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Notes toward a supreme (legal) fiction

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Forthcoming in the *Journal of Legal Philosophy*, a symposium on Maksymilian Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (Hart 2020).

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1 INTRODUCTION AND OVERVIEW OF THE BOOK

How clean the sun when seen in its idea,
Washed in the remotest cleanliness of a heaven
That has expelled us and our images.

Wallace Stevens, 'Notes Toward a Supreme Fiction'²

Maksymilian Del Mar's new book, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication*³ offers a finely drawn map of various ways of reasoning in and through law. The book is about the ways that thoughts, values, commitments and ways of seeing, move, take hold, settle, startle and – at times – release grip, re-orient, and/or transmute. It is a book that is teeming with references. There are threads to pull at everywhere.

Some legal philosophers when they write, write as if they have closed all the books around them. One gets the opposite sense here. Del Mar seems to write from deep in the stacks. There is an openness here, and a generous, distinctive – almost radical – practice of naming and citing influences for Del Mar's own thinking (a particularly moving part of the book is Del Mar's section on 'The Story of the Project' which documents the book's slow-build over years of reading, workshops and teaching). The book is bric-a-brac, and knotty-pine ringed, and it would be easy to imagine Del Mar meeting any criticism that he missed an important source or two, or corner of literature in the fields of aesthetics, rhetoric or the philosophy of imagination, with a good-natured pointing gesture, *oh, that could go right over there*. There's sparse reference to law in the first three chapters, and few references that someone schooled narrowly in the field of analytical jurisprudence, as it was taught for a good while,⁴ will have come across at any real frequency. Part of the book's contribution, as I see it, is its insistence that the study of legal reasoning raises questions about language, and the communal use of language long and deeply thought about in other disciplines.

² Wallace Stevens, *Selected Poems* (John Serio ed., 2015).

³ Maksymilian Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (Hart 2020).

⁴ See, eg, HLA Hart, *Essays in Jurisprudence and Philosophy* (Oxford University Press 1983) <www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198253884.001.0001/acprof-9780198253884> accessed 26 July 2019; Jules L Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2004).

The book's first three chapters, on 'Inquiry', 'Artefacts' and 'Imagination' (in this order and titled as such) present as libraries of concepts and theories of models, forms and methods for approaching artefacts, such as fictions, scenarios and metaphors, that, as the second half of the book suggests, illuminate our understanding of the work of artefacts, and the possibilities of artefacts, in law, and judicial reasoning, more specifically. The references are dizzying in number, but delicately drawn, and conscientiously offered. For example, the subject of the book's first chapter is *inquiry*, and the work of the chapter for Del Mar is to tentatively construct his understanding of the term.⁵ Over the chapter, the model of *inquiry* that Del Mar has in mind comes to extend beyond the traditional dichotomy of justification and discovery (which, as Del Mar writes, has worked to separate out in our understanding of adjudication what are thought to be analytical and normative questions about reason-giving from empirical studies of judicial psychology and decision-making),⁶ to encompass an activity shaped and embedded by interactive and communal social dimensions,⁷ and diachronic dimensions,⁸ that is experimental and open, and which involves normative duties.

Artefacts, as explicated through the work of Chapter 2, are forms of language that draw us in by signalling their own artifice, asking us to make something of them, and, as such, consciously draw in processes of imagination. Imagination, the subject of Chapter 3, involves the construction or adoption of a new epistemic frame, which can serve to open up different modes of affective, sensory and kinesic participation within, or across, this freshly imagined realm, with each mode offering the potential, at least, to move thoughts and expand ideas, to offer fluidity, vivacity, play, insight, verve.

Near the middle of the book, at the end of Part I, *Models*, we get a transition chapter entitled 'Enabling Inquiry' in which Del Mar sets the stage for bringing the models previously explored (that is, models of inquiry, models of artefacts and models of imagination) to bear on the practices of judicial reasoning in appellate cases in common law jurisdictions. The chapter summarizes Part II of the book, *Case Studies*, of which there are four, 'Fictions', 'Metaphors', 'Figures', 'Scenarios', each a chapter that begins with what Del Mar calls an *approach* to the concept that describes how each contributes to forms of interactive and collective inquiry (alongside other

⁵ Del Mar (n 2) 29.

⁶ *ibid* 29–30.

⁷ *ibid* 38.

⁸ *ibid* 53.

‘institutional infrastructure; certain other technologies, devices and strategies; an education system, and more’⁹) before describing and analyzing various examples of fictions, metaphors, figures and scenarios in common law judicial reasoning. In the chapter on metaphors, for example, in a section on the social dimension of metaphors, Del Mar writes

that there is a sense in which metaphor is interaction-making if not also community making. It helps establish, or facilitates, an interaction, eg a conversation, involving some complicity, between persons. As (Ted) Cohen puts it, a ‘transaction is precipitated’ in which persons ‘actively engage one another in coping with a piece of language’.¹⁰

Later the legal metaphor of the living tree constitution is introduced with Del Mar detailing its start as an imperial metaphor, replete with paternalistic imagery and constructed to set the frame for a broad but particular understanding of political authority.¹¹ It is then shown to morph into a metaphor concerned with a theory of constitutional interpretation, which highlights for Del Mar the ways in which legal metaphors can alter over time, and come to signify different legal terrain without, in the view on offer, ever becoming conventionalized or uncontested.¹²

In each of the final four chapters in Part II, the book intends for the reader to step, arms loaded, into the terrain of the law. This is a move that has one reaching for a metaphor – is there before us a hurdle, a gate, or a wall? At times, this final description feels the most apt, and in Sections 2 through 4 of this review, I explore three sets of questions that aim to raise some of the difficulties of moving the book’s general insights and arguments about inquiry, imagination, and artefacts into the terrain of the law, and common-law based judicial reasoning.

⁹ *ibid* 218.

¹⁰ *ibid* 305–06.

¹¹ *ibid* 319.

¹² *ibid* 320–9.

2 BROAD AND LOW AND CLOSE TO THE GROUND

Language is not an abstract construction of the learned but is something arising out of the work, needs, ties, joys, affections, tastes, of long generations of humanity, and has its bases broad and low, close to the ground.

Walt Whitman, 'Slang in America'¹³

What twists when we think about the possibilities of language not generally but within our existing practices of adjudication? How might the materials gathered-up and sun-dried in the early chapters meet with questions about the coercive state apparatus,¹⁴ with police, prisons, eviction notices, border patrols, tiny corporate tax rates etc.?¹⁵ How does the landscape shift when we think about these aspects at work in the practice of judicial reasoning, where questions about legal institutions, political economy and history arise to foreground laws, at times, perniciously false claims to legitimacy, and, at times, utterly hollow rhetorical associations with justice? How to think about creativity and word and image play (even as audience, researcher or witness) in the face of the brute power imbalance between the judge and, as Dworkin used to put it, the person in the well of the court? How does someone with a great deal of power over others know if they've ever written a line capable of stirring insight or delivered a joke that elicited real laughter. I take these to be serious epistemic and political questions.

Del Mar is a remarkably subtle and attentive legal philosopher but here the questions still loom large over whether and how it is possible to examine legal reasoning as an abstract form given the history and place of law in the operation of the various state and transnational legal systems.¹⁶ In the book's concluding chapter, in a section entitled, 'The Politics of Artefacts and Imagination', Del Mar addresses

¹³ Walt Whitman, 'Slang in America' (1885) 141 *The North American Review* 431.

¹⁴ Alan Hunt, 'Law, State and Class Struggle' (1976) 20 *Marxism Today* <<https://legalform.files.wordpress.com/2017/08/hunt-law-state-and-class-struggle-19761.pdf>>. Accessed March 7, 2022.

¹⁵ Rocio Lorca, 'The Presumption of Punishment: A Critical Review of Its Early Modern Origins' (2016) 29 *Canadian Journal of Law & Jurisprudence* 385; Rocio Lorca, 'Punishing the Poor and the Limits of Legality' [2018] *Law, Culture and the Humanities* 1-20; Rocio Lorca, 'Sick and Blamed: Criminal Law in the Chilean Response to COVID-19' (2021) 50 *Netherlands Journal of Legal Philosophy* 142.

¹⁶ See Manderson's intervention in this volume.

his decision not to foreground questions concerning the history and politics of the use of artefacts in judicial reasoning. Del Mar writes:

I wanted to focus in this book on inquiry, ie the process of generating insight into what values, vulnerabilities and interests might be at stake in a case and in others potentially like it in the future. The difficulty with placing the politics of legal form and cognition in the foreground is that it can all too easily slide into a cynical exercise in which we see all such forms and processes via a filter of suspicion, of masked domination, violence, and exclusion. However, I struggled with paying equal attention to this dimension and to the ways that the forms and processes of legal practice can enable inquiry. Given the lack of defences of artefactual language and imagination in adjudication, I erred on the side of being upbeat and positive about the capacity of these forms and processes to contribute to the making of normative insight and thus to doing justice.¹⁷

We see this differently. I do not yet see how it might be possible to map out the formal attributes and artefactual aspects of common law judicial reasoning without being open to the charge that the work is ahistorical and acontextual, and, thus, at root, missing something deep and significant at the level of politics.¹⁸ It seems necessary to ask the question of whether and how artefacts of judicial reasoning that have been rooted in particular institutional forms and historical contexts have been prone to serving certain political ends over others. The methods of ideal theory abstract away concerns about the politics of distribution, about compliance, about the coercive apparatus of the state,¹⁹ including the coercive ideological apparatus of the state, and so too – as the recently passed political philosopher Charles Mills put it so powerfully in his book, *The Racial Contract* – the injustices of the past perpetrated through law.²⁰ In the field of international law, there is a rich literature detailing how the self-stylized technical and professionalized form of legal writing is not just removed from questions of impact, that is – staid, dry, and grip-less in the day-to-

¹⁷ Del Mar (n 2) 442.

¹⁸ See, eg, Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press 2016).

¹⁹ See, eg, Robert Cover's often-cited criticism of JB White in Robert M Cover, 'Violence and the Word' (1986) 95 *The Yale Law Journal* 1601.

²⁰ Charles W Mills, *The Racial Contract* (Cornell University Press 2011).

day,²¹ but acts as cover for a pernicious and at times brutal and totalizing – politics of extraction, exclusion, dispossession and structured inequality.²² The book argues that artefactual reasoning is part of legal reasoning, and here it is largely successful, but it can't leave behind the question of whether these forms are prone to serving the same ends. Capacious artefacts of legal reasoning like the *standard of civilization*,²³ *sovereign debt*²⁴ and the *doctrine of terra nullius*²⁵ have been used to serve highly specific interests, giving legal warrant to acts of dispossession and violence. On the page, maybe even in the brief, we might see possibilities threaded through the images of some artefacts of legal inquiry, but it will be important to seek out the specific ways that these possibilities are altered, if not altogether foreclosed,²⁶ when brought into the formal, institutionalized practices of common law adjudication.²⁷

Del Mar understands language as social, as something that we respond to as 'affective, sensory, and embodied beings'²⁸ and as 'something that is connected, in complex ways, to the exercise of power, ie it is both capable of creating power imbalances and enabling the powerful to exploit the vulnerable, as well as being a

²¹ Or, as Gerry Simpson recently, and splendidly, put it, 'this disembodied, disarticulated discipline'. Gerry Simpson, *The Sentimental Life of International Law: Literature, Language, and Longing in World Politics* (1st edn, Oxford University Press 2021).

²² See, eg, Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011) <<http://ebooks.cambridge.org/ref/id/CBO9781139048200>> accessed 27 June 2020; Ntina Tzouvala, *Capitalism As Civilisation: A History of International Law* (1st edn, Cambridge University Press 2020) <www.cambridge.org/core/product/identifier/9781108684415/type/book> accessed 20 January 2022; James Crawford, Martti Koskenniemi and Surabi Ranganathan, *The Cambridge Companion to International Law* (Cambridge University Press 2015).

²³ Tzouvala (n 21).

²⁴ Robert Knox, 'Haiti at the League of Nations: Racialisation, Accumulation and Representation' (2020) 21 *Melbourne Journal of International Law* 1.

²⁵ John Borrows, 'The Durability of Terra Nullius: Tsilhqot'in Nation v. British Columbia' (2015) 48 *University of British Columbia law review* 701; Jeffery G Hewitt, 'Land Acknowledgment, Scripting and Julius Caesar' (2019) 88 *Supreme Court Law Review* 27.

²⁶ One example here comes from an excellent supervised research project written by a JD student that illustrated how several legal arguments that would advance justice for trans individuals seeking life-saving health care could not find footing within current judicial constructions of the s 7 right to Life, Liberty and Security of the Person under the *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982. Francis Nasca, 'Access to Gender-Affirming Surgery in Ontario: A Section 7 Analysis of the Ontario Health Insurance Plan Funding Regime' (Osgoode Hall Law School).

²⁷ Emily Kidd White, 'Till Human Voices Wake Us: The Role of Emotions in the Adjudication of Dignity Claims' (2014) 3 *Journal of Law, Religion and State* 201.

²⁸ Del Mar (n 2) 79.

resource of the vulnerable against the powerful'.²⁹ For Del Mar legal language is, at least to an extent, indeterminant and open, with artefacts like metaphors, scenarios and fictions playing a role in establishing these elements. Del Mar is aligned with James Boyd White who he says 'did not see legal language as closing down possibilities for meaning-making, but rather precisely as offering resources for its continual transformation'.³⁰ Citing White's book, *The Legal Imagination*, Del Mar finds that because law is a social, interactive and communal activity, that it is open to 'multiple stories, multiple languages'.³¹

Under a section entitled 'Rhetoric, Power, Violence' there is a reference to Peter Goodrich whose writing on the politics of legal language

foreground(s) the following questions: 'Who is speaking? Who has the right to speak? Who is qualified to do so? Who derives from it their own special quality, their prestige, and from whom, in return, do they receive if not the assurance, at least the presumption that what they say is true?'³²

Del Mar makes space for this argument but counters that this is not the only way legal language works, to which we might wish to respond, is this not the way in which legal language has overwhelmingly worked? To release this concern, might we have to hold some sort of empirical view about the law – in some places, all places – gradually moving towards justice?³³ Or the more subtle view that artefacts of legal reasoning themselves can alter the practices, institutions and material foundations of adjudication. If the latter, then how? The book emphasizes the possibilities of legal language to further conditions of justice, but part of its enduring impact might be the way it sets up the crucial question of constraint, pushing readers to seek out the ways in which existing legal systems foreclose, deradicalize, placate, harness and/or co-opt these possibilities through adjudicatory processes.

²⁹ *ibid.*

³⁰ Maksymilian Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (Hart 2020) 83.

³¹ *ibid* 83.

³² *ibid* 85. (Citing Peter Goodrich, 'Law and Language: An Historical and Critical Introduction' (1984), 11 *Journal of Law and Society* (2) 173 at 176).

³³ But 'time is neutral', as Dr Reverend Martin Luther King memorably wrote. Martin Luther King, *Letter from Birmingham City Jail* (American Friends Service Committee 1963).

3 ON THE NORMATIVE DIMENSIONS OF INQUIRY IN LAW

For Del Mar, the normative duty to engage in inquiry arises because adjudication involves stakes pertaining to particular ‘values, vulnerabilities and interests’³⁴ and it is important to try to ascertain these clearly. The elements that comprise Del Mar’s conception of inquiry in legal reasoning – the openness, the embeddedness, the duty to inquire into the values, vulnerabilities and interests existing in a case (or like cases in future), illuminate the challenging task of doing justice for Del Mar, and encourage us ‘to think of the process (of seeking justice) as an on-going activity, one which we engage in together, ie interactively and collectively, and over time, and one which we never be wholly satisfied with, nor ever complete or finish’.³⁵ The book sets out its argument on the normative dimensions of inquiry, explicitly from pages 66–77, though it deepens in various ways across the chapters. Del Mar summarizes the argument as such:

Specific artefacts, like fictions, metaphors, figures, and scenarios, and their related processes of imagination are valuable when they assist interactive and collective practices of inquiry, in the instant case and over time, providing modes of experimentation that allow for the making of insights as to what values, vulnerabilities and interests might be at stake in the case and in cases potentially like it in the future.³⁶

It is useful for Del Mar to set out this explicit functional, normative argument so clearly. It opens space for the reader to productively apply pressure to the account. As the argument is situated within common-law appellate reasoning, there is a real question about how we are to consider and weigh this future gaze that is alluded to in the argument. The book is not altogether clear on the utopian aspects of this account. Is the future envisioned one in which all existing legal principles are fulfilled? Is it a just future (however this might be substantively constructed)? These don’t necessarily lead to the same picture of things. The account also leaves open the question of how traditional Rule of Law principles,³⁷ the ones offered by Lon Fuller

³⁴ Del Mar (n 2) 66.

³⁵ *ibid* 69.

³⁶ *ibid* 30.

³⁷ Catherine Z Elgin, ‘Impartiality and Legal Reasoning’ in Amalia Amaya and Maksymilian Del Mar (eds), *Virtue, Emotion and Imagination in Law and Legal Reasoning* (Hart Publishing 2020) <www.bloomsburycollections.com/book/virtue-emotion-and-imagination-in-law-and-legal-reasoning> accessed 2 July 2020.

for example,³⁸ interact with its model for normative inquiry in common law legal reasoning. Questions about the weight and authority of precedent loom,³⁹ and, so too, questions about the considerations of fairness at play between past and future persons.⁴⁰

An important piece of the work that remains underspecified is the interrelationship or priority accorded to the values, interests and vulnerabilities that a judge is meant to seek out (and not only amongst themselves, but across categories, and as against existing legal precedents and principles). Is the goal that everything is illuminated? If so, are these values, interests and vulnerabilities simply meant to be brought to light, or are they meant to have some sort of special impact on the reasoning, and eventual judgement and/or legal remedy provided? What are the decision rules for the invariable conflicts arising among and between them? Or is there a presumed unity of value at play, or a quiet pitch for the utilitarianism of Bentham or Mill?

Del Mar is interested not just in the presence of artefacts in judicial reasoning but in the ways in which those artefacts might facilitate the pursuit of justice through adjudication. Here the work of John Gardner is especially illuminating.⁴¹ In Gardner's view, it is because law involves adjudication that it necessarily implicates the virtue of justice, which is the virtue that accords to questions of proportionality – that is, *who gets what and why* (and we could add GEM Anscombe here for the question, and *via whom*).⁴² For Gardner, a court cannot avoid questions of proportionality, of allocation, of distribution.⁴³ Justice is an all-things-considered judgement, and legal precedent, practice, and the interpretation of principles over time factor but, so too, can come into tension with what justice requires. As Gardner writes,

Perhaps the underlying mistake of some legal formalists is to think that the only goods and ills that have to be allocated between litigating parties are the

³⁸ Lon L Fuller, *The Morality of Law* (rev ed, Yale University Press 1969).

³⁹ Nina Varsava, 'The Gravitational Force of Future Decisions', *Philosophical Foundations of Precedent* (Oxford University Press Forthcoming)
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3956848>. Accessed March 8, 2022.

⁴⁰ *ibid.*

⁴¹ John Gardner, *Law as a Leap of Faith: Essays on Law in General* (1st ed, Oxford University Press 2012).

⁴² GEM Anscombe, 'On the Source of the Authority of the State' (1978) 20 *Ratio* (Oxford) 1.

⁴³ Gardner (n 39).

goods and ills of fulfilled and frustrated expectations, so that so long as the law does not frustrate any of the expectations it creates, but fulfils them all by sticking to the rules, it cannot but be just. There are three mistakes here. The first is the neglect of the other things that must still be allocated apart from the frustrated and fulfilled expectations (such as the losses and the penalties). The second is the mistake of thinking that justice would always be in favour of minimizing frustrated expectations on both sides when in fact, were the expectations morally abhorrent ones, justice might be in favour of maximizing frustrated expectations on both sides. The third is to think that whatever expectations the law itself creates cannot but be legitimate ones, even when they are morally abhorrent.⁴⁴

Following this, it seems imperative to work out the precise pull of the inherent conservatism that exists within the past-looking, common-law practices of judicial reasoning. Should past decisions that have supported injustice supply constraint even where they have not been recognized as violations of positive law? What of the quiet, path-setting, frame-setting decisions that have furthered injustice? The book gestures at something potentially revolutionary about the role of inquiry and imagination in legal reasoning, something radical in the identification of certain not-yet-legally recognized interests, values and vulnerabilities but the structures, forces and habits that might work to resist these movements are, in the book, out of frame.

This section on normative inquiry brought to mind a response to HLA Hart's understanding of legal obligation⁴⁵ – as being something we feel the pull of – that doesn't in Hart's use of the term amount to a fully blown moral obligation, with the response that if you are interested in obligation, you need to be interested in morally real obligation.⁴⁶ Cast in the terms of the book, if we are interested in the normative dimensions of legal inquiry, aren't we interested in the shape of the normative commitments that further justice full stop? If so, we might need to be open to the charge that the confines of the judicial role, and common-law reasoning, are a less than ideal place to work out these questions.

⁴⁴ *ibid.*

⁴⁵ HLA Hart, *The Concept of Law* (Oxford University Press 1972).

⁴⁶ See, eg, RM Dworkin, *Law's Empire* (Belknap Press 1986); Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979)

<www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198253457.001.0001/acprof-9780198253457> accessed 26 July 2019; Joseph Raz, *The Practice of Value* (Oxford University Press 2005) <www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199278466.001.0001/acprof-9780199278466> accessed 26 July 2019.

Imagination for Del Mar ‘is a combination, and indeed a balancing act, of two simultaneously exercised and active processes: first, the entrance into a distinct epistemic frame, in which we selectively suspend certain epistemic norms and commitments; and second, participation along a spectrum of affective, sensory and kinesic involvement’.⁴⁷ It involves movement across the inside and the outside of a frame, and ‘a mixture of passivity and activity, of distance and immersion, of being offline and online, of withdrawal and participation’.⁴⁸ Strikingly, Del Mar’s model does not treat imagination ‘as a rare exercise of genius, and it does not seek to burden imagination with the demands of creativity’.⁴⁹ One response to this might be to worry once more, as I have above, about how the training and social power of the judge might constrain these processes of imagination. On this I say more below. Another might be to say, in the interest of justice, that we do need to aim for something akin to genuine creativity here. That is, something capable of radically reorienting our thinking about what justice in adjudication demands. Something that is not apt to settle for a politics of appeasement. For the poet Wallace Stevens, genuine creativity is so rare that the poet seems to sit as God in the moment of creation.⁵⁰ It is a high bar but a useful thought because it highlights the propensity to claim insight when we are just repeating lines and phrases, and playing old chords, while left open to the charge that even our best images and metaphors derive mainly from habits and well-trodden pathways of thought.⁵¹ The blunt concern here is the idea of a judge aiming at cleverness, or profundity, while managing to deliver only a dressed-up version of the same old hand, the same pernicious errors supported with the full power of the court; the vice of preciousness disguising a politics, yet again.

⁴⁷ Del Mar (n 2) 26.

⁴⁸ *ibid.*

⁴⁹ *ibid.* 126.

⁵⁰ Stevens (n 1). See, eg, ‘The Man on the Dump’ at 117. As explained by Murdoch, ‘Poetry is the creation of linguistic quasi-things; prose is for explanation’: Iris Murdoch, ‘Against Dryness: A Polemical Sketch’ (1961) 16 *Encounter*. Cited also in Gerry Simpson, ‘The Sentimental Life of International Law’ (2015) 3 *London Review of International Law* 3.

⁵¹ Virginia Woolf cast the idea as follows: ‘Words, English words, are full of echoes, of memories, of associations – naturally. They have been out and about, on people’s lips, in their houses, in the streets, in the fields, for so many centuries. And that is one of the chief difficulties in writing them today – that they are so stored with meanings, with memories’. BBC, ‘Virginia Woolf “On Craftsmanship”’ (29 April 1937) <www.literaturecambridge.co.uk/news/craftsmanship>. Accessed March 8, 2022.

I gather the underlying claim is that methods of inquiry, that is, these artefacts and fictions, can be used in accordance with political virtue, or political vice. This is surely correct, though I think I part ways with Del Mar when he says that ‘because of the difficulties of judging, judges often employ a more experimental attitude and more experimental epistemic practices, eg being less assertive, and embracing uncertainty rather than pretending it is not here’.⁵² We are trading intuitions here but it seems we more regularly see the opposite, that is, shows of assurance and conviction, and full-throated reasons detailing the necessity, or rightness even, of a ruling.

Both Iris Murdoch and Simone Weil wrote on the difficulty of grasping the lived experiences of others,⁵³ and the difficulty of working beyond the ego in processes of inquiry.⁵⁴ In the terms of the book, this translates into a concern about the ways in which artefacts of legal reasoning can be fashioned, consciously or not, to re-confirm one’s own prior commitments.⁵⁵ The role of intuitions is not discussed at length in the book, and the conditions under which we might know when they have been revised, or revised in accordance with justice, remain unclear.⁵⁶ It seems imperative to ask, however, about when, and how we might know when, inquiry is real, as opposed to a gesture, a dalliance, or a self-pleasing fantasy. And, so too, the more fundamental question about what it means to ask whether an inquiry might be real. How might inquiry move the structure of our thoughts, and normative commitments? Inquiry clearly pushes us beyond our prior commitments at times, but we also are heavily rationalizing, self-deceiving creatures.⁵⁷ As seats of power seem well able to exacerbate this tendency, it would be useful to probe the ways the

⁵² Del Mar (n 2) 203.

⁵³ Iris Murdoch, *Metaphysics as a Guide to Morals* (1st American ed, Allan Lane, The Penguin Press 1993); Murdoch (n 48); Simone Weil, *The Iliad: Or, The Poem of Force* (Mary McCarthy ed, Pendle Hill 1956).

⁵⁴ Weil (n 51). Simone Weil wrote of the difficulty of witnessing the suffering of another without either moving to obscure the other’s pain (often by way of erasing their subjectivity, and/or lowering their status), or by entertaining some measure of self-satisfaction or voyeuristic pleasure. For Weil, the efforts of holding one’s attention on a subject, while actively and conscientiously resisting the slide into more pleasurable (or simply less agitating) emotional states, constituted an ethic.

⁵⁵ Emily Kidd White, ‘On Emotions and the Politics of Attention in Judicial Reasoning’ in Amalia Amaya and Maksymilian Del Mar (eds), *Virtue, Emotion, and Imagination in Legal Reasoning* (Hart Publishing 2020).

⁵⁶ See, eg, Thomas Nagel, ‘Types of Intuition’ (2021) 43 *London Review of Books*.

⁵⁷ Murdoch (n 48); Maria Aristodemou, ‘A Constant Craving for Fresh Brains and a Taste for Decaffeinated Neighbours’ (2014) 25 *European Journal of International Law* 35.

judicial role might constrain Del Mar's model of inquiry along these lines?⁵⁸ As Iris Murdoch wrote, much of what we think of as inquiry is fantasy.⁵⁹ For Murdoch, 'we are not isolated free choosers, monarchs of all we survey, but benighted creatures sunk in a reality whose nature we are constantly and overwhelmingly tempted to deform by fantasy'.⁶⁰ She continues, 'what we require is a renewed sense of the difficulty and complexity of the moral life and the opacity of persons'.⁶¹ I have written in the past of the concern that judges use ill or false versions of empathy in their legal reasoning practices, drawing on the language of the claimant, without real efforts to understand their station or point of view.⁶² The concern here is how judges might employ artefacts to entrench their own intuitions (or more perniciously, their own stereotypes, and prejudices) about the claimant and the case, whilst committing the specific wrong of using others as argumentative props after a costless exploration into their lives.⁶³

Del Mar might respond that there is no place outside of language to work out these questions of justice. I am interested in further explication of this view, and the idea that the work is to develop the sensibilities required to ascertain real values, vulnerabilities and interests and to weigh them clearly. If you are doing this in an ego-centric way – the response could go – then you are doing this badly, and in a manner that furthers injustice over justice. That might be right, but there is still a question whether the normative framework outlined above gives us a sufficiently structured politics to understand when and how this might go awry in our reasoning efforts.

Two of my favourite stories to teach with in legal theory involve the writings of John Borrows on his Grandpa Josh in 'Indian Agency: Forming First Nations Law

⁵⁸ See, eg, Susan Bandes' writings on the deeply problematic ways that judges think they are evaluating the emotion of remorse in sentencing. Susan A Bandes, 'Remorse and Demeanor in the Courtroom: Cognitive Science and the Evaluation of Contrition', in *About the Integrity of Criminal Process: From Theory into Practice* (1st edn, Hart Publishing 2016).

⁵⁹ For Del Mar on Murdoch's understanding of fantasy, see Del Mar (n 2) 127.

⁶⁰ Murdoch (n 48).

⁶¹ *ibid.*

⁶² White (n 53).

⁶³ White (n 51).

in Canada’,⁶⁴ and Patricia Williams in ‘The Raw and Half-Cooked’.⁶⁵ Both pieces include stories that offer highly generative, sideways-entry critiques of dominant legal positions on the relationship of law to land, or the relationship of law to rights. The latter piece recounts the story of the 2010 earthquake in Haiti through the perspective of a commodity, that is, a bag of rice, and then later through a fantastical-seeming story about a child awoken from the dead. As I take it, the power of these stories, along with their images, their fictionality (and suspensions), their vivacity and pull, and their implicit invitations to break boundaries – draw from them being stories about law that are markedly outside the bounds of the usual practices of common law appellate legal reasoning. Therein lies their critical purchase and power. The crux might be that the existing institution-bound practices of judicial reasoning just can’t be our locus of interest if we want to think about the ways in which artefacts in our language about law contribute to justice.

5 CONCLUSION: METAPHORS, FICTIONS AND OPEN-ROAD FUTURES

All of the formal properties have to be cracked and the simplicities released.
Saul Bellow in a letter to John Berryman⁶⁶

Del Mar’s philosophical method is one that mimics the building of a stone wall, and where something feels sturdy it is because you’ve seen the pieces set into the places that make it so. The book is rich-textured, and deeply generous, offering insights, references, lines of inquiry and highly detailed, fruitful models that readers interested in legal theory will be apt to hold onto.

If, alongside Del Mar, we are looking for justice, it seems incumbent upon us to consider how the strictures of judicial reasoning – even after recognizing the varieties of artefactual language present within it – may remain even still too narrow. What are the institutional, economic and political pre-conditions for the possibilities associated with language so beautifully established in the book to settle or thrive vis-

⁶⁴ John Borrows, ‘Indian Agency: Forming First Nations Law in Canada’ (2001) 24 *Political and Legal Anthropology Review* 9.

⁶⁵ Patricia J Williams, ‘The Raw and the Half-Cooked’ in Peter Brooks and Hilary Jewett (eds), *The Humanities and Public Life* (1st edn, Fordham University Press 2014).

⁶⁶ Cynthia Ozick, *Critics, Monsters, Fanatics, and Other Literary Essays* (Houghton Mifflin Harcourt 2016) 75.

à-vis the existing infrastructures and practices of common law adjudication? The book doesn't spell out this conclusion as it might have done, but part of its enduring impact might be that we come to feel the pressure of the question and ask what sort of political life could open up the generative capacities of language to begin to serve justice in public processes of adjudication, for the language of law to be open, communal, curious, sensitive to past and alive to place, and somehow future-gazing?