



ARTICLE

Improvising with Peter

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Abstract

When listening to a recently rediscovered home cassette recording of South African musician and activist Hugh Masekela, which was a gift from the late legal theorist Peter Fitzpatrick in 2004, unleashed are a series of recollections and reflections on the distinctiveness and significance of Fitzpatrick's scholarship, especially in relation to the emerging field of critical legal studies in improvisation. This short piece recalls Peter's boundless wisdom, kindness and generosity, and the lasting impact that his thought and texts have had on his students, colleagues and readers the world over.

Keywords: critical legal theory; critical improvisation studies; Peter Fitzpatrick; bebop jazz; Hugh Masekela; responsive/determinate

1 Introduction

Improvising with Peter, I listen, I write, I listen again. From the stereo system sounds an audio recording of South African musician and activist Hugh Masekela's guest appearance on BBC Radio 4's *Desert Island Discs* on 11 July 2004.¹ The music of Billie Holiday, Louis Armstrong, Dizzy Gillespie and Miles Davis fills the room. My heart grows heavy: this cassette tape was given to me by Peter Fitzpatrick and his wife, Shelby. I was writing my PhD thesis with Peter at the time on Derrida, law, race and jazz, and they thought I might find it interesting. That was Peter for you.

The 16-year-old+ cassette tape provides a fortuitous entry into my remembrance of the uniqueness and significance of legal theorist Peter Fitzpatrick, both as a scholar and as a person, in relation to my own work and that of so many others. Hugh Masekela, like Peter, was an 'original'. Along with saxophonist Kippie Moeketsi and pianist Abdullah Ibrahim (Dollar Brand),² Masekela formed the Jazz Epistles in 1960 (*Jazz Epistle, Volume 1*, Gallo) and cut the first LP of modern African jazz in South Africa. As Black musicians, the Jazz Epistles were only able to record one session together before the South Africa's apartheid government forced them into exile. This recording, of which only 500 copies were printed, was almost lost forever (Rentner, 2017).³ The tracks are marked by 'challenging improvisation' – a cross between South African *mbaqanga*⁴ and American *bebop*⁵ (Ansell, 2018). Writes Giovanni Russonello of *The New York Times*: 'With a heavy, driving pulse and warm, arcing melodies, their music was distinctly South African, even as its swing rhythms and fluttering improvisations reflected affinities with American jazz.'⁶

¹Trumpeter, flugelhorn-player, singer, composer and activist Hugh Masekela passed away after a long battle with prostate cancer on 23 January 2018 (Ansell, 2018). To listen to the BBC episode, go to <https://www.bbc.co.uk/programmes/p00938bc> (accessed 20 October 2020).

²Other members of the band included trombonist Jonas Gwangwa, bassist Johnny Gertze and drummers Makaya Ntshako and Early Mabuza.

³I was able to buy the MP3 version on iTunes, but my local record store could not obtain a vinyl version for me.

⁴*Mbaqanga* is form of South African township jive (Ansell, 2018).

⁵For more on the American jazz-style bebop as it relates to Fitzpatrick and law, see Ramshaw (2006).

⁶Russonello (2017).

This music takes me back to Peter, not just because of the recently rediscovered cassette tape on which it is recorded, or Peter's legacy of scholarship (and activism) on issues of race/colonialism and law, including writings on Nelson Mandela and South African apartheid (Fitzpatrick, 2004; 2005a; 2005b). It is actually the reference to Masekela's bebop improvisation that triggers reminiscences of my PhD days, studying under Peter's guidance at Birkbeck School of Law in London, England.

2 Improvisation and law

Like many, when I first started reflecting on the relationship between musical improvisation and law, I thought them to be odd bedfellows. Ought not law eschew all spontaneous or unpredictable elements – be stable, predictable and apply equally to all persons? This can be starkly contrasted to the prevailing perception of jazz or musical improvisation⁷ as that which is founded almost solely upon spontaneous invention or creation. Both conceptions, when read through Peter Fitzpatrick's scholarship, are ultimately found wanting, as will be detailed below.

As is the case for many PhD candidates, when I first arrived in London, I had my case-study but not a suitable theoretical framework in which to analyse it. The object of my inquiry, which I had first encountered while writing my LLM thesis at the University of British Columbia in Canada, were the New York City (NYC) cabaret laws,⁸ which policed, among others, jazz musicians working in NYC clubs in the 1940–60s. These performers were required by law to hold a valid NYC Cabaret Employee's Identification Card in order to work in a licensed establishment. Of particular interest to me was the temporal connection between the introduction of these so-called 'police cards' and the emergence of a new and supposedly 'wild', improvisatory brand of jazz, namely bebop, in Harlem after-hours night clubs. And legendary musicians such as Charlie Parker, Thelonious Monk, Billie Holiday and Bud Powell were but a few of the artists who were deeply tormented by these laws.

Relying heavily on the writings of Peter Fitzpatrick, I sought to examine the positioning of the cabaret laws as determinate and general in opposition to a wildly singular improvisation. These laws, though, were not beyond dispute or challenge, thereby indicating that the dichotomy between law and improvisation can never be purely settled or determined. My doctorate thesis, and the monograph that followed (Ramshaw, 2013), proffered a conception of law as *fundamentally improvisational* in nature, based on four key premises: (1) improvisation and law share the same 'structural tension' (Landgraf, 2011, p. 25) in that their meaning rests on the aporetic⁹ relation between singularity (responsiveness) and generality (determinacy); (2) conventional definitions of law render invisible or ignore its singular or unpredictable elements; (3) the singular must be reclaimed in and for law; such that (4) the *creative potential* of justice as improvisation can be embraced; improvisation, in other words, must be looked to as a model for social change with a view to shaping legal, political, cultural and ethical dialogue and action (Ramshaw, 2013).

Herein lies the significance of Peter Fitzpatrick's scholarship to my own work.

3 Law beyond positivism

Fitzpatrick's conception of modern law as both 'responsive' and 'determinate' (see below) borrows heavily from, but also goes beyond, Derrida's offering of justice as deconstruction (Derrida, 2002, p. 243). As Margaret Davies explains:

⁷I am mindful that equating jazz so fully and inevitably with improvisation is quite problematic. However, it is also the case that certain types of jazz have, in the past, focused largely on improvisation, thereby contributing to this vision of jazz as 'largely improvisational in nature' (Hall, 1999, p. 1599). Bebop is but one example. For further discussion, see Ramshaw (2013, chapter 4).

⁸Two notable legal historical studies of the NYC cabaret laws include Chevigny (1991) and Cohen (1993).

⁹Aporia comes from the Greek *aporos*, meaning 'without passage' or 'without issue' (Beardsworth, 1996, p. 32).

‘Justice is the relationship to the other which cannot be determined or simply mediated by the construct of law, but which reaches out to the other through an experience of the failure, instability, inadequacy, and unfoundedness of law. Deconstruction is an intervention in the law which reveals both the embeddedness of otherness within the law and the impossibility of purity. Deconstruction and justice are impossible, but necessary.’ (Davies, 2009, p. 232)

Derrida has been criticised for his positivistic conception of law: ‘when Derrida *does* focus upon the institutional law, he takes as his point of departure the positivist view, which states essentially that law is separate or separable from its “other,” non-law’ (Davies, 2009, p. 72, emphasis in original). While Derrida’s emphasis on the traditional (positivist) concept of ‘law’, particularly in ‘Force of Law’, does not detract from his ‘interrogation of the conceptual frontiers of the idea of law’ (Derrida, 2002, p. 72), Fitzpatrick adds to Derrida’s discussion of law and justice a more complex and critical conception of modern law *beyond* positivism.

For Derrida, law is necessary for justice: ‘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 that cuts and divides’ (Derrida, 2002, p. 252). Yet, as Fitzpatrick makes evident, so too is justice, as the ‘undecidable’ (p. 253), ‘necessary for law’ (Fitzpatrick, 2005a, p. 4). Law, writes Fitzpatrick, ‘cannot be ... enduringly ordered and predictable’ (2005a, p. 8). If it were, ‘there could be no call for decision, for determination, for law’ (Fitzpatrick, 2005a, p. 9). Instead, for law to endure, it requires a simultaneous ‘responsiveness’, an ‘attunement and attentiveness to what is beyond’ (Fitzpatrick, 2005a, p. 9). Law, he argues, must be able to ‘change and adapt to such other things as “society”, or “history”’ (Fitzpatrick, 2005a, p. 9; see also Fitzpatrick, 2005c, p. 464). And this responsiveness to the other of law is ‘essential for law’ (Fitzpatrick, 2005a, p. 9, emphasis added). As Fitzpatrick notes, ‘[i]f law did not have its responsive dimension, we would not be able to speak of how law adapts over time to suit new circumstances’ (Fitzpatrick, 2005b, p. 4).

4 Fitzpatrick’s enduring legacy: justice *as* improvisation

Applying Fitzpatrick’s determinate/responsiveness ‘model’ to my own writings on law and improvisation, we find that the aporetic relation between the determinative (generality) and responsive (singularity) requires, borrowing from Fitzpatrick in another context, ‘some subsisting relation and thence some commonality’ between the responsiveness that is privileged in musical improvisation and the determinacy deemed essential to modern law (Fitzpatrick, 2001, p. 59). Law cannot subsist without improvisation’s responsive ‘opening onto all that lies beyond’, just as musical improvisation requires *some* determinacy in order to endure as a ‘contained, distinct’ entity (Fitzpatrick, 2001, p. 59). In the words of bassist Charles Mingus, ‘You gotta improvise on *some*thin’ (quoted in Kernfeld, 1995, p. 119, emphasis added). To do otherwise would make its recognition *as* improvisation impossible.

It is therefore the ‘necessity yet impossibility’ (Fitzpatrick, 2005c, p. 464) of both pure determinacy (law) and pure responsiveness (musical improvisation) that ‘iteratively impel[s]’ both ‘into existence’ (p. 464). The ‘originary repetition’ (quoted in Beardsworth, 1996, p. 32) of improvisation becomes its law (pp. 32, 35) and without such improvisation could not exist. While improvised music, such as Masekela’s bebop jazz, may at times reach out ‘towards the unknown’ (quoted in Bailey, 1992, p. 54), it always finds its vertical limit at the ‘horizon of law’ (Fitzpatrick, 2003, p. 58). Moreover, improvised music needs this limit, needs law, in order to remain inventive. For, ‘[w]ithout a limit, there can be no relation to the other’ (Fitzpatrick, 2001, p. 76) and, without the other, there would be no hope, no chance of transformation or change. Thus, for me, Fitzpatrick’s greatest contribution is his reclaiming of the wildly singular as necessary for modern law (Fitzpatrick, 2003; 2013). This openly responsive dimension, in both law and improvisation, while never complete or absolute, glances towards the singular other and keeps alive the possibility of creativity, ethics and justice in society.

Conflicts of Interest. None

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