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Judging the Singular: Towards a Contingent Practice of Improvisation in Law

McNeilly, K., Stapleton, P., & Ramshaw, S. (Guest ed.) (2018). Judging the Singular: Towards a Contingent Practice of Improvisation in Law. *Critical Studies in Improvisation*, 12(1).
<http://www.criticalimprov.com/article/view/3725>

Published in:
Critical Studies in Improvisation

Document Version:
Peer reviewed version

Queen's University Belfast - Research Portal:
[Link to publication record in Queen's University Belfast Research Portal](#)

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Just Improvisation

Sara Ramshaw and Paul Stapleton

Introduction: Law and Improvisation

One of the most common myths or misconceptions surrounding improvisation is that it is structure-less and devoid of “law,” adhering to “neither convention nor protocol,” tolerating “no system of constraint” and requiring “no prior thought” (Fischlin and Heble 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 is required to learn the skills of the art of improvisation. Why else do many improvisers – John Coltrane being a telling example (Fischlin et al 95) – spend so much time rehearsing for an improvised performance, or preparing to be spontaneous? This work or discipline is “necessary 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 6).

Critical scholars of improvisation have done much to problematize or criticize the understanding of musical improvisation as unique and “unforeseen,” as “pure spontaneity.” Improvisation is not simply “a process of creation that emphasizes freedom” (Panish 123). To improvise well requires an attention to “discipline,” “technical knowledge,” as well as “background, history, and culture” (Lewis 153). Rather than eschewing all formality or structure, the improvised act can only be understood in relation to the pre-existent, be it the original melody, theme or musical tradition. In the words of Charles Mingus, “[y]ou gotta improvise on somethin’.” To do otherwise would make its recognition *as* improvisation impossible.

Although improvisation is most often associated with the musical or sonic realm, Ramshaw has written extensively about the fundamentally improvisatory nature of the Common Law (see, for example, Ramshaw *Justice*). As no two legal actions can be *exactly* the same, each judicial application of existing rules or past precedents to new facts creates, in fact, a new and improvised law. And it is the very nature of legal judgment that elicits a negotiation between the singularity of a particular case and the pre-existing rules or laws to which it must adhere or follow. 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 (Ramshaw “Jamming” 134; see also, Ramshaw “Deconstructin(g)” 4).

While not disputing the importance of fairness and equality in relation to law, the collaborative research as between Ramshaw (law) and Stapleton (music) calls for increased recognition of the improvised creativity that is at the heart of justice. One of the key tenets of critical improvisational research is the belief in improvisation’s emancipatory promise. Instead of being unplanned and purely spontaneous, improvisation self-consciously engages with tradition and convention, enabling resistance to past oppression and injustice and opening up possibilities for new ways of being together in society, both locally and at the global level.

Ramshaw and Stapleton share an engagement with improvisation as a “social practice” (Heble and Seimerling 42; Fischlin and Heble 11), one that, when applied to both the disciplines of law and music, aims to facilitate new kinds of intercultural and interdisciplinary conversations and foster new, better, ways of being with one another, both as individuals and as members of diverse communities, in multicultural and sometimes divided (as is still the case in Northern Ireland)¹ societies.

This is, however, no uni-directional application of musical improvisation to the discipline of law. If that were the case, the potential impact would be far less significant. Instead, our interdisciplinary research has the potential to move paradigms underlying research in *both* fields. Essentially, our collaborative interdisciplinary research is not just about taking knowledge from one discipline and applying it to another. Rather, it is about creating a dialogue that aims to shift established concepts and practices in both disciplines, and thus beyond.

Translating Improvisation Research Group

This cross-disciplinary dialogue is of crucial importance, as the activities of the Translating Improvisation Research Group evidence. This interdisciplinary research group, led by Ramshaw and Stapleton, originated from Project Group funding from the Queen’s University Belfast (QUB) Institute for Collaborative Research in the Humanities (ICRH) during the 2013-14 academic year and we continue to meet regularly for a seminar series, workshops and concerts. Translating Improvisation Research Group brings together approximately 30 academics and postgraduate students researching across diverse disciplines, such as architecture, law, anthropology, behavioural psychology, drama and music, to investigate the possibility of bridging the gap between the musical frame for discussion and those in other fields. We aim to overcome the popularly held misconception that improvisation is simply “making it up as you go along.” Rather, we argue that improvisation is more productively understood as a skilled practice that transcends disciplinary boundaries and promotes new approaches to creative decision-making, critical dialogue, risk-taking, and collaboration across diverse domains and levels of expertise (for example, how judicial discretion is applied on a case by case basis, or how architectural designs interplay with the agency of builders and inhabitants). Our aim is to rethink how best to cope with future events that cannot be predicted with a sufficient level of certainty, or for which a single correct response does not exist.²

The Translating Improvisation Research Group thereby reveals the wider challenge of critical improvisation studies. Recent decades have seen a widespread adoption of risk-adverse bureaucracy that has largely failed to deal with the complexities of modern society. What has resulted is the de-professionalization of skilled workers through an over-reliance on targets and procedures. We contend that in many areas of professional practice, no amount of predetermined procedure or technological assistance will successfully replace the ability of a skilful practitioner to adapt to the unique demands and contingencies of individual situations. Therefore, we must better understand how skill is acquired and how expertise can be updated when faced with changing circumstances. Improvisation can provide an alternative model, which prioritises human adaptability above inflexible or unenforceable procedures, providing alternative mechanisms for addressing the challenges of specific

dynamically unfolding situations. In many areas it is clear that improvisation is the *modus operandi* even when it is common practice to claim that decisions are entirely directed by procedure, precedent and other regulatory controls. Therefore, the root of the challenge is not a lack of improvisation, but a significant gap between improvisatory practices and our understanding of how these practices are learned, constrained and ideally critiqued and reinvented.

Into the Key of Law Research Project

Building on the collaborative interdisciplinary work of the Translating Improvisation Research Group, in January 2014, Ramshaw and Stapleton were awarded an UK Arts and Humanities Research Council (AHRC) Early Career Research Grant for a project entitled *Into the Key of Law: Transposing Musical Improvisation. The Case of Child Protection in Northern Ireland*. This project united the fields of Family Law and Critical Studies in Improvisation (CSI), viewing improvisation not just as a musical, but also as a *social practice*. Improvisation teaches us how to *actively* listen to the singularity of a situation and its relationship to context and the surrounding circumstances.

Child protection suited this exploration well because of the recent and ongoing review of the system in the UK and the call for a reconsideration of the structures currently in place. Following the Final Report of the Family Justice Review panel (2011), and the government's response to this report (2012), significant changes were proposed to the organisation and administration of the family courts in England and Wales. Of particular concern was the issue of delay in care proceedings, which can have extremely negative and detrimental effects on children in care.

Contemporaneous to the Family Justice Review, Professor Eileen Munro was asked by the government to conduct an independent review of child protection in England. *The Munro Review of Child Protection: Final Report* was published in May 2011, setting out recommendations for the reform of the child protection system, which she viewed as over-bureaucratized and overly-concerned with compliance (Munro "Final" 5). A child-centered system was recommended, "one that keeps a focus on children, checking whether they are being effectively helped, and adapting when problems are identified" (5). Munro calls for flexibility in decision-making, allowing those working in child protection "to be given more scope to exercise professional judgment in deciding how best to help children and their families" (5).

In her 2012 *Progress Report: Moving towards a child-centred system*, Professor Munro considered how well the implementation of her recommendations had progressed and "how the child protection landscape as a whole is changing" (Munro "Progress" 3). One key recommendation was the removal of fixed timescales, which, on the surface, seemingly contradict the need for swift decision-making in child protection cases. However, in the locations where exemptions were granted from statutory timescales, the results have been very positive and it is reported that "the additional flexibility has encouraged better, more thoughtful working practices, and better and clearer consideration of priorities" (3).

The Munro Review (and the Progress Report that follows) thereby identified the systematic issue of inferior decisions being made by child protection professionals

because too much attention is given to formality (e.g., timescales), without any gain in the sense of this leading to better decisions. In essence, what was being called for is the creation of an adaptive, flexible environment in which improvisation can take place, where improvisation must be understood as the confidence and technical ability to negotiate a smooth path between the demands of the general system of rules and an individual case.

Following Munro, our research project aimed to determine how best to equip legal practitioners, e.g., judges and lawyers, technically and theoretically, to be confident in the improvisatory role which they are being called to undertake. As musicians are perhaps best placed to understand improvisational “language,” that is, its techniques, discourses and pedagogies, transposition of knowledge from the musical to the legal realm is not only possible (as is evidenced in this collaboration between a lawyer and a musician), but also necessary. The overall aim of the project was therefore to facilitate cross-disciplinary conversation and knowledge transfer on the question of how best to effect better, more creative and courageous, decision-making in the area of child protection law. This, ultimately, not only impacts law and society more generally, but children at risk of abuse and neglect in particular.

The project focused on child protection professionals in the jurisdiction of Northern Ireland (NI). With the recent changes to the family justice system not yet (if at all) applying to the Northern Irish jurisdiction,³ the project team was keen to assess how child protection in NI might differ from other jurisdictions and how innovative solutions developed from this research might also be beneficial elsewhere in the United Kingdom (and beyond).

Through discussions, interviews and improvisation workshops with key stakeholders in this area, such as judges, lawyers, social workers, policy makers and charity/third sector employees, along with local and international musicians, this project endeavoured to bring to light further changes necessary to enable quicker, more creative decisions in the area of child protection law and thus to counter inequality and injustice in this area.

This interdisciplinary collaboration brought together a diverse and international research team, consisting of:

- Dr Sara Ramshaw (Principal Investigator), lawyer/legal academic (Canada)
- Dr Paul Stapleton (Co-Investigator), musician/improviser/academic (USA)
- Dr Adnan Marquez-Borbon (Postdoctoral Fellow), improviser/musician (Mexico)
- Dr Kathryn McNeilly (Research Assistant), legal academic (Northern Ireland)
- Seamus Mulholland (Research Assistant), Barrister-at-Law (Northern Ireland)
- Dr Matilde Meireles (Research Assistant and Archivist), sound artist (Portugal).

Throughout the life of the project, our research team conducted over thirty (30) semi-structured interviews and five (5) focus groups with musicians and professionals working in the field of child protection, including social workers, policy makers, community activists, as well as prominent members of the Northern Irish judiciary and legal profession, including UK Supreme Court justice and former Lord Chief

Justice of Northern Ireland, the Right Honourable the Lord Kerr of Tonaghmore. We also organised and guided six (6) improvisation workshops in which invited participants from a range of backgrounds and professions to explore the temporal, physical and social dynamics of improvisation.

“Just Improvisation” Symposium

In May 2015, as part of the *Into the Key of Law* project, we organised an interdisciplinary, international symposium at Queen’s University Belfast’s Sonic Arts Research Centre (SARC) entitled “Just Improvisation: Enriching Child Protection Law through Musical Techniques, Discourses and Pedagogies.” This event brought together academic and non-academic participants, both local and international, from musical, legal and social work backgrounds to explore the improvised creativity that is at the heart of legal decision-making, specifically as it applies to the area of child protection law.

Over the two days, panel discussions and improvisation workshops explored the current improvisatory practices in the legal domain. Local and international improvising musicians and key members of the Northern Irish judiciary and Bar, such as then Siobhan Keegan QC (Vice Chair of the NI Bar) and Denise McBride QC (now Dame Keegan and Dame McBride, the first Northern Irish High Court judges), alongside Her Honour Judge Patricia Smyth and His Honour Judge Brian Sherrard, discussed the role of improvisatory practices and skills in legal advocacy and judicial decision-making.

Also participating and in attendance were local social workers, social work academics and members of the charity, Belfast and Lisburn Women’s Aid. They all spoke poignantly about the current issues surrounding Northern Irish child protection law. The symposium was free and open to the public and included improvisation workshops and a concert by two famed contemporary improvising musicians, Okkyung Lee (Korea) and Maria Chavez (Peru). The keynote speakers included the internationally renowned improvising musicians/composers/academics, Pauline Oliveros (USA) and Ellen Waterman (Canada). The ensuing discussions highlighted the importance of improvisation not only as technical ability, but also as one that demands careful listening and empathy to the multiple parties involved in such delicate and complex cases.⁴

***Just Improvisation* Special Issue**

This Special Issue is comprised of articles, comments and opinions, and an interview, ensuing from discussions at the “Just Improvisation” Symposium. We are particularly pleased that, before her death in November 2016, Pauline Oliveros agreed to have her keynote address, entitled “Safe to Play,” included in this volume. It is a beautiful treatise on the joy of “play”: play as improvisation and improvisation as play. She begins by telling us how improvising with babies is one of her favorite things and how, although improvisation cannot be legislated, law, particularly the United Nations Convention on the Rights of the Child (UNCRC), “has helped in many ways to promote safety for children and bring consciousness to the value and necessity of safety for children but the child has to feel safe in order to play and to have a healthy life.” To an audience of judges, lawyers, social workers, artists and musicians,

Oliveros speaks about her revolutionary book, *Sonic Meditations*, and how it “seems to resonate with the principles of the UNCRC.” She concludes with two thirty-second listening meditations, during which the environment is enlivened through what Oliveros describes as “the listening effect.” Following this sequence of near silent contemplation, Oliveros leaves us with one final question: “Can we make our listening a safe zone, a place where the children of the world will feel safe to play?”⁵

In the wake of Pauline’s untimely passing, her longtime spouse and collaborator, IONE, a writer and performance artist, very kindly agreed to share her thoughts about her and Pauline’s time in Belfast. In a piece called, “Listening with Pauline in Belfast,” she writes about the “joy” she, Maria Chavez and Pauline all felt, celebrating their birthdays together at the symposium. And about the *curiosity* felt by the participants – child and family advocates (judges, lawyers and therapists) and artists and musicians of all kinds – all being in the same room together, discussing the difficult topic of child protection. She writes: “We had all experienced our own families. Most importantly, we had all *been* children” (emphasis in original). IONE’s piece vividly captures the transformative potential of interdisciplinary conversations and the importance of listening – *really* listening – to one another. As is poignantly articulated in her final sentence: “Here, it was ‘safe to play’.”

We are also very grateful to have keynote speaker, Ellen Waterman’s “Notes on Improvisation and Justice,” which she wrote up immediately following the event. They are so detailed and thoughtful that readers of the Special Issue who were not in attendance will definitely feel as if they had been. She writes about how she came to the symposium thinking that “the goal was to examine the ways that improvisers can inform child protection law.” She left with “the insight that those involved in child protection law are themselves practiced improvisers in a field where the stakes are the lives, health, and welfare of children and women suffering from domestic abuse.” In her description of the two days, Waterman eloquently shares with us her thoughts as to the power and possibility of interdisciplinary interactions as between improvising musicians and those working in the area of child protection law.

Another participant in the symposium, Simon Rose, begins his essay, “When law listens,” with an image of the river: “its two distant banks and the separated practices of law and improvisation in music”. He then proceeds to deconstruct or challenge this supposed separateness, illustrating the profound significance of interdisciplinary conversation for all those involved in law and music. Rose focuses his reflection on the final panel of the conference, a panel that included two judges and a barrister (who would soon become one of NI’s first female High Court judges). These speakers spoke of the challenges they faced in relation to child protection law, but also the need for creativity and “bespoke solutions,” because every child, every family, is *different*. Rose reveals how working with difference is “a forte of improvisation,” thereby highlighting instances of unity between the two fields. He also engages with the so-called “realtime-ness” of improvisation and how this relates, perhaps paradoxically, with judicial decision-making in child protection law. Finally, the “myriad out-workings” of trials, which work to surprise even the most seasoned lawyer, is thought through by Rose “as a useful improvisational approach,” offering “a novel articulation for improvisation in music practice.” Rose ends his piece with law and music, both “standing on the same bank.”

Bennett Hogg's article, "Improvisation in Process," highlights the shared practices and concerns of improvisation and social justice. However, more than the other papers, he is attentive to their dissimilarities and distinctions. As he writes: "Improvisation and judgment are not abstractions to be mapped onto one another, but concrete cultural practices. Apparent similarities, then, should initiate deeper interrogation of the phenomena under investigation, rather than being taken at face value as *de facto* connections." This "deeper interrogation" illustrates, for example, that while "'bad' social justice can destroy lives - judgments affected by racial, class, or gender stereotyping, for example - few lives are ruined by bad musical improvisation." This is an important point and one that Ramshaw is particularly interested in (see Ramshaw "The Creative Life"; "Improvising (Il)legality"). After a careful and thoughtful discussion of the "musical work," what it means to be "heard," and the role of "mediation" in both music and law, Hogg concludes that, although we cannot "transpose practices from musical improvisation onto the judicial process," we can "try to hold insights from both practices up to the same light, and allow insights from one to inform emergent strategies in the other." This article offers a stimulating reading of the relationship between law and musical improvisation, especially for those interested in this area of interdisciplinary research.

Simon Waters, a member of the Translating Improvisation Research Group at QUB and important contributor to its activities and those of the *Into the Key of Law* research project, provides a meticulous meditation on the "ethics of listening" from an improvising musician's perspective. Bringing together seemingly disparate topics – from Billy Elliot's description of dancing as "disappearance" in his audition for the Royal Ballet in the film by Stephen Daldry to Sartre and de Beauvoir's descriptions of sexual activity and the erotic, as described by Penelope Deutscher – Waters skilfully paints the "self (body)" as "an ethical relation with otherness" in which empathy becomes an improvisatory strategy of "'othering the self' through the relinquishing of familiar assumptions that 'control' or 'exploration' must always be conscious attentive conduct." Although room does not exist in this Editorial to summarise adequately the richness of Waters' argument, we will end as he does, noting that, for anyone interested in issues of ethics and justice, it must be realised that the "empathic body is also necessarily an improvising body."

Kathryn McNeilly and Paul Stapleton's article, "Judging the Singular: Towards a Contingent Practice of Improvisation in Law," is a fascinating exploration of the benefits of improvisation in relation to judicial decision-making and a call for a more "conscious and critical practice" of improvisation in law. The authors encourage judges, and the legal system as a whole, to consciously think of the judicial role in improvisational terms, engaging in what the authors call, "judging the singular." This activity of judging singularity involves "a *contingent* approach to and practice of improvisation in law; one that is grounded in the context within which it takes place and is inherently open to responsive development and change based upon this context." Applying empirical research gathered from the *Into the Key of Law* research project, McNeilly and Stapleton structure their discussion around certain key themes, which emerged from interviews with judges, lawyers, social workers and improvising musicians, namely those of "singularity," "anticipation," "responsiveness/adaptability," and "constraint." What emerges from this research is a portrait of judges as always already expert improvisers in everyday decision-making. However, this expertise is constrained by various institutional factors, such as "the

trend towards a marginalization of singularity, limited space for effective and holistic listening, responsiveness and adaptability as well as an advancement of bureaucracy over expertise.” The authors ultimately conclude that the system *can* change – and *must* if judges are ever going to be allowed “to make the best decisions.”

The article by Ramshaw, Marquez-Borbon and Mulholland, entitled “Hydra: A Creative Training Tool for Critical Legal Advocacy and Ethics,” details the development and aims, as well as the key tenets, of the improvisational “game piece,” *Hydra*,⁶ which was invented by the *Into the Key of Law* research team, with the input of participants in the initial pilot and discussions with focus group and audience members at various international conferences and events. *Hydra* is a response to perceived deficiencies in traditional moot court or advocacy training in common law legal education, which is often criticised for failing to adequately prepare advocates to be nimble-footed in the courtroom and able to respond quickly and responsively to unexpected situations. In contrast, *Hydra*, named after the serpent-like water monster with numerous heads in Greek mythology, hones legal argumentation skills, requiring participants to be Hydra-headed and skilled at rapidly analysing a legal issue from a variety of angles and perspectives, teaching advocates to be prepared for the unexpected. This article focuses on the importance of moulding creative, critical and ethical legal advocates and how improvisation can be used as a pedagogical tool or practice to inspire such creativity, openness and empathy. In the final section, the authors outline the components or “rules” of *Hydra* and the deficiencies they think this game piece will address in legal education.

The final contribution to the Special Issue is an interview with Her Honour Judge Patricia Smyth of the Northern Ireland County Court, who the authors, perhaps slightly provocatively, label “The Improvising Judge” (it ends up, she loves the title!). Judge Smyth was an invaluable contributor to the *Into the Key of Law* research project, volunteering as a project interviewee, focus group member and a panel participant at the “Just Improvisation” Symposium. Generously giving up her precious time to consent to this interview, Judge Smyth provides valuable insight into a variety of important issues, such as training judges to become better improvisers, the limits of improvisation in, particularly, Northern Irish family law, the existing structures or skills that make improvisation possible and, perhaps most importantly, the importance of creativity, “bespoke solutions” (her words), and attentive or deep listening in the family law realm.

The editors of this Special Issue wish to thank the Arts and Humanities Research Council (AHRC) in the UK for funding the interdisciplinary research project, *Into the Key of Law: Transposing Musical Improvisation. The Case of Child Protection in Northern Ireland*. We would also like to thank QUB’s Institute for Collaborative Research in the Humanities (ICRH), which, sadly, no longer exists, and QUB’s Sonic Arts Research Centre (SARC) and School of Law, which provided both financial and other support.

As one final thought, we dedicate this Special Issue to composer, improviser and humanitarian Pauline Oliveros who died on 24 November 2016 at her home in Kingston, NY at the age of 84. Pauline was a remarkable human being and a phenomenal and gifted artist. She will be dearly missed – but never forgotten.⁷

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Notes

¹ The focus on Northern Ireland (NI) stems from the fact that the editors of this collection were, and one still is (Stapleton), resident in NI for the past decade. Much of the research discussed in this Editorial is also focused on NI. In terms of the division that still exists in the jurisdiction, despite the Belfast (or Good Friday) Agreement 1998 establishing a power-sharing executive framework, NI remains in crisis. A recent and ongoing example of this division is as follows: following the March 2, 2017 local election, unionists lost their majority at Stormont and talks began between the two largest parties, the Democratic Unionist Part (DUP) and Sinn Féin, to try and form a new power-sharing Executive. Talks to date (as of June 2017) have been unsuccessful and the NI Assembly is currently suspended. It is uncertain what will happen following the hung Westminster Parliament in England and a possible (informal) coalition between the Conservative Party and the DUP. For more information on the crisis and division in NI as it relates to improvisation, see Ramshaw and Stapleton (forthcoming).

² The seminar series and other related events are all available to the public via our Translating Improvisation website, <www.translatingimprovisation.com>.

³ Northern Ireland is currently in the process of reviewing the family justice system to assess and improve current procedures. The Preliminary Report was published on 4 August 2016. For more information, see <<http://www.jsbni.com/civilandfamilyjusticereview/Pages/default.aspx>>.

⁴ The symposium was audio/video-taped and is available for public access via our Translating Improvisation website, <<http://translatingimprovisation.com/archive>>.

⁵ To watch Oliveros' keynote address, please go to the Translating Improvisation website, <www.translatingimprovisation.com>.

⁶ As is detailed in the paper by Ramshaw, Marquez-Borbon and Mulholland, *Hydra* owes its inspiration to John Zorn's *Cobra*.

⁷ For those unfamiliar with her work, see the Deep Listening Institute website, <<http://deeplistening.org/site/content/home>>; and the Pauline Oliveros website, <<http://paulineoliveros.us>>. For further information on Pauline and her career, see, for example, tributes in *The New York Times* (Smith) and *The New Yorker* (O'Brien).

Judging the Singular: Towards a Contingent Practice of Improvisation in Law

Kathryn McNeilly and Paul Stapleton

Abstract

At present improvisation is a tacit practice within law; regularly used but largely unacknowledged amongst judges and other legal actors. This article advances the benefits of improvisation and calls for a more conscious and critical practice of improvisation in law, focusing on the role of the judge. However, in this process of moving from the tacit to the critical it is imperative to avoid an abstract conception of improvisation which is straightforwardly translated into the legal context. How we propose this can be done is by foregrounding contingency; urging towards a contingent practice of improvisation in law that is grounded in, and emerges from, the context within which it takes place.

Keywords

Judging; Judicial Practice; Law; Common Law; Singularity; Contingency

Introducing the Contingent

In law the role of the judge is seminal, both as a symbolic figure representing justice to the layperson and as the practical arbitrator between competing interests in the adversarial common law system. A canon of thought has emerged pertaining to judges and judicial decision-making, the way in which judges approach the task of responding to each case in front of them, and the resources they use to do so. This includes conventional understandings of the judge's role as that of a detached, neutral mediator, as well as development of substantial critiques of such understandings in the form of procedural justice, therapeutic jurisprudence and feminist approaches to judging (Hunter et al). These latter approaches have done much to emphasize the importance of a more active and engaged role for the judge to ensure fairness and respect (Tyler; Lind and Tyler), facilitate emotional, psychological and physical wellbeing of individuals engaged in the justice system (King; Wexler), and be attentive to the gendered nature of law and justice (Hunter) respectively. In this piece, we aim to add to such literature, considering how judicial decision-making, and the skills involved in this activity as a practice of judging the singular, may be productively thought through in terms of improvisation.¹ The tools of improvisation, and a grasp of improvisation as an important, emancipatory social practice,² facilitate insights into judging which are not possible by other means. From this we encourage judges to consciously think of their role in improvisational terms: to actively engage in a critical practice of improvisation in law which is directed towards enhancing just outcomes for each case they judge on.

In undertaking this exploration we draw upon qualitative interview data with judges working in the area of family law and professional improvising musicians³ collected during the course of the Arts and Humanities Research Council funded project *Into the Key of Law: Transposing Musical Improvisation. The Case of Child Protection in Northern Ireland*.⁴ This project is unique in its interdisciplinary grounding and in engaging the study and discipline of law with that of music. The aim of the project is to draw upon the concepts and practices of improvisation in music to explore space for, and indeed already existing practices of, improvisation in law. Initially, law may seem a highly unlikely site for improvisation given the centrality of tradition, precedent, predictability, and stability in its underpinnings. However, the judge-made common law which exists alongside statute law in jurisdictions such as the United Kingdom, Canada, India, Hong Kong, Australia, and the United States of America actually offers inherent possibilities for, and indeed requires, improvisation in the course of its everyday activity (Ramshaw, *Justice*). Law is, at its heart, a practice, not a text, involving response to an individual case within a system of precedent using the legal and practical resources that are available. Currently improvisation appears as a subtle, tacit practice employed by judges, lawyers, and other professionals involved in the legal system, although rarely consciously thought of as such. Here is where productive space exists for improvisational thought to provide insights into judging and for a consciously critical practice of improvisation to emerge.

It is also important to note, however, that while we do not wish to merely observe and stay with a tacit practice of improvisation, neither does our work aim to codify improvisation in law, employing an abstract universal idea of what improvisation "is" which can be straightforwardly translated to the legal context. Rather, what we seek to do is to advance a *contingent* approach to and practice of improvisation in law; one that is grounded in the context within which it takes place and is inherently open to responsive development and change based upon this context.⁵ Improvisation is not a "static" concept engaged in the same way in various contexts and locations; it must be viewed as emerging from particular contexts, constantly shaped, articulated, and rearticulated within and in response to such. To encourage a critical practice of improvisation in law, therefore, we must begin with the contingent. In what follows below, we engage with what already exists in relation to improvisation in legal practice, judicial work specifically, and use this as a basis to argue for a more conscious development of a critical

approach to improvisation in law. By exploring how judges characterize their work and the skills this work involves, we begin to gather a sense of how they engage with improvisation in their everyday role, and where judges' thinking on improvisation and its relation to judicial work may be developed in a more critical and conscious direction. We have broken down discussion into a number of themes where judging can be thought to involve key improvisational elements and judicial skills stand to be explored further, and critically honed, as improvisational: singularity, anticipation, responsiveness/adaptability, and constraint.

Singularity

Encounters with singularity/generalities and the idea of "judging the singular" is a crucial part of the judicial role. Judging singularity within the wider confines of precedent involves judges making use of key improvisational techniques, and the resources of improvisation are useful to think through more closely what is involved in this activity. While judges are bound by a system of common law precedent which requires application of pre-existing rules to the case in front of them, each case remains unique and demanding of a unique response. Each time a judge gives judgment they are improvising in the sense of offering a particular result in the particular case they are judging on (MacLean 124). No two cases, however, are the same and the system of precedent, therefore, always involves improvisation in the sense of using and adapting already existing rules in a slightly different or new way each time, rather than merely applying a rule directly. As Sara Ramshaw states,

Improvisation in judgment calls for ongoing, practical decision-making as the 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 (*Justice* 3, emphasis in original).

Engagement with singularity is also a key skill of improvising musicians. As musician John Butcher outlines,

You're playing something and listening with the intention of moving from A to B in the next moment, and then something happens in the music, which you hear, and you realize, "Ok, that would be a bad choice. I've got to do something else."

Just as improvising musicians must always come to each improvisation anew but with the knowledge and experience of music, their instrument and past improvisational encounters, so too are judges inherently involved in improvisation each time they are called to give judgment in a case. Judges must come to each case anew, must recognise and engage with its singularity, but do so using the legal resources available to them and within the wider temporal context of the case at hand. This latter point is very important in family law cases which may extend over a significant duration.

In our interviews judges did indeed appear to be aware of the tension between singularity and generality characterizing their work, and the need to attentively negotiate the tension between the two. As one judge explained, "the legal principles are straightforward. What is difficult in family work is applying those principles to every single case because every case is so different and so unique." Another judge commented that,

It's very rare that you get identical sort of circumstances in two different cases, and by their very nature the judge has to weigh the competing considerations and decide how much significance to give to this and how much to that.

From such comments, judges may already perceive their role as requiring constant navigation of singularity in the context of a wider system of precedent and the need to riff on it each time they judge, and the challenges this can involve. Space exists to build upon this awareness, and to consciously conceptualize this as an improvisatory skill to be honed. A critical practice of improvisation in law would stress the improvisational task of responding to singularity as forming the heart of our common law system. In better recognizing this activity of improvisation, possibilities emerge to foreground the singular and what it demands, how justice can be done in a case. This is especially important in family law where singularity takes on a crucial significance. In the words of one judge, "these cases are very, very fact-specific." In this area of law no two families or situations are the same, and attention to the singularity of each case is particularly important to reach a uniquely just outcome for each child and family. The importance of attention to singularity for the judge in family law work is emphasised by the fact that in this area, in contrast to other areas of civil law or the criminal law, Parliament has afforded judges with a large amount of room for discretion in order to reach the best outcome.⁶ This statute-mandated discretion to facilitate response to the unique facts of family law cases can be thought of as space for improvisation. Space to improvise around the singularity of a case to come to a uniquely just result within the context of the system of legal rules and precedent within the area of law more generally. Thinking in this way holds potential to allow judges to further and more consciously engage the tension between singularity and generality in their work and the skills involved in finding an outcome for each case that is unique; tailored justice emerging from the practice

of improvisation as citation or iteration of precedent as always (re)iteration in the context of each uniquely singular case.

Recognising the singularity of every case, and the skills of improvisation inherent in the common law system of precedent as (re)iteration and using this to stimulate a conscious, critical practice of improvisation in law, however, also involves something else. It requires recognition that there can be no “right answer” to a legal case. Legal scholar Ronald Dworkin famously asserted that “in most hard cases there are right answers to be hunted by reason and imagination” (*Law’s Empire* viii-ix). For Dworkin, a right answer to a hard case can be found by a judge, presented as a fully knowledgeable and wise Hercules, through employment of legal rules and principles.⁷ This view, however, has been heavily critiqued. Legal realists and the Critical Legal Studies movement have asserted that law is, in fact, indeterminate and that multiple potential answers exist to any legal dilemma (Kennedy; Kress; Tushnet). For such scholarship, the answer a judge delivers depends on a number of factors, including existing law, the time and practical resources available, policy and personal political views, and also the potential for appeal and any damage that may result to their reputation (Kennedy 526-528). Understanding judging through the lens of improvisation builds on the insights of such work; it involves moving beyond the binary of right/wrong, not being constrained by the idea that a right answer to every case exists, and foregrounding that justice is made, not found, invented anew rather than pre-existing. It also adds, however, to such previous work. Conceiving judging as a critical practice of improvisation involves understanding the activity of negotiating the continuum of potential answers to a case as an explicit act of improvisation, and encourages judges to learn how to negotiate this continuum as an improvisational skill.

Conceptualizing answers to the singularity of a case as existing in multiple forms indeed appears compatible with how some judges already view their role. As one judge we spoke to stated, “there is a range of reasonable responses. It’s on a continuum . . . there’s certainly plenty of times when it’s very hard to know what answer to arrive at.” Another judge added that,

There are a range of options available to you and provided you chose one of the options, which fall within the spectrum of reasonable responses to a particular decision, there should not be interference with your judgment.

Acknowledging that there is a range of responses to a case encourages a more open and responsive mind, characterizing the judge’s function as being about identifying and navigating all possible “answers” to find one that might best respond to the singularity of the case at hand. The skill to be honed is to encourage judges to engage with the entirety of the facts in front of them to reach the answer that best achieves justice. In learning to do so, improvisational resources may be drawn from. These include the ideas of adaptability and listening which are discussed below. Translated to the legal context, such ideas would encourage judges to stay present with a case and remain open to negotiation of the spectrum or continuum of possible answers before them in a manner that is informed by engagement with all that surrounds them in the context of a case. Only through careful and holistic attentiveness to singularity and the uniqueness of facts can the best possible answer emerge. Such improvisatory resources can take existing thoughts on judicial practice further, not merely observing that there are multiple answers to a case and highlighting the resources that judges use to reach an answer, but offering tangible tools to facilitate reaching of answers in a way that is grounded in an ethical approach to the world around us.

However, this acknowledgment that there is no “right answer” to be found, which follows from thinking of singularity and generality in legal practice in improvisational terms, may have challenging implications. A critical practice of improvisation includes acknowledging that there is not one right answer to seemingly “clear cut” cases, encouraging a full exploration of all the possible options on the continuum where the tendency may otherwise be to remain blind to these. This is especially the case in family law where the facts judges are dealing with may be harrowing, and pressure is exerted by public opinion and the media in light of highly publicized abuse cases such as Baby P (see Warner), to reach a particular result. As one judge commented,

Well, there are . . . cases where there is an obvious right answer. One of them is a sex abuse case, for example. Significant violence, something of that sort, you know, where really there is nothing else to be done.

Embracing a critical improvisational approach, this judge would acknowledge that while on first glance there may appear to be an “obvious right answer,” that this cannot be predetermined and exists in a field of other potential answers. Any such answer still requires consideration alongside other possibilities on the continuum to avoid a silencing of singularity and prevention of possibilities for justice to be done. Asserting that there is no “right answer” in such cases does not mean evading taking a tough stance where required, but it does encourage judges to stay with the singularity of every case and to always critically reflect on the range of answers available to them.

Anticipation

The second theme emerging from our engagements with judges which demonstrates an already existing tacit practice of improvisation in law which stands to be reflected on further is that of anticipation. Anticipation is a key element of improvisation in music.⁸ It offers both possibilities and challenges for improvisers. As musician Maria Chavez comments from her practice:

Anticipation is tricky because there are moments where you want to create a sound, but you're also waiting for the right moment. When I have that moment of anticipation where I want to make that sound, but it doesn't happen for one reason or another, it becomes something completely different. It unexpectedly changes the whole sculpture of the sound piece.

This is a concept that appears to also be highly important to the judicial role. Anticipation emerged from our research as holding potential both to hinder, as pre-judging, but also to enhance, judicial work. The tools of improvisation can assist in visibilising both sides of anticipation and provide resources for judges to navigate them.

Naturally judges may encounter a case and on first reading find themselves anticipating what this case is about or what it requires. Following rejection of the idea that there can be a "right answer" to be found, however, it is necessary to look at anticipation in judging in a slightly different way. Understandably, refusing the possibility of a right answer, especially in difficult cases, in favor of a more open response to the singularity of each case may generate anxiety for those engaging in decision-making activity. In addition to the challenge this poses to traditional ways of thinking about law and the judicial role, limited economic resources and a sensitivity to avoid delay in resolving cases may lead to a preference for the general and make it difficult to stay with a foregrounding of the singular. This, taken to its more dangerous and extreme ends, can lead to a tendency to pre-judge, to anticipate what a case is about or what justice in this case would look like without fully engaging with the singular. The critical improvisational approach we are advancing seeks to bring a greater awareness of pre-judging through making the improvisatory role of judges more explicit. While such an approach to pre-judging was not the predominant tendency amongst our interviewees, its dangers in judicial work in the contemporary economic context were perceptible. As one judge commented, "don't make a case complicated, unless it has curious or unique features. Most cases don't. By far and away, most cases have more or less the same issues." This is a problematic approach from the perspective of seeking just outcomes, and one that engaging in a consciously critical practice of improvisation would serve to guard against.

In contrast to pre-judging, thinking about judicial decision-making as an inherently improvisational activity and advancing critical engagement with this idea gestures towards the need for anticipation in judicial decision-making that is open, alert, and responsive to singularity. Foregrounding and responding to singularity is not advanced here as involving purely unrestrained activity where judges can never know what the outcome may be and come to the endeavor of judging completely unprepared. Rather, engaging in a critical practice of improvisation involves judges seeking to manage singularity through a number of strategies, one of which is an alertness and anticipation of singularity within a wider context of generality and judicial experience. Judges will bring their experience of past cases and knowledge of law to each new judgment, but instead of allowing this experience to lead to a form of pre-judgment which closes down possibilities for meaningful engagement of what justice in this case may look like, such experience may be employed to aid an alertness. This means adopting a sense of anticipation of what this case *might* require and *might* involve which keeps judges engaged with the singular with an eye to precedence and their past experience more generally.

Good judicial decision-making can be regarded as always about anticipation in the form of an alertness grounded in, but not clouded by, experience that is beneficial to the particular case at hand. Improvising musicians also make use of anticipation when they draw on previous knowledge, techniques, and experience to shape their improvisational trajectory, but are willing to let go of these habits if they do not match with the demands of specific moments. The danger of relying too much on prior technique is observed by musician Bennett Hogg who states, "I've played with people who have too much drilled technique in their approach. They are actually difficult to improvise with because there's this level of inflexibility." Musician Bonnie Jones also emphasizes that improvisatory action is not purely spontaneous, not fully unanticipated, as you always act with "the sum total of your experience as a human being up to that point." Accordingly, moves towards a more critical practice of improvisation in law would involve judges being aware of the extent to which they do anticipate, while remaining sensitive to how their experience and knowledge contributes to or impedes this process. Thus, we aim to encourage an alert form of anticipation which is accompanied by an open-minded ability to acknowledge that things can always be otherwise.

Responsiveness/Adaptability

A third theme emerging from our discussions with judges that appears central to thinking through a critical practice of improvisation in law grounded in contingency is that of responsiveness or adaptability. Skilful

improvisers cope with unexpected situations and see opportunities to exploit within these situations. Musician Matthew Bourne states,

You've kind of a rough idea in mind as to what you are there to do. But, at any given moment that could change; and I think the skill is adapting, and including those disturbances. They are unexpected and do come into the narrative of what you are doing.

Clear parallels can be found between the skills of improvisers in this regard and judges. In our interviews, judges stated that a key part of their role was to adapt and respond to facts of a case and also to continue to do so as the case progressed. Family law cases especially involve facts that shift and change throughout the process, often quite dramatically. Being ready to adapt your approach to, or understanding of, a case and respond accordingly is central to the role of a judge in this area.

The importance of responsiveness and adaptability emerged as central to what judges themselves regard as good judicial decision-making amongst our interviewees. As one judge stated, "it is part of the proper discharge of one's function that one is prepared to change one's mind and should be open to thinking again." Similarly, another judge reflected on the importance of responsiveness and adaptability in the area of family law especially:

It would not be unusual to read a set of papers and have a preliminary view, and then hear oral evidence, or have the evidence tested—insist on the evidence being tested—that the social workers want to give—and forming a very different view. But, as a judge I am used to keeping a very open mind throughout and I think it's vitally important in family work.

Another judge described their experience in the following terms,

Things can seem perfectly logical but then some new piece of evidence emerges or someone looks at a piece of evidence and says something—'ah, but no, that's not quite what I meant'—and they put a new slant on it, and it's rather like a child playing with a kaleidoscope, you give it a shake and suddenly the picture is quite different.

Good judicial decision-making, therefore, is adaptable and responsive to the singularity and shifting shape and facts of each case and, furthermore, is consciously aware of the need to be so. This is a key skill that a more conscious, critical approach to improvisation in law would draw attention to. A critical practice of improvisation would seek to build on recognition of the importance of responsive listening and acting in the judge's role and recognition of these elements as skills that need to be honed to effectively respond to the singular. A central part of honing responsiveness and adaptability in a critical practice of improvisation in law is through the idea of listening. To be responsive and adaptive in a way that benefits the interests of justice, judges must really listen to the case in front of them, including, crucially, to the parties involved.

The concept of listening has been dominant in literature surrounding judging and judgecraft, including judicial listening as a skill to be honed (Mack and Anleu). In different ways, all critiques of conventional forms of judging have emphasized the value of listening. This has included listening to the voice of the litigant (procedural justice), active listening and response (therapeutic jurisprudence), and listening to marginalized voices/experiences (feminist judging).⁹ The approach to judging that we advance picks up on such attention to listening in judicial work, but does so drawing on a specific conception of this term which is rooted in critical studies in improvisation and the conception of listening as an important social practice holding emancipatory possibility (Heble and Caines; Oliveros "Deep").¹⁰ This goes beyond previous conceptions of listening in the approaches to judging which have emerged to date.

Our interview participants demonstrated an awareness of the crucial difference that listening to voices, such as that of children who are the subject of legal proceedings, can make in judicial decision-making, and to the ultimate outcome of a case, in family law. As one judge stated,

One boy, in particular, stands out in my mind. A boy of 14, who really changed the direction of the case by wanting to see us, and we then focused on what his concerns were, and tried to identify that to the social workers concerned. It really helped in that case, so, sometimes hearing the voice of the child—as it's often put—is very important.

The approach we are advancing, however, does more than integrate the voice of the child, or other parties, into the case and the judge's decision-making. Rather, it involves introducing an important shift in how judges understand and approach listening in their work.

Critical studies in improvisation stresses listening as holistic, as an activity that requires mutual communication. Listening emerges, through work such as that of Pauline Oliveros and her influential conception of deep listening (Oliveros *Deep*; "Deep"), as an activity which is not simply about hearing but which involves a responsibility to, and interaction with, all that surrounds. Listening in such a deep and attentive way holds the potential to be transformative, to connect us with others and the world around us in a more meaningful manner. Our interviews with improvising musicians reflected this idea of a holistic, active approach to listening. As musician Simon Rose comments,

The problem with listening, or the word "listening," is that very often it's used in a kind of sense like it's dropped in and therefore needs no qualification. But really it needs to be active. Active listening can result in committed playing.

In the context of judicial decision-making, where listening is an integral part, approaching this activity through the lens of improvisation indicates that it is not enough to merely listen to someone in a case; to listen effectively to that person a response is also involved. As one judge in our study put it, you must "make that person know they have been heard." A key part of responsiveness to singularity in judicial work, therefore, is responsive listening to adequately engage with singularity in a given case and adapt to its ever-changing form. Our interviews with judges demonstrated that listening is a key element of good judicial decision-making, and of making sure justice is achieved. However, thinking of the judge's role as one of improvisation involves beginning to understand and engage in listening as an active and responsive activity, one that is better thought of as characterized by response as opposed to mere hearing. Through actively conceptualizing listening in such a way judges can begin to consider listening in their work as a social practice which holds much potential to facilitate the ends of justice and of wider social change.

Constraint

As noted above, responsiveness and adaptability to the singularity of each case is not completely spontaneous or unrestrained in the critical approach to improvisation in law that we are advancing. This is why, finally, it is important to engage with the idea of constraint which also emerged in our interviews as a key part of the judge's role and, crucially, of the improvising judge's role. Constraint in judicial decision-making can be thought of in two very different, but inter-related, senses. Firstly, judges often face bureaucratic constraint such as targets, timelines, and limited resources. Such constraint can limit possibilities for effective decision-making and for achieving the best possible, and most just, outcome in a particular case. This type of constraint can be understood as requiring an improvisatory response. Secondly, however, constraint in the judicial role can also be self-imposed where judges actively apply constraints on their work, and that of other professionals around them, to productively guide action. Such self-imposed constraints may aid the improvising judge in her role, especially in responding to bureaucratic pressures and so become in themselves an improvisatory response. We will consider each of these ideas of constraint in turn.

In a legal system where limited economic resources and lengthy case times are increasingly prevalent, judges face a myriad of bureaucratic constraints to reduce costs and time spent deciding a case. One example of this in the area of family law is recent reform in England and Wales requiring child protection cases to be processed within twenty-six weeks (see Welbourne). Similar reform has not yet taken place in Northern Ireland where our research took place, but pressure to considerably reduce delay is nevertheless palpable. While the judges we interviewed were indeed concerned to reduce delay, few agreed that introduction of a strict timeline approach was beneficial in terms of reaching a just result, or in assisting judges to respond effectively to the singularity of the case in front of them. As one judge stated, "my own view is, although avoiding delay is important, shoehorning a case into a particular number of weeks, is not necessarily producing the best outcome for the child." Another agreed, expressing the dangers of injustice to the lives involved that could result if a timeline approach was adopted in Northern Ireland: "these are very vulnerable people that we are dealing with, and sometimes people need time to really understand what is expected, and what the requirements are." Such comments, which reflect a broad consensus amongst our interviewees, indicate that bureaucratic constraints are not productive in advancing good judicial decision-making, nor necessarily the interests of justice.

While a critical practice of improvisation does not hold possibilities to solve all bureaucratic constraints placed upon judges, it does offer possibilities to visibilize spaces and resources which may be drawn upon to work productively within these constraints. Bureaucratic constraint may be productively negotiated in the pursuit of justice through an improvisatory response, using the skills of improvisation more consciously to work with and through bureaucratic challenges. Judging in a context of increasingly demanding constraints imposed from the system itself may be enhanced through foregrounding and consciously utilising improvisational resources such as responsiveness, adaptability, alertness to singularity, and rejection of a "right answer" approach. These resources can offer a counter to bureaucratic constraints, and can help facilitate just outcomes within a system where singularity is being pushed out, encouraging judges to resist attempts to advance cases through the court system by whatever means and as quickly as possible at the expense of justice. Improvisation in the context of bureaucratic constraints such as the proposed twenty-six week timeline in child protection cases does not mean

undertaking judgment in a more hasty or less thoughtful way, but indeed the very opposite. It seeks to encourage judges to be especially aware of the dangers of closing their eyes and ears to singularity in the pressure of an over-stretched system, and ensuring that singularity remains foregrounded.

In our discussions with judges, however, a second idea of constraint emerged which may be productively engaged. Constraint can also be detected as a resource productively used by judges in the sense of self-imposed constraint to facilitate good judicial decision-making. One example of this where judges utilize constraint to facilitate effective responses to singularity is that of case management where judges set key dates for action and timetabled a case so to ensure that unproductive delay was minimized. This involved encouraging themselves and other professionals to work to those dates while, unlike the twenty-six week approach above, according flexibility as required. As one judge commented,

Cases have got to be actively case managed. And what that means is at each review you've got to have a purpose. You've got to have read the papers that have come in since the last review, you've got to see whether they raise any more questions that you haven't thought of, and you've got to do something purposeful at the review.

Similarly, another judge explained their approach to such self-imposed constraint in the following terms:

I've already said that [I don't endorse] the guillotine of a particular set of or period of weeks, but, setting regular reviews, regular court appearances, regular opportunities for parties to object, if something is not being done, or to change direction, if that needs to be done. I think that's the way forward, as far as we're concerned, just to try to keep the cases constantly in front of us, and constantly see what we can do to improve things.

There is evidence of judges adopting such self-imposed constraint as a means of responding effectively to bureaucratic pressures placed upon them, and doing so in a way that works with the resources they have to encourage the best outcome for a case. Another judge explained their approach in the following terms:

I have kicked ass around my court day in and day out, and demanded that assessments were done more quickly than I was told they could be done. There is delay everywhere. If there has to be an assessment, "well, we have to make a referral first to the resource panel to see will they pay for it," even though the judge has said, "I want it done." Then there will be a waiting list possibly for the family center, then the family center not unusually will say: "we're not going to do any work until we have a psychological assessment of the parents" . . . so my approach was to take every single case and, in respect of every aspect of the case, look at ways in which things could be done more quickly—practical ways—it has to be done very practically for a judge. But it was very, very hard work. And, I was up against a massive system where delay is endemic.

In this sense, positive constraints placed by the judge on herself and other professionals involved in the case to progress it more effectively can be a powerful tool, and looking for opportunities where this can be done is essential in a system where time and resources are limited. The key is to hone this skill in a way that differs from a bureaucratic approach driven by statistics as opposed to the interests of particular cases. A critical approach to improvisation can fulfill this purpose, stressing the importance of fluidity, responsiveness and adaptability as crucial to justice, but as taking place not in a fully free way, but within the context of constraint as a useful and necessary part of managing complexity. As musician David Borgo says: "the artist's role is to show how we can gracefully deal with surprise and complexity." To aid in this process, musician Ellen Waterman emphasizes the productive nature of employing constraint in the form of rules: "I like the idea of rules for play. We don't operate outside of a context. It's very important that we learn how to use rules and relate to rules in a positive way." Constraint, self-imposed constraint especially, is an important element guiding any improvisational activity and one which judges appear already to be engaging with to enhance just outcomes. This is an integral part of the improvising judge's role, especially in contingent settings of stretched resources and endemic delay.

Conclusion

From the above analysis and our discussions with judges and musicians a key realization emerges: many judges are already expert improvisers, using a range of improvisational resources to manage the difficult activity of judicial decision-making. Improvisation is already happening in law, and indeed is a crucial thread weaving through judicial work. Space does exist, however, to think through further, or more consciously, the elements of the judicial role and judicial skills which are improvisational. When we do this a critical practice of improvisation may begin to emerge within law that aims to foreground the singular and offers tools to productively advance the aims of justice in a challenging and demanding system. While the insights and experiences of musical improvisation are useful in this emerging approach to improvisation in law, this approach must be considered as fundamentally contingent—emerging, evolving, and shifting in relation to the specific context of law and particular contexts for judging.

In thinking through such a contingent approach to improvisation in law, it is important to recognize that judges are the experts who are highly skilled in employing a number of improvisation skills already in their everyday decision-making. The legal system must recognize this expertise to allow judges to make the best decisions. Indeed, our research shows that this is not just the case for judges, but also for other professional legal practitioners who often feel similarly restricted by the bureaucratic system within which they operate. This system demonstrates trends towards a marginalization of singularity, limited space for effective and holistic listening, responsiveness and adaptability as well as an advancement of bureaucracy over expertise. Even if the system cannot change, however, judges and other legal professionals can. The improvisatorial nature of law, judicial decision-making in particular, and judges' expertise as improvisers stands to be more consciously recognized and engaged with by these professionals themselves. Bringing this improvisatorial expertise into view is something that needs to be developed, fostered and practiced, just like any other skill.

In advancing a critical approach to improvisation, we suggest that foregrounding contingency is crucial, foregrounding improvisation itself as a context-specific activity capable of development in new ways to better meet ever-emerging challenges in diverse locations from music to law. Our advancement of a contingent approach to improvisation in law in this sense has implications for how we understand the concept of improvisation more generally. It is essential that as a concept and practice improvisation is kept unsettled, embraced as an open-ended ideal as opposed to a static and abstract concept. In doing so we are retaining a critical perspective to improvisation itself, to how we conceptualize it more broadly, and to what it might become in the future. Just as a critical approach to improvisation is required in law to challenge spaces of comfort which do not serve the ends of justice, so too is a critical approach to the idea of improvisation itself imperative, rejecting the comfort of a false, abstract universal, in order to retain the critical force that the concept and practice of improvisation may offer.

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¹ This is very much an emergent area of thought. For related work see Ramshaw *Justice*; "Jamming"; Manderson; Piper; Marisi.

² See, for example, Fischlin; Fishlin and Heble; Heble and Waterman; Heble and Siemerling; Heble.

³ Due to the sensitive nature of judicial decision-making generally, and in the context of Northern Ireland in particular, all direct quotations from judicial interview participants have been anonymized. Musicians have consented to use of full names.

⁴ The project is directed by Sara Ramshaw (PI) and Paul Stapleton (Co-I). For further information visit: <http://www.translatingimprovisation.com/ahrc>

⁵ For discussion on this point thoughts may be directed to Judith Butler's conception of the relationship between universality and contingency ("Universality"; *Undoing* 190-191; Butler, Laclau and Žižek).

⁶ See, for example, the idea of the "welfare of the child" in Article 3 of the Children Order (NI) 1989 which is the paramount consideration guiding judicial decision-making in child law cases, but offers room for wide discretion as to what this requires in a particular case.

⁷ See also Dworkin *Taking Rights*; Dworkin "No Right."

⁸ For wider discussion of anticipation and music more generally see Huron. For a cognitive science approach to understanding music improvisation where anticipation is quantitatively studied see Pressing.

⁹ In the context of family law, the area pertinent to our project, the need to listen to the voice of the child, and the absence of such voices from legal proceedings, has also been a dominant theme (Raitt; Parkinson and Cashmore; Taylor).

¹⁰ See generally "Part 1: Listening" in *The Improvisation Studies Reader* (Heble and Caines, eds.), which features texts on the subject of listening by George Lipsitz, Jean-Luc Nancy, Ingrid Monson, Pauline Oliveros, and others.