**Some Notes on Improvisation, Public Policy and Law**

Sara Ramshaw and Daniel Weinstock
ICASP and CREUM

## Improvisation and Social Policy

Why might an understanding of the improvisational arts provide us with an interesting lens through which to understand both the process of public policy formation and that of public policy implementation?

Obviously, the claim is not that public policy practitioners make it up as they go along. (Perhaps they do, but then the claim is not that this is what they *ought* to do!). But improvisation is never about just making it up, either. According to my imperfect and imprecise conception of what improvisation is, the following things seem to be true of it, (though many other things may be true of it as well).

1) It is structured, but its structure is not of the top-down variety, where one agent defines a theme that then constrains what everyone who is hierarchically subordinate to that agent does subsequently. Rather, it begins with a shared sense of the broad parameters within which performance will occur, but is premised on the idea that all will contribute to fleshing out what lies within those parameters according to an understanding and/or set of competencies that may at first diverge. The final result fleshes out the theme in ways that might not have been predicted on the basis of any one participant's starting point.
2) It is social. Improvisation requires reacting sympathetically to others' contribution. It is underpinned by social virtues such as trust, sympathy, friendship, and the like.
3) It is egalitarian. All participate equally in the creative process. No one set of competencies or perspectives is privileged.
4) It is rational, but the conception of rationality that is in play is not one that drives a hard wedge between emotion and reason, nor is it one that views the kinds of canons of rationality that are expounded in logic textbooks as exhaustive of what human rational life consists in.

If these four properties adequately capture what happens when people improvise, then perhaps it can be of use in illuminating some of what happens in the public policy process. Perhaps even more strongly, perhaps it can illuminate the way in the this process is carried out, *in ideal circumstances.*

Consider what seem to me to be truisms about public policy formation today.

First, public policy is complex, in that very few (if any) public policy issues are domain-specific. They cut across a wide range of areas, both in that a given public policy objective will often be *shared* by practitioners across different domains, and because the pursuit of a given public policy objective will often *impact* on other domains, sometimes in unexpected ways.

What this means is that public policy must escape the silos that still structures the way in which policy competencies are defined. It will therefore necessarily be social, in that good policy will result from the bringing together of many minds. It will also have to be egalitarian, in that things will begin to go wrong when one perspective or way of understanding the public policy question at issue attempts to achieve a position of normative privilege. And it will have to instantiate many of the social virtues that are

important components of social rationality, especially sympathetic responsiveness to the often unpredictable points of view of others.

It also means that public policy formulation will have a relationship to theme and structure that resembles that which we find in improvised music. Though a public policy initiative may originate from a particular domain, its final form ought ideally to reflect the contributions that will be brought to its fleshing out by a number of participants.

The importance of thinking about improvisation in the context of public policy formation is all the greater if (second) public policy formation incorporates a component of public participation. Increasingly, governments are attempting to bring the public in at a consultative level in the process of making policy. This has been especially true in areas of moral controversy, such as new genetic technologies or assisted reproduction technologies. It might not be excessive to claim that there is in societies like Canada an expectation on the part of the public that mechanisms will be set up that allow governments to canvas the views of its members, when complex issues of public policy arise.

The ways in which public participation has been elicited have however oscillated between two extremes. On the one hand, models of participation (citizen juries, deliberative polls, etc.) exist that regiment public participation within fairly tight structures that channel participation along fairly narrow lines. On the other, for example in the case of the citizens' forums organized by the Bouchard/Taylor Commission, public participation can take the form of a free-for-all, or of a succession of monologues which do not truly take advantage of the social setting in which they are set to effect epistemic and empathetic gain among its members. Thinking about improvisation may help us come up with better ways in which to incorporate citizen viewpoints to the public policy formation process.

A third way in which we may illuminate our practices of public policy making in helpful ways by thinking about improvisation points back to what was said earlier about the way in which improvisation is a rational activity, but one in which a conception of rationality that belies the standard reason/emotion duality is at work. Standard theoretical views about democracy tend to cluster around two extremes, neither one of which seems either very attractive or particularly true to life. On the one hand, we have conceptions which view democratic deliberation as having to do merely with the jockeying of diverse interest-holders, attempting to gain competitive advantage relative to others. On the other, we have partisans of "deliberative" democracy who conceive of democracy as having to do with the exchange of reasons, where reasons are construed in a narrow propositional manner. Squeezed out of this duality is the way in which actual people comport one another discursively within democratic space. They tell stories, cajole, attempt to elicit sympathetic identification, etc. There may be a point at which such practices become manipulative in a way that should worry democrats, but surely there is a need both for a "phenomenology" (for lack of a better term) and an ethics of democratic persuasion that is truer to our ideals of what democratic life is like. Perhaps the ways in which performers communicate within the context of musical (or dramatic) improvisation can provide ius with clues about what a theory of this kind might look like.

Finally, turning to issues of policy implementation, the kinds of virtues of responsiveness to the irreducible unpredictability of others that improvisation embodies may help to counteract some risks to which public policy implementation is prey. Like all rational agents, public policy practitioners are subject to confirmation bias. An epistemic and moral investment (in a particular policy, for example) may tend to make us

insufficiently sensitive to evidence that tends to disconfirm our initial hypothesis, and to place excessive emphasis on evidence tending to confirm it. This is particularly problematic in the area of public policy when the sources of disconfirming evidence are the people for whom policy has been designed in the first place.

Public policy practitioners should possess the epistemic and moral virtues required to constantly adapt and alter their initial conclusions in the light of new evidence, to view them as in some sense provisional. What's more, feedback loops desirable at the level of individual agents should also be built into public policy institutions. The hypothesis here is that looking at the way in which agents incorporate the requisite traits and virtues in the context of improvisation can help us to come to a better understanding of how the process of policy can be both conceptualized and improved by attending to improvisation.

***Improvisation and Law***

As that which is spontaneous and unforeseen, musical improvisation is meant to eschew all law, convention, structure or form. To the uninitiated, improvising jazz musicians seem to be making it all up as they go along. This perception is not only incorrect, it has racist undertones. Improvisation, in accordance with this understanding, is envisaged as primitive, instinctive and unconscious; either compensation for the inability to read notated music or a freakish gift. The improviser is thus viewed as an 'ego-driven mystic' who is unable to describe his or her own creative process. Musicologists and musicians criticize this understanding of improvisation. Wynton Marsalis, for instance, once said, 'Jazz is not just, "Well, man, this is what I feel like playing." It's a very structured thing that comes down from a tradition and requires a lot of thought and study' (quoted in Paul Berliner, *Thinking in Jazz: The Infinite Art of Improvisation*, p 63). Musical improvisation is thus not simply a process of creation that emphasizes freedom and spontaneity. To improvise well requires much skill and training, along with an attention to discipline, technical knowledge, history, tradition and culture.

That being said, the dominant view in the West continues to position improvisation as utterly spontaneous in opposition to a stable and determinate set of laws and practices governing Western music. A similar dichotomy underlies the conception of Western legality. Following Hobbes, Rousseau, and, somewhat later, Freud, the tale of law's founding is almost always told in relation to a violent uncertainty or 'state of nature' from which we allegedly escaped. Unpredictability is thus constituted as something external to Western law, as that which must be reined in or controlled. Far from being improvised or unforeseen, law is supposed to furnish modern society with certainty and predictability. What we most expect from law, in other words, is pre-announced rules that are clear and intelligible. The ideal of the rule of law in Western democratic society means that everyone is bound by the law and determinations of what is and what is not lawful remain under the control of the democratically-elected legislature; police are employed to enforce these laws and courts adjudicate any alleged infractions or disputes over meaning.

The rule of law in the West demands that any inventive or unpredictable qualities be strictly managed or controlled. As the argument goes, if law could simply be invented in each act of decision, it would hold no set and enduring truth. Any invention of law by judges or others must thus be determinately contained or restricted through, inter alia, the device of legal precedent or *stare decisis*. Precedent, in its reliance on past legal decisions, assures that like cases are treated alike and similarly situated individuals treated similarly. As a guard against the arbitrary and capricious, precedent enables citizens to conduct their affairs with stability and predictability.

This seemingly straightforward account of precedent nonetheless belies the rather complex relationship of law to invention. For every lawyer or legal theorist who condemns judge-made law or judicial activism, there are others, such as legal realists or critical legal theorists, who applaud any inventive techniques in law. This lack of consensus as to the role invention plays in law actually flows from the very nature of the legal decision. Every judicial act is in a sense a species of invention. As no two actions can be *exactly* the same, judges make new law *every time* they are asked to decide a case. Law can thus neither dispense with nor be completely determined by precedent. The legal decision instead lies on the border between what 'is' and what 'otherwise could be'.

While musical improvisation must mask its structured elements in order to continue as a revolutionary and creative art form, the inverse is true for law: the inventive dimension of law must be subordinated to tradition and precedent in order to endure as authoritative and commanding in Western society. The dominant opinion in the West thereby remains that judges should simply find or discover the law that already is and those who invent or make new law are viewed to be bad judges, destroyers of democracy.

Tradition plays very important, albeit different, roles in both the legal and improvisational fields. The Common Law tradition recognizes the relationship of the individual judgment to (social) justice as being bound to the attempt to conform to the past through the system of precedent. The law recognizes the authority of an original revolutionary moment, and thenceforth upholds a conservative backward looking stance, only reluctantly and rarely acknowledging its role in creating a novel future, regarding this as a political imperative. In musical improvisation, the relationship of the individual performance to (aesthetic) justice is equally bound into a notion of tradition in so far as many improvisational practices, although not all, strive towards singularity and otherness. Respect here is paid to the tradition by attempting to push it into an unknown future. Musical improvisation recognizes constant revolution, constant risk, the rolling out of the future through stepping forward from what is known into the unforeseen. The range of differences between law and musical performance as divergent social practices could easily lead to an occlusion of what, despite these differences, remains a primary point of convergence between these two aspects of the social. In each case there is a prioritized occasion (judgment, performance) of present interplay between tradition and the instant case, between present, past and future, between the individual actor (as judge or musician) and the tradition as a whole, and through the developing tradition, the world beyond.

A range of social theorists have explored the abstract impossibility of separating law as pure generality and normativity from the singular aspects of openness and alterity. A range of legal scholars have explored the convergence between law and aesthetics by focusing on the aspects of the social power of law derived from emotional allegiance, rather than institutional authority. What remains under-achieved is detailed investigation into the structural qualities of the realization of law's persistent re-imagination, in other words an attention to the legal judgment as a *species of improvisation*.

Thinking about law and improvisation in this manner illuminates the resonance, as a condition of justice, of the legal extempore with the legal tradition and the world beyond. It attempts to isolate and illustrate the structural qualities of legal judgment (read broadly as determinations of how and when the law should be applied) as matters of timing. What is at stake is the continued depiction of law out of time as a kind of necessary deadness, and a depiction of law's out of timeness which should pertain to the vibrancy of the musical extempore.