https://link.springer.com/article/10.1007/s11196-017-9518-9

DOI 10.1007/s11196-017-9518-9

Messner, Claudius. 2018. Now This: On the Gradual Production of Justice Whilst Doing Law and Music. *Int J Semiot Law* 31, 187–214

Abstract This paper examines the role of performance in law and music as a structural means of their self-programming construction. Music and law are considered as parallel social practices or performative doings. The paper begins with a critical analysis of the special aesthetical features of present-day juridical practice as exemplified by legal trial and legal expertise. Drawing upon reflections on the modern discourse on aesthetics and art, the article then examines in greater detail the specific traits of performance in law and jazz music. Performative processes move from representation to presentation, from a preoccupation with rules and controlling to induced self-programming. Both law and jazz regard the unknown future as a resource for present decisions by ''inventing'' new possibilities; both require, expand and promote a responsibility that does not follow from statutes nor can be expressed in a code of ethics. Finally, the article addresses the performance situation in jazz. Jazz being polyphonic and improvisational by nature, improvisation makes explicit tradition by staging the context dependency of its performance. It is mediated by the knowledge, the operational history and the communication of the participants. Jazz is an exercise in the possibilities of an ''aesthetics of imperfection'' which can open up new ways of seeing law and politics.

Keywords Modernity • Cultural practice • Judging • Polyphony • Learning • Democratic governance

The purpose of this paper is to explore the immanent aesthetic dimensions of law. If we don't decide, from the very beginning, to bind ourselves to a concept of law as a code and system of written rules, law is not a book or text nor can it be found in the books or in other texts. From the ''material'' point of view, law appears to be a constellation of various media and mechanisms of representation which presuppose and produce aesthetic effects [1, 2]; from the operative point of view, law is not a matter of reading and reciting, but a social practice which does not reproduce, but produce law anew by staging it in the single case [3, p. 62ff]. However, if the desideratum of an ''aesthetics of the law'' has already been formulated by Gustav Radbruch [4], a systematic analysis is yet missing [5]. The classical theory of law denies that modern law could or even should be sensitive and, thus, responsive towards social and cultural contexts [6]. Postmodern legal critics in search of ''responsiveness'', seemingly unconcerned about possibly destructive contaminations of heterogeneous fields of knowledge, propose as remedies ''transcendence'' towards the law's ''other'' or its ''aesthetisation'' without clarifying what an aesthetical statute of the law might look like [7, 8]. Within media theory or cultural studies, reflections on aesthetics are mainly focused on single phenomena, or consider the ''aesthetic'' as a side effect [9, 10].

One source for the marginality of aesthetics in contemporary legal thinking is certainly a reductionist concept of the aesthetic that makes it appear a superficial phenomenon which, in contrast to criticisms in terms of politics, economics and morals, remains external to law and thus has no profound effects on it [11].

Rather different is the concept and role of aesthetics in the history of philosophy. From the vantage point of philosophy, in particular within the analysis of language both in analytic

philosophy and in Wittgenstein's late philosophy, aesthetics is concerned not only with art and is not limited to experience and the evaluation of an object in accordance with aesthetic criteria. There, it includes, especially, the reflection on the conditions of creation and of aesthetic judgment. Far from being relegated to the ''beautiful'' and to ''art'', the category of aesthetics has fundamental epistemological and politico-practical implications, not just for philosophical themes and concepts, but also for juridical questions and notions of law.

It should be clear then that we have to review both legal and aesthetic categories in the context of the emergence of our modern (Western) understanding of art. If we start from the premise of modern society's self-description through its open future and its ability to learn as well as its irreversible functional differentiation and, thus, the internal differentiation of law: can we regard aesthetic research as a useful instrument of law theory? Could it shed some light on the relationship between law and its ''other''? Could we imagine increasing the responsibility of juridical practices by means of aesthetical reflection? What is the potential of an ''aesthetics of the law''?

This paper is an attempt to respond to those questions by comparing the classical, prevalently scientistic sense of modern law with an aesthetic sense. The paper is in three parts. Arguing that the modernist figuration of ordinary legal discourse ignores the specific performance of juridical practice, the first part offers a critical analysis of the different aesthetical features of legal trial and legal expertise. The second part, drawing upon reflections on the modern discourse on aesthetics, art and music, examines in greater detail the specific traits of performance in law and music and presents jazz and its implicit ethics as an 'aesthetics of imperfection'. Finally, jazz is explored as the contrapuntal form of today's world music and discussed as a practice which can open up new ways of seeing law and politics.

1 Juridical Practice

1.1 Contemporary Law and Law Theory

Until today, law theories have tried to find a concept or a definition of the law which would be applicable universally as an analytic category. The various research activities which bear the name of legal theory probably do not have a distinct and autonomous object of knowledge, and the philosophy of law is deprived of a suitable language for answering Kant's question of the substance of law [3]. The fact is that contemporary law is perfectly visible as a dynamic ''cultural'' artefact which depends, whatever shape it is assuming, on the contingent conditions of its social production. Constituted in unstable practical contexts and by persons ascribing different senses, law reflects deeply rooted convictions of its functionality for society and presents itself more than ever as an almost *idiographic* expression of a concrete community of interpreters.

The acknowledgment of law's embeddedness in <global> contexts further clarifies its emergence from different legal systems, and thus implies the proliferation of constellations of systems. These evolutionary processes brought about the dissolution of unitary visions. If this is true in particular for the prolific image of the state as a sovereign and central actor, it is also true for the monist vision of a unitary legal system which, corresponding to the state, implies a unique canon of rules of interpretation.

Law is no longer, if ever it was, the correlate of singular identities. Cultural and legal pluralism are evolving together. And it could not be otherwise, given that the social practices from which it emerges are symbolically over-determined. All this is well known. Surprising however, is ''the poor interest of legal positivism in theorising the artistic traits of the law'' [12,

p. 68]. In actual fact it is not only a lack in legal positivism, it is also a shortcoming of the formalism of traditional legal thinking which, in considering the meaning of statements as a function of the single elements constituting it, regards meaning as available and formally ''calculable'' without any need for tracing it back to the conditions relative to contexts and speakers. Trying to grasp aesthetic reality, formalism persists in considering artefacts as objects that need to be dealt with as discrete ''works'' or as singular selfsufficient texts [13]. It presumes that one can analyse the internal complexity of such entities whilst ignoring the complex relationships that in everyday juridical practices occur between power and meaning.

However, just re-directing our attention may not be enough. The decisive factor is the elaboration of the connections between the system of signs and speaking, between linguistic structure and event, between the system of language and the regime of its execution. In order to avoid the intellectualistic epistemological reductionism of the *linguistic turn*, one needs to move the emphasis from describing the rules and structures of language—here mistaken as ''system''—to observing the continuous reiteration and modification of rules and structures through speaking [14] or, rather, through social communication.

As has been showed by Austin, Luhmann and Derrida (albeit from different angles and in different terms), there is no ontological difference between language and speaking and thus no primacy of language: the notion of a pure linguistic system has been replaced by the assumption of a constant renewal of the linguistic rules by the practice of speaking. But, as I already said, the reign of signs and symbols is just one issue, the other one is the variety of the media and the pluriverse of the materiality of communication [15, 16], the worlds of sounds and voices, of writing, of books and libraries, of printing and of archives, of the wires of telecommunication and of satellite systems. This is the media side of communication, traditionally considered as an aspect that does not contribute—it being mere vehicle—to shaping the structure and substance of sense. However, as well as there being no pure language, there is no pure communication. The production of meaning does not take place if not through the media which forge its specific shape and consistency.

In light of such findings [3, p. 317ff] the dissolution of unitary visions affects not just the perception of ''new'' legal phenomena and the integration of corresponding descriptions into juridical discourse, but the (re-)construction of an unitary scientific discourse itself by its modern guardian, the theory of law, as well. If it seems clear, today, that law, even though it may not be an ''art'', is a form of artistic manufacture, it is because in everyday practice aesthetic qualities are connected with law's rationality and authority. At any rate, aesthetic infection does not threaten global juridical practice, but it does the monoculture of the modern reason of law, the classical scientific conception of law and the recurring models which shape the creation, the understanding and the identity of law. Contrary to all expectations, the worldwide proliferation of heterogeneous practices increases the need for theory, actually for a theory able to deal with the intrinsically artistic qualities of law, that is: an aesthetics. That seems to be the challenge.

1.1.1 An Operative Concept of Law

Law, as object of research, slips from discursive meshes rather than adapting easily to the analytical or empirical definitions given by the disciplines that deal with it. The central idea according to which ''law'' indicates a complex object to be observed in its differentiation and evolution has to be accompanied by the acknowledgement that there is no singular criterion suitable for explaining the unity, logic and functioning of the subject ''law''. The concept remains amorphous and dubious.

However, what we can try to do is to describe law by outlining important traits. In this respect it is useful to recall Wittgenstein's idea that, in the ''practice of language'', belonging to a category depends on ''family resemblance'' rather than definition. Drawing on Wittgenstein's aesthetic philosophy it seems in fact plausible to depict law as a ''cluster'' concept [17] by starting with the simple hypothesis that we call ''law'' a something that resembles other things that are already called law. Then we can indicate the sufficient conditions for the application of the cluster concept, but none of them will be individually necessary and no register will itemise all sufficient conditions. Rather than being based on a catalogue of firm definitions, ''family resemblance'' depends on a list of traits which may or may not exist. This refers to the properties that all the things named have in common and is thus, without further qualification, an empty term. In showing what are the relevant characteristics, the cluster represents an account that implies substantial descriptions and applies the traits set out as criteria, however without regarding them as sufficient for determining a phenomenon as ''law''. This without doubt leaves ample room for conceptual vagueness, that is to say an indeterminacy that would represent a serious difficulty for any account centred on the resemblance between phenomenon and model. Here, however, it does not constitute a problem: the list of qualifying traits is not affected by deficiency or incompleteness because it does not refer to a model or paradigm.

In what follows I will consider ''law'' as a construction based on a cluster concept that allows for a depiction of law which depends on the analysis of real or potential cases of presumed phenomena of law rather than on definite criteria. In other words, I think it is possible to name law a phenomenon that in a different situation would not be considered law. The construction does not claim essentiality, but heuristic and pragmatic usefulness. The operative concept of law is rooted in the idea of a ''social practice'' [3, p. 70ff, 18, 19], i.e. of forms of social actions within common horizons of meaning. That said, allow me to make two points: first, law certainly cannot be represented without further elaboration as a ''social practice''; to stop here would be as if contenting oneself with the statement that law is an art and ignoring that there are many [20]; secondly, speaking of practice does not mean jettisoning the idea of a rule, but placing it in a theoretical framework appropriate for showing the *specific* connection between the rules and the context in which they are produced and reproduced.

1.1.2 Trial

Let me briefly look at the trial as a cultural format. That might be worthwhile as a first step towards an understanding of the aesthetics of law, but it may also help us to understand how a truth is constituted by, and dependent upon, the self-programming forms of its production and to recognise its often invisible coercive power.

Trials are one of the most culturally appreciated manifestations of law. Trials are said to be instruments of the so-called formation of evidence and of the conviction of the judge which, by virtue of their formal structures, make visible the process of legal decision-making. They seem to establish a definitive legal answer that is both particular and universal, not only affecting the case at hand but also adding to the normative discourse of law. So, the trial scene often appears as the privileged space for the public determination of the peculiar form of truth called *legal truth*, if not as the primary scene of the birth of law itself. That said, one should remember that a trial does not take place on account of the facts but in order to examine what has been said about the facts put in issue.

From the point of view of ethnography [21] or interpretative sociolinguistics [22] the sentencing process is a particular kind of linguistic event in which language and verbal interaction seem to define social interaction itself. In Western societies, the trial is made up by a

ritualised and codified performance of which one needs to know the rules and conventions. The process is strongly culturalized: the role and the behaviours of each participant, the interactive and discursive strategies, the regulations of the taking of speaking turns, the distinctions between what one can do or not do, say or not say, all that does not derive from ordinary interactive experience [22]. The mere necessity to elaborate interpretations before the court constitutes an element which is strange and puzzling within ordinary verbal interactions. Because the interested parties do already know, they understand the other party as well as the law. All know the law. The question is which interpretation has to be preferred.

The physical context of the courtroom is inseparable from the nature of legal stories. Places and positions, choreography, clothes, postures, attitudes, ceremonies, languages, norms of interaction and conduct compose the trial scene and intimidate and alienate who have received no instruction. At the theatre of the trial the (presiding) judge is the only ratified director of the performance. From the production of a narration which explains the conflict between the parties as a 'case' to the argumentation and the reasons for the judgment, the (chief) judge subjects the parties to his power. Throughout the trial, he (or she) proves, by the authority of his words, to be the only and definitive force of the production of law.

With regard to the other actors present in the courtroom, a fact worth noting is that all communications have at least two addressees. Whereas interactions during the examining debate appear to be dyadic, the presence of 'double recipients' is always decisive: on the one hand, the judge (as the substantial recipient) or the other party, and the person quested (who sometimes is not the main recipient at all) on the other [22, p. 194f]. Of course, that picture would be incomplete if one failed to also consider the distinctive position of a possible jury and, in particular, of the audience who, as actors not allowed to intervene in the interactions, constitutes a silent and sometimes influential social actor; and there is also, finally, the role of the broader public [23].

As Ben Authers [2] has noted, at the centre of the construction of legal truth is testimony, i.e. the stories told to a court by witnesses and experts through a combination of statements and formalised answers to questions. Based on the faith that (at least) first instance judges have ''collectively perceived (what is extremely important: all at the same time, all at the same moment) the same reality, have elaborated and ruminated on identical information within the same context'' [22, p. 259], hierarchies of value are given to testimony by law. But, as Philip Auslander observes, there are striking similarities between that belief in truth and reality and arguments about the authenticity of artistic ''live'' performances. Indeed, he comments, ''the essence of testimony is not the information recalled but the performance of recalling it in the courtroom'' [24, p. 145]. Memory is contingently and conversationally evoked by examination as testimony in the trial scene. Testimony is not memories themselves, but is the performance of remembering [25]. Only through performance does it become the exemplary form of evidence. Improvisation, we might then say, is a procedural necessity for the legal production of legal truth and law.

1.1.3 Expertise

Compared to other forms of juridical knowledge such as legal science, doctrine, or theory, expertise is the preeminent form of today's juridical knowledge [3, 26, 27]. We find expertise in many different contexts: judges prepare a decision through expertise (opinion), academic professors produce expertise on certain subjects, and lawyers are entrusted to provide business companies with their expertise. The increasing importance of legal expertise reflects the evolution of modern law, the law of world society or, as is often said, the law of globalisation,

evolving into hitherto unknown, seemingly self-sufficient forms of juridical practice. In this context, ‘‘globalisation’’ is used to indicate the continuing expansion of law beyond traditional political and juridical limits, and precisely a new character of law as being caused by processes which have moved the elaboration and resolution of legal problems from the traditional field of administratively constituted legal orders to the areas of exclusive competence of global economic and political actors, i.e. private regimes, which with their own, internal definitions and rules, strategies of conflict resolution and arbitration depend upon the self-organisation of multinational companies.

Such is the sheer size of legislative and jurisprudential, doctrinal and theoretical materials, produced and reproduced day after day at local, national and transnational levels, and with the internal diversity and pluralism characteristic of an ever more expansive global legal practice, that many perceive the transformative effects on traditional legal and political systems as omens of a ‘‘new world order’’. Some regard them as signs of law’s loss of social significance, others believe to recognise an increasing ‘‘juridification’’ of society. One thing is clear: the unresolved problems of the law arise at the level of juridical phenomena rather than at the level of theoretical reflection. But it is also true that the new institutional places of the *world law* represent a challenge to legal theories of the old continental European style [3, p. 295ff]: what is taking shape is an evolutionary path that, dismissing the use of -explicit- rules, leads to flexible decisional processes the management of which is delegated to the black box called ‘‘law’’ by a society that contents itself with accepting or rejecting and scandalising (as the case may be) the results. So, from the point of view of classical law theory, the new, ‘‘soft’’ law appears to be perfect imperfect law marked by lesser consistency, poor scientific transparency, lesser certainty and more discretion, more dependency on experts, more morali- sation and politicisation. If what we perceive as law would be but a particular opportunity (e.g. a political mechanism, a commodity, a mass-media event or something else), its integrity would vanish, its essentials would be the participation of experts rather than procedures, and argumentation rather than rationality. Indeed: ‘‘In a world where anything could be an avatar of law, much will depend on what people interpret law to be: law will become whatever people treat as if it were law’’ [26, p. 224].

However, theory is under pressure from more than one corner. It is often noted that legislation in different countries and on different topics seems to follow ever more the method of trial and error by first attempting and thereafter judging the result. On the other hand, themes and problems of everyday legal business are increasingly short-lived to the extent that theory is often too late to comment on them. But what really questions the role of law theory is the rapid development of the jurisprudence of the supreme courts, especially at the level of the European Union: this is about a judicial abstraction that establishes new methodological standards that do not easily match onto the classical rules of interpretation [3, p. 321]. In this way, the main problem of juridical method, i.e. the correct application of the law, runs the risk of remaining unanswered by legal theory: ‘‘There is a rightness of the practice, Jochen Bung notes, which is always a step ahead of its theoretical reflection, i.e. the attempt to say why the rightness is right’’ [28, p. 11]. In other words, by developing its own dynamics, juridical practice has replaced theory in explaining, from a legal point of view, the correct recognition and application of the law. In this sense, practice proves to be self-sufficient. Technique has eclipsed theory: a sophisticated and disenchanted professional experience no longer needs it.

The sociologist Niklas Luhmann believed that modern society’s model of rationality is represented not by society itself as a whole, but by the plural logics of the ‘‘classical’’ functional systems, such as politics, economics, or the law. That assumption seems to be

confirmed by the machinery of global legal expertise. Expert work claims and establishes a multiplicity of sources connected to a network which, by inventing a realistic legal cosmology wherein laws and precedents are represented as causes and effects, antecedents and consequences, reversely produce their own validity and foundational myths. The ‘‘new’’ law mirrors the countless references from one type of rationality to the other, ensuring the operative autonomy of centrifugal rationalities and thereby contributing to the ‘‘constitutionalization’’ of the pluralism of private regimes.

As a type of knowledge produced by legal ‘‘experts’’ such as judges and lawyers and referring to (decisions on) practical problems, expertise is, as David Kennedy has noted, a specific form of ‘‘work’’. It is a social practice that produces a form of knowledge that positions professionals ‘‘between what is known and what must happen’’ [26, p. 108]. Aware of adding its own evaluation to a context where other interpretations are possible, legal expertise is an interpretation working to resolve the conflict of interpretations through argumentation and rhetoric. Unlike theory it represents a form of juridical knowledge that abandons the project of analysing the conditions of possibility of juridical knowledge.

David Kennedy notes that on the old scholarly road to the theory and practice of law there were two theoretical questions to start from: how do we identify binding rules, and how are they made effective as law in the world? For the contemporary expert, by contrast, ‘‘the problem of rules is not a problem’’. The legality of law ‘‘is not inherent in the norms but created in their use. As a result, everyone now speaks a loose jargon of principle and policy’’ [26, p. 238]. And if the rules have no pedigree, ‘‘law has no special province to be determined. Acting as if law had normative power sometimes works and, if we believe, may yet bring us a better world’’ [ibid.].

So, expertise is as pragmatic as inherently transgressive [29]. It is pragmatic because it refers to the particular context in which it is requested. In contrast to the researcher who aims at responding to questions he himself put forward during his research project, the expert (or, of course, the researcher acting as expert) responds to the question set by his client who will use the expertise in order to make a decision. So, ‘‘contexts’’ never are black boxes nor do they reflect certain necessities, but are the results of ongoing background work which the framing of the situation depends on. That construction of reality depends, again, upon certain taken-for-granted background assumptions, on the one hand, and on the decision to be taken as point of arrival, on the other. All this does not determine what is to be done, but is mobilised towards the decision on how to act. In order to present his expertise, the expert has to synthesise all available knowledge and, consequently, cannot avoid transgressing the limits of his own competence and of his discipline. On the contrary, forced to act as if he knew the answer to all questions, the expert claims the superiority of his view and the irrefutability of his argumentation—a presentation supported by the use of symbolical and rhetorical means which have to do rather with the expertness of the expert (specialisations, degrees), his status (academic and legal) and his social identity (gender, ethnicity, sexual orientation), than with the possible quality of the expertise itself [3, p. 322ff].

The legal expert has to bear in mind the fact that not all that he says or could say in responding to a question will be equally welcomed by his (private or judicial) interlocutors. He needs to be cautious while communicating. Those that wish to have a voice or give it to others have to participate in certain language games and have to be disposed to use a language or an idiom that is not only requested by their discourse, but that is also sensible to social desirability and social receptivity. The acquisition and employment of the just idiom is a premise of the success of the expertise. Otherwise, the expert would not be able to ‘sell’ his knowledge and his

expertise. All this lets expertise assume a fundamentalist aspect [30] that makes it appear more than it really is: a judgment requested in the knowledge that other opinions are possible.

2 Aesthetics and Art

2.1 The Modern Discourse of Aesthetics and Aesthetic Research

However, speaking of ''aesthetics'' in the present context complicates our task because modern aesthetics has at its disposal only a reduced notion of art and the aesthetical [31, 32] and displays a tendency to identify the ''artistic'' with the ''aesthetical''. Ever since the invention of 'experience' [33] and the development of the idea of the aesthetic in the 18th century, we are used to think of art as the 'fine arts' and of aesthetics as limited to (commentary on) the 'originality' and 'beauty' of these forms [34-36]. Inadequacies of this view derive from the unwillingness of ''the Moderns'' [37] to put aesthetic categories and the descriptions by practitioners [38] in their proper cultural and historical context. But, as networks of signification (not: of signs) through which we experience and communicate [3, p. 22], cultures prepare or to observe, or, as the case may be, prevent us from seeing something as art. Social communication matters in terms of the distinction, ideals, and expectations it offers for the encounter with art.

The aesthetic thinking of Scholasticism had pivoted around the notions of order, harmony, proportion, symmetry and congruence as well as consonance, a key concept adopted from music theory [1, p. 75ff]. The leitmotif of such views is the ancient Greek persuasion that the beauty of the whole derives from the proportionality of its elements. For Thomas Aquinas harmonia, claritas and integritas are the fundamental constituents of the forma which represents beauty and determines the perception of order and structure [39]: splendor formae, forma est lumen purum.

As is well known, at the centre of the new universal order envisioned by the Moderns stands the free, equal, autonomous human Subject [32, 40], a subject that is imagined to be one obeying no laws but those it ordained for itself, ''one which'', as Michael Chanan [41] notes, ''like the work of art itself, discovers the law in the depths of its own free identity, rather than in some oppressive external power. Like the work of art as defined by the discourse of aesthetics, the bourgeois subject is autonomous and self-determining'', sovereign. Driven by a desire for order and coherence, the modernist aesthetic discourse is guided by the fiction of unity and aims at synthesising the diverse. Preference is given to the visible and eye 'evidence', not to the ear and listening. Much as in the twin ''system'' of science and the ''province'' of law, the empire of aesthetics does not admit fields of indeterminacy or disorder, the terrible chaos.

Thus, it is not really surprising to note that in the end also the modern aesthetic of the law comes from the drive to coherence and from a systemic rationality which— in its clarity and symmetry, in its equilibrium, in its elegance, composure and integrity the highest expression of reason—does not contain any reference if not the reference to the order itself that is represented by it: stable, the ending of becoming, the ''system'' is the place where everything finds a place and where, as everything is in its place, all is right. But harmony confirms only the value of the system as form, or, to put it differently, form here possesses inherent value. The rhetorical move of the argument consists in pretending to talk about reason (supposed to be objective, neutral, universal) while it is a matter of aesthetics. Law is rational or, at least, guided by its own

reasons, that is beyond doubt. But law has no means to prove the ''systemacity'' by which it is orientated if not by reference to the formal criteria that law itself first elaborates and then presupposes as universal fundamentals of its operation.

Ironically, that vision is incapable of seeing that ''what makes something art is not something that meets the eye'' [42, p. 138]. On the contrary, it ignores the importance of imagination and can not develop a new aisthesis as both an investigation into the sensible and a reflection on the conditions of the various ways a ''world'' is constructed and judged. It fails to consider aesthetics as a kind of ''perceptology'' [43] which is independent from art, and it fails to grasp both aesthetics and art as modes of our ''seeing as'' of objects in Wittgenstein's sense, i.e. as 'worldmaking' responses to events [44]. For Wittgenstein, understanding depends on certain practices and pre-linguistic modes of experience. As meaning, experience is always already given in linguistic games and forms of life. We will use the term 'aesthetics' here in order to indicate, on the one hand, perceptions which rest on the senses, and, on the other, ''artistic'' constructions which rest on ''thinking trough perceptions'' rather than through ''concepts'' or ''functions'' [45, p. 235]. Aesthetics is about perceptions and feeling as well as about visible forms and figments of language.

In this sense, it seems to me that Wittgenstein's later philosophy provides the *practical* instruction (not to think and talk about but) to ''look at'' the many uses we make of ''languages'' as different modes of playing open ended ''games'' and to describe the distinct ''life forms'' we are living in 'naturally'. It is by their description as particular activities that we are led to notice the 'dawning of new aspects' of things, to 'see' them ''suddenly anew and differently'' [46, par. 66]. This approach embraces ordinary language, discourse and art as social practices.

That is the common ground which allows us to explore, in what follows, some analogies between law and music.

2.1.1 Music

As Max Weber observed, there is a certain homology between the evolution of music and that of society. For Weber, the evolution of European music (as well as of European law) is determined by the same processes of rationalisation from which modern society emerges [47]. At the time of Weber's writing, fundamental assumptions of the modernist discourse on language, art and the ability to adequately express the human experience were long questioned and ultimately eroded, witness Hugo von Hofmannsthal's famous *Lord Chandos Letter* (1902). According to the classical discourse, what finds expression in works of art is the singularity of a genius. Forms of art are seen as perennial monuments to the incomparable properties of the individual person and to the uniqueness of transitory life. If, with the transition to an industrial society, this vision lost its interpretive and communicative force, it has been completely discredited by the standardised production of cultural goods [48] by the emerging culture industry and the diffusion of the mass-media cinema, radio and, subsequently, television. Since the postwar period these developments have given rise to a constantly spreading mass culture which has blurred the distinction between high art and low art. Today, it appears as global popular culture. Music, its production as well as its reception, is one essential element of that culture.

However, actual debates on the artistic status of music, its features and functions, seem to be still prejudiced by traditional conceptions. Linguistics and semiology try to apply to signs and language categories elaborated in describing verbal language, denying, where these attempts fail, the character of language or sign to what escapes the scheme [49]. The language of music

has proved to be immune to all efforts of describing it using verbal language and linguistic code as a model. Musicologists, on the other hand, have often doubted if music could at all ‘‘speak of’’ something, and have regarded music as ‘‘absolute’’, free from texts, programmes and functions [50]. Here, music is regarded in isolation, as pure music. If one looks at it as a social activity and cultural format, one realises that a ‘pure music’, i.e. music separated from contexts, would not be music in its state of origin. ‘Pure music’ is a modernist idea. There is no such thing as pure music.

But, is music capable to denote? This is the underlying question, and it is the classical question of music’s being language. What is at stake here, is reference. As Michael Chanan concisely notes, ‘‘Music is incapable of statements, because music has no means of denotation’’ [41, p. 141]. One might raise two objections to this conclusion: first, it could well be that music has its roots in speaking (although speech, as it is known, is only a late phylogenetic acquisition), but that does not say much about the functional elements of music; secondly, ‘linguisticity’ is manifested by syntax [51], but formal syntax is not always followed by substantial semantics. ‘‘The distinctive trait of music seems to be that in music one can imagine an aesthetical object even without anything signified or just one whose meaning wholly depends on the discretion of the recipient’’ [48, p. 93].

But, the strong argument for objecting to the thesis that « music has no means of denotation » is not its social character as such, but the fact that the constitutive elements of music are repetition and repeatability. Musical pieces begin to assume the character of a sign within and through certain customs and practices, because the repetition, recognition and remembering of the meaning of a situational context is associated with the music [52]. In other words, what is ‘denotative’ (i.e. possessing references to the non-musical context), is the use of music. Repetition, e.g. the repeated performance of a symphony in a concert hall, the melodies which come from the loudspeakers in a supermarket to envelop customers, a saxophonist finishing his improvised solo with citations of an old popular song, pop music often heard on record and seen on video. ‘‘So many different settings, so many different kinds of action, so many different ways of organising sounds into meanings...” [53, p. 2]. In his classical study on how patterns are acquired in the visual arts, Michael Baxandall [54] has showed that meaning is assigned to dance in a similar way. If music is language, than it is an open language that has no denotative signs. Rather, every musical meaning, in whichever way it may have been generated, will be altered by the repetition of its performance.

Within the scope of the present contribution it may suffice to consider music as a non-referential ‘parallel practice’. As the musical ‘‘game’’ is organised by time, the paradigm it follows is rhythm, not theme [55]. What Lyotard once said about art seems especially true for music: it says that it cannot say. Artefacts, in general, ‘‘can’t say ain’t’’ [13, 56], artefacts cannot make negative assertions, let alone lead to expressions of what is unspeakable. Rather, they constitute a ‘reality’ of their own. Their power lies in keeping open ‘‘le champ des mots, des lignes, des couleurs, des valeurs, pour que la verite s’y figure’’ [57, p. 60]. But, when saying so, one should hurry to explain that what music has to tell us does not depend on any ‘saying’. For it is also true that the split between the eye and the ear, and the mind and the body [58, 59], is constantly evaded by music or, more precisely, the whole complex of what Christopher Small calls ‘‘musicking’’: ‘‘To music is to take part, in any capacity, in a musical performance, whether by performing, by listening, by rehearsing or practicing, by providing material for performance (what is called composing), or by dancing’’ [53, p. 9].

As a performative utterance in a specific situation or, if one prefers, as the staging of an event, music is essentially characterised by its visuality, sheer materiality and carnal effects [60,

61]. Polymorphic as it is, music seems to disavow even the tale of the 'fine arts' by combining ''the temporal aspects of film and dance with the spatial aspects of painting and sculpture, where pitch space (or frequency space) takes the place of three-dimensional physical space in the visual arts [52, p. 17].

What conclusions can be drawn in regard to law? It is evident, after all, that aesthetical approaches can serve as the basis for imagining and focusing new possibilities and meanings of law within practices, situations and events typically not regard as ''juridical''. Aesthetics emerges as specific investigation on how we know what we know, how our knowledge is structured by perceptions, sensations and measures, and how our experience of the world depends on power. Aesthetic reflection is a research process aimed at describing, arranging and putting together (*composer*) what we are doing in constructing reality. To this end, observations of contiguities between ''law and arts'' or suggestions that art should influence positively the law [38], are hardly very helpful. As the notion of art is not less amorphous and dubious than the notions of law and justice, attempts to resolve problems of description by trying to establish a correspondence between them do not seem plausible.

Aesthetic terms are to be considered a peculiar genre, but they are as little esoteric as any others. Following Wittgenstein, Frank Sibley proposed to speak of aesthetic concepts ''when a word or expression is such that taste or perceptiveness is required in order to apply it'' and characterised 'taste' just as the ability to ''to notice or discern things'' [62, p. 421ff]. Examples span from most common terms (lovely, dainty, graceful, elegant) to others such as unified, balanced, and integrated to lifeless, serene, dynamic, powerful, vivid, delicate, moving, trite, sentimental, tragic and others still—an almost endless list which is not limited to adjectives nor to artistic contexts. What all such expressions have in common is that we are required to exercise judgment to apply them. This means, as Sibley observes, ''that there are no non-aesthetic features which serve as conditions for applying aesthetic terms'' [62, p. 424]. Nor are they ''rule-governed'' [62, p. 435].

Neither aesthetic nor legal concepts admit of a 'mechanical' employment of rules and procedures. Within the law, to respond to new 'cases' we are required to exercise *reflective judgment* [6] guided by a complex set of examples and precedents. What is true for the law is also true for aesthetics. We learn from samples, examples, and precedents and they ''play a crucial role in giving us a grasp of aspects; but it's impossible to derive from these examples conditions and principles ... which will guide us consistently and intelligibly in applying the terms to new cases'' [62, p. 431]. How, then, do we support our judgments, and how do we bring others to 'see' what we 'see'? We've already given the answer: by rhetorically 'drawing' attention to what we remember, recognise and present as relevant 'aspects' and relations.

2.2 Performance of Law

Modernist law theories still understand interpretation as contemplation not as practice. Referred to the logical structure of legal texts, interpretation seems to be independent of the formation of *iudicium*, i.e. the procedural determination of law in and as a sentencing process [63, p. 364ff, 64]. The 'solidity' of the textual 'body' appears to be as objective as certain a bedrock of legal knowledge. Whereas the unity of the legal code has been dissolved long ago in various positivisations, legal thinking is still preoccupied with discovering given stable forms. While legal hermeneutics, insisting on the idea of language as a bastion of legal knowledge, continues to be fixed on the interpretation of texts, philosophical, semiotic and cultural studies have shown that there is no ''linguistic code'' including the indisputable rules of correct speaking, no code of practical discursive reason letting rely the production of law on a normative theory of

argumentation, and not even an ‘‘application’’ of laws fitting a deductive scheme [65, p. 826, 66]. The stability of the rules and the unity of the corpus of legal knowledge are, as already noted, threatened by the differentiation of practices and the multiplicity of available information and possible versions of a present-day law still in transition (from continental and common law) to new ‘‘globalised’’ forms. So, confidence is fading that law really ‘‘speaks’’ to us and that, if it does, it has to say something.

A different perspective opens, if we consider law’s ‘‘speaking’’, i.e. the peculiar kind of ‘talking about’ law which recognises and produces law by simultaneously saying what is law and what is said as law, as an event describing it by analogy to the collaborative execution of a piece of music. This view can explain some rarely considered aspects such as the phenomenon of the plurality of voices or polyphony. By showing how every communication emerges from a constant change of the modes of participation, polyphony reveals the unilateralism of theories of speech act centred on a speaker as well as the tacit alignment to the ideal of mono- and homophony that characterises the universal-pragmatical theory of communication centred on consensus production. From the point of view of polyphony, the continuation of discourse and communication is completely independent of the issue of dissonances. Concepts such as rhythm and sound rather shift our attention to non discursive forces that already bind the speaker and let him be tuned in prior to any rational consent and beyond a mutual sharing of meaning. The rendering of ‘‘facts’’ so that judges can hear them is not a simple representation, but a presentation— naming, telling, saying, thus setting out, fixing, explaining—that propounds the world in which its descriptions make sense. So, the law’s mode of representation would seem to be ‘‘narrative’’ and rhetorical, and, in fact, narration and rhetoric are important properties of law. However, while the law’s mode of representation is narrative and rhetorical in the illustrated sense, law—law’s musicking—is not reducible to speech, discourse, or invention. On the contrary, the silence of law and what it tells us sottovoce may be as important as its discourse [22, 67].

Operative law is performance of law. Performance does not mean that something is done with words, but that a ‘doing’ is staged [68]. If one defines performance as a ‘‘process of representation through bodies and voices in front of an audience of persons present’’ [69, p. 85], it shows to possess three aspects: the *mise en scene* as a particular mode of using signs, the corporeal character caused by the material, and the perception of that materiality as an aspect referred to the observer as well as to the function and the point of view of the observation [70].

In this sense, law is manifestation, production, *mise en scene,* staging of a doing, showing, declaring, informing, responding and promising. That *performing* is always also a staging anew, never a sic et simpliciter reproduction. It is an iteration that transforms what it repeats: citation-*alteration* is the way in which iterations constitute sense. From this movement emerge the regular of the linguistic event. For the simple fact of its occurring, every utterance brings about a new situation [6, p. 547]. As the present event, it is in a new context and is constituting a new context. It’s meaning is not yet given, but still has to settle down. What is ‘‘regular’’, then, is not the reproduction of sense according to conventional lines, but its continuous modification in moving from utterance to utterance. Sense proliferates by iteration without any possibility of being established a priori on the grounds of a certain measure of formal recognition, such as a ‘‘central core of undisputed meaning’’ [71, p. 11, 72, p. 12].

So, it might be useful to distinguish two meanings of ‘performance’, representation and presentation [69]. *Representation* means applying a competence as, for example, the execution of a musical score. From the practical point of view, it is about using certain abilities which are already available so that the structure established in advance—a text, a score—remains intact and not influenced by the way of using it. On the other hand, *presentation* indicates the fact that

a performance is able to move the structure of the realisation in the same way as, at theatre, a play is not simply executed, but staged. This is not a matter of discovering and emphasising given evidences, but of generating evidence through the performative process.

In sum, the clue to the ‘‘mystery’’ of the juridical trial as a process of judging that leads to a ‘sentence’, a ‘‘last word’’ that decides a case, seems to lie in the fact that the law-finding process does not lead simply to the selection between two options at hand [63]. Rather, it has to be considered a performance that -by determining the constituents of a case, examining witnesses, evaluating evidence, weighing interests, interpreting precedents and, finally, pronouncing a sentence-produces a result which does not derive from anywhere else. The last word of the decision cannot be deduced from the case nor does it follow from what the law says. That famous word can present itself as the law’s speaking solely in the guise of a declaration of law which reveals a violent character insofar as the meaning of law it just establishes did not already always constitute the basis of the judging. That sense, generated by the just terminated performative process itself, will endure only until it will have been replaced by a succeeding performance.

Thus, an ‘‘aesthetics of the performative’’ looks at law not as a set of texts or works, but as event and *staged* facts [70, p. 161ff], investigating on the various levels of transformations involved: alterations of materiality, alterations of relations between the performing actors, alterations of the special relationships between performing actors and audience(s). All have to be analysed primarily in terms of embodiment and imagination rather than in terms of semantics and interpretation. What counts, here, is not the understanding of the acts performed by the actors, let alone the intentions of authors, but the experiences provoked in who participates at the performance. In this way, the traditional distinction between an ‘‘aesthetics of production’’ and an ‘‘aesthetics of reception’’ is blurred. As Erika Fischer-Lichte stresses, performances have an autopoietic character, they ‘‘are generated and determined by a self-referential and ever-changing feedback loop. Hence, performance remains unpredictable and spontaneous to a certain degree’’ [70, p. 38]. So, aesthetic investigation ends up in broader semiotical and epistemological questions aimed at accounting for a passing event whose ‘presence’ is constituted by the recognition of and the identification with the self-programming of the performance which is attended: the mode of existence of performances is not that of a simple being there, but that of becoming.

2.3 From Representation to Presentation

To summarise, classical modern law remains fascinated by its self-description as a system of rules to ‘‘follow’’ through interpretation and execution. Always concerned about the significance and legitimation of rules, modernist theory has eliminated from the list of its homework the development of own ideas on the normative universe of contemporary society [6, 9]. However, the ‘rules’ followed by thinking, speaking, acting persons are not simply regular ways of behaviour that can be observed, counted and described with mathematical models. They have to be conceived as ‘‘laws of form’’ that guide our modes of constituting and maintaining our world vision: rules are our expectations of a good form of that world. So, given that the common source of our worldmaking in every-day practices as well as in art and science is what Aristotle called ‘aisthesis’, can we imagine aesthetic experiences and procedures as more fruitful a ground for understanding law’s operating?

To my eyes, there is a need for a description of law which, in rejecting abandoning the modernist ideology, is able to pave the way for connecting normativity to experience, an experience understood as ‘‘composed’’ from the many traces imagination produces by narrating

what is perceived as reality [45, p. 228]. Critique alone is therefore not enough. As Sheila Jasanoff [73] pointed out the fact that scientific knowledge at present has lost social legitimation depends upon the 'how' of its production rather than of the 'who' and 'what'. To tackle this problem, Jasanoff argued, the ''institutionalised'' forms of thinking and the usual techniques of scientific analysis had to be integrated (or substituted) with ''modest'' methods which aim at accounting for those margins of knowledge constituted by contingency, uncertainty, ambiguity, and the unforeseeable. Focal points are framing, images and narratives that structure the representation of things and events, vulnerabilities of the persons possibly involved, distribution of consequences and foremost learning [74]. In short, a new approach to global governance would require the integration of the ''can-do orientation'' of scientific social engineering with the ''should do'' questions of ethical and political analysis [73, p. 243].

So, when assuming, as a principle, that there is no private normative life, the second step of re-orientation requires imaginative proposals of forms of living together structured by what Robert Cover [75] explained as the communal—not: communitarian—mode of world maintenance in contrast to the Western ''imperial'' mode. Certainly, such reveries or, in the words of Peirce, ''play of musement'' [76, p. 97], cannot be developed as a formal science like logic, but will assume the shape of a social science or rather a social quest for an aesthetics of law.

Part of it will be a semiotics which, by reviewing concepts such as meaning, sign, interpretation and communication and by reflecting on itself, rejects the obsolete notion of language as code and configures itself as an investigation of how signs signify and of how they do *live* globally ''in their natural habitat—the common world in which men look, name, listen, and make'' [20, p. 151]. Perhaps, 'law' will then be considered a sign [77, p. 293] to be also explored by means of the philosophy of language. The role of a philosophy of language, in this constellation, would be that of insisting on the necessity of going beyond merely cognitive games by dealing with life also in the pragmatical sense of taking care of it, of ensuring a decent life of the common world: it's about ''preparing oneself to listen to the symptoms of the present world of globalisation'' [49, p. 36].

Therefore, neither science nor theory, not even theory of reflection. In order to become sensitive and responsive: ''responsible'', an empirical ethics is needed, a particular attitude capable to evaluate our acting in terms of social existence. Michel Foucault had envisaged it as a philosophy of 'curiosity', a new kind of critique which is not any longer obsessed with policing the borders of philosophy with a bigger dog. Nor does it content itself with reclaiming praxis as a term. What is fascinating to me, Foucault says, is ''the idea that ethics might bestow upon existence a strong structure without having to recur to a legal order, an authoritative system or the organisation of a discipline'' [78, p. 78]. It is about the differences of existing and about existing differently, the outline of an ''aesthetics of existence''. This means, first, it is not about true and false, but about our relationship to truth, not about reality and possibility, but about our sense of reality and our sense of possibility, it is about the strange and the familiar. As a *critique* it aims

> ''a faire exister une reuvre, un livre, une phrase, une idee; elle allumerait des feux, regarderait l'herbe pousser, ecouterait le vent et saisirait l'ecume au vol pour l'eparpiller. Elle multiplierait non les jugements, mais les signes d'existence; elle les appellerait, les tirerait de leur sommeil. Elle les inventerait parfois? Tant mieux, tant mieux'' [79].

No jurisdiction is claimed here, no 'veridiction'. Not the ''self-control'' of a normalising society nor the ''self-care'' recommended by expertocracies. Not judgments as the last words ending a trial are pronounced here, but always only incipits, first words, imperfect words which

however can open processes. Differences of existence are explored in order to enable us to think and to act differently—''pour devenir autre que ce qu'on est''. It's about maximising connections, powers, possibilities of living.

But how to practise the *art* to ''make play the differences'', how to create the principal ''reuvre'' of one's own becoming 'different'? *Becoming* itself is critical, for if identity is what defines a world of representation (presenting again the same world), then becoming means beginning anew presenting a world. Here as elsewhere [80, p. 57], Foucault trusts in the mentor-model of accompanied experiencing. That is a personal relationship which, centred on the common performance of the 'aesthetics of imperfection', aims at increasing a person's power to act, whilst at the same time not diminishing the other's similar powers: the common exploration of possibilities emphasises the best of each one rather than the deficiencies of all. In the next section, I will present jazz as a model of this art.

3 Jazz: Aesthetics of Imperfection

3.1 Jazz as Art Music and ''World Music''

Ted Gioia [81] represents the origin of jazz in a primal scene of 1819 when on Sunday morning slave dances take place in New Orleans' Congo Square. It is no coincidence, Gioia argues, that the birth of jazz happened in this city because the fusion of Spanish, French and African elements with Latin-Catholic culture had produced here a multiethnic milieu far more tolerant in accepting social hybrids than the English-Protestant ethos.

African music may be cautiously characterised by the predominance of call-and- response-forms, the cross-fertilisation between music and dance, and the integration of the musical performance in social practices. Musicking [53, 60] does not mean the production or reproduction of 'works' or models of form, but participation in social practices whose meaning cannot be conceived as the sum of actions by single actors. The whole is greater than the sum of the parts. What qualifies the musician as a group member or as a soloist is not the correspondence to the requirements of a score, but rather the individuality of his voice within a community [48], an idea totally alien to Western efforts to standardisation [82]. By comparison to modern Western music, there is no separation of audience from artists, and 'personal' sounds of human or instrumental 'voices' are focused on in instances where Western composers would rely on notation [47]. In general, the musical qualities shared and communicated are improvisation, spontaneity and, most distinctively, rhythm.

> In African music, in both its original and its various Americanised forms, different pulses are frequently superimposed, creating powerful polyrhythms that are perhaps the most striking and characteristic aspect of these traditions. In the same way that Bach might intermingle different but interrelated melodies in creating a fugue, an African ensemble would construct layer upon layer of rhythmic patterns, forging a counterpoint of implied time signatures, a polyphony of percussion [81, p. 11].

As Small notes, in the Western classical tradition, sound-relationships are dramatic, that is to say, articulating ''tensions and relaxations, climaxes and resolutions, developments and variations ... They can be thought of as stories, or discourses'' [53, p. 139]. African music and jazz in its endless pulsating is not focused on well-aimed climaxes. If there are climaxes, they are contingent climaxes, reached in a way different from the constructive logic of synthesis and reconciliation and followed by surprise, eruption or decreased intensity [48], developing independently of the intents of a Subject.

However, both Bach and jazz cannot be understood out of their social, historical and technical contexts. There is no pure music and thus no proper significance of music. If music has a value, then because it is socially plausible: ‘‘Art and the equipment to grasp it are made in the same shop’’ [20, p. 150].

So, the fact of the birth of jazz out of a modern culture of slaves will not appear as a minor detail. That culture arises from a primary total deprivation. This makes a difference. According to the classical Western vision of the artist, he or she does not use a given vocabulary to express himself, but he himself generates it as his own peculiar saying within a general system of signs and as his or her *proprium* of qualities. By contrast, jazz musicians initially did not possess property or idiosyncrasies. From the point of view of the culture which observed their art, they had *no property at all*. This may be the reason why jazz musicans, as Diedrich Diederichsen speculates, always learned to be spontaneous on ‘‘the spur of the moment’’ and to acquire properties. Instead of pretending to possess sounds, they hold on to the singular sound which characterises their individual playing. Jazz elaborates on someone else’s signs [48].

So it seems that the only history of jazz one can tell is the story of its continuous transformation, by describing the fast evolution of the jazz idiom [83] from popular music to (refined) art music, and by narrating how, since the dawn of the twentieth century, such gentle ‘wild’ figures like Louie Armstrong became ‘musicians’ first and then ‘‘stars’’ which won over American and, only one generation later, also European audiences.

But this story would be incomplete if it would not report at once how jazz assimilated elements of the European tradition of composition, contributing thereby to the advancement of modern music [81]. Being a globally understood sophisticated music: the art music of our time, jazz might justly be called *world music*, namely a universal musical language that allows different idioms to co-exist. In this sense, jazz is at home everywhere but probably will never have a definite residence. As an art of the refugee and of the moment, jazz is the nomadic reason of contemporary music, a music of becoming, fusion, and openness.

3.2 Counterpoint

From the foregoing discussion of the concepts of art and music, it should be clear that we will not try to define jazz. On the assumption that some music can be more or less a member of the jazz family we can describe jazz as modern art music in the following way: jazz is not, in any sense, a so-called primitive art. On the contrary, jazz ‘‘more than any other form of modern art ... holds the standards of technical capability’’ [84, p. 62]. To be sure, jazz—as every form of art deriving from oral traditions—shows its severity and precision in ways which are different from annotated or written forms of art. If music is always ‘‘organisation of time’’ and ‘‘ordering of sounds’’ [82, p. 11, 85, p. 133], jazz is to be considered as a ‘thick’ management of time and sounds, an always only specific, situated performance. Jazz ‘‘lives and dies in the instance of performance’’ [84, p. 111]. Pleasure, inclusiveness, discipline, and invention are the key notions.

Pleasure and emotion are not the sensations of the European musical and theatrical tradition. In jazz, they do not depend upon persons, a person’s character or variations of expression. When emotion appears, it often seems unmeasured, extreme and frequently not well explained. That, exactly, may appear as stereotypical, even though it remaining always unpredictable and surprising.

Emotion, here, is unique as an instantaneous event, not because of the incomparability of a person’s expression.

We limit ourselves on two points. First, all this has to do with the polyphonic or contrapuntal structure of jazz mentioned in the long passage cited above. Polyphony or, in classical composition, the counterpoint (cantus contrapunctus) is a musical texture characterised by two or more melodic lines of equal importance being sung (or played instrumentally) simultaneously [86]. Usually polyphony rests upon the conception of equality between voices. There is typically no domination of one voice over the others, and if there is, it is temporary, the role of prominence switching from one voice to another [85].

Let us look briefly at the use of polyphony in jazz and baroque music, following Ted Gioia's reference to the fugues of Johann Sebastian Bach [87]. The fugue is one of the most significant types of composition in the baroque era and is polyphonic by definition. It is a composition characterised by one main theme, called the subject, and the imitation of that theme by different voices. The imitation of the subject starts at equally spaced intervals of time in each of the other voices. First the subject, then the second voice, then the third, and then the fourth. Unlike this, polyphony in jazz does not originate from a compositional master plan, but, as we will see in a moment, from the improvisational nature of jazz. 'New Orleans jazz', for example, is known for its polyphonic texture of many different melodies being played together by different instruments in a small group of performers. Out of the performers, 'front-line players' (trumpet, trombone and clarinet) all improvise melodies at once.

In both cases polyphony, the ensemble of the different independent voices playing distinct melodies at once, is used to create more expressive sounds. Polyphony indeed makes music more complex and enjoyable. With a multitude of different melodic lines playing at once, one can create many different combinations which, to be appreciated, require more than one listen, and every listen could be very different from each other. This of course is true not only for the audience, but for the group of performers as well. Polyphonic performance needs polyphonic listening. From this point of view, one may consider polyphonic listening as a ''practice of mutual respect'' [85, p. 131]. It must be remembered that it is the reception of the performance to determine its meaning and that this meaning cannot be found by referencing to intentions. At any rate, polyphony requires considerable discipline of performing and listening as well as a certain composure or, let us rather say: coolness. Coolness, the dictionary explains, is a modern expression that indicates a comfortable or calm state of a person or a situation; 'cool' is what has lost warmth, or, figuratively, ardour; 'to cool' means to cause this loss. The interesting point is that the word combines aesthetical with ethical qualities, for example, when saying ''Learn to be cool under fire'': be or remain not excited, composed, under control—in the face of a crisis; ''Stay cool'': you must not get caught, not even when causing or suffering injustices and anomalies.

Second, by working with deliberated rhythmical 'irregularities', jazz proves to be serious about the ordering of perceptions in a particular way. Since the metrical rule is not contained in the melodic organisation, the melodic construction can be opened for further rhythmical influences. In order to do so, the metre—or more precisely, the principle of measure called 'beat'—is played as *a conditio sine qua non*—or is varied, or is even merely imagined. The fundamental respect for the beat—even when its dissociation is under way—allows undreamed and always newly surprising caprices: the beat must be perceptible as the in-betweens of irregularities.

Thus, musicians have to practise the particular discipline of allowing an idea to be expressed which is still being elaborated in the performance. As Elliott Carter once said, the musical score, if there is any, ''serves fundamentally to avoid that the musician plays what he already knows and to guide him while exploring new ideas and technics'' [cit. in 84, p. 73]. Every single action is based on regularities: forms of routine which allow for making oneself available

and being free to expect the unexpected. Thus there is a constant call on the musician's perceptive capabilities. The performance, furthermore, requires improvisation and spontaneity, but both will increase rather than reduce the commitment of artists. Jazz composer and pianist Sun Ra is told to have pointed out that in particular the most 'free' collective improvisations bear the greatest risk of faux pas. The more you risk, the more good reasons you must have. So take musicking seriously, ''as serious as your life'' [cit. in 48, p. 213]. The performance shows how one assumes risks [60] and draws the appropriate consequences. If assuming risks is part of the jazz artist's 'creativity', then it is also the matrix of a responsibility which does not follow from statutes but from collaborative processes of attribution and thus cannot be expressed in a code of law or morals. The responsibility required in jazz differs from legal and moral responsibility. According to the modern view of responsibility, individual responsibility is the only sort of responsibility there is, because it is a function of being a human agent. Responsibility is not something we attribute to human beings but is, rather part of what we mean by being a human *subject*. We are responsible only for conduct that is a 'free' expression of our will. Responsibility, then, is a matter of fact, not of social construction. Nevertheless, moral and legal responsibility are to be conceived as artefacts in the sense that it is the law (or morals), not nature, that tells us what legal (or moral) responsibility is and when it arises. Artistic responsibility in jazz exceeds by far the limits established by modern legal, moral or political order by calling to respond not only for one's own conduct, but for some ''other'' that is or could be involved. In this way jazz tries to practise contrapuntal necessity and inventive freedom at once.

Improvisation is not about the absence of rules. Improvising musicians negotiate fruitful courses of action in uncertain situations. This practice can be understood as a self-organizing process that rests on and *stages* the particular contextual constraints which encourage the emergence of something new and inventive. By ''looking back as it moves forward'' [88, p. 5], that is by repetition and alteration of what has been played before, improvisation reaches a degree of consistency. Ideally, improvised performances are concerned with process rather than finished product [89], with the presentation of multiple voices rather than imposition of a coherent perspective, and with interrogation of real differences and relations between empirical concrete persons rather than with formal correspondence. As Michael Chanan observes, the democracy of the jazz combo ''consists in a dialogue of nuance and musical gesture that leads to the fine-tuning'' of collaboration [41, p. 161].

Jazz is not a static theme. Rather than communicating a 'what', jazz is oscillating about a un-notational 'how', about procedure and event. This 'how' is always determined by the artists constant commitment to the persons, the time, and the situation of the performance. As the relative stance assumed by the artist: his ethos, the 'how' has its own history and tradition.

From the point of view of the participants, rather than a statement, jazz is field work in aesthetics and ethics. Herbie Hancock has presented jazz as a common endeavour where ''high value'' is placed ''on collaboration, on openness to new ways of seeing and a generosity of spirit'' [90]. It is an exercise in curiosity built on exploration, courage, and cooperation.

There was the time, Hancock remembers, when being a member of the Miles Davis Quintet he felt musically stuck. ''Everything I played sounded the same'', he reports. Davis saw his frustration and offered some enigmatic advice.

> Don't play the butter notes'', he said. ''Butter notes?, I thought. ''What is that? Does 'butter' mean 'fat'? Or does it mean 'obvious'? I had to think about it, and finally realised that if I left out the notes that most clearly define the chords it would allow the harmonies to open up to various views [90].

Collaboration is explained here as an ethics of common learning fostered by the particular kind of personal relation that is the mentor-student relation with its alternation of reciprocal speaking and listening. Called ascetic by Foucault, this relation permits the ‘‘transformation’’ of modes of thinking and acting, speaking and listening ‘‘as one does’’ in individual ways of doing, that is in ethos [91]. Acting emerges from a self-modulating process, a continuous adaptation to the situation one remembers, recognises and, by ‘‘modeling’’, alters [76, p. 125]. That might hurt the idea according to which plans and consequences confer dignity to existence, but is it not true that we calibrate, at least in ‘real life’ contexts, the capability of acting of the authentic moral person exactly this way: as the capacity to improvise within rules [92]? What would be worth morals which do not decide in a crisis, in emergencies, in case of the collapsing event, in front of the incalculable, what would be worth an ethics which is available then and only then when you already know how to go on? In Jazz, primacy is given to the doing, not the doer. Agency appears as the result rather than a source of improvising musicking. Working with what is at hand in the concrete situation: hence the ‘‘worldmaking’’ power of jazz, an art which, in staging a world, frames an indefinite number of ‘‘possible worlds’’ too [3, p. 30ff].

There is a tension between improvisation and citation, between spontaneous responses and convention, between invention and heteronomy. It is this kind of social and objective tension that makes the dominant Subject lose his power. When individuality appears in a performance, it always indicates ‘‘a Self related to others’’ [48, p. 218], singularity is shown in taking shape as a moment of the collective performing. The human subject does not disappear but is, rather, free to choose his own mode of connecting to the the others and their ‘doing’ music. Commitment, then, means to live fully up that relation, at the edge of the moment—without a ‘‘plan B’’.

So, when Hancock explains that ‘‘what you hear, is not jazz or a trumpet, you hear Miles’’, this is not to say that Davis’ art consists of constructing an expression *owning* to himself. Rather, it means that the art is in ‘‘taking the word’’ (*prendre la parole*, *das Wort ergreifen*, *prendere la parola*): in beginning to speak just at the right moment. Again, this act is not without risks and does not depend on discretion. The critical time for action, the *kairos*, results from the unfolding interaction of speaking and listening between the interlocutors, it cannot be derived from the structure of music itself. To music in jazz, it seems to me, is to take or to take up what is passing, thereby playing with forms, juggling with significations.

Jazz is the moment. A matter of possibilities, aspects, prospects, never of judgment. Hancock remembers one extraordinary moment in Stockholm in 1967, during a performance by the *Quintet*. ‘‘This night was magical’’, he recounts. ‘‘We were communicating almost telepathically’’, playing one of the group’s signature pieces, ‘‘So What’’:

> Wayne [Shorter] had taken his solo. Miles was playing and building and building, and then I played the wrong chord. It was so, so wrong. In an instant, time stood still and I felt totally shattered. Miles took a breath. And then he played this phrase that made my chord right. It didn’t seem possible. I still don’t know how he did it. But Miles hadn’t heard it as a wrong chord—he took it as an unexpected chord. He didn’t judge what I played [90].

The line between ‘right’ and ‘wrong’ depends upon our expectations. Why wouldn’t we dare to expect differently and to be surprised by unknown possibilities? There is no wrong playing, only better choices. This is why one *must* follow the beat. There is always the possibility to transgress. But only who is sensitive to rules will be able to break them. Rules do not cut off, rules *support possibilities*. The interaction of ‘voices’ enables one, as Edward M. Said put it, to develop an attitude of ‘‘moving from one domain to another, the testing and challenging of

limits, the mixing and intermingling of heterogeneities, cutting across expectations [93, p. 55].

If in the illustrated sense jazz means ‘‘making oneself understood by anyone’’, would it be too much to recommend it as critical model for speaking democratically of democracy, namely speaking ‘‘on the subject of democracy in an intelligible, univocal, and sensible fashion’’ [94, p. 71]?

4 Conclusion: Towards a Different Sense of the Law

Our considerations here were not aimed at constructing a bridge towards art by discovering elements of law within works of art or stylising modern law as art. Aesthetic experience is not limited to art. Throughout this paper I did not recommend jazz, or music in general, as a metaphor [95] or a model for juridical practice, but tried to show analogies between different *languages*, considering music, the least denotative of the arts, as a ‘‘parallel practice’’. The general question has been what (scientific)’’thinking through concepts’’ eventually could learn from aesthetical ‘‘thinking through perceptions’’. In concluding I will return to this question and will delineate some points concerning legal discourse.

Facing the global political economy in which power, law and justice are interwoven, the theory of law as a discipline can not continue to rely on its classical conceptions centred on state, science and rule and elude to tackle the problems of non juridical normativities. Instead of delegating this question to philosophy and other disciplines, it will have to propose an own vision of the world society in which take place juridical practices of any kind. Today, a map of legal exposure, risk, and opportunity is part of the basic toolkit for political and economic actors operating transnationally [3]. Contemporary law has become a powerful strategic tool for people struggling for advantage on the global stage [9]. But law theories, in addressing the role of law at the global level, ‘‘rarely reflect on the law as an instrument of distribution or cause of inequality’’ [26, p. 218].

To attain a new sense of law, juridical phenomena have to be explored and described by means of aesthetics. Structurally open to diversity and differences, a new view will not propose a new ‘‘order’’, which is to say the closed world of an universal system, but the pluriverse of artistic ‘‘compositions’’ or assemblages [45, p. 242]. Perhaps, law will be considered an imago. Used as a term in the sense of Freudian psychoanalysis, imago does not simply mean an unconscious representation, but ‘‘il faut y voir, plutot qu’une image, un scheme imaginaire *acquis,* un cliche statique a travers quoi le sujet vise autrui. L’imago peut donc aussi bien s’objectiver dans des *sentiments* et des *conduites* que dans des *images*. Ajoutons qu’elle ne doit pas etre comprise comme un reflet du reel, meme plus ou moins deforme’’ [96, p. 364, my italics]. The *imago* is a three-dimensional form that conditions our understanding of the world and the place and role of the others in it. It is prior to, or, at any rate, is prior to theoretic understanding, as it is to symbolic articulation, and necessary to both. It provides an elementary sense of what communities are like. ‘‘It does create units—units of discourse which are fundamental to all thinking and doing, units of feeling around which emotions of loyalty and assurance can cluster’’ [97, p. 67].

At any rate, a theory of law will no longer conjure unreal things out of concepts and into the world. Rather, it will elaborate on its own idea of liberty and responsibility as expressions of diversity, allowing of the possibility that the language of responsibility does not mark a homogeneous practice and concept, but rather that it marks a variegated and heterogeneous set of practices and concepts. Thus it will do the step from a hermeneutics of jurisdictions to a hermeneutics of the good life. In this transition, the lesson learned from improvisation in jazz

might make the difference. As we saw, improvisation is not about mere contingency, it is about creative responses to contingent events, about being able to relate them to a general 'law'—certainly not by ''subsuming'' events under rules, but by citing the 'law' to mark an event as its transgression. As such incisions on the surface of events must be evidenced as emerging from performances, there will be need for an appropriate semiotics.

Finally, if needs be, theory will reflect on a *cluster theory* of law. But this will not be a stopgap solution. Rather, it will correspond to the methodical requirement to become *contextual*, *concrete* and *modest*. Becoming contextual and concrete means doing the kind of ''field work'' that, as John Austin more than half a century ago predicted, would ''soon be undertaken in, say, aesthetics; if only we could forget for a while about the beautiful and get down instead to the dainty and the dumpy'' [98, p. 9]. What will count then is, as in jazz, not the result, but the process of production: research and exploration, not the stock of knowledge. Becoming modest means to accept that field work as an empirical, experimental ethics to be developed by means of perceptology and on the ground of our being *touche* [99]. As that implies being able to reflectively address our own being situated in local contexts, it should lead to a way of regarding the variety of knowledge practices as a polyphony of voices commenting one upon another. Certainly, ''the double perception that ours is but one voice among many and that, as it is the only one we have, we must needs speak with it, is very difficult to maintain'' [20, p. 234]. But exactly this is today, or so it seems to me, the demand for ''speaking justice'' [25]: to set aside our local conceptions of law and politics and to take up instead a broader notion of politics as responsiveness to the material needs and human rights within world society [3, 9]. At the end, this is the field where an aesthetics of law will have to play its game. For, if democracy has to do with the direction of one's life through choices taken by the individual rather than through enforced laws, then democracy is whatever the way people live together and aesthetics is redundant. If, on the other hand, ''democracy does not exist and if it is true that ... it never will exist, is it not necessary to continue'' [94, p. 74] trying to hear and to read anew the rhythm of its heartbeat? To achieve it then, well, it is necessary to improvise, ''II faut bien improviser, il faut *bien* improviser'' [100, p. 332].

References

1. Dedek, Helge. 2010. Die Schönheit der Vernunft. (Ir-)Rationalitat von Rechtswissenschaft in Mittelalter und Moderne. *Rechtswissenschaft* 1: 58-85.
2. Authers, Benjamin. 2010. Truth in the telling: Procedure, testimony, and the work of improvisation in legal narrative. *Critical Studies in Improvisation/Etudes critiques en improvisation* 6: 1.
3. Messner, Claudius. 2016. *Orientamenti del diritto*. Napoli: Edizioni Scientifiche Italiane.
4. Radbruch, Gustav. 2003. Rechtsphilosophie (1932). In *Rechtsphilosophie*, ed. Ralf Dreier/Stanley L. Paulson, 1-193. Heidelberg: C.F. Muller.
5. Haltern, Ulrich. R. 1999. Musik (und Recht) heute. *HFR*, 111-126. http://www.humboldt-forum- recht.de/deutsch/9-1999/index.html.
6. Messner, Claudius. 2012. <Living> law: Performative, not discursive. *International Journal for the Semiotics of Law - Revue internationale de Semiotique juridique* 25 (4): 537-552.
7. Moller, Kolja. 2015. Rechtskritik und Systemtheorie. In *Systemtheorie und Differenzierungstheorie als Kritik. Perspektiven im Anschluss an Niklas Luhmann*, ed. Albert Scherr, 186-210. Weinheim/ Basel: Beltz.

8. Menke, Christoph. 2010. ‘Ästhetisierung’. Zur Einleitung. In ‘‘Ästhetisierung’’. *Der Streit um das Ästhetische in Politik, Religion und Erkenntnis,* ed. Ilka Brombach/Dirk Setton/Cornelia Temesvari, 17-22. Zürich: diaphanes.
9. Darian-Smith, Eve. 2013. *Laws and societies in global contexts: Contemporary approaches*. Cambridge: Cambridge UP.
10. Coombe, Rosemary J. 2001. Is there a cultural studies of law? In *A companion to cultural studies*, ed. Toby Miller, 36-62. Cambridge: Blackwell.
11. Fischer-Lescano, Andreas. 2015. Soziologische Rechtsasthetik. *Nach Feierabend, Zurcher Jahrbuch fur Wissensgeschichte,* 31-59.
12. Viola, Francesco. 2015. Il diritto come arte della convivenza civile. *Rivista di Filosofia del diritto* 4 (1): 57-74.
13. Eco, Umberto. 2003. Dire quasi la stessa cosa. Esperienze di traduzione. Milano: Bompiani.
14. Kramer, Sybille. 2001. *Sprache, Sprechakt, Kommunikation. Sprachtheoretische Positionen des 20. Jahrhunderts*. Frankfurt: Suhrkamp.
15. Vesting, Thomas. 2010. Legal theory as media theory: Reflections on the necessity of linking theory of language and media theory. *Ancilla iuris* (anci.ch), 47-88.
16. Gumbrecht, Hans Ulrich, and Karl L. Pfeiffer. 1995. *Materialität der Kommunikation.* Frankfurt: Suhrkamp.
17. Gaut, Berys. 2000. ‘Art’ as a Cluster Concept. In *Theories of art today,* ed. Noel Carroll, 25-44. Madison: Wisconsin UP.
18. Fish, Stanley. 1989. *Doing what comes naturally. Change, rhetoric, and the practice of theory in literary and legal studies*. Durham London: Duke UP.
19. MacIntyre, Alasdair. 1981. *After virtue. A study in moral theory*. Notre Dame: Notre Dame UP.
20. Geertz, Clifford. 1983. *Local knowledge*. New York: Basic Books.
21. Legnaro, Aldo, and Astrid Aengenheister. 1999. *Die Aufführung von Strafrecht: Kleine Ethnographie gerichtlichen Verhandelns*. Baden-Baden: Nomos.
22. Bellucci, Patrizia. 2002. *A onor del vero. Fondamenti di linguistica giudiziaria*. Torino: UTET.
23. Peterson, Jeremy. 2007. Unpacking show trials: Situating the trial of Saddam Hussein. *Harvard International Law Journal* 48 (1): 257-292.
24. Auslander, Philip. 2008. *Liveness: Performance in a mediatized culture*. London: Routledge.
25. Nicholls, Tracey. 2010. Speaking justice, performing reconciliation: Twin challenges for a postcolonial ethics. Critical *Studies in Improvisation/Etudes critiques en improvisation,* 6 (1).
26. Kennedy, David. 2016. *A world of struggle: how power, law, and expertise shape global political economy*. Princeton: Princeton UP.
27. Somek, Alexander. 2006. *Rechtliches Wissen*. Frankfurt: Suhrkamp.
28. Bung, Jochen. 2010. New Approaches to Legal Methodology. *Ancilla iuris* (anci.ch), 1-14.
29. Nowotny, Helga. 2003. Dilemma of expertise. Democratising expertise and socially robust knowledge. *Science and Public Policy* 30 (3): 151-156.
30. Schlag, Pierre. 2002. The aesthetics of American law. *Harvard Law Review* 115 (4): 1047-1118.
31. *Aesthetics and Ideology*, ed. George Levine. New Brunswick: Rudgers UP, 1994.
32. Scheible, Hartmut. 1988. *Wahrheit und Subjekt. Ästhetik im burgerlichen Zeitalter.* Reinbek: Rowohlt.

33. Deleuze, Gilles. 1953. *Empirisme et subjectivite.* Paris: PUF.
34. Andina, Tiziana. 2012. Realismo in ontologia, idealismo in arte. Una tensione mortale. *Methode 1* (1), 29-45. http://www.methode.unito.it/methOJS/index.php/meth/index. Accessed 9 June 2014.
35. Messner, Claudius. 2004. Icaro, per esempio. La sofferenza e l'immagine. *Sociologia del diritto* XXXI (3): 57-76.
36. Manderson, Desmond. 2000. *Songs without music: Aesthetic dimensions of law and justice*. Berkeley, CA: California UP.
37. Latour, Bruno. 1993. *We Have Never Been Modern*. Harvard UP (or. *Nous n'avons jamais eetee modernes*, Paris 1991).
38. Brunello, Mario, and Gustavo Zagrebelsky. 2016. *Interpretare: Dialogo tra un musicista e un giurista*. Bologna: Il Mulino.
39. Eco, Umberto. 1970. *Il problema estetico in Tommaso d'Aquino*. Milano: Bompiani.
40. Thornhill, Chris. 2007. *German political philosophy. The metaphysics of law*. London: Routledge.
41. Chanan, Michael. 1999. *From Haendel to Hendrix: The composer in the public sphere*. London: Verso.
42. Danto, Arthur C. 2000. Art and Meaning. In *Theories of art today,* ed. Noel Carroll, 130-140. Madison, WI: Wisconsin UP.
43. Ferraris, Maurizio. 1997. *Estetica razionale*. Milano: Cortina.
44. Nancy, Jean-Luc. 2014. Quand le sens ne fait plus monde. *Esprit*, 3-4.
45. Deleuze, Gilles, and Felix Guattari. 2000. Was *ist Philosophie? Frankfurt: Suhrkamp (original publication: Qu'est-ce que la philosophie?*, 1991. Paris: Minuit.
46. Wittgenstein, Ludwig. 1977. *Philosophische Untersuchungen*. Frankfurt: Suhrkamp.
47. Weber, Max. 1921. *Die rationalen und soziologischen Grundlagen der Musik* (1911). München: Drei-Masken-Verlag. http://www.zeno.org/nid/20011440767.
48. Diederichsen, Diedrich. 2014. *Uber Pop-Musik.* Köln: Kiepenheuer & Witsch.
49. Ponzio, Augusto, and Susan Petrilli. 2008. *Lineamenti di semiotica e di filosofia del linguaggio*. Bari: B.A. Graphis.
50. Dalhaus, Carl. 1983. *Foundations of music history*. Cambridge: Cambridge UP.
51. Martinet, Andre. 1984. Double articulation as a criterion of linguisticity. *Language Sciences* 6 (1): 31-38.
52. Levitin, Daniel. 2008. *The world in six songs: How the musical brain created human nature*. New York, NY: Dutton/Penguin.
53. Small, Christopher. 1998. *Musicking: the meaning of performing and listening*. Hanover, N.H.: New England UP.
54. Baxandall, Michael. 1972. *Painting and experience in fifteenth century Italy*. London: Oxford UP.
55. Kaduri, Yael. 2006. Wittgenstein and Haydn on Understanding Music. *Contemporary Aesthetics*, 4. http://www.contempaesthetics.org. Accessed 10 May 2014.
56. Worth, Sol. 1975. Pictures Can't Say Ain't. *Versus. Quaderni di studi semiotici*, 85-108.
57. Lyotard, Francois. 1973. *Derive a partir de Marx et Freud.* Paris: Union generale d'editions.
58. Nancy, Jean-Luc. 2008. *Noli me tangere: on the raising of the body*. New York, NY: Fordham UP.
59. Blumenberg, Hans. 2001. Licht als Metapher der Wahrheit. Im Vorfeld der philosophischen Begriffsbildung (1957). In *Ästhetische und metaphorologische Schriften,* ed. Anselm Haverkamp, 139-171. Frankfurt: Suhrkamp.

60. Laborde, Denis. 2009. Faire la musique. *Äppareil*, 3. doi:10.4000/appareil.850.
61. Le Guin, Elisabeth. 2006. *Boccherini's body: Än essay in carnal musicology*. Berkeley, CA: California UP.
62. Sibley, Frank. 1959. Aesthetic concepts. *Philosophical Review* 68 (4): 421-450.
63. Messner, Claudius. 2014. Luhmann's Judgment. In *Special issue Luhmann*, ed. C. Messner, *International Journal for the Semiotics of Law - Revue internationale de Semiotique juridique* 27 (2), 359-387.
64. Satta, Salvatore. 1994. Il mistero del processo (1949). In *Il mistero del processo*, 11-37. Milano: Adelphi.
65. Bourdieu, Pierre. 1987. The force of law: Toward a sociology of the juridical field. *Hastings Law Journal* 38 (5): 814-853.
66. Dell'Anna, Maria V. 2013. *In nome del popolo italiano. Linguaggio giuridico e lingua della sentenza in Italia*. Roma: Bonacci.
67. White, James B. 1985. *Heracles' bow: Essays on the rhetoric and poetics of the law*. Madison, WI: Wisconsin UP.
68. Kramer, Sybille. 1998. Sprache-Stimme-Schrift: Sieben Thesen über Performativitat als Medialitat. *Paragrana* 7 (1): 33-57.
69. Christensen, Ralph/Kent D. Lerch. 2005. Performanz. Die Kunst, Recht geschehen zu lassen. In *Recht vermitteln - Strukturen, Formen und Medien der Kommunikation im Recht* (Die Sprache des Rechts, vol. 3), ed. Kent D. Lerch, 55-132. Berlin New York: De Gruyter.
70. Fischer-Lichte, Erika. 2008. *The Transformative Power of Performance. Ä new aesthetics*. Abingdon New York: Routledge (or. *Ästhetik des Performativen*, Frankfurt 2004).
71. Dennis, James L. 1993. Interpretation and application of the civil code and the evaluation of judicial precedent. *Louisiana Law Review* 54: 2-19.
72. Hart, Herbert L.A. 1961. *The concept of law*. Oxford: Clarendon.
73. Jasanoff, Sheila. 2003. Technologies of humility: Citizen participation in governing science. *Minerva* 41: 223-244.
74. Messner, Claudius. 2004a. Observing victims. Global Insecurities and the Systemic Imagination of Justice in World Society. In *Imaginary Boundaries of Justice. Social Justice across Disciplines*, ed. Ronnie Lippens, Oxford Portland: Hart, 185-202.
75. Cover, Robert M. 1983. The supreme court: Foreword—nomos and narrative. *Harvard Law Review* 97 (4): 4-68.
76. Sebeok, Thomas A. 1991. *Ä sign is just a sign*. Bloomington: Indiana UP.
77. Simon, Josef. 1989. *Philosophie des Zeichens*. Berlin New York: de Gruyter.
78. Foucault, Michel. 1986. Sex als Moral. Gespräch mit H. Dreyfus und P. Rabinow. In *Von der Freundschaft. M. Foucault im Gesprach,* 69-84. Berlin: Merve.
79. Foucault, Michel. 1980. Le philosophe masque. *Dits et Ecrits,* vol. IV, text n. 285.
80. Messner, Claudius. 2011. Subjectivation as Problem and Project. Is there an Existentialist Motif in Foucault? In *Crime, Governance and Existential Predicaments*, ed. James Hardie-Bick and Ronnie Lippens, 36-60. Basingstoke: Palgrave Macmillan.
81. Gioia, Ted. 2006. *The history of Jazz*. Oxford: Oxford UP.
82. Kunzler, Martin. 2005. *Jazz Lexikon*. Berlin: Directmedia.
83. Caporaletti, Vincenzo. 2015. Razionalita dell'improvvisazione - Improvvisazione della razionalita. *Itinera* 10: 189-215.
84. Gioia, Ted. 2007. *L'arte imperfetta. Il Jazz e la cultura moderna.* Milano: excelsior1881 (or. *The Imperfect Art*, New York 1988).
85. de Groot, R. 2010. Music at the limits: Edward Said's musical elaborations. In *How the West Was Won: Essays on Literary Imagination, the Canon, and the Christian Middle Ages for*

Burcht Pranger, ed. Willemien Otten/Arie Vanderjagt/Hent de Vries, 127-45. Leiden: Brill.
86. De la Motte, Diether. 1991. *Il contrappunto*. Milano: Ricordi.
87. Wolff, Christian. 2000. *Johann Sebastian Bach*. Frankfurt: Fischer.
88. Landgraf, Edgar. 2014. *Improvisation as art: Conceptual challenges, historical perspectives*. New York: Bloomsbury.
89. Mertens, Wim. 1983. *American minimal music*. London: Kahn & Averill.
90. Hancock, Herbie. 2014. The Ethics of Jazz, Set 1: The Wisdom of Miles Davis, Set 2—Breaking the Rules. *The 2014 Norton Lectures*, Cambridge, MA: The Mahindra Humanities Center at Harvard University. http://mahindrahumanities.fas.harvard.edu/content/norton-lectures. Accessed 9 June 2014.
91. Foucault, Michel. 2003. *L'ermeneutica del soggetto. Corso al College de France (1981-1982).* Milano: Feltrinelli (or. *L'hermeneutique du sujet,* Paris 2001).
92. Ramshaw, Sara. 2013. *Justice as improvisation: The law of the extempore*. London: Routledge.
93. Said, Edward W. 1991. *Musical elaborations*. New York: Columbia UP.
94. Derrida, Jacques. 2005. *Rogues. Two essays on reason*. Stanford: Stanford UP.
95. Bucholtz, Barbara. 2003. On canonical transformations and the coherence of dichotomies: Jazz, jurisprudence, and the University Mission. *Univ. Richmond Law Review* 37: 425-469.
96. Laplanche, Jean/Jean-Bertrand Pontalis. 1967. *Vocabulaire de la psychanalyse*. 7th edition 1981. Paris: PUF.
97. Walzer, Michael. 1992. On the Role of Symbolism in Political Thought (1967).In *The Self and the Political Order*, ed. Tracy B. Strong, 64-76. London: Blackwell.
98. Austin, John L. 1956-57. A Plea for Excuses. *Proceedings of the Aristotelian Society*, *New Series*, 57, 1-30.
99. Derrida, Jacques. 1998. Le *toucher, Jean-Luc Nancy.* Paris: Galilee.
100. Derrida, Jacques. 2004. Play: The first name. *Genre* 36: 331-340.