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## Jamming the Law: Improvisational Theatre and the 'Spontaneity' of Judgment

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### Abstract

Modern 'nonscripted' theatre (NST) clearly owes much to improvisation. Perhaps less obviously, and more surprisingly, so too does modern law. In this article I will contend that, despite all the rules of evidence and procedure, statutes and legal precedents that fundamentally govern the decisions and actions of a judge, it is only through 'spontaneity' that judgment can take place. This claim may appear strange to those well-versed in the common law tradition which proceeds on the basis of past legal decisions, or reason where no precedent exists. NST, on the other hand, is assumed to rely heavily on the unprecedented and unreasoned. Therefore, when the public watches a NST production, it places its faith in the belief that what is being observed is entirely new and is being produced 'on the spur of the moment'.

# Jamming the Law: Improvisational Theatre and the ‘Spontaneity’ of Judgment

Sara Ramshaw<sup>1</sup>

Modern ‘nonscripted’ theatre (NST)<sup>2</sup> clearly owes much to improvisation. Perhaps less obviously, and more surprisingly, so too does modern law.<sup>3</sup> In this article I will contend that, despite all the rules of evidence and procedure, statutes and legal precedents<sup>4</sup> that fundamentally govern the decisions and actions of a judge, it is only through ‘spontaneity’<sup>5</sup> that judgment can take place. This claim may appear strange to those well-versed in the common law tradition<sup>6</sup> which proceeds on the basis of past legal decisions, or reason where no precedent exists.<sup>7</sup> NST, on the other hand, is assumed to rely heavily on the unprecedented and unreasoned. Therefore, when the public watches a NST production, it places its faith in the belief that what is being observed is entirely new and is being produced ‘on the spur of the moment’.<sup>8</sup>

The dominant understanding of the common law tradition is complicated by the fact that no two cases appearing before a court for judgment can be *exactly* the same. There will always be some distinction or dissimilarity; no two actions take place at the exact same time, with the exact same parties and the exact same factual situations. This distinction forms the basis of the adversary system<sup>9</sup> in which two opposing sides struggle to convince a judge or jury that her or his interpretation of the case law, statute or regulation is the most persuasive and should be accepted as ‘the truth’. Cases that are strikingly

## Ramshaw

similar to previous decisions rarely make it before a judge because, if it is impossible to contradict or distinguish a past precedent, the outcome will basically be known or guaranteed in advance and settlement out of court, to save on the enormous expense of adjudication, would most likely be suggested and encouraged. Thus, each judicial application of existing rules or past precedents to new facts creates, in fact, a new and improvised law. Novelty and creativity, however, must be subordinated to tradition and precedent in order for law to remain legitimate and commanding in contemporary society. Law, in other words, cannot be seen to be produced ‘on the spur of the moment’. To be just, it must apply fairly and equally and be known by all in advance (Pue 2000: 17).

While not disputing the importance of fairness and equality in relation to law, this article calls for increased recognition of the improvised creativity that is at the heart of legal reasoning. It matters not whether the case to be decided is criminal,<sup>10</sup> civil,<sup>11</sup> procedural,<sup>12</sup> substantive,<sup>13</sup> decided from the bench,<sup>14</sup> communicated through written reasons — in the United Kingdom, Australia, Canada or elsewhere in the common law world<sup>15</sup> — or decided by a panel of judges, at the trial or the appellate level.<sup>16</sup> It is the very nature of legal judgment, the making of a decision, that elicits a negotiation between the singularity of a particular case and the pre-existing rules or laws — be it case law, statute law, laws of evidence and procedure — to which it must adhere or follow. This process of negotiation is also one of translation: the judgment or decision must present the novel and new as comprehensible in light of current modes of legal thinking and understanding. Thus, the ‘spontaneity’ of judgment is not so much about temporality as it is about translation and negotiation between the novel (singular) and the pre-existent (general), the individual (case) and the collective (law).

To better understand the ‘spontaneous’ elements of judgment, improvisation is theorised here through NST, which dispels the myth that creativity in improvisation is the result of an unconscious mind or lone genius. Instead, improvisation exists only in relation to a collective or community, to pre-existing rules or protocols, to the actions or words of audience members or fellow actors on stage. In this article, the judge

takes on the role of ‘nonscripted actor’ in the theatre of the courtroom drama. While the storytelling in which the judge engages is not, strictly-speaking, extempore, the act of judgment entails improvising on past precedent to ensure that the singularity and uniqueness of each case is made comprehensible through the more generalised law already in existence. ‘Spontaneity’ in legal judgment, borrowing from NST and critical studies in improvisation, calls for a far more nuanced and complex conceptualisation of improvisation than simply extempore or spur of the moment action or decision. The freedom of the judge to decide is neither limitless nor completely constrained. Judgment involves a negotiation between the singularity or otherness of the individual case and the generality of pre-existing laws and precedents. Legal improvisation must thus take into account the community within which the judgment is being made and therefore entails ‘jamming’ or ‘creative group performance’ (Sawyer 2006), as will be explained below. Conceived this way, the creativity of law is less about the individual will of the judge (or judicial activism<sup>17</sup>) and more about what decision is most just in the light of the circumstances and audience<sup>18</sup> concerned.

### Improvisation in Theatre

Although improvisation is not completely foreign to performance in scripted theatre, it is more often used during the rehearsal process to assist actors in developing their roles (Easty 1966: 109). It is a preparatory technique, a tool in an actor’s training and a means for discovering the subtext of a script. Improvisation ‘is not customarily utilized in performance, except at times of crisis, when something has gone wrong and an actor must “ad lib”’ (Fox 2003: 94). While no performance, rehearsal or reading can be *exactly* the same every time it is performed, which suggests the inclusion of some improvisational elements, actors will generally aspire to consistency and predictability in a performance and fear, perhaps even despise, surprise.<sup>19</sup>

NST, on the other hand, provides the necessary critical approach to and analysis of ‘spontaneity’ and improvisation. It includes many forms such as Theatre of the Oppressed (Boal 1985), Theatresports

## Ramshaw

(Johnstone 1979; Weibe 2005: 42-3), Action Theatre (Zaporah 1995). For the purposes of this article, the focus will be on Playback Theatre (Fox 2003; Fox and Dauber 1999) as a form of improvisational theatre in which audience members tell stories about particular events in their lives and these stories are 'played back' or 'recreated and given artistic shape and coherence' (IPTN<sup>20</sup>) by the actors on stage (Fox 2003: 3).

The decision to concentrate on this type of theatre stems, in part, from its resemblance to the legal case:

In the Playback method, members of the community tell their stories in the public sphere instead of just to trusted family, friends, or neighbours in private spaces, and the actors decide how to perform the story — which elements to emphasize or omit (Meer 2007: 107).

This mirrors the private stories told by litigants in the public courtroom and the decisions of lawyers who dictate which elements of the story will be highlighted or ignored. Of course, Playback does not replicate the legal case precisely. In this form of improvised theatre, actors must perform 'spontaneously', without discussion or negotiation, and 'work collectively to retell the story as authentically as possible' (107). The storytelling, which takes place in the courtroom, is rarely extempore or without discussion or negotiation, and it aims not towards authenticity per se (although the story told is supposed to be authentic and truthful), but towards persuasiveness and reason. As such, it is not necessarily the spontaneous storytelling, but the negotiation, that takes place in Playback Theatre between the singular and the general, the individual and the collective<sup>21</sup> that makes it an intriguing comparator when examining the creativity of legal judgment.<sup>22</sup> Finally, much has been written by the founders of Playback Theatre about its workings and the meaning of 'spontaneity' in acting. This analysis is extremely useful for dispelling many of the myths surrounding the process and conceptualisation of improvisation and is another reason for the focus on Playback Theatre in this article.

One further caveat is required before beginning the analysis. This article is concerned with law, not with theatre. The ensuing discussion of improvised theatre is thus being used to mount an argument about

law, not illuminate the practice of Playback Theatre. As such, it relies heavily upon the claims made about the practice and process of Playback Theatre by its founders and participants. And while I have never actually witnessed such a production, the point of this article is not to argue that Playback Theatre actually achieves what its founders claim for it, but that their rhetoric reveals, metaphorically at least, something interesting about the practice of law.<sup>23</sup>

### **Playback Theatre – Background**

The original Playback Theatre Company began in New York City (NYC) in 1975, with Jonathan Fox as its director.<sup>24</sup> Its aims were, and remain, threefold: (1) to reach out to its audience; (2) to bring theatre closer to everyday reality; and (3) to break away from the tradition of scripted theatre. Playback is influenced by community ritual and theatre and the oral tradition of storytelling and psychodrama, especially the use of improvisation and the release of creative energy and notions of inclusiveness, where every individual has a place in the collective (IPTN). Although there is no script, there is a ‘rhythm and sequence’ to a Playback Theatre performance:

A Conductor is the host and facilitator of the process. After a period of introduction and warming up, someone will volunteer to tell a story. It could be a short moment, or about a longer event. They may be past, present or future stories. They could be about a very special time or about something that happens everyday. In the course of a performance 3, 4 or 5, maybe more, people will come forward to tell a story in this way. Towards the end of a performance, the Conductor may invite reflections on the process, and the team will create some sort of closure appropriate for the event (IPTN).

The person telling the story is called the ‘Teller’. She or he leaves the audience area and sits in the Teller’s chair. The story is told from there, with the support of the ‘Conductor’. During the ‘Interview’ stage, the Teller chooses actors to play roles in the story. As each actor is chosen, she or he stands. The story begins and the Conductor says, ‘Let’s watch’. This is the cue for the performers to begin enacting the story. Music

## Ramshaw

may provide atmosphere and mood; boxes or chairs may be used to define the space. During the performance, the actors 'spontaneously improvise a re-enactment of the story, and this may happen in different artistic forms, aiming to present and capture the essence and heart of the story'. The performance ends with the actors looking to the Teller in an act of acknowledgment. During the 'Closure' stage, the Teller has an opportunity to say more if they are so moved. Sometimes the Teller is offered the chance to correct or transform the scene; the actors replay it accordingly. The Conductor then thanks the Teller and she or he returns to her or his seat. Another person is invited to tell the next story, and so on (IPTN).

### 'Spontaneity' in Playback Theatre

'Spontaneity' plays a large role in Playback Theatre. According to its creators, the practice of Playback Theatre is characterised by '[a]uthenticity in the spontaneous moment' (IPTN); it 'challenges the actors to listen, allow intuition and inspiration to arise, trust and support each other, and to call upon their innate personal wisdom and experience' (IPTN). In addition to the acting and theatre skills, personal awareness and self-development are keys to becoming a talented Playback actor.

For its creator, Jonathan Fox, the success of a Playback Theatre performance depends on 'spontaneity', which, for him, 'is deeply associated with *action* and a definite type of *nonthinking*' (Fox 2003: 79, emphasis in original). Fox describes 'spontaneity' in relation to four key features. The first is *vitality*:

Persons who do not hold back and are able to express themselves directly convey a sense of *aliveness*. They move, they laugh, they surprise, they shine. They convey an appealing warmth or magnetism that is evident from the instant they enter the hall (80, emphasis in original).

The second is *appropriateness*:

The idea of spontaneity as heedless impulse belittles the potential

of the concept. ... The actor with spontaneity ... will always have a measure of the situation, will be adequate in any role, and will know when to blend in and when to stand out (80).

The third is *intuitiveness*:

The spontaneous nonscripted actor, unrestricted by a playwright's lines, can say whatever comes, often producing word and action as stunning à propos as it is unexpected. Thus an actor with a trained imagination and with full access to his or her senses has available a wide range of expressive possibilities (80).

Finally, the actors must display a *readiness for change*:

In a nontextual situation, the unexpected is a way of life. To deal with irregularity in a creative way requires an ability to accept each moment as it comes and respond dynamically. Most important of all is to accept the idea of living constantly with the unforeseen (80-1).

Fox's signs of 'spontaneity', outlined above, resonate with the work of other critical theorists of improvisation such as Fischlin and Heble (2003, 2004), who view improvisation as a complex 'social practice' (Fischlin and Heble 2004: 14), a 'provocation to avoid stasis' (13) and a 'resistance to orthodoxies' (11). Where Fox is less rigorous and convincing, though, is in his analysis of those factors that resist the 'spontaneous'. According to Fox, such 'blocks' to 'spontaneity' are: (1) *knowledge* '... the desire to *know* often acts as an impediment to spontaneity' (Fox 2003: 83, emphasis in original); (2) *planning* 'The unspontaneous actor will often want to decide ahead of time exactly what will happen' (83); and (3) *analysis* 'The analytical actor will interpret the scene instead of entering into it, and the portrayal will have a heady, undynamic feel' (83-4). Fox's advice for attaining 'spontaneity', then, is: '*Don't ask questions, don't plan, don't analyse*' (84, emphasis added).

One of the primary aims of critical studies in improvisation<sup>25</sup> has been to challenge the conception of improvisation as requiring 'no prior thought' (Fischlin and Heble 2004: 23), as adhering to 'neither convention nor protocol' (23), and as being primarily concerned with

## Ramshaw

the 'unblocking of obstacles that impede access to forms of individual self-expression' (23). Fox too admits that even NST such as Playback is 'wary of fully embracing the idea of spontaneity' where it is viewed solely as 'unplanned action' (Fox 2003: 85). 'Spontaneity', he argues, is 'made possible by adherence to the *ritual*' (Fox and Dauber 1999: 7, emphasis added): 'The sameness of the ritual allows, paradoxically, for tellers to take risks, often surprising themselves by the story that emerges' (Fox 2003: 263). The ritual creates a framework for the process which enables the unpredictable to occur:

When the ritual is held well by the conductor and the performers, there is a subconscious sense of safety amongst the audience. And in this atmosphere, the most profound as well as the most mundane of personal stories will feel welcomed and honoured (IPTN).

Although there is no written script to guide the action, Playback Theatre is not without its conceptual 'frames'. For Fox, the 'frame' refers to 'a category of understanding, a principal theme of [the] story-of-the moment, an appreciation of which will guide decisions for action' (Fox 2003: 91-2). Fox explains the 'frames' in relation to certain dichotomies which, for him, are unsettled by the 'spontaneous'. Of particular relevance to this discussion is the dichotomy between structure and freedom. Improvisation is often conceived as complete freedom in opposition to the structure associated with, for example, scripted theatre. To quote Fox:

In considering 'improvisation,' there is a definite connotation of *second best* associated with the word, according to which one is distinctly at a disadvantage when one has to improvise, be it a poem or a solution (Fox 2003: 94, emphasis in original).

The extemporaneous play is both aesthetically and expressively devalued: 'The plot won't add up, there will be loose ends, the characterizations will be thin. Nor is it likely to *look* very good — no chance here for breathtaking costumes, backdrops, or lighting effects' (95). Any experience of the unknown, with which improvisation confronts us, is thereby discouraged in contemporary theatre and culture (95). And yet it is the unknown and the possibility of failure,

which makes success possible in the world of improvisation: 'Failure is not the poison but the spice of oral composition' (96).

What Fox, and other critical theorists of improvisation, appreciate is that 'even for improvisation, a certain level of structure is necessary' (96). NST groups practice improvisation within 'structured contexts' (96): 'Teachers of creative drama develop a method for their sessions. ... The comic-satire actors perform structured theatre "games," which, if not "rehearsed," are intensively practiced' (96-7). Therefore, Playback Theatre is itself intensely structured around a framework consisting of an opening, a closing and scenes in between involving the interview, the setting-up, the enactment, and the acknowledgment (97).

A further distinguishing characteristic of improvisation is that the framework for action is set up so that it can be superseded:

At that instant, a metacommunicative frame surrounding both original and new will encapsulate both and give the occasion meaning. The exciting part is that this 'superframe' of understanding is never known beforehand. There is an atmosphere of uncertainty and unpredictability which Turner describes with the word 'liminal' (Fox 2003: 98).

'Spontaneity', then, can be thought of as a 'creative response to a liminal condition' (99). Once again, as Fox explains:

What is most important, then, in discussing structure and freedom in the theatre is not that there must be structure, nor that there must be freedom, but that there be established a condition of liminality between the two states. Thus, seeing a play, with all its structure, can be a liminal experience, while seeing a happening, which is "spontaneous," can be deadening. Any combination is possible so long as it falls within a spectrum at the extremes of which are the anomie of excessive freedom and the dispirited productivity of rigid structure (99).

If liminality and risk are feared due to a lack of confidence, the NST performance will also be lacking. No matter how experienced or talented an actor may be, without the 'courage to consciously seek out a liminal moment' (101), she or he will be unable to confront 'the heart of darkness in a story' (101). Therefore, the Playback performer will walk 'steadfastly towards liminality' (101) in order to 'go all the

## Ramshaw

way with a story' (101) and, '[i]n the presence of such full spontaneity, audience attention is intense' (101).

'Spontaneity' thereby requires being both *in* the moment, animal-like, with senses open to information from the environment, *and* standing *outside* the moment to make sense of what is occurring. Only then can action be taken and this action in turn creates a new environmental condition. 'Spontaneity', as Fox explains, is thus 'the ability to maintain a free-flowing constantly self-adjusting cycle of sensory input, evaluation, and action' (101), not simply '*quickness* of action' (101, emphasis in original). It is envisaged as '*choice* of action' (101, emphasis in original).

This conceptualisation of 'spontaneity' as choice, as opposed to unthinking or unplanned action, is important to the discussion on law and justice below. Improvisation may involve play or playfulness, but it also calls upon our highest intelligence (102), 'where the nonrational and rational are comprehended in an understanding which surpasses the understanding of each' (90). 'Spontaneity' entails both *experiencing* and *understanding* the moment; it brings the audience and actors together in a shared experience of 'involvement and purpose' (91). The 'spontaneous' integrates and provides a 'sense of culture as *connecting*' (91, emphasis in original). Improvisation is therefore not simply or solely an expression of the individual unconscious but, as Bateson says, 'it is concerned with the relation *between* the levels of communication' (quoted at 91, emphasis in original).

### Justice as 'Spontaneity'

Much has been written on the theatrical aspects of law or the relationship between law and theatre or law as performance (see, for example, Rogers 2008, Stone Peters 2008, Balkin and Levinson 1999, Balkin 2003). Very little academic literature exists, however, on the topic of law, justice and improvisation.<sup>26</sup> Modern law, as reasoned and rule-bound, is often viewed as antithetical to improvisation (Soules 2004: 270). Legal precedent, for example, encourages the view that

judges should not spontaneously invent law and any judicial activism should be controlled or reined-in. Nitta (2001) explains:

One of the most important values in our political system is that all people should be subject to 'rules of law and not merely the opinions of a small group of men who temporarily occupy high office.' The doctrines of precedent and *stare decisis* support this value by: (1) fostering impartiality by providing a neutral source of authority by which judges must justify their decisions and (2) limiting the actual impact that a single person has on shaping the law. Therefore, by offering a framework in which judges must decide a case, precedent minimizes the influence of personal bias or beliefs on judicial decisions and consequently promotes the public's faith in our system of justice (Nitta 2001: 798-9, citations omitted).

Precedent thereby limits the scope of judicial power. It restricts the role of a judge to determine the law in each case, 'not according to his [or her] own judgment, but according to the known laws' (809). Nitta argues that '[j]udicial power, therefore, does not allow a judge to invent laws, but to determine only what the law is in accordance with laws previously pronounced' (809-10). Moreover, precedent is often viewed as integral to justice; it 'encourages the public to have faith that justice will be done and consequently allows the public to trust their affairs to the adjudication of the courts' (Nitta 2001: 798).

Not only is judgment limited by precedent, courtroom decisions must adhere to rules of evidence and procedure. In fact, on its face, the common law seems to hold very little room for improvisation and spontaneity. And yet, it is also the case that every judicial act is, in some sense, improvised. As no two actions can be *exactly* the same, judges 'make new law' (Dworkin 1986: 6) *every time* they are asked to decide a case. These legal performances are unique events, 'never merely a rehearsal on a different stage' (Davies 1996: 97-8). Law can thus neither dispense with, nor be completely determined by, the device of precedent (Deutscher 2005: 98). In the words of Rogers, '[w]hile norms and legal precedents may be applied they must be re-read, re-created or re-constructed for each new set of circumstances' (Rogers 2008: 431). The legal decision thus always contains the possibility of

## Ramshaw

being 'otherwise' (Fitzpatrick 2001: 89). However, the improvised aspects of law must be subordinated to the known, to legal precedent and tradition, in order to endure as authoritative and commanding in Western society.

Accepting the view offered above that 'spontaneity' and improvisation are far more complex than typically conceived — 'improvisation is too good to leave to chance' (Paul Simon, quoted in Fischlin and Heble 2004: 31) — and acknowledging that judges do improvise on the law when asked to decide a case, what does a critical study of improvisation, such as that proposed by NST, add to our discussion of law and justice?

For the late French philosopher, Jacques Derrida, law, to be just, cannot be *but* improvised and 'spontaneous'. In his article 'Force of Law: The "Mystical Foundation of Authority"', Derrida unpacks the 'difficult and unstable distinction between justice and law' (Derrida 2002a: 250), which he likens to the 'problematic relation between the singular and the general' (Attridge 1992a: 181; see also Derrida 1992: 187). Justice — 'infinite, incalculable, rebellious to rule and foreign to symmetry, heterogeneous and heterotropic' (Derrida 2002a: 250) — is positioned as singularity (248) in opposition to a more generalised law. Derrida explains: 'Each case is other, each decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely' (251). Justice, in other words, to be truly just, can never be known in advance; to be completely faithful to the singularity of the other, it must be spontaneous and improvised in nature.

Improvisation as the purely singular is, as noted above, an impossibility, and justice can never be totally 'spontaneous' in nature. Just as improvisational theatre requires a frame or ritual from which to depart in order to *be* improvisation, justice can only be revealed *through* law, through 'a *system* of regulated and coded prescriptions' (Derrida 2002a: 250, emphasis added), which is constituted solely in terms of its 'generality' (245) and 'universality' (245). Justice, in other words, is 'dependent on the determinate presence effected by the legal decision' (Fitzpatrick 2005a: 4). As Derrida explains: 'No justice is exercised, no

justice is rendered, no justice becomes effective nor does it determine itself in the form of law, without a decision' (Derrida 2002a: 252).

Conversely, and perhaps somewhat paradoxically, law needs justice as singularity in order to remain legitimate and authoritative in Western society. According to Peter Fitzpatrick, law 'cannot be ... enduringly ordered and predictable' (Fitzpatrick 2005a: 8). If it were, 'there could be no call for decision, for determination, for law' (9). Instead, for law to endure, it requires a simultaneous 'responsiveness' (9), an 'attunement and attentiveness to what is beyond' (9). Law, argues Fitzpatrick, must be able to 'change and adapt to such other things as "society", or "history"' (9; see also Fitzpatrick 2005b: 464). Moreover, this responsiveness to the other of law is '*essential* for law' (Fitzpatrick 2005a: 9, emphasis added).

If law needs justice and justice needs 'spontaneity' then law needs improvisation to be just. Not a purely singular or extemporaneous improvisation — for such is impossible. Instead, it is an improvisation that requires law as much as the converse is true. To help explain, and by definition, improvisation must 'overflow, overlook, transgress, negate' (Derrida 1989: 41) that from where it comes, be it a frame or ritual. Improvisation, in other words, may be constituted by originality, but its recognition *as* improvisation is wholly dependent on those laws and codes it transgresses (Attridge 1992b: 310). Improvisation thus needs to *be with* law to *be* improvised. Its originality, in other words, can only be 'display[ed]' (Derrida 1989: 27) and brought into presence or made present, *through* law, through that from which it departs.

Conversely, law needs improvisation to remain properly commanding in Western society. As revealed by Derrida (2002a) in the paper 'Force of Law':

To be just, the decision of the judge, for example, must not only follow a rule of law or a general law [*loi*] but must also assume it, approve it, confirm its value, by a reinstating act of interpretation, as if, at the limit, the law [*loi*] *did not exist previously* — as if the judge himself invented it in each case. Each exercise of justice as law can be just only if it is a '*fresh judgment*' (Derrida 2002a: 251, emphasis added).

## Ramshaw

Such improvised elements in law ensure that it never becomes completely or ‘perfectly stilled’ (Fitzpatrick 2005a: 9; Fitzpatrick 2003: 58). In its concern for otherness and the new, improvisation effectively sustains the need for decision, sustains the need for law (Fitzpatrick 2005a: 9; Fitzpatrick 2003: 58). If law’s content was completely lacking in improvisation, or was ‘perfectly stilled’ (Fitzpatrick 2005a: 9), ‘it would cease to rule the situation that would inexorably change around it’ (9). If judgment, in other words, was always known in advance, there would be no need for decision, or for law.

### **The Art of Jamming: The Individual and the Collective**

Admittedly, not all improvisation is creative. However, if one takes the position, à la Derrida above, that it is only through improvisational creativity that the (im)possibility<sup>27</sup> of justice can be realised, what remains is an unpacking of the cultural myths (surrounding improvisation and creativity) that impede societal acceptance of the image of judge as improviser. Some of these myths include the idea that improvisational creativity ‘is a burst of inspiration from a lone genius; that a person working alone is always more creative than a group; and that social conventions and expectations always interfere with creativity’ (Sawyer 2006: 259). What Sawyer’s work on ‘creative group performance’ makes evident is that creative and just improvisation ‘is fundamentally social and collaborative’ (257); ‘it involves preparation, training, and hard work’ (257) and ‘the process is more important than the product or the personality’ (257).

Creative group performance is often referred to as ‘jamming’ (3). To use the term ‘jamming’ in relation to law may seem strange, not the least because of its social history and meaning. The term was first used by jazz musicians to indicate an ‘impromptu gathering of musicians with the purpose of improvising together’ (3). It is often emphasised that it was in jam sessions, such as those in New York City or elsewhere in the US, that great improvising jazz musicians — Charlie Parker,

for instance — honed the art of the improvised solo. The notion that improvised creativity is a ‘solo art’ (Green 1966: 40) is critiqued by musicians and actors alike. Improvisation is often portrayed as ‘merely the expression of individual freedom’ (Stewart 2003: 96) or something actors and musicians ‘do “off the top of their heads”’ (96). Creative group performance, that is, improvisation, though, is a communal effort and is judged in relation to the collective performance as a whole.

This is one of the paradoxes of improvised creativity. The improvising performer ‘works with and against the group at the same time’ (Jones 1991: 48). It involves a ‘delicate balance’ being struck ‘between [a] strong individual personality and the group’ (Ellison 1953: 189). The US writer, Ralph Ellison, describes the jam session as ‘a marvel of social organization’ (189). It is a ‘cruel contradiction’ (234), he writes, that an improviser must ‘lose his [or her!] identity even as he finds it’ (234) and ‘each solo flight, or improvisation, represents ... a definition of his identity: as an individual, as a member of the collectivity and as a link in the chain of tradition’ (234). The creativity of any improviser then, instead of being illimitably free and unconstrained, depends on the group and the community within which he or she is improvising for meaning.

The term, jamming, typically connotes a positive experience. As R K Sawyer (2006) explains:

... when a performance goes particularly well, the musicians might say ‘we were really jamming tonight.’ In the last several decades, the term has been widely used outside of jazz to describe any free-flowing creative group interaction. ... For example, actress Valerie Harper, who began her career at the Second City, Chicago’s legendary improvisational theater, said ‘I’ve always found improvisation ... to be close to jazz musicians jamming — you’re really listening to each other, really hearing’. ... *The American Heritage Dictionary* (1982) defined the jam session as both a type of jazz performance and also as ‘an impromptu or highly informal discussion.’ The Harvard Business School professor John Kao referred to work teams as jamming when they are effective and innovative (Sawyer 2006: 3, citations omitted).

## Ramshaw

Jamming, however, also entails a violence, as expressed by the term ‘cutting contests’, in which musicians engaged during jam sessions as a form of ‘musical duelling’ (Belgrad 1989: 180). ‘Cutting’ tested the ‘skill and creativity’ (180) of the individual musicians and it was in these ‘cutting contests’ that ‘musicians established and maintained a hierarchy of professional competence’ (DeVeaux 1997: 209).<sup>28</sup>

Marshall Soules (2004) writes on the violent contradiction of jamming in relation to both acting and music:

The complex negotiation of identity within a performance context — whether the art be music, acting, writing, or performance of self in everyday life — pits individual freedoms against the constraints and opportunities of society’ (Soules 2004: 268).

Each assertion of individuality is challenged by the collective and requires much ‘commitment, courage, and risk-taking’ (268) by the improvising performer. The violence or cruelty done to the individual, however, is simultaneously marked by an ‘affirmation ... of ... implacable necessity’ (Derrida 2001: 292; see also Soules 2004: 268). Violence, in other words, not only renders individual expression expressible, but also ensures the possibility of this expression being other than what it is. This ‘cruel contradiction’ (Soules 2004: 269), which ‘threatens to erase the traces of identity’ (269), also ‘animates improvisation’ (269) and enables it to thrive:

... both improvising musicians and actors must lose their identities even as they find them, but they do so within a framework of productive constraints — the protocols of improvisation. In a seeming paradox that threatens to erase the traces of identity, improvisation thrives when the performance of character is given latitude of expression within the framework of the ensemble (Soules 2004: 269).

These protocols — the “long established codes” determining “precedence and precisely correct procedure” (270) — act as law. Thus, while it ‘may at first seem antithetical to popular notions of improvised creativity’ (270), improvisation can only exist in relation to these ‘voluntary constraints’ (270) and to law.

The paradox that animates improvisation not only applies to improvised theatre, but to *scripted* acting as well. Citing renowned Russian actor and teacher, Michael Chekhov, Soules writes:

Every role offers an actor the opportunity to improvise, to collaborate and truly co-create with the author and director. This suggestion, of course, does not imply improvising new lines or substituting business for that outlined by the director. On the contrary. The given lines and the business are the firm bases upon which the actor must and can develop his improvisations. *How* he speaks the lines and *how* he fulfills the business are the open gates to a vast field of improvisation. The ‘hows’ of his lines and business are the *ways* in which he can express himself freely (quoted at 269, emphasis in Soules).

The laws of ‘lines and business’ in scripted theatre may be more explicit, but even performances as ‘radically improvisational’ (270) as Ornette Coleman’s *Free Jazz* are not without some constraints. The protocols or laws governing the music in this particular recording are outlined in Martin Williams’s liner notes to the album:

Not only is the improvisation almost total, it is frequently collective, involving all eight men at once. And there were no preconceptions as to themes, chord patterns or chorus lengths. *The guide for each soloist was a brief ensemble part which introduces him and which gave him an area of musical pitch* (Williams 1998: 2-3, emphasis added).

Improvisation is accordingly ‘not typified by unrestrained freedom’ (Soules 2004: 271) and instead requires a constant mindfulness as to how the individual improvisations are determining or influencing the performance as a whole. Ornette Coleman explains this further in relation to his *Free Jazz* recording:

The most important thing ... was for us to play together, all at the same time, without getting in each other’s way, and also have enough room for each player to ad lib alone — and to follow this idea for the duration of the album (quoted in Williams 1998: 3).

Improvisation in both music and theatre demands a ‘constant negotiation between the freedoms accorded to the individual improviser and those of the group as a whole’ (Stewart 2003: 93). It requires both

## Ramshaw

‘individual responsibility for the sounds [or actions] produced and collective responsibility for the overall performance’ (Prévost 2004: 358). Creative improvisation accordingly provides ‘the means towards both individual self-fashioning *and* communal liberation’ (Gilroy 2000: 497, emphasis added).

‘Spontaneity’ in legal judgment similarly calls for 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, which both allow and constrain that freedom. Instead of being illimitably free to make any decision, the judge improvises in relation to the law that already exists and to the society and community (the audience) for whom she or he is judging. Conceived this way, the creativity of law becomes less suspect and allows for the possibility of ‘spontaneity’ that is just and desired. ‘Jamming’ the law requires, amongst other things, ‘deep listening’<sup>29</sup> (Oliveros 2005), that is, the ‘intense form of commitment and responsibility to — as well as interaction with — all that surrounds us: people, environments, nature, the sounds of daily life’ (Fischlin and Heble 2004: 11). It demands attunement, not only to the singularity of the situation, but also to the context and community within which the judgment is made. By listening deeply to the personal stories of others, we may begin to understand ‘our story as a community of people and thus tap into the collective and universal experience’ (IPTN). Social action, in other words, makes ‘spontaneity’ possible, which in turn enables social change and transformation as space is made ‘for the stories of the community, through individual voices’, and their effects on us (IPTN).

## Law as Creative Group Performance

As with Playback Theatre, modern law plays back stories in the courtroom with a view to translating individual experiences into a form understandable by the collective (Fox 2003: 263). The uniqueness of each story or case is made meaningful through its translation into pre-existing rules of evidence, procedure, precedent and general legal principles. The judge takes on the role of ‘nonscripted actor’ in this play,

improvising on the story to make it comprehensible to the collective (fellow judges, lawyers and other legal audiences). However, the ‘spontaneity’ of the judgment is not illimitable. Its singularity is only meaningful when translated through the law already in existence. Thus, improvisation in law is never completely unknown and unpredictable.

Recognising the importance of ‘spontaneity’ in judgment entails a concurrent appreciation of the importance of ‘creative group performance’ or ‘group creativity’ (Sawyer 2006: 3-4) in law. As a ‘living, practiced tradition’ (245), which is by nature collaborative and creative, law insists on the ‘[i]mprovisational creativity’ (245) of both the individual performer (judge) and the performance community or audience. Law, like theatre, is an ‘ensemble art’ (Sawyer 2006: 252). No one law, statute, or judge comprises the whole of ‘law’ and each individual judgment is a product of ‘changing interactions’ (252) with the collective. These *changing* interactions are, by their very designation, at least somewhat unpredictable and improvised.

Read as improvisation, law becomes a ‘social practice’ that is ‘predicated on the exploration of alternative (and alterative) modes of being in community’ (Fischlin and Heble 2004: 13), of being *in* and *with* others in society. It is for this reason, and for the ‘hope and possibility’ (11) that come from ‘envisionings of possibilities excluded from conventional systems of thought’ (11), that ‘spontaneity’ in judgment should be welcomed and encouraged. In its ‘resistance to orthodoxies’ (11), improvisation in law, as in theatre and music, has the potential to produce new ways of knowing and being in the world. In unpacking the law’s ‘lived reality of creativity’ (Sawyer 2006: 259) as that which is ‘almost never a solitary activity’ (259), but is instead ‘fundamentally social and collaborative’ (259), it is obvious that law, like Playback Theatre, has the potential to ‘build communities that have been torn asunder’ (Fox 1986: 263) and to bring about positive and necessary change in contemporary society. Notwithstanding, or perhaps because of, its optimism, instead of being feared, denied or discouraged, legal improvisation — as jamming or creative group performance — should be embraced.

## Notes

- 1 Deepest gratitude is offered to the Editors of this Special Issue, Marett Leiboff and Sophie Nield, for their support and assistance throughout the process of writing this article, as well as the engagement and suggestions of the participants at Law's Theatrical Presence Workshop in London, England on 5 December 2009, namely Patrícia Branco, Sophie Nield, Theron Schmidt, Karen Walton and Graham White. I would also like to thank the anonymous reviewers for their very constructive comments on the original draft and, as always, thanks to Eugene McNamee for his insightful feedback and discussion on the ideas offered herein.
- 2 With no script guiding the performance, 'nonscripted' actors utilise improvisational acting techniques to stage stories extemporaneously.
- 3 The concept 'modern law' denotes the 'traditional representation [of] the discipline of law' as 'always, in the last instance, an enterprise in strict reason or logic and human social behaviour' and, correspondingly, 'as the consequence of reasoned intentions and explicitly formulated goals' (Goodrich 1986: 545). For a critique of this vision of law in modernity, see Goodrich (1986) and Fitzpatrick (1992).
- 4 In common law legal systems, a legal precedent or authority is a previous legal case or decision, establishing a principle or rule, which a judge or other judicial body may (and, at times, must) follow when deciding a subsequent case with similar issues or facts. Precedent, as will be described in further detail in Section 4, is founded on the principle that 'like cases will be treated alike, and that similarly situated individuals are subject to the same legal consequences' (Rehnquist 1986: 347).
- 5 Placing 'spontaneity' in quotation marks signifies a departure from the dominant societal or dictionary definition of spontaneity as 'involuntary, not due to conscious volition' (OERD 1996: 1400).
- 6 The Common Law, as defined by *Black's Law Dictionary*, is 'a body of law that develops and derives through judicial decisions, as distinguished from legislative enactments' (Black 1990: 276). In contrast, a Civil Law legal system features laws that are written and collected or codified through legislative enactments as opposed to judges (246).
- 7 In instances where a dispute is fundamentally distinct from all previous cases, judges have the authority and duty to make new law. This is called *primaec impressionis*, a 'case of a new kind, to which no established principle

of law or precedent directly applies, and which must be decided entirely by reason as distinguished from authority' (Black 1990: 1189).

- 8 The word 'improvisation' is derived from the Latin *improvisus*, which 'refers to the 'unforeseen' or that which occurs 'on the spur of the moment'" (Alterhaug 2004: 98).
- 9 Adversary system is defined by Black as "The jurisprudential network of laws, rules and procedures characterized by opposing parties who contend against each other for a result favorable to themselves. In such system, the judge acts as an independent magistrate rather than prosecutor" (Black 1990: 53).
- 10 Criminal or penal laws refer to all the statutes (federal and, in some countries, state laws) that 'define criminal offenses and specify corresponding fines and punishment' (Black 1990: 1133).
- 11 Civil law is a body of law that is concerned with 'civil or private rights and remedies, as contrasted with criminal law' (Black 1990: 246).
- 12 Procedural law prescribes the manner in which rights and duties among and for persons, natural or otherwise, may be exercised and enforced in a court (Black 1990: 1203).
- 13 As distinguished from procedural law, substantive law fixes duties and establishes rights and duties among and for persons, natural or otherwise (Black 1990: 1203).
- 14 Judgment is given immediately after hearing the arguments while the judge is still sitting in court.
- 15 Common law countries can trace their legal heritage to England as former colonies of the British Empire. They include Australia, Cameroon, Canada, Ghana, Hong Kong, India, Ireland, Malaysia, New Zealand, Pakistan, Singapore, South Africa, Sri Lanka, and the United States of America.
- 16 My deepest appreciation is offered to the anonymous reviewer who forced me to consider these distinctions and their relationship to judgment.
- 17 Activist courts, Bork argues, 'announce principles and reach decisions not plausibly derived from the Constitution [and other pre-existing laws]' (Bork 2003: 19). Such invention of law 'from whole cloth' (Baker 2002: 140) is seen to 'rightfully undermine our confidence in courts' (140) and give judges licence 'to do what they please' (Kaufman 1980: 81).

## Ramshaw

- 18 The audience plays a large role in both theatre and law. Unfortunately, there is not space enough in this article to give this issue proper attention.
- 19 One example of this comes from my own experience. Several years ago, I was cast as Katharina in a community theatre production of Shakespeare's *Taming of the Shrew*. In one rehearsal close to the opening of the production, the Director, as a joke, asked me to throw a pie in the face of Gremio in the final scene (Act 5, Scene 2) during Kate's 'Fie, fie!' monologue. The actor playing Gremio, who was probably the most experienced and talented in the ensemble and had a great sense of humour and adventure, instead of being amused by the surprise, reacted very angrily and stormed off the stage. He explained later that it was not the pie in the face that angered him, but the improvised divergence from the scripted and rehearsed action, which wrenched him out of character and forced him to lose his concentration and forget his next action.
- 20 This is taken from the International Playback Theatre Network (IPTN) website: <http://www.playbacknet.org>. The IPTN was established in 1990 by Jonathan Fox, Jo Salas and Judy Swallow to 'facilitate communication between playback practitioners and guide the playback movement' (Fox and Dauber 1999: 12).
- 21 In Playback Theatre, according to its founders, 'each person's uniqueness is honoured and affirmed while at the same time building and strengthening our connections to each other as a community of people' (IPTN).
- 22 To be explained later, in relation to Jacques Derrida's writings on law and justice, legal judgment is being conceived here as the aporetic relation between singularity and generality, individuality and collectivity.
- 23 Much of this caveat is taken from the report of one anonymous reviewer. I agree wholeheartedly with the statements and offer thanks for the sentiments expressed therein.
- 24 Playback Theatre is now practised in at least 30 countries (Fox and Dauber 1999: 13).
- 25 For information on this new field of interdisciplinary research, see the 'Improvisation, Community and Social Practice' Research Project, funded by the Social Science and Humanities Research Council of Canada (SSHRC) Major Collaborative Research Initiative (MCRI). <http://www.improvcommunity.ca>.

- 26 A recent edition of the journal *Critical Studies in Improvisation* is dedicated to the theme of 'Law, Justice and Improvisation'. See Piper and Waterman (2010).
- 27 '(Im)possibility' is read through the Derridean concept of *différance*, or the 'formal play of differences' (Derrida 2002b: 26), 'of traces' (26), which 'forbid at any moment, or in any sense, that a simple element be *present* in and of itself, referring only to itself' (26, emphasis in original). Impossibility is, for Derrida, 'not the *opposite* of the possible' (Beardsworth 1996: 26, emphasis in original). Instead, it 'supports' (Derrida 2005: 91) and '*releases* the possible' (Beardsworth 1996: 26, emphasis in original). Impossibility and failure, in other words, contain the trace or promise of possibility. In its failure, possibility survives.
- 28 Reputations were both made and broken in these jam sessions. One of the most celebrated ordeals was when drummer Jo Jones 'threw his high-hat cymbal on the floor of the Reno Club in Kansas City to make it clear to a struggling teenaged Charlie Parker that he most emphatically did *not* belong – yet' (DeVeaux 1997: 214, emphasis in original). In response to this humiliation, Parker went home and stayed there, practising, for *three months* – until he knew what he was doing (227). Thus, for young musicians still learning their craft, the 'competitive give-and-take of "cutting"' (Belgrad 1989: 180) was 'as much a part of their training as practising scales' (DeVeaux 1997: 211).
- 29 According to the Deep Listening Institute's website:  
Deep Listening® is a philosophy and practice developed by Pauline Oliveros that distinguishes the difference between the involuntary nature of hearing and the voluntary selective nature of listening. The result of the practice cultivates appreciation of sounds on a heightened level, expanding the potential for connection and interaction with one's environment, technology and performance with others in music and related arts. For more information, see <http://www.deeplisting.org/site/about>.

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## Ramshaw

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