

# Artefacts of Legal Inquiry

*The Value of Imagination in Adjudication*

Maksymilian Del Mar

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# Introduction

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## I. The Claim

The central claim of this book is that artefacts and related processes of imagination are valuable in adjudication insofar as they enable activities of inquiry. In brief, as modelled in this book:

- Activities of inquiry are social, ie both interactive and collective, processes that: are not reducible to, but overlap with, the contexts of discovery and justification; occur in real time and over time; are experimental in their cognitive and expressive character; and the object of which is the making of insight into what values, vulnerabilities and interests might be at stake in a case and in cases potentially like it in the future.
- Artefacts are forms of language that: first, signal their own artifice, thereby also capturing our attention; and second, call upon us to participate, ie to do things with them.
- Imagination is a combination of two simultaneously exercised and active processes: first, we enter a distinctive epistemic frame, which is an active and deliberative process of constructing a certain epistemic attitude, including selectively suspending certain epistemic norms and commitments while retaining others; and second, we participate within that epistemic frame along a spectrum of affective, sensory and kinesic involvement.

This is, I readily acknowledge, an inelegant mouthful. It is the task of this book to elucidate and elaborate on this claim, I hope more elegantly. In order to do so, I construct what I call three ‘models’, which are all key to the above claim: inquiry, artefacts and imagination. Models, roughly for now, are theoretical devices that are designed to help us focus on some distinguishable object of study, while at the same time enabling and encouraging us to see its variability. Thus, this book is not a wholesale theory of adjudication. Instead, it seeks to construct three specific models that, I hope, help us to get a little closer to, and appreciate, certain hitherto neglected features of adjudication.

In fact, ‘adjudication’ is somewhat of a misleading label for another reason: the book is not concerned with adjudication in general, but with a specific context of adjudicatory practice, namely the practice of appellate courts in the English common law in the twentieth century. I consider this sensitivity to, and self-reflexiveness about, context to be an important part of the activity of theorising. Of course, I do not claim to be fully sensitive to or wholly self-reflexive about that context; far from it. It is inevitable that I make assumptions about features of that practice that I have not articulated or

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reflected upon: there are ‘hinges’ upon which this door swings (with apologies to Wittgenstein).<sup>1</sup> Nevertheless, my aim, which also marks the limitations of my claim, is to assist us to see and appreciate a little better certain features of the above-mentioned context of adjudicatory practice. Whether the models developed here are thought, by others, to be helpful in other contexts of adjudication – or indeed in this one! – remains to be seen.

The book is structured into two parts. The first part elucidates and elaborates the three models, namely inquiry in Chapter 1, artefacts in Chapter 2, and imagination in Chapter 3. The first part ends with Chapter 4, which serves as a bridge between the two parts, relating the three models to each other, with one eye on the case studies in the second part. The second part then examines four case studies, these being all examples of artefacts, and their related processes of imagination. In each case, the focus is on when, and if so how, these artefacts and related processes of imagination enable activities of inquiry. The four case studies are: fictions in Chapter 5, metaphors in Chapter 6, figures in Chapter 7 and scenarios in Chapter 8.

One feature of the book is that it makes distinctions between these different artefacts, and their related processes of imagination. Another feature is that the defence of the value of these is a contingent one, ie it depends on whether they enable, rather than obstruct, activities of inquiry. Thus, identifying what are the features of these artefacts, and their related processes of imagination, that assist inquiry is a vital part of the analysis.

As may already be evident from this brief description, this book is no wholesale defence of the inherent value of artefacts and the imagination. It is very much a contingent defence.<sup>2</sup> Nevertheless, and given especially the neglect and side-lining of imagination in theories of adjudication, this is an undoubtedly upbeat and positive book. Artefacts, and their related processes of imagination, deserve not only our theoretical attention: they also deserve a case to be made for their valuable contribution to adjudication. Making that case is the task of this book.

## II. The Story of a Project

As I have presented the structure of the book, it may seem that theory, or what I call ‘modelling’, in part one precedes and drives the identification, description, analysis and evaluation of the case studies, which are presented in part two. That is not so and indeed was not so. In order to show this, and also to offer a perhaps more accessible way into the questions and issues explored in this book, I want to offer a brief and personal account of how this project began and describe some of its twists and turns along the way.<sup>3</sup> Far from being driven solely or even mainly by theoretical concerns, the real engines of

<sup>1</sup> On ‘hinge epistemology’, inspired by Wittgenstein, see Coliva and Moyal-Sharrock (2016).

<sup>2</sup> For a fascinating study of the very genre of defences, with a focus on defences of poetry in the Renaissance, see Ferguson (1983). It is interesting to ask, for instance, why do we (feel we have to) offer a defence of poetry, and not, say, of science?

<sup>3</sup> I do so deliberately, even if at the risk of sounding indulgent, as we do not often enough share our personal experience, including affective experience, of research. I do so also in the service of recognising the limits of theorising, which are set, in part, by the particular life and experiences of a theorist.

this project have been particular instances of language use, which I kept coming across when reading, and re-reading, common law cases, and which puzzled me, and which still very much puzzle me, often with equal measures of excitement and exasperation.

Although the roots of this project may lie in the pleasures of reading common law cases during my undergraduate studies, a reading that was very much informed by my also studying literature and philosophy at the time,<sup>4</sup> the more immediate beginning was a reading of Lon Fuller's series of papers on legal fictions.<sup>5</sup> Wonderfully generative and speculative, I still recall the excitement of reading these papers, initially in some dark bar in Berlin, now some seven years ago. Fuller's reflections took me quickly to the work of Hans Vaihinger, and his magnificent *As If*,<sup>6</sup> which although a little too in the vein of the Kantian tradition for my taste, could also be thought of in another way: as an aesthetically-sensitive pragmatism concerned with devices for thinking with, for trying things out, for experimenting. In Vaihinger's case, this was also a most expansive pragmatism, the objects of which appeared to have no bounds, for he found fictions in such a dazzling range of areas of human inquiry, from philosophy to mathematics to science to law, and beyond. I was attracted to the non-foundationalist, the delicately sceptical, but also the upbeat, tone of classical pragmatism. Unlike some contemporary versions of pragmatism, the classical pragmatist tradition, including not only Vaihinger, but also Charles Sanders Peirce and John Dewey, was still awash with enthusiasm if not enchantment. The human mind, and human minds together, could, in the eyes of these classical pragmatists, do so much, and they were giddy with the pleasure of showcasing those possibilities. I too, in truth, was giddy.

I began to think seriously about fictions, or at least as seriously as my then new-job at Queen Mary University of London allowed. I was reading all I could about them, especially in the common law tradition. At the same time, I was reading cases that could be said to have deployed them. My enthusiasm, informed as it was by Vaihinger and his defence of fictions, kept jarring up against a disjuncture between theory and practice: on the one hand, courts were clearly using fictions, finding them useful in a whole range of different areas of the law, and perhaps especially private law; on the other hand, the theory on fictions in the common law, both by scholars and in extra-judicial writings by judges, was passionately critical of fictions. At times, it seemed like scholars were in competition to see who could be most critical about them. Jeremy Bentham's infamously colourful critique, characterising fictions as the pestilential breath of the law, and so on,<sup>7</sup> seemed to have infused common law scholars to the point of blindness. They could no longer see, or were so unwilling to admit, the possibility that fictions could be valuable.

I turned to the historians, and this helped enormously, though only partially. Sir Henry Maine, for example, had argued that modern law no longer needed fictions,

<sup>4</sup> One of the most formative, but also pleasurable, aspects of my experience as an undergraduate student at the University of Queensland was moving, often in the same day, from a class on Victorian literature, to a class on epistemology, and then to a class on contract law. During this period, and increasingly so as I focused more and more intensively on law, I was also influenced by less mainstream views on common law reasoning, especially the work of Julius Stone (1985), Geoffrey Samuel (2003), Bernard Jackson (1988) and William Twining and David Miers (1976).

<sup>5</sup> Fuller (1930–31). I engage with these three papers in more detail in ch 5.

<sup>6</sup> Vaihinger (1925) [1911].

<sup>7</sup> See Ogden (1932).

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but he nevertheless found an important place for them in the history of legal development: they were the first mode of legal change, followed, in ever-higher degrees of rationality, by equity and finally by legislation.<sup>8</sup> So, for Maine, fictions were irrational and no longer needed, but still, there was a begrudging sort of recognition that they may at a certain point have been valuable. What if, I thought, Maine, and others since,<sup>9</sup> had over-estimated the so-called 'rationality' of the modern age? What if fictions were still valuable today, and it was an illusion to think that we, in the present, were so much more enlightened that we no longer needed them?

This possibility raised other questions: for instance, the vexing problem of just how to define fictions. Scholars had given so many different examples of fictions, and some of these seemed to mix up fictions with other kinds of devices, like metaphor or figuration, which I had a sense were doing different sort of work. Partly in order to deal with these difficulties, and in order to begin a conversation from which I could also learn, I convened a workshop on legal fictions at the IVR Congress in Frankfurt in 2013, and this led eventually to a special issue and a large edited volume.<sup>10</sup> It was in this period, and thanks to conversations with William Twining and others, that I began to develop my own view of fictions, offering my own defence of their value in enabling common law change.<sup>11</sup> Legal fictions, as I came to define them, were a means of temporarily suspending operative requirements of an existing rule, while still applying the normative consequence of that rule, thereby signalling to future courts that either the rule ought to be abandoned and a new one created, or that an exception ought to be introduced. Importantly, fictions were not a means of changing the law. They were, instead, a means of deciding the case without changing the law, but nevertheless communicating the potential need for change in the future.

One of the vital shifts of perspective that this defence of fictions required was that one could not hope to see the value of fictions if one focused only on their use in the instant case. If one focused only on the instant case, fictions were indeed a failure, eg of rationality, of principled justification, of transparent reason-giving in adjudication. If, however, one thought of reasoning as something that occurs over time, then what looks initially like a failure may in fact turn out to be a blessing, for the extra time that a fiction enabled gave courts the opportunity to explore, by reference to a greater range of factual scenarios, how to respond to the alleged inadequacy of the rule that the fiction signalled.<sup>12</sup> There was another crucial point: the extra time that fiction bought, so to speak, was not only extra time for that judge or that panel of judges, but for a whole range of future readers of the case, including other judges, advocates and scholars. Thus, fictions enabled a mode of interactive and collective reasoning, deliberation and experimentation. And, I wondered, what if we looked at legal reasoning, and adjudication in general, in much more social terms than mainstream theories of legal

<sup>8</sup> See Maine (1931) [1861].

<sup>9</sup> In contemporary scholarship, Peter Birks had made a similar argument: see Birks (1986).

<sup>10</sup> See Del Mar and Twining (2015).

<sup>11</sup> See Del Mar (2015a).

<sup>12</sup> There was a parallel interest that kept reminding me of the importance of approaching legal reasoning diachronically: an interest in the relations between legal theory and legal history. See Del Mar and Lobban (2014) and Del Mar and Lobban (2016).

reasoning appeared to do? What if we shifted the perspective entirely, and instead of examining the rationality of justification offered by a single judge in an instant case, we instead explored the practices of signalling, communicating, and experimenting over time by a community of different actors in the adjudicatory process?

It is these questions, driven as they were by shock and frustration with the negativity of common law scholars about fictions, especially given their long and continued role in practice, that formed the crucible within which this project was born. Having made the defence of fictions, I began to think whether a similar kind of defence could be made of other devices, also often derided or side-lined by mainstream theories of legal reasoning. The derision, with respect to these other devices, was often not as passionate or exaggerated as it was in the case of fictions. Some of these other devices, such as the ones I study in this book, ie metaphors, figures, and scenarios, were less often said to be wholly irrational; more often, they were simply characterised as either unhelpful or unnecessary, or as the flotsam and jetsam of the common law. In keeping with mainstream attitudes to rhetoric and rhetorical language, many of these devices were said to be but superfluous embellishments, at worst vain flights of whimsy, and at best powerful means of persuasion, but really in the end unbecoming of the gravity of the law. Adjudication, it seemed, had to be a sober affair: not only rational, with transparent and principled reasons given for decisions, but also objective, neutral, and universal, operating in the realm of a heaven of concepts, held together securely by logic and untainted by anything as messy as an experiment.

As will be obvious to the reader, I was taken aback by such attitudes. Surely, given that it was impossible to escape the contingent genealogies of our language, we needed to confront the rhetorical dimension of communication rather than hide it away. The very idea of a language that was sober, objective, neutral, universal, and so on, was itself a style, a genre, with its own forms and their genealogies. The attack on rhetoric was a form of self-delusion, a noble dream for some perhaps, but really a nightmare. Similarly so with the idea that language was something we could master, or that meaning was something we could control: to think like this was to forget about the deeply social character of language and meaning.

All this was well and good, but also said many times by those who came to the defence of rhetoric and the social character of language, both past and present, from Vico to Derrida, and even more so, feminist epistemologists and feminist theorists of legal reasoning and legal language. How could we, how could I, move beyond mere critique? If rhetoric was not reducible to optional ornament or to powerful persuasion, what exactly was valuable about it? This question has animated this project throughout. In a thirst for possible ways of defending rhetoric, and, in particular, to eventually thinking of it as a form of inquiry, I turned to a whole range of scholarship from many different fields. This has included, naturally, the theory and history of rhetoric itself; literary theory and history,<sup>13</sup> some of which explicitly involved defences of rhetorical forms, such as those given by IA Richards,<sup>14</sup> and some of which was in a different

<sup>13</sup>I was, and remain, especially taken with the work of Wesley Trimpi, Joel Altman, Kathy Eden, Lorna Hutson, Quentin Skinner, Peter Mack, and others working on rhetoric in the early modern period.

<sup>14</sup>See Richards (1936).

vein, informed by more recent developments in cognitive science and philosophy of mind, such as work in cognitive literary studies;<sup>15</sup> psychology, including developmental psychology, as in Paul Harris' work on imagination;<sup>16</sup> the history and philosophy of science, where rhetoric too was defended, eg by Jeanne Fahnestock;<sup>17</sup> and to philosophy, eg within epistemology, in the work of Catherine Elgin, and, within methodology, in feminist accounts of the aesthetics of philosophical discourse, such as those by Michèle Le Doeuff or one of my teachers in philosophy, Marguerite La Caze.<sup>18</sup>

Throughout this time, in what has seemed like endless reading, across many different disciplines, I continued to teach and think about common law cases, including mainstream theories of legal reasoning. One of the key sources for me was Neil MacCormick's work on legal reasoning, which, though mainstream, was also always responsive to less mainstream views, eg Chaim Perelman's rhetorical accounts of legal argumentation. MacCormick's *Legal Reasoning and Legal Theory*<sup>19</sup> was crucial for me, in part because it was packed with examples. For instance, it was by trying to make sense of MacCormick's reflections on consequential reasoning in law, from his 1978 book, but also beyond to his Dewey lecture on the subject,<sup>20</sup> that I began to think seriously about what I call in this book 'scenarios', ie short, fictional narratives, which play a variety of roles, eg testing and refining possible ways of justifying a decision in a particular case and others like it in the future. Somewhat to my surprise, one could think about universalisation, as MacCormick deployed it, but also Kant and Hare, as a kind of thought experiment, ie a mode of 'what-if' thinking, which was not possible wholly in the abstract, but which needed the stimulus of specific and sometimes exaggerated facts. In other words, MacCormick's defence of the role of consequences in legal reasoning,<sup>21</sup> as based not on probabilistic reasoning, ie trying to predict the outcome of certain rules, but instead on hypothetical reasoning, ie based precisely on reactions, in part emotional, to hypothetical cases, emerged, slowly, as another kind of device to think with. In this respect, I thought, hypothetical cases, or, as I call them in this book, scenarios, resembled fictions, though they were processed in different ways and performed different kinds of functions.<sup>22</sup>

Crucial in all this was not only research, but also teaching. This included teaching Contract Law to first year undergraduates when I first arrived at Queen Mary. Readers will notice that quite a few of the examples discussed in this book are contract law cases. Of particular, direct importance was the experience of teaching a Masters course on 'Imagination and Legal Cognition' and later 'Common Law Reasoning'. I taught fictions, certainly, but also began to incorporate other devices: scenarios and metaphors, as well as what I then-called 'personification', or the use of imaginary figures, such as the reasonable person. Teaching allowed me to work in detail through examples, driven as

<sup>15</sup> Scholarship by Terence Cave and Ellen Spolsky was especially important for me, as was Lisa Zunshine's *The Oxford Handbook of Cognitive Literary Studies* (2014).

<sup>16</sup> Harris (2000).

<sup>17</sup> Fahnestock (1999).

<sup>18</sup> See Elgin (1996); Le Doeuff (1989); and La Caze (2002).

<sup>19</sup> MacCormick (1978).

<sup>20</sup> See MacCormick (1983).

<sup>21</sup> See Del Mar (2015c).

<sup>22</sup> Dewey too was important for me here, eg in his notion of dramatic rehearsal, as well as various interpretations of him, eg see Fesmire (2003).



the course was by cases and discussion of those cases. I also began to experiment with different ways of theoretically framing what I was interested in; hence the reference to 'imagination' and to 'cognition' in the title of the course, which were attempts to get beyond narrow and rigid uses of 'reasoning' or 'rationality'.

I will, of course, be saying a great deal more about imagination in this book. At times in this project I was overcome by the immensity of the literature on imagination, which has also mushroomed in recent years, constituting new-found interest amongst analytical philosophers.<sup>23</sup> At times, too, I got, and still get, lost in various thickets of discussions of imagination, such as the debates over mental imagery, or debates about the role of imagination in perception, eg the seeing-as way of understanding imagination. One of the important turning points in this respect was the sudden realisation that it was vital not to lose sight of two things when thinking about imagination: first, the complex and dynamic relations between imagination and forms of expression and representation, especially in language; and second, that imagination was not something that occurred only in the mind of an individual, but that there were important social dimensions to imagination, including both interactive and collective modes of imagining. Both of these realisations helped a great deal, if only to rescue me a little, though I am by no means wholly free, from endless perplexity at just what goes on in the mind of an individual when imagining.

There are three other influences on this project that have informed it throughout and that have shaped it and continue to shape my work in general. They are: emotion; morality; and education.

Like imagination, emotion has been one of the most side-lined, derided and neglected dimensions of legal thought, at least until relatively recently, when there has been an outpouring of works, both philosophical and historical, on the importance of emotion for law in a whole range of ways.<sup>24</sup> There is no serious discussion of emotion, and its epistemic significance, in mainstream theories of legal reasoning, certainly not in the positivist, analytical tradition, eg in HLA Hart or Joseph Raz, nor in the interpretivist tradition of Ronald Dworkin. Realist and other naturalist-inspired theories of adjudication had and have more reference to emotion, though these references have often struck me as being too narrowly focused on the psychology of decision-making. For all the emphasis placed on the importance of psychology in legal realist writings, eg in Jerome Frank, there was little to be found on the epistemic role of emotion, or on the entanglement of emotion with deliberation and reasoning.<sup>25</sup> Indeed, it was partly in order to engage properly with the role and value of emotion that I began to get increasingly frustrated with the division of labour mandated by the justification-discovery dichotomy (imported from the philosophy of science), which was advocated so eagerly especially by analytical legal philosophers. This dichotomy, about which I say more in Chapter 1, has had the effect of splitting research between empirical studies of how one came to a decision on the one hand, ie discovery, and analytical or normative studies

<sup>23</sup> See, eg, Kind (2016) and Kind and Kung (2016).

<sup>24</sup> Work on affective histories of law is especially important: see, eg, the essays collected in Bailey and Knight (2017); and Holmes and Johnson (2018).

<sup>25</sup> An exception is the work of Leon Petrażycki, who remains greatly under-valued in this area. See Petrażycki (1955), and for a helpful discussion, Motyka (2007).

of practices of giving reasons, ie justification, on the other hand. The problem with this is that a serious engagement with emotion, or, for that matter, imagination, and its epistemic importance, including its role in deliberation and reasoning, simply has to cut across these divisions. Put another way, the kind of division of labour engendered by the dichotomy between discovery and justification was, I found, not helpful when seeking to understand the multifarious and vital roles of emotion and imagination in adjudication.

In fact, the more I engaged with imagination, the more often I kept coming across emotion. The two, I kept finding, were more closely related than one might at first think. If we looked more carefully, we could see that many acts of imagining involve emotion, and many emotions have an imaginative component, eg think only of how much we imagine when experiencing fear or jealousy. I began to crave scholarly literature on the complex and rich relationship between emotion and imagination, which, in the legal context as in any other context, calls for and requires interdisciplinary research. It helped me enormously to think through these issues with Amalia Amaya, and the group of scholars we invited to our joint project on ‘Virtue, Emotion and Imagination in Law and Legal Reasoning’<sup>26</sup>

Most of the study of emotion in adjudication that I came across was via the concept of empathy. I came to think there were important distinctions to be made between empathy, sympathy and compassion,<sup>27</sup> and that, again, some of what is defended under the canopy of emotion, and especially empathy, is perhaps better defended under the canopy of imagination.<sup>28</sup> Work on these emotions is important, but I also came to feel frustrated by the very narrow focus on just these processes, and the lack of engagement with other kinds of emotions in adjudication, eg with epistemic emotions, such as those of doubt or satisfaction, or what Hume called the ‘calm passions’. I also began to think that there was another story to tell about the role of simulated emotions, ie the process of imagining one’s emotional reactions, for instance to the actions of imaginary figures (like the reasonable person) or to hypothetical scenarios. I shall be returning to these issues later in the book.

The interest in emotions, and most obviously empathy, sympathy and compassion, was intimately related to morality, and the vexed issue of whether, and if so how, moral reasoning features in legal reasoning. On this, of course, there is no shortage of debate in mainstream theories of adjudication. But my approach to these issues has always been from less-frequently opened doors, or via less-well-travelled paths: precisely via emotion and imagination, or indeed via education. Thus, the moral imagination has been an interest for me for a long time, certainly ever since encountering the work of my other doctoral supervisor (in addition to Neil MacCormick), Zenon Bańkowski. It was thanks to Bańkowski, and his work on the anxiety and moral perception of the judge,<sup>29</sup> that I began to think about the presence of morals in adjudication. It was also thanks to Bańkowski that I thought and wrote about vulnerability, and about the inevitable difficulties, and yes, anxieties, of being able to see the suffering and vulnerability of

<sup>26</sup>This has recently culminated in an edited collection: see Amaya and Del Mar (2020).

<sup>27</sup>See Del Mar (2017a).

<sup>28</sup>A point made also by Kind (2020).

<sup>29</sup>See Bańkowski (2001), Bańkowski (2006), and Bańkowski (2013). See also Del Mar and Michelin (2013).

those who come before the courts, especially where that suffering and vulnerability may be distinctly unfamiliar to, in part because it was distant to the personal experience of, the judge or judges in question.<sup>30</sup>

The key questions that emerged for me out of engagement with Bańkowski's work, and his references, including Iris Murdoch, Simone Weil, and Martha Nussbaum, included: what helps a judge to have the requisite attention, and be able to encounter, the suffering and vulnerability of others that he or she has not experienced? How can judges, and other legal professionals, loosen the hold of their professional habits so as to, again, better see what ought to be seen, and what may be beyond the scope of a rule as conventionally understood? And how should the 'ought' be understood here? 'Ought to be seen' according to whom? Here, I kept coming back to the basic existential situation of moral difficulty, of the sheer effort required to, for a start, recognise the limitations of one's own moral outlook and intuitions about the right and the good, and, then, of seeking to go beyond oneself, as it were, and out towards the people coming before the court and their experiences and plights. This included reflection on my own stance as a theorist examining the work of judges: could I theorise that work, including sometimes be critical of it, in a way that was also respectful of the moral difficulties the judges faced? Could I find a way of being mindful of those difficulties, and the various inevitable epistemic and institutional limitations, while not falling into mere apology? Could I practice a form of respectful critique of judicial work? Could I do so not from a position of the superiority of hindsight, with unshakable confidence in the correctness of my moral beliefs, but instead from a hermeneutic perspective that recognised the difficulties, the fragility and incompleteness of any moral knowledge, but nevertheless insisted upon certain duties and standards?

And I began to think: is there a connection between the devices I was interested in and teaching, especially fictions, metaphors, figures, and scenarios, and this experience of moral difficulty and normative uncertainty, and the process, indeed the duty, of being responsive to suffering and vulnerability? My answer is that yes, there is a link. In this book I seek to articulate that link via the model of 'inquiry', and especially its normative dimension. It is, I shall argue, at least in part, via artefacts and related processes of imagination, that we can make insights into potential normative relevance, ie better sense, the values, vulnerabilities and interests that may be at stake in a case and in cases potentially like it in the future.

The reader has probably already discerned how concerns with education permeates much of the above. Indeed, my first way in, broadly speaking, to these issues of imagination, emotion, morality, and their connections to law and adjudication, was via reflection on pedagogical practices, and ultimately also on my role and duty as a teacher. Beginning with a collaboration with Bańkowski in Edinburgh, when I was a PhD student and a tutor in jurisprudence, and during which we thought together about the possible role and value of visual and dramatic arts for teaching legal professional ethics,<sup>31</sup> I have throughout the last ten years often returned to and grappled with questions about moral education in law schools. And, as I did so, while developing the

<sup>30</sup> I have wrestled with the issues in numerous places, see, eg, Del Mar (2012), (2013) and (2014).

<sup>31</sup> See Del Mar (2010a); Bańkowski and Del Mar (2013); and Bańkowski, Del Mar and Maharg (2013).

above interests in emotion and imagination, I began to write about their roles in legal education.<sup>32</sup> Indeed, as originally envisaged, an important part of this book was to be a discussion of imagination in legal education. That is no longer the case – the principal reason being that I could not do this topic justice in a part of a book – but I want to emphasise that it has greatly informed the arguments and claims made in this book. Pedagogical reflection, for me, has never been a side-line or a soft subject that is of no philosophical significance; on the contrary, reflection on pedagogy has been, for me, one of the most important matters to think carefully about, both philosophically and existentially.

And so the many braids of one's work, and one's life, too, as a colleague, as a teacher, as a member of an institution, come together, mostly in unpredictable and often accidental ways, to inform a project, and here a book.

### III. Limits and Scope of this Book

It is important that I outline more explicitly the limits and scope of this book. I do so in three steps: first, I highlight the very specific context of the examples drawn on in this book, namely contemporary common law adjudication in English appellate courts; second, I discuss the broad attitude I take to the ethics and politics of adjudication; and third, I say a little more about what I mean by 'modelling' as a theoretical practice.

#### A. Common Law Adjudication

Almost all the examples drawn on in this book come from the common law tradition. They are also almost all from the late twentieth and twenty-first century, and thus largely contemporary examples. The contemporary focus does not mean, however, that one can simply take features of common law practice for granted. Indeed, an important part of any theory of legal reasoning, and this may be all the more important when one's focus is contemporary, is just what features of practice are deemed important as the institutional setting for that investigation. Indeed, I take it to be a duty and virtue of theorising to be as reflexive as one can about the construction of one's object of theorising.

At first blush, this may seem surprising. Is it not the ambition of theorists to apply to wherever and whenever one finds practices of legal reasoning? But that's just the rub: exactly *where* and *when* does one find them? And what does one mean by 'practices of legal reasoning'? The moment one asks this question one also quickly realises how many different kinds of adjudicatory institutions there are, and have been, operating in very different institutional environments, with very different histories and influences.<sup>33</sup> Indeed, one very quickly realises that one needs an account of what are

<sup>32</sup> See Del Mar (2011), (2016a), (2018a) and (2018b).

<sup>33</sup> In addition, as William Twining has often insisted, there is the issue of practices of legal reasoning outside the adjudicative context. Hence, Twining urges us to think more broadly of 'reasoning in legal contexts': see recently Twining (2019), 116–135.

the differences between adjudicatory institutions that matter, and which, in one's view, do not. For example, does it matter whether we are talking about a domestic court as distinct from an international one, and is the domestic/international distinction the most, or even a, relevant distinction? Does it matter that we are talking about an appellate court rather than, say, a magistrate's court? Does it matter that we are talking about a court dedicated to a very specific area of the law, say a tribunal dealing only with patent applications, or a generalist court, hearing appeals from all areas of the law, or perhaps a constitutional court? Does it matter whether the court is sitting in its contentious or advisory jurisdiction? Does it matter who the judges are, eg is there a relevant difference between, say, Supreme Court Justices and arbitrators, and are differences in typical career progressions of judges significant? Does it matter whether the judges form a tight-knit, long-term community, or are more ad hoc appointments? Does it matter what kind of assistance judges receive, say from judicial clerks, or what resources they have easy access to, eg libraries, databases and other archives? Does the procedure before the court matter, eg whether it is adversarial or inquisitorial, or what style of advocacy it facilitates and encourages? Is it important what options judges have to express their views, eg whether they do so orally or in writing, and if in writing, whether there are only ever single, collective judgements or also separate and dissenting opinions?

These questions are just the tip of the iceberg, but the moment one turns to them, even in a superficial way, one quickly sees that one can hardly avoid asking them. These questions also illustrate the close relationship there is between comparative law and legal theory, for all the above questions, if they are to be asked properly, can only be done with sensitivity to the difficulties and opportunities of comparison.<sup>34</sup> Similarly so as to the relations between legal history and legal theory: important insights as to peculiar institutional features of the practice one is focusing on often only come into view when one compares, say, the contemporary instantiation of a tradition with its past lives, but also in terms of its relations with other traditions across time.<sup>35</sup>

I cannot here perform this task with the rigor and discipline it requires. Nevertheless, I shall attempt to be as reflexive as I can about the features of the contemporary practice of the common law that I have taken as important for this book. To reiterate, to articulate such features is not an optional matter. I take to be an essential part of what it means to theorise legal reasoning. In this respect, then, comparing and historicising are distinct and important aspects of any theoretical project.

Needless to say, I am hardly the first to attempt the identification of important institutional features of common law reasoning. Some theories of legal reasoning have presented themselves not as general theories but precisely as theories of common law practice.<sup>36</sup> This literature itself has many divisions which are often un-mentioned,

<sup>34</sup> See, eg, John Bell's work on judicial cultures (2006). See also Bell (2016).

<sup>35</sup> See, eg, Patrick Glenn's scholarship on legal tradition (2014) and on common laws (2007). See also Samuel (2018a) and (2018b) on the importance of studying legal reasoning historically; and, generally, Gordley (2013); and Thomas (2011).

<sup>36</sup> An important challenge to the abstractions of analytical jurisprudence in this respect, ie from the perspective of the particularities of the common law, was made by Brian Simpson in his influential 'Common Law and Legal Theory' (1973). See also Twining (1986); Edlin (2007) and Edlin (2016); Postema (2002) and Postema (2003); Eisenberg (1988); Schauer (2009), chapter 6; and Jaffey (2017).

as for instance between mainly US-based theories and mainly UK-based theories,<sup>37</sup> or as between theories that take the colonial and imperial context of the common law seriously and those that do not.<sup>38</sup> Similarly so with respect to theories, even, say, within the UK, that are historically sensitive, and thus seek to theorise common law reasoning as it has changed and developed over time, and those which focus, largely un-reflexively, on contemporary common law.<sup>39</sup> One can multiply such divisions further, depending on whether the focus is mainly on appellate courts or lower courts and other tribunals, or on reasoning with law or reasoning with fact,<sup>40</sup> or on case-based reasoning or statutory interpretation.<sup>41</sup> All these divisions can be contested. The differences between, say, appellate and first-instance reasoning, or between case-based reasoning and statutory interpretation, may be argued to be irrelevant. The point, once again, is that it is important to be as reflexive as one can about the differences one endorses and those one does not insist upon.

My focus here is on twentieth and twenty-first century common law in English appellate courts. I do attempt to take seriously the imperial and colonial context of the common law, though, to my regret, this really only surfaces in one of the case studies in the second part of the book (in Chapter 6 on metaphor). I generally also focus on reasoning with law, although I do not accept a very rigid distinction between reasoning with fact and law. But even if one limits oneself in this way, there is still very considerable scope for differences as to which institutional features of common law practice one takes as important, and which one does not.

To illustrate this briefly, consider Grant Lamond's approach to one of the nuggets of theorising about common law practice: precedent.<sup>42</sup> Lamond makes clear that there are some features of common law practice that, for the purposes of theorising precedent, are relevant and that he takes seriously, ie he takes them to be constraints on any plausible theory of precedent. These include: the absence of canonical formulation of rules or principles; the significance of the facts of cases and the extensive attention paid to those facts, eg in the practice of distinguishing; and the persistence of disagreement as to the legal significance or ratio of a past case.<sup>43</sup> On the other hand, and it is laudable that

<sup>37</sup> There are many significant institutional, cultural and other differences between these two legal traditions, and yet scholars of common law reasoning often mix them. Sometimes, though, the differences do come to the surface, often unwittingly, as became evident in some responses from UK scholars to Dworkin's mainly US-based theory of legal reasoning. See, eg, Priel (2016). There is important comparative work to be done within common law traditions; in other words, even within the common law, there are important differences that affect the practice and normativity of common law reasoning.

<sup>38</sup> Although there are many important historical studies of common law in its imperial and colonial contexts, there are few theories of common law reasoning that take these contexts seriously. An exception is the work of Peter Fitzpatrick (2002).

<sup>39</sup> There have been a number of scholars who have stressed the importance of theorising common law reasoning historically and diachronically, critiquing the often atemporal, static, momentary and ahistorical theories of legal reasoning by contemporary analytical jurisprudence: see, eg, Lobban (1991); Samuel (2003); Waddams (2003); Hutchinson (2005); and Postema (2002), (2003), (2017). I return to the importance of diachronicity in Chapter 1.

<sup>40</sup> This importance of taking facts seriously in theories of legal reasoning has been a theme of Twining's scholarship; see, eg, Twining (1984).

<sup>41</sup> See the two volumes of the Bielefelder Kreis, one on comparing statutory interpretation and the other on comparing precedential reasoning: MacCormick and Summers (1991) and (1997).

<sup>42</sup> Lamond (2005).

<sup>43</sup> *Ibid.*, 3.

Lamond is explicit about this, there are features that Lamond claims are not relevant to, and in this sense are not constraints on, a plausible theory of precedent in the common law. One such feature is whether or not the judgement delivered by a court is a single or a multiple one. Lamond asserts that he is 'not concerned with complications that arise in legal practice from cases where there is no agreed majority judgement in favour of the result, or the judgement gives two separate but individually sufficient grounds, or no reasons at all are given by the court'.<sup>44</sup> He adds: 'These questions are important for practitioners, but the key theoretical questions arise from the uncomplicated single judgement case.'<sup>45</sup> What should we make of this move? On what basis can one assert that only some features of practice, and not others, raise 'key theoretical questions'? Would not the fact that something is 'important for practitioners' be instead an argument for its *prima facie* theoretical importance? And when constructing a theory of legal reasoning in the common law, or even, in a more limited way, of its precedential dimension, can one really ignore a feature as prominent as the regular production of multiple, sometimes dissenting, judgements?

In answering these questions we have to keep in mind one crucial point: that no matter how reflexive we are about features of practices, there are always going to be some that we take for granted, and even where we are reflexive about them, there can always be disagreement between theorists as to what ought to be taken as relevant. Thus, although I disagree with Lamond that one can ignore the feature of the production of multiple, sometimes dissenting, judgements in the common law, I also wish to make clear that there is no neutral stance here, no stance above the practice. Instead, a theorist must articulate what they take to be relevant, while recognising that these choices are part of a theory, as are the less reflexive taken-for-granted features, either included or excluded as relevant.

What follows, then, are the features of contemporary common law practice I take to be especially relevant and important for this book. I recognise these are all theoretical claims that cannot be properly defended in this book. However, as noted above, I take it to be part of the ethics of theorising that one tries to be reflexive about them. There are four such features: individuality, multiplicity, discursiveness and restrained generalisation. I shall treat them briefly in turn.<sup>46</sup>

The first feature one may label 'individuality'.<sup>47</sup> To take this as a feature, let alone the first, is already controversial. And yet, there are so many aspects of contemporary common law practice that signal its importance. One of these is that judgements in the common law are not anonymous but signed by the judge(s) that author them. Further, the judgements are referred to as 'opinions' or as 'speeches'. Common law judges present themselves and are treated as authors of opinions. They also often have public personas, eg, as scholars in their own right, and as speech-givers on public occasions. As authors,

<sup>44</sup> *Ibid.*, 4.

<sup>45</sup> *Ibid.*

<sup>46</sup> The features identified here bear some similarity to others: see, eg, Postema (2003), 3–9, who identifies six features (by reference to the 'artificial reason' of the common law): it is pragmatic; it has a public mission; it is a contextual competence (involving long years of immersion in the particularity of cases); it is non-systematic; it is discursive (meaning that it is argumentative and contested); and it is common or shared.

<sup>47</sup> I prefer this term to 'subjectivity', which carries a heavy philosophical baggage. For an important recent defence of the role and value of subjectivity in common law adjudication, see Edlin (2016).

judges have their own styles and temperaments, eg some are known for their dissenting judgements. An outstanding example is Justice Michael Kirby, known as the Great Dissenter in the High Court of Australia. Others are known for their distinctive style: Lord Denning is the most obvious example in the English context. Or they are said to have a distinctive voice and temperament: Justice Ruth Ginsburg of the US Supreme Court is, again, a standout example. Some judges are known, too, to be especially sensitive to certain sources or to certain issues, eg some take it to be an important feature of any domestic judge to take seriously the sources of international law or the practice of so-called ‘foreign’ courts, while others resolutely do not. Here, one need only contrast the jurisprudence of Justice Kirby with the late Justice Anthony Scalia of the US Supreme Court. Another way in which the presence of individuality is made visible in the contemporary common law is that judges are not discouraged from the use of the first person. Indeed, the first person may be found more often than the royal third person.<sup>48</sup> Judges will often say ‘I confess to the difficulties of this case’ or share other aspects of their experience of the case before them. This sharing of individual experiences is important, eg it serves to communicate attitudes of an individual judge to certain issues. It matters, for example, whether judges express confidence in, or, equally, doubt or hesitation in applying, a certain rule or principle.<sup>49</sup>

To say that individuality is an important feature of the contemporary common law tradition is not, for the moment, to defend its role, or indeed to attack it. Nevertheless, I would like to make explicit that I think individuality is not only a central feature of common law practice, but also, on the whole, a valuable one. The presence of individuality allows for many of the other features I shall mention in a moment. But it is also important in its own right: for example, one could argue that the practice of judgement is, in some respects inevitably, one that involves drawing on one’s own personal experiences. To see this is also to recognise the importance of diversity on the bench. Of course, the drawing on of one’s personal experiences, including one’s emotional knowledge, acquired as a member of a certain gender, a certain culture, and a certain community and social class, needs to be and is typically appropriately tempered by certain social and institutional practices. There are, appropriately, many forms of interpersonal review and constraint, including the duty to address the audience of one’s peers, to deploy a common language, to draw on recognised sources, and other institutional constraints. Thus, what I take to be both relevant and important for common law adjudication is the presence of individuality, enabled by various processes, such as the signing of judgements, calling them ‘opinions’, noticing their distinctive styles, use of the first person, etc., as appropriately filtered and constrained by social and institutional practices.

Another important feature one may call ‘multiplicity’. The fact that the large majority of appellate judgements in the contemporary common law are multiple, including some that are dissenting, is a central feature of that practice. Without the presence of

<sup>48</sup> I have no evidence to support this: it is my own impression from many years of reading cases.

<sup>49</sup> In this sense, attitudes are very much part of the law, and are as important as, say, rules, principles, concepts or doctrines. One can argue that one’s knowledge of the law as a practitioner must include a pragmatic sense of judicial attitudes, eg how positively or negatively disposed they may be to certain rules, principles, concepts, doctrines or arguments. More work is needed on this altitudinal dimension of legal expression and legal knowledge.



such multiple judgements, each offering a slightly different construction of the relevant facts, and each taking their own opportunity to examine and respond to the arguments of counsel, and to offer their own further resources and views on the issues at hand, common law practice would be a great deal different from what it is. Again, this includes, but is not limited to, the capacity to give dissenting judgements. Just as important is the opportunity to contribute to a majority decision, but in one's own distinctive way. Multiple judgements in any case can differ in a bewildering array of ways: eg they can treat as relevant some rather than other cases, and even where there is agreement on which cases are relevant, there can be considerable disagreement on how to construe their legal significance for the present case or for future projected cases. Further, the justifications offered for the decision can be widely different, even if they agree on the result, and this includes diversity in how any agreed-upon rule or principle is articulated. In addition, judgements can also differ in their constructions of the relevant facts of past cases, or indeed the present case. Sometimes, this 'multiplicity' is the cause of frustration of law teachers or practitioners. There are two responses to this: one is that we cannot wish it away, for it is simply a feature of the practice; another is to consider how we can treat that multiplicity not as a bug, but as a feature, ie to ask, in other words, what are its benefits, as much as it may have some negative consequences. I shall not do that here, but we will see that I shall have occasion throughout this book to refer back to the presence of multiplicity, this being an important feature, for instance, of the treatment of certain artefacts, such as metaphors or scenarios.

A third, and related feature, is what we might call the 'discursiveness' of contemporary common law practice. To point to this feature is to recognise not only the sheer length of common law judgements, though this too is important and looms especially large when one compares it to the considerably shorter judgements one finds in other legal traditions. Length is important, but to speak of discursiveness is also to notice the wide variety of uses of language deployed in common law judgements, ie to begin to see the many different kinds of communication practices engaged in by judges. One way to see this is to notice the many different kinds of audiences judges are addressing: the parties before them, their legal representatives, the arguments of other judges (whether in the courts below or in the present court, or in anticipating the arguments of higher courts), courts in other jurisdictions, scholars, and the press and the general public. Another is to recall the oral dimension of common law judgement, ie the fact that judgements were delivered orally, some *ex tempore*, some after deliberation, and all this against the background of the long history in the common law of the art of dialogue;<sup>50</sup> and to recognise that, although this has been transformed in various ways, with judgements being written, and no longer delivered in full orally, vestiges of orality remain.<sup>51</sup> One such echo is the often un-structured, or more loosely structured, character of judgements. There is not one formula for how one composes a judgement. Another is the presence of side remarks, eg the inclusion of discussion that is not strictly speaking necessary to deciding the present case. The presence of this 'obiter dicta', as it

<sup>50</sup> The Yearbooks of the Common Law may be characterised as the greatest medieval repository of the art of dialogue. See, eg, Bolland (1925).

<sup>51</sup> See, eg, Tiersma (2007).

is often called, or, more generally, of digressions or tangents in a judgement, I take to be another central aspect of contemporary common law practice. It is important that common law judgements often read more like conversations than systematic and formal treatises. There are many other ways to bring out the discursiveness of common law judgements, eg, one could emphasise the absence of canonical formulation of rules or principles, while also noticing that certain formulations come to acquire the status of often-repeated ‘sayings’ or ‘maxims’, or even ‘doctrines’ or ‘formulas’; one could also pay attention to the varying genres (tragic, comic, epic, lyric) as well as to the varying literary forms, eg parable, maxim, etc deployed; and one could begin to classify the different kinds of digressions and tangents entertained by judges.<sup>52</sup> As the reader will see, one of the aims of this book is to begin to point to the sheer variety of language uses, and thus also communication practices, in the common law tradition.

The fourth and final feature I shall call ‘restrained generalisation.’ This may equally be labelled in other ways, eg some have referred to the ‘minimalism’ of the common law,<sup>53</sup> or to its ‘gradualism’ or ‘pragmatism’,<sup>54</sup> or to its ‘inductive’ approach as signalled for instance by the central role of analogy,<sup>55</sup> and others, as Lamond above, have spoken of the significant attention bestowed upon facts, and the many practices of constructing and framing facts or patterns of facts.<sup>56</sup> I have long been fascinated by these practices. Indeed, in many respects, I could trace the pleasure I felt, and feel, reading common law cases to the realisation of, and hunt for, the importance of fact patterns in common law reasoning, and to how that patterning of facts in the common law overlaps with the various ways of making patterns with words in literary history. Another way to read this book, and especially the case studies in the second part, is to think of them as particular ways of making patterns of facts with language. Is that not a way we could classify, say, metaphors, figurations or scenarios?

In calling this feature ‘restrained generalisation’, though, I would like to signal the importance of not only patterning of facts, but also the presence of a tension between attention paid to facts of the present case, past cases as well as projected future cases with an equally fascinating and various array of practices of generalisation. In some respects, thinking of the common law as ‘inductive’ is helpful; in other ways, however, it hides from view the presence of generalising practices, and their relations with the more fact-anchored aspects of common law practice. There are occasions, even if relatively rare, in which common law judges go out of their way to assert, with varying degrees of confidence, a general rule, formula, doctrine or principle, these being themselves different genres or forms of generalisation. These varieties of generalisation, and their roles and consequences, cannot be wished away, as one might be tempted to, if committed to an all-out romanticised particularism.

<sup>52</sup> Examining the rich variety and value of ‘obiter dicta’, including how this has changed historically, would make for an exciting and important project. Indeed, there is a cultural, and perhaps especially literary, history to be told about digression: see, eg, Terry (1992); and Cotterill (2004). Interestingly, Anselm Haverkamp has recently suggested that ‘Productive Digression’ could be a good translation of the ancient term ‘poiesis’: see Haverkamp (2017).

<sup>53</sup> See Sunstein (1999).

<sup>54</sup> See, eg, Atiyah (1987).

<sup>55</sup> See, eg, Levi (1949), and Weinrib (2005).

<sup>56</sup> See, eg, Samuel (2003); and Jackson (1988).

Further, and this is of special significance to this book, as I shall expand on later, adjudication is not a mere matter of deciding a present case, or on ‘applying’ past ‘sources’ to ‘present facts’. This language of ‘identification’ of ‘sources’, being ‘applied’ to make and justify a ‘decision’ is in many respects misleading<sup>57</sup> and occludes from view the variety of temporalities important to adjudication, the most obvious of which is the attention paid by judges to the future. The point here is that judges do engage in generalisation, but that this is often restrained in various ways, with judges often employing alternatives to statements of too general or universal scope.

Indeed, yet another way to think of the artefacts examined in this book is to see them as examples of restrained generalisation. But there are other examples of restrained generalisation, which I do not explore in this book, eg the use of the prefix ‘quasi’, as in ‘quasi contract’. Such uses of language signal that some change may be necessary. They suggest that further reflection is called for, in ways that may challenge the currently conventionally accepted classification or taxonomy of concepts, and that may require the introduction of some new category (such as ‘unjust enrichment’). It is true that the common law often finds ingenious ways of avoiding ever having to systematise or ‘theorise’ its classifications, eg by focusing on ‘remedies’ or ‘interests’,<sup>58</sup> or by insisting on its character as an always-moving classification system,<sup>59</sup> or by deploying policy-based rather than, or in conjunction with, principled justifications.<sup>60</sup> Nevertheless, to repeat, it is also the case that judges in the common law tradition do engage in practices of generalisation or abstraction, that there are a wide variety of such practices, and that these are often restrained in different ways. Much work remains to be done on these practices, including considering whether to see the patterning of facts as part of a spectrum of generalisation or abstraction, or whether to see these practices instead as in productive tension with various ways of attending to and constructing facts and patterns of facts.<sup>61</sup>

Individuality, multiplicity, discursiveness and restrained generalisation: these are the general features of common law practice that I take to be relevant and important for this book. Although I have not sought to defend their value, I do think they are valuable, even if they also have their drawbacks and dangers. For instance, a defence of these features could argue that they help to ensure the resourcefulness of the contemporary common law. Further, such resourcefulness may be argued to have moral and political value: it makes the law more contestable, and, at once, more accessible to argument, and thereby also creates a space in which more voices can contribute to the making of law in the endless pursuit of justice.<sup>62</sup> The common law, we might say, is always in the making, all of it always contested, though to different degrees at different times, and stabilised, though only ever provisionally and tentatively, by certain conventional commonplaces

<sup>57</sup> See also Swaminathan (2019).

<sup>58</sup> See Samuel (2017).

<sup>59</sup> See Levi (1949). See also Balganesch and Parchomovsky (2015) for an interesting attempt to show how the common law tradition combines stability and change via ‘concepts’, eg good faith, privity, duty of care, proximate cause, foreseeability, reasonableness, commercial fairness, unreasonable risk, offensiveness, substantial harm, wanton disregard, amongst others: (2015), 1125.

<sup>60</sup> See Waddams (2003).

<sup>61</sup> For a fascinating study along these lines in the context of Talmudic legal reasoning, see Moscovitz (2002).

<sup>62</sup> See McCormick (2005) for a defence of the rule of law in this vein. We could characterise McCormick’s particular defence of the rule of law as part of a tradition of ‘rhetorical jurisprudence’.

and common forms of argument. This relatively loose and dynamic normative world, which also allows it to remain open to absorbing resources from beyond itself, and thus other normative worlds, makes room for argument, for pleas of justice to be heard. To me, that sounds like an attractive prospective defence of the resourcefulness of the common law, but, again, not one I can make here.<sup>63</sup>

Another point to make is that these features may strike the reader as quite general and abstract. Indeed, I have not enumerated all the various institutional manifestations of these general features; nor have I, as indicated above, engaged in any comparative or historical examination of the personnel and procedures of adjudication in the contemporary common law tradition. Some of these will emerge in the course of this book. For the moment, the key point is that the claims I make in this book about the value of artefacts and related process of imagination are limited to the presence of these features, and their institutional manifestations, and to no doubt others that, despite my best efforts, I have not been reflexive about.

## B. The Ethics and Politics of Adjudication

Theories of adjudication and legal reasoning are rife with ethical and political disagreement about the exercise of judicial power. Disagreements and divisions on this score are often passionate. They are also very complex. It would be impossible to avoid caricature in any summary. We could try to say, for instance, that some theorists have been divided to show either: 1) that judges exercise virtually no power at all, being mere mouthpieces of the law already made, mere declarators of law already there, or doing nothing but rather mechanically, or without great difficulty, deciding particular cases, say by merely applying laws with determinate meanings; or 2) that, appearances deceive, and that no matter how determinate legal language seems on the surface, or how easy the case seems, or is made to appear, and no matter how inevitable the justification in a case looks, or again, is made to look, judges are effectively exercising arbitrary power, making the law up as they go along, deciding on the basis of either a moral hunch or an ideological bias, and then cleverly constructing the appearance of a decision determined by reason and pre-existing laws.

Of course, this division is much too crude and does not correlate with the much more subtle positions of individual theorists. It also hides from view other vectors of disagreement. For instance, one might argue there is a subtler split between: 1) those who do think that judges exercise power, and at least a weak form of discretion, including making law, eg by interpreting it, but that this is for the best, eg because that is the best way to protect rights; and 2) those who think that, because judges never are merely mouthpieces, they always exercise either weak or, more often, strong discretion, which

<sup>63</sup>Of course, this picture is, in some respects, much too idealised, eg what appears as openness to other traditions to some, to others involves the exercise of epistemic violence. This is especially visible in the tragic treatment of indigenous traditions by common law courts, see, eg, Veitch (2007), Valverde (2015), ch 5 on 'the Honour of the Crown'; and Motha (2018). The common law, like other legal traditions, is also a site of epistemic violence, and has as many jurisprudential as it has jurisgenerative techniques and dynamics: see Cover (1983).

is un-determined by pre-existing authoritative standards, so everything possible should be done to minimise that power and the role of judges in a legal system, eg there should be no expansive bills of rights, which would, so the argument goes, give judges too much power vis-à-vis the democratically elected legislature. Here, the positions may be taken to hover between seeing judges as heroes, ie protectors of our rights, and of liberty and equality, especially against encroachment by executive power, and between seeing them as villains, perhaps necessary for a system to operate but regrettably so, standing in the way of a truly democratically government. This second vector of disagreement correlates perhaps a little better to positions taken in the literature, but it, too, is too crude to be helpful.

Although both of these divisions cannot be relied upon as summaries of the stances taken, they do give a flavour of the debate and disagreement. My own impression in reading this literature is that it does sometimes feel like moving from one extreme to another, eg from characterisations of judges as exercising enormous, almost wholly unconstrained power and characterisations of them as almost like automatons, operating within strict confines of logic and form; and, equally, between great belief in judicial power and great suspicion of it.

The highly charged language of these debates is a sign, surely, that a lot is at stake, and that debates over the exercise of judicial power reach considerably beyond the issue of adjudication, to broader issues of method, ethics and politics. Indeed, one could argue that disagreement over the exercise of judicial power, including its reality, its desirability, and its justifiability, has been at the centre of debates within legal theory and jurisprudence generally, and certainly within the twentieth century. Legal positivism, argued Ronald Dworkin, fails as a theory in part because it leads to an untenable account of the power exercised by judges. Positivism, or at least the positivism propounded by HLA Hart, by focusing exclusively, Dworkin said, on law as a system of rules, identified by a conventional rule of recognition, ends up, in hard cases, where the rules do not dictate a result, with a picture of judges exercising what he called 'strong discretion', ie a discretion un-determined by pre-existing authoritative standards. Dworkin's solution – his interpretivism – in which judges exercise merely weak discretion, a discretion guided in hard cases by principles, is in part a defence of the exercise of judicial power and the role of judges in a democracy, but it is also in many respects a theory of law built upon a theory of adjudication. On this picture, the law is not merely a system of rules; it is an empire of principles, and it is Dworkin's allegedly more accurate theory of adjudication that allows us to see this.<sup>64</sup>

The ensuing debate – the Hart-Dworkin debate as it has come to be known – has dominated not only the late twentieth century literature on adjudication, at least in the English-speaking world, but also the general jurisprudential landscape. There have been any number of attempts to defend Hartian legal positivism, and to show that it is, or some version of it is, compatible with a tenable theory of adjudication and legal reasoning.<sup>65</sup> Equally, there have been other kinds of responses to Dworkin, eg defences of realist positions, which were also criticised by Dworkin, say on the role of consequences and

<sup>64</sup> See Dworkin (1986).

<sup>65</sup> These include the work of Joseph Raz and Neil MacCormick but extend considerably beyond to many contemporary analytical legal theorists.

policies in legal reasoning.<sup>66</sup> There have also been important critiques from critical legal scholars and feminist legal theory,<sup>67</sup> not to mention other approaches to adjudication from natural law theory<sup>68</sup> or from within law and humanities scholarship.<sup>69</sup> To say this is hardly to cover the field, for theories of adjudication and legal reasoning have been, as is suggested above, in many ways the central preoccupation of so many legal theorists in the twentieth century, both in the common law and beyond.<sup>70</sup> All these theories are shot through, sometimes more and sometimes less self-consciously, with methodological, ethical and political disagreements about judicial power, but also considerably beyond, extending to issues concerning relations between law and morality, and law and politics. And it would take considerably more than one book to try to map these disagreements, and to do the various positions justice.

For present purposes, what is important is that I give a sense of my own approach, while also pointing out the limits of what is undertaken in this book. In this respect, I would like to be especially clear: this book does not offer a fully worked-out and explicit ethical and political theory of adjudication; far from it. Nevertheless, the ethical and political dimension of adjudication is crucial to this book, and that can be seen in various ways, perhaps most obviously in the unpacking of the ‘normative’ dimension of inquiry in Chapter 1. What I would like to do here, in brief compass, is to articulate the attitude that informs my approach to the ethics and politics of adjudication in general.

My starting point is to begin not with the power exercised by judges, but with the power exercised by theorists when observing and evaluating the practice of adjudication. It is often easy to forget just how privileged the position of the theorist is when compared to that of the judge: the theorist is not the one with the burden and responsibility to decide, or to offer plausible and persuasive reasons for the decision; the theorist is also not the one placed, or not placed as much, under very considerable institutional constraints, eg of time and resources, including the quality of counsel submissions, keeping in mind that counsel too are subject to all kinds of constraints; and, just as, if not more, importantly, the theorist has the benefit of the passage of time, including having the judgement or judgements authored by the judges to work with, rather than having to construct them from scratch, and possibly even a longer passage of time, thanks to which she can have access to insights that are available now, but were not then. The privileged position of the theorist suggests to me the importance of trying, when theorising adjudication, to recreate as much as possible the vulnerable, constrained and uncertain position of the judge, faced with the dispute before her, and feeling the burden and pressure of deciding and producing a helpful judgement.

This starting point has some important consequences. It involves treating every exercise of adjudication as epistemically, morally and politically difficult. This is not merely because judges are themselves epistemically-limited creatures, like all of us, and

<sup>66</sup> Out of a large literature, see Greenawalt (1976).

<sup>67</sup> See, eg, Kennedy (2008), Goodrich (1986), and Conaghan (2013).

<sup>68</sup> See, eg, recently Crowe (2019).

<sup>69</sup> Work in law and humanities often approaches similar issues, but through other frames and problematics, eg exemplarity (see Lowrie and Ludemann (2015)).

<sup>70</sup> For an overview of the last 25 years of scholarship in the twentieth century, and one which encompasses also theorists beyond the common law tradition, see Feteris (1997).

also not merely because of the institutional pressures and constraints of time, resources, etc that they are under, which are, as noted above, considerable. It is also because of the central duty of a judge: to do justice. To do justice is always difficult; it has to be. This includes deciding, for instance, whether a case is easy or hard, this being a decision that, in itself, is a difficult one, even if it is sometimes presented as obvious. Adjudication has to be difficult because it involves judgement, and judgement, if it is to be exercised by a human being rather than by a machine, has to involve difficulty: hesitation, for example, is part of the phenomenology of judgment. It is also difficult because it involves 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 own system and beyond. Furthermore, all these cares and concerns have to be balanced against each other: a sometimes almost impossibly difficult task.

Of course, recognising that judging is incredibly ethically and politically difficult does not mean that one needs to ignore or downplay the exercise of power by judges. Nor does it mean that one has to avoid holding the judges to account, upholding what one takes to be the standards and responsibilities of judgement. It does mean, however, that one approaches these tasks in particular ways. It means, for instance, taking seriously, as I try to in this book, the mechanisms and strategies developed by judges to cope with the difficulties of judging. One of these mechanisms and strategies is to work with language, and to deploy uses of language that call on others for assistance, either in the present case, eg by opening up dialogue between judges and advocates, say by way of a proposed metaphor or scenario, or in future cases, eg using a fiction and signalling to future courts that legal change is needed, but perhaps when better informed by a wider range of cases. Taking seriously these 'coping' mechanisms and strategies (a term I do not much like, for it casts a negative shadow over what may be better seen to be features, rather than bugs, of adjudicatory practice) does not mean that one cannot see them as exercises of power. To the contrary: to be in a position where one can introduce a metaphor that others will need to read and consider is a position of power; 'rhetorical' or 'discursive' power one may call it. It follows that such uses of power can be criticised, eg there may be better or worse metaphors: some that are more helpful than others, or perhaps some that have outlived their usefulness. However, what foregrounding the difficulties of judging does exclude is taking up a position in which one decries the use of 'coping' mechanisms and strategies altogether, say, by projecting the image of an ideal judge who, in all his impressive omniscience, can see the right answer or come up with the ideal universal justification.

Let me be especially clear: yes, judges do exercise very considerable power. Particular decisions, particular procedures for reaching them and other institutional features of adjudication, and the language of judgements in general, are, in themselves, exercises of power. They can also be seen to be violent, eg doing epistemic violence, for instance, to other languages and other normative worlds, with consequences that are often hidden from view, sometimes both for 'winners' and 'losers', but in any event always operating, as Robert Cover pointed out, in 'a field of pain and death'.<sup>71</sup> Recognising the power

<sup>71</sup> Cover (1986), 1601.

and violence of adjudication, however, does not exclude approaching, with humanity, the difficulties that judges face. Put more strongly, by foregrounding these difficulties, I think we, as theorists, owe it to the judges to treat their efforts in adjudication as sincere efforts to do, and to appear to do, justice. This includes approaching the above-mentioned ‘coping’ mechanisms and strategies not as judges falling short of some ideal, or as judges hiding their exercises of power, but as genuine attempts to care, ie to do justice in the instant case while also doing justice to other cares and concerns, such as the moral and political quality of the law, and the authority and legitimacy of the court. We can certainly disagree with the way that judges attempt to do justice. We ought not, however, unless we have very clear evidence to the contrary (eg corruption), approach judging as something other than exercising the very difficult task of doing justice.

There is another aspect to this attitude of foregrounding the difficulties of judging, while nevertheless recognising the power of judges, and insisting on certain standards and responsibilities of judging. One of the ways that theorists have taken that difficulty seriously is by shifting the critical lens away from judges, and the power they exercise, to the law itself, and the alleged blindness to suffering and vulnerability that it manufactures. To position matters in this way is to propose a tension between the universal pretensions of the law and the particular cases that come before judges.<sup>72</sup> To do this is to speak less of the violence of the judicial power, and more of the violence of law itself. The exhortations, under such an approach, are then to certain virtues of judging, eg, the virtues of attention to particulars, or the virtues of empathy, sympathy, compassion and mercy, which are then said to require education, eg via literature.<sup>73</sup> Although I recognise the importance of this approach to judging, this is not the approach I take in this book. One of the worries I have is that positioning matters in this way, ie as a tension between the universal and the particular, is that it makes us approach the language of law in certain ways, and more often than not, to see it as an obstacle to doing justice in some particular case. This can have the effect of making us too suspicious of legal language, and equally, too hopeful, if not too romantic, about the personal qualities and virtues of judges, as important as these are.<sup>74</sup> It also, I think, makes us focus too much on the instant case, and this can obscure from view the other temporalities at work in adjudication, eg the importance of caring for the future, including the implications a particular way of deciding the case can have for future potentially similar cases.

While recognising the importance of the literature that situates the issues of adjudication in this way, my approach in this book is different. Rather than seeing the language of law as either an obstacle or a guide, which is more or less determinative, to be applied or interpreted in a particular case, I wish instead, in foregrounding the difficulties of judging, to see legal language as a communicative and cognitive resource. To approach legal language in this way is to see it as something we think with, not only in the instant case, but also over time, and not only as individual judges but together with others, and

<sup>72</sup> For some great essays on this tension, see Bańkowski and McLean (2006). For more on particularity and singularity, see, eg, the essays in Lowrie and Ludemann (2015).

<sup>73</sup> See, eg, Nussbaum (1997).

<sup>74</sup> None of what I say here is intended as a critique of virtue jurisprudence. I do think, however, that talk of virtues, especially at an individual level, needs to be combined with attention to the qualities of legal language, and to other social and institutional features of adjudication.



as something we can draw on to communicate under conditions of uncertainty, in part by way of coping with the difficulties of judging. This does not mean that legal language is something that judges merely use. To the contrary: we cannot merely *use* language because we cannot predict or control its meanings. Language is too much of a social phenomenon to speak of controlling it or mastering it. Put another way, we may use language, but it also uses us, for it affects us in ways we cannot predict, control or master.

My title for this section is 'the ethics and politics of adjudication', but it could equally be 'the ethics and politics of theorising about adjudication.' I take this theorising to be epistemically, morally and politically difficult too; hence the insistence here on theoretical modesty in approaching the exercising of judging. Approaching judging, in this book, means foregrounding its difficulties, taking seriously its ways of coping with those difficulties, holding those ways of coping up to certain standards and responsibilities, and trying one's best to be neither too suspicious nor too hopeful about either judges or the language of law.

### C. Modelling

I have been emphasising, throughout this introduction, the limits of theorising, and I want to return to this theme yet again. In this book, as noted already above, I propose three 'models': inquiry in Chapter 1, imagination in Chapter 2, and artefacts in Chapter 3. I use the terminology of 'modelling' for a number of reasons.

One such reason is the desire to move away from the terminology of 'concepts', and thus also away from the associated claims to capturing the nature or essence of something. Sometimes, if not typically,<sup>75</sup> when we speak of concepts, eg 'the concept of law', we mean to refer to the necessary and sufficient conditions of that something, eg with respect to law, the necessary and sufficient conditions that allow us to distinguish law from, say, social norms, morality and coercion. I acknowledge that an important part of theorising is constructing a distinguishable object of study. However, it is sometimes forgotten that any attempt to distinguish some object will always be contingent on what we think it is relevant to distinguish it from. Once we realise the contingency of our pools of comparison and contrast, eg social norms, morality and coercion with respect to the concept of law, we also come to see that any attempt to build a concept is necessarily incomplete, giving us a very specific view of what we, in some particular community, think is relevant and important to distinguish law from. Thus, it is in part to embrace, rather than hide, the contingency of theorising, and thus be mindful of its limitations, that I use the terminology of models rather than concepts. In that respect, I am conscious that the models I here propose, ie of inquiry, artefacts and imagination, are one of a number of possible ones, given that I have distinguished them, selectively, from certain other phenomena. I try to be as explicit as I can about what I compare inquiry, artefacts and imagination to and what I contrast them with, though I am also conscious that I cannot make all of this explicit, no matter how hard I try.

<sup>75</sup>I acknowledge that there are other traditions of characterising concepts, eg as prototypes. I also acknowledge that this is a very rough and crude characterisation of 'conceptual analysis'. I make no claims about what 'conceptual analysis' entails. Rather, my aim here is to clarify my own approach to the activity of theorising. For a sophisticated approach to what he calls 'constructive conceptual explanation', see Giudice (2015).

A second reason for preferring the terminology of models, *eg* to concepts, is that in addition to constructing necessarily contingent distinguishing marks or threshold criteria, and thus helping us to focus on some distinguishable object of study, models foreground variability. On the way I approach modelling, one proposes a relatively thin layer of distinguishing marks or threshold criteria, *eg* for imagination to count as imagination. One does so in order to make as much room as possible for variation. Thus, and especially with respect to artefacts and imagination, I have attempted to construct models of these that will allow us to capture some, though again, only some, of that variability. For instance, with respect to artefacts, the model seeks to make room for the many different ways in which we can signal artifice as well as the many different ways in which artefacts invite us to participate. Similarly so with the model of imagination: I have constructed this in such a way that we see that we can enter a distinctive epistemic frame in many different ways, suspending different kinds of epistemic norms and commitments, and that we also participate in many different ways, along a spectrum of affective, sensory and kinesic involvement. Models, then, not only help to signal limitations, and thus the contingency of any theoretical activity of making a distinguishable object of study; they also help us to foreground and emphasise variability.

A related point is that insofar as modelling involves constructing relatively thin layers of distinguishing marks or threshold criteria, placing more emphasis on variability, then this may also help us to forge links and build bridges between different disciplines and literatures. One of my aims, in constructing the models I do in this book, is that it will: 1) show scholars working in fields outside adjudication, *eg* literary theorists and historians, philosophers of mind and language, cognitive scientists and psychologists, just how rich, and ripe for the picking, are adjudicatory practices; and 2) show scholars working on adjudication just how much there is to learn, about adjudication, from scholars working in the above-mentioned fields. Accordingly, in the case of each model, I try to situate the models I construct by reference to a wide range of literatures about them. There is a danger, of course, in this practice, given that the literatures I try to relate to the models in question are so varied. Nevertheless, even if at the risk of being eclectic and superficial, I thought it important to design the models in such a way that they can attract a variety of disciplinary orientations and languages. This goes for all three models, but it is perhaps clearest in the case of the model of inquiry. I acknowledge the rich and complex history of the term 'inquiry', but I model it in a very specific way, namely in order 1) to loosen the hold of the dichotomy between justification and discovery, which I argue has led to unhelpful divisions and hierarchies of disciplinary labour; and 2) to enable more multi- and inter-disciplinary work on adjudication.

So far I have identified two reasons to prefer the terminology of modelling: first, to signal the limitations of one's theoretical work, especially with respect to the contingency of the distinguishing marks or threshold criteria that one uses to make a distinguishable object of study; and second, to foreground and emphasise variability, in part in order to enable multi- and inter-disciplinary research on that object of study.

There is also a third reason, namely that to use the terminology of modelling can help us remember the evaluative character of theorising. Thus, I include within the construction of a model the articulation of a certain attitude to what it seeks to make relevant, *eg* a certain kind of attitude to the imagination, namely that it is something worthy of our theoretical attention and that it may be important and valuable, *eg* that

we can think of it as a distinctive kind of epistemic activity, which may be valuable to inquiry. Theorising is not just about constructing a concept of something or giving something hitherto-nameless a label. Theorising, and in this case modelling, is an evaluative activity: one does not point to something merely for the sake of it, but because one thinks it is something worthy of attention.<sup>76</sup> Further, to think of theorising as an evaluative activity is also to recognise that it is laden with emotion: theorists, too, after all, are affectively-embodied beings. To construct a model, then, is to signal one's attitudes, including emotions, to that which one is proposing as relevant and worthy of our theoretical attention. These emotions relate not only to what one claims for one's theory, and thus how reflexive one is of a theory's necessary limitations, but also to how one attempts to relate to different disciplines and literatures.

To speak of models, at least to my ears, helps to keep in mind that theorising is an activity, with inevitable and inescapable limitations, involving attitudes both to one's own claims and to one's relations with other theorists, including those from different disciplines and working in different theoretical languages and methods. Put another way, to think of theorising-as-modelling is to remember that theorising is an activity performed by affectively-embodied and socially and historically situated beings.<sup>77</sup>

#### IV. The Painting on the Cover

I end this introduction with a word about the painting on the cover of this book. It is a trompe l'oeil entitled 'Escaping Criticism', painted in 1864 by the Spanish painter Pere Borrell del Caso, who was well-known for trompe l'oeil paintings. It depicts a young boy, poised at the threshold of a painting frame, seemingly both eager and anxious to escape the frame. The boy is both inside and outside, on the doorstep if you will, and in a liminal state, in some respects within the world of art and in other respects in defiance of it. The boy is also both passive and active, waiting but also alert, still but at the same time full of movement. This is a balancing act in so many ways, and for me, when I first saw it, it struck me as an icon of imagination.

I saw it this way because imagination, as I model it here, 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. It is precisely both an inside and an outside, a mixture of passivity and activity, of distance and immersion, of being offline and

<sup>76</sup>This is not unrelated to points about the practice of theory that have been made by natural law theorists for a long time, most obviously Finnis (1981).

<sup>77</sup>It would be interesting to apply the same framework (of inquiry, artefacts and imagination), which I apply to adjudication in this book, to the making of legal theoretical insight. Of course, there would be specific cultural and institutional features of the practice of scholarship, in different times and places, and this would call for different artefacts, and different processes of imagination, than those found in adjudication. Nevertheless, some may well be very similar: eg uses of figures in legal theory (Dworkin's Hercules), scenarios (and thought experiments generally) and metaphors (eg Hart's core and penumbra, Kelsen's pyramid). See, eg West (1985); Schlag (2002); and Del Mar (2013b).

online, of withdrawal and participation. Imagination has often been explained and described as a lack, ie as missing something, whether that be in terms of escape from reality, or by reference to creating a mental object of something that is not present, and that is part of the story. But imagination, as others have also noticed, is much more than that: it is also something active, in part a driver of action, as it was for Aristotle, both for animals and humans,<sup>78</sup> as something we actively perform, eg in seeing-as, but also in deliberating as-if, what-if or if-only, and something that draws on so many features of us as affectively-embodied beings, engaged and responsive to the world and others.

We can, then, see the painting as an icon of imagination. But the painting is, of course, also an artefact (a visual artefact, whereas I focus on linguistic artefacts). As modelled in this book, artefacts are forms that: first, capture our attention by signalling their own artifice; and second, call upon us to do something with them. An artefact is not fully definable by its formal properties. Its capacity to perform its functions is in part dependent on whether it actually does capture our attention and successfully calls upon us to do something with it. In this case, the painting was and remains an artefact for me. My attention was captured by the signalling of its own artifice, also triggered by its title 'Escaping Criticism'. But my engagement with it was by no means confined to some abstract reflection, as if in a state of withdrawal from my emotions, my senses and my body. I also engaged with it, and still do, when I spend time with it, simulating the movement of the boy (kinesic participation), simulating the boy's emotion (affective participation – here, that mix of anxiety and curiosity), and perhaps even simulating what the boy sees when he looks into the great beyond (sensory participation). This artefact, then, successfully called upon me to imagine.

<sup>78</sup> See Nussbaum (1986).