

# Inquiry and Imagination in Adjudication

## The Case of Digitalisation\*

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

### 1 Introduction

To what extent should a theory of adjudication be sensitive to context? Think of contextual differences between common law and civil law systems as well as the societal contexts in which courts work. This is not an easy question, as one of the points of normative theory is precisely to abstract from certain contingent features of actual practices and from the social, political and economic contexts in which they function.<sup>1</sup> Abstractions may help to ascertain what adjudication in essence boils down to – or should boil down to. In doing so, they may also help to provide an evaluative framework with sufficient critical bite.

In *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (*Artefacts*), Del Mar explicitly commits himself to a contextual approach to adjudication. That is, the scope of application of his theory of adjudication is limited to a specific context: namely, twentieth and 21st century common law adjudication by English appellate courts. Moreover, Del Mar intends to take heed of context by being responsive to the actual ‘limitations of persons and the difficulties they face in doing justice’.<sup>2</sup>

*Artefacts* is, if anything, an impressive intellectual *tour de force*, bringing together and drawing upon insights from a wide range of (sub)disciplines, such as (legal) history, classical studies, rhetoric, humanities, philosophy and legal theory in order to come to grips with the practice of adjudication by English appellate courts. Offering a rich repertoire of perspectives, Del Mar’s monograph is much more than the development of an argument, so any summary will necessarily do it injustice. Nonetheless, a bold attempt will be made here.

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1 As Kant has put it in his essay ‘On the common saying: That may be correct in theory but it is of no use in practice’: ‘A sum of rules, even of practical rules, is called *theory* if those rules are thought as principles having a certain generality, so that abstractions are made from a multitude of conditions that yet have a necessary influence on their application’. Immanuel Kant, *Immanuel Kant. Practical Philosophy*, trans. M.J. Gregor (New York: Cambridge University Press, 1996), 279.

2 Maksymilian Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (Oxford: Hart, 2020), 76.

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Del Mar's thesis boils down to the claim that judges for reasons of respect for the concrete litigating parties and for the future legal order are duty bound to exercise inquiry, that is, to gain 'insight into what values, vulnerabilities and interests might be at stake in a case and in cases potentially like it in the future'.<sup>3</sup> Moreover, a central claim of the book is that legal artefacts – such as fictions, metaphors, figures, scenarios and related processes of imagination – play a key role in facilitating this process of inquiry. By pointing to their own artifice, legal artefacts capture the attention and invite judges and other legal professionals to enter into a distinctive epistemic frame through which insights can be gained into the values, vulnerabilities and interests at stake in the case at hand and in similar cases in the future.<sup>4</sup>

*Artefacts* can also be read as a tribute to English appellate courts. It makes a strong case for the normative value of the way they fulfill their adjudicative task through satisfying the 'basic and never finished or complete duty to be responsive to the ever-changing normative environment' – that is, to the needs, interests and vulnerabilities of the litigating parties and similar parties in the future.<sup>5</sup> As such *Artefacts* is firmly established within a tradition of legal scholarship, which gives the work that courts do a 'great aura of majesty and authority',<sup>6</sup> or a 'special sauce',<sup>7</sup> rather than focusing on the darker sides of adjudication. In the conclusion of the book, Del Mar expresses some doubt about whether he has not sketched too rosy a picture of adjudication, arguing that more work should be done on the political dimension of artefacts and related processes of imagination, as well as their relations to power, domination, violence and exclusion.<sup>8</sup>

An obvious dark side of the way (English appellate) courts work that Del Mar does not touch upon concerns the fact that in Western societies only a minority of citizens have access to courts. In the words of Hazel Genn, current Western legal systems are in a 'sorry state'<sup>9</sup> because they are 'too slow, too expensive, too complicated, and too adversarial to provide litigants with what they want'.<sup>10</sup> In response, all sorts of modernisations of the justice system have been proposed and are taking place to make the legal process more affordable and accessible to citizens, one of which is the highly ambitious £1 billion programme in England and Wales to improve access to justice.<sup>11</sup>

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

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

5 Del Mar, *Artefacts of Legal Inquiry*, 66.

6 H.L.A. Hart, *The Concept of Law*, 3rd ed. (1961; repr., Oxford: Oxford University Press, 2012), 210.

7 Tim Wu, 'Will Artificial Intelligence Eat the Law? The Rise of Hybrid Social-Ordering Systems', *Columbia Law Review* 119 (2019 [2001]): 2024.

8 Del Mar, *Artefacts of Legal Inquiry*, 442.

9 Hazel Genn, *Judging Civil Justice* (Cambridge: Cambridge University Press, 2010), 51.

10 Richard Susskind, *Online Courts and the Future of Justice* (Oxford: Oxford University Press, 2019), 28.

11 Senior President of Tribunals, *The Modernisation of Tribunals 2018: A Report by the Senior President of Tribunals*, 2018, [https://www.judiciary.uk/wp-content/uploads/2019/01/SupplementarySPT-report-Dec-2018\\_final.pdf](https://www.judiciary.uk/wp-content/uploads/2019/01/SupplementarySPT-report-Dec-2018_final.pdf).

In view of this ‘sorry state’ of Western legal systems, it may not come as a surprise that access-to-justice scholars have been critical of legal theorists who stress the moral importance of the way traditional courts work without taking heed of this justice gap. In the words of Susskind, legal theorists tend to ‘celebrat[e] the ceremonial, vintage Rolls Royce rather than work towards ensuring transport for all’.<sup>12</sup>

Del Mar’s ideal of adjudication is vulnerable to this criticism as well. It celebrates a predominantly paper-based practice, assigning important roles to the extensive, time consuming, and thus, expensive professional writings and oral legal pleadings of lawyers and to the lengthy individual opinions of several judges in individual cases. If we consider the challenges that legal systems currently face regarding access to justice, the following questions naturally arises: is Del Mar’s ideal sufficiently scalable, is it sufficiently accessible, or is it only available to the lucky few who can afford it? Do the extensive collective engagements with literary artefacts such as figures and scenarios by lawyers and judges – such as in *White and Carter v. McGregor*, in which several alternative scenarios were ‘played with’ – not overlook the need of the parties involved to resolve their case within a reasonable time? If one takes seriously the idea that justice delayed is justice denied, how does one distinguish an expensive, time-consuming professional ‘literary game’ from doing justice?

One development that is strongly promoted by the access-to-justice movement is digitalisation: the increasing use of legal technology in the justice sector is hailed as a way to deliver ‘cheaper, faster, and better’ justice. As Lord Burnett of Maldon put it, ‘We cannot ignore the complexity of too much of what we do or the trouble and expense associated with it for litigants. That is a complaint that has echoed down the ages. Yet the sensible use of technology may provide enduring solutions to these problems’.<sup>13</sup>

Over the last two decades, the justice sector has made increasing use of technology.<sup>14</sup> This development has primarily consisted of the use of relatively simple assisting technologies, such as automated case management, digital filing and search engines. Recently, also more complex applications have been deployed, such as expert systems, predictive analytics and machine learning. For instance, several jurisdictions are experimenting with or planning to develop *online courts*, whose primary function is to adjudicate high-volume, low-value claims.<sup>15</sup> Today, in addition, courts provide new ‘user-friendly’ services with the help of legal

12 Susskind, *Online Courts and the Future of Justice*, 166.

13 Lord Burnett of Maldon, Lord Chief Justice of England and Wales, ‘The Cutting Edge of Digital Reform’ (First International Forum on Online Courts, 3 December 2018), <https://www.judiciary.uk/wp-content/uploads/2018/12/speech-lcj-online-court.pdf>.

14 For a clear overview of the use of legal technology by courts, see Tania Sourdin, *Judges, Technology and Artificial Intelligence* (Cheltenham: Edward Elgar Publishing, 2021), 1-31.

15 Susskind envisions that ‘online courts will lead the way to a fully integrated online and physical court service, well-suited to the 21st century’. See Susskind, *Online Courts and the Future of Justice*, 64.

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technology, such as tools that inform citizens about their rights and the avenues open to them and that assist them in formulating their arguments and gathering their evidence. Courts also make increasingly use of apps that offer recommendations or solutions based on conditional and causal logic decision trees, and in some cases, more advanced AI techniques. Although the phenomenon is still considerably rare, fully automated AI judges are used as well.<sup>16</sup>

## 2 Del Mar's ideal of adjudication and the reality of digitalisation

Despite the digitalisation that is taking place within justice systems legal theorists who focus on courts and adjudication tend to write 'as though we are living in a print-based society'.<sup>17</sup> Del Mar's monograph is no exception.<sup>18</sup> There, no reference is made to the development of digitalisation and how this might bear upon our understanding of what courts do or should do. This is regrettable; legal theorists such as Del Mar, who provide an incredibly rich history of thought to our understanding of what values, concerns and presuppositions may be at stake in the way 'traditional' courts work, are much-needed voices in the debate on digitalisation within the justice system. In the words of Donoghue: 'our grasp of the ethical and moral questions concerning the use of IT lags significantly behind the burgeoning technological advances'.<sup>19</sup>

Hence, the rest of this comment can be read as an attempt to further contextualise Del Mar's theory by addressing the question to what extent this ideal of adjudication is capable of flourishing within a justice system that is increasingly embracing the use of legal technology. This endeavour comes with serious limitations, not least due to length constraints of this contribution. It will, in any case, risk charges of 'technological determinism',<sup>20</sup> a term used to criticise the portrayal of technology as an isolated force that causes social change. For instance, no attention will be paid to the numerous situated ways in which judges, legal engineers and other (legal) professionals, as an intrinsic part of the open-ended practice of adjudication,

16 Changqing Shi, Tania Sourdin and Bin Li, 'The Smart International Journal Court – A New Pathway to Justice in China?', *International Journal for Court Administration* 12 (2021): 3-19.

17 Susskind, *Online Courts and the Future of Justice*, 241.

18 The same goes for virtue-ethical approaches to adjudication, such as I have defended myself. These are also highly sensitive to the 'Rolls Royce' critique, as well as the charge that they simply ignore the development of digitalisation in society at large and within the justice system.

19 J. Donoghue, 'The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice', *The Modern Law Review* 80 (2017): 995-1025.

20 Wyatt identifies two parts of the critique of the term 'technological determinism': '[T]he first part is that technological developments take place outside society, independently of social, political or economic forces. [...] The more crucial second part is that technological change causes or determines social change'. S. Wyatt, 'Technological Determinism is Dead; Long Live Technological Determinism', in *Handbook of Science and Technology Studies*, ed. E. Hackett, O. Amsterdamska, M. Lynch and J. Wajcman (Cambridge: MIT Press, 2008), 168.

do things with technology and technology, at the same time, does with them.<sup>21</sup> In this comment, as well as in legal scholarship on digitalisation in the justice system more generally, technological determinism lurks not only because ethnographic research in this specific field is still wanting but also because normative legal scholarship has a strong tradition of ignoring the social, economic and political embeddedness of legal institutions and of the ways individual legal professionals relate to their concrete environments.

With these limitations in mind, below, the question as to what extent Del Mar's ideal of adjudication can flourish in a digitalising justice system will be addressed by singling out three features: its experimental character, its future orientedness, and the emphasis placed on the emotional engagement of judges.

The experimental character: one key aspect of Del Mar's ideal of adjudication is that it is experimental in terms of the tones, styles and attitudes adopted by the legal professionals involved. According to Del Mar, the practice of inquiry that he celebrates is committed to an 'ethics of collaborative ambivalence'<sup>22</sup> in which (expressions of) not knowing, doubt and insecurity by judges and other legal professionals such as lawyers are facilitated and cherished.<sup>23</sup> Del Mar contrasts this professional ethos of 'collective ambivalence' with accounts of adjudication that conceptualise legal reasoning as a highly individualistic, monadic, decisive and will-imposing practice surrounded by an air of inevitability – an ideal clearly embodied, according to Del Mar, in Dworkin's 'alpha male, Judge Hercules'.<sup>24</sup>

In addition to encouraging judges to use words that signal doubt, difficulty and uncertainty in rather straightforward ways, Del Mar argues that linguistic artefacts and related processes of imagination play a key role in facilitating this experimental character.<sup>25</sup> They invite legal professionals to enter a 'distinctive epistemic frame' in which certain 'epistemic norms and commitments' are suspended and others are retained.<sup>26</sup> Del Mar, for instance, discusses in close detail how the figure of the Officious Bystander has been a useful linguistic device for 'carefully experimenting with and exploring tentatively the prospects of a good faith requirement in English contract law'.<sup>27</sup>

21 Drawing on the work of Foucault and Butler, Coeckelberg suggests use of the term 'technoperformances' not only to give expression to the reciprocal and situated dimension of technology use but also to highlight the power that technology exerts over its users (technologies 'direct and choreograph us'). Marc Coeckelbergh, *The Political Philosophy of AI* (Cambridge: Polity Press, 2022), 118. See also Marc Coeckelbergh, 'Technoperformances: Using Metaphors from the Performance Arts for a Postphenomenology and Posthermeneutics of Technology Use', *AI & Soc* 35 (2020): 557-568.

22 Del Mar borrows this term from Amélie Rorty, 'The Ethics of Collaborative Ambivalence', *The Journal of Ethics* 18, no. 4 (2014): 400.

23 Del Mar, *Artefacts of Legal Inquiry*, 66.

24 Del Mar, *Artefacts of Legal Inquiry*, 59, 57-59.

25 Del Mar, *Artefacts of Legal Inquiry*, 50-51.

26 Del Mar, *Artefacts of Legal Inquiry*, 143, 438.

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

Can this experimental character of adjudication flourish in a digitalising justice system? One contraindication is that Del Mar's account of experimentalism is intimately linked to the affordances of human language and to a text-based 'mode of existence' of the law.<sup>28</sup> Linguistic artefacts, such as figures and scenarios, are presented as crucial devices for creating an epistemic space in which several possibilities can be collectively explored. Also, on a more general level, Del Mar's ideal fully relies on the text-based affordance of interpretation, on the 'hermeneutic gap' between a concept and its application. Because of their textual nature, the simplest legal rules require an act of interpretation, a judgement for their application.<sup>29</sup>

However, in a digitalising and increasingly code- and data-driven environment, the affordances of text and human language, such as interpretation, will not necessarily be available to judges and legal professionals, thereby influencing the experimental character of adjudication. According to Hildebrandt: 'Precisely because the textual nature of contemporary law seems obvious, we may overlook the critical affordances of text-driven infrastructures, taking for granted what may be on the verge of a major transformation'.<sup>30</sup>

Digitalisation within the justice sector may, in addition, lead to a mindset among legal engineers and legal professionals that favours 'codified justice'.<sup>31</sup> This mindset would focus on binary thinking and disambiguating legal terms rather than on cherishing ambivalence, doubt, insecurity and hesitation.

Moreover, under the influence of automation bias,<sup>32</sup> judges themselves might become increasingly reluctant to 'suspend certain epistemic norms and commitments'.<sup>33</sup> That is, because of the objective constraints exerted upon judges by the digital systems they use, but also due to psychological factors it will be easier to follow or mimic the recommendations of a software programme rather than try

28 The use of the term 'mode of existence' in this context is borrowed from Mireille Hildebrandt, who in turn borrowed it from Bruno Latour; cf. Mireille Hildebrandt, *Smart Technologies and the End(s) of Law: Novel Entanglements of Law and Technology* (Cheltenham: Edward Elgar Publishing, 2015), 146; Bruno Latour, *An Inquiry into Modes of Existence: An Anthropology of the Moderns* (Cambridge: Harvard University Press, 2013).

29 Del Mar puts it as follows: 'Adjudication has to be difficult because it involves judgment, and judgment, if it is to be exercised by a human being rather than a machine, has to involve difficulty: hesitation, for example, is part of the phenomenology of judgment'. Del Mar, *Artefacts of Inquiry*, 21.

30 Mireille Hildebrandt, 'Data-Driven Prediction of Judgment: Law's New Mode of Existence?', OUP Collected Courses Volume EUI Summer-school, 2019, <https://ssrn.com/abstract=3548504>.

31 Richard M. Re and Alicia Solow-Niederman, 'Developing Artificially Intelligent Justice', *Stanford Technology Law Review* 22 (2019): 242.

32 Danielle Keats Citron, 'Technological Due Process', *Washington University Law Review* 85 (2008): 1272; Sourdin, *Judges, Technology and Artificial Intelligence*, 135.

33 Del Mar, *Artefacts of Legal Inquiry*, 1.



to imagine what needs, interests and vulnerabilities might be at stake for both the litigants in the case at hand and for citizens in the future.<sup>34</sup>

Hence, to the extent that linguistic resources that could still be used for interpretative debates and thus for the processes of inquiry remain, these might be increasingly seen as ‘bugs’: redundant resources of delay that deny citizens fast, clear and low-cost legal answers. This is not least because digitalisation is intimately linked to a commitment to efficiency and effectiveness, and digital systems, consequently, tend to be programmed for immediate, frictionless execution.<sup>35</sup>

Another feature of Del Mar’s ideal of adjudication is that it emphasises the forward-looking dimension of adjudication. According to Del Mar, courts have a duty to care ‘not only for the parties in the present case, and for the law’s past, but also for the moral and political quality of the law in the future, and for the authority and legitimacy of the court and related institutions, again in the future’.<sup>36</sup> The normative import of the reasoning in a concrete legal case partly derives from its place in a temporal trajectory from the past into an anticipated, inherently open future: ‘[T]his mode of reasoning is not [...] merely retrospective – fixing a future by imposing on it a rule based on inferences from a given past. [...] It is unavoidably path-dependent, but not rigidly path-determined’.<sup>37</sup>

Legal artefacts play an important role in facilitating this forward-looking dimension of adjudication. Del Mar, for instance, presents scenarios as particularly helpful linguistic artefact in cases in which a judge is in doubt about the implications of a concrete decision for future cases. The use of a scenario can signal to future courts the need for further inquiry into the values, vulnerabilities, and interests at stake in similar cases yet to come.<sup>38</sup>

A digitalising justice system appears to pose a threat to this future-oriented dimension of adjudication, and not merely because the specific linguistic artefacts

34 Crootof coined the term ‘technological-legal lock-in’, whereby ‘the technological, economic, and political edifices within which code is entrenched’ may seriously constrain the possibilities of those working with these systems. See Rebecca Crootof, ‘“Cyborg Justice” and the Risk of Technological-Legal Lock-In’, *Columbia Law Review Forum* 199, no. 7 (2019): 247.

35 Laurence Diver, ‘Computational Legalism and the Affordance of Delay in Law’, *Journal of Cross-Disciplinary Research in Computational Law* 1, no. 1 (2020): 9-11.

36 Del Mar, *Artefacts of Legal Inquiry*, 55.

37 Del Mar, *Artefacts of Legal Inquiry*, 55-56. As such, Del Mar is critical of moral approaches to adjudication that characterise legal reasoning as a species of moral reasoning that primarily focuses on the quality of the reasoning in view of the interests at stake in the concrete case in the here and now (Del Mar, *Artefacts of Legal Inquiry*, 54). More particularly, Del Mar criticises virtue-ethical approaches, such as those developed by Claudio Michelon, Amalia Amaya and myself. I think Del Mar makes a valuable point, which I will gladly take on board in my own research. For the objects of critique, see Amalia Amaya, ‘The Role of Virtue in Legal Justification’, in *Law, Virtue and Justice*, ed. Amalia Amaya and Ho Hock Lai (Oxford: Hart Publishing, 2013); Claudio Michelon, ‘Lawfulness and the Perception of Legal Salience’, *Jurisprudence: An International Journal of Legal and Political Thought* 9, no. 1 (2018): 47-57; Iris van Domselaar, ‘Moral Quality in Adjudication: On Judicial Virtues and Civic Friendship’, *Netherlands Journal of Legal Philosophy* 44, no. 1 (2015): 24-46.

38 Del Mar, *Artefacts of Legal Inquiry*, 55.

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that facilitate care for a future legal order will be less commonly used, as discussed above. One of the recurring concerns expressed in the literature on digitalisation in the justice sector is that both code- and data-driven systems primarily focus on the past.<sup>39</sup> By definition, code in the form of an unambiguous set of formal rules cannot respond to an uncertain, radical underdetermined future.<sup>40</sup> At best, codes can represent a set of determinate alternative scenarios with the help of complex decision trees. Therefore, legal decision-making that relies on code is deterministic and predictable, not able to reckon with or respond to unforeseen, indeterminate situations.<sup>41</sup>

In addition, data-driven systems, such as machine learning systems that are for instance used to support legal decisions-making also focus on the past: machine learning programmes derive rules from patterns identified in data sets (comprising data from the past). As such they may ‘creat[e] an “echo chamber” where old points of views become decisive even in new cases with new contexts’.<sup>42</sup> Hence, in the words of Hildebrandt, both code and data-driven justice systems ‘scale[e] the past’ and ‘freeze[...] the future’;<sup>43</sup> they are only able to address the future in terms of (a formalised) past.

The future-orientedness of adjudication is also imperilled by a digitalising justice sector simply because computer systems cannot meaningfully engage with a human, situated reality. For adjudication to be future-oriented and to ‘keep pace with the times’,<sup>44</sup> it must rely on the often tacit societal, institutional, and ethical understandings of human judges and legal professionals. Such understandings are

39 For the distinction between code- and data-driven systems, I have drawn on Mireille Hildebrandt, ‘Algorithmic Regulation and the Rule of Law’, *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences* 376, no. 2128 (2018): 20170355. For the definition of code-driven law I follow the definition of Hildebrandt addressing ‘legal norms and policies to address legal norms or policies that have been articulated in computer code’. Mireille Hildebrandt, ‘Code-driven Law: Freezing the Future and Scaling the Past’, *Is Law Computable?: Critical Perspectives on Law and Artificial Intelligence*, ed. Simon Deakin and Christopher Markou (Oxford: Hart Publishing, 2020), 1.

40 Hildebrandt, ‘Code-driven Law’, 7-8.

41 Hildebrandt, ‘Algorithmic Regulation and the Rule of Law’, 2.

42 Dag Wiese Schartum, ‘From Legal Sources to Programming Code: Automatic Individual Decisions in Public Administration and Computers under the Rule of Law’, in *The Cambridge Handbook of the Law of Algorithms*, ed. Woodrow Barfield (Cambridge: Cambridge University Press, 2020), 316. See for this point also Harry Surden, ‘Machine Learning and Law’ *Washington Law Review* 89 (2014): 87, 105.

43 Hildebrandt, ‘Code-driven Law: Freezing the Future and Scaling the Past’, 78. A similar point is voiced by Antoinette Rouvroy and Bernard Stiegler when stating that in a code- and data-driven context ‘perhaps there is some progress made on a specific notion of objectivity, but we can also lose something in the understanding of justice [...] as an undecidable horizon’. See Antoinette Rouvroy, and Bernard Stiegler, ‘The Digital Regime of Truth: From the Algorithmic Governmentality to a New Rule of Law’, *La Deleuziana*, no. 3 (2016): 11.

44 Crootof, ‘“Cyborg Justice and the Risk of Technological-Legal Lock-In”’, 250 (quoting Thomas Jefferson).



gained only through experience and can never be captured in decontextualised numeric logics or mathematical formulas.<sup>45</sup>

The indispensability of the implicit understanding for the future-orientedness of adjudication brings us to last feature of Del Mar's ideal of adjudication: the emphasis placed on the emotional engagement of judges. Subscribing to a strand within moral philosophy that assigns an epistemic role to emotions, Del Mar stresses the indispensability of the affective, emotional engagement of judges. Judges need to be emotionally engaged with their cases because emotions offer unique 'access to the world, to others and to matters of value'.<sup>46</sup> According to Del Mar, artefacts invite and stimulate this engagement. For instance, scenarios, because of their narrativity and affective phenomenology, afford judges opportunities to imagine in emotionally attuned ways. Scenario's facilitate 'emotion-experiments' as opposed to mere 'thought experiment[s]'.<sup>47</sup> This enables legal professionals 'to sense that some value, vulnerability or interest may be at stake that [they] had not considered before'.<sup>48</sup>

To what extent can emotional engagement in a digitalising justice system flourish? At first blush, the possibilities seem limited, as both the narrativity and affective phenomenology of concrete legal cases, at least as they are dealt with by judges, will likely be reduced. The substitution of written and oral narratives with codes and 'plain' data and the reduction of in-person encounters with litigating citizens and their counsels are likely to limit the occasions in which judges are confronted with the kinds of vivid realities that may elicit emotional responses.

In addition, within a digitalising justice system also the appreciation of the role of emotions is likely to be negatively affected. Legal technologies and the companies who have direct economic interests in their perceived value may foster suspicion among the public and legal professionals of the emotional and thus inherently personal dimension of adjudication.<sup>49</sup> The use of predictive judicial analytics, for instance, has been criticised for its focus on 'extra-legal factors that influence decisions' and other 'behavioural anomalies' and thereby for creating a climate in which technology is more easily seen as a solution for all-too-human judges.<sup>50</sup> Moreover, the influence of 'automation bias' on judges cannot be ignored where it concerns the judges' appreciation of their own emotional involvement; due to this psychological mechanism, they will be more likely to trust the algorithms' recommendations than rely on their own, sometimes inarticulate, emotionally laden judgements.

45 John Morison and Adam Harkens, 'Re-Engineering Justice? Robot Judges, Computerised Courts and (Semi) Automated Legal Decision-Making', *Legal Studies* 39, no. 4 (2019): 618-635.

46 Del Mar, *Artefacts of Legal Inquiry*, 159.

47 Del Mar, *Artefacts of Legal Inquiry*, 391.

48 Del Mar, *Artefacts of Legal Inquiry*, 394.

49 Re and Solow-Niederman, 'Developing Artificially Intelligent Justice', 242-289.

50 Daniel L. Chen, 'Judicial Analytics and the Great Transformation of American Law', *Artificial Intelligence and Law* 27, no. 1 (2019): 15-42.

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In sum, the above discussion shows a tension between Del Mar's ideal of adjudication and the reality of digitalisation within the justice system. This tension is of course not unique to Del Mar's theory; it can – albeit to a more or lesser degree – be discerned in normative theories of adjudication more generally. Hence, those legal theorists who wish to walk the fine line between taking their ideal(s) of adjudication seriously and being responsive to digitalisation – as a potential way to reduce the justice gap- will be facing the question of how to address this tension.

### 3 Future research and conclusion

While addressing the tension between an ideal of adjudication and the reality of a digitalising justice system, three avenues for research come to mind. One avenue bites the bullet: it accepts that digitalisation within the justice system involves a genuine loss of value(s) associated with the way traditional courts work, but at the same time it acknowledges the need for adjudication to become scalable and cheaper and the valuable role of digitalisation therein. The central question would then not so much be what the ideal practice of adjudication would look like, but rather what would 'good enough' look like.<sup>51</sup>

From this perspective, triage would be one of the natural research topics. Is there a way to differentiate between cases that demand the exercise of inquiry, imagination and judgement by human judges and cases that can be handled in a 'good enough' way via semi-automation with the help of decision-support systems or in an online environment?<sup>52</sup> A classic distinction that is proposed in this context is between easy and hard cases. The idea is that such a distinction 'might lead to a much faster legal system and as such also allow judges to deal with the hard cases in which their highly trained human judgment is most needed'.<sup>53</sup> This distinction is, of course, problematic. The simplicity or complexity of a legal case is often in the eye of the beholder. For instance, what may appear to be a 'simple' case from a court's perspective might seriously impact the interests of the parties or third parties involved and, on that account, perhaps require human judgement. Moreover, it is precisely the imaginative work of lawyers and judges that might be required to 'see'

51 According to Susskind 'the comparison that should be made is with what we have today – court service that are too expensive, take too long, are barely intelligible to the non-lawyer, and so exclude countless potential litigants with credible claims'. Susskind, *Online Courts and the Future of Justice*, 90.

52 For one of the rare substantive contributions to the topic of triage, see Sourdin, *Judges, Technology and Artificial Intelligence*, 255-256.

53 Tim Wu, 'Will Artificial Intelligence Eat the Law? The Rise of Hybrid Social Ordering Systems', *Columbia Law Review* 119, no. 7 (2019): 2001-28, 2005.

that a case is much more complex than was initially thought.<sup>54</sup> Or to put it in Del Mar's words: 'whether a case is easy or hard [is] a decision that, in itself, is a difficult one, even if it is sometimes presented as obvious'.<sup>55</sup> Another avenue to address this tension is a rather optimistic one: it is an attempt to dismantle the tension as potentially only apparent by exploring how the ideals associated with the way traditional courts can be realised through optimal human-machine interactions, by 'teamwork',<sup>56</sup> 'co-performances',<sup>57</sup> or the use of co-bots.<sup>58</sup> This 'techno-optimist' approach seeks to combine the best of both worlds – human and machine – while minimising the drawbacks of each. Crootof (admittedly, quite sceptically) paraphrases this idea as follows: '[T]houghtful limitation can sometimes result in more generativity: Poets can find that the constraints of the sonnet, limerick, or haiku forms free them to be more creative in other ways. If the design allows for it, judges may be incentivised to 'innovate' within the structures necessitated by human-machine teaming'.<sup>59</sup>

For instance, if one holds, like Del Mar, that the experimental character of adjudication is a crucial feature of adjudication, one could explore whether and how, within the context of digital processes, space can be built in by design to not only allow but also stimulate inquiry and imagination – albeit in different ways.<sup>60</sup> Similarly, one could try to 'optimise' the emotional engagement of human judges. For instance, one could think of technological possibilities to increase the vividness of cases and the experienced reality of the values, vulnerabilities and interests involved of the litigating parties.<sup>61</sup>

Of course, this avenue comes with the risk of naivety. In further advancing this line of research, the risks posed by structural human-machine interactions within the justice sector need in any case be seriously addressed: for example, human judges

- 54 Sourdin has proposed a broader list of relevant criteria, such as whether the case has already been handled by an AI justice, whether the case is complex or contains elements of novelty, whether one of the parties is vulnerable, whether there is a continuing relation between the disputants, whether the case is emotionally charged, and to what extent the case involves a high level of emotions on the part of the disputants. See Sourdin, *Judges, Technology and Artificial Intelligence*, 255-256. For the role of moral perception in adjudication, see Iris van Domselaar, 'The Perceptive Judge', *Jurisprudence. An International Journal of Legal and Political Thought* 9, no. 1 (2018): 71-87.
- 55 Del Mar, *Artefacts of Legal Inquiry*, 21.
- 56 Saul Levmore and Frank Fagan, 'The Impact of Artificial Intelligence on Rules, Standards, and Judicial Discretion', *Southern California Law Review* 91, no. 1 (2019): 1.
- 57 Coeckelbergh, 'Technoperformances: Using Metaphors from the Performance Arts for a Postphenomenology and Posthermeneutics of Technology Use', 562.
- 58 Tania Sourdin, 'Judge v Robot? Artificial intelligence and judicial decision-making', *University of New South Wales Law Journal* 41, no. 4 (2018): 1130.
- 59 Crootof, "'Cyborg Justice" and the Risk of Technological-Legal Lock-In', 247.
- 60 See, e.g., Diver's suggestion that certain specific text-based affordances, such as delay, which we have reason to value at specific moments within a procedure, could also be secured by and through design. Laurence Diver, 'Computational Legalism and the Affordance of Delay in Law', *Journal of Cross-Disciplinary Research in Computational Law* 1, no. 1 (2020): 9-11.
- 61 E.g., Jon Rueda and Lara Francisco, 'Virtual Reality and Empathy Enhancement: Ethical Aspects', *Frontiers in robotics and AI* 7 (2020).

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being reduced to ‘tokens of legitimization’,<sup>62</sup> and of legal professionals becoming increasingly dependent on powerful, profit-driven tech companies.<sup>63</sup>

But, perhaps more important than these avenues of further research is legal theorists taking the justice gap (more) seriously and, in the spirit of Del Mar’s *Artefacts*, collectively engaging in a practice of normative inquiry and imagination to address the question: how can courts do justice in a digitalising society and justice system? If anything, Del Mar has shown us what is at stake.

62 Wu, ‘Will Artificial Intelligence Eat the Law?’, 2005; Re and Solow-Niederman, ‘Developing Artificially Intelligent Justice’, 246-247.

63 Crotoof, “‘Cyborg Justice’ and the Risk of Technological-Legal Lock-In”, 247; Re and Solow-Niederman, ‘Developing Artificially Intelligent Justice’, 272.