

Chapter 3

(Un)remembering

Countering law's archive – improvisation as social practice

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Nothing is a mistake. There's no win and no fail, there's only make.

John Cage (sic)¹ (Kent 2008: 176)

[T]he act of improvising also tells us something about ourselves and the world we share. It transforms contingency into necessity, while simultaneously reminding us of the necessity of contingency.

(David Borgo 2014: 48)

A mistake made during an improvised musical performance may be aesthetically unpleasant, but is rarely lethal or dangerous. Members of the listening audience (and perhaps even the other musicians on stage) may not even notice the gaffe. A mistake in law, by contrast, can have dire consequences. Wrongly convicted persons can be imprisoned, sometimes for life. Those mistakenly freed are at liberty to commit further crimes, including violent ones. That said, lawyers and legal academics have much to learn from musicians regarding their approach to mistake in ephemeral performance. Transitional justice studies² often link failures and wrongs with apology and reconciliation (Barkan and Karn 2006; Teitel 2006). Yet, when viewed through the practice and techniques of improvisation, failure does not necessitate apology. In improvisation, it is more about recognising failures and being accountable through future actions, rather than archiving the mistake(s) and apologising for such. Doing rather than saying. Un-remembering rather than re-inscribing. Responding to the new situation with knowledge and confidence, without the weight of guilt.

This chapter takes its inspiration and substance from ephemeral performances, or 'improvised doings' as Landgraf calls them (2011: 21), which resist the compulsion towards the archiving of mistakes for which

1 This quote is often attributed to John Cage. However, after extensive investigation, it appears that it actually originated from educator and artist Sister Corita Kent, as part of a class she taught in 1967–68.

2 For a critical summary of transitional justice studies, see Turner (2013).

apology is subsequently demanded. Improvisation is theorised here as a *social practice* (Fischlin and Heble 2004: 11), one that can be applied to the discipline or field of law (Ramshaw 2013a). Improvisation as social practice envisions ‘possibilities excluded from conventional systems of thought’ (Fischlin and Heble 2004: 11) and thus is an ‘important locus of resistance to orthodoxies of the imagination (knowing), of relations with others (community), and of relations to the materials of the world around us (instruments)’ (ibid.). Law, as Ramshaw elsewhere notes, is fundamentally improvisational, requiring a constant negotiation between the freedom of the judge to take account of the otherness or singularity of the case *and* the existing laws or rules that both allow for and constrain that freedom (2013a: 3). What this chapter explores is how to reconcile this conception of law as improvisation with its archival elements and what thinking about law through musical improvisation adds to the discussion of law’s counter-archive.³

First, it is important to clarify that musical improvisation is not completely unarchivable. The improvised act is never one of pure immediacy. Instead, it retrospectively develops and builds on its own history (Landgraf 2011: 17). To improvise well requires great skill, discipline and technical knowledge, as well as an attention to ‘background, history, and culture’ (Lewis 2004: 153). Thus, rather than eschewing all formality and structure, the improvised act can only be understood in relation to the pre-existent (and the archive), be it the original melody, theme or musical tradition. In the words of Charles Mingus, ‘[y]ou gotta improvise on *some-thin*’ (cited in Kernfeld 1995: 117, emphasis added). To do otherwise would make its recognition *as* improvisation impossible (Ramshaw 2013a: 43). Moreover, an essential aspect of musical improvisation is that it ‘archives historical practices and speaks to a community about its past and present’ (Fischlin and Heble 2004: 7): ‘Improvisation as remembrance’, Fischlin and Heble write (2004: 11).

That said, improvisation is simultaneously *counter*-archival in nature. As the ‘sound of surprise’ (Fischlin *et al.* 2013: 203), it is oriented towards the ‘unknown’ (Corbett 1995: 225). Improvisation involves practices that cannot, by their very nature, be ‘readily scripted, predicted, or compelled into orthodoxy’ (Caines and Heble 2015: 2; see also Fischlin *et al.* 2013: 203; Fischlin and Heble 2004: 22). And this can result in the unsettling of ‘comfortable preconceptions’ and cast doubt on ‘fixed and stable ways of seeing, and hearing, the world’ (Fischlin *et al.* 2013: 203). What follows takes as its starting point Fischlin, Heble and Lipsitz’s question about what is at stake in improvised musical performances and to whom (Fischlin *et al.*

3 As musicians are best placed to provide in-depth knowledge of the practices of improvisation, and one of the authors is himself a sound artist and musical improviser, this chapter focuses extensively on musical improvisation.

2013: 203), interrogating the significance of risk and mistake in ‘improvised doings’. Abolishing the need for apology, an archive of a different kind is created and the question then turns to what is at stake for law and justice when theorised through the ‘ethics and aesthetics of surprise’ (ibid.: 204).

Mistake

‘Erring is essential to human endeavour’ (Peters 2012: 6). It is the constant ‘trying something out’, which, as Gary Peters notes, ‘becomes less and less hit and miss ... and becomes instead a task that gains in consistency and intensity. This process transforms, over time, if not the nature then certainly the feeling of certitude necessary for an improvisation to take place’ (ibid.: 6). Mistake invites certitude, which enables improvisation.

The notion that improvisation is in any way related to or dependent on certainty and predictability appears to go ‘against the grain of most writing on improvisation, which very much places the emphasis on the unfixing of fixed structures’ (Peters 2012: 6). As mentioned above, performances based on an ethics and aesthetics of surprise resist memory, disengaging with the ‘politics of memorialisation’ (McNamee 2009: 50), and the archival process more generally. As David Borgo writes, it is the exploration of *uncertainty* that is the *raison d’être* of improvising musicians: ‘Improvisers not only welcome but they worship the sound of surprise. They revere the uncertainties of new techniques, new conceptions, and new performance occasions, groupings, and venues’ (2005: 14). And, as Borgo articulates elsewhere, improvisers often seek out contingency: ‘Creative use of the accidental or the unexpected – as comments from countless improvisers will attest – helps to keep the music fresh’ (2014: 38).⁴

Yet, as also stated in the introduction, one of most common myths or misconceptions surrounding improvisation is that it is structure-less (Alterhaug 2004: 103) and devoid of ‘law’, adhering to ‘neither convention nor protocol’, tolerating ‘no system of constraint’ and requiring ‘no prior thought’ (Fischlin and Heble 2004: 23). In actual fact, improvisation is only made possible through a thorough knowledge of the tradition in which it is taking place and much practice or dedication to learning the skills of the art of improvisation (Demsey 2000: 789; Bailey 1992: xii). Why else do many improvisers – John Coltrane being a telling example (Fischlin *et al.* 2013: 95) – spend so much time rehearsing for an improvised performance, or preparing to be spontaneous? This work or discipline is ‘necessary

4 Improvisation, in accordance with this view, is conceived as ‘the creation and development of new, unexpected, and productive cocreative relations among people. It cultivates the capacity to discern elements of possibility, potential, hope, and promise where none are readily apparent’ (Fischlin *et al.* 2013).

to the extent that it allows the improviser, at the decisive moment, to begin and sustain a work with a degree of certitude that belies the uncertainty of its origin and gestation' (Peters 2012: 6).

Peters perhaps goes farther than others to label most improvisation as *predictable*. In his article, 'Certainty, Contingency, and Improvisation', he explains that the 'pleasure' associated with improvisation actually stems from a 'shared certainty' as between the audience and the improviser(s) regarding the fact that 'quite strictly prescribed things are likely to happen', as opposed to the 'much-heralded *uncertainty* that so effectively fuels the risk-taking agenda and the edgy virtuosity that accompanies it' (2012: 6, emphasis added). He continues by saying that 'it is precisely the improviser's desire for certainty that does indeed protect formal structures from any serious disruption or deconstruction—that's the point... [I]f you want uncertainty then stay away from improvisation' (ibid.: 6, emphasis added).

Assertions of predictability or inevitability in improvisation are extremely controversial (Borgo 2014: 38). Improvisers, on the whole, are reluctant to acknowledge or speak about inevitabilities in improvised performance (ibid.: 39). As Borgo shrewdly articulates: 'Few would subscribe to the pejorative notion that *anything goes* in improvisation, but many hold dear to the notion that *anything can happen*' (ibid.: 39, emphasis in original). That said, Borgo acknowledges that, 'as an improvisation progresses, artists and audiences alike are in a state of continually wanting to know what will happen next. Improvisations create a movement whose direction we want to see continued' (ibid.: 45). The sense of inevitability thus comes from the '*narrowing* of possible choices' (ibid.: 45, borrowing from Landgraf 2009), enabling us 'to predict, to forecast, so that we can be prepared for what comes next' (Borgo 2014: 45). Borgo reconciles the paradoxical conceptions of improvisation as both contingent and predictable by describing 'successful' group improvisation as having the feeling of '*improbable inevitability*': 'The various contingencies and adaptations that emerge through the process of improvising become "inevitable" only when the music successfully integrates them into itself' (ibid.: 45).

The '*improbable inevitability*' of 'successful' improvisations, can, as Fischlin, Heble and Lipsitz point out, 'encourage people to take new risks in their relationships and collaborations with others, to work across various divides, traditions, styles, and sites, and to hear (and see) the world anew' (Fischlin *et al.* 2013: 204). But not every improvisation is successful. What is at stake, then, when improvisation fails, and to whom? And even when improvised encounters fail, can they 'actually provide listeners with an important model for rethinking how and why they need to find productive ways to address encounters with difference'? (ibid.).

What does it mean to fail as improvisers? Fischlin *et al.* (2013: 205) list some instances in which a musical improvisation may not be seen (or heard) to succeed:

- (1) The music fails to surprise us; it simply resorts to clichés, or relies on ‘habitualized gestures’
- (2) The musicians are unwilling or unable to listen to one another
- (3) Authoritarian musical gestures are deployed, or
- (4) The musicians are more focused on the development of their own virtuoso techniques than with the collective endeavour.⁵

We would also add that improvisation might fail when the audience does not have a context or experience to properly engage with the performance. Improvised music, especially that of the more experimental variety, can be challenging to listen to (Glouberman and Sorbara 2004). Thus, audiences also need to practice and hone their skills of listening. However, as Fischlin, Heble and Lipsitz note, ‘even in so-called failed improvisations there always remains the spark of what might have been: the fact that chances were taken (or not) and that the performative agency enacted, however successfully, can still teach the listener something valuable’ (2013: 205).

Why, then, might the failures of musical improvisation be of interest to critical legal theorists? When musical improvisation does not work, the result is often thought of in terms of a musical or aesthetic failure (Fischlin *et al.* 2013: 205). But if we consider the complex ways in which improvised musical practices ‘inhabit the *social* landscape’, and how problem-solving in improvised music corresponds with that in other areas of human experience, then the implications of improvisational failure in music may be far more wide-reaching and profound than first imagined (*ibid.*, emphasis added).

Christopher Small, in his book *Musicking*, writes that ‘[w]hen we perform, we bring into existence, for the duration of the performance, a set of relationships, between the sounds and between the participants, that model ideal relationships as we imagine them to be and allow us to learn about them by experiencing them’ (Small 1998: 218). Thus, acts of ‘musicking’, in determining their success or failure, should be judged on their ‘success in articulating (affirming, exploring, celebrating) the concepts of relationships of those who are taking part’ (*ibid.*: 213). ‘We may not like those relationships’, as Small points out, ‘but we should understand that our opinions are as much *social* as they are purely aesthetic. ... That is to say, we are passing an opinion not merely on a musical style but on a whole set of ideal relationships that are being articulated by the musical performance’ (*ibid.*: 213, emphasis added). Thus, when an improvisation fails, the participants (musicians and audience members alike) gain an understanding of how relationships in general can fail. But

5 According to John Stevens, ‘The thing that matters most in group music is the relationship between those taking part ... Good and Bad become simply a question of how much the musicians are giving, that is the music’s form’ (cited in Scott 2014: 95).

as critical improvisation scholars suggest, if we listen closely we can find meaning in what might have been, glimpsed in momentary instances where connections take place or are even simply imagined (Fischlin *et al.* 2013: 204). These failures can aid in the realisation of ideal possible futures, a process of both learning from and un-remembering the past and present. It is in this manner that improvisers become experts at forgetting mistakes, as they are only stepping stones to more certain (or confident) successes.

As such, often the ‘unforeseen antagonisms’ that emerge from an ‘act of improvisation gone wrong’ generate ‘their own surprising turn of events, out of which new forms of alliance, new and unforeseen kinds of community-building ... take place’ (Fischlin *et al.* 2013: 218). As critical improvisational theorists remind us, ‘even in failed instances of improvisation, the social significance of the failures becomes the locus for new dialogue, however tense, that is productive of new forms of engagement, new ways of understanding agency and social practices that test the limits of the listener’s ability to interpellate dissidence and difference’ (*ibid.*: 219). This is because it ‘teaches the listener that in the surprise of the unexpected lies the potential for new understanding, for necessary, though not always easy, self-examination, and for renewed and unrelenting efforts to attempt to negotiate difference’ (*ibid.*).

Unremembering the archive: The trauma of memory

The archive is commonly characterised as an unfaithful representation of the ephemeral art experience, with documentation often conceived negatively in relation to the knowledges embodied in live events. This formulation was questioned by the ‘Dialogic Evidence: Documentation of Ephemeral Events’ project,⁶ which aimed to reconcile the archive with ephemeral performance by exploring the possibility (and the limits) of a productive co-existence between sonic art, performance art and documentation practices (Stapleton 2008). The project championed the (often undervalued) provisional nature of the knowledge embodied in performance, and developed archival strategies which made explicit the unstable nature of documentation. This section further interrogates the concepts of ‘liveness’ and ‘rememberings’⁷ in relation to the (counter) archive in both

6 Paul Stapleton was the Principal Investigator of this 10-month long research project, active from mid-September 2006 to mid-July 2007, which was supported by the Arts and Humanities Research Council’s Small Grants in the Creative and Performing Arts Scheme and the University of Central Lancashire. For more information, see <http://gtr.rcuk.ac.uk/project/54C60FBB-7382-432D-A1AF-B526CFE15C40>.

7 ‘Rememberings’ was suggested by Simon Ellis, a participant in the Dialogic Evidence project, as an alternative to the term ‘documentation’ or ‘archive’.

music and law. Here, we argue that the acceptance of archival doubt, as a suspension of disbelief, is a necessity in the aporia of the performative moment where the past fails to fully account for the present, and the present fails to accurately represent the past. Yet an ephemeral performance does not exist without the past, and the past is only understood through the living present.

In *Archive Fever*, Jacques Derrida troubles the distinction between the 'psychic archive' and 'spontaneous memory' (Derrida 1995: 19). Derrida claims: 'There would indeed be no archival desire without the radical finitude, without the possibility of a forgetfulness which does not limit itself to repression' (ibid.). Derrida goes on to say that such archive fever 'verges on radical evil' (ibid.: 20). However, it is not only in death (of oneself or the archive) that forgiveness forgetfulness is possible. For improvisation, unremembering (of self, memory, history and social conventions) is an impossible and necessary evil.

Two distinct, yet interconnected, examples, document this. In the first instance, celebrated jazz saxophonist, Ornette Coleman, attempts to escape the trauma of memory and 'short-circuit the habitual aspects of his saxophone playing' by taking up the violin and the trumpet (Frisk 2014: 157). Habit, as 'embodied memory', can both 'allow for freedom and limit the space for it' (ibid.: 157, 153). Coleman thus sought to shake off habit, the goal being to 'create as spontaneously as possible – "without memory," as he has often been quoted as saying' (ibid.: 157, citing Litzweller 1992: 117). With no formal instruction on how to play the violin or trumpet, he was free to 'play and improvise in a manner that his memory made it difficult for him to do on the saxophone' (Frisk 2014: 157).⁸ Frisk explains: 'Freedom from memory and freedom from influence from extra-musical parameters – these "unknown" instruments gave Coleman a sense of *internal* freedom, liberated from the physical memory associated with his saxophone playing' (ibid.).

A second, somewhat related, example has Derrida being invited by Coleman to perform a 'solo' on stage with him and pianist Joachim Kühn at the Jazz a la Villette festival in Paris in 1997. Timothy Murphy describes this event: 'On the appointed evening, Derrida took the stage with Coleman and Kühn and began to perform his composition, but press reports indicate that the audience jeered him so loudly that his words could

8 It might be of interest to readers that trumpeter Miles Davis was extremely angry about Coleman's attempt to play the trumpet. In his autobiography, he writes: 'I don't know what's wrong with him. For him – a sax player – to pick up a trumpet and violin like that and just think he can play them with no kind of training is disrespectful toward all those people who play them well' (Davis and Troupe 1989: 250). Thanks to Maurice Macartney for alerting us to Davis's comment.

hardly be heard' (Derrida 2004: 331). The archived memory of this event is quite traumatic for Derrida, as he details at a Q and A session with the audience at the premier of the film *DERRIDA* at Film Forum in New York City in October 2002: 'And once onstage, I started reciting this special text that I'd written for this occasion as he accompanied me, improvising. But his fans were so unhappy with this strange man coming onstage with a written text that they started, uh, whistling? [Booing?] ... So it was a *very painful experience*' (Dick and Ziering Kofman 2005: 115, emphasis added).

Despite the painful nature of this 'failed' performance, Derrida went on to publish his pre-composed text in full (Derrida 2004). It is in this document that Derrida's understanding of the tense relationship between preparation, as that which is necessarily archival in nature, and improvisation, as that which counters the archive, is revealed: 'As all of you see, I have here a sort of written score, you think I am not improvising, well, you are wrong. I am pretending not to improvise, I just pretend, I play at reading, but by improvising' (ibid.: 332). Just as an actor knows her lines and yet must still deliver them *as if*⁹ for the first time, Derrida's performance here is both rehearsed and new in the performative moment.¹⁰

Reflecting on this event in *Counterpath* (with Catherine Malabou), Derrida seems to suggest, however, that there is something about improvised *music* that offers a counterpath in relation to the archive: 'Music always travels "further closer" than words. The brief "rehearsal" that preceded the improvisation, Coleman's or my own, in no way resembled what took place before the audience ... [T]he event comes, as always, after the event' (Malabou and Derrida 2004: 97). And, in the 'improvised' text he (attempted to) read on stage: 'it's that music, that which happens where it wasn't expected, well, it must create, well, it must create, it must create, it must be created where it is expected without expecting' (Derrida 2004: 334). On the other hand, Coleman's seeming hostility towards memory is not complete when it comes to improvised music: '... in jazz', he explains, 'you can take a very old piece and do another version of it. *What's exciting is the memory that you can bring to the present*' (Coleman and Derrida 2004: 322, emphasis added). As these examples reveal, there is a move towards reconciliation without apology as between liveness and remembering, performance practices and archival documentation (Stapleton 2008: 2). What this means in relation to the time of the apology in law and improvisation will be explored in the following section.

9 For more on the fictive nature of the 'as if', see Motha (2013).

10 For more on this event in relation to the aporia of performative immediacy, see Ramshaw (2013b).

Rememberings (into) the present

Erlend Dehlin, focusing on organisational improvisation,¹¹ conceptualises improvisation as ‘an inextricable feature of human practice’, a ‘fundamental, everyday phenomenon’ (Dehlin 2008: x). For Dehlin, every act of decision or sensemaking becomes ‘more or less improvised’¹² and thus it is only in terms of ‘purity’ that improvisation in music and law would diverge. Dehlin (2008: xi) posits that the ‘purity’ of improvisation varies in two regards:

- (1) The degree of spontaneity, and
- (2) The genuineness of creativity.

In relation to the former, spontaneity is measured in accordance with the ‘perceived distance between thought and action. The shorter the delay, the more spontaneous the appearance of the action’ (Dehlin 2008: xi). The genuineness of creativity is a qualitative measure in which sensemaking goes beyond ‘technical problem-solving and routine’ (ibid.).

Assertions of ‘purity’ or ‘genuineness’ in improvisation can be extremely dangerous.¹³ And, following Morrow, as well as Fischlin and Heble, we are reluctant to offer any ‘authentic’ conception of improvisation, which would then limit the *potential* such a concept invites (Fischlin and Heble 2004: 31). That said, it is almost impossible to think about improvisation in law and music without framing it in terms of temporality or degrees of spontaneity. According to Borgo, ‘[t]he act of improvising produces a temporal and sensual immediacy, it allows complexity to emerge from a simple and contingent beginning’¹⁴ (Borgo 2014: 46). However, the ‘action of response’ in improvisation ‘happens quicker than consciousness can grasp, and the formation of expectations often occurs on non-conscious levels’ (ibid.). As such, ‘any interpretation of the music, whether by performers or

11 For more on this, see the special issue of *Organization Science* on ‘Jazz Improvising and Organizing’ (1998), which explored the adaptive capabilities of organisations. It emerged from a symposium in Vancouver, Canada on ‘Jazz as a Metaphor for Organizing in the 21st Century’.

12 For more on this conceptualisation as it applies to improvisation in architecture, see the video footage of Timothy Waddell and Ruth Morrow’s (2014) talk entitled ‘Translations: Improvisation / Architecture’ which took place as part of the Translating Improvisation Research Group (TIRG) 2014–15 Seminar Series at Queen’s University Belfast on Friday 7 November 2013. See www.translatingimprovisation.com.

13 This comment emerged from a personal communication with Professor Ruth Morrow, School of Planning, Architecture and Civil Engineering (SPACE) at Queen’s University Belfast on 13 November 2014.

14 As Derrida reminds us, *arkh*, from which the archive comes, means both a *commencement* and a *commandment* (Derrida 1995: 1).

listeners, can only come *a posteriori*, and is therefore subject to the same misinterpretations as all human memories and utterances' (ibid.).¹⁵

This characterisation of improvisation, as quicker than consciousness or un-conscious, can be quite problematic. That improvising musicians 'dig into their unconscious minds and bypass more conventional modes of intellection' (Gabbard 2004: 300) has very 'racist' (Derrida 2004: 332) origins: 'Various versions of this myth have circulated since the beginning of jazz history when the predominantly African-American musicians were considered too primitive to be playing a music mediated by intellect' (Gabbard 2004: 300). Moreover, according to Gabbard, '[t]he trope of the improvising jazz artist as the unthinking explorer of the unconscious is still very much with us' (ibid.: 301).

While not wishing to return to racist conceptualisations of the unconscious improviser, there does seem to be more of an acknowledgement or exploration in contemporary writings on improvisation of the varying degrees of spontaneity, which, in Dehlin's words, influences the 'purity' and 'flow' of the improvisation, and which, following Csikszentmihalyi (1990), can lead to 'radical transformation happen[ing] in real time' (Dehlin 2008: xi). For example, Franziska Schroeder blogs that, after much thinking about and observing herself in the process of 'free' improvisation, '[o]ne thing has become clear': 'I seem to take two quite different approaches when aiming to play "free"' (Schroeder 2014). She terms these two different ways of playing and engaging with one's instrument as: 'found improvisation' and 'determined or predetermined improvisation' (ibid.). In relation to the former, Schroeder desires her 'body to "find" the music inherent in the instrument and in [her]self (it does work and does happen – even if it sounds a little clichéd!)' (ibid.). She writes: 'I aim to improvise spontaneously, where I ask my body and instrument to produce the outcome, rather than me deciding what music will be; it is a bodily attitude where I try to be very much in the moment and fluid, where I can be relaxed and fully present; something that I guess is more *unconscious*' (ibid., emphasis added). As with Dehlin, Schroeder, following Csikszentmihalyi, likens this to a 'state of "flow"', that is, 'a deep focus on the activity of music playing to an extent that we are no longer concerned with the physical

15 A version of this chapter was presented on the afternoon of Friday 6 September 2013 as part of the Law's Counter Archive parallel session at the annual Critical Legal Conference, which took place at Queen's University Belfast. The pre-scripted text was performed by Sara Ramshaw and was intertwined with live music improvisations by Paul Stapleton (Bonsai Sound Sculpture) and Michael Speers (percussion), in an attempt to create a dance between constative and performative *sayings* and *doings*. Our rememberings of this event are gathered together in the Appendix to this chapter. They are preferably to be read aloud, thus inviting you (the reader) to inhabit our first-person perspectives.

instrument itself, the environment, or individual aspects of playing', 'a state where thoughts and any concerns disappear', 'an optimal balance between skills and challenge in the activity of musical performance' (ibid.).

Schroeder distinguishes 'found' improvisation from more conscious or 'determined' improvisation: 'My body and instrument relation change immensely when I put myself into this state where I want to know everything what [sic] is going to happen, where I aim to anticipate every musical step and idea (is this possible, you will probably ask?)' (2014). The 'self-reflexive awareness required of performance' (Soules 2004: 280), or 'performative-consciousness' (Soules 2004: 281, citing Schechner 1988), evident in Schroeder's 'found' improvisation evidences the possibility of 'accomplished' improvisers learning (and practising) 'codes that connote freshness, looseness, and a feeling of spontaneity' (Gabbard 2004: 315). Such learned procedures 'create a pattern so complex that we get an illusion of randomness' (Nachmanovitch 1990: 27).

The illusion of spontaneity in musical improvisation plays with time and temporality, just as the illusion of temporal constraint in Western systems of law and justice produces a vision of legal decision-making as extremely measured and linear in nature. The ideal of the rule of law in Western democratic society tells the story of predictability, equality and certainty, both in process and judgment. The common law, for instance, relies on the device of legal precedent in order to ensure that like cases are treated alike and similarly situated individuals share the same legal outcome. Judges are not supposed to make pronouncements based on their own personal inclinations or whims. What is lost, though, in this focus on certainty and predictability is the fact that judgment, if truly just or justified, must necessarily be somewhat uncertain and unpredictable. Put more simply, if the outcome of the judging was known in advance, there would be no need for judgment or decision. The Western common law tradition is based on the notion that everyone deserves his or her day in court. But there would be no point having one's case adjudicated or heard unless there was the possibility, however slight, that the judge may find in one's favour. Legal judgment then, by its very nature, demands a degree of improvisation and unpredictability. Justice cannot be known or determined in advance and any such knowledge of or influence on a particular outcome would certainly be construed as unjust, corrupt and unfair (Ramshaw 2006; 2013a).

To be truly just, or justified, each judgment would have to break with the past – as well as any future that is based on the past – and offer an absolutely unique interpretation that no existing decision could or ought to guarantee absolutely (Derrida 2002: 251). This, of course, is impossible, especially in the *time* available for judicial decision-making. Judgment thus entails both a (singular) act and a (general) process: the uniqueness of each problem can only be addressed or understood through pre-existing structures of language/thought/problem-solving abilities or techniques/etc., and the

temporality of judgment rests on the paradoxical relation between the singular and the general. Judgment as paradox means that no legal decision can ever be completely just or justifiable: we can never have all the information or knowledge necessary to make a judgment that is fully faithful to the singularity of a particular situation; we can never have thought through an issue from every single angle, perspective or viewpoint (Derrida 2002: 255). There is always an element of justification that is beyond comprehension and knowledge. This deficiency, though, is not necessarily a bad thing. The unknown outside that is always inside the time of judgment is actually what enables law and society to adapt or change. In other words, if everything was always fully explainable or completely justified, there would be no call for change in society, no call for judgment. Eventually legal judgment would find itself redundant (Fitzpatrick 2005: 9). The continued legitimacy of law thereby rests not on its having all the answers, but on its uncertainty and incompleteness.

In his essay, 'Melody and Law's Mindfulness of Time', Gerald Postema plays with the temporality of law by offering *melody* as a 'metaphor and model' in which to 'understand the role of time in law's characteristic normativity' (2004: 205). To the existing dominant models of law's normativity in jurisprudence, namely those of *nomos* (reasons) and *thesmos* (commands), Postema adds melody or *melos* (ibid.: 207). This third model is of particular value to lawyers and legal academics for it 'highlights the temporal dimensions of law's normativity that the other models leave in the shadows' (ibid.). Melody, argues Postema, orders time through the constituent elements of '*attention, memory, and anticipation*': 'Deciding cases governed by precedent is like grasping a melody as it is being played. ... It involves *attention* to present circumstances, *memory* of past decisions, and *anticipation* of the direction in which the rule or *ratio* is moving. The past is essential to precedent-sensitive reasoning, but it is not simply backward-looking' (ibid.: 208, 214, emphasis added). According to Postema, '[l]aw's memory is always bent to the present in anticipation of the future. Equally, its focus on the future is from the threshold of past and present. At any point in the arc traced by the *ratio* decision-makers interact with decision-makers going before them and coming after them' (ibid.: 214).

Postema's conceptualisation of the melodious time of law, while intriguing, is somewhat limited for our purposes for it remains tied to *linearity*, even if the past, present and future interact in a complex fashion (2004: 214). In contrast to the linear sensemaking typically employed in law, Dehlin advocates '*improspective*' decision-making, that is sensemaking that looks *into* the present – '*in* the present, *on* the present' (Dehlin 2008: 59) – rather than *backwards* at the past (Dehlin 2008: x). Improvisation, following Weick (1979, 1995 and 2001) and Schön (1991), becomes a *process* of 'evolving, ongoing action involving varying degrees of creativity and spontaneity' (Postema 2004: 15).

As with law and legal judgment, time plays a key role in improvisation. In Ellen Waterman's 'Some Strategies for Improvisation in Collaborative Writing', she lists some of the skills or techniques necessary for 'good' improvisation, all of which involve a temporal blurring of past, present and future in order to create a paradoxical meeting place in which the most 'just' music occurs (2009).

'Good' improvisation, says Waterman, involves, for example, 'deep listening' (2009: 2). Deep listening is a philosophy and practice developed by 'improvising composer' Pauline Oliveros and entails the ability to both send and receive ideas and be self-reflexive and sympathetic in one's response (2005: xix). This requires not only knowledge of what has gone on before in the past and attentiveness to the present moment, but also sympathy for the future or for the unknown (Fischlin and Heble 2004: 11). Another key element is 'a sophisticated knowledge of form and structure' which enables a call and response structure and allows for the emergence of variation and counterpoint or contrary ideas (Waterman 2009: 2). Again, the present collides with the past of tradition in order to respond in a manner that is forward-looking. The *ability to 'code switch'* is also extremely important, meaning having more than one way of proceeding at one's disposal and being flexible and responsive to the tones, languages and approaches of others (ibid.). Once more, knowledge of tradition is crucial, along with an ear to future proceedings in the present moment. 'Good' improvisers are 'committed to a non-hierarchical process', one that demands sustained focus, respect and attention to the process itself and a shared responsibility for the outcome (ibid.). Time in this process or the process of time melds together past, present and future in order to create a more just and loving relationship to the other. Finally, Waterman mentions the need for 'trust in others (and the process)', which involves learning strategies to build trust within and among communities and various stakeholders and the unlearning of lifelong habits (ibid.). The past thus becomes a tool in the present for future change. Together these elements, when applied to law, envision a process that looks beyond a strict application of a dead document, dead in the sense that, regardless of scope, it cannot respond fully to the singular life of each individual situation, to a more dialogic and responsive decision-making, one that, like improvisation, involves risk-taking and collaboration in an attempt to achieve justice or make for a more just result.

Apology (or, sorry, no time to apologise)

Apology is an inefficient use of time in musical improvisation. It slows things down, sidetracks and disrupts movement forward. Viewing law as fundamentally improvisational in nature allows for a certain level of abstraction in which the present bows down before another place in time, where, at least

potentially, there is another time in place. This re-framing of the question of judgment and justice in terms of temporality is a familiar Derridean idea, the notion that judgment is often out of time, that the times are out of joint. The idea can be conveyed more simply, and more musically, by noting that, whatever the substantive merits or otherwise of the multiple co-factors that go into judgment, sometimes it is obvious that the timing is all wrong. To rework this idea back from the mundane to the abstract, the issue might be phrased as a question: how could the timing ever be right when the past and the future by their nature are never accessible in the present?

Musical improvisation, which can be taken as a continuing and profound examination of the issue of timing, occurs, *plays* even, in the paradoxical space where the present so resonates with the past and the future that this might be considered a 'meeting'. This is obviously impossible, and yet equally obviously constitutes exactly the nature of this art form. The premise of this section is that thinking through the relationship between improvisation and time is useful to those interested in critical legal theory and law for it enables a view of the temporality of judgment or justification as far less static and linear. Musical time in improvisation is somehow a gift outside of worldly time, outside of the economy of exchange and restitution. The timeline given by the jazz rhythm section to the improvising soloist may change in character in response to changes in the character of the improvising solo (Monson 1996: 82–83). Time responds to change and in so doing changes time. By giving time to justice in this manner, a more nuanced conception of judgment and justification may be possible.

Critical Studies in Improvisation (CSI) theorises improvisation as a complex and dynamic social phenomenon, one that interrupts traditional orthodoxies of judgment and takes on a shared responsibility for participation in the community, all the while accepting the challenges of risk and contingency. To say then that law as archive improvises or that it ought or needs to improvise should not be regarded negatively. What is needed in contemporary critical legal theory is a conceptualisation of law *as* improvisation, as a creative social phenomenon that is similarly complex and dynamic and, when truly just or justified, aims at all the things Waterman says above of 'good' improvisation. Although it is beyond the scope of this chapter, more critical work is needed on what it actually means to improvise in relation to the archive that is law. To do this, unpredictability must be viewed not as random unpredictability but as improvisation critically conceived or what we like to call 'just unpredictability'. What is at stake in this exploration is the continued depiction of legal decision-making as uncreative and static, as a kind of necessary deadness or dead archive; as opposed to a depiction of the creative life of law as a dynamic social phenomenon, one that pertains to the life-affirming vibrancy of the musical extempore in which the past, present and future dance together in a never-ending paradox of living and learning, justice and social change.

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Appendix: Remembrances of the event

Paul Stapleton: I'm worried that Michael is not here yet. I've set up and sound checked, but Michael has yet to arrive and the session is about to begin. I know he has just flown back from NYC and that he thought he was arriving into Dublin yesterday morning, and not today. He got the time change backwards. I also know he would be driving on little sleep, having to pick up his drum kit somewhere in Portadown before heading here, room 6B on the third floor of the Peter Froggatt Centre at Queen's University Belfast. I really don't like performing as a soloist, so I hope he makes it here in time. More importantly, I hope he is ok. During sound check I noticed that my turntable attachment stopped working due to a loose wire. The rest of my custom-made instrument, the Bonsai Sound Sculpture (or BoSS) seems to be working ok. This will be the second time

Michael and I have played together as a duo, and the first time we have played together in front of an audience. And this is not your usual improv gig audience. And this is not a typical performance space. Actually, I'm thinking of this more as a trio. Sara will be reading our co-authored text (also our first publicly presented collaboration) and we will be intervening with music. We won't be performing over Sara's speech, but we still will be in a three-way dialogue. No idea how this will turn out. We have never done this before. But I am excited by this risky situation. Will a critical legal audience respond well to our musickings? I don't think I even know what a critical legal audience is. The unusual nature of the space we are performing in, where I am standing now, does not bother me. I don't believe in neutral performance spaces. The space is another partner in the improvisational dialogue, offering both physical (acoustic) affordances and social expectations. I am set up at the back of a medium-sized classroom. Standard room layout with PowerPoint projection facility and chairs facing forward. Windows on the left and door on the opposite corner from where I am standing. We are warned that we can't be too loud as a parallel session will be happening in an adjacent room. This will be an interesting constraint for Michael and I. The only other time we have played together was in a recording session at the Sonic Arts Research Centre last month that we plan to release as an album (www.paulstapleton.net/portfolio/michaelspeers). In this previous recording session we were trying to make Merzbow sound like Kenny Rodgers (i.e. we made music at a volume and intensity level that literally shook the building). It will be interesting to see how we respond to this volume constraint today. I'm all for reduced playing, but Michael and I have never done this together. Michael arrives! He is now setting up a minimal kit. The session starts in a few minutes. He looks tired. I tell him about the volume constraint and the structure of: Musical Introduction (5 minutes); Reading of written text Part 1 – Mistake (6 minutes); Musical Intervention (5 minutes); Reading of written text Part 2 – Apology (3 minutes); Musical conclusion (1 minute). He nods his head. We haven't rehearsed this and we are not watching clocks, so the timings will be approximate. We set no other explicit constraints on the content of our playing. But we both know we are not going to decide what we play out of nowhere. I've known Michael for three years and we both have seen each other improvise many times before. We know how to listen to each other, how to allow for space, how to blend together, how to clash, how to make the other change direction. How to expect the unexpected, how to anticipate surprise, and how to cope with being challenged by the unknown. We are on last, so we will first have to sit through two other talks before we perform. Michael and I sit towards the back of the classroom. This must be strange for Michael. He doesn't even really know Sara or anything about this conference. I have at least looked at the program, and Sara and I are well aware of the points of connection in our research and have started

collaborating over the past year. Michael was in New York less than a day ago, he rushed to get here, and now he has to sit for 45 minutes listening to people talk about subject areas for which he has little context. Yet, he has read our paper and I'm fairly sure he gets what we are going for. Before the talks begin I text him the following message: 'My turntable stopped working. Loose wire. Can be fixed, but not today. 2 papers before our performance. We are on at 2.40pm to 3pm, followed by questions for 30min. This must be the most surreal start to a gig [...]'. I'm surprised by how engaging the talks are, and time is passing quicker than I thought it would. I wonder how the ideas of the speakers before us will effect our playing, how their language might be used as source material. Will we respond to their words? It is now time for our performance. Michael and I stand up and move to our instruments at the back of the room. Sara is at the front of the room. The audience of about 25 people is looking back and forth, between Sara at the front and us at the back. Michael and I make eye contact briefly, take a breath, and then start simultaneously to make sound ... That feels like about 5 minutes. We stop playing together at the same time. And now Sara begins speaking. Mistake. I know that quote is commonly attributed to John Cage, but I forget when and where he said or wrote it. Dialogic Evidence. The Archive. The live archive. How do we apologise for mistakes in our performance? How are mistakes even possible in improvisation? Did we make any mistakes just then? Who decides? Who cares? Does our performance really require that kind of judgment? Is not asking forgiveness a precondition of improvisation? Who am I in this act? Who have I become? Who will I become? How do I un-remember who I am? 'It is in this manner that improvisers become experts at forgetting mistakes, as they are only stepping stones to more certain (or confident) successes.' Sara stops talking and we start playing again ... My preconscious flow is broken for a moment when I wish my turntable was working. I pause briefly then reach for a bow just as Michael does the same ... I remember something about '**inscribing** the lived experience of **suffering** into legally recognizable categories' ... 'what forms of **silence** or **deafness** re-victimize survivors or **undermine** reconciliative efforts, and what forms of **hearing** truly do **justice**?' ... 5 minutes, thereabouts. We find an ending and Sara starts again. Apology. '[...] 'unforeseen antagonisms [...] In improvisation, it is more about recognizing failures and being accountable through future actions, rather than apologizing. Doing rather than saying. Un-remembering rather than re-inscribing.' Inevitability. 'Without guilt.' Sara stops. We play for approximately one minute. One last quiet moment. And end.

Sara Ramshaw: Our 'paper' followed the launch of my newly published book, *Justice as Improvisation: The Law of the Extempore*, which was introduced by my former PhD supervisor, Professor Peter Fitzpatrick. His generous and kind words, and the pressure of having to say something about my

research to a crowd that included some of the most important and revered critical legal scholars in the world, left me feeling very self-conscious and exposed. I had not thought much about Michael's lateness as I had confidence in Paul's solo improvisational abilities. Only later did I find out that Paul does not enjoy performing as a soloist. I trusted him and his skills completely, though, and thus put zero thought into the logistics of their set-up or performance. I was more worried about how their music would be received by the audience of critical legal scholars. I was still a fairly inexperienced and naïve listener of experimental improvised music and did not fully understand many of the decisions or sounds made by Paul on his BoSS myself. And yet I was/we were, in a sense, *forcing* such music on an audience of, what I could only assume, were even less experienced listeners. Starting to feel *very* nervous. I remember that the table at the front of the room could not fit all the speakers behind it. As I was the final speaker, I situated myself to the left of the table for the other talks and remained there for our presentation. After two amazing papers by Jill Stauffer ['Reconciliation as Repair (in a world where some things remain broken)'] and Sara Kendall ['An Uneasy Ethics of Redemption: Oppenheimer's *The Act of Killing* as Transitology'], it was our turn. We had prepared the written text in advance and the approximate temporal length of the improvisations – I am continually amazed at musicians' acute awareness of and accuracy in relation to time – but I had no idea what they were planning to play, although I had heard Paul on his BoSS before. I remember that I was wearing long clunky Fleuvog boots and a knee-length skirt. With no table dividing me from the audience, the feelings of exposure and self-consciousness returned, even stronger than at the book launch. Luckily, I had the set text to guide me. During the improvised musical sections of the 'paper', most of the audience remained facing the front of the room, even though Paul and Michael were playing behind them. I saw some struggling with the sounds, not knowing where to look or what to do; others had their eyes closed, focusing intently on the sounds coming from the back of the room. I kept wondering whether we had made a huge mistake. I was scared to end for fear of the lacklustre response we may get. But, at the same time, wanting Paul and Michael to finish faster so that the uncomfortableness caused by the unfamiliar sounds would cease. I ended: 'what if one could repeat a mistake enough times such that it sounded inevitable. Is this a hiding of a mistake, an admission of mistake, a means of reconciling a mistake with what should have been, or is it simply not a mistake at all? And what role do you, as audience members listening to the repeated mistake, play in making conscious, in archiving, the mistake for which we – without guilt – will not apologise?' Paul and Michael played for one final minute. The response from the audience and the Q & A discussion that followed was unbelievable, far exceeding our most optimistic expectations.