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Every now and then, critics of some development in American law become so demoralized by the insensitivity of courts to the usual kinds of legal critique that they turn in frustration to critical metaphors drawn from the arts. Sometimes, these metaphors have been drawn from literature on the theory that "the literary imagination can help us . . . conceive a new and better legal regime."[1] At other times, the metaphors have been musical.[2]

In the most recent entry in this genre, *Jazz Improvisation and the Law: Constrained Choices, Sequence, and Strategic Movement within Rules*, Professor William Buzbee argues that "a richer understanding of the nature of law is possible through comparative, analogical examination of legal work and the art of jazz improvisation."[3] In making this claim, Professor Buzbee, a musician himself, composes, as it were, a kind of fugue weaving together two practices—law and jazz—that are not ordinarily thought compatible, or even similar.

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1. GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW 3–4 (2000).

2. *See, e.g.*, Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991).

3. William W. Buzbee, *Jazz Improvisation and the Law: Constrained Choice, Sequence, and Strategic Movement within Rules*, 2023 ILL. L. REV. 151, 153 (2023).

Like those who have gone before him, Buzbee's ultimate project is one of legal critique. An environmental law scholar, he is frustrated and unhappy with a growing body of decisional law in his field,[4] and he wishes to enlist the norms of jazz improvisation—a practice he holds in high regard—as a way of demonstrating the deficiencies of these rulings. I share Buzbee's concern about these rulings, but the short response to his analysis is simply that the best way to critique legal decisions is by demonstrating their shortcomings under the norms and conventions of legal practice, not by arguing that they are deficient according to the norms of some other practice. I shall return to this point at the end.

My main goal here, however, is to take up the invitation that Buzbee's article offers to reflect upon the analogy between legal practice and jazz improvisation. My interest in this subject is longstanding and personal. I began my legal career as a civil litigator with the U.S. Department of Justice, and I've been a law professor for the last 35 years, with occasional pro bono practice on the side. But I am also a formally trained pianist who has performed on and off in jazz combos since college. For the last two decades, I have been a regular participant in a vibrant regional jazz scene, performing at clubs, festivals, and many other venues.[5] I thus approach the subject from what I suspect is the unusual perspective of someone who has long participated in both practices at a relatively high level.

In this brief response, I want to dispute Buzbee's central claim: jazz improvisation and law, I shall argue, are best thought of as distinct practices, and the analogy obscures more than it reveals. Because my disagreement with

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4. *Id.* at 185–213.

5. For those inclined to check out my bona fides, see our CD and two sets from a recent live performance at PAUSA art house, Buffalo's premier jazz club. For a link to the CD, *see* Marc Cousins Bass, YOUTUBE, https://www.youtube.com/@marccousinsbass [https://perma.cc/6KXL-SYJW]. For links to watch the two sets, *see* PAUSA art house, YOUTUBE (Oct. 3, 2022), https://www.youtube.com/watch?v=Hgfnj9cr7qY&t=483s [https://perma.cc/9MTA-LZ3K] and https://www.youtube.com/watch?v=fSMSpBc68tU&t=832s [https://perma.cc/J667-XSBP]. For a link to the upcoming slate of performers at PAUSA art house, *see* PAUSA art house, https://www.pausaarthouse.com/.

Professor Buzbee is rooted in personal experience, it is phenomenological rather than theoretical; it proceeds, that is, not from dispassionate analysis of the characteristic features of law and jazz, but from the lived experience of deep, longstanding, and simultaneous immersion in both disciplines. Phenomenology, of course, is neither proof nor logic: different people may experience the same phenomenon differently, and one person's experience in this sense cannot in some way "refute" another's. Consequently, the only claim I make here is the limited one that my own experience as a practitioner of both law[6] and jazz improvisation does not comport with the account given by Professor Buzbee. To put the point more viscerally, when I put my law books away at the office, come home, pack up my gear, and set up at a gig, I do much more than change my clothes, location, and tools; I put on a completely different mindset—I experience law and jazz as two entirely different disciplines.

Subject to these qualifications, my argument proceeds as follows. First and foremost, Buzbee's analogy, in my view, rests on two reciprocal errors: he underestimates the degree of freedom actually enjoyed by jazz musicians, but he overestimates the degree to which that freedom issues in actual creativity.

Both law and jazz, to be sure, demand that their practitioners make choices within disciplinary constraints, but the disciplinary boundaries of jazz impose far fewer constraints on its practitioners than the boundaries of legal practice. As a result, lawyers who try to incorporate techniques of jazz improvisation into their legal practice will likely be making a disciplinary mistake, and risk practicing law badly to the extent they do so.

On the other hand, the fact that jazz musicians operate under fewer professional constraints does not mean that their work is any more creative, or novel, or original than the work of lawyers, or that jazz's loftiest artistic aspirations entitle it to be held in higher regard. The deflating truth is that what jazz improvisation principally shares with the

6. I confine myself here to the experience and perspective of a litigator. I have virtually no experience with transactional law, and so make no claims about it.

practice of law is not so much the inherent possibility of disciplinary creativity, but the quotidian reality of professional drudgery. Most jazz, like most law, is plodding and mediocre, and the intentional production of novelty is exceedingly rare in both practices.

Finally, the comparison between law and jazz does not help identify the nature of the shortcomings that Buzbee identifies in the cases he criticizes. The problem isn't that the judges in these cases improvised badly within the bounds of legal conventions, or even the conventions of jazz. The problem is that these judges very likely were writing their decisions in the pursuit of extralegal goals—political or ideological ones—in ways that violated the norms and conventions of good judging. A disciplinary performance that aims at goals outside the discipline is likely to be a bad performance regardless of the discipline, and consequently little is gained by criticizing these decisions from the perspective of any discipline other than the one in which the performers purport to be working.

I. BUZBEE'S ARGUMENT

Jazz Improvisation and the Law offers an in-depth, insightful, and deeply nuanced account of both jazz and legal practice, so a brief summary cannot do it justice. In abbreviated form, then, and strictly for present purposes, what I take to be the core argument runs something like this.

Law and jazz, Buzbee contends, share important attributes. Contrary to conventional understandings, he argues, law is not "a cloistered search for a settled thing."[7] Like jazz improvisation, law "involves a contested and sequential process that no one person or institution controls or can wield in a truly final manner."[8] The essence of jazz improvisation, Buzbee contends, is "a performer making on the spot creative choices that are not planned or dictated in advance."[9] The creative impulses of the jazz musician arise, however, within both a musical framework established by

7. Buzbee, *supra* note 3, at 161.

8. *Id.*

9. *Id.*

the piece being performed, and a set of genre-specific conventions agreed to in advance by the musicians. This renders jazz improvisation a paradoxical mix of both freedom and constraint: the improviser is free, but only within a domain of "constrained choices." Nevertheless, Buzbee observes, the practice of jazz improvisation involves far more than "mere interpretation" of a musical text;[10] the performer becomes instead a participant in the creation of the work itself.

Legal practice, Buzbee continues, bears many similarities to the practice of jazz improvisation. Like jazz, law is made through a sequence of "[s]trategic and constrained choices in the dynamic legal system."[11] Like jazz, law provides its practitioners with many tools that enable "choice and dynamism."[12] And, like jazz, law is not settled; it moves. Ultimately, "because law involves a collective activity, with unpredictable actors, constrained choosing, and outcomes revealed over time, it is structurally a great deal like jazz improvisation."[13]

In a lengthy, final section of the article, Buzbee deploys this understanding of the linkage between law and jazz improvisation as the basis for critiques of recent doctrinal developments in several areas of environment law. Although wide-ranging, his critique amounts at bottom to the contention that the judges who issued the rulings he criticizes did so by improvising, but badly: their decisions are "akin to an unskilled and unconvincing [jazz] performance that fails to engage key constraining materials."[14]

II. A PHENOMENOLOGY OF LAW AND JAZZ

The foundation of Buzbee's analogy of law to jazz is a descriptive account emphasizing that each enterprise is collective, that its participants make unpredictable moves

10. *Id.*

11. *Id.* at 179.

12. *Id.* at 181.

13. *Id.* at 182.

14. *Id.* at 192.

and responses within a range of constrained choice, that its results are revealed over time, and that it is decentralized in the sense that no institution controls it with finality.[15] This account, in my view, proves far too much: described at this level of generality, virtually any group activity, especially activities undertaken by professionals operating within disciplinary constraints, would bear a striking resemblance to both legal practice and jazz improvisation.

Jazz and law do indeed share similarities, but they are dwarfed by significant differences that give jazz musicians a much wider scope of play than lawyers. These differences make jazz improvisation, in my experience, a poor model for legal practice. At the same time, the range of freedom enjoyed by jazz musicians might set the table but it doesn't cook the meal. Most jazz, like most law, is workmanlike at best, and usually mediocre.

A. *Degree of Freedom*

The degree of freedom enjoyed by jazz musicians exceeds that enjoyed by lawyers in at least four dimensions: audience, *telos*, *ethos*, and stakes. I take up each briefly in turn.

1. Audience

The audience for a jazz performance is universal. It consists in principle of everyone in the world. More pragmatically, the target audience is the universe of all jazz fans, which, though to jazz musicians depressingly small, is still a very large group, but also one of eclectic tastes. As a result, a jazz performance—a "set," for example, or an "album"—is not confined to a specific genre or rigid format of presentation. Tunes may vary in tempo, meter, instrumentation, duration, mix of composition and improvisation, era of composition, or along any other dimension pertinent to the performance of music that is recognizably jazz. The music can attempt to engage the listener intellectually, emotionally, or both. Audience expectations, that is to say, can be met in such a large and

15. *Id.* at 182, 192.

varied number of ways that the nature and demands of the audience impose only limited constraints, and those tend to be mainly the constraints of patience and attention that confront any performer in an artistic setting.

A legal performance, in contrast, is intended for a bizarrely narrow audience: judges and other lawyers. Moreover, at least in my own practice area of litigation, a legal performance serves an extremely limited and well-defined purpose: to persuade a legal decision maker to take a desired action. There are no more than 32,000 or so judges in the United States,[16] and unlike members of a jazz audience, each has undergone significant professional training and acculturation, experiences that severely narrow the grounds upon and methods by which they understand themselves to be open to persuasion by lawyers.

The extremely narrow profile of the audience for legal products imposes enormous constraints on what lawyers can talk about and in what manner. This is not to say that lawyers lack all discretion. They can, as Buzbee demonstrates, improvise within disciplinary boundaries, but the relevant boundaries are far more confining than those facing jazz musicians. Lawyers must talk about text, they must talk about precedent, they must talk about relevant facts, and only relevant facts. For jazz musicians, an equivalent constraint on the subject matter and manner of their (musical) discourse might be something like limiting them to performing in a single, highly prescriptive, and possibly somewhat archaic style, like boogie-woogie.[17]

2. *Telos*

The *teloi* of jazz and legal performances—their end goals, their reasons for being—are quite distinct. The goal of a jazz musician is to produce a performance, and nothing more. The

16. Institute for the Advancement of the American Legal System, *FAQs: Judges in the United States*, 3 (last visited Aug. 29, 2023), https://iaals.du.edu/sites/default/files/documents/publications/judge_faq.pdf.

17. *See, e.g.*, the prototypical classic 'Boogie Woogie Stomp' by Albert Ammons. BlueBlackJazz, *Albert Ammons - Boogie Woogie Stomp | Piano transcription*, YOUTUBE (Mar. 17, 2011), https://www.youtube.com/watch?v=tBmVtW5qxGs.

goal of a lawyer is never merely to produce a legal "performance" or product, like a brief or a contract. To the contrary, the goal in law is to produce a result—to win a case, to obtain a remedy for a harm, to write a contract or will that will successfully structure a transaction and hold up in court, and so on. The performance is not the end, but a purely instrumental means to an end.

This distinction has profound consequences for the degree of freedom experienced by practitioners in the two domains. Jazz, for example, can be playful, whereas law is serious business. To be sure, there is room for humor even in the courtroom, but it is of a limited and highly respectful kind that is distinctly un-jazzlike.

Unlike law, which institutionalizes power, the roots of jazz lie in sly and subtle resistance to power, and to brutal racial oppression in particular. Because that resistance had to be plausibly deniable and thus kept implicit, jazz has often served as a means for musicians surreptitiously to mock the pompous pretensions of the established order. For this reason, one of the defining features of jazz has been a kind of wry subversion accomplished by undermining expectations. For example, the core of the jazz repertory has long consisted of "standards," a collection of popular and Tin Pan Alley hits from the early and mid-twentieth century. One of the foundational moves of jazz as a genre is to take tunes that are familiar to the audience and play them in unfamiliar ways—at a different tempo, with a different harmonic structure, or in a different genre altogether. Think of the iconic Louis Armstrong performance of "Mack the Knife,"[18] from the Bertolt Brecht operetta "Threepenny Opera." Armstrong achieved a massive popular hit by converting what had been a slow, creepy waltz[19] about the murderous habits of a career criminal into a swinging, seemingly cheery number in a way that produced an enormous—and ironically

18. Bryan Galvez, *Mack the Knife by Louis Armstrong*, YOUTUBE (July, 27, 2012)., https://www.youtube.com/watch?v=28ULUQgxJ5M.

19. Various Artists – Topic, *The Ballad Of Mack The Knife (From "The Threepenny Opera")*, YOUTUBE (Sept. 15, 2018). https://www.youtube.com/watch?v=_kE_D43b9m0.

amusing—discordance between the lyrics and the musical vehicle by which they were delivered.

It was precisely this aspect of the practice that drew me to jazz as a child. I grew up in a family of musicians, and classical music was the coin of the realm. When I first started hearing jazz I was amazed. Jazz musicians could take a hoary old music-hall waltz, like, say, "The Man on the Flying Trapeze," and play it in 4/4 meter, or at double the speed, or half the speed, or could swing it, or even play it as a samba, if they were so inclined. "You mean," my eleven-year-old self asked incredulously, "you're *allowed* to do that?" The kind of permission, and concomitant musical freedom, that jazz gives to musicians was a revelation.

Legal practice is not and never can be subversive in this way, or at the very least cannot so present itself. Law is, after all, the very foundation of the established order. To poke fun at the law, or to mock the pomposity of the presiding magistrate, might produce a kind of satisfaction in the practitioner that is similar to the satisfaction available to jazz musicians and audiences, but it is extremely unlikely to produce the results within the legal system toward which lawyers strive.

By the same token, importing a legal *telos* into a jazz performance would result in bad jazz. It would mean that my goal during a performance was not to produce a good performance but to achieve a result to which the performance was merely a means—to impress an agent in the audience, say, or to make enough noise to annoy the neighbors. Any performance aimed at pursuing goals extrinsic to the performance would by definition be a poor one; it would require ignoring or overriding the contributions and choices of the other musicians in a way that undermines the integrity of the musical product. Doing so would be perceived by fellow musicians as rude and artistically destructive.[20]

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20. In the language of the philosophy of joint action, a "joint commitment *obligates the parties one to the other* to act in accordance with the commitment." MARGARET GILBERT, JOINT COMMITMENT: HOW WE MAKE THE SOCIAL WORLD 8 (2014). It follows that "[a] joint commitment is not rescindable by any one party unilaterally, but only by the parties together." *Id.* at 40. As a result, non-conformity provides a normative basis for criticism by the other participants. *See*

3. *Ethos*

Another significant difference between jazz improvisation and law is that jazz is cooperative whereas legal practice, preeminently in the case of litigation, is competitive. Here, the two disciplines could not be more different.

When I play jazz, my goal is to open possibilities for my bandmates. I signal what I am doing so they can anticipate my moves. I try to leave space for them to add their own contributions as a tune develops. I invite them at every opportunity to collaborate. When they take me in a new direction, I follow. Comedians who practice improvisation often say that the key to a successful performance is to adopt an attitude of "yes, and . . . ," by which they mean that when one performer says something unexpected, the other performers immediately affirm it and move further in the same direction.[21] Jazz improvisation adopts a similar *ethos* of mutual affirmation.

When I practice law, I do exactly the opposite. All my efforts are devoted to limiting my opponents' options. I try to maintain strict and unilateral control of the course of the litigation. I keep my intentions secret until I reveal them at a time and in a manner that is most advantageous to me. I try to box my opponents in, confining them to positions from which their replies will be weak. This goes, incidentally, for the judge just as much as for my opponents. I do not invite the judge into the case as a collaborator. Instead, I present the case in a way designed to make the judge feel so constrained by precedent, governing legal principles, and the relevant facts that he or she perceives the outcome as fully determined, and in no way amenable to the exercise of judicial discretion.[22] In short, in law I strive always to take

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MICHAEL E. BRATMAN, SHARED AND INSTITUTIONAL AGENCY: TOWARD A PLANNING THEORY OF HUMAN PRACTICAL ORGANIZATION 55 (2022).

21. *See, e.g.*, The Second City, *How to Say "Yes, And"*, secondcity.com/how-to-say-yes-and/ (last visited Aug. 29, 2023).

22. I have laid out this strategy in greater detail in JAMES A. GARDNER & CHRISTINE P. BARTHOLOMEW, LEGAL ARGUMENT: THE STRUCTURE AND LANGUAGE OF SUCCESSFUL ADVOCACY (3d ed. 2020).

complete command, and to put myself in a dominant position. In jazz, I neither strive for nor feel in command; at most, I make suggestions to co-equal musical partners.

In this respect, I think a much closer analogy to law than jazz would be competitive sports or a strategic game like chess. Tennis, for example, is, in Buzbee's terminology, "a collective activity, with unpredictable actors, constrained choosing, and outcomes revealed over time." Yet when Novak Djokovic drives an approach shot into the backhand of an opponent, his aim is not to produce an engaging tennis performance (even if that is a frequent byproduct); it is to produce a weak reply that he can put away. His aim, that is to say, is domination under the rules and norms of the practice, a goal completely foreign to the *ethos* of jazz improvisation.

4. Stakes

In a legal proceeding, the stakes can be enormously high, involving not only large sums of money, but a client's freedom. Legal practitioners get essentially one shot at the result they desire, and then must live with the consequences. The outcome of legal proceedings can establish precedents that may bind many other people, in unforeseeable ways, far into the future.

In jazz, by contrast, the stakes are basically zero. Performances are ephemeral and exert no precedential influence on anyone, not even the original performer. The same performance can be repeated endlessly, until the musician gets it right or gives up in boredom. In jazz, a performer can spontaneously blurt out an idea, even a bad one, with few consequences; in law, never. The fact that so little is at stake confers on jazz musicians a degree of freedom that legal practitioners simply do not enjoy.

B. *Professional Drudgery*

If jazz and law diverge in the degree of freedom they offer their practitioners, they nevertheless share two basic attributes. First, in neither discipline do practitioners typically come anywhere near exercising the available

freedom to its limits. Second, a performance that falls short in this way is nearly always good enough.

According to Buzbee, originality in jazz occurs through "on the spot creative choices that are not planned or dictated in advance."[23] That's true, in a way, but highly misleading; in fact, the frequency of originality in jazz improvisation, and its depth and impact on the musical product when it appears, are often greatly overstated.[24] In fact, most jazz solos rely heavily, even overwhelmingly, on repetition, genre-specific cliché, and the recycling of well-practiced patterns.[25]

This reflexive reliance on the familiar and conventional starts from the very moment that novice jazz musicians begin to learn their craft. That learning is accomplished mainly by naked and unapologetic imitation. Jazz musicians do not learn their craft by getting in touch with and learning to draw upon some mysterious, inner source of musical creativity. They learn by listening to other musicians, figuring out what they like, and imitating it over and over. When I was a teenager, I imitated Oscar Peterson; much later, I imitated Bill Evans. Even for mature musicians, the imitation never stops; these days, I've been trying to work out chord voicings used by the Brazilian pianist Eliane Elias. It's not that I intend to pass myself off as these musicians, a fraud I could never in any case accomplish, and which, if I could, would bring me no advantage. It is simply that I like the sounds these pianists produce and want to add them to my toolbox just in case they might prove apt in some future situation.

This reliance on the familiar and conventional continues as the jazz musician gains experience. Jazz solos are

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23. Buzbee, *supra* note 3, at 161.

24. The advent of bebop in the mid-twentieth century was accompanied by a cult of genius, an image often self-consciously cultivated by the performers themselves. *See* SARA RAMSHAW, JUSTICE AS IMPROVISATION: THE LAW OF THE EXTEMPORE 66–70 (2014).

25. Benson calls this "premeditated spontaneity." BRUCE ELLIS BENSON, THE IMPROVISATION OF MUSICAL DIALOGUE: A PHENOMENOLOGY OF MUSIC 133 (2003). He explains: "Improvisation . . . is far more organized than it might appear. Many of these limitations come from the tradition in which they have arisen, in the sense that improvising is based on and can only be understood in light of the entire tradition of improvising that has gone on before." *Id.* at 136.

comprised fundamentally of units or modules ("phrases," in the musical vernacular). The soloist approaches the tune with a mental map of its harmonic structure—two bars of F major, for example, followed by two bars of B-flat seven, then back to F for another two bars, and so forth. Over time, musicians develop repertoires of ways to fill these modules and to string them together—a personal library, as it were, of riffs, licks, patterns, arpeggios, substitute chord sequences, and other material. A solo consists of a continuous sequence of these phrases strung together in real time as seamlessly as possible.

The phrases in a musician's personal library, moreover, are generally highly practiced and honed. The speed at which jazz improvisation proceeds makes genuinely reflective composition in the heat of the moment extraordinarily difficult. One must react, and quick reaction is made possible mainly by simplification, accomplished by limiting the task at hand to selecting from among well-practiced phrases that can be summoned and executed with little effort.

Jazz soloists who strive self-consciously to create novelty on the spot, without planning or forethought, are likely to experience a performance as a kind of white-knuckled careening across a landscape deeply rutted by conventions and littered with beckoning clichés. The temptation to succumb to these clichés is strong, and everyone does it. That is why even history's most accomplished jazz musicians have a recognizable "style"; when pressed, they fall back on a personal library of riffs and phrases that they can produce without difficulty, and more importantly, without conscious thought.

When I was in college, I was a member of the Yale Jazz Ensemble. For one performance, we were fortunate to have as a guest artist the legendary alto saxophonist Benny Carter. During rehearsal, we played a jazz standard—I can no longer recall which one—on which Carter played a gorgeous, lengthy cadenza, an improvised ending played alone and outside the tempo of the piece. When we performed that evening at the concert, I was crushed to hear Carter play exactly the same cadenza, note for note. That experience taught me a valuable lesson: in jazz, what appears to be an

act of spontaneous creation is often carefully conceived in advance and highly practiced.[26]

In short, creativity is not ordinarily the immediate goal of a jazz improvisation, nor can it be; novelty cannot simply be summoned on demand by even the most extraordinary musicians. Worse, it is more likely than not that deliberate effort to produce novelty, spontaneously and without forethought or prior exploration, will produce a bad result. Experienced musicians therefore typically, and necessarily, set their sights much lower, often aiming at nothing more than simply keeping a musical conversation going. In this sense, an improvised jazz performance is nothing more complex than a game of catch or beach paddle, in which the participants' only goal is to continue the game by keeping the ball in the air.

The foundation of the skill of simply "keeping it going" is not, however, novelty, but predictability. The jazz soloist says to his bandmates: follow me. But it is possible for musicians to follow one another only when the arc of the solo is immediately legible, and legibility in turn is possible only against a well-developed background of deeply shared, genre-specific norms and assumptions. The cult of artistic genius notwithstanding, it is possible to speak gibberish in jazz. Generally, if creativity or novelty arrive at all, they do so as a byproduct of nothing more than successful practice of the craft.

Law, too, relies heavily on imitation. Young lawyers learn their craft by imitating briefs and memos they have seen, and by adopting the stylistic preferences of their mentors and supervisors. Indeed, in law imitation is in some circumstances professionally required: if a particular argument carried the day in some similar case in a different court, you had better make precisely the same argument in the case at bar. Mature lawyers similarly draw constantly on arguments they have made before, arguments they have practiced and honed.

In law, as in jazz, few if any occasions arise in which the path to success runs self-evidently through novelty and

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26. *Id.* at 133–47.

creativity rather than workmanlike craft and competence. A "lawyer's lawyer" is a lot like a "musician's musician"—each is admired within his or her respective peer group not for some constant stream of original, genre-smashing contributions, but for the ability to work skillfully, and to get satisfying, if not highly original or eye-opening results, within the bounds of the genre and its conventions. A constant stream of innovation spells trouble. If I were hiring a lawyer, I would not want a self-conscious violator of conventions, the legal equivalent of the jazz legend Ornette Coleman. I would want someone like Cannonball Adderley, who was universally admired for his virtuosity and flexibility within the bounds of deeply established convention.

III. ON EVALUATING PERFORMANCES

For the reasons outlined above, evaluating performances occurring within one discipline by the standards of a different discipline entails risks. The two disciplines may not be fully commensurable. Apparent similarities may be misleading. Actual similarities may be submerged, and thus visible mainly to participants. Practices might look very different from internal and external vantage points.

I think Professor Buzbee's analogy of law to jazz stumbles over this risk. And although I'm not certain it is Buzbee's intention to make recommendations to legal practitioners, the fact that his article appears in a law journal might well be taken by lawyers to suggest that they can improve their practice skills by incorporating into their approach the techniques of good jazz improvisation. As a practitioner in both domains, this strikes me as a bad idea. First, jazz musicians enjoy far more freedom than lawyers, and attempting to exercise that degree of freedom might be ill-advised in the tightly constrained setting of a legal proceeding. Second, jazz improvisation necessarily involves a surrender of control—to one's fellow musicians, as well as to chance. Surrendering control might occasionally work out well for art, but it is not the kind of risk that a lawyer ought to take with the welfare of a client.

In the end, what I find most puzzling about Buzbee's approach is that the cases he criticizes by the standards of

jazz improvisation can just as easily, and with less risk and greater force, be criticized from within the disciplinary bounds of legal practice. The body of decisional law that Buzbee critiques includes rulings narrowing standing to sue in environmental cases, limiting the power of Congress to address environmental harms, restricting judicial deference to environmental agencies, and using purportedly neutral methodological choices, such as textualism, as a way to drive judicial decision making in a more conservative direction.[27] These decisions might be bad jazz, but that hardly matters because they are surely bad law, and for basically the same reason: they abuse the techniques of a practice not to achieve goals within the practice, but to achieve goals extrinsic to it. Those goals are political and ideological, not legal.

Unfortunately, these moves have quickly become standard in a federal judicial repertoire that is pushing us slowly toward populism[28] and illiberalism.[29] It seems to me more than sufficient to attack this kind of decision making as a perversion of legal norms without dragooning we poor, struggling jazz musicians into the battle.

27. Buzbee, *supra* note 3, at 185–213.

28. Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283 (2021).

29. *See, e.g.*, James A. Gardner, *The Illiberalization of American Election Law: A Study in Democratic Deconsolidation*, 90 FORDHAM L. REV. 423 (2021).