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The Creative Life of Law: Improvisation, Between Tradition and Suspicion

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Originally applying solely to chefs, waiters, dishwashers and the like, New York City (NYC) regulations governing cabaret employees were altered in 1943 to include musicians and entertainers who, until the late 1960s, would be required to hold a NYC Cabaret Employee's Identification Card. The introduction of these notorious "police cards" occurred roughly contemporaneously to the emergence in after-hours night clubs in Harlem of a new and supposedly "wild," improvisatory brand of jazz: bebop. This article adds, to the many rather practical theories on why these cards were introduced, a more abstract discussion coined in terms of the relationship between suspicion and tradition, focusing on differing essences of law and improvisatory jazz. While law breathes tradition and is suspicious of improvisation and unpredictability, the converse is true of jazz. Allusion to tradition in jazz improvisation is often viewed as a betrayal¹ of its creative and spontaneous nature. And yet it is only through its departure from the stable transmission of past meaning that improvisation gains meaning. Law, in contrast, while appearing to be entirely composed of tradition, is constantly betraying itself in order to transmit some sort of determinate and fixed meaning. As no two legal actions can be exactly the same, judges must improvise on tradition and past precedent every time they are asked to decide a case. Law can thus neither dispense with nor be completely determined by tradition. The legal decision instead lies on the border between what it "is" and what it otherwise could be (Fitzpatrick 89), and every judicial act is, in some sense, a species of improvisation. This article uses the cabaret cards to explore this uncertain terrain between law and improvisation, between tradition and suspicion.

The Rise and Reform of the NYC Cabaret Cards

When jazz first became popular in NYC in the early 1900s, it was considered a "naughty novelty" (Chevigny 40). White patrons would flock to a row of clubs in Harlem dubbed "Jungle Alley" to listen to "jass" bands (the word "jass" referred to sexual intercourse (40) or orgasm² (Taylor 43)). They came to listen to the "'hot' and 'barbaric' jazz" and "risqué lyrics," and to watch the "'junglelike' dancing" of the cabaret floorshows (Anderson 139). The "legend of Harlem by night—exhilarating and sensuous, throbbing to the beating of drums and the wailing of saxophones" (Lloyd Morris, qtd. in Anderson 139-140)—beckoned white people Uptown "with a shiver of adventure" (Chevigny 40-41). They perceived themselves to be abandoning the restraints of respectability, a perception that was intensified by the fact that Harlem clubs were some of the few places in the segregated United States where people of different races could mix (41).

In late 1926, the Board of Aldermen of NYC determined that there was "altogether too much running 'wild'" in these clubs, and that action needed to be taken. According to the Minutes of the 7 December 1926 committee meeting on local laws,

These night clubs or cabarets are simply dance halls, where food is served at exorbitant prices to the tune of jazz and tabloid entertainments. A very frank opposition was voiced by one of the licensees, on the ground that when strangers came to New York they wanted to "run wild." Well, there has been altogether too much running "wild" in some of these nightclubs and, in the judgment of your Committee, the "wild" stranger and the foolish native should have the check-rein applied a little bit. It is well known that the "wild" strangers are not all interested in our great museums of art and history, in our magnificent churches and public libraries, our splendid parks and public monuments. They are interested in speak-easies and dance halls and return to their native heaths to slander New York.

Your committee believes that those "wild" people should not be tumbling out of these resorts at six or seven o'clock in the morning to the scandal and annoyance of decent residents on their way to daily employment.

Favorable action is recommended. (Municipal Assembly 572; see also Chevigny 55-56)

Action came in the form of Local Law No. 12, enacted on 12 December 1926. The NYC cabaret licensing laws soon followed, coming into effect on 1 January 1927 (*The People v. Greenberg and Slevin*³ 399) and defining cabarets as "any room, place or space in the city in which any musical entertainment, singing, dancing or other similar amusement is permitted in connection with the restaurant business or the business of directly or indirectly selling to the public food or drink" (s. 1(a)).

In 1931, control of the cabaret laws was transferred from the NYC Licensing Bureau to the New York Police Department (NYPD) Division of Licenses.⁴ The transfer of authority from the Licensing Bureau to the NYPD was

justified in terms of the “certain evils that flourished in and followed the prohibition era” (*Friedman v. Valentine*⁵ 439). In order to control these so-called “evils,” police began fingerprinting applicants for cabaret licenses (i.e., owners). However, according to Justice Pecora in the 1941 case of *Friedman v. Valentine*, “simply fingerprinting such applicants did not give the police the adequate means to prevent crimes by and with employees, steerers and operators of so-called ‘clip joints,’ nor to apprehend the perpetrators” (440). Further restrictions were said to be needed. These came in the form of the NYC “police cards,” first introduced in 1940.

According to Cohen, on 20 June 1940, the Police Commissioner created—“not by statute or by ordinance or by legislative authority”—the NYPD Cabaret Rules and Regulations, which provided “control over employees by means of the unlawful and oppressive Cabaret Employee’s Identification Card” (*The Police Card* 18, emphasis in original). This system of regulation enabled police to fingerprint and photograph people who worked in licensed places and to issue identification cards, “denying the cards to people they thought were not of good character” (Chevigny 57-58).⁶

Having initially escaped regulation, musicians and performers were added to those employees covered under the Cabaret Employee’s Identification Card system of regulation in 1943. Upon their inclusion in the system, jazz musicians became its “most vulnerable victims” (Cohen, *The Police Card* ix). Musicians were required to have their cards on file with the nightclub owners during the time they were employed at a cabaret club, and the owners had to “enter the card number into a book that [was] kept for police inspection” (Hoefer 7; see also Cohen, *The Police Card* xiv). It became unlawful for a club to hire a person who did not have a so-called “police card,” and cards were denied to anyone with a criminal record, regardless of how petty or distant the crime (Nicholson 167).

Not only was the cabaret card system degrading to the musicians, it was also conducted in an atmosphere of “petty graft, corruption and personal influence” (167). Musicians applying for a card were often sent next door to a photo studio to pay for an identification photo—even if they had brought their own picture. Some musicians who were denied cards at first, usually because of past drug offences, found they could hire a lawyer and eventually obtain a card (Chevigny 61). However, many had neither the money nor adequate knowledge of the system to fight the problem. Others, such as Billie Holiday,⁷ were rumoured to have had their appeals continually denied because of their political commitment to desegregation (Gomez 197 fn 7). The irony of this system was that artists denied a cabaret card could still perform in theatres, Central Park and, as Holiday later demonstrated, the nation’s foremost stage, Carnegie Hall (Nicholson 167).

In the late 1950s, the “clamor” (Chevigny 61) against the “police cards” increased.⁸ Following the untimely death of comedian Lord Buckley, who was denied a cabaret card and the ability to work in NYC for several weeks due to a nineteen-year-old conviction for public drunkenness, the Citizens’ Emergency Committee (CEC) was formed in November 1960 in order to put an end to the card system once and for all (62). The CEC charged the NYPD with corruption and argued that “many performers were forced to pay bribes to maintain the cabaret cards, without which they are not supposed to work” (Carr 1).

A petition was drafted by the CEC and sent to Governor Rockefeller by telegram on 15 November 1960 asking for an overall investigation of the NYPD. The committee asked the governor to “appoint a special authority to examine ‘the effect of any illegal activity’ among the department’s ‘present and former personnel’” (Gelb, “Charges of Police Corruption” 1; see also Gelb, “City Will Study” 1; Gelb, “Inquiry on Police” 44). Governor Rockefeller directed that a report be filed by Mayor Wagner; in turn, Wagner directed Commissioner of Investigation Louis I. Kaplan to conduct a “sweeping investigation of charges of police corruption” (Gelb, “City Will Study” 1). He was ordered to “‘check every phase’ of the situation,” focusing first and foremost on the police department’s licensing of cabaret employees (1).

The police responded to this investigation with a “commando type raid” on more than twelve hundred cabarets in NYC (“Cabaret Card Situation Simmers” 11). According to an article in *Down Beat* magazine, “[f]ar from becoming more lenient in the handling of the card cases, the New York police cracked down with severity, as if resenting the challenge to their rule over a major slice of the entertainment world” (11). The raids, which were staged the weekend before Thanksgiving 1960, produced 114 violations; 20 court summonses were recorded and issued (11). The punishment for any violation was a four-day suspension, which meant that violating clubs were shut down over the holiday weekend (11; see also Perlmutter, “City Lifts Permits” 21). The raids, claimed Counsel for club owner Jack Silverman of the International Theatre Restaurant, were “not based upon reason or violation of law but upon anger and retaliatory measures” (qtd. in Peluso and Lee 3).

In his report to Governor Rockefeller, Mayor Wagner denied that there was any evidence of police corruption in the issuance of cabaret cards to entertainers and other employees. However, he did agree to have the regulations changed to permit employees to be awarded permanent identification cards provided they did not violate the law. Moreover, it was recommended that applicants be able to obtain their cards and be fingerprinted and photographed at a more convenient locality for musicians and entertainers—the midtown theatrical area (Hoefer 20)—and “at a place not associated with other police activities” (Perlmutter, “Mayor to Relax” 1). In light

of these recommendations, identity cards were made permanent in 1961 and the administration of the system was transferred back to the Department of Licences, away from the NYPD, at a location far more convenient for musicians and performers (Chevigny 64).

Notwithstanding these changes, the cabaret card system remained in place—at least until John Lindsay came into office as mayor of NYC in 1966. According to Chevigny, “[Lindsay] and his cohorts sought to make New York ‘Fun City,’ partly no doubt to encourage the tourist trade, but also because they were less suspicious of fun, and of the diversity of the city” (Chevigny 67). Mayor Lindsay determined that the “hated fingerprinting” would first be eliminated, followed by the card system more generally (67). This elimination proved unexpectedly easy, as Chevigny explains:

After trying to get the City Council to pass a bill to abolish fingerprinting, the administration realized that none was needed. The fingerprinting had begun as the result of an administrative decision in 1940, and could be ended the same way; Mayor Lindsay simply ordered it to be ended. That somehow broke the spell of fear of wicked comedians and musicians; the rest was simple. . . . When the bill to ratify the mayor’s action by eliminating the licensing of club employees came up in the City Council, the License Commissioner scoffed at the notion . . . that the safety of the public is served by a system which presupposes a need to be suspicious of everyone, from top-flight artists [to] go-go girls and bartenders, and require them to submit to the indignity of a police-like check. (67)

The bill to end the cabaret card system of regulation passed with only one vote in opposition (67). It was lauded as a victory for musicians and performers: no longer would the fingerprinting requirement keep entertainers from working in NYC.⁹

The Tradition of Suspicion

Many have over the years speculated on the aim and purpose of these cabaret cards. Originally applying solely to the chefs and waiters working in cabaret clubs, some have argued that the “police cards” came into existence for completely different reasons than crime protection and control (Cohen, *The Police Card* 18) and were “directed as a political weapon at the presumed [Communist] leadership of the Joint Board of Waiters and Chefs Union” (Cohen, “Affidavit” 13; see also Cohen, *The Police Card* 19-20; Peretti 115; Nicholson 167; and Kelley 65).

In 1941, Samuel Friedman, President of the New York Joint Board of the Hotel and Restaurant Employees International Alliance and Bartenders International League of America, brought an application to the Supreme Court of New York for an order to restrain the enforcement of police regulations requiring employees of cabarets to be fingerprinted. The pleadings indicated that the primary concern of the unions was the issue of fingerprinting, along with certain violations of labour rights. Inferentially, argues Cohen, “due to the climate of that time (1939-1941),” there must also have been concern that the police department’s new rules and regulations regarding cabaret employees were “politically undemocratic procedures” (Cohen, *The Police Card* 19). In petitioner Friedman’s Brief, it states, “we respectfully urge upon the Court the fact that fingerprinting and identification cards are part of an internal passport system which does not comport with the American way of life, and which infringes upon the fundamental rights of liberty which only the sovereign state, acting under the police power, may abrogate for good cause shown” (qtd. in Cohen, *The Police Card* 19). Also inferred was that these rules and regulations were simply “a ruse to prepare a labor black-list and a means to bar union organizers from the field of operations” (20). They were, in other words, viewed as being “politically motivated and not a crime deterrent” (20).

Justice Pecora, deciding the case solely on affidavit evidence, held that the cabaret card system was necessary to “purg[e] the business of unfit elements” and to “aid effectively in the solution of crimes or offenses peculiarly connected with the operation of cabarets” (*Friedman v. Valentine* 440). He found that the “Petitioners have failed to show that the regulations under attack are not justified by conditions existing in the cabaret industry” (441).¹⁰ Moreover, the judge maintained that “positive and convincing reasons for such regulations” were in fact “common knowledge” (441).

The reasons behind the decision to later include musicians and performers under the regulations are unclear. Admittedly, there “was some underworld involvement in running the clubs” (Chevigny 59). Nonetheless, the “nexus between crime and the musicians and other entertainers was entirely symbolic” (59). Chevigny explains,

Neither the news reports nor the cases reveal a single instance during the entire controversy when anyone, whether from the police or any other source, claimed that a musician, or any entertainer, was denied a card because he had committed a crime in or even close to a club.

The cards were invariably denied because of a past criminal record, often for narcotics offenses. (59)

It has thus been argued that the addition of musicians to the list of employees requiring cabaret cards was in fact a “racist impulse to control the supposedly degrading abandon of black music” (59) and that, through the cards, the NYPD was attempting to “stomp out the ‘threat’ of the wild, rhythmic sounds of jazz, and to curtail the intermixing of blacks and whites in Harlem jazz clubs” (Miller).

The above claim is supported by the fact that, at the same time musicians were required to obtain a “police card,” cooks and dishwashers were deemed to no longer require regulation (Cohen, *The Police Card* 19; see also Hoefer 6). The rationale for the removal of the latter was that kitchen staff “did not come into *direct* contact with the public” (Hoefer 6, emphasis in original). Thus, it appears the cabaret laws looked less to crime control and more to the regulation of intimacy and the prevention of “any close contact between the audience and the seductive art [of jazz]” (Chevigny 60). This view was supported by a Press Release offered by the Citizens Union on 12 December 1960: “Intimacy is encouraged by the crowding, the drinking, the music and the dim lights. In such surroundings, a shady character can make hay while the sun is not shining. Because of these special circumstances, it is fair to put cabarets and dance halls in a class by themselves for regulatory purposes” (Citizens Union 2-3; see also Chevigny 65).

The fear of intimacy between audience and musician relates back to the description of jazz offered above as “wild” and morally unsound. When jazz music was first introduced to the Western public in the early 1900s, it “evoked a loud moral outcry” (Leonard inside flap). Many saw it as a “reversion to savagery” (inside flap), as “wild and immoral” (Chevigny, qtd. in Weinberg). Jazz, it was said, “not only undermined the morality of susceptible young people, but also threatened all civilization, which, if the jazz age continued unchecked, seemed doomed to barbarism” (Leonard 29).¹¹ It was viewed as being “full of *wild* excesses and formlessness, totally lacking in restraint and discipline” (32, emphasis added).

To the white socialites who lived downtown, Harlem, the hub of jazz in NYC, “seemed to embody the primitive and thrilling qualities,” which “represented a blend of danger and excitement” (Haskins 20). Haskins claims that “[t]he exotic jungle rhythms gave intimations of sensuality beyond the wildest fantasies of the sons and daughters of proper New York society. . . . Harlem was an adventure; Harlem was the unknown; and Harlem became a fad” (20-21). To quote Langston Hughes,

The Negro was in vogue, and in Harlem the speakeasy took on a new dimension. White downtowners invaded Harlem to observe the blacks at play, “flooding the little cabarets and bars where formerly only colored people laughed and sang, and where now the strangers were given the best ringside tables to sit and stare at the Negro customers—like amusing animals in a zoo.” (qtd. in Haskins 21)

Dubbed the “Montmartre of America” (Erenberg 256), Harlem became the place to visit “[i]f one were looking ‘to go on moral vacation,’ or wished to soften the ‘asperities of a Puritan conscience’” (Osofsky 185).

Jazz became the sound of “wild” sexuality, of “primitive rhythms which excite the basic human instincts” (Sousa, qtd. in Leonard 33), and was deemed the music of “man’s ‘lower nature,’ the carnal” (33). The association between jazz, “wildness,” and sexuality was allegedly inspired by Freud’s work on the “repression presumed endemic to Western civilization” (Ogren 146). In keeping with the “Freudian underpinnings of the cult of primitivism” (156), many 1920s artists and intellectuals “invested primitive cultures with ‘uncivilized’ virtues—particularly sexual freedom” (146). Thus, Harlem jazz came to be seen as “an attempt to reproduce the marvellous syncopation of the African jungle” (qtd. in Ogren 146), and “curious whites” would travel uptown to “safely watch the primitives perform their rites in their native habitat,” hoping that “by merely looking on they could revitalize their own sexually pale lives” (Ostransky 218).

This “white celebration of ‘primitivism’” (Ogren 146) was reflected in the decor of many Harlem clubs, especially those that catered specifically to white downtowners, or “slummers” (Haskins 57), as they were called. The Cotton Club,¹² for example, had a “jungle décor,” complete with “numerous artificial palm trees” (33). Its floor shows, recalls Lena Horne, “had a primitive, naked quality that was supposed to make a civilized audience lose its inhibitions. The music had an intensive, pervasive rhythm—sometimes loud and brassy, often weird and wild. The dances were eloquently provocative; and if they were occasionally stately, that stateliness served only to heighten their abandon” (qtd. in Anderson 175; also qtd. in Chevigny 40). For the white audience,¹³ the music had the desired effect of “conjuring up tribal warriors and man-eating tigers and war dances” (Haskins 50). Haskins writes: “Watching and listening to the spectacle, the Cotton Club patrons could have no doubt that they were witnessing firsthand the emergence of the primal African from beneath the sequined costumes and tan skins of the performers” (50, 53). Befitting this image, the house band, originally known as the Washingtonians,

soon became “Duke Ellington’s Jungle Band,” and many of Ellington’s compositions during this time reflected the jungle motif: “Jungle Jamboree,” “Jungle Blues,” “Jungle Nights in Harlem,” and “Echoes of the Jungle” (53).

The expectation of the audience at the Cotton Club in relation to Ellington’s “jungle music” was to encounter “sounds they could not predict, sounds that would seem to them strange, exotic, primitive, guttural” (Ostransky 216). According to Ostransky, this gave Ellington “the licence to try unusual chords, timbres, sonorities (unusual, that is, in the jazz of the time)” (216-217). However, listeners (both white and black) unfamiliar “with the rhythms or the exchange of ideas in an improvised art experienced this as ‘abandonment’” (Chevigny 41-42). And, as Chevigny points out, “It turned out to be a historic misfortune that the forces of respectability identified the music with sexual abandon in a crude sense and that the purveyors capitalized on it; they played into the hands of early critics who condemned jazz as cacophonous on the one hand and insidiously immoral on the other” (42). Thus, whether or not Ellington took his “jungle music” seriously or considered it to be a “private joke,”—played with “considerable tongue-in-cheek, a high degree of put-on” (Ostransky 216)—this music worked to reproduce and reinforce the image of jazz as “wild” and savage, and would go on to “influence the work of jazzmen everywhere” (217).

By the late 1930s, Harlem nightclubs were visibly in decline. Following the race riots on 19 March 1935, which were sparked by a rumour that a black teenager was being beaten, New Yorkers no longer viewed Harlem as the “center of exotic nightlife” but saw it instead as “a dangerous slum” (DeVeaux 229). Large clubs, such as the Cotton Club, either closed or relocated downtown in and around 52nd Street (dubbed “Swing Street”). This movement downtown prompted some black musicians to “wonder whether the widely publicized dangers of wandering through Harlem at night were simply a ruse to frighten white customers away from Harlem after-hours clubs to a more convenient midtown location” (229). Whatever the reason, by the mid-1940s, “the center of gravity had gradually shifted away from Harlem to 52nd Street” (229). During that time, some Harlem clubs “remained in operation to provide the adventurous with late-night entertainment and musicians with sporadic employment” (229). It was in these after-hours clubs that a new brand of jazz found its origins, namely “bop” or “bebop.”

The Suspicion of Tradition

Developed between 1939 and 1941 in after-hours jam sessions in Harlem, NYC, bebop emerged as a “wild” and “revolutionary” music (Chevigny 45; see also Ross 257; Ellison 201; Green 39; Hughes 118). After an evening of playing in a large orchestral swing band, musicians would gather in these Harlem venues to “learn new techniques or to hear a new melodic sequence (or ‘lick’)” (Belgrad 180). Daniel Belgrad argues that the most important function of the bebop jam session was to give musicians the opportunity to practice solo improvisation, a musical technique that had little place in the performances of large swing bands (180).

Adopting the improvisational focus of the jam session, “where the paramount concern was unbroken momentum” (DeVeaux 377), bebop “radically revised the prevailing definition of jazz”¹⁴ (202; see also J. Jones 64). Characterised by an extremely fast tempo, dissonant notes, “polyrhythmic complexity,” and “irregular phrasings” (Belgrad 187), bebop was seen to be “an aggressive, esoteric music, difficult to understand or to play, and deliberately so” (Chevigny 45). It was defined ideologically as a music of “revolt”—“revolt against big bands, arrangers, vertical harmonies, soggy rhythms, non-playing orchestra leaders and Tin Pan Alley; against commercialised music in general” (Allsop 33)—and “a reaction against big-band swing” (Belgrad 185).

Bebop’s departure from the character and presentation of big band swing, and its focus on the more intimate and improvised jam session style of playing, along with other factors to be discussed below, contributed to its “separatism” (Beyer 542) from the musical and cultural tradition from which it emerged. The failure to view bebop as a continuation of the jazz tradition was partially purposive, but it also owed itself somewhat to the “vagaries of circumstance” (DeVeaux 7). The Second World War, for instance, was seen to be a factor: “youthful fans called overseas after Pearl Harbor missed out on the crucial intervening developments (the ‘gradual incorporation’ of ‘new techniques’) and failed to recognize the continuity of the new jazz style on their return” (7). Those who remained in the United States were subject not only to “wartime restrictions on materials” (Belgrad 181), but also to a recording ban which “effectively blocked the production of new recordings” (DeVeaux 7) between 1942 and 1945. Much of bebop’s “wild” and suspicious image thereby arose from the fact that these circumstances made impossible a gentle continuity or transition from big band swing to bebop.

Bebop’s transgressive and “wild” reputation was also derived in part from the musicians themselves, from their actions and attitudes, along with the music they played. Musicians such as Charlie “Bird” Parker and “Dizzy” Gillespie, for example, adopted “distinctive patterns of dress and speech,” signifying a withdrawal from “the conventions of popular American culture” and a separation from dominant American society (Beyer 542). Adding to this counterculture image was bebop’s construction in Western society as a protest against commercialism: “through the uncompromising complexity of their art, bop musicians are said to have asserted their creative

independence from the marketplace" (DeVeaux 4). Bebop, asserts Calmore, "represented a conscious step toward African and African-American music that could not be commercialized by whites" (Calmore 2152).

The heavy reliance on improvisation by bebop musicians further intensified its seeming unconventional break from the big band swing tradition. Although not all improvisation is revolutionary or innovative, and some can actually be quite traditional in nature,¹⁵ improvisation is, for the most part, positioned in opposition to tradition, and the importance of the latter "to the uniqueness of individual spontaneous expression" (Soules 276) is often ignored or undervalued. Both George Lewis and John Panish have written on the different ways of conceiving improvisation in relation to tradition. In his book, *The Color of Jazz: Race and Representation in Postwar American Culture* (1997), Panish argues that African-Americans see the tradition embedded within improvisation while white Americans simply see individualised spontaneity as devoid of collectivity and context. Similarly, but slightly less racially essentialized, George Lewis adopts the terms "Eurological" and "Afrological" to "refer metaphorically to musical beliefs and behavior that . . . exemplify particular kinds of musical 'logic'" (Lewis, "Improvised" 133). For Lewis, the "Eurological" perspective conceives improvisation as "pure spontaneity" (148), unmediated by "history or memory" (147). In contrast, the "Afrological" approach emphasises the discipline, technical knowledge, and "thorough attention to the background, history, and culture" (153) which is necessary for the creation of "good" improvisation. What both authors make evident, albeit in slightly different ways, is that individually-oriented Western society is unable or unwilling to view jazz improvisation as "something informed by tradition and mastery of its techniques" (G. Jones 91).

In contrast to the dominant view of improvisation, the "structural and thematic unities that inhere in African American culture" (Panish xvii) are emphasised by Panish through the work of Henry Louis Gates, Jr. In *The Signifying Monkey: A Theory of African-American Literary Criticism*, Gates posits the following conception of improvisation:

Improvisation, of course, so fundamental to the very idea of jazz, is "nothing more" than repetition and revision. In this sort of revision, again where meaning is fixed, it is the realignment of the signifier that is the signal trait of expressive genius. The more mundane the fixed text ("April in Paris" by Charlie Parker, "My Favorite Things" by John Coltrane), the more dramatic is the Signifyin(g) revision. It is this principle of repetition and difference, this practice of intertextuality, which has been so crucial to the black vernacular forms of Signifyin(g), jazz—and even its antecedents, the blues, the spirituals, and ragtime—and which is the source of my trope for black intertextuality in the Afro-American formal literary tradition. (Gates 63-64)

Thus, instead of privileging the individualistic elements of jazz improvisation, Gates points to the "repetition and revision" of tradition itself (Panish 81), or what Lewis would call "[t]he changing same" (Lewis, "Afterword" 163).

Far from being a "universal experimental technique" which is disengaged from any particular cultural tradition and which can be adopted and modified for one's own purposes, improvisation, for Panish, is actually "part of a specific cultural lineage" (120). In other words, improvisation is "not only a process of creation that emphasizes freedom and spontaneity," it is also "a culturally specific concept that is ineluctably connected to historical and contemporary social contexts" (123). As such, improvisation "is connected to more than simply a single person's unconscious, emotional life or creative genius" (123).

The context in which jazz improvisation takes place includes the existing musical material, which "constitutes the jazz tradition and comprises such diverse forms as blues songs, variations on pop melodies, chord progressions, intervals, scales, rhythmic patterns, and other performers' improvised solos" (125). A jazz musician puts these elements "together in different ways" in order to take his or her "place within the jazz tradition" and "establish his [or her] unique voice" (125). As Panish highlights, "In this sense, jazz playing is as much a traditional approach as it is an individual one" (125).

Tradition both limits and enables jazz improvisation. On the one hand, guardians of the canon may resist "outsider incursions" (Bucholtz 451) by "deploying elitist and formalistic standards against the innovations of the other" (452). Any departure from these standards is deemed to be outside the tradition and is viewed suspiciously as a threat or disruption to the prevailing rules. Improvisation, though, does not appear out of nowhere and, while it is often the "otherness" or spontaneity of improvisation that is privileged or sought, the improvised act can never be completely beyond or outside the law of the musical text. Improvisation, in other words, exists only in relation to an original melody, theme, or musical tradition. In the words of Charles Mingus, "[y]ou gotta improvise on *some*thin'" (qtd. in Kernfeld 119, emphasis added). To do otherwise would make its recognition as improvisation impossible. Moreover, the skill or talent of a jazz soloist is often judged by his or her ability to return, after a period of "wild" improvisation, to the original melody, to "somehow [return] to *sense* when he seemed to have unleashed mere *chaos*" (J. Jones 64, emphasis added).

Jazz improvisation is accordingly neither spontaneous nor created instinctively or by divine intervention. It is hard work, asserts Dempsey (Dempsey 789), and “there is no musical activity which requires greater skill and devotion, preparation, training and commitment” (Bailey xii). Rather than completely discounting the tradition, the “accomplished improviser” will instead react against the known to work out “the codes that connote freshness, looseness, and a feeling of spontaneity” (Gabbard 315). Such learned procedures “create a pattern so complex that we get an illusion of randomness” (Nachmanovitch 27). Often the best improvised performances come about when a “familiar number” is improvised upon, as opposed to “a wholly fresh melody” (Finkelstein 74). Musicians in the former situation “know all the nuances, the ins and outs of the old piece. They have worked it out many times, and have a base from which to go further” (74).

In light of the above, it must be acknowledged that bebop emerged out of a tradition and it was only through much “thought and study” (Marsalis, qtd. in Berliner 63) that it attained its appearance of “wild” unconventionality. As DeVaux explains, “Within its brief confines, bop musicians concentrated all that was most novel and disorienting in their new musical language. By placing it *first*—before the listener could situate the improvisation within some recognizable context—the beboppers made it impossible to hear their music as a version, a ‘jazzing,’ of some other repertory” (DeVaux 425, emphasis in original). The effect was unnerving, even to fellow professional musicians. Drummer Dave Tough describes his reaction to hearing Parker and Gillespie play for the first time on 52nd Street: “As we walked in, see, these cats snatched up their horns and blew crazy stuff. One would stop all of a sudden and another would start for no reason at all. We never could tell when a solo was supposed to begin or end. Then they all quit at once and walked off the stage. *It scared us*” (qtd. in DeVaux 425, emphasis added). Thus, compared to the large orchestral performances of the swing era big bands or any other music that was “planned and familiar” (Chevigny 50), bebop was seen as “wild” and spontaneous, frightening all who were listening to it for the first time.

The Illusion of Tradition

Where bebop musicians worked hard to mask the known and traditional elements of their music in order to appear more revolutionary and creative, the opposite can be said of the NYC “police cards”. It is not the illusion of randomness, but instead that of stability and predictability, which is privileged and sought in the legal realm; and it is the traditional, not the novel, which is placed at the forefront of any legal performance.

At the foundation of any Common Law tradition is a body of past decisions called “precedents.”¹⁶ Strict adherence to such “provides certainty” (Nitta 797), “fosters judicial economy” (798), and “encourages the public to have faith that justice will be done” (798). In its reliance upon previous legal decisions, precedent supposedly guards against the “arbitrary and capricious” and “allows citizens to arrange and conduct their affairs with stability and predictability” (798). The Common Law’s focus on a stable tradition or fixed past is said to support the values of justice and fairness by fostering impartiality through the provision of “a neutral source of authority by which judges must justify their decisions” (798) and by “limiting the actual impact that a single person has on shaping the law” (798-799). According to Nitta, “by offering a framework in which judges must decide a case, precedent minimizes the influence of personal bias or beliefs on judicial decisions and consequently promotes the public’s faith in our system of justice” (799). In stark contrast to bebop jazz, any creativity in law must thereby be masked or denied, and legal justification is almost wholly focused on a fixed tradition or on “laws previously pronounced” (810).

The Common Law’s desire for tradition and stasis is clearly evident in the case law surrounding the NYC “police cards.” As noted above, the first case to determine the constitutionality of these laws was *Friedman v. Valentine*, originally heard in 1941 by Justice Pecora of the Supreme Court of New York County and then later affirmed by the Supreme Court, Appellate Division, First Department (1943, Martin, P. J., and Townley, Dore, Cohn, and Callahan, JJ.). The Supreme Court held that, although there was no specific state or municipal law authorizing the creation of the “police cards” or any past precedent upon which the court could rely, the NYC Cabaret Employee’s Identification Card system of regulation was nonetheless justified in relation to broader determinations of legality and principles underlying the legal tradition. The specificity and novelty of the cabaret card laws, in other words, and their effect on employees of cabaret clubs, were discounted in favour of a more static, but terribly vague, notion of “good versus evil.” According to Justice Pecora, “The test of constitutionality is whether an evil exists and whether there is a logical relation between the eradication of the evil and the enactment of regulations intended to cure the condition” (441). The cabaret card regulations were therefore deemed to be a “lawful and proper exercise of power” (441) in that they could be traced to some fixed notion of controlling or ridding cabaret clubs of any unpredictable or suspicious elements.

Any improvised aspects of the “police cards,” such as their origination outside the legislative framework (as Mayor Lyndsay discovered when he tried to reform the law in 1967) and their inconsistent and unpredictable enforcement by the NYPD, were ignored or subordinated by Justice Pecora to the illusion of the wider legal tradition based on certainty, predictability, and fairness. Tradition was placed at the forefront of the decision in order to (dis)orient reasoning towards the predictable and stable—even if this stability or determinacy was itself an illusion. Once reported, the judgment became precedent and was absorbed into the tradition, thereby

determining or, in Cohen's words, "haunt[ing]" (*The Police Card* 22) all future attempts to fight the cabaret card system.¹⁷

The Tradition of Illusion

If the principal illusion of the Common Law is that precedent and tradition are its ultimate and animating forces, then it is the mystique of improvisation that comprises the tradition of illusion in jazz. Much belief is placed in the "mystical 'improvisational genius'" (Finkelstein 73) of the jazz musician as an "ego-driven mystic who is unable to describe his or her own creative process" (Lewis, "Afterword" 170). James Lincoln Collier claims that jazz musicians are themselves partially to blame for the continuing mystery surrounding improvisation. He postulates that they tend to avoid many of the technical improvisation schemes to which they could have recourse. The reason for this avoidance may be a "fear" felt by musicians that "too much conscious control will inhibit the free expression of feeling they are supposed to be exhibiting" (Collier 59). This notion that one should not talk or even think about the improvisational method has been, Collier argues, "endemic to jazz for a long time" (59). In his book, *Jazz: The American Theme Song*, he investigates why musicians are so loath to discuss their own creative process and concludes that it is because "they are afraid analysis will kill the spirit of the music" (60). "Jazz," he writes, "is supposed to be spontaneous, supposed to be a product of the feeling of the moment" (60). Thus, it is assumed, albeit incorrectly, that "if you deliberately set out to impose some sort of scheme on the music" (60-61), it will "interfere with the direct expression of feeling" (61).

That being said, much work is currently being done by musicologists and other theorists on the art and process of improvisation. Paul Berliner, for example, has written a 900-page ethnomusicology treatise on this exact topic (Berliner 1994), and Derek Bailey has examined improvisation not only in jazz but also in Indian music, flamenco, baroque, church organ music, and rock-and-roll (Bailey 1992). Kernfeld's *What to Listen for in Jazz* (1995) is also instructive on the topic of improvisation, as is Ingrid Monson's book, *Saying Something: Jazz Improvisation and Interaction* (1996). All these sources challenge the extemporary nature of improvisation and confirm that "there is far more to improvisation than meets the ear" (Berliner 3).

The Illusion of Suspicion

If jazz improvisation can never fully escape from what it transgresses, and law cannot be completely tied to precedent and the past, then the suspicion each holds in relation to tradition obscures and masks their similarities. The illusion of suspicion in both the Common Law and jazz improvisation brings law in line with jazz as a creative entity. While the jazz tradition hinges upon a denial of tradition, law's creativity depends, at least in part, on the denial of its own creativity. It is important to note, though, as Fischlin and Heble do, that "the battle over how to think improvisation is neither inconsequential nor unrelated to larger issues" (Fischlin and Heble 16). The Common Law's relationship to tradition may be a creative one, but such creativity is not always or necessarily just. To say that law improvises or has improvisational elements does not mean that legal decisions solely meant to buttress hegemonic power are improvisatory in nature (15). To be "truly improvisatory," borrowing from Fischlin and Heble, law must turn away from the "predictably manipulative and adaptive," from that which is "dictated by the self-interested goals of the imperial ideology," and "initiate something quite different" (15).¹⁸ While not all improvisation in law is just (as the story of the NYC cabaret cards attests), by recognizing and acknowledging the parallels between the tradition of illusion in law and the illusion of tradition in jazz, law is seen to lead a more creative life—one which brings us closer to the affirmation and acceptance of "otherness" and the initiation of "something quite different" in Western law and society.

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Notes

¹ From the Latin *tradere*, tradition means both "to transmit and to betray" (Zartaloudis 391; see also Fitzpatrick and Joyce).

² According to Sidney Bechet, "[j]azz could mean any damn thing: high times, screwing, ballroom. It used to be spelled jass, which was screwing" (qtd. in Green 43).

³ 74 N.Y.S.2d 803, 12 Misc. 2d 396 (1958) (NYC Mag. Ct.), Scopas M.

⁴ This move was quite “farcical,” to quote Maxwell Cohen (*The Police Card* 18), for although Prohibition was still the “law of the land,” cabarets that sold drinks to the public “had to qualify and pay licence fees to the Police Commissioner, the very official whose function it presumably was to apprehend and prosecute the law breaker” (18). Even more farcical was the fact that the Seabury Vice Inquiry had on 25 February 1932 disclosed that many members of the police force were “either active or silent partners in thousands of speakeasies” (18) and “[a] great many on the force acted as bartenders when they were supposed to be actively employed on some ‘perplexing’ criminal matter” (Lavine, qtd. in Cohen, “Affidavit” 14). In fact, on the very same day as the Seabury Vice Inquiry, a police department hearing was held involving two patrolmen, J. Quinlaven and William O’Connor, who, according to press reports, were charged with having hired a collector, Levey, to collect \$7,500 for them from 150 speakeasies every month (Cohen, *The Police Card* 18; see also Cohen, “Affidavit” 14).

⁵ 177 Misc. 437, 30 N.Y.S.2d 891 (1941), Pecora J, affirmed 42 N.Y.S.2d 593, 266 A.D. 561 (1943) (NY Sup. Ct., App. Div.), Martin, P.J., and Townley, Dore, Cohn and Callahan, JJ.

⁶ Applicants were charged a \$2 “service charge” (s. 6(l)), which was then deposited into the Police Pension Fund (s. 6(l)); cards were renewable every two years (s. 6(k); see also Chevigny 58; Cohen, *The Police Card* 1).

⁷ Holiday was denied a cabaret card after her 1947 conviction for narcotics possession (Chevigny 59). Though she occasionally worked in a club without one (Nicholson 124), Holiday spent the rest of her life fighting to get a card.

⁸ Lawyer Maxwell Cohen, for instance, was especially visible in the fight against the cabaret cards and brought test suits to the Supreme Court of New York County in 1950 and again in 1960. Cohen argued that the police department had “no explicit authority with regard to the Police Cards and for the imposition of fees and the deposit of such funds in the Police Pension Fund” (*The Police Card* 24). The police admitted as much in their answer. However, they argued that “the authority was implied in the power of the Police Commissioner to make reasonable rules and regulations” (24).

The first test case had as its plaintiffs bandleader Johnny Richards and two of his side musicians, pianist Bill Rubenstein and trombonist J.J. Johnson. A “bargain” was eventually struck in chambers in which it was agreed that “police cards” would be issued to Rubenstein and Johnson if Cohen withdrew the other causes of action (without prejudice to his rights to institute other actions in the future) (Cohen, *The Police Card* 50). The court did not comment on the legality of the cabaret cards and “the system remained undisturbed” (Chevigny 62).

The second test suit was brought on behalf of singer Nina Simone and musician Quincy Jones, amongst others. Relying on the decision of *Friedman v. Valentine*, Justice Fine held that the fingerprinting requirement and identification cards were constitutional and legal and the “court is bound by the determination of the Appellate Division that the regulations are valid” (*Simone v. Kennedy* 840).

⁹ Frank Sinatra, for example, had boycotted cabarets since 1957 in a protest against fingerprinting (Lissner 1, 24) and famously admitted to working in NYC clubs in the 1950s, such as the Copacabana, without a cabaret card. He is quoted as saying: “I will not seek a cabaret card in New York because of the indignity of being fingerprinted, mugged [photographed] and quizzed about my past” (qtd. in Chevigny 63).

¹⁰ It is important to note that the burden of proving necessity and justification is not on the plaintiffs but instead lies with the police department (Cohen, *The Police Card* 21).

¹¹ Leonard is describing the depiction of jazz in J. Hartley Manners’ play, *The National Anthem*, which opened on Broadway in 1922 (Leonard 29).

¹² The Cotton Club, at 142nd and Lenox Avenue, was opened in 1922 by owner Bernard Levy (Ostransky 201). It remained in Harlem until 16 February 1936, at which time it moved downtown to Broadway and 48th Street (200 West 48th Street). The jungle decor remained. The Cotton Club closed down for good on 10 June 1940 (Haskins 113-114, 156).

¹³ The Cotton Club had a policy which was “opposed to mixed parties” (Van Vechten, qtd. in Haskins 36). Only the lightest-complexioned blacks gained entrance, and even they were carefully screened. As Haskins explains: “The club’s management was aware that most white downtowners wanted to *observe* Harlem blacks, not mix with them; or, as Jimmy Durante put it, ‘it isn’t necessary to mix with colored people if you don’t feel like it. You

have your own party and keep to yourself. But it's worth seeing. How they step!" (Haskins 37, emphasis in original).

Thus, at the Cotton Club, the audience was primarily white, while the performers were black. But there were further restrictions on the performers, or at least the female ones: "The chorus girls had to be uniformly "high-yaller" ["nothing darker than a light olive tint" (75)], at least 5'6", dancers, and able to carry a tune. And they could not be over twenty-one" (33). This ensured that all female employees were "light-skinned women who could appeal to white concepts of beauty, but had the touch of darker exoticism and hence animality" (Erenberg 257).

¹⁴ According to Townsend, "Improvisation is often taken to be a defining and unique feature of jazz" (7).

¹⁵ Thanks to the anonymous reviewer who pointed out the following in the initial review of this article: "There are ways of improvising within highly structured and long-standing musical forms (viz: the soloist's cadenza in the classical concerto; the constraints of the blues form) which are not innovative, but traditional."

¹⁶ Precedent is defined as an "adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising from a similar question of law" (Black 1176).

¹⁷ In *Simone v. Kennedy*, for instance, the court deferred to precedent and held that the "court is bound by the determination of the Appellate Division that the regulations are valid" (*Simone v. Kennedy* 840).

¹⁸ Derek Attridge tackles a similar problem when he asks, "What is the ethical ground for attention to and affirmation of otherness, when the result of this effort may be without any humanly recognizable merit, or indeed—since the other that is brought into being may . . . turn out to be a monstrosity—may serve quite inhuman ends?" (126). He gives the example of the flourishing of Nazism and suggests that certain outcomes, i.e., the Final Solution, "would be likely to lead to the retrospective reinterpretation of the event as uninventive, since it would not give rise to further invention, but rather to a closing down of possibilities" (160 fn 4).

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