

# The Song and Silence of the Sirens: Attunement to the ‘Other’ in Law and Music

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Now the Sirens have a still more fatal weapon than their song, namely their silence. And though admittedly such a thing has never happened, still it is conceivable that someone might possibly have escaped from their singing; but from their silence certainly never. Against the feeling of having triumphed over them by one’s own strength, and the consequent exaltation that bears down on everything before it, no earthly powers can resist. [...]

But Ulysses, if one may so express it, did not hear their silence; he thought they were singing and that he alone did not hear them.

—Franz Kafka<sup>1</sup>

The Sirens: evidently they really sang, but in a way that was not satisfying, that only implied in which direction lay the true sources of the song, the true happiness of the song.

—Maurice Blanchot<sup>2</sup>

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<sup>1</sup> Franz Kafka, ‘The Silence of the Sirens’, in *The Complete Short Stories of Franz Kafka*, ed. Nahum N. Glatzer (London: Vintage, 1999), 431.

<sup>2</sup> Maurice Blanchot, ‘The Song of the Sirens: Encountering the Imaginary’, in Maurice Blanchot, *The Station Hill Blanchot Reader*:

The other is ‘heard’ in the text and this ‘hearing’ leads to an understanding of how one may open a place where the other comes to the fore. The necessity of ‘hearing’ this other in a text is akin to what has been termed ‘attunement’.

—Nathan Crawford<sup>3</sup>

*Dedicated to Peter Fitzpatrick*

What can be heard when we learn to listen imperfectly?<sup>4</sup> When we resist law’s attempts to fully control<sup>5</sup> or make selective our listening<sup>6</sup> and instead open our ears to the

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*Fiction and Literary Essays*, trans. Lydia Davis (Barrytown: Station Hill Press/Barrytown Inc., 1999), 443.

<sup>3</sup> Nathan Crawford, *Theology as Improvisation: A Study of the Musical Nature of Theological Thinking* (Leiden: Brill, 2013), 75.

<sup>4</sup> Deriving from the Latin, *imperfectus*, imperfection can mean ‘unfinished, incomplete’: Andy Hamilton, ‘The Art of Improvisation and the Aesthetics of Imperfection’, *British Journal of Aesthetics* 40, no. 1 (Jan 2000): 168–185; (171).

<sup>5</sup> The powerful controlling effect that the acoustics of law has on the bodies of its subjects, or what Whitney terms the ‘auditory logic’ of the legal system, is explored further below. For more on the auditory logic of law in the writings of Kafka, see Tyler Whitney, *Spaces of the Ear: Literature, Media, and the Science of Sound 1870–1930* (PhD diss., Columbia University, 2013), 93; and Tyler Whitney, ‘Listening to the Law: Acoustical Embodiment and Industrial Space in *Der Proceß*’ [*The Trial*], *Colloquia Germanica* 46, no. 4 (2013): 343–365. It is perhaps of note that, according to Whitney, Kafka’s ‘The Silence of the Sirens’ was composed around the same time as *The Trial*, most likely October 1917: Whitney, ‘Listening to the Law’, *ibid.*, 362, fn 8.

<sup>6</sup> James Parker’s research on his experience at the International Criminal Tribunal of Rwanda (ICTR) in 2011 is a telling example of the desire for auditory selectivity in law. At the ICTR, those in the public gallery can only listen to the legal proceedings through headphones, which become ‘your exclusive portal into the juridical world you see before you through the glass’. Technology allows

voices of the ‘other’, thereby inviting justice to be done? Employing the story of Odysseus and the Sirens, this text interrogates the possibility of ‘attunement’, as that which bridges the hearing/listening divide and is both grounded in the material/corporeal (hearing), yet also reaches or *strains* beyond such hearing to the unknown or the as-of-yet-unheard (listening).

To connect attunement to the song and silence of the Sirens and to the (non-)listening taking place in *The Odyssey* is calculative. Unlike the eye, the ear never closes.<sup>7</sup>

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one to become selectively attuned to the law. However, even those in the central chamber wear headphones, although these are not a condition of hearing. Thus, this selective attunement to the law actually works to separate one from other beings/sounds/etc. Parker reasons:

Indeed, headphones are quite literally a condition of participation in a trial at the ICTR. As a result, acoustic experience there has become radically personalized. From the perspective of an acoustic jurisprudence, one of the most interesting aspects of the soundscape at the ICTR is not so much *what* it sounds like, but the technical means by which you are required to listen. James E. K. Parker, *Acoustic Jurisprudence: Listening to the Trial of Simon Bikindi* (Oxford: Oxford University Press, 2015), 184 (emphasis in the original).

<sup>7</sup> Seth Kim-Cohen, *In the Blink of an Ear: Toward a Non-cochlear Sonic Art* (New York: Bloomsbury, 2013), xviii. See also Peter Goodrich, ‘Auriculation’, *Law and New Media: West of Everything*, eds. Christian Delage, Peter Goodrich and Marco Wan (Edinburgh: Edinburgh University Press, 2019), 56–72 [129–166 iBooks edition], 129 (iBooks edition). Does the use of technology, though, close our ears to attuned listening? Lawyer and performance artist, Julie Lassonde, has created an interactive performance piece focusing on the unwritten laws/norms on/of public transit. Via the use of technology (earbuds), her performance explores the constraints on attuned listening that such technology can produce. See Julie Lassonde (with Sara Ramshaw and Kristen Lewis), ‘Three Experiments in Developing Unwritten Laws/Norms’, 2018 Performing the World Conference, New York City, 21–23 September 2018. See also James Parker’s work on the headphones used at the ICTR: Parker, *Acoustic Jurisprudence*, above.

So, too, attunement demands openness, an ever-openness to the ‘other’: to sounds, persons, and ways of being. As Lisbeth Lipari notes: ‘*some* kind of listening is happening everywhere, all the time.’<sup>8</sup> Yet, at the same time, ‘truly engaged listening hardly happens anywhere.’<sup>9</sup> Attunement as attentive listening strives towards an engagement with all that surrounds us. This listening can be both ‘deep’, as per Pauline Oliveros,<sup>10</sup> or ‘shallow’, as Kim-Cohen explains:

Deep listening suggests something to be quarried, something at the bottom, a bedrock, an ore, a materiality that contains riches. Oliveros, working along Cagean lines, imagines that sounds-in-themselves are deeply valuable entities, imbued with eternally rewarding sensual and experiential qualities. Imagine the same volume of listening attention. But instead of condensing it within a concentrated, narrow-gauge bandwidth, shallow listening pools at the surface, spreading out to encompass adjacent concerns and influences that the tunnel vision of the deep model would exclude. ...

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<sup>8</sup> Lisbeth Lipari, *Listening, Thinking, Being: Toward and Ethics of Attunement* (Pennsylvania: The Pennsylvania State University Press, 2014), 2 (emphasis in original). John Cage makes a similar point: ‘There is Always Something to See, Something to Hear’: John Cage, *Silence: Lectures and Writings* (London: Marion Boyars, 1968 [2009]), 8.

<sup>9</sup> Lipari, *ibid.*, 2.

<sup>10</sup> Deep Listening® is a philosophy and practice developed by the late ‘improvising composer’ Pauline Oliveros, which expands the ‘perception of sounds to include the whole space/time continuum ... Such expansion means that one is connected to the whole of the environment and beyond’. As such, ‘deep listening’ begets compassion and understanding. ‘In this way,’ she writes, ‘discovery and exploration can take place. New fields of thought can be opened and the individual may be expanded and find opportunity to connect in new ways to communities of interest. Practice enhances openness’: Pauline Oliveros, *Deep Listening: A Composer’s Sound Practice* (Lincoln: iUniverse, 2005), xxiii, xxv.

With shallow listening, there is no there there – or there is no ore. Rejecting the material riches of sound-in-itself as an outright impossibility, shallow listening also rejects the transcendent ineffability to which sound often lays claim. Shallow listening, insists on immanence. Shallow listening insists that we retain the ability to intervene and to effect the sites at play in the sonic work.<sup>11</sup>

Somewhat mirroring Kim-Cohen’s ‘non-cochlear sonic art’,<sup>12</sup> which refuses to turn a deaf ear to the world and instead ‘responds to demands, conventions, forms, and content not restricted to the realm of the sonic’,<sup>13</sup> attunement, be it ‘deep’ or ‘shallow’, strains to listen to a beyond that is always ever outside of ‘ear’ range.

Attunement, though, is not simply about how we can be better listeners in law or in music, although it is also about that.<sup>14</sup> Borrowing from Lipari, to be attuned is to probe how we can understand listening as carrying humans into *being*. She calls this way of thinking about listening as *akroatic thinking*,<sup>15</sup> a ‘*thinking*

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<sup>11</sup> Seth Kim-Cohen, *Against Ambience and Other Essays* (New York: Bloomsbury, 2016), 134–135.

<sup>12</sup> According to Kim-Cohen, the “non” in non-cochlear is not a negation, not an erasure, not, as Derrida puts it, “absence, negativity, non-Being, lack.” It is most definitely not silence. The non-cochlear and the cochlear “pass into one another indefinitely.”: Kim-Cohen, *In the Blink*, xxii. In essence, non-cochlear sonic art ‘maintains a healthy skepticism toward the notion of *sound-in-itself*’: *ibid.* (emphasis in original).

<sup>13</sup> Kim-Cohen, *In the Blink*, xxii.

<sup>14</sup> See Section 5 on attunement in judicial practice.

<sup>15</sup> The term, ‘*akroatic listening*’ is derived from the Greek word *akroatic*, meaning ‘hearing’, and what German musicologist Hans Kayser calls ‘a very specific mode of thinking’: Lipari, *Listening, Thinking, Being*, 2, 4 and 223, fn2.

*listening as a way of being*.<sup>16</sup> Akroatic thinking, for Lipari, is closely connected to an ethics of attunement, that is, ‘an awareness of and attention to the harmonic interconnectivity of all beings and objects.’<sup>17</sup> Even the most isolated of listening is dialogic in that ‘words from the past as well as the future continually reverberate with sounds, phrasings, voices, and meanings far distant from their utterance at any given moment in time.’<sup>18</sup> As such, attunement *is* being; it is a relationality to and with others, with the ‘other’, which is enacted through listening.<sup>19</sup>

Beginning with Homer’s story of the Sirens, and Kafka’s and Blanchot’s reinterpetations, this chapter explores ‘attunement’ as an imperfect listening that tunes its ear to the inaudible and unknowable ‘other’. Compared to Kafka’s law, understood as a relentless and unceasing ‘droning noise’, the origin of which is unlocatable,<sup>20</sup>

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<sup>16</sup> Lipari, *Listening, Thinking, Being*, 2 (emphasis in the original).

<sup>17</sup> *Ibid.*, 2–3.

<sup>18</sup> *Ibid.*, 5.

<sup>19</sup> *Ibid.*, 7.

<sup>20</sup> Franz Kafka’s short story, ‘Advocates’, provides an excellent example of this. In this story, the law is represented by a unlocalisable ‘droning noise’, which is everywhere and nowhere at the same time (similar to how Deleuze and Guattari describe the law in Kafka’s work as ‘always in the office next door, or behind the door’: Gilles Deleuze and Félix Guattari, *Kafka: Toward a Minor Literature*, trans. Dana Polan (Minneapolis: University of Minnesota Press, 1986), 45.). Kafka writes: ‘What reminded me of the law court more than all the details was a droning noise in the distance which could be heard incessantly in the distance; one could not tell from which direction it came, it filled every room to such an extent that one had to assume it came from everywhere, or, what seemed more likely, that just the place where one happened to be standing was the very place where the droning originated, but this was probably an illusion, for

justice as attunement is read here through a Derridean deconstruction of law and musical improvisation to suggest that, instead of endeavouring to harness and control the sonic like Odysseus did, it should be permitted to sing – ‘throats rising and falling, ... breasts lifting, ... lips half-parted’<sup>21</sup> – in the place between song and silence, where listening is always a listening-*with*.

### 1. The Song and Silence of the Sirens

The story of the Sirens is most famously told in Homer’s *The Odyssey*. It is often read as a myth of origin, a tale of the emergence of modern law and society<sup>22</sup> or the triumph of law over wild transgression. The seductive Sirens of Homer’s poem are ‘savage’ and ‘monstrous’<sup>23</sup> sea demons: half woman and half bird. They are also ‘remarkable musicians’.<sup>24</sup> Living on an island in the Mediterranean and attracting passing sailors with their music, the ships would be drawn too close to the rocky coast by the wondrous song of the Sirens and would crash amongst the rocks. The Sirens would then devour the sailors.<sup>25</sup> As the

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it came from a distance’. Franz Kafka, ‘Advocates’, in *The Complete Short Stories*, ed. Nahum N. Glatzer (London: Vintage, 1999), 449.

<sup>21</sup> Kafka, ‘The Silence of the Sirens’, 431.

<sup>22</sup> See Theodor W. Adorno and Max Horkheimer, *Dialectic of Enlightenment*, trans. John Cumming (London: Verso, 1997) and Theodor W. Adorno, Max Horkheimer and Robert Hullot-Kentor, ‘Odysseus or Myth and Enlightenment’, *New German Critique* 56 (1992): 109–141.

<sup>23</sup> Adriana Cavarero, *For More Than One Voice: Toward a Philosophy of Vocal Expression*, trans. Paul A. Kottman (Stanford: Stanford University Press, 2005), 103.

<sup>24</sup> Pierre Grimal, *The Penguin Dictionary of Classical Mythology* (London: Penguin Books, 1991), 403.

<sup>25</sup> *Ibid.*, 403. According to Jankélévitch, the Sirens ‘have only one goal: to reroute, mislead, and delay Odysseus. In other words, they

story goes, Odysseus/Ulysses is warned by the Goddess of the Goddesses (Circe) about the danger the Sirens posed:

... Now heed what I say and the God himself will quicken it in your memory. Your next land-fall will be upon the Sirens: and these craze the wits of every mortal who gets so far. If a man come on them unwittingly and lend ear to their Siren-voices, he will never again behold wife and little ones rising to greet him with bright faces when he comes home from sea. The thrilling song of the Sirens will steal his life away, as they sit singing in their plashet between high banks of mouldering skeletons which flutter with the rags of skin rotting upon the bones.<sup>26</sup>

She advises him to ‘stop the ears’ of his ship crew with beeswax so that they do not hear a sound. ‘Perhaps,’ she inquires of Odysseus, ‘you wish to hear their singing?’ She suggests that he have himself lashed against the mast with rope and ensure that, if at any time he tries to get loose, the crew should only bind him tighter. ‘That way,’ she says, ‘you may safely enjoy the Sirens’ music.’<sup>27</sup>

Odysseus takes heed of her advice and later recounts the story of his encounter at a banquet in his honour: ‘such words they sang in lovely cadences. My heart ached to hear them out.’<sup>28</sup> He admits that he had struggled to free himself in order to follow the music of the Sirens, but his crew had heeded his original command and had

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derail the dialectic, the law of the itinerary that leads our mind toward duty and truth’: Vladimir Jankélévitch, *Music and the Ineffable*, trans. Carolyn Abbate (Princeton: Princeton University Press, 2003), 3.

<sup>26</sup> Homer, *The Odyssey*, trans. T.E. Shaw (Gloucester: Alan Sutton, 1986), 169–170.

<sup>27</sup> *Ibid.*, 170.

<sup>28</sup> *Ibid.*, 174.

bound him tighter to the mast. As a result, Odysseus and his shipmates emerged unscathed from their encounter with the Sirens.

Kafka, in his short essay, 'The Silence of the Sirens', adds three twists to Homer's tale.<sup>29</sup> First, Kafka has Odysseus stuffing his ears with beeswax, instead of those of his crew members.<sup>30</sup> Secondly, Kafka places the power of the Sirens not in their song, but in their *silence*.<sup>31</sup> Finally, Kafka speculates that Odysseus did not hear the silence of the Sirens; he instead imagines they are singing and that he has 'mastered their voice'.<sup>32</sup> It is then the gaze of Odysseus, 'so alluring in its self-confidence', which induces the Sirens to fall 'desperately in love with him',<sup>33</sup> thereby forgetting to sing.<sup>34</sup> In Kafka's version, the Sirens 'no longer had any desire to allure; all they wanted was to hold as

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<sup>29</sup> Elizabeth Boa, 'Revoicing Silenced Sirens: A Changing Motif in Works by Franz Kafka, Frank Wedekind and Barbara Köhler', *German Life and Letters* 7, no. 1 (2004): 8–20, 12. See also Steven L Bindeman, 'Kafka's Appropriation of Silence', in Steven L Bindeman, *Silence in Philosophy, Literature, and Art* (Leiden: Brill/Rodopi, 2017), 124–125.

<sup>30</sup> It is intriguing that Kafka is completely silent as to whether the crew members also stuffed their ears with wax as they did in Homer's original tale.

<sup>31</sup> *Ibid.*, 431. According to Elizabeth Boa, common to Kafka's short story and Adorno and Horkheimer's *Dialectic of Enlightenment* 'is the silencing of the Sirens as the uncanny modulates into travesty, a shift reflecting the authors' growing sense of their collusion in a culture which was oppressive to women, yet at the same time an inability to break free from the prevailing gender ideology. In both texts the Sirens lose their song, which is appropriated to fuel the supposedly androgynous creativity of the male artist': Boa, 10.

<sup>32</sup> Renata Salecl, 'The Sirens and Feminine Jouissance', *differences: A Journal of Feminist Cultural Studies* 9, no. 1 (Spring 1997): 14–35, 30.

<sup>33</sup> *Ibid.*

<sup>34</sup> Kafka, 'The Silence of the Sirens', 431.

long as they could the radiance that fell from [Odysseus's] great eyes'.<sup>35</sup>

What Kafka makes evident in his interpretation is that the Sirens could not and did not actually sing their perfect, absolute or universalising song during their encounter with Odysseus. For, if they had, he would not have survived to tell his tale. As Kafka writes: 'The song of the Sirens could pierce through everything, and the longing of those they seduced would have broken far stronger bonds than chains and masts'.<sup>36</sup> Blanchot suggests, though, that the Sirens could not have been perfectly silent either:

The Sirens: evidently they really sang, but in a way that was not satisfying, that only implied in which direction lay the true sources of the song, the true happiness of the song. Nevertheless, through their *imperfect* song, songs which were only a song still to come, they guided the sailor towards the space where singing would really begin.<sup>37</sup>

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<sup>35</sup> Ibid.

<sup>36</sup> Ibid. Slavoj Žižek argues that it was the desire the Sirens had for Odysseus that caused them to become subjectivized and this subjectivization caused their music to cease:

When desire subjectivizes itself, when it is subjectively assumed, the flow of words is set in motion, since the subject is finally able to acknowledge it, to integrate it into its symbolic universe; when drive subjectivizes itself, when the subject sees itself as the dreadful Thing, this other subjectivization is, on the contrary, signalled by the sudden onset of *silence* – the idiotic babble of *jouissance* is interrupted, the subject *disengages* itself from the flow. The subjectivization of drive is this very withdrawal, this pulling away from the Thing that I myself am, this realization that *the Monster out there is myself*. Slavoj Žižek, *The Ticklish Subject: The Absent Centre of Political Ontology* (London: Verso, 1999), 305 (emphasis in the original).

<sup>37</sup> Blanchot, 'The Song', 443 (emphasis added). The Siren song is imperfect, argues Bonnet, in that it plays 'tricks on listening, in the sense that [the sounds] do not hold together, and refuse to participate in bringing about comprehension through listening': François

For Blanchot, the impossibility of perfect song (Homer) and/or perfect silence (Kafka) is best understood as the *imperfect* song that Odysseus *imagines*<sup>38</sup> he hears when he sees the embodiment of sound<sup>39</sup> or, to quote Kafka, the Sirens' 'throats rising and falling, their breasts lifting, their eyes filled with tears, their lips half-parted.'<sup>40</sup> The Siren song becomes, what François Bonnet would call, 'phantom sounds,' as that which plays 'tricks on listening, in the sense that they do not hold together, and refuse to participate in bringing about comprehension through listening.'<sup>41</sup> Thus, this space of imagined/phantom song and/or imperfect listening can only gesture towards a listening (as comprehension) that is 'still to come.'<sup>42</sup>

It is this *imperfect listening* that I am here naming 'attunement'. It is a movement or, in Jean-Luc Nancy's words, a *straining*,<sup>43</sup> towards the acoustic 'other', which, borrowing from Blanchot in another context, is not only 'unknown, obscure, foreign, but such that apart from this movement it does not seem to have any sort of real prior

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J. Bonnet, *The Order of Sounds: A Sonorous Archipelago* (Falmouth: Urbanomic Media Ltd, 2016), 19.

<sup>38</sup> The importance of the imaginary is detailed below.

<sup>39</sup> I am reminded here of a quote by Kathleen Stewart: 'The senses sharpen on the surfaces of things taking form. They pick up texture and density as they move in and through bodies and space, rhythms and tempi, possibilities likely or not. They establish trajectories that shroud and punctuate the significance of sounds, textures, and movements': Kathleen Stewart, 'Atmospheric Attunements', *Environmental and Planning D: Society and Space* 29 (2011): 445–453, 448. Thank you to Andreas Philippopoulos-Mihalopoulos for guiding me towards Stewart's work.

<sup>40</sup> Kafka, 'The Silence of the Sirens', 431.

<sup>41</sup> Bonnet, 19.

<sup>42</sup> Blanchot, 'The Song', 443.

<sup>43</sup> Jean-Luc Nancy, *Listening*, trans. Charlotte Mandell (New York: Fordham University Press, 2007), 6.

existence.<sup>44</sup> As Nancy explains: ‘To be listening is always to be on the edge of meaning, or in an edgy meaning of extremity, and as if the sound were precisely nothing else than this edge, this fringe, this margin.’<sup>45</sup> Yet, it is in this movement or straining towards the unknown that the ‘true sources of the song, the true happiness of the song’<sup>46</sup> is called forth.

Before engaging further with this concept of imperfect listening as attunement to the (acoustic) ‘other’, and its relation to law and music, it is important to consider the relationship between ‘hearing’, ‘listening’ and ‘attunement’.

## 2.1. Hearing/Listening

No clear consensus exists as to whether there is a distinction between ‘hearing’ and ‘listening’, or whether these concepts are interchangeable in significance and intent.<sup>47</sup> Lipari provides an extended discussion of the distinction:

As it turns out, in the English language we have two words for the auditory process: ‘hearing’ and ‘listening.’ The verb ‘to hear’ derives from the Middle English *heren* and is related to Old High German *hören* and the Latin *cavēre*. *Webster’s* defines ‘to hear’ as ‘1: to perceive or apprehend by the ear’ and ‘2: to gain knowledge of by hearing.’ [...] The verb ‘to listen,’ in

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<sup>44</sup> Blanchot, ‘The Song,’ 447.

<sup>45</sup> Nancy, *Listening*, 7.

<sup>46</sup> Blanchot, ‘The Song,’ 443.

<sup>47</sup> Andrew Dobson, for example, applies the terms interchangeably, yet only includes ‘listening’ in the Index under the heading ‘listening and power’: Andrew Dobson, *Listening for Democracy: Recognition, Representation, Reconciliation* (Oxford: Oxford University Press, 2014), 213.

contrast, is derived from the Middle English *listnem* and is defined by the idea of attention to sound. [...] This etymology illustrates that ‘listen’ and ‘hear’ are not simply synonyms, but are inflected with different meanings that suggest different ways of being in the world. Etymologically, ‘listening’ comes from a root that emphasizes attention and giving to others, while ‘hearing’ comes from a root that emphasizes perception and receiving from others.”<sup>48</sup>

Jean-Luc Nancy keeps alive the distinction between ‘hearing’ and ‘listening’ in his book, *Listening*, by opposing the French *écouter* (translated as ‘listening’) and *entendre* (‘hearing’, which means *understanding*, as well as hearing). He explains:

*Entendre*, ‘to hear,’ also means *comprendre*, ‘to understand,’ as if ‘hearing’ were above all ‘hearing say’ (rather than ‘hearing sound’), or rather, as if in all ‘hearing’ there had to be a ‘hearing say,’ regardless of whether the sound perceived was a word or not.<sup>49</sup>

*Entendre* thus ‘imposes a truth on what is heard. It suggests that we hear sonorous form as presented figures, or that we hear internally consistent, knowable, and identifiable *beings*.’<sup>50</sup>

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<sup>48</sup> Lipari, *Listening, Thinking, Being*, 50.

<sup>49</sup> Nancy, *Listening*, 6.

<sup>50</sup> Michael Gallope, ‘Review of Jean-Luc Nancy. 2007. *Listening*, translated by Charlotte Mandell. New York: Fordham University Press,’ *Current Musicology*, no. 26 (2008): 157–166, 158 (emphasis in original). This imposition of ‘truth’ may also be why we use the term ‘hearings’ in relation to law. As James Parker notes, the Old English *heran* means not only to hear, but also to *judge*: James Parker, ‘A Lexicon of Law and Listening,’ *Jindal Law and Humanities Review*, no. 1 (2020): 2–23, 9 [also published in this collection]. Seth Kim-Cohen gives ‘hearing’ the properties of ‘both a listening and an *investigation*’: Kim-Cohen, *In the Blink*, xviii, (emphasis

In contrast, *écouter* ('listening'), for Nancy, entails a 'straining toward a possible meaning, and consequently one that is not immediately accessible.'<sup>51</sup> It implies an orientation towards the unknown other, beyond the presented sound: 'Listening means that we strain from one moment to the next, splitting and stretching the listening subject into the grounded opening of experience itself.'<sup>52</sup> Not seeking to understand what we hear in advance, listening, in this way, orients us towards a reference or referral 'that maintains no stable identity over time or across space'<sup>53</sup> – similar to Derrida's deconstruction/*différance*.<sup>54</sup> Thus, according to Grant:

[For Nancy,] listening (*écouter*) holds a privileged place over the more constrained hearing (*entendre*) in his account. Listening, he maintains from the beginning, is closer to sensing or touching, preserving the radical intra-alterity of the sonorous, while hearing intends a defined, knowledgeable object separate from a perceiving subject.<sup>55</sup>

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added). James Boyd White also writes on the importance of the 'hearing' in relation to law:

The hearing is the heart of the law ...; but the hearing reaches its fullest significance only when it is coupled with the obligation to explain. Then the judicial opinion becomes a form with wonderful possibilities for meaning. It is a composition in which the speaker must choose a language for telling a story and justifying a result, and must do so against the reasonable claims of the losing side that he or she speak differently. James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of Law* (Madison: University of Wisconsin Press, 1985), 241.

<sup>51</sup> Nancy, *Listening*, 6 (emphasis added).

<sup>52</sup> Gallope, 'Review', 158.

<sup>53</sup> *Ibid.*, 158 and 159.

<sup>54</sup> See below for a discussion of Derridean deconstruction and attunement.

<sup>55</sup> Roger Mathew Grant, 'Review of *Listening* by Jean-Luc Nancy', *Journal of the American Musicological Society* 62, no. 3 (2009):

The notion of listening as a ‘straining’ is important to my conceptualisation of attunement. Attunement requires effort or labouring.<sup>56</sup> Sean Mulcahy analogises it to John Cage’s experience of straining to listen in the anechoic chamber,<sup>57</sup> suggesting that attunement is also *embodied*: ‘we stretch forward to listen, furrow our brows to comprehend, sometimes cup our hands around our ears to block out extraneous sounds.’<sup>58</sup> The embodiment of listening is clearly

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748–752, 750. Also distinguishing between ‘hearing’ and ‘listening’ is theoretical psychologist Johanna Motzkau who, drawing on the work of process philosophers and others such as Henri Bergson, Gilles Deleuze, Isabelle Stengers and Alfred North Whitehead, theorises listening as an *emergent* configuration that is at once social and personal: Johanna Motzkau, ‘Around the Day in Eighty Worlds: Deleuze, Suggestibility and Researching Practice as Process’, *Theoretical Psychology: Global Transformations and Challenges*, eds. Paul Stenner, Johanna Motzkau, John Cromby, and Jeffrey Yen (Toronto: Captus Press, 2011), 59–72. In other words, while ‘hearing’ is viewed as a *passive* taking in of information, ‘listening’ needs to be *active*, an active use of personal and professional discretion and curiosity, as well as communication between individual professionals and agencies. Listening, for Motzkau, is a continuous process of attention, selection, ordering and sense-making. That said, due to the simultaneity of most hearing and listening, the distinction, while important for theorising, has very little practical significance: from personal conversations between the author and Motzkau.

<sup>56</sup> For James Parker, the ‘strain’ of listening, its ‘effort, care, work,’ is especially important in law: Parker, *Acoustic Jurisprudence*, 6.

<sup>57</sup> Cage, *Silence*, 8. This experience will be detailed further below.

<sup>58</sup> Personal correspondence with Sean Mulcahy (October 2018). For others, such as Salomé Voegelin, the important distinction is not as between ‘listening’ and ‘hearing,’ but between the visual and the acoustic. ‘Hearing,’ for her, is the acoustic, which, similar to Nancy’s *écouter* (‘listening’), is ‘full of doubt: phenomenological doubt of the listener about the heard and himself hearing it’: Salomé Voegelin, *Listening to Noise and Silence: Towards a Philosophy of Sound Art* (New York: Continuum, 2010), xii. D. T. Copenhafer writes of how our ‘inner voice’ complicates any distinction between listening and hearing:

In addition to raising the question of what language sounds like when it is not spoken aloud, inner voice troubles any easy distinction

evidenced in the story of the Sirens and Odysseus' act of binding himself to the mast to protect his ears from the power of the sound. While space does not exist in this text for an extended discussion of attunement and embodiment or embodied attunement, the relationship between attunement and the auditory is explored in the section to follow.

## 2.2 Attunement

My preferred understanding of 'attunement'<sup>59</sup> is that forwarded by Nathan Crawford in his 2013 book, *Theology as Improvisation: A Study in the Musical Nature of Theological Thinking*. In this book, Crawford unites the philosophy of Jacques Derrida with musical improvisation to think attunement as a way of thinking the other in/as improvised music.<sup>60</sup> Taking up the thought of Jewish

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between 'active' listening and 'passive' hearing. Listening to our inner voice, we realize how much thinking, reflection, is a hearing, an overhearing of the incessant calamity of a voice speaking within us. Do we speak in this voice, or are we spoken by it? Do we listen or do we hear? (David Tyson Copenhafer IV, 'Invisible Ink: Philosophical and Literary Fictions of Music' (PhD diss., University of California, Berkeley, 2004), 4).

<sup>59</sup> One notable approach to attunement in law is that of Richard Dawson's who, in his book *Justice as Attunement: Transforming Constitution in Law, Literature, Economics and the Rest of Life*, understands attunement as an orientation towards (shared) meaning, a 'getting on the same page'. For Dawson, attunement is 'a way of paying close attention to ... "variations of meaning" ... [in order to] do justice to ourselves and to others': Richard Dawson, *Justice as Attunement: Transforming Constitution in Law, Literature, Economics and the Rest of Life* (Abingdon: Routledge, 2014), xvii. For reasons that will, hopefully, become obvious, I do not share Dawson's understanding of attunement. In other words, we are not in attunement with respect to the concept of attunement.

<sup>60</sup> Crawford, *Theology as Improvisation*, 27.

theologian, Michael Fishbane,<sup>61</sup> Crawford reads attunement as a 'relation with the other'. For Fishbane, being attuned with the world means understanding one's place in relation to the rest of the world, to one's interaction with all things. Attunement, for both Fishbane and Crawford, consists of 'becoming aware' that the world is not a fixed, static place, but is instead a 'dynamic happening that one knows through the irruptive and caesural event that is the contingency of worldly existence.'<sup>62</sup>

This 'becoming aware' is closely connected to improvised music in its ability to train musicians in attentive or 'deep listening', to borrow from the late Pauline Oliveros. Crawford explains:

... attunement seeks to cultivate a certain type of person by allowing one to be mindful of one's interaction with the world. This is because a large part of attunement is the cultivation of a self who is capable of being attuned to the other however that other may come. Part of this cultivation of the attuned self is the development of one's ability to listen with attention and humility.<sup>63</sup>

Attunement is not simply passive reception, though. It actively engages (with) otherness through listening and

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<sup>61</sup> See Michael Fishbane, *Sacred Attunement: A Jewish Theology* (Chicago and London: University of Chicago Press, 2008). Attunement is linked by Fishbane to law in that his understanding of such is found in two moments in the life of Moses. The first takes place in the covenant (contract) that God makes with Moses, promising that he 'shall be', that is, be there for Moses and the people Moses leads. The second moment of attunement in Moses' life is his call to the Israeli people to abide by God's laws to provide meaning and structure to their being in the world and interaction with it. (Crawford, *Theology as Improvisation*, 30 [paraphrasing Fishbane, 52–6]).

<sup>62</sup> Crawford, *ibid.*, 28–29, 30.

<sup>63</sup> Crawford, *ibid.*, 30.

responding. ‘Responsiveness is a necessary part of what it means to be attuned,’ writes Crawford.<sup>64</sup>

As will be detailed below, responsiveness is a key concept in both musical improvisation<sup>65</sup> and law.<sup>66</sup> Before embarking on that analysis, it is important to elaborate upon the bridge between musical improvisation and law and how Crawford’s use of Derrida to establish the ontological qualities of attunement<sup>67</sup> applies equally to law and music. As will be explained, Derrida calls on us to think attunement as a ‘way of being,’ to borrow from Lisbeth Lipari,<sup>68</sup> as that which avoids closure and thinks texts (musical, legal or otherwise) anew.<sup>69</sup> Moreover,

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<sup>64</sup> Ibid., 30–31.

<sup>65</sup> Davide Sparti theorises responsiveness in musical improvisation as follows:

The act of improvisation makes constant reference to (and use of) the improviser’s ability to expose himself [sic] to music in such a way that he is able to respond both creatively and continuously to whatever happen and to whatever he makes happen. Improvisation is a peculiar emergent accomplishment, constructed diachronically and bearing the marks of collaborative authorship. This circularity, moreover, is only possible because the musical event itself is implicitly richer than the individual musicians who have generated it, containing a plethora of virtualities, each with the capacity to open up new musical horizons. Davide Sparti, ‘On the Edge: A Frame of Analysis for Improvisation,’ in *The Oxford Handbook of Critical Improvisation Studies (Volume 1)*, eds. George E. Lewis and Benjamin Piekut (New York: Oxford University Press, 2016) 182–201, 195.

<sup>66</sup> Peter Fitzpatrick, ‘Access as Justice,’ *Windsor Yearbook of Access to Justice* 23, no. 1 (2005): 3–16, 9. See also Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992) and Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001).

<sup>67</sup> Crawford, *Theology as Improvisation*, 33.

<sup>68</sup> Lipari, *Listening, Thinking, Being*, 2.

<sup>69</sup> Crawford, *Theology as Improvisation*, 34–35. Crawford is writing here in relation to improvisation and attunement. I add law to this list in light of Fitzpatrick’s call to view law not as fixed and stable but as simultaneously (and necessarily) responsive and ever-changing: Fitzpatrick, ‘Access,’ 8–9.

Derridean deconstruction *as* attunement highlights the necessary, but problematic, ‘interaction between saying something “new” and being faithful to the tradition’<sup>70</sup> – an issue that lies at the heart of both musical improvisation and law. In both realms, complex negotiations take place as between the pre-existent and the original/new; generality/universality and singularity. In legal decision-making, for instance, pre-existing generalised precedents/laws are applied to a new and singular case or set of facts; while musical improvisation, to be recognised *as* improvisation, must always gesture or strain towards a particular melody or musical tradition, even as it takes flight into seeming randomness and chance.<sup>71</sup>

Derridean deconstruction (as attunement to the ‘other’) provides a perfect bridge to understanding the improvisational qualities of law, along with the inevitably structured nature of musical improvisation, upon which the next section will expound.

### 2.2.1 Deconstruction as Attunement

Crawford puts forward a persuasive case for Derridean deconstruction as that which ‘flows out of a concern of being in rhythm with, or in-tune with, the other of the text’.<sup>72</sup> This attunement can be evidenced in Derrida’s term *différance*, which inserts an ‘a’ in place of the ‘e’ in order to capture the dual movement of difference and

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<sup>70</sup> Crawford, *Theology as Improvisation*, 35.

<sup>71</sup> For more on the relationship between law and musical improvisation, see Sara Ramshaw, *Justice as Improvisation: The Law of the Extempore* (London: Routledge, 2013).

<sup>72</sup> Crawford, *Theology as Improvisation*, 67.

deferral.<sup>73</sup> Deferral temporises, makes temporal, gives space to, delays.<sup>74</sup> Difference, on the other hand, 'others': makes 'not identical.'<sup>75</sup> *Différance* thus 'forbid[s] at any moment, or in any sense, that a simple element be present in and of itself, referring only to itself.'<sup>76</sup> It continually defers (pure) presence in favour of a 'trace' of that which never arrives. Not (pure) absence or nothingness, the 'trace' 'permits the possibility of thinking beyond the binary opposition of presence and absence'<sup>77</sup> and, by analogy, it challenges all oppositional constructions, such as old/new, pre-existing/original, generality/singularity.

For Crawford, in order to understand how one becomes attuned to the 'other' requires a supplement to *différance*, namely Derrida's conception of '*rhythm*' in his two-volume *Psyche*.<sup>78</sup> With several of the essays pursuing a musical theme,<sup>79</sup> to be attuned is to hear the rhythm of the text as that which opens up to possibilities and 'lives in the gap that exists between the way that the text speaks and the way one should receive that speaking through listening.'<sup>80</sup> Attunement to rhythm resists totalisation of meaning and 'opens a path for thinking that resists any

<sup>73</sup> James K.A. Smith, *Jacques Derrida: Live Theory* (New York: Continuum, 2005), 44. See also Geoffrey Bennington, 'Derridabase', in *Jacques Derrida*, eds. Geoffrey Bennington and Jacques Derrida. (Chicago: University of Chicago Press, 1993), 70–71.

<sup>74</sup> Crawford, *Theology as Improvisation*, 67.

<sup>75</sup> *Ibid.*, 68.

<sup>76</sup> Jacques Derrida, *Positions*, revised edition, trans. Alan Bass (London: Continuum, 2002), 26 (emphasis in original).

<sup>77</sup> Smith, *Jacques Derrida*, 76.

<sup>78</sup> Jacques Derrida, *Psyche: Invention of the Other, Volumes I and II*, trans. Peggy Kamuf and Elizabeth Rottenberg (Stanford: Stanford University Press, 2007–8).

<sup>79</sup> For example, 'What Remains in Force by Music', 'The Deaths of Roland Barthes', 'Désistance'.

<sup>80</sup> Crawford, *Theology as Improvisation*, 72.

attempt at closure.<sup>81</sup> It owes itself to ‘iterability’,<sup>82</sup> which strains towards the ‘other’ (as ‘pure anteriority’<sup>83</sup>) through the repetition of the originary act, thereby calling forth originality while all the while denying it. Attunement thereby permits justice to be done to the other. In Crawford’s words: ‘The other is “heard” in the text and this “hearing” leads to an understanding of how one may open a place where the other comes to the fore.’<sup>84</sup>

While there is much more that could be said on the relationship between deconstruction and attunement, in the interests of space, it is necessary to open up the discussion and direct attention to attunement as a musical way of thinking.

### 3. Attunement *to/in/as* Musical Improvisation

Listening<sup>85</sup> is central to music making,<sup>86</sup> particularly improvised music.<sup>87</sup> Moreover, the so-called ‘unpredictable

<sup>81</sup> Ibid., 70.

<sup>82</sup> Derrida, *Psyche*, 51.

<sup>83</sup> Peg Birmingham, ‘Toward an Ethic of Desire: Derrida, Fiction, and the Law of the Feminine’, in *Feminist Interpretations of Jacques Derrida*, ed. Nancy J. Holland (Pennsylvania: Pennsylvania State University Press, 1997), 131.

<sup>84</sup> Crawford, *Theology as Improvisation*, 75.

<sup>85</sup> Musicians can be just as guilty of privileging ‘listening’ over ‘hearing’. Writes Lipsitz:

... in social life as well as in musical life much can be lost by not listening. Hearing just happens, but listening entails attention and interpretation. Listening is an act of deliberation and discernment, a capacity that gets cultivated through experience. (George Lipsitz, ‘Improvised Listening: Opening Statements. Listening to the Lambs’, in *The Improvisation Studies Reader: Spontaneous Acts*, eds. Rebecca Caines and Ajay Heble [Abingdon: Routledge, 2015], 11).

<sup>86</sup> Crawford, *Theology as Improvisation*, 93.

<sup>87</sup> According to sound artist Maria Chavez, ‘[s]kill in improvisation more than instrumental technique is about the skill of the

creativity' of improvisation can 'forge new relationships among different sounds' thereby 'teaching people ways of envisioning and enacting new relationships among different people'.<sup>88</sup> This, in turn, enables musicians (and non-musicians alike) to 'revise the terms of listening and learning',<sup>89</sup> as George Lipsitz explains:

Improvisation plays a crucial role in creating the capacity for an augmented sense of listening because at its core, improvisation is an art that opens doors. It creates new understandings of previousness and futurity in order to explore hidden possibilities. It privileges temporary and ephemeral resolutions over permanent and set in stone closures, recognising that yesterday's resolutions always require renegotiation and adaptation tomorrow as situations and conditions change.<sup>90</sup>

Thus, when new relationships are forged as between different sounds during the process of musical improvisation, it provides a basis for understanding and teaching people 'ways of envisioning and enacting new relationships among different people', both on stage and off.<sup>91</sup>

Crawford advances attunement in improvisation as 'a way of thinking that opens a musician(s) to the possibility of taking apart and reorienting a piece so that it may be heard anew'.<sup>92</sup> He does this by stressing the 'multiple places

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performer as a listener': 'What the Participants are Saying', Information Booklet for the UK Arts and Humanities Research Council (AHRC)-funded project, *Into the Key of Law: Transposing Musical Improvisation. The Case of Child Protection in Northern Ireland*, 2015. See <http://translatingimprovisation.com/wp-content/uploads/2016/02/IKOLBooklet.pdf>, 10.

<sup>88</sup> Lipsitz, 'Improved Listening', 11.

<sup>89</sup> *Ibid.*, 12.

<sup>90</sup> *Ibid.*, 11.

<sup>91</sup> *Ibid.*

<sup>92</sup> Crawford, *Theology as Improvisation*, 94.

a musician is attuned in order to create music,<sup>93</sup> especially improvised music. Not only do musicians need to be attuned to a particular piece of music and to the tradition within which it resides, but also to the other musicians, the audience, their instrument(s), and to the acoustics of the space in which they are performing.<sup>94</sup> Numerous critical improvisation scholars have highlighted these multiple attunements. For example, Ingrid Monson, who interviewed musicians for her 1996 music ethnography, *Saying Something: Jazz Improvisation and Interaction*, writes about how listening (as attunement) in musical improvisation means not just having a basic knowledge of the framework of a tune, its melody and harmonic structure, but musicians must be so thoroughly familiar with these elements that they 'can attend to what everyone else in the band is doing'.<sup>95</sup> According to Monson:

Nearly every musician who talked to me mentioned the importance of listening in good ensemble playing. Listening in an active sense – being able to respond to musical opportunities or to correct mistakes – is implicit in the way the musicians use this term. It is a type of listening much like that required of participants in a conversation, who have to pay attention to what is transpiring if they expect to say things that make sense to the other participants. Listening affects what musicians decide to play at a particular moment...<sup>96</sup>

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<sup>93</sup> Ibid.

<sup>94</sup> Thanks to Sean Mulcahy for reminding me about the importance of the performance space, and Johanna Motzkau, the instruments.

<sup>95</sup> Ingrid Monson, *Saying Something: Jazz Improvisation and Interaction* (Chicago: The University of Chicago Press, 1996), 83.

<sup>96</sup> Ibid., 84.

Failure to be attuned or respond to other musicians is often the sign of ‘bad’ improvisation: ‘To say that a player “doesn’t listen” or sounds as though he or she is playing “something he or she practiced” is a grave insult.’<sup>97</sup> Although failures in attunement can sometimes be productive and lead to interesting interactions and outcomes, such is beyond the scope of this article.<sup>98</sup>

Attunement in musical improvisation is therefore ‘dynamic and quintessentially social,’<sup>99</sup> calling ‘communities into being’ and serving as ‘markers for new social identities and social relations.’<sup>100</sup> For Crawford, ‘[l]istening produces attunement because it opens me up to the other and finds meaning elsewhere.’<sup>101</sup> Jean-Luc Nancy, in his book *Listening*,<sup>102</sup> explores listening in relation to his

<sup>97</sup> Ibid.

<sup>98</sup> AMM guitarist Keith Rowe has spoken about the (ethical) possibilities of non-listening:

The act of NOT listening is very important, preferring juxtaposition to confabulation, disturbing the congruity and avoiding Pavlovian laminates. Non listening for me is about the intensification of the edge, or frame. This might be seen as an attempt to limit certain aspects of encroachment of the external environment, and it’s always been a part of my musical makeup. I’m very aware that it’s almost heretical to praise not listening, but nevertheless I feel there is a place for it. (Cited in Marcel Cobussen and Nanette Nielsen, *Music and Ethics* [Farnham: Ashgate, 2012], 60).

See also Sara Ramshaw and Paul Stapleton, ‘From Prepeace to Post-conflict: The Ethics of (Non) Listening and Cocreation in a Divided Society’, *Playing for Keeps: Improvisation in the Aftermath*, eds. Daniel Fischlin and Eric Porter (Durham: Duke University Press, 2020), 300–324.

<sup>99</sup> Lipsitz, ‘Improvised Listening’, 12.

<sup>100</sup> Ibid., 12. (referencing Franz Fanon, *The Wretched of the Earth* (New York: Grove Press, 1968), 243).

<sup>101</sup> Crawford, *Theology as Improvisation*, 98.

<sup>102</sup> Nancy, *Listening*.

radical singular-plural ontology<sup>103</sup> in which being and alterity are understood as ‘singular plurality’,<sup>104</sup> as that which presupposes ‘innate otherness.’<sup>105</sup> Sound, according to Grant, allows Nancy to ‘rethink the relationship of self to self (in identity and community)’ and it is in the concept of the ‘return, or *renvoi*,<sup>106</sup> of resonant sound’ that ‘Nancy finds a sonic elaboration of his singular-plural construct.’<sup>107</sup> To elaborate:

... we become subjects in the same way that sound vibrates through the cavity of an instrument – sound belongs to nothing and everything and is everywhere simultaneously, already different unto itself. Listening, then, is nothing short of a way of conceptualizing being in the world, tuned in to the *renvoi* [return] and self reference of the reverberation.<sup>108</sup>

Musical performer and composer Wilfrido Terrazas concurs: ‘Improvisation makes you conscious and alert to the

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<sup>103</sup> For more information, see Jean-Luc Nancy, *Being Singular Plural*, trans. R.D. Richardson and A.E. O’Byrne (Stanford: Stanford University Press, 2000).

<sup>104</sup> Grant, ‘Review of *Listening*’, 748–752, 749.

<sup>105</sup> *Ibid.*, 749.

<sup>106</sup> Jean-Luc Nancy explains this concept in further detail in his Foreword to Peter Szendy’s book *Listen: A History of Our Ears*:

A sound is always ‘returned,’ restored: it is restored from itself to itself. A sonorous body that is struck *returns* the blow by the sound that is the vibration of the blow itself. Sound is at the same time *struck* (pinched, rubbed, breathed, etc.), *returned*, and *heard* [*entendu*, understood] in the precise sense that it is *understood* [*s’entend*] or that it *makes itself* heard [se fait entendre]: and for that, in that, it *listens to itself* [*s’écoute*]. (Jean-Luc Nancy, ‘Foreword: *Ascoltando*’, trans. Charlotte Mandell, in Peter Szendy, *Listen: A History of our Ears* [New York: Fordham University Press, 2008] ix–xiii, x.

<sup>107</sup> Grant ‘Review of *Listening*’, 749.

<sup>108</sup> *Ibid.*, 749–50.

world. It awakens listening skills that are highly specialised and that make you aware of your sonic surroundings. It makes you be conscious of other people playing with you.<sup>109</sup>

While the above interrogated the importance of listening to *sound* in musical improvisation, the section to follow questions whether *silence* has itself important properties that are equally worthy of pursuit as they relate to attunement in/to/as musical improvisation

### 3.1 The Sound of Silence in Musical Improvisation

*Man fears the absence of sound as he fears the absence of life. ... Since modern man fears death as none before him, he avoids silence to nourish his fantasy of perpetual life.*<sup>110</sup>

Silence, more often than not, equals negation, and arises from a not-listening or a lack of attunement: a cue or introduction missed; spaces meant to be filled that are left vacant, etc. Not all silences, though, emerge from ‘disengaged hearing’. In addition to active and deliberate (non) listening,<sup>111</sup> the choice to be silent can have a creative and

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<sup>109</sup> What the Participants are Saying, Information Booklet for the UK Arts and Humanities Research Council (AHRC)-funded project, *Into the Key of Law: Transposing Musical Improvisation. The Case of Child Protection in Northern Ireland*, 2015. See <http://translatingimprovisation.com/wp-content/uploads/2016/02/IKOLBooklet.pdf>, 10.

<sup>110</sup> R. Murray Schafer, *The Soundscape: Our Sonic Environment and the Tuning of the World* (Rochester: Destiny Books, 1993) 256. Compare with John Keats’ *Ode on a Grecian Urn*: ‘Heard melodies are sweet, but those unheard/Are sweeter’: <https://www.poetryfoundation.org/poems/44477/ode-on-a-grecian-urn>.

<sup>111</sup> See Rowe (cited in Cobussen and Nielsen, *Music and Ethics*, 60); and Ramshaw and Stapleton, ‘From Prepeace to Postconflict’, 308.

productive dimension. Miles Davis is but one example of an improviser who listened to other musicians and audiences in order to open up ‘opportunities for strategic silences that could make what was *not* played as important as what was played.’<sup>112</sup> To quote Davis: ‘I always listen to what I can leave out.’<sup>113</sup>

For the late musical composer John Cage, silence was integral to music itself and he gave it equal weighting in terms of significance to sounded notes.<sup>114</sup> Cage’s 4’33”, perhaps one of the ‘most misunderstood pieces of music ever written’, is also one of his most appreciated.<sup>115</sup> It was first performed by David Tudor in Woodstock, New York on 29 August 1952. Tudor came on stage at the Maverick Concert Hall, sat down at a piano, lifted the lid and did not play a note for 4 minutes and 33 seconds. He then closed the lid,

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<sup>112</sup> Lipsitz, ‘Improvised Listening’, 13 (emphasis in original).

<sup>113</sup> *Ibid.* Felix Nobis explains the power of silence in relation to law and theatre:

I think [silence] can speak, it can recalibrate the listener, it can give the listener opportunity to find themselves again within the story. That’s incredibly valuable. It can also give an audience an opportunity to adjust and scratch if they’ve been holding on to a moment. Doing a long one person show of 60–70 minutes, it’s important to find those moments of allowing the audience to move or to cough if they’ve been holding that in for that long. It’s a matter of timing, tuning in to the audience and then finding a moment to pull back, maybe having a little cough yourself even if you don’t need it, to just shake things up a little bit and break the tension which couldn’t possibly hold that long. There’s an element of orchestrating that suspension of tension and then pulling it back. Silence can often work as a tool like that. Sean Mulcahy, ‘Acting Law | Law Acting: A Conversation with Dr Felix Nobis and Professor Gary Watt’, *Exchanges* 4, no. 2 (2017): 189–200, 194.

<sup>114</sup> Kyle Gann, *No Such Thing as Silence: John Cage’s 4’33”* (New Haven: Yale University Press, 2010), ix. See also Cage, *Silence*, 8; and Libby Scheier, ‘There is No Such Thing as Silence’, *Canadian Woman Studies* 14, no. 1 (1993): 9.

<sup>115</sup> Gann, *ibid.*, 10.

stood up and exited the stage.<sup>116</sup> While this may appear like a very lazy composition by Cage, involving no work at all, in actual fact, Cage revealed later that 4'33" took him longer to write than any other piece of music, involving a four-year gestation period.<sup>117</sup> For Cage, this was his 'most important work'.<sup>118</sup> It is a piece of music that deflects back to the listener the question of 'what is music?' and/or what does it mean to listen?<sup>119</sup> It also begs the question: what is silence?<sup>120</sup>

Oft retold by Cage, the idea for 4'33" came to him in 1951,<sup>121</sup> after he spent time in the anechoic chamber at Harvard University:

For certain engineering purposes, it is desirable to have as silent a situation as possible. Such a room is

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<sup>116</sup> Voegelin, *Listening to Noise and Silence*, 205, fn 1. See also Gann, *ibid.*, 6.

<sup>117</sup> Gann, *ibid.*, 14. BBC Radio 3 and BBC 4 (television) broadcast a performance of 4'33" by the BBC Symphony Orchestra at London's Barbican Centre in 2004 as part of a programme of events dedicated to Cage's work. The audience response was mixed. See 'Radio 3 Plays Silent Symphony', *BBC News*, 19 January 2004. <http://news.bbc.co.uk/2/hi/entertainment/3401901.stm>

<sup>118</sup> Gann, *ibid.*, 15.

<sup>119</sup> Daniel Belgrad, 'Improvisation, Democracy, and Feedback,' in *The Oxford Handbook of Critical Improvisation Studies (Volume 1)*, eds. George E. Lewis and Benjamin Piekut (New York: Oxford University Press, 2016), 289–306, 295.

<sup>120</sup> Silence, especially in places such as Northern Ireland, can have political ramifications. See Hilary Bracefield, 'Musical Perspectives. The Politics of Silence: The Northern Ireland Composer and the Troubles', *Music, Music Therapy and Trauma: International Perspectives*, ed. Julie P. Sutton (London: Jessica Kingsley Publishers, 2002), 83–93. Also of note is Seamus Heaney's poem, 'Whatever You Say, Say Nothing' in Seamus Heaney, *North* (London: Faber & Faber, 1996), 52–55. See also Ramshaw and Stapleton, 308–309.

<sup>121</sup> According to Gann, determining the exact date of Cage's visit to the anechoic chamber at Harvard is 'a maddening puzzle': Gann, *No Such Thing as Silence*, 164.

called an anechoic chamber, its six walls made of special material, a room without echoes. I entered one at Harvard University several years ago and heard two sounds, one high and one low. When I described them to the engineer in charge, he informed me that the high one was my nervous system in operation, the low one my blood in circulation. Until I die there will be sounds. And they will continue following my death. One need not fear about the future of music.<sup>122</sup>

This experience is said to have spawned the so-called Cagean aesthetics of ‘letting sounds be themselves.’<sup>123</sup> No longer hearing sound and silence as opposites, Cage understood them as aspects of the same continuum, thereby dissolving dualities.<sup>124</sup> And yet, 4’33” is not simply a sonic or musical phenomenon, as Kyle Gann explains:

It called upon the audience members to remain obediently silent under unusual conditions. The pianist’s refusal to play calls a whole network of social connections into question and is likely to be reflected in equally unconventional responses on the part of the audience.<sup>125</sup>

Cage challenged or exploited the conventions of modern concert hall etiquette by ‘programming the work to be performed at a prestigious venue, with high-status players and conductor.’<sup>126</sup> Accordingly, the audience’s expectations were heightened long before the performance

<sup>122</sup> Cage, 8; see also Kim-Cohen, *In the Blink*, xvi; and Gann, *ibid.*, 160–66.

<sup>123</sup> Kim-Cohen, *In the Blink*, xvi.

<sup>124</sup> Gann, *No Such Thing as Silence*, 163.

<sup>125</sup> Gann, *ibid.*, 19.

<sup>126</sup> Frances Wilson, ‘Sounds of Silence: thoughts on John Cage’s 4’33”’, <http://www.interlude.hk/front/sounds-silence-thoughts-john-cages-433>.

began and they felt ‘cheated’ the first time they heard it. Recalls Cage:

They missed the point. There’s no such thing as silence. What they thought was silence, because they didn’t know how to listen, was full of accidental sounds. You could hear the wind stirring outside during the first movement. During the second, rain-drops began pattering the roof, and during the third the people themselves made all kinds of interesting sounds as they talked or walked out.<sup>127</sup>

Attunement to silence in musical improvisation is thereby as dynamic and quintessentially social as listening to sounded notes themselves – perhaps even more so. As Adam Jaworski notes, ‘[o]ne of the most important uses of silence in every society is maintenance of a taboo... Paradoxically, as with many other instances of silence, its study is only possible when it is *broken*.’<sup>128</sup>

Seth Kim-Cohen warns of the danger of making sound itself omnipotent.<sup>129</sup> If, as John Cage suggests, even silence is sound, then everything *is* and ‘[s]ound alone,

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<sup>127</sup> Ibid. In a conversation with Michael John White, Cage described the audience reaction further:

People began whispering to one another, and some people began to walk out. They didn’t laugh – they were just irritated when they realized nothing was going to happen, and they haven’t forgotten about it 30 years later: they are still angry. Bindeman, 14 (citing Cage in Richard Kostelanetz, *Conversing with Cage* [London: Routledge, 2003], 66).

<sup>128</sup> Julie Sutton, “‘The Pause that Follows’ ... Silence, Improvised Music and Music Therapy’, *Nordic Journal of Music Therapy* 11, no. 1 (2002): 27–38, 28 (citing *Silence: Interdisciplinary Perspectives*, ed. Adam Jaworski (Berlin: Mouton de Gruyter, 1998), 392).

<sup>129</sup> Kim-Cohen, *In the Blink*, 259.

signifies itself'.<sup>130</sup> Invoking Derrida, Kim-Cohen maintains that sound in and of itself is 'just as inconceivable as self-presence'.<sup>131</sup> Perfect silence, in other words, is an impossibility, just as perfect song/sound. Perhaps a more productive way of perceiving silence (and sound/song) is as 'contingent and relational'.<sup>132</sup> 'musicians hear silence as not only part of the music but also as a reference point out of which musical sound emerges'.<sup>133</sup> Silence communicates.<sup>134</sup> However, the communicative potential of silence can be difficult to perceive,<sup>135</sup> which is perhaps why we find silence so discomfoting.<sup>136</sup>

What does all this have to do with law, you might ask? The next section aims to bridge the sound and silence of musical improvisation with that of the Common Law legal system to probe the relevance or applicability of attunement to justice in law.

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<sup>130</sup> Kim-Cohen, *ibid.*, 259 and 260. Salomé Voegelin argues, though, that Cage is not trying to suggest that all silence is sound, but instead that every sound, including silence-as-sound, is *music*: Voegelin, *Listening to Noise and Silence*, 80.

<sup>131</sup> Kim-Cohen, *In the Blink*, 259.

<sup>132</sup> Marie Thompson, *Beyond Unwanted Sound: Noise Affect and Aesthetic Moralism* (New York: Bloomsbury, 2017), 121.

<sup>133</sup> Sutton, "'The Pause that Follows'", 30.

<sup>134</sup> *Ibid.* Blanchot has also written about the impossibility of silence: 'But without language, nothing can be shown. And to be silent is still to speak. Silence is impossible. That is why we desire it': Maurice Blanchot, *The Writing of the Disaster* (New Edition), trans. Ann Smock (Nebraska: University of Nebraska Press, 1995), 11.

<sup>135</sup> Sutton, "'The Pause that Follows'", 30.

<sup>136</sup> According to Yiannis Gabriel, '[s]ilence is fatal because it is unbearable', [http://www.yiannisgabriel.com/2016/11/when-sirens-fall-silent-and-silence\\_25.html](http://www.yiannisgabriel.com/2016/11/when-sirens-fall-silent-and-silence_25.html) (emphasis removed).

## 4. (Attuning to) Imperfect Law

Returning to the Sirens' story, to understand the impossibility of perfect song – and perfect silence – it is worthwhile to engage with Blanchot's concepts of the 'limit' and the 'imaginary'. In the tale of Odysseus and the Sirens, we are told that '[e]ach wants to be everything, wants to be the absolute world'.<sup>137</sup> However, co-existence with the 'other absolute world'<sup>138</sup> is impossible for how can something stand opposite a universal?<sup>139</sup> Phrased slightly differently and borrowing from critical legal theorist, Peter Fitzpatrick, '[t]he antithesis of the universal can only be utterly antithetical. It has to be of a totally different kind of existence'.<sup>140</sup> Such is the paradox of universality:

... anything which stands opposite the universal in its completeness can only be utterly different or absolutely 'other' to the universal. At the same time, whatever provides the constituent negation of the universal must somehow be transgressively beyond a universal which remains constantly cued to it.<sup>141</sup>

The aporetic encounter between the singular and the universal is accordingly best understood through an engagement with the concept of the 'limit'. Once traced or inscribed, the limit serves to discriminate between a certain order (Odysseus/law) and a certain disorder (Sirens/

<sup>137</sup> Blanchot, 'The Song', 448.

<sup>138</sup> *Ibid.*, 448.

<sup>139</sup> Fitzpatrick, *Modernism*, 63.

<sup>140</sup> Peter Fitzpatrick, "'In God We Trust' Can Relieve Us of Trusting Each Other", *The Believer* 3, no. 8 (2005): 63–72, 69.

<sup>141</sup> *Ibid.*, 63.

transgression). While the two concepts on either side of the limit are disjoined from one another, they do not exist in isolation, as Fitzpatrick explains:

... if the limit were completely divisive there could be no relation between what is separated by the limit. The two sides of the limit would exist in complete difference, not knowing at all of each other. So, with the limit there must be some subsisting relation and thence some commonality between the two sides. In a pure relation, the two sides would simply appear or disappear in each other and there could be no limiting division between them. We are, then, 'bound' to an irresolution between the limit as a condition and quality of our contained, distinct being and the limit as an opening onto all that lies beyond and is other to that being.<sup>142</sup>

The same holds true for Western law. As with Odysseus and the Sirens, law wants to be everything, wants to be the absolute world.<sup>143</sup> Modern law, however, cannot be *everything*, that is, truly universal and unchanging. As Fitzpatrick writes, '[i]n coming to and being at where it is now, the common law will have been responsive to historical change, or to the needs of the nation, or to the development of society'.<sup>144</sup> In stark contrast to its purported fixity and stability, 'it will have accommodated changing facts, all coming from beyond it'.<sup>145</sup> Conversely, law cannot be purely singular or unpredictable either: 'If law is to "be", to "take place" at all, it cannot subsist as ineffably responsive

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<sup>142</sup> Fitzpatrick, *Modernism*, 59.

<sup>143</sup> Blanchot, 'The Song', 448.

<sup>144</sup> Peter Fitzpatrick, "'No Higher Duty': *Mabo* and the Failure of Legal Foundation,' *Law and Critique* 13 (2002): 233–252, 236.

<sup>145</sup> *Ibid.*, 236.

but must come to a place of determination. This place, in turn, must not just contain law's responsiveness but must habitably sustain it.<sup>146</sup> Law, for Fitzpatrick, thus lies in an aporetic space within which the demands of determinacy and responsiveness are played out.<sup>147</sup>

In Homer's tale, Odysseus triumphs over the Sirens through his being bound to the mast and his crew members having had their ears stuffed with wax. As Kafka points out, though, such measures would have been futile for the Sirens' song could pierce through everything and the longing they induced from those they seduced 'would have broken far stronger bonds than chains and masts.'<sup>148</sup> Kafka instead has the Sirens forgetting to sing, remaining *silent*, and, for that reason alone, Odysseus escapes death.

Of interest here is how Kafka reconciles this interpretation with his later assertion that the power of the Sirens actually lies in their silence. He writes:

Now the Sirens have a still more fatal weapon than their song, namely their silence. And though admittedly such a thing has never happened it is conceivable that someone might possibly have escaped from their singing; but from their silence certainly never.<sup>149</sup>

The Sirens, accordingly, could not have been perfectly silent either. Otherwise Odysseus would never have survived to tell his tale, as the next section illustrates.

<sup>146</sup> Fitzpatrick, *Modernism*, 7.

<sup>147</sup> *Ibid.*, 91.

<sup>148</sup> Kafka, 'The Silence of the Sirens', 431.

<sup>149</sup> *Ibid.*, 431.

## 4.1 The Sound of Silence in Law

*I wonder if justice silenced would actually be justice lost, in that we wouldn't have our day in court, we wouldn't have our hearing, we wouldn't have the sense that our voice has been heard ... There might be something absolutely essential to justice in society to having the sound heard.*<sup>150</sup>

As noted above, silence in musical improvisation is often interpreted negatively, as an *absence* (of sound).<sup>151</sup> Similarly, silence in law can be unsympathetically construed. It often marks the place of the oppressed and the voiceless, of victims and victimisation. In her book, *Just Silences*, Marianne Constable offers a very Cagean provocation, which endeavours to hear the possibilities of justice in the silence of law: 'One often hears that an absence of voice is an absence of power and an absence of justice and, conversely, that voice means empowerment and justice.'<sup>152</sup>

Focusing on current judicial practice in Australian courts, Katharine Biber relatedly writes about the 'jurisprudence of silence' in which:

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<sup>150</sup> Gary Watt in Mulcahy, 'Acting Law', 192. According to Peter Goodrich: 'It is both literally and legally true that without hearing there is no balancing, no justice': Goodrich, 'Auriculation', 153 (iBooks edition). See also Peter Goodrich, 'Attending the Hearing: Listening in Legal Settings', in *Reception and Response: Hearer Creativity and the Analysis of Spoken and Written Texts*, eds. Graham McGregor and R.S. White (Abingdon: Routledge, 2015), 11–36.

<sup>151</sup> Andreas Philippopoulos-Mihalopoulos, *Absent Environments: Theorising Environmental Law and the City* (Abingdon: Routledge-Cavendish, 2007), 95.

<sup>152</sup> Marianne Constable, *Just Silences: The Limits and Possibilities of Modern Law* (Princeton: Princeton University Press, 2005), 8.

... the accused's silence must be accompanied by exhaustive judicial speech; the jury must be rigorously tutored in all of the inferences that are unavailable from silence. They cannot be left at large to experience the silence for what it is: the work of a judicial apparatus.<sup>153</sup>

She argues that law alone refuses to hear silence as ambiguous in meaning and that only lawyers demand that 'silence means nothing'.<sup>154</sup> She concludes by arguing:

A sensitivity to silence — its performance, its absence and its interpretation — would transform the jurisprudence of silence. To fully grasp what silence is, where its limits lie and what might be done with it, is law's ongoing project. Since *Weissensteiner*,<sup>155</sup> Australian appellate courts have urged that we smother silence with words. This doctrine prevents silence from simply being heard. Silence, wherever it occurs in law's jurisdiction, must be explained and explained and explained. In this babble of explanation law misbelieves that it protects silence; further, it often misattributes the term 'silence' to certain kinds of noise. Law's commentary forecloses the possibility that silence might be deliberately ambiguous, that it

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<sup>153</sup> Katherine Biber, 'How Silent is the Right to Silence?', *Cultural Studies Review* 18, no. 3 (2012): 148–170, 160.

<sup>154</sup> *Ibid.*, 161.

<sup>155</sup> In *Weissensteiner v R* [1993] HCA 65, the accused, Mr Weissensteiner, was arrested by the Australian Federal Police in Papua New Guinea for the murder of a young couple last seen in his company. He did not call any evidence at trial or take the witness stand. As a result, the trial judge directed the jury that they were entitled to draw an inference of guilt due to the Defendant's failure to explain the circumstances surrounding the case, circumstances of which he undoubtedly had some knowledge. This has become known as the Weissensteiner Direction.

might invite speculation, or that inferences demand to be drawn from it.<sup>156</sup>

The power of silence in law is also explored by law and theatre scholar, Sean Mulcahy, who argues that ‘[s]ilence is a recurring element in legal performance. Silence affects and, in particular, attunes the audience to the legal performance.’<sup>157</sup> Considering courtroom silence in its ‘aesthetic sense’, Mulcahy looks to performance studies to explain the sound of silence in law. Gary Watt provides a telling description: ‘Silence is so much more eloquent than words very often. ... When you shout the sound immediately dies away, whereas silence gets louder and louder and louder the longer it lingers. It’s not emptiness, but a solid thing that demands our attention.’<sup>158</sup> Perhaps this is why, for Dawson, law requires ‘attentive silence’ so that attentive listening may occur: ‘Justice begins in “silence” and in listening’.<sup>159</sup>

For Peter Goodrich, ‘[t]he genius of law is in its nose. Justice, however, is all in the ear’.<sup>160</sup> This suggests that, while law and legal reasoning focus on ‘sniffing out ... malversation’, justice cannot but listen; it is ‘forced to

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<sup>156</sup> Ibid., 163–64.

<sup>157</sup> Sean Mulcahy, ‘Silence and Attunement in Legal Performance’, *Canadian Journal of Law and Society* 34, no. 2 (2019): 191–207, 194.

<sup>158</sup> Gary Watt in Sean Mulcahy, ‘Acting Law | Law Acting: A Conversation with Dr Felix Nobis and Professor Gary Watt’, *Exchanges: The Warwick Research Journal* 4, no. 2 (2017): 189–200, 194.

<sup>159</sup> Dawson, *Justice as Attunement*, 29. Jack Tan’s soundscape, *Waiting for hearing to begin*, is a perfect example of this. See <https://jacktan.wordpress.com/art-work/hearings>. Much gratitude to Sean Mulcahy for alerting me to Tan’s artwork.

<sup>160</sup> Goodrich, ‘Auriculation’, 129 (iBooks edition).

receive'.<sup>161</sup> The listening of justice, though, is primarily linguistic and there is a 'continuing sense of norm and rule as rhythm, as sonic pattering'.<sup>162</sup> This can be problematic in that, as Andreas Philippopoulos-Mihalopoulos observes, 'silence has been populated by sounds, and more specifically by words'. Thus, silence is defined 'antithetically, as the absence of language or of specific sounds'.<sup>163</sup> 'Silence', argues Philippopoulos-Mihalopoulos, 'remains what language is not', and 'one can only see silence when one sees the trees – without trees [words/sound] there is no silence'.<sup>164</sup> Silence then becomes an inherent part of legal language.<sup>165</sup> Philippopoulos-Mihalopoulos instead calls for legal unutterance:

Unutterance goes beyond silence, in that it does not purport to be communication in the societal way, it cannot be converted into language or meaningful gestures or even the absence of that, and it is not a projection of society. Unutterance remains a meaningless perturbation irritating the system through its *malgré soi* invitation. It lies beyond the communicative possibilities of meaning, and cannot be domesticated by a system. Unutterance is not simply a retreat

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<sup>161</sup> Ibid.

<sup>162</sup> Ibid., 135 (iBooks edition). See also Julia Chryssostalis' recent writings on nomos and legal otology (incl. pp. 59–68), as well as Julia Chryssostalis, 'Beyond Otonomy, or Beyond the Law of Law's Ear', *Journal of Law and Society* 31, no. 1 (2004): 149–158.

<sup>163</sup> Philippopoulos-Mihalopoulos, *Absent Environments*, 96.

<sup>164</sup> Ibid.

<sup>165</sup> Thank you to the anonymous reviewer for steering me towards Philippopoulos-Mihalopoulos's *Absent Environments*, which includes an extended discussion of silence and the Sirens in Chapter 4. See also Andreas Philippopoulos-Mihalopoulos, 'The Silence of the Sirens: Environmental Risk and the Precautionary Principle', *Law and Critique* 10, no. 2 (1999): 175–197.

from communication, ... but a double negation: negation of language and negation of non-language. By underlining and erasing the form language/non-language, unutterance silences the logocentric meaning of silence.<sup>166</sup>

While there is a great deal more that can be said about unutterance as a mode of breaking free from the song/silence binarism in law, I will leave such for another day. Instead, I return once again to the Sirens, and re-imagine justice as attunement through the imperfect listening of justice to the 'other' in law.

#### 4.2 The (Siren) Song (and Silence) of Law

What led, ultimately, to Odysseus's alleged victory over the Sirens? The answer lies, I believe, in Blanchot's opening sentence wherein he writes: 'The Sirens: evidently they really sang, but in a way that was not satisfying.'<sup>167</sup> Reading Blanchot through Kafka it can be said that Odysseus and the Sirens are brought together through an *imperfect* listening to the (imagined) Siren song, which, for Blanchot, is what gives the Sirens their power.<sup>168</sup> But it is this imaginary that, in turn, robs the Sirens of their mighty silence for, in Odysseus' mind, they are *actually* singing: their outward physical appearance (lips, throat, breasts: parting, lifting and falling) mirrors those of songstresses.

To aid comprehension, a brief accounting of Blanchot's concept of the 'imaginary' is necessary. The image, for

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<sup>166</sup> Philippopoulos-Mihalopoulos, *Absent Environments*, 97.

<sup>167</sup> Blanchot, 'The Song', 443.

<sup>168</sup> *Ibid.*, 445.

Blanchot, is best understood as a cadaver, a ‘cadaverous presence [that] establishes a relation between here and nowhere.’<sup>169</sup> S. Brent Plate explains:

Just as a cadaver is typically thought to come ‘after’ the being itself, the image, if all it did were to imitate the ‘real’ thing, would be subordinated as a secondary event. But for Blanchot, contrarily, the image is ‘not the same thing distanced, but the thing as distancing’ ... . The perception of the image exists in an in-between place, a mediated site.<sup>170</sup>

Thus, while most accounts of the imaginary posit the ‘real’ and the ‘image’ as belonging to distinct and stable orders,

... Blanchot argues that the imaginary is within the thing or, if you like, that the distance *between* a thing and its image is always *within* the thing. On this understanding, it is none other than being that subverts any attempt to compare the real and the imaginary.<sup>171</sup>

Blanchot, in other words, redefines ‘experience’ such that it becomes ‘a perilous exposure to the absence at the heart of being.’<sup>172</sup>

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<sup>169</sup> Maurice Blanchot, ‘Two Versions of the Imaginary,’ trans. Lydia Davis, in Maurice Blanchot, *The Station Hill Blanchot Reader: Fiction and Literary Essays* (Barrytown: Station Hill Press/Barrytown Inc., 1999), 419.

<sup>170</sup> S. Brent Plate, ‘Lacan Looks at Hill and Hears His Name Spoken: An Interpretive Review of *Gary Hill* through Lacan’s ‘Ts’ and Gazes,’ *Postmodern Culture* 6, no. 2 (January 1996), para. 3.

<sup>171</sup> Kevin Hart, ‘Review of Geoffrey Hartman, *Scars of the Spirit: The Struggle Against Inauthenticity* (New York: Palgrave Macmillan, 2002),’ *Bryn Mawr Review of Comparative Literature* 4, no. 1 (2003), <https://www.brynmawr.edu/bmrcl/Summer2003/Hartman.html> (URL no longer accessible; copy with author; emphasis in original).

<sup>172</sup> *Ibid.*

The imperfect song of the Sirens, to which Odysseus imagines he is *not* hearing, lies in the space *between* perfect song and perfect silence, which is its true place. The impossibility of perfection (as unity or self-presence) requires that the Sirens' song always be insufficient, 'still to come', a song that simply guides sailors to 'that space where singing would really begin'. This song, in other words, can only be but a 'movement towards the song', 'an expression of the greatest desire': 'the desire for a marvelous beyond'.<sup>173</sup>

Bringing Blanchot's analysis to bear on the subject of Western law, we see that the power of law lies similarly in its imperfection, in its failure to be 'everything' or 'absolute world'. Law's trick, like that of Odysseus, 'is to seem to limit [its] power: in a cold and calculating way [law] finds out what [it] can still do, faced with the other power'<sup>174</sup> (i.e., transgression). By maintaining a limit between the two, by 'think[ing] its other',<sup>175</sup> law effectively reins in or controls – 'interiorize[s], incorporate[s]'<sup>176</sup> – its transgressive and perilous outside. Of concern here is whether the other is able to escape this 'maneuver of incorporation at the limit or by surprise'.<sup>177</sup> In other words, just as the imperfect song gestures towards the 'song to come',<sup>178</sup>

<sup>173</sup> Blanchot, 'The Song', 443–445.

<sup>174</sup> *Ibid.*, 448.

<sup>175</sup> Hélène Cixous, 'Apprenticeship and Alienation: Clarice Lispector and Maurice Blanchot,' in Hélène Cixous, *Readings: The Poetics of Blanchot, Joyce, Kafka, Kleist, Lispector, and Tsvetayeva*, trans. Verena Andermatt Conley (Minneapolis: University of Minnesota Press, 1991), 90.

<sup>176</sup> *Ibid.*, 90.

<sup>177</sup> *Ibid.*, 90.

<sup>178</sup> Blanchot, 'The Song', 443.

so too does the imperfect law announce the possibility of a justice ‘to come’,<sup>179</sup> which is a coming that never arrives, but which promises nevertheless ‘gradual and necessary transformation’<sup>180</sup> within law and society?

In the penultimate section of this article, I interrogate what attunement as imperfect listening would look or sound like in the everyday practice of law, particularly as it applies to judicial decision-making.

### 5. Attunement in Practice: The Power of Imperfect Listening in Law

As the above attests attunement as imperfect listening is always a listening-*with* (others/the ‘other’/otherness). This is why improvised music practices are so important to law. Not entirely intuitive, attunement in both law and music must be learned and honed. As Bennett Hogg (composer/improviser/cultural theorist) clarifies: ‘It’s to do with picking up the messages other people are putting out and responding to them, which requires a level of nuance and a kind of listening training that you get from studying an instrument well.’<sup>181</sup> Improvised musical practices thus speak not only to music, but to other realms as well, such as law and justice, as the UK Arts

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<sup>179</sup> Jacques Derrida, ‘Nietzsche and the Machine,’ in Jacques Derrida, *Negotiations: Interventions and Interviews, 1971–2001*, ed. and trans. Elizabeth Rottenberg (Stanford, California: Stanford University Press, 2002), 240.

<sup>180</sup> *Ibid.*, 241.

<sup>181</sup> What the Participants are Saying, Information Booklet for the UK Arts and Humanities Research Council (AHRC)-funded project, *Into the Key of Law: Transposing Musical Improvisation. The Case of Child Protection in Northern Ireland*, 2015. See <http://translatingimprovisation.com/wp-content/uploads/2016/02/IKOLBooklet.pdf>, 11.

and Humanities Research Council (AHRC) sponsored research project, *Into the Key of Law: Transposing Musical Improvisation. The Case of Child Protection in Northern Ireland*, evidences.<sup>182</sup> One key finding arising from this project was the importance of listening – *really* listening – to the voices of others in the courtroom and in other legal settings. For instance, at the Just Improvisation Symposium held at Queen’s University Belfast (QUB)’s Sonic Arts Research Centre (SARC) on 29–30 May 2015, Her Honour Judge (HHJ) Patricia Smyth, a Northern Irish District Court family law judge, says this about the importance of listening:

[I]f people genuinely feel they have been listened to, that the judge has understood their point, that the judge has given it proper consideration, even if they lose, they can deal with it ... because they have been listened to. ... And, it is a key task for any judge to not just listen, but to convey the fact to the person that they have been listened to, and, in my own experience in the family court, I think it is an absolute priority that the vulnerable parents are made to feel that they matter, that they are treated with dignity and respect, and I consciously speak directly to parents, for example. I do it deliberately and consciously so that they understand, and very often some of the vulnerable people who find their way into court, they’ve never been listened to by anyone, they’ve been treated like a piece of dirt by authorities everywhere all their lives, and, as a judge, I make it a priority that in my court they will not feel like that.<sup>183</sup>

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<sup>182</sup> For more information on this project, see [www.translatingimprovisation.com/ahrc](http://www.translatingimprovisation.com/ahrc).

<sup>183</sup> The transcript of this discussion is with the authors. For video documentation of the panel discussion in which HHJ Smyth

The process of listening described above by HHJ Smyth is, to my mind, the epitome of attunement in law: an active engagement with the ‘other’ through listening and responding – which accords nicely with Cobussen and Nielsen’s description of musical improvisation as ‘an open listening attitude, an openness towards other voices and the voices of others.’<sup>184</sup> This is perhaps why Oliveros,<sup>185</sup> who was in the audience during HHJ Smyth’s talk, responded to her description of judging by exclaiming, ‘*It’s deep listening!*’<sup>186</sup>

In an interview following the Symposium, HHJ Smyth was asked what it means to listen openly and/or respectfully in law. In response, she provided some very practical advice for how to evidence to litigants that they are being listened to:

Body language is key. Eye contact is key. I use my voice very deliberately. I used my voice very deliberately in a lot of different spheres as a judge.

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participated, see Panel 3, ‘Imagining the Future,’ <http://translatingimprovisation.com/portfolio/symposium>.

<sup>184</sup> Cobussen and Nielsen, *Music and Ethics*, 10 (emphasis added).

<sup>185</sup> Oliveros passed away on 24 November 2016 at her home in Kingston, New York at the age of 84. For those unfamiliar with her work, see the Deep Listening Institute website, <http://deeplisting.org>, and the Pauline Oliveros website, <http://paulineoliveros.us>. For further information on Pauline and her career, see, for example, a tribute in *The New York Times*: Steve Smith, ‘Pauline Oliveros, Composer Who Championed “Deep Listening”, Dies at 84,’ *New York Times*, 27 November 2017, <https://www.nytimes.com/2016/11/27/arts/music/pauline-oliveros-composer-who-championed-deep-listening-dies-at-84.html>.

<sup>186</sup> The transcript of this discussion is with the author. For video documentation of the panel discussion in which Pauline Oliveros commented from the audience, see Panel 3, ‘Imagining the Future.’ <http://translatingimprovisation.com/portfolio/symposium>.

... Calling a person by their full name ... Speak to them with respect. Also, I will explain in very clear, simple terms what the problems are, so that they build a rapport with me. I mean, I have had a lot of cases, which would be in regularly for various reasons, and I would build a rapport. I think it was enormously important in getting breakthroughs. ... [T]hat requires very determined conscious effort.<sup>187</sup>

To the question of whether the skills of attentive listening in law can be taught, she answered: ‘Absolutely. ... It’s a very, very important skill. And, it *can* be taught.’<sup>188</sup> Also, noting the hard work that goes into attentive listening or attunement in law, and the current limitations in the legal system as they relate to (judicial) time and resources, HHJ Smyth said the following regarding whether there is enough time for attuned judgment: ‘It’s not a time issue. It’s not a time issue. I mean I could spend all day *not* listening to people, if I wanted to. Or, I could spend five minutes really listening. So, it’s not a time issue, it’s a training issue.’<sup>189</sup>

## 6. Attuning to Attunement in Law and Musical Improvisation: Concluding Remarks

According to François Bonnet, for Kafka, it is the *desire* to hear as opposed to the hearing itself in which voice/sound gains meaning.<sup>190</sup> The imperfect listening of attunement, in which there exists no stable or fully present

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<sup>187</sup> Sara Ramshaw and Seamus Mulholland, ‘The Improvising Judge ...’ *Critical Studies in Improvisation* 12, no. 1 (2018).

<sup>188</sup> *Ibid.*, 11.

<sup>189</sup> *Ibid.* Much more can be said on the relationship between law, attunement and time, but that is for another time.

<sup>190</sup> Bonnet, *The Order of Sounds*, 145.

voice-object, offers the possibility of deep or attentive listening to the other in both law and music. It is an ever-open listening, which takes into account the singularity of the situation, even when constrained by rules/resources/time/etc. It is especially important when seeking justice for litigants, particularly, but not solely, in the family law realm.

In light of the above, attunement in both law and improvised music can be defined as possessing the following key characteristics. Although not an exhaustive list, attunement as imperfect listening aims to be:

- (1) Dialogic/responsive (Lipsitz; Fitzpatrick; Lipari);
- (2) Open/generous (Nancy; Lipari);
- (3) An emergent process (Motzkau);
- (4) Hard work (HHJ Smyth; Nancy; Parker; Lipari; Moore;<sup>191</sup> Stewart<sup>192</sup>);
- (5) Risky/courageous (Motzkau; Lipsitz; Lipari); and
- (6) Inventive (Lipari).<sup>193</sup>

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<sup>191</sup> As Nathan Moore shrewdly observed at the *Legal Otologies | Hear Law Sound* event hosted by Westminster Law School in December 2020, there would not be an instance where attunement would not be necessary; the difference is the effort or work one devotes to the task (I hope that I have interpreted Nathan's comment accurately). For writings by Moore on the acoustic or sonorous in/of law, see Anne Bottomley and Nathan Moore, 'Sonorous Law II: The refrain', *Zizek and Law*, ed. Laurent de Sutter (Abingdon: Routledge, 2016) 201–219.

<sup>192</sup> According to Kathleen Stewart, '[e]very attunement is a tuning up to something, a *labor* that arrives already weighted with what it's living through. The intimacy with the world is every bit about that world's imperative; its atmospheres are always already abuzz with something pressing': Stewart, 'Atmospheric Attunements', 448 (emphasis added).

<sup>193</sup> According to Lipari, several recurring themes shape an ethics of attunement: 'interconnection and generosity, impermanence and humility, iteration and patience, and invention and courage': Lipari, *Listening Thinking, Being*, 6.

Judicial attunement, in particular, takes place on three interrelated planes of meaning, or what Crawford calls ‘triple attunement’:<sup>194</sup> (1) attunement to tradition (for example, legal texts signifying a broad range of laws, such as precedents and statutes, rules of procedure, both formal and informal, etc.); (2) attunement to other legal professionals (colleagues, judges of other courts and jurisdictions, barristers and solicitors, police, social workers, etc.); and (3) attunement to the general public (required for the continued legitimacy of the legal system). I would add one more, which is attunement to time and space, that is, context and the singularity of the event of listening.

In conclusion, this article sought to offer an engagement with the concept of attunement that goes beyond current enquiries in contemporary law and legal theory. It does so by pairing attunement with imperfect listening, deconstruction and musical improvisation, the aim being to open up the ears of law to the sounds (and silences) of the ‘other’. Attunement as imperfect listening to otherness and alterity hearkens to a ‘now-time’,<sup>195</sup> which is ‘precisely not a temporality that remains identical to itself as an immediate presence.’<sup>196</sup> Instead, according to Lorey, the now-time is a ‘constructive temporality in which the splitters of history are composed anew, in which history

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<sup>194</sup> Crawford, *Theology as Improvisation*, 101 (he is writing here of the place of attunement in musical improvisation).

<sup>195</sup> Walter Benjamin, ‘On the Concept of History’ in W. Benjamin, *Selected Writings, Volume 4: 1938–1940* (Cambridge: The Belknap Press of Harvard University Press, 2003), 395.

<sup>196</sup> Isabell Lorey, ‘Presentist Democracy: The Now-Time of Struggles’, *Subjectivation in Political Theory and Contemporary Practices*, eds. Andreas Oberprantacher and Andrei Siclodi (London: Palgrave Macmillan, 2016), 149–63, 156.

always arises.<sup>197</sup> Now-time is thereby a ‘creative midpoint’, borrowing again from Lorey, ‘not a transition of the past into the future.’<sup>198</sup>

Likewise, attunement is not a perfect attentiveness to absolute song or silence, but a ‘creative midpoint’ in which the imperfect listening to the imagined song directs the way to the ‘still to come’, where listening (and justice) *really* begin. Bending Blanchot’s opening sentence into the closing one here, we can say: justice – it seems it does indeed exist, but in an unfulfilling way, one that only gives a sign of where the real sources of justice originate...<sup>199</sup>

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<sup>197</sup> Ibid.

<sup>198</sup> Ibid.

<sup>199</sup> Maurice Blanchot, ‘The Song’, 3. I rely here on the translation of ‘Encountering the Imaginary’ in *The Book to Come*, trans. Charlotte Mandell (Stanford: Stanford University Press, 2003), 3.

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