigny, were doubtful of a successful outcome. But, against the odds, with Chevigny as their advocate, the musicians won. On January 28, 1988, the aptly named Judge David B.Saxe struck down New York’s “three in a bar rule”, although it would be two more years before this was fully implemented in the form of a cabaret licence exemption for venues up to a capacity of 200 listeners.

When the UK Licensing Bill was published in November 2002, musicians felt badly let down. On winning the General Election in 1997, New Labour had promised to overhaul both liquor and entertainment licensing. Musicians working in pubs, bars and restaurants took this to mean a relaxation of the “two in a bar rule”. Originating in 1961, this was an exception from the general requirement to hold a “public entertainment licence” (PEL) for live performances. But, as with cabaret licences in New York, the licensing authorities often made the process of obtaining a PEL prohibitively costly and time consuming. By March 2001, the Home Office estimated that barely 5% of over 110,000 liquor-licensed venues in England and Wales held annual PELs [“Liquor Licensing Deregulation—Consultation on Licensing Hours for New Year’s Eve 2001 and Her Majesty’s Golden Jubilee in June 2002”, Introduction, para 26, p. 4].

However, while the similarities between the New York City and UK entertainment licencing regimes were striking, there were also significant differences. The broad similarity was the combination of irrational legislation and petty local authority enforcement resulting in the decimation of smaller local venues where musicians perform. Ultimately, in both the UK and New York, this can only be explained in terms of a fundamental lack of respect for what Chevigny calls “vernacular” music.

Some of the large-scale parallels were repeated on a smaller scale, such as the limited exceptions to the general entertainment/cabaret licensing requirement. However, while the two-performer exception applied across England and Wales, and was more restrictive in terms of the number of performers, it did not specify instrumentation. And while there may have been some covert zoning arrangements, this was not explicitly permitted in the UK as it was in New York City. There are also significant historical and cultural differences. In the UK, entertainment licensing dates back to 1752. In New York, cabaret licensing began in 1926. In the UK, overzealous enforcement of entertainment licensing is more likely to result from local residents with a “not in my back yard” syndrome, rather than inter-racial tension. Moreover, jazz is not central to the cultural history of the UK. Despite the fact that some British jazz musicians are among the best in the world,

jazz musicians generally did not campaign against entertainment licensing restrictions as effectively as their North American counterparts. Indeed, with some notable exceptions, it was folk and classical musicians who campaigned most successfully against the Licensing Bill in the months following its publication.

If the "two in a bar rule" was bad law, it was made far worse by petty local authority enforcement. Since the early-1980s, when responsibility for entertainment licensing was transferred from magistrates to local authorities, there had been a steady flow of complaints from musicians concerning heavy-handed local authority interference. In 2001, I collected a set of verifiable accounts. These included:

- a leading sax player stopped in mid-solo by an enforcement officer warning that the venue did not hold a PEL;
- a Camden bar-owner threatened with a £20,000 fine and a jail sentence for allowing a guest musician to sit in with a duo;
- a pub landlord in Greenwich threatened with prosecution by the council because folk musicians "were being watched by at least a dozen customers who were tapping their feet to the music and thus being entertained by the audience";
- a folk pub in Weymouth threatened with prosecution on the basis that case law from 1793 counted members of the public who sang along as performers; and
- a leading string quartet forced to sit in silence while a CD was played in lieu of their banned performance in a Hampstead book shop.

In addition, where bar owners applied for PELs they were often hit with licence conditions costing thousands of pounds to implement, such as rewiring the entire premises, or fitting extra toilets. As it became clearer that new licensing law was in preparation, increasing numbers of musicians shared their "two in a bar" experiences via email and internet discussion groups. It seemed that heavy-handed enforcement was both widespread and commonplace. As often as not, arts officers within the enforcing authority would know nothing about the culturally destructive antics of their own licensing department. There was more than one instance of a musician receiving a grant from the local council to promote a series of live gigs only to have the events shut down by licensing officers citing a technical breach of the law.

In one notorious High Court case in 2002, the London Borough of Southwark pushed for and succeeded in obtaining "obiter" to the effect that the "two in a bar rule" meant no more than the *same* two performers throughout the course of an evening's entertainment. This set a national precedent, rendering any musician sitting in with a duo in an unlicensed venue a potential criminal offence for the bar owner. [*London Borough of Southwark v Sean Toye*, Administrative Court, Royal Courts of Justice, 21 February 2002, Ref: CO/3692/2001]

So, how could the government call their Licensing Bill deregulatory when it actually increased local authority licensing control over virtually all forms of live music? Among other things the Bill proposed the licensing of all public concerts in churches (other than religious services); it criminalized performers who failed to take every precaution to check venues held the appropriate licence, and even criminalized landlords providing a piano in a bar for customers to entertain themselves, unless licensed.

Ministers attempted to justify these draconian measures in Parliament and in numerous letters to MPs. Their main argument seemed to be that public safety and noise legislation was inadequate where live music was concerned. Take one example, a DCMS document

published in January 2003, circulated to MPs by the then licensing minister Kim Howells:

> "The penalties provided in the Licensing Bill are maximum penalties and, as with all offences, the courts would decide on the appropriate punishment depending on the facts of the case. Severe penalties might be appropriate in some cases, however rare, for instance where a musician put lives at risk by trailing bare cables through an audience."
>
> ["Regulation of Entertainment Under the Licensing Bill", DCMS, January 2003, para 24.2]

Indeed, within two weeks of the Bill's publication Howells himself specifically cited public safety as the justification for licensing all public concerts in churches:

> "The churches in London, for example, have been subject to a licensing regime for 40 years. There are big churches that hold very big concerts for profit. And if something was to go wrong inside one of those churches, there was a fire or something else happened, then the Local Authorities who have to inspect those premises would really be in trouble and they have to be paid for those functions. And that's why there has to be a licence—*it's to do with public safety*."
>
> [BBC R4 Today, Thursday 28 November 2002, Kim Howells interviewed by John Humphrys, 7.40am, my emphasis]

In fact the Health & Safety Executive later confirmed that risks arising from trailing cables were already covered by separate safety legislation, irrespective of licensing. Experts in safety law pointed out that employers, and indeed self-employed performers, already have statutory duties to conduct risk assessments, and to provide a safe working environment. Breach of these duties can already lead to criminal prosecution and potentially unlimited fines.

Two months after his Today programme appearance, following censure from the Church of England and an 8,000-signature petition from church choirs, Howells announced a u-turn:

> "The exemption I am announcing today will enable religious institutions and music societies to flourish. It will bolster the measures already contained in the Bill that are designed to foster live music, by opening up greater opportunities for musicians to perform."
>
> [Extract from DCMS press release, 3 February 2003]

Clearly, entertainment licensing was not required on public safety grounds alone.

On noise, the DCMS document commented:

> "…The Government simply does not accept that live music in pubs is never a source of disturbance. The Institute of Acoustics lists 'amplified and non-amplified music, singing and speech sourced from inside the premises' as a principle source of noise disturbance from pubs, clubs and other similar

premises…"

["Regulation of Entertainment Under the Licensing Bill", DCMS, January 2003, para 3.5]

This missed the point. No-one had claimed that live music was never a source of disturbance. The point was that the government had provided no evidence that it was a significant source of disturbance, which it would have to be in order to justify increased regulation. Nor had the government demonstrated that separate noise legislation was insufficient. The Institute of Acoustics (IoA) reference was also somewhat misleading. No IoA publication title was provided by DCMS. They appeared to refer to a then unpublished draft document. The quote implies that live music is somewhere around the top of a list of sources of actual complaint. But the President of the IoA subsequently wrote to Tessa Jowell, Secretary of State at DCMS, objecting to the inappropriate use of a document about a proposed Code of Practice that was nothing more than an early draft. The IoA document, the "Good Practice Guide on the Control of Noise from Pubs and Clubs", was finally published in March 2003. It does list noise from amplified and unamplified music among a list of eight categories described as "…main sources of noise that can cause disturbance from pubs, clubs and similar premises…". The IoA Good Practice Guide also states:

> "Noise disturbance can also arise from televised sporting events, which are often relayed at high volume and can be accompanied by patrons cheering, shouting and singing."
>
> [p. 5, para 3.4]

That sentence was present in the draft IoA document used by the DCMS, and yet it did not appear in the DCMS publication.

In eight months of Parliamentary debate the government never produced any evidence of a significant noise problem caused by live music in bars or anywhere else. The Chartered Institute of Environmental Health, which provides noise nuisance data used by the government, confirmed that they could not discriminate between complaints caused by music or noisy people, let alone noise from unamplified music. In discussions with me, the Noise Abatement Society, UK Noise Association, and the Institute of Alcohol Studies, made it clear that live music was low on their list of priorities. They were focused on one source of noise complaint: noisy people outside licensed premises. A spokesperson for the UK Noise Association said that complaints from recorded music appeared to be much more common than from live music. The noise nuisance policy section of the Department of Environment, Food and Rural Affairs (DEFRA) confirmed the powerful legal remedies already available to local authorities and the police to deal with noise emanating from within bars and pubs, irrespective of entertainment licensing. These include local authorities' power to seize noisy equipment immediately, to serve anticipatory noise abatement notices as well as noise abatement notices requiring immediate compliance. Since 2001, the police have had the power to close noisy licensed premises immediately for up to 24 hours. It was arguably the case, however, that local authorities and the police sometimes lacked the resources to implement these powers effectively.

But even without these powerful counter-arguments it was impossible to reconcile the government's public safety/noise/ crime and disorder rationale with the Act's exemption