

Maksymilian Del Mar's *Artefacts of Legal Inquiry*

Some reflections*

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Book Symposium: Maksymilian Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication*

Maksymilian Del Mar's *Artefacts of Legal Inquiry* is a book with many virtues. First of all, being a political philosopher by profession, I am grateful for the clarity with which it is written and for the organisation of the text, especially for someone outside the legal discipline. Also, the book's scholarship is impressive, and thus it is a very instructive book on many different but interconnected debates, something which I very much appreciate. Finally, I should point out, I found myself either in continuous agreement with or very persuaded by many of the book's arguments, and so I celebrate that Del Mar wrote this book and that I got the opportunity to read it.

The overall argument of the book is that there are certain resources – which he calls 'artefacts' – and certain imagination processes that are key in adjudication because they enable legal inquiry. Artefacts are resources such as 'fictions', 'metaphors', 'figures', and narratives or 'scenarios', which are especially conducive to legal inquiry because, in signalling their own artifice in legal discourse, they make us to 'enter into' an epistemic attitude that involves imagination in a strong and fruitful way.¹ Moreover, the author claims, legal inquiry is a duty because law is incomplete – it is always a 'work in progress' – and thus adjudication is a never-ending task. Such an incompleteness, in turn, has to do, on the one hand, with our own epistemic limitations into normativity, and on the other, with the ever-evolving character of normativity itself.² The book is then a detailed exploration of how this type of legal inquiry happens – how artefacts work to promote legal inquiry, and what those processes of imagination consist and result in.

I would like to centre my contribution here, first, on four points that I found especially interesting and compelling, but on which I would like to either raise a concern or pose a question. Second, and as a brief note to conclude my reflections, I would like to raise an objection to Del Mar's interpretation of the cognitive approach to metaphors that has been so influential in legal studies. Let us begin with the first four points.

* I want to thank Amalia Amaya for the invitation to participate in this exchange, and to Maks Del Mar, for his very interesting book.

1 Maksymilian Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (London: Hart, 2020), 1.

2 Del Mar, *Artefacts of Legal Inquiry*, 76.

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In the book, Del Mar says ‘Hesitation ... is part of the phenomenology of judgment’.³ I really appreciated this point, as I myself have been very interested in hesitation – vacillation, oscillation – as a key part of a phenomenology, not only of judgement, but more generally of human action.⁴ The hostility with which hesitation and experimentation are received in our philosophical, ethical, and legal tradition is overdetermined. First, we have the legacy of Kantianism and rationalism more generally, for whom only what is categorical and imperative can count as valid or justified from a philosophical point of view. Second, politically and legally, we also have the very influential liberal concern with legal certainty: the fact that the law should not vary but be equal for all. Values as important as impartiality and fairness hinge on that idea.

In this book, however, we find a different position. Of course, it is not that Del Mar is in support of legal uncertainty, or that he praises lack of clarity and consistency in the law or in adjudication. But he does acknowledge two things. First, that adjudication is difficult especially because the kind judgment that it calls for has many audiences. As the author says, adjudicating means ‘caring, and expressing one’s care, for the many addressees of any one judgement, as well as for the moral and political quality of the law, and the authority and legitimacy of the court and its procedures, including, for instance, its relations with other courts, within its system and beyond’.⁵ Thus, adjudicating means speaking to different publics at a time and, according to the author, that calls for some degree of hesitation.

Second, he argues, hesitation in the law is also required as soon as we acknowledge that the law should be open towards the future. We tend to ‘focus too much on the instant [and present] case’, leaving aside ‘the other temporalities at work in adjudication’.⁶ In particular, we forget about the importance of caring, not only for the past of the law – that is, for understanding how it came to be, and the interests and values that gave birth to it, like in originalism – but also for its future. As I said before, Del Mar’s view is that legal inquiry ‘in its normative dimension is an ongoing, open-ended and never complete process’.⁷

In this respect, he quotes Benjamin Cardozo saying to his peers ‘What we hand down in our judgement is [a] hypothesis’.⁸ However, Dal Mar argues, that should not be taken as a sign of failure. Rather, he offers, ‘We need to move away from an ideal of adjudication and reasoning that posits an all-knowing individual, a hero, with his monological confidence, his decisiveness and assertiveness’.⁹ Adjudication,

3 Del Mar, *Artefacts of Legal Inquiry*, 21.

4 See my ‘Attempts at Free Choice: Bergson and Scheler on Agency and Freedom’, in *The Belief in Intuition: Individuality and Authority in Henri Bergson and Max Scheler* (Philadelphia: University of Pennsylvania Press, 2021), 40-77.

5 Del Mar, *Artefacts of Legal Inquiry*, 21.

6 Del Mar, *Artefacts of Legal Inquiry*, 75.

7 Del Mar, *Artefacts of Legal Inquiry*, 75.

8 Benjamin Cardozo, ‘Law and Literature’, *Yale Law Review* 699 (1925): 706, quoted in Del Mar, *Artefacts of Legal Inquiry*, 58.

9 Del Mar, *Artefacts of Legal Inquiry*, 58.

according to Del Mar, is experimental science, and it is deeply social, interactive, and collaborative – even agonistic, one might say.¹⁰ All this emphasises, in the author's view, the need for humility as a judicial virtue, and for modesty as a theoretical virtue, when we approach adjudication.

I want to express, first, the extent to which I agree with these ideas about uncertainty and the law. I think they are part of a very much needed antidote to what we might call 'legal fundamentalism', and that they rightfully acknowledge not only the finitude and fallibility of human epistemic capacities, but also the open and historical character of our societies. Very importantly as well, this understanding of the law allows us to better address some of the greatest risks that the world faces today, such as climate change, where an important degree of uncertainty regarding the different schemes of protection that will be needed in the face of the new and increasing vulnerabilities still prevails.

Nevertheless, I would like to pose a question on this point, regarding a potential, unwanted, side-effect of this view. I am thinking of an epistemic concern about what it means to conduct legal inquiry in a world divided between experts, on the one hand, and laypeople, on the other. In this case, of course, the experts would be the judges, lawyers, and legal theorists. In a recent essay for the *Boston Review* about the pandemic and the public health policy response to it, Zeynep Pamuk reflects about how to deal with uncertainty and the limits of science in a pandemic. There she argues that 'emphasizing the limits of [...] knowledge and calling for humility can have the effect of absolving scientists and government officials from responsibility for failing to produce the right kind of knowledge. It can serve to excuse not knowing what was in fact knowable, and not being prepared for what we should have seen coming. It can deflect citizens' rightful criticisms by suggesting that laypeople simply fail to grasp the uncertainty and incompleteness of science'.¹¹

To be sure, Pamuk says, scientific knowledge is inherently uncertain, fallible, and incomplete, and that calls for humility on the part of the scientists and government officials handling the pandemic. However, it can also be a double-edged sword, and therefore, instead of 'a blanket rhetoric of humility', she argues, we need to distinguish 'between different reasons why our knowledge and capacity for control happen to be limited', so that the difference between limitations that were avoidable and those that were not, is as clear as possible.

My question here for Del Mar is as follows: does he think something similar could happen in the field of adjudication? In other words, does he see any danger that, eventually, humility could be abused in that way, i.e., in a way that could absolve judges from taking responsibility of their decisions? This happens today with scientists; it happens with economists – can it happen with judges as well? Here, I am perhaps imagining a judge saying, especially in cases that might involve

10 Del Mar, *Artefacts of Legal Inquiry*, 59.

11 Zeynep Pamuk, 'The Contours of Ignorance', *Boston Review*, 8 December 2021, https://bostonreview.net/forum_response/the-contours-of-ignorance/.

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technical difficulties, either scientific, technological, or economic: ‘Well, I’m human, I have epistemic limitations, as any human being, and I could not have predicted so and so. The perfect judge does not exist, and you cannot blame me for that.’ Could that be a potential worry in contemporary judicial landscapes? And if so, how can we, from a citizen’s perspective – and that is important because such is Pamuk’s worry – distinguish between legitimate reasons for ‘tentative gropings’ or ‘approximations’ to justice, on the one hand, and negligence, on the other? Again, this could be a concern especially when highly technical considerations are involved in a given case.

Let us move to the second point that I wish to raise. One of the things I really appreciated in the book was the author’s continuous resistance to dichotomies regarding our cognitive and epistemic capacities. One of the important lessons I got from *Artefacts of Legal Inquiry* is that inquiry in general, and legal inquiry in particular, is a process where mind and body, agency and context, freedom and conditioning go together, and do not cancel each other out. Legal inquiry, in that sense, is less than a fully and totally deliberate and conscious process because it is always embodied, always affective, social, and temporal. However, that does not mean that the process is blind, or simply a rationalisation of impulse and drives. On the contrary, Del Mar emphasises all the time the extent to which human agency is, at the same time, embodied and affective, but also intelligible and subject to evaluation and revision. I really appreciated the non-reductionist spirit that is infused in the book.

Now, I want to focus on the author’s discussion about emotions, and the affective dimension of legal inquiry. In the discussion about the extent to which legal inquiry is affective, I agree with Del Mar’s treatment of emotions as ways of knowing, as ways of accessing certain kinds of normative values that would not be available to us without such an affective component. Here, he follows a tradition in which emotions have an epistemic value, as they call our attention to certain principles or vulnerabilities, making them salient and relevant. Thus, for instance, respect can alert us to dignity, and compassion can alert us to the degree in which we are all related to each other and are mutually dependent.

In several places in the book, Del Mar argues in favour of a ‘more conscious and more deliberate uses of emotions, [...] as part of practical or theoretical rationality, or more broadly, as part of inquiry’.¹² He argues, more specifically, that ‘emotional simulation’ can be an active means of inquiry, and the chapters on ‘figures’ and ‘scenarios’ are examples of that.

This idea about ‘emotional simulation’ as an active means of legal inquiry made me wonder where the author stands on the following question about one specific emotion, namely, empathy in adjudication. Many people, including the author himself, have written about the importance of empathy and compassion as judicial

12 Del Mar, *Artefacts of Legal Inquiry*, 166.

virtues.¹³ However, others disagree. In particular, I am thinking of the psychologist Paul Bloom, who has argued that while what he calls 'cognitive empathy' or 'rational compassion' – which means just concern for other people – is a desirable trait in people's moral constitution, affective empathy – namely, *simulating* and *reproducing* the emotions of others in ourselves – is morally counterproductive: according to the evidence he considers, it will often lead to paralysis instead of altruism, and, above all, it most certainly will result in partiality and irrational behaviour. For these reasons, Bloom thinks, in the case of judges it is even more troubling that they let themselves be affected by empathy.¹⁴ My question is: does Del Mar see the kind of affective participation and emotional simulation that he considers in the book as somehow prone to these dangers? If so, when and how to counteract those dangers?

The third point I would like to discuss has to do with the very important role that the book gives to listening and reading as key active parts of legal inquiry. Del Mar emphasises how the artefacts of legal inquiry that he explores in the book are in need of good readers to be taken up, to be fruitful, to be productive. Good reading and good listening are not optional for legal inquiry to happen, the author says, because otherwise the interactive and agonistic dimensions of it would disappear.

I deeply agree on this point, since it is consonant with recent valuable developments in political theory that regret the fact that listening has received comparatively little attention in democratic theory. Since Aristotle, speech is what makes human beings 'political animals' and, therefore, from a philosophical and political theory perspective, we are normally focused on empowering citizens to speak and have their voice heard in the public sphere. On the contrary, listening has been unfavourably associated with something passive and weak, not suitable for the wise and the independent – the ones who are supposed to rule either over others or themselves.¹⁵

I think something similar might be the case in legal studies. There is plenty of emphasis on rhetoric as the art of speaking and arguing, but less on the art of listening to others' arguments. And again, to be sure, Del Mar's book offers an excellent corrective on that point. He says once and again, that reading and listening are key, that uptake is essential for inquiry. Still, it is interesting to note that, according to some theorists of listening in democratic theory, the prejudice

13 See, among many others, Toni Massaro, 'Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?', *Michigan Law Review* 87, no. 8 (1989): 2099-127; Susan Bandes, 'Compassion and the Rule of Law', *International Journal of Law in Context* 13, no. 2 (2017): 184-96; and Maksymilian Del Mar, 'Imagining by Feeling: A Case for Compassion in Legal Reasoning', *International Journal of Law in Context* 13, no. 2 (2017): 143-57.

14 Paul Bloom, *Against Empathy: The Case for Rational Compassion* (New York, NY: Ecco, Harper Collins, 2016).

15 Susan Bickford, *The Dissonance of Democracy Listening, Conflict, and Citizenship* (Ithaca: Cornell University Press, 1996); Andrew Dobson, *Listening for Democracy: Recognition, Representation, Reconciliation* (Oxford: Oxford University Press, 2014); and Mary Scudder, *Beyond Empathy and Inclusion: The Challenge of Listening in Democratic Deliberation* (New York, NY: Oxford University Press, 2020).

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against listening finds one of its roots in the misguided idea that everybody can listen, and so, one might think, listening is easy, it comes naturally, and therefore need not be cultivated, both at the individual and collective levels. In other words, the problem is not only how much listening is undervalued and ignored, but also how it is sometimes wrongfully taken for granted.

My question, then, is: how do we train ourselves as listeners, as readers, capable of legal inquiry? And by ‘ourselves’ I mean different communities: judges, lawyers, theorists, citizens? The author speaks very briefly about education at the end of the book and directs the reader to his previous work on legal education. So, maybe, on this point, I would just like to invite the author to say more about – to use the term that he alludes to at the end of the book – the *techne* of legal listening. What is the appropriate training and what are the biggest obstacles to being an open and receptive listener and reader in legal inquiry?

Now, let me move on to my next and next-to-last point, which is on the book’s chapter on ‘figures’. In this chapter, the author shows in detail how certain figures in the law, such as the ‘Reasonable Person’ or the ‘Officious Bystander’ can ‘anchor our inquiry more, in a way that allow us to balance evaluation of the actions of parties with the circumstances of the case’.¹⁶ ‘Figures’, Del Mar argues, allow for a more ‘relational and situated judgment’ in ways that are dynamic and flexible. They let us ‘explore relations between human action’, on the one hand, and different contexts on the other, so that we can balance ‘the weight we attribute to human agency’ and to ‘contextual features’ that might be relevant,¹⁷ without cancelling any of those. On this point, he says, ‘By rendering a figure, we avoid reducing something quite complex, into a general proposition that simply cannot bear the burden of that rich meaning’.¹⁸

My question here is about the potential challenge to the use of ‘figures’ in legal reasoning coming from arguments against character evidence in common law. I am not an expert here – I am not a lawyer and do not operate in a common law system. However, I wonder whether using ‘figures’, as the author suggests, as an element in legal inquiry, could imply somehow that we, in turn, approach the defendants’ character in problematic ways.¹⁹ People who argue against character evidence say that a fair quest for the truth should focus on conduct and not on character, i.e., *not* on the inner nature or moral worth of the parties, as the resource of the ‘figure’ seems at times to be inviting us to do. Is that an issue for Del Mar? And if so, how would he address it?

Finally, I would like to conclude with a minor objection. In the chapter on metaphors, Del Mar discusses the ‘conceptual metaphor theory’ (CMT), developed first by George Lakoff and Mark Johnson forty years ago, and developed further by

16 Del Mar, *Artefacts of Legal Inquiry*, 386.

17 Del Mar, *Artefacts of Legal Inquiry*, 345.

18 Del Mar, *Artefacts of Legal Inquiry*, 344.

19 See David Leonard, ‘In Defense of the Character Evidence Prohibition: Foundations of the Rule against Trial by Character’, *Indiana Law Journal* 73, no. 4 (1998): 1161-215.

several scholars in the field of legal studies. According to this theory, metaphor is always rooted in our embodied nature, trying to uncover the various ways in which metaphorical language responds to patterns of bodily activity and experience. Del Mar acknowledges the important insights that such an approach has afforded in legal theory but considers that, on the down side, it is too conservative: it ties metaphors 'too tightly' to our body, providing therefore an overly deterministic account of them. CMT focuses on 'the most conventional uses of language'²⁰ instead of turning, as Del Mar does, to the way in which metaphors 'signal they own artifice' and trigger imaginative process that enrich adjudication.²¹ Moreover, says the author, CMT's 'obsession' to trace metaphors back to 'some basic recurring bodily action and experience' 'can quickly take on 'fanatical' proportions',²² missing how metaphors can actually 'attract[t] our attention to themselves as means of communication'.²³

While I understand the author's point, and how, indeed, signalling one's own artifice can be interpreted as the exact opposite of appealing to common [embodied] sense, I do not think such an opposition is necessary. Lakoff and Johnson's themselves do not necessarily have a conservative approach to metaphors. Nothing in their view denies, I think, that metaphors can be vehicles of change, and in fact, they claim that 'much of our culture change arises from the introduction of new metaphorical concepts and the loss of old ones'.²⁴

Theoretically speaking, the point can be put thus: the fact that, epistemically, metaphors are rooted in our bodily experience, does not necessarily imply cultural conservatism or hard limits to imagination in Del Mar's sense. A case in point is Jennifer Nedelsky's criticism of Lakoff and Johnson's idea that, because we all are bounded creatures – bounded from the outside world and from others by the body each one of us has or *is* – other concepts that we use to refer to the world in general – like rights, for instance – tend to reproduce this 'container scheme'. Nedelsky's project is to criticise 'bounded' conceptions of rights – rights as side-constraints – and favours instead a 'relational' notion, according to which rights primarily relate us to other people in certain ways instead of separating us from them. However, notice that she does not argue that the relational conception of rights is *not* rooted in our embodied nature; rather, she says that it is rooted in a *different way* of experiencing our bodies.²⁵

She offers, for instance, how pregnant women experience their body in ways that emphasise not how our skin separates us from the world, but rather in terms of how it connects us with it. And this is not merely an idiosyncratic experience of

20 Del Mar, *Artefacts of Legal Inquiry*, 284.

21 Del Mar, *Artefacts of Legal Inquiry*, 282ff.

22 Del Mar, *Artefacts of Legal Inquiry*, 284.

23 Del Mar, *Artefacts of Legal Inquiry*, 285.

24 George Lakoff and Mark Johnson, *Metaphors We Live by* (Chicago: University of Chicago Press, 1980), 145.

25 Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011), 110-112.

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pregnant woman: Nedelsky attributes it to the philosopher Alfred North Whitehead, it can also be easily attributed to Henri Bergson, and it has been claimed by people who are aware of our ties to nature and to certain organic processes.

Similarly, Steven Winter, who has greatly developed CMT in the field of legal studies arguing that imagination is not ‘random, unpredictable, or indeterminate’,²⁶ does not seem to think that language cannot point to anything new culturally, socially, and politically. Thus, my point is that the embodied nature of language that CMT underscores does not necessarily translate into cultural conservatism, or into a conservatism of the imagination. Moreover, as Del Mar himself concedes, there is not a hard dichotomy between metaphors that signal their own artifice and metaphors that are more conventional,²⁷ and therefore, one can confidently endorse, I think, the most important insights of CMT without concluding that it offers a deterministic or conservative approach to legal imagination. Still, again, this is just a minor comment to a series of arguments with which I am mostly in agreement.

Let me finish reiterating what a pleasure it was to read this book, and that I very much recommend it to scholars interested in adjudication as a cultural, linguistic, philosophical, moral, and even political phenomenon.

26 Steven Winter, *A Clearing in the Forest: Law, Life, and Mind* (Chicago: University of Chicago Press, 2001), 259.

27 Del Mar, *Artefacts of Legal Inquiry*, 237, 322, 324.