

Imagining Law

Conversing, Listening, Feeling, Hesitating*

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

1 Introduction

One's imagination is triggered by the surprising thoughts of others – certainly, mine has been by the very generous and wonderfully generative comments of Adriana Alfaro Altamirano, Iris van Domselaar, Claudio Michelin, and Greg Walker. I thank them all very warmly, and in what follows attempt, inadequately, to provide some initial replies.

2 Conversing

What might it mean to take the collective dynamics of legal reasoning seriously? Equally, why might it be important to understand those collective dynamics diachronically, i.e., as comprising activities with variegated temporal durations, some involving relatively short and intense real-time interactions, and others being communications spread out over time?

Part of the answer to those questions will be ethical: as I argue in *Artefacts of Legal Inquiry*,¹ some of the devices and forms of language (which I also characterise as 'experimental', e.g., involving a willingness to explore and suggest, rather than assert and control) that have developed in common law reasoning can be understood as diachronic and collective forms of inquiry into what values, vulnerabilities, and interests might be at stake in past cases, in the present case, and in potentially similar future cases. If we focus solely on the instant case, and on the decisions justified in it, we might well miss the value of those devices and linguistic forms that are especially helpful in generating a conversation across time as to what a community might care about.

Another part of the answer (which, admittedly, I did not develop in the book) will also be political: conceptualised as collective and diachronic, legal reasoning has

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1 *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (Oxford: Hart, 2020).

the potential to be democratically valuable, i.e., to involve more persons, more voices, including the citizen body, and not just the officials, in a conversation about what the law ought to be. For this to be so, however, both officials and citizens would need the skills to be capable of participating in that conversation, and this raises all kinds of difficult questions about the pedagogy of those skills.

In this section, and by way of response to Claudio Michelon's comments, I focus on the first of those aspects: the ethical. In the next section, I turn to the political (which is not to say, of course, that the two can be separated so neatly).

Michelon offers very helpful suggestions, which I gratefully adopt, as to why the model of 'inquiry', as I term it in the book, might be of assistance in understanding certain features of common law reasoning (especially so-called inference to the best explanation – IBLE – arguments) that would otherwise be perplexing, if not simply inefficient and redundant (e.g., because a more straightforward and economical analogy is also available). For Michelon, IBLEs are part of adjudication conceived as a 'social search for legal reasons for action, developing over long stretches of time'. As I conceive them in the book, though without really developing this much, these reasons are 'values, vulnerabilities, and interests', which courts look for when inspecting law's past, when examining the facts of the present case, and when projecting into potential legal futures.

According to Michelon, adopting the above social and diachronic search model of adjudication helps us to see why IBLEs are valuable and why they are expressed as they are, i.e., experimentally, and thus often with hesitation and caution, precisely leaving lots of space for future collaboration. IBLEs may be inefficient and redundant in a sense, but they not only decide present cases (as analogies also do) – they also establish resources (as analogies do not) for future, collaborative search for further legal reasons. I find myself very much in agreement with Michelon (even if, on another occasion, I would be inclined to be more charitable to the forward-looking potential of analogical reasoning). In response, I raise a few points as to how much further we might go in reconceiving adjudication if we take this collective, diachronic, and experimental account of adjudication seriously.

The idea expressed in *Artefacts of Legal Inquiry*, namely that legal reasoning can be conceptualised, in part, as an experimental conversation across time, is, in many respects, not new. Support for it might be found, for instance, in Sir Edward Coke's famous defence of the common law as 'artificial reason', as the work of many hands over long periods of time, or perhaps in David Hume's account of law (albeit, for him, in particular, property law and contract law), in the *Treatise of Human Nature*, as a collective, conventional, and imaginative process, leading also to the emergence of an artificial virtue of justice.

If we do think of adjudication in this way, this also calls for attention to the precise means by which those involved in adjudication find ways of working together – sometimes agreeing with each other, adding to each other's work, and sometimes disagreeing, but even then, often in ways that generate resources for the future.

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Here, what comes into view are the forms of language articulated by individual judges, often precisely in ways that do not hide subjectivity, but instead deploy subjectivity in the service of communal work. Thus, for example, in the case cited by Michelin in his comments – *Lipkin Gorman v. Karpnale*² – all the judges refer and/or discuss not only the views of their fellow judges (e.g., Lord Bridge of Harwich says: ‘I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Templeman and Lord Goff of Chieveley’³), but also the views and arguments of counsel in the case, the judgements made in the Appeal Court below, and the views and arguments of the judges in the cases cited by counsel. In addition, they themselves look beyond, incorporating views and arguments of courts from other jurisdictions. Amongst those judges who agree – and this is a case in which all the judges agree, there being no dissenting judgements – they do not all agree for the same reasons: thus, e.g., Lord Griffiths, who says that he has read the drafts speeches of all the Lordships, says that he agrees, in particular, with the reasons of Lord Templeman and Lord Goff, in relation to some issues, and to Lord Goff alone in relation to other issues. Even when it comes to agreement, then, the case is a patchwork of individual, subjective responses to the reasons of others.

Moments of disagreement are even more interesting. These arise less as between the judges in the House of Lords, and more between them and the majority judges in the Court of Appeal, which, in this case, the House of Lords reverses, thus allowing the appeal. These disagreements are articulated cautiously and often with great expressions of courtesy, e.g., Lord Goff says that he is ‘unable to accept the alternative basis upon which Parker LJ held’ a certain view, going on to give a different perspective, prefaced with the phrase ‘In my opinion’, which appears multiple times.⁴ Lord Goff is acutely aware of who he is agreeing or disagreeing with, and on what basis, but also keen to emphasise that all he is expressing is his own, personal opinion. Rather than characterising another judge’s view as simply wrong, he instead says that, as above, he finds himself unable to accept a certain argument. The fault, it appears, is always with the speaker: the speaker finds certain things difficult and expresses his own view. That view, in addition, is often given an affective colour: the judge is disposed to be confident or confesses to difficulty (e.g., Lord Goff says at one point: ‘I confess that I have not found the point an easy one’⁵). There is affective nuance in this conversation: the judges are not afraid to express their epistemic emotions, especially when they are engaging with each other’s views, whether this be fellow judges, or counsel, or judges in other courts in past cases. Further, they do so in various subjective emotional shades; different, sometimes subtly different, affective colourings of their views. This produces a quite complex, affective tapestry of agreement and disagreement. It also expresses a certain decorum and politeness: interactional ethics, it turns out, is very much part of the practice of appellate-level, common law reasoning.

2 *Lipkin Gorman v. Karpnale* [1991] 1 AC 548.

3 *Lipkin Gorman v. Karpnale*, 558.

4 *Lipkin Gorman v. Karpnale*, e.g., 575.

5 *Lipkin Gorman v. Karpnale*, 582.

Also interesting are moments in which a judge might drop the first-person address, and speak instead in the third person: e.g., Lord Goff says at one moment, ‘In these circumstances, is it right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these?’⁶ Here, Lord Goff explicitly refers to a joint enterprise – to each judge asking themselves a certain question or considering whether they should – while also inviting himself and his fellow judges to dwell on their ‘feelings’. Again, legal reasoning here is a joint inquiry, though still one in which each judge ought to feel free to express their own, subjective emotions.

Part of the point here is that the forms and the genre of common law reasoning allow for both subjective and inter-subjective dynamics to emerge and play their part in generating a courteous conversation. This is a conversation, in turn, that is not only focused on deciding the present case – it is also very much concerned with how others, in the future, will read the present judgement, and thus in trying to be both as helpful to future audiences, while at the same time not taking away their agency. The judges, in fact, go out of their way to offer resources for future audiences, explicitly leaving room for future collaboration. Lord Goff, as Michelon notes, is especially forthright about this. For example, in discussing the Change of Position principle, which he is tentatively and cautiously articulating, he says – and notice again the reference to emotion:

I am most anxious that, in recognising this defence to actions of restitution, nothing should be said at this stage to inhibit the development of the defence on a case-by-case basis, in the usual way... At present I do not wish to state the principle any less broadly than this...⁷

And Lord Goff goes on to mention various qualifications to the principle, even so tentatively stated. He also notes various possible contingencies, e.g., other areas of law developing to affect this one in ways yet unknown. The decorum and politeness of legal reasoning here involves respecting the future views of others: one expresses one’s emotions but does so in ways that allow others in the future to come in and express theirs, thereby adding or chipping away at something being proposed as a possible way forward. The search for legal reasons for action is a deeply subjective and intersubjective, emotional, and respectfully collective inquiry, which looks both backwards at what might be learnt from past cases, while also looking forward, at how future audiences might be assisted and left enough room for their own affective searching.

What can we learn from this briefest and shallowest of dips into what is a complex case, and one which, as Michelon notes, has become ‘foundational’ for the development of the law of unjust enrichment in England? One conclusion I would propose is that we take seriously the social and interactive ethics so clearly present in this case: the sense of mutual respect, decorum and politeness,⁸ and the ways in

6 *Lipkin Gorman v. Karpnale*, 579.

7 *Lipkin Gorman v. Karpnale*, 580.

8 On politeness, see e.g., Chaoqun Xie (ed.), *The Philosophy of (Im)politeness* (Cham: Springer, 2021).

which this is expressed, e.g., through confession, self-critique, the articulation of doubt and uncertainty, or the posing of questions. The details of how one's subjectivity is expressed, vis-à-vis the subjectivities of others, are important; the language itself is significant. Can we really extricate formal aspects of legal argument from this deeply, richly, equally subjective and inter-subjective expression of mutual respect, whether in agreement or disagreement? In fact, the forms of language deployed in the above case are echoes of a rich history of the relationship between the decorum and politeness of conversation and legal reasoning. For instance, the pleading dialogues of the medieval Yearbooks, which remain one of the richest repositories of medieval dialogue that we have, were also a form of social exchange, involving banter and camaraderie. Similarly, Renaissance humanist norms of the polite and witty conversation became entangled with the practice of argument and debate in courts, also affecting practices of writing (e.g., the genre of the essay). This, in turn, is also a gendered history: these norms of decorum and politeness were also, in large part, norms of masculinity, of male bonding, of male solidarity and humour, of the gentleman and the courtier, and this too had, and continues to have, an enormous impact on practices of legal reasoning.⁹ Again, these gendered norms of decorum, politeness, and the manners and styles of good conversation, are not separable from legal reasoning and its standards; they are entangled with them. If we are minded to separate them, or not see those connections, then we might well ask: why? What kind of theoretical approach to legal reasoning is stopping us from seeing it in its context as part of a culture of polite, gendered conversation?

The other conclusion concerns the emotions, especially epistemic emotions: emotions that express confidence in or enthusiasm about some view, or indeed doubt and difficulty. Again, could these just be subtracted or extracted, and thought to be superfluous to the whole enterprise, or does, instead, the practice of legal reasoning very much depend on such layers of emotion being included, and woven into the discourse? Emotions are also expressions of attitude – of endorsement or critique, but often in more subtle, indirect, less assertive and thus more conversational ways. There are many shades of attitude possible, and allowing – indeed, expecting – emotions to be articulated arguably helps finer shades of attitude to be communicated. 'I find this point difficult', a judge says, or 'I am concerned about this development', says another. There is a signalling of attitudinal complexity, which needs further work, or a worry that something may need to be reflected on with greater caution than hitherto thought. Importantly, these are not just epistemic emotions of single, individual judges – they are also, if not especially, ways of communicating together, and thus ways of inquiring together.¹⁰ All this too is part of the rich tapestry of common law argument.

9 Here, the male bonding culture of the Medieval and Early Modern Inns of Court is crucial: see, e.g., recently Amanda McVitty, 'Homosexuality, Sexual Misconduct and Gendered Violence in England's Pre-Modern Legal Profession', *Past & Present* (2022): <https://doi.org/10.1093/pastj/gtac025>.

10 See also Laura Candiotti, 'Epistemic Emotions and Co-Inquiry: A Situated Approach', *Topoi* (2022), Online First: <https://doi.org/10.1007/s11245-021-09789-4>.

Notice, also, that from the perspective of adjudication understood as, at least in part, a conversation across time, what counts as a good argument or, for instance, a virtuous judge, also changes. A good argument, from that perspective, is not necessarily one that is water-tight, efficient, economically-articulated, unambiguous, and complete. It is not necessarily something that can be extracted, as a quote (a formula, say, a clear principle, or a rule with a step-by-step guide to its application), and inserted easily into a textbook or a lecture for undergraduates (as teachers sometimes hope for). Rather, it may well be something that instead calls for and requires the effortful participation of others – that is relational more than monological; precisely an invitation for others to pick up later down the line. At the same time, it may also be better for being redundant and repetitive: legal conversation might well need redundancy and repetition, if not saturation and density. There is epistemic value, one might argue, in a thick conversation, involving iteration, often with minor variation. One way forward here, then, in future research, would be to pay more attention to this category of relational, invitational, iterative and conversational argumentation.

Relatedly, we could look again at judicial virtues, but this time from the perspective of legal conversation across time. A virtuous judge, on this approach, is someone good at conversation – someone skilled in conversing legally. This includes the skill of listening, which I will consider in the next section, but it also includes speaking in a certain way so as to relate with others and encourage others to have a voice. Here, it might be worthwhile drawing on the work of linguists and others studying the norms of everyday conversation: turn-taking, using unfinished sentences, being elliptical, using irony, winking, smiling, and using language that signals a commitment to conversing rather than preaching, to being involved in a joint enterprise rather than heroically beating one's breast and waiting for the applause. Common law reasoning, it turns out, might be more like everyday talk than we commonly think; after all, it is a social practice, a deeply affective joint activity, full of emotion, with norms of mutual respect and courtesy being entangled with, and inextricable from, forms of argument.

I have but scratched the surface of legal reasoning as a conversation, and a great deal more exciting discoveries await. For now, I can do little more than express enthusiastic agreement with Michelin's final word, that 'there are more things in the heaven and earth of adjudication than are dreamt in the dominant legal philosophy of adjudication'.

3 Listening

Adriana Alfaro Altamirano also picks up on the collective, diachronic, and experimental dimensions of adjudication. Here, Altamirano has two questions – one more of a worry, the second more of an invitation to elaborate. The first concerns the potential danger of the experimental mode of communication offering an opportunity for judges to escape responsibility: I avoid articulating a principle, a judge says, because I am unsure, and so will leave this for future

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audiences to work out. Is this not a judge hiding behind a social, diachronic, and experimental approach to adjudication – hiding and not doing his or her job? The second concerns the ability to participate in a conversation across time: what skills does one need here, e.g., reading and listening? If so, what might a pedagogy of reading and listening be like? And might such a pedagogy of reading and listening help us see the democratic value of legal reasoning?

Altamirano's worry is an important one and relates to how we conceptualise the epistemic responsibilities of judges. How much ought we to expect from judges, and what exactly are we expecting? In keeping with the above suggestion that we take seriously the collective and diachronic aspects of adjudication, I do think it is important to approach this issue by not focusing exclusively on a single judge. Thus, for example, in appellate-level common law courts, the epistemic burdens of judging are distributed, often in informal ways, which also depend on the specific interests of the judges. In the *Lipkin Gorman* case mentioned above, two out of three judges write very short judgements, while the other three write much longer judgements. Lord Goff, in particular, writes the longest judgement, and one that the other judges refer to, with quite some epistemic deference. The judges recognise that Lord Goff is the expert on unjust enrichment, and that this is an area of personal interest to him. Similarly, so with future readers of this judgement: counsel and other courts, as well as scholars, all recognise Lord Goff's expertise in this domain, and will tend to give particular weight on his 'opinion'. Appellate level courts, then, are particular kinds of epistemic communities in which epistemic burdens are distributed: so, sometimes it is justifiable for a judge to say, 'I am unsure, and will on this point defer to my colleague, who is more knowledgeable about this area of the law'.

Notice that collaborating and working together in this way does not mean that judges are required to agree with each other, or indeed always to defer to another judge's expertise. By no means: expressing one's view can entail disagreeing, e.g., with respect to how to describe the facts, how to articulate the reasons for the decision, as well as with regard to the agenda and resources for the future development of the law. In the above case, in the Court of Appeal decision, Lord Nicholls dissented from the majority. Arguably, the case would have been less valuable for future courts – certainly the House of Lords, which returned to and endorsed his views – if Lord Nicholls had not done that. Common law reasoning is a collective enterprise, involving the sharing of burdens and tasks, and encouraging the formation of individual opinions – again, as part of resources for a conversation over time. Sometimes this involves deferring to someone else's epistemic expertise; and sometimes it involves going it alone, dissenting from the majority, and offering a view that might be ignored for some time, before it is resurrected, and transformed into a new consensus. One's epistemic duty as a judge – one's role in the collective inquiry – can thus vary, though it can also be the case that for a certain court at a certain time, a judge might come to play a certain epistemic role more consistently, e.g., think of the High Court of Australia in the 1990s, and the important role of the 'great dissenter', as he was known, Michael Kirby (who championed, for

instance, the relevance and significance of international law norms for Australian law).

This, I realise, is not a full answer to Altamirano. Certainly, the least we expect a judge to do is decide the present case and to offer reasons for the decision, and in doing so, respect and listen carefully to the arguments put before her by the parties in the case. That is the minimum: that is a responsibility that a judge cannot abdicate from. But I think that, in addition, judges have heavier burdens than that: a judge ought to respect the law's past, care for the law's future, and also take care to consider the impact of their behaviour on the authority of the court and the law more generally. Importantly, though, as above, if we take seriously adjudication as a social practice, and legal reasoning as a collective and diachronic activity, then we need to see this duty as a collective one, which may be distributed differently in different cases.

What we do not want, I would argue, is a discursive practice or culture of judgement that encourages judges to hide away the difficulties of a case, especially with respect to its future legal significance. This does not mean judges can just give up and say only: 'this is all too difficult, so I will leave it for another day'. Rather, judges ought to at least articulate why they find it difficult. Again, the common law is better, especially as a collective and diachronic enterprise, for making room for subjective opinions, including the articulation of epistemic emotions (e.g., of doubt, difficulty, uncertainty, and anxiety, or indeed confidence and optimism). There is no hard and fast rule here: sometimes, as noted above, in multi-judge appellate courts, it may be entirely appropriate, on occasion, for a judge to defer to a fellow judicial colleague, in recognition of that colleague's superior knowledge of a certain area of law. To do otherwise – to think one can have an important opinion, in every case, and in every area of the law – underestimates the complexity of the law and overestimates one's own individual abilities. At other times, it will be appropriate to offer either one's own independent reasons for a decision, or to dissent. Thus, it is a difficult balancing act, and a virtuous judge will be one who considers when it is appropriate to strike out on one's own, and when it is appropriate to hold back, and defer, or postpone further reflection in some other way (not the decision and its justification – this cannot be postponed – but instead the development of the law in a certain direction). Again, the law is a joint enterprise, requiring friendship more than heroism, and this has consequences for how we conceptualise the epistemic duties of an individual judge.

The second of Altamirano's questions concerns the pedagogy of listening. This is related to the question of how to speak: as mentioned above, if we think of adjudication as a conversation across time, then this entails speaking or writing in a relational or dialogical rather than monological way – a way that leaves enough room, precisely, for listening or reading of active epistemic agents in the future. But this does not answer the question: we still need to reflect on what it might mean to listen or read well, and how this might be taught. This, in turn, relates to the political dimension I mentioned above: can legal reasoning be democratically valuable? What would it mean for it to be so, such that it invites and includes

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participation not only by legal officials, but also by citizens? Can the rule of law be a space for genuine contestation and discussion of law's shape, where the stakes and the futures of law are up for grabs by any member of that community? But if so, then, again: what is it to participate well, as a member of a community, in that contestation and discussion of legal futures?

The first step here must be, as Altamirano has herself recently argued, drawing on a crop of exciting work on the politics of listening,¹¹ to recognise the complexity of listening as a skill and a political value. For instance, listening is often thought to be something passive – not itself an act, but instead something one undergoes. But listening is an act, and a very important one, both for the individual concerned as well as for a community. Nevertheless, listening is a special kind of act, which does require some 'passivity'; to listen is, at least in part, to be silent and allow oneself to be persuaded, to an extent, or to allow oneself to be transformed by what one hears. To be a spectator of a spectacle is, in part, not to be an actor, although the cultures of spectating vary widely, and some cultures have blurred that distinction in all kinds of ways (from Ancient Greek theatre to Bertold Brecht). Still, the complexity is there: listening is an act, something one does (and something one does more or less well), but this does not mean listening does not have elements of what we might think of as 'active passivity', e.g., staying silent, and being alert and attentive.

Reading, in that respect, is similar: to read is to do something active, but it is also to proceed slowly, allowing oneself to be transformed by what one reads, rather than, say, reading in order to be confirmed in what one already knows, or reading for extracting something useful, a helpful quote or clever footnote, say. This, it turns out, is more difficult than it might seem – which is not necessarily a fault of individual readers, but is also deeply entangled with the economics, technology, and culture of reading practices.¹² When is slow, transformative reading really rewarded, and made possible by a community? And when do technologies of reading help us to read slowly and transformatively? Compare, for instance, the design of a medieval manuscript with that of a Kindle: the medieval manuscript has heavy pages, which take time and physical effort to turn; it has margins, which either capture one's attention in various surprising ways, or which encourage us to draw and write in them; and it is perhaps not written with any spaces between words, so that it requires effort to pronounce out loud, as one must to make sense of it, thereby also deciding how to pronounce it. Which one are we likely to read

11 Adriana Alfaro Altamirano, 'Narrative and the "Art of Listening": Ricoeur, Arendt, and the Political Dangers of Storytelling', *Political Theory* (2022), Online First, <https://doi.org/10.1177/00905917221108160>, citing Susan Bickford, *The Dissonance of Democracy: Listening, Conflict, and Citizenship* (Ithaca, NY: Cornell University Press, 1997); Andrew Dobson, *Listening for Democracy: Recognition, Representation, Reconciliation* (Oxford: Oxford University Press, 2014); Daniel Gross, *Being-Moved: Rhetoric as the Art of Listening* (Oakland: University of California Press, 2020); Mary Scudder, *Beyond Empathy and Inclusion: The Challenge of Listening in Democratic Deliberation* (New York: Oxford University Press, 2020).

12 See Michelle Boulous-Walker, *Slow Philosophy: Reading Against the Institution* (London: Bloomsbury, 2016).

more slowly and attentively? Again, this is not all about an individual reader's or listener's skills: it is also about technologies and cultures of reading and listening – it is a matter, once more, of collective rather than solely individual dynamics.

Having said that, there are resources we can turn to for a pedagogy of reading and listening, which are, at once, exercises in enabling and encouraging democratic vigilance, and thus democratic participation of the citizenry in the fate of their community. Let me here mention but one example from the ancient Greek practice of sophistic rhetoric: Gorgias's *Encomium of Helen*.¹³

First, to recall: sophistic rhetoric is born, arguably, in circumstances of urgent pedagogical need. The citizens of sixth century BCE Sicily, who have their property stolen by tyrants, need to recover it, and to do that, they need to argue their own cases in the courts (the Greeks did not have professional advocates). As a result, they desperately need training in forensic oratory, so that they can persuasively present their cases in court. Arguably, the sophists emerge to fulfil that need, and to train the citizenry in the arts of rhetoric. They do this in different ways.¹⁴

Gorgias, one of the most famous sophists, writes and delivers a display speech. It is said to be a speech in praise of Helen, but it is not really that: it is, instead, a defence speech (rather than a speech of praise), and not necessarily of Helen, or not only of Helen, but of sophistic rhetoric itself.¹⁵ Gorgias's point is to teach the citizenry the art of rhetoric, but this is not an art confined to speaking: it is also very much an art of listening. Gorgias wants to speak in such a way as to encourage the audience to listen actively and vigilantly, which also means not just accepting or taking for granted some customary view. In this case, that the customary view is that Helen is to blame for escaping with Paris, thereby triggering the Trojan War. Gorgias does not, however, argue straightforwardly for absolving Helen from responsibility: rather, he suggests there are four possible ways to argue against Helen (i.e., that the Gods intervened to make her do it; that she was forced physically; that speech persuaded her, and that she fell in love), but that in each case, there are reasons to think that she is not blame-worthy. He sets up his speech, then, in such a way that the audience needs to decide which cause is most plausible, and, within each, what are the probabilities that Helen is not blameworthy with respect to that cause. The audience, then, must listen and exercise judgement: Gorgias is not telling them what to think; he is laying down possibilities for the active exercise of judgement (requiring choice between causes, but also assessment of probabilities within them).

Throughout his speech, Gorgias keeps referring to himself in the first person, and signalling what he is doing – now, he says, I am turning to the next part of the argument, and now, look, I have finished, but perhaps all I have been doing is

13 See Gorgias, *Encomium of Helen*, trans. D.M. MacDowell (Bristol: Bristol Classical Press, 1982).

14 For a wide-ranging discussion of the history of sophistry and a defence of sophistic epistemology, see Susan Jarrett, *Rereading the Sophists* (Southern Illinois UP, 1991).

15 For the latter argument, see John Poulakos, 'Gorgias' *Encomium of Helen* and the Defense of Rhetoric', *Rhetorica* 1 no. 2 (1983): 1-16.

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having some fun with you (as he says at the end).¹⁶ In other words, Gorgias is inviting his audience to be self-conscious about the very art of speaking, about how speeches are constructed, and about the authority of those who speak. But Gorgias is doing even more than that: for most of his speech, he addresses the third possible cause, namely that Helen was herself persuaded by the speech of Paris to abscond with him. Speech, he tells his audience, is like a drug or like magic – it can sweep you off your feet before you realise it. But is it so necessarily? Is his speech like that? Notice how Gorgias is inviting his audience to learn to listen to speech in a particular way, again, with awareness of its construction, with knowledge of its techniques and means (especially the sweet music of its words and their sounds), with attention in particular to its reliance on authority (e.g., in the form of physical charm), and with the vigilance that he may be speaking about something else or have other ends in mind than those he is articulating explicitly. Gorgias's *Encomium of Helen*, then, is precisely training in listening: an active, political, democratic form of vigilance, which is about both enjoying speech, while being mindful of its power, and exercising independent judgement about what it is ostensibly about and what it argues. The audience are invited, thus, to examine what is not said, or what else might be being said with the words being uttered, and they are invited to form their own view: to be active, to notice, to pay attention, to not allow themselves to be drugged, while still enjoying the ride.

The language of 'noticing' here is telling, and we could cite other examples from sophistic pedagogy, which involved attempts to teach rhetoric by way of teaching listeners to 'notice', to 'pay attention', to 'be mindful of'.¹⁷ Part of the point here is that this is a lesson in democratic vigilance: of what it means to listen actively, as a citizen, so as to watch out for tyranny, and the tyrant's abilities to pull the wool over our eyes.

What, though, might this have to do with contemporary common law reasoning? Well, notice, for one thing, the importance Gorgias attributes to keeping the past alive: to showing that there is no one account of the past, but that there are multiple possible such accounts, e.g., four possible causes for why Helen absconded with Paris. Keeping the past alive – not allowing one version to dominate (avoiding the tyranny of a single past) – and keeping in mind, too, that any one account of how the past is articulated is connected to the making of contemporaneous judgement

16 The remarkable final sentence is: 'I have removed by my speech a woman's infamy, I have kept to the purpose which I set myself at the start of my speech; I attempted to dispel injustice of blame and ignorance of belief, I wished to write a speech as an encomium of Helen and an amusement for myself': Gorgias, *Encomium of Helen*, 27.

17 A remarkable example is Lysias's *On the Murder of Erasthosthenes*, written about brilliantly recently by James Fredal in his *The Enthymeme: Syllogism, Reasoning, and Narrative in Ancient Greek Rhetoric* (University Park: Pennsylvania State University Press, 2020). One of the meanings of 'to enthymise' in Ancient Greek is precisely to 'notice'. For an attempt to show why Fredal's account of enthymising is important for legal reasoning, see Maksymilian Del Mar, 'Enthymising', *Oxford Journal of Legal Studies* (2022), Online First, <https://academic.oup.com/ojls/advance-article/doi/10.1093/ojls/gqac027/6779858>. On the ethics of noticing, as part of the arts of theatre, and its importance for jurisprudence, see Marett Leiboff, *Towards a Theatrical Jurisprudence* (London: Routledge, 2019).

(e.g., the praise- or blameworthiness of Helen), is part of what it means to listen or read well (e.g., in this case, reading one's cultural history well). Judging Helen is not so easy – certainly not as easy as the customary view dictates. To judge well is to listen well: for instance, to listen to the past in such a way that one realises how much depends on which cause is identified as the key one, and then on how the probabilities within that cause are evaluated and assessed. Equally, to listen well is to judge well: to listen is not just to be persuaded, with no independent exercise of judgement. On the contrary, to listen is to be active, to be aware of the manner in which one is spoken to, and to what is not said or what else might be being communicated.

The challenge here, with respect to contemporary common law reasoning, is to see how the common law might itself be thought to be a space for such active listening, for such democratic vigilance. To some extent, the discursive character of the common law helps to keep the past alive. But this by itself is not enough. There needs to be space for more active contestation and discussion of the law, including by those who are not officials, and not steeped so deeply into its customary mores. To be alive, the law needs the energy of democratic listening. This may be approached, in part, through the institution of the jury, but it can also be approached by conceiving of courts as spaces for such contestation and discussion. The common law needs new cases, which embarrass the state of the law, but then it also needs officials – its judges, especially – to hear those cases with openness to the cases themselves challenging their understanding of the shape of the law and its future. It also needs to make sure that all citizens, including and especially in hopeless cases (e.g., migrants being deported by the state), have access to barristers who will represent them. The art of defence, then, is crucial to the rule of law. There is, in other words, a need for speaking and listening on both sides: both the officials and the citizens need to be able to both speak and listen. Both need training in the techniques of rhetoric, which is an art of both speaking and listening.¹⁸ Is the institution of the jury, and the run of new cases, enough to make the common law democratic? Probably not, but then what is needed, institutionally? That is a question for another time – for now, I emphasise but the importance of the question.

4 Feeling

In addition to raising the above two queries, Altamirano's comment contains two other challenges. The first relates to the danger of empathy for adjudication: Altamirano is worried that the kind of emotional simulation, for instance in terms of emotionally experiencing scenarios (or what I also call 'emotion experiments'), advocated in the book might run into the same objections that have been raised against empathy, i.e., that far from being helpful ways of relating emotionally with others, empathy leads to 'paralysis instead of altruism' and results in 'partiality and

18 See Daniel Gross, *Being-Moved: Rhetoric as the Art of Listening* (Oakland: University of California Press, 2020).

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irrational behaviour'. A not unrelated concern is the role of judging with character, or with attention to character, as she sees figural imagining doing: should this really be allowed in adjudication? Ought not judgement focus on conduct rather than character (understood as 'the inner nature or moral worth of the parties')?

In his comment, Greg Walker raises a similar point with respect to figural imagining: whereas the *Officious Bystander* might help have a helpful association with comedy, this is less so with the *Reasonable Person*, where 'comedy needs to be kept at arms' length'. When reasonableness is made comic (as with the straight man being, as it were, too straight), then reasonableness soon disappears. Further, might not judging by imagining with certain figures, like the *Reasonable Person*, narrow rather than broaden the inquiry, e.g., because it 'brings with it a particular tonal and propositional inflection'? Thus, for example, by viewing a defendant from the perspective of the *Reasonable Person*, we might already see them as at least all too potentially unreasonable, 'his culpability' being 'subtly but significantly increased, precisely because we do not think from his viewpoint'. Not a neutral perspective at all (if there ever was one), the *Reasonable Person* is a device to stack the cards against the defendant, even if subtly (and thus all the more perniciously).

These three queries are different, but they are related. Each of them speaks to difficult matters that concern the role of emotion and character in judging others, which includes the role of one's own emotions and one's own character, as well as the role of the emotions and character of others. At its broadest, it concerns issues of self and other: if we are to imagine what the experience of others is like, in the course of judging them, how are we to do so, and what manner of doing so is conducive to judging well?

In *Artefacts of Legal Inquiry*, I argue that inquiry can be aided by the devices of scenarios and figures, especially when these are placed in the collective (including agonistic) context of adjudication. In other words, evaluating the role and value of a device, which triggers imagination, is never, in the adjudicative context, solely a matter of seeing how a particular judge might use it on any particular occasion; it is, instead, always also a matter of seeing how different versions of imagination are swapped and exchanged, as a result of the collective use of a device. Thus, a judge is never just imagining one version of what a *Reasonable Person* would have done (which Walker is absolutely right to say is normatively loaded), but is first of all confronted with (at least) two rival versions, articulated by the two rival advocates – and many more such versions may well be available, especially in an appellate level, multi-judge bench. Part, then, of the role and value of these devices is precisely how they enable and encourage the joint effort of imagining, and then the sharing and swapping of that effort.

That is important, for what may be unhelpful at a purely individual level, may be helpful interactively or collectively. Any one use of a single imaginary perspective could be dangerous; by contrast, multiple uses of multiple perspectives might be valuable. Even so, however, this is not a complete answer to the above queries. The question still remains: is imagining others' experience helpful in judgement, and if

so what kind of imagining is most helpful? How do emotions come into it? And what about character?

When confronting these questions, it is important to state at the outset what would be unhelpful. Thus, if empathy is understood, as Altamirano suggests, as ‘simulating and reproducing the emotions of others in ourselves’, then the arguments against it certainly have bite. Part of the problem with empathy so understood is that in that process, we remain at the centre of things: the process involves us rather coldly incorporating the emotions of others into our world. Rather than reaching out to the other, as other, we instead incorporate the other into our own self, appropriating their emotions as if they were our own. Although this can, sometimes, help with seeing another’s point of view, it is ultimately too self-centred to be helpful.

The process going in the other direction is also not helpful, i.e., a process that identifies with the other. This can happen easily when, for instance, we are watching a film, and, forgetting we are in the cinema, come to identify with a certain character. If the filmmaker or storyteller is good, then this identification could occur even with someone who we initially evaluated negatively. But it can of course also happen in court: if, for instance, we were to sympathise with one of the parties, feeling sorry for them. This is the opposite of the first process, for whereas in the first case we were self-centred, and appropriated the other into the self, here, in the second case, we lose the self, getting lost in the feelings of the other, as we imagine them to be.

What these two contrasting possibilities suggest is that a more complex process is required, and especially one that retains the distinction between self and other, without placing either in the centre. There has been something genuinely dialogical: in Simone Weil’s language, when she describes friendship, there has to be both intimacy and distance.¹⁹ The notion of ‘reaching out’ is a good one here: there must be a reaching out to the other, as other, but without loss of self, i.e., without a sense that it is us doing to the reaching, thereby also being mindful of our limits in being able to understand what the other might be feeling. There is a complex to-and-fro: at no point are we in the shoes of the other, but at no point are we also so comfortable as to be unchallenged by the effort, and the inevitable limitations, of really trying to understand another’s experience. We must be perpetually in movement, somewhere between appropriation (to the self) and identification (with the other).

When writing *Artefacts of Legal Inquiry*, I was attracted by the idea that fiction – the signalling of artifice – is one of the ways in which we might move in this complex way. Contrary to what is sometimes thought, fiction is not an obstacle to emotional immersion, including the process of reaching out to simulate and understand the experience of others. Rather, fiction is both necessary and helpful, for it allows to

19 Simone Weil, ‘Friendship’, in *Simone Weil: An Anthology*, ed. Sian Miles (London: Penguin, 2005), 281-289.

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retain the sense of self that we need in order to experience the emotion of the other as other. Apart from the general frame of fiction, I also argued that indirection helps: so rather than directly trying to imagine the experience of the other, we draw on devices such as imaginary scenarios and imaginary figures to help us probe that experience, while continuously reflecting on our process of imagining, and thus being mindful that it is us who is imagining the experience of the other.

In all of this, it is vital that we actually do have an emotional experience (this is arguably missing from the rather cold process of empathy). For this process to be helpful, we must be emotionally immersed, we must actually be moved emotionally. While it may be possible to attempt this directly, it is often more helpful to do so indirectly, e.g., by emotionally simulating the experience of imaginary characters in imaginary scenarios, which one might analogically relate to the situation of the person in question, or by emotionally simulating the experience of imaginary figures in their counterfactual acts.

Again, we need this emotional experience because we are creatures who connect to value via emotion: it is with emotional experience that we are able to disclose, to ourselves, what might matter, what might be worthy of our care and concern. But our inquiry into value, and the exercise of our judgement, does not end there, with this emotional experience: the emotion must go along with being in a certain epistemic frame, where we know we are imagining, and thus where there is still work left to do in order to inquire or come to judgement. These devices – imaginary scenarios and imaginary figures – are not the end of the inquiry, they are not the entire process of judgement: they are part of it, and important parts of it, for they allow us to connect to our emotions (and to the emotions of others also imagining, like other advocates or judges also using the same device), but they are not themselves sufficient. In a way, their point is to help us keep moving and avoid the traps of appropriation or identification.

Thus, to consider Greg's point: yes, a Reasonable Person stance might well dispose us to view the defendant's actions with some suspicion. However, we are not really imagining – not in the sense in which I mean it – if we identify with that stance to such an extent that we conclude that the defendant acted unreasonably. We must remain aware that we are imagining, and that this is an artificial exercise, designed to help us discern potentially relevant values, vulnerabilities, and interests. It is a process of inquiry: it is not the making of a decision. I probe the experience of the other, and probe what values, vulnerabilities, and interests might be at stake in my judgement, by trying on a perspective. Again, as noted above, I should try on a variety of such perspectives, including, as a judge, the versions of those perspectives imagined by the two advocates, and possibly my fellow judges. In addition, I might well also combine drawing on imaginary figures with the use of other imaginary devices, e.g., scenarios or metaphors.

How does character come into this? I do not think there is any sharp distinction between conduct and character. The rhetorical tradition shows us this, as does reflection on moral judgement influenced by it, such as the work of David Hume

and Adam Smith.²⁰ Thus, our evaluation of conduct is always to an extent also an evaluation of character, even if this does not surface explicitly. But character here not need mean ‘inner nature or moral worth’ of a person. It need not mean anything as grand and abstract as that. Rather, character is itself conveyed through conduct in certain circumstances: we know character by tracing its expression in circumstantial action. Character is itself situational – in ways explored by the rhetorical tradition, e.g., in the Theophrastan character writing tradition, which was, importantly, comic, i.e., involved portraying certain character traits as a matter of performing certain kinds of actions in certain kinds of situations.²¹

What we are doing, then, when we imagine by drawing on devices such as scenarios or figures, is that we are exploring our evaluation of certain conduct or action by situating it in certain circumstances, involving relations and interactions between (imaginary) characters. We simulate the emotional experience of multiple characters, who express their character with certain actions in relation to the actions of other characters. That is the imaginary environment in which we engage in inquiry, in the process of judgement: not appropriating or identifying the experience of the other, but instead exploring how various characters might feel in certain circumstances. In this process, we generate insight into what might be the potential values, vulnerabilities, and interests at stake.

The dangers of bias, narcissism, partiality, and paralysis that both Altamirano and Walker point to are very real. They continue to be real, even when we imagine. But imagination does, it seems to me, help alleviate some of the dangers. For that to be so, however, we must retain the awareness of artifice: of this being an act of imagination by us, and therefore also only of one many possible such acts. Comedy can often help, as long as we are laughing about ourselves, for comedy is precisely an art of heightened artifice – something that explores and delights in the gaps between our mental life and our physical one. The dangers never really leave us, but imagination can be a bulwark against the tendency to either centralise or to lose the self.²²

5 Hesitating

In her comment, Iris van Domselaar sets down a challenge for me, but really for us all: is digitalisation, e.g., ‘the use of apps that offer recommendations or solutions based on conditional and causal logic decision trees’ or more advanced AI techniques, including ‘fully automated AI judges’, a threat or an opportunity for adjudication? Might not such technological developments assist us in making law more transparent and knowable amongst the population, as well as making our

20 On this influence, see Benedict Robinson, *Passion's Fictions from Shakespeare to Richardson: Literature and the Sciences of Soul and Mind* (Oxford: Oxford University Press, 2021).

21 See, e.g., Harry Newman, ‘CharacterTM: Character-writing, Drama, and the Shape of Literary History’, *Journal for Early Modern Cultural Studies* 21 no. 2 (2021): 142-177.

22 For a very helpful discussion of these dangers, see also Adriana Alfaro Altamirano, ‘Max Scheler and Adam Smith on Sympathy’, *The Review of Politics* 79 no. 3 (2017): 365-387.

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court system more affordable and more efficient? Van Domselaar's question is all the more pointed when one defends, as I do in the book, the role and value of imagination in adjudication, with its vital links to the senses, embodiment, and the emotions. Is this not all too old-fashioned, van Domselaar asks? Is this not a paean to a bygone age? Does not that argument in favour of the imagination, combined with the language and text-based focus of *Artefacts of Legal Inquiry*, make it distinctively unprepared for the digital revolution of the 21st century?

An important aspect of van Domselaar's challenge is the underlying normative claim: that justice systems, at present, are – here quoting Hazel Genn – in a 'sorry state', for they are 'too slow, too expensive, too complicated, and too adversarial to provide litigants with what they want'. There is a need, these voices argue, for 'cheaper, faster, better' justice. Online courts might just provide a panacea for these failings of the justice system, especially in the context of high-volume, low-value claims. Van Domselaar's challenge here, once again, is that a model of adjudication that places such emphasis on the role and value of imagination – including its experimental, diachronic (and especially forward-looking), affective, and collective dimensions – seems to rule out the emancipatory and equalising potential of new technological developments. Or does it, van Domselaar asks? Maybe there are possibilities here, such as hybrid, human-machine models, which minimise the drawbacks of both humans and machines, augmenting the best of both, and thus optimising justice?

Let me at the outset acknowledge the importance of the normative claim, while also observing that it is of course not new. Jeremy Bentham's critique of the common law, based precisely on its opaqueness to the population, on its (for him rather deliberate and corrupt) inefficiencies, on its mysteries and obscurities, on its grubby greed, lining only the pockets of ever-richer lawyers, is well-known, and echoed in the sources van Domselaar cites. Bentham's dream was for an ideal code that each of us could carry round, insofar as it applied to us, in our pocket, learn it off by heart at school, and thereby be perfectly informed of how we can maximise pleasure and minimise pain in our lives. Who knows, Bentham might well have jumped at the sound of 'online courts' or 'fully automated AI judges': after all, these could not be bribed, would not use fictions to gain jurisdiction and therefore business for their courts, and would certainly not make law while pretending not to make it.

Bentham's critique was passionate and has done much to inspire important democratic reforms of the common law. His call for giving persons reasonable notice of the punishment that awaits them if they are found to have broken the law was and remains vital: much like the work of Cesario Beccaria, by whom he was himself inspired, it provided the philosophical basis for a much-needed critique of criminal justice systems, and the ways in which these exploited those most vulnerable in a community. It certainly is important that our justice system does not become too expensive, too difficult to access, with too many delays, and impossible to understand.

However – and it is an important however – the efficiency and affordability of justice are but two values that need to be balanced against others. We should not make the mistake to think that ‘high-volume, low-value’ claims are somehow less important, such that they can be ‘managed’ by ‘online courts’: why should the rich get the best barristers, arguing before the best judges, just because their claims are worth several millions? Is not justice a duty owed to all citizens, equally? Similarly, so with so-called ‘easy cases’. As van Domselaar notes, that is not something that appears on the surface of a case; it requires judgement. Was Mrs Donoghue’s case²³ against the manufacturer of bottles containing lemonade (which, in this case, included a snail) an easy case? Was it not, at first blush, a straightforward, walk-in-the-park matter of deciding in favour of the manufacturer, given there was, at the time, simply no duty to take care by manufacturers? Is that not what an online court or fully automated AI judge would have decided? And what would then have happened to so many areas of the law (in the above case, the law of negligence in English common law), which have been driven by seemingly easy or even hopeless, desperate cases, which turned out, on further inspect, to be very difficult and important?

The point here is not to argue against online courts or fully automated AI judges *tout court*. The point is to see there are important values at stake, and that these are not exhausted by the call for efficiency and affordability. How does or can an online court or AI judge listen? Does it not listen like the ATM machine listens: if you have no funds left, then the computer says ‘no’, no matter how desperate your situation. If the rule of law depends, as some have argued,²⁴ on the possibility of each citizen having the opportunity to speak, and be heard, in a court of law, no matter how small or trivial the case may seem to the rest of us, then what would happen if we were to delegate even a portion of cases to online courts or AI judges? Does not the vitality – the very legitimacy and authority of law – depend on its capacity to be challenged, stretched, contested, critiqued, and reformed by the citizenry, again, even in the most seemingly smallest and most insignificant of cases? Can an online court or an AI judge reflect critically on themselves, and on the limits of law as they understand it at present? Can an algorithm judge itself?

Recent years have seen incredibly aggressive attacks on the judiciary and on courts, and both from the left and the right. In many ways, courts are easy targets: they are undemocratic, inefficient, expensive, technical, pompous, scary – and much else besides. There is plenty of room for improvement. But we must be careful, surely, in all these critiques, many well-warranted, not to throw the baby out with the bathwater. Are not courts still our best defence against the ambition of executive power? Recall some of the most important and iconic battles between executive and judicial power: for instance, Sir Edward Coke’s impassioned plea for ‘artificial justice’, mentioned above, as distinct from the ‘natural justice’ of King James I/VI, who presented himself as the fountain of all law, the representative of God on earth. The separation of powers, the independence of the judiciary, and yes, even

23 *Donoghue v. Stevenson* [1932] UKHL 100.

24 See Neil MacCormick, *Rhetoric and the Rule of Law* (Oxford: Oxford University Press, 2005).

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the technicalities of the common law, which are not necessarily easily manipulable by government ministers, are fragile achievements, and ones which can be all too swiftly dismantled, with all the grave danger that comes with the ensuing centralisation and concentration of power. None of this is to say that critique of courts should stop; much to the contrary – courts, like any other institution, need critique to remain alive, and it is our common duty to critique them. But let us not destroy them as we do so.

So, to return to van Domselaar's challenge: is digitalisation a threat or a promise to adjudication? One source of a possible answer to that question, and perhaps a surprising one at first, is Tudor drama. Greg Walker's brilliant take on the echoes and parallels between some aspects of twentieth century appellate-level common law courts and the dramas of the fifteenth and sixteenth centuries, and his own discussion, in his other work, on the political value of Tudor writing,²⁵ might give us some resources with which to tackle the challenge posed by van Domselaar. We can ask: what can digitalisation – what can AI – learn from early modern drama? And why might it be important for it to do so?

As Walker argues, it is via the literature and drama of the period, that persons 'sought to unlock so many of the complex challenges of their own contemporary moment' – exploring, defending, and resisting the demands of Henry VIII and the Henrician state. Monarchical legislation, in this period, was on the rise. The king had to get his own way, and many lost their heads in the process. The texts written, the language used, the theatrical devices employed – all the means of rhetoric and fictionality, of narrativity and character, of poetics and imagery – was put to work, to vital cultural and political work, generating mirrors to ambition, to greed, to the lust for power, and the associated inability and unwillingness to judge oneself.

Walker cites a number of examples, including the dramas and works of John Heywood, a member of the Thomas More circle – playwright, musician, and comic poet.²⁶ He notes how Heywood created little 'hypothetical dramatic debates', which helped persons of the time to pause and hesitate, and to reflect, together, while still enjoying themselves, on what might be at stake in the struggles of the period. These works brought members of the community into a joint space, where, again importantly, they could take pleasure in reflecting on what was happening to their community, and what they could, individually and collectively, do about it. The sometimes outrageous fictionality of these works – e.g., spiders and flies conversing to each other about whether a spider, having caught a fly, can eat it – were not obstacles to either immersion or reflection; in fact, the fictionality was a condition of combining immersive and reflexive aspects of experience, so as to make possible a pleasurable mode of democratic vigilance. In many respects, these were works that helped persons to listen: to what was happening, to the voices of their own conscience, to the pleas of those who were suffering, often invisibly so.

25 See Walker, *Writing under Tyranny*.

26 See Walker, *John Heywood*.

Heywood's *The Spider and the Fly* (1556), which I alluded to above, is a good example.²⁷ Fascinatingly, as Walker discusses, it is also an example that connects in all kinds of ways to the techniques of common law reasoning, as well as to the very substance of common law at the time. Much like the wolf in the famous fable of the Wolf and the Lamb, the spider looks for a justification to eat its victim. Much to the annoyance of the spider (as with the wolf in the fable), every accusation he comes up with (e.g., burglary, breaking and entering) is countered with great wit by the fly: I am not guilty of burglary, she says, for I was flying in the day, not the night, and I am not guilty of breaking and entering, for I came here unwillingly.

What may seem like innocent fun, or an indulgence in the techniques of pleading, is anything but: the stakes are high, for these are precisely the kinds of legal grounds upon which rich property-owning lords would seek to punish poor tenants or those needing access to common lands (e.g., for wood, or left-over produce). The law itself is very much on trial here, including both its customary bias against the poor, as well as new developments that looked to use law to enforce the system of enclosures of common land, so as to maximise profit for the rich. Heywood eases us in, with playful, and again, seemingly indulgent and innocent scenes of legal argument, but his eye is firmly on questions of justice, and on the possibility – indeed vital need for – critical reflection on the way law is an instrument of the rich, exploiting the poor and vulnerable.²⁸

Heywood's *The Spider and the Fly* deserves to be in the canon of legal theoretical texts. It is a quite wonderful and very powerful dramatisation of how law, at its most technical, is implicated in the power struggles of its time – in Heywood's time, the Tudor battles over access to common lands, and the rights of the poor. It uses law to think against law itself, but still, to an extent, in the name of law (certainly in the name of a just law): it takes us elsewhere, to the far-flung, absurd world of flies talking back to spiders, in order to help us think alongside the reality all around us. The fictionality here is vital, as is the pleasure we take in being taken somewhere else: we are in suspense (will the fly manage to escape?), we are immersed emotionally in the stakes, we laugh (while holding our breath, aghast) at how someone, in the most desperate and hopeless situation of all (what can be more desperate than being caught in a spider's nest, the spider approaching, its fangs moist with hunger...), might still manage, through their wit alone, not through force, to argue themselves out of it.²⁹

Tudor drama, then, offers a kind of pedagogy of listening, a pedagogy of judgement, a form of training in democratic vigilance, in the arts of resistance, defiance, and

27 John Heywood, *The Spider and the Fly* (Guildford: Charles W Traylen, 1966).

28 For more background, see James Holstun, 'The Spider, the Fly, and the Commonwealth: Merrie John Heywood and Agrarian Class Struggle', *English Literary History* 71 no. 1 (2004): 53-88.

29 At the risk of a spoiler: the fly does not manage to argue herself out of it, and needs instead the help of a maid, who quite possibly is Queen Mary. Thus, the poem can be understood as advocating a kind of monarchical-socialism. In the fable of the Wolf and the Lamb, to recall, after the lamb has given perfectly good answers to false accusations, the wolf ignores them and unceremoniously gobbles it up.

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rebellion, and in the ability for critique, especially self-critique (Heywood's parabolic prelude to *The Spider and The Fly* is a wonderful warning against a reading that would allegorise the spider and the fly too quickly, making for easy judgement against others, rather than critically reflecting on one's own limitations). It is so effective precisely because it is fictional – indirect, artificial, offering opportunities to imagine.

And also, because it is somewhat unpredictable: Walker's reminder here, in his comment, that imagination, even if it retains some element of the willed, of the self-conscious and the intentional, is also, to an extent, un-containable, un-controllable, un-disciplined, and un-willed, is really important. It is what allows any exercise of imagination to surprise itself: pace Wittgenstein and others, we can and do surprise ourselves in our imaginings. Dramatic devices and certain forms of language do cue an imagination that is always, to an extent, a wild ride, and one we cannot wholly predict or control. That is a risk, but also a wonderful gift, and a much-needed source of surprise, wonder, and ultimately also insight – one that is of vital importance not just to democratic politics, but also, for instance, to scientific inquiry.³⁰ It shows again how much we need the arts, in all domains of life.

So, what, then, might digitalisation and AI learn from Tudor drama? Well, here we would have to throw the challenge back to digital advocates: can digital technology offer opportunities for us to imagine, and thus also to critically reflect on ourselves? Can it offer mirrors of judgement, especially ones we would take pleasure in? Does it enable play, which is no mere indulgence, but is in fact of vital, serious importance for any discourse or institution to remain alive and relevant to our concerns? Drama, literature, and poetry: these are also technologies. Differences between media matter, of course, but a poem and a database are not necessarily that different: both are scaffolds for thought, for processes of reflection and judgement. Can a database, or some app, be a niche for hesitation, a shelter for reflection? Can it cue and trigger pleasurable surprise? Can it immerse us, while not allowing us to forget we are involved in an epistemic exploration?

These, I think, will be key and difficult questions. But perhaps not impossible ones to answer. Developments in the digital humanities, such as work on digital memory arts, or special kinds of maps that do trigger imaginings, might well offer some resources for developing judgement-enhancing hybrid models of human and machine coupling in the legal context.³¹ Might it be possible to build a Tudor-like database of common law cases, which does not shut down, but instead opens up possibilities, for judgement? What might this look like? How would it avoid turning

30 See e.g., Mary Morgan, 'Experiments Versus Models: New Phenomena, Inference and Surprise', *Journal of Economic Methodology* 12 no. 2 (2005): 317-329; and, recently, Steven French and Alice Murphy, 'The Value of Surprise in Science', *Erkenntnis* (2021), Online First, <https://doi.org/10.1007/s10670-021-00410-z>.

31 See, e.g., Johanna Drucker, *Graphesis: Visual Forms of Knowledge Production* (Cambridge, MA: Harvard University Press, 2014); and Seth Long, *Excavating the Memory Palace: Arts of Visualization from the Agora to the Computer* (Chicago: Chicago University Press, 2020).

cases into simple rules to be applied, and instead retain the richness and complexity of case law, which relies on more associative, imagistic, affective, collaborative, and yes, imaginative, processes of judgement? Well, that is a challenge to attempt to answer another time, but I am most grateful to van Domselaar for raising it.

6 Conclusion

What futures can we imagine for law? Will law be an obstacle, or can it be an ally, in our fight, for instance, against climate change, against the torture and extermination of animals, and against the exploitation and destruction of the planet? Do the technicalities of law, and our legal institutions, actually help us discern better what might matter to us as communities? Does law help us to judge, including reflect, on ourselves, and our limitations, generating new insights into emerging values, vulnerabilities, and interests?

I find these questions as important as I find them difficult – in fact, almost impossibly difficult. But there is one thing I myself have found vital in attempting to answer them and that is the history of the arts and the humanities. When law forgets its roots in, and its place amongst, the arts – rhetoric, literature, drama, poetry, painting – it risks everything: all connection to us as emotional, social, embodied animals, and to our capacities for change, adaptation, and self-critique.

A large part of the point of *Artefacts of Legal Inquiry* was to remind us of the importance of that link: to show that law is not so far away, after all, from the techniques and pleasures of the arts, and to argue that the ethical and political value of law depends on us maintaining that link. We have to be able to play with law for it to be ethically and politically relevant and alive. Law's future can be bright, but only if it does not lose sight of itself as a collaborative artistic craft.