

# Maksymilian Del Mar's *Artefacts of Legal Inquiry*

## A Literary Perspective\*

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

Maksymilian Del Mar's ground-breaking monograph, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (hereafter *Artefacts*) offers a rich, multi-faceted account of what happens when judges examine the submissions of advocates and decide how the English common law should be applied in particular cases.<sup>1</sup> Based on voracious reading in, and thinking through, the principles and practises of English common law, European philosophy, and global literary studies, it is a book which only someone trained and acculturated in all three disciplines could produce. It is demonstrably a *tour de force* of up-to-the-minute interdisciplinary scholarship.

But what, it might be asked, does a book that offers a detailed, case-specific account of the linguistic and cognitive dimensions of judicial inquiry in the field of twentieth-century common law practise have to interest a scholar of sixteenth-century literature and politics? The answer, it turns out, is a great deal, not least because many of the roots of both modern legal conventions and early Tudor literature, deep and long-lasting in the first case, relatively newly formed and close to the surface in the second, can be traced to the legal training, the moots and disputations of the early-modern Inns of Court, an institution in which both Del Mar and I have an abiding scholarly interest.<sup>2</sup> But, more generally, what is not to like for a literary scholar in a book that talks about genres, figures, metaphors, audiences and performances, scenarios, figures and tropes, and which discusses the literariness and narrativity of inquiry, and its 'poetic character'?<sup>3</sup>

*Artefacts* makes an elegant, extended case for the value of drawing on the insights and methodologies of literary and philosophical studies to enhance legal scholars' understanding of the processes of judicial inquiry. And in what follows I will try to repay the compliment by teasing out some of the implications of Del Mar's

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

2 Maksymilian Del Mar, 'Ludic Legal Pedagogy: Mooting in Early Modern England', in *Law and Poetics in Early Modern England and Beyond*, ed. Subha Mukherji and Camilla Temple (London: Palgrave Macmillan, 2022), forthcoming. I am very grateful to Maks Del Mar for letting me see a copy of this paper before publication. See also Greg Walker, *Writing Under Tyranny: English Literature and The Henrician Reformation* (Oxford: Oxford University Press, 2005), passim.

3 See, for example, Del Mar, *Artefacts of Legal Inquiry*, 60-61ff.

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anatomisation of legal inquiry for the study of literature, specifically in my own primary field, early theatre studies, a field that actually makes a clutch of fleeting appearances in *Artefacts*, if never quite centre stage, then at least in supporting roles, furnishing an example here or swelling a footnote there on narrativity or figuration. In what follows I will begin by discussing the ways in which Del Mar's work chimes with, or offers new ways of thinking about, the drama of the early sixteenth century, and will then move more explicitly to consider some ways in which the two fields of early theatre and modern legal inquiry as described by Del Mar might inform each other, picking up on the cues and insights gained from my reading of *Artefacts* as I go.

On starting to read *Artefacts*, I was immediately struck by the resonant echoes of questions that have long interested me. The interest in legal fictions and the use of scenarios that is central to the book took me back to the community of common lawyers of early-modern London and the culture they shared with a wide cross-section of early-Tudor elite male society, influenced and inflected by the argumentative protocols of mootings and the disputative and imitative pedagogy of the grammar schools and universities.<sup>4</sup> As I argued in a book called *Writing Under Tyranny: English Literature and the Henrician Reformation*, the invitation to seek an illuminating, generative analogy through the kinds of legal fictions and scenarios dealt with so revealingly in *Artefacts*, was for many early-Tudor politicians, scholars, and divines, also the key with which they sought to unlock so many of the complex challenges of their own contemporary moment. The natural reaction to political challenge and change for such men was to look to case law and precedent and to generative legal fictions, the hypothetical 'what ifs' of *case-putting*.

'Put case that...' is a phrase that echoes through the documents and literary texts of the reign of Henry VIII, as individuals sought to explore, defend, or resist the unprecedented demands of the Henrician state and of the religious reformers in the 1520s and 1530s through analogy and scenario setting. 'Put case that I know that a thief came to me and asked his alms for God's sake, then would I give him alms...because he asked it of me for God's sake: and so in like manner, whatsoever you give in the honour of God or for any good saint, God shall reward you for it, though it be given to an image of stock or stone', argued the Crutched Friar George Rowland, defending offerings to religious images.<sup>5</sup> 'Put case that Parliament declared that God was not God...', teased Sir Thomas More, inviting Sir Richard Rich to explore with him the limits of parliamentary competence in 1534.<sup>6</sup> This culture of case putting was indeed virtually all-pervasive in early-modern metropolitan political culture until suddenly, with the Treason Act of 1534, Henry's government declared the previously safe, speculative space of 'what if...?' to be

4 See, for example, Alex Novikoff, *The Medieval Culture of Disputation: Pedagogy, Practice, and Performance* (Philadelphia: University of Pennsylvania Press, 2013), especially 133-171.

5 Walker, *Writing Under Tyranny*, 21.

6 John Guy, *Thomas More* (London: Arnold, 2000), 188-189; Edward Berry, 'Thomas More and the Legal Imagination', *Studies in Philology* 106 (2009): 316-340; Greg Walker, *John Heywood: Comedy and Survival in Tudor England* (Oxford: Oxford University Press, 2002), 178-185.

itself subject to the laws of treason and misprision. 'Imagining the death of the king', a notion hitherto interpreted relatively narrowly and metaphorically, became literally a capital crime, as, by expansion of the terms of the Act, did imagining that the king was not the head of the Church, or that Anne Boleyn was not his lawful wife and queen. Thinking alone, if those thoughts were articulated in words, was now a criminal act.

In Del Mar's engaging account of the challenges inherent in arguing for the important role of the creative imagination in legal discourse, I also heard clear echoes of my own excitement at recognising, during the late 1980s, the interdependencies between imaginative literature and history in the early modern period, stimulated by the interesting (if not entirely satisfactory) claims of the fledgling New Historicism. Conventional political history, like legal scholarship, at that time saw itself as a serious, empirical, fact-based enterprise governed by the limits of the measurable and the clearly documented. It was deeply suspicious of extending its purview to literary texts and the ways of thinking they prompted, seeing them, rather as Del Mar suggests, conventional legal scholars view notions such as fictionality, as subjective, frivolous, whimsical, at best of only tangential interest to those studying matters of political, constitutional, or economic history.<sup>7</sup> It was the latter which were taken to be the proper focus of a discipline then dominated by a model of administrative history personified by the doyen of Tudor historians, Sir Geoffrey Elton. What did, what *could*, a love poem or a comic play have to tell such sober-minded historians about important matters such as the expansion of parliamentary competence in the sixteenth century or the changes to Church and State brought about by the Break with Rome and the early English Reformation? My own sense, which grew into a conviction, an itch that I have been scratching ever since, was that they had a lot to tell historians about the things in which they were interested, if they would only listen to them with the same attentiveness to rhetoric, to genre, to tone, and to their likely reception as literary scholars afforded them, just as those more sober texts venerated by historians as 'sources' (statutes, proclamations, diplomatic letters) might have much to say to literary scholars if they read them with that same attention. What I was beginning to consider was the thought, so well-articulated by Del Mar in *Artefacts*, that it might well have been to the safe(r) spaces, the 'what ifs...' of poetry, narrative, and drama that those in and around the centres of royal administration went when they wished to discuss the implications of those changes, not least when debate in other forums was being more rigorously monitored and policed. And, moreover, by examining the rhetorical practises, tropes, and manoeuvres practiced by poets and playwrights (individuals who were often at the same time also lawyers, legislators in the House of Commons, courtiers, or clerics), one might detect echoes of, and strategies and assumptions shared with, the rhetorics of parliamentary speeches, legal judgements, and statutes that could shed light on both.

7 See Del Mar, *Artefacts of Legal Inquiry*, 5, where the claim is made that conventional legal scholarship saw the metaphors, figures, and scenarios that interest Del Mar as 'superfluous embellishments, at worst vain flights of whimsy, at best powerful means of persuasion, but in the end unbecoming of the gravity of the law'.

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It seemed to me self-evident that the shared experiences of legislators, lawyers, aristocrats, and clerics in grammar school classes, university exercises, and/or the moots and dialogues of the Inns of Court, meant that poets, playwrights, lawyers, and politicians spoke much the same language, shared the same assumptions, respected the same protocols and traditions of inquiry, lived, breathed, and delighted in the same reservoir of classical examples, and shared the same enthusiasm for competitive, adversarial debate, and the same urge to put cases to prove their points or explore their differences. So, like Del Mar, I tried to demonstrate the value of thinking both *historically* about literary texts and *literarily* about historical ones, examining the language of statutes, speeches, and diplomatic correspondence with the same attention to rhetorical tropes, figures, metaphors, and inherent narrativity as one would extend to a poem or a play-text. Asking, not just ‘what is this text saying?’, but what kinds of cultural work might it be performing by doing so in the particular contexts of its production and reception? And, not only what did its authors seem to intend, but also what might its readers or witnesses have taken from it? What opportunities did it offer them for cultural work of their own? What, that is, did these texts *do*?

In this context, Del Mar cites an interesting term coined by Ellen Spolsky, describing what she calls ‘niche constructions’ such as poems, genres, libraries, and paintings, as ‘shelters for reflection’.<sup>8</sup> This idea would seem perfectly to describe, for example, the way in which the Tudor playwright, musician, and epigrammatist, John Heywood, a figure who has long fascinated me, conceived of and fashioned his *interludes*.<sup>9</sup> These were hypothetical dramatic debates, theatrical exercises in ‘what if...?’ performed for communities of lawyers, courtiers, and citizens in and around London in the reign of Henry VIII. They too can be thought of as ‘shelters for reflection’, if by that term we mean, not isolation chambers that are safe because they are withdrawn from the wider socio-political world, but spaces temporarily marked out *in the midst of* communal life in which that community is invited to join in pausing to register, scrutinise, and puzzle out a vexing issue, arenas for that collective reflection that Del Mar calls ‘inquiry’. For the cultural work of drama, and of literature and art in general, is precisely, I would argue, to create, in times of crisis, the space and time for inquiry, and to give that inquiry emphatic cognitive energy. In so doing, drama has the capacity to make strange the present situation, to clarify what might be at stake in *this* idea, *here*, *now*, and thus to enable the possibility of action in ways that other forms, other ways of thinking cannot. And crucially, as Del Mar suggests,<sup>10</sup> such work, such shelters for reflection, are perhaps most necessary, and most effective, not when it is a case of steering a community towards consensus and concerted action, but when a community is divided and what is needed is a space in which to acknowledge those divisions, to reflect upon them, and upon how one might individually and collectively navigate through their consequences. This was certainly so in Heywood’s case, writing for a legal and

8 Del Mar, *Artefacts of Legal Inquiry*, 93, citing Ellen Spolsky, *Contracts of Fiction: Cognition, Culture, and Community* (Oxford: Oxford University Press, 2015), 7ff.

9 Walker, *John Heywood*, especially 152-161.

10 Del Mar, *Artefacts of Legal Inquiry*, 95.

courtly community divided by contrary allegiances to Church and State, and/or to the protection of traditional practises and a desire for reform, experiencing in real time the unprecedented challenges to political, ecclesiastical, legal, and doctrinal authority created during the long, fraught period of Henry VIII's Break with Rome.

Heywood's interludes, like those of his father-in-law, the lawyer and law-publisher, John Rastell, blur the distinctions between play and dialogue, bringing onto the stage hyperbolic, dramatised pastiches of the exercises, moots, and disputations familiar to anyone trained in the grammar schools and the Inns of Court. 'What characterises the happiest and unhappiest states regarding amorous love?', asks one play. 'What is the best form of weather to promote human prosperity, and how might a god-like figure best ensure that prosperity?', asks another. 'How should a person act in order to best ensure a swift passage to heaven?', asks a third. Or, as Heywood asked whimsically in his non-dramatic work, *The Spider and the Fly*, begun in the same period, 'which law would be broken if a fly flew into a spider's web and got caught there? Is his crime burglary? Criminal damage? Trespass? What redress might the Spider reasonably expect to be awarded? And might that extend so far as allowing him to eat the fly?'<sup>11</sup> In each case, advocates for the various possible subject positions (a water-miller who believes that only steady rain on windless days benefits mankind, a wind-miller who believes that only steady wind and no rain should prevail, an aggrieved, hungry spider, or an unfortunate fly...) are brought on stage (or into the narrative) to argue their cases, before either a quasi-judicial figure or general agreement among the debaters brings the work to its conclusion.

A play like Heywood's *A Play of the Weather*, which variously foregrounds, pastiches, and makes strange, even faintly ridiculous, the language of the Royal Supremacy and Henry VIII's novel claims to royal omni-competence in Church and State (at precisely the time that Henry's government was energetically striving to normalise them and render them unexceptional) does precisely what Del Mar claims for what he calls 'artefactual language'. It 'has the capacity to surprise, to pull members of the community out of their ordinary run of communication with each other, and to enable them to pause and hesitate together'.<sup>12</sup> This was a vital service in the fraught, hectic months of the break with Rome which witnessed the rush to normalise, popularise, and realise it in legal form via statute, and to enforce it via the unprecedented device of universal oaths of agreement. That capacity to enable a community 'to pause and hesitate together' (an especially astute and generative phrase) that Del Mar recognises in the exercise of the imagination; that affordance of artefactual language to make its own use 'less automatic, less ready to hand and thus something itself strange or requiring attention and care',<sup>13</sup> was, I would argue, nowhere more necessary, and nowhere more valuable than in the legal and political circles in which Heywood was moving in the late 1520s and 1530s.

11 Walker, *John Heywood*, 302-323.

12 Del Mar, *Artefacts of Legal Inquiry*, 227.

13 Del Mar, *Artefacts of Legal Inquiry*, 224.

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By producing a play which voiced and explored comically the frustrations, the responsibilities, and the potentialities of royal office at a time when King Henry was energetically extending those potentialities to authoritarian effect, all the while dressing his actions as paternalistic concern for his people, Heywood offered his audiences a chance to pause and acknowledge what was happening. And he did so through the deployment of an imaginary *figure*, a figure well known to anyone educated in a Tudor grammar school: Jupiter, the imperious, dangerously powerful, but deeply flawed and paradoxical king of the gods. Such a figure exemplifies the uses to which Del Mar suggests figures are put in the contemporary courtroom. It cues ‘different affective reactions to a hypothetical scenario’ which ‘may create conditions for the emergence of particular kinds of collective dynamics, i.e., ones in which we imagine together, collectively, over a period of time’.<sup>14</sup> Put case, Heywood’s play implicitly says, that a god-king known for his sexual transgressions, his intemperance, his violence, came to us now and asked us to tell him what was wrong with the world (literally, what was wrong with the weather, but the argument is a proxy for a far wider discussion of social inequalities and injustices), and what he should do to make things better. What should we tell him? What would *I* tell him? And what might others who do not share my values, interests, and vulnerabilities tell him? And how might all those disparate, contradictory, potentially entirely incompatible petitions be reconciled or at least managed in the interests of a just, prosperous, and harmonious commonwealth? Such a play invites its audiences to share in the business of inquiry, and offers them a novel perspective from which to pause and reconsider recent royal claims.

More generally, Del Mar’s model of *figuration*, the idea of ‘the construction and expression of a legal test in the form of a figure with a limited range of attributes, qualities, or traits’<sup>15</sup> seems a perfect description of the means of operation of many genres of early drama. One thinks most obviously, perhaps, of the *Commedia dell’Arte* with its stock figures (Pantalone, Arlecchino, Il Dottore), its familiar gags and routines, its *burle* and *lazzi*. But equally apposite is the moral drama with its personified virtues and vices, and the debate plays with their characters defined by a single attribute, interest, or quality. Indeed, we might imagine a number of Heywood’s debaters, chiefly perhaps, the protean Vice figures, as an equivalent of that redolent legal figure, the Officious Bystander. In the case of the vice Merry Report in *Weather*, perhaps we might think of him as the Faux-Naïve Bystander, the figure who seems drawn to ask the kinds of obvious but politically unaskable questions that everyone is thinking but no one dares voice. Is that an elephant in the middle of the room? Why has no one mentioned it? So, the king is head of the church now, is he? And he says he always has been? But did he not write a book defending papal supremacy only eight years ago? I thought he did.

The presence of implicit drama, of situation comedy nestling at the heart of legal inquiry is one of the great discoveries for me in my reading of *Artefacts*. As Del Mar suggests, there is, of course, an implicit mini-drama, a lightly sketched comedy of

14 Del Mar, *Artefacts of Legal Inquiry*, 220-228 and 348.

15 Del Mar, *Artefacts of Legal Inquiry*, 334.



manners involved in the very notion of a figure such as the Officious Bystander. They are (or rather, *he is*, for the Officious Bystander of my imagining is undoubtedly male, a version of Arthur Lowe's pompous, interfering Captain Mainwaring in the BBC TV series, *Dad's Army*), *he is* a bundle of narrative energy generated by the contradictory aspects of his minimally sketched identity.<sup>16</sup> He is a *bystander*: his role is not to be involved, to stand back and stand by. Yet he is also *officious*, and that officiousness compels him (like a Brechtian *gestus*) *not* to stand by at all, but repeatedly to interfere in matters that do not concern him. Indeed, he never appears without interfering, always butting in to ask those obvious but so judicially helpful questions of the parties involved, getting them to, no doubt irritably, confirm for him the things that seemed so obvious to them that they had not written them into their contracts.

There is thus a whole comic scenario implicit in that artefactual combination of antithetical terms 'officious' and 'bystander'. Whenever he is introduced into a scenario, the Officious Bystander brings with him, then, not merely a scenario, but a tone, even a mode or genre of thinking about things that transforms the question under consideration and gives it that lightly comic dramatic quality. So, certainly, as Del Mar observes, the figure is mobile, free-standing, ready to be deployed in any scenario that a judge or advocate thinks fit.<sup>17</sup> But that is not to say that he is entirely detached from culture. Nor is he quite neutral, free of any associations beyond the precise legal point at issue. And those associations that he carries with him through time, from case to case, are, of course, precisely what give the figure its memorability, its potency, and ultimately its judicial and cultural value. Similarly, the Reasonable Person and the Right-Thinking Person, although less obviously, have generic and tonal implications too. To deploy the Reasonable Person in a scenario, I would suggest, implicitly renders it less immediately comic, less playful, although not perhaps entirely immune from humour.<sup>18</sup> The dynamics of comedy themselves would seem to work in that direction. For, to be a Reasonable Person in a comic situation is by implication to play the stooge or straight man, the figure likely to be driven steadily *less* reasonable and *more* irate through time as the exasperating comic situation develops around them – think, perhaps, of John Cleese in the *Monty Python* 'Dead Parrot' or 'Cheese Shop' sketches, or Michael Palin in 'The Argument', trying to reason through increasingly Kafkaesque situations and growing steadily more furious at every turn. ('Is this the right room for an argument?', 'I've told you once', 'No, you haven't', 'Yes, I have', 'No you haven't!' etc.). Reasonableness and comedy are not, then, naturally good bedfellows. So, if the Reasonable Person or The Right-Thinking Person are to perform to their full potential in a scenario, comedy needs to be kept at arms' length. This too surely inflects the conditions of inquiry in the case in question, even if only subtly or even subliminally.

16 Del Mar, *Artefacts of Legal Inquiry*, 350.

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

18 For the association of the Officious Bystander, and indeed even the Reasonable Person, with comedy and humour, see Del Mar, *Artefacts of Legal Inquiry*, 350-351.

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As Del Mar observes, '[s]ocial persons draw us into social landscapes, and thereby enable a specific construction and evaluation of the parties'.<sup>19</sup> But they also draw us at the same time into generic landscapes whose horizons may be determined by the sort of outcomes and expectations that this particular genre habitually generates, and the ways of reading that it conventionally invites. To take one of the scenarios cited in *Artefacts*, that of the farmer who places his haystacks so close to his neighbour's barn that a fire begun in the former carries over to the latter.<sup>20</sup> If we bring the Reasonable Person into this situation to ask what she might think of the farmer's actions, this brings with it a particular tonal and propositional inflection. We are surely perceptually involved in the scenario alongside the Reasonable Person, cued to read it from her perspective, and thus to see the farmer as implicitly the *other*, to view him from the position of the Reasonable Person. The possibility of his culpability seems thereby subtly but significantly increased, precisely because we do not think from his viewpoint, he does not seem to be quite like us, like *me*, and so is more likely to be at fault. If, on the other hand, owing to a farcical set of misunderstandings, the Officious Bystander were to wander into the scenario from the realm of contract law and begin to ask, as he surely would, whether the farmer is naturally assuming that he will be liable for any damage caused by his placing of the haystacks so close to that barn, then the tone would, I think, be rather different. The suggestion that the farmer's actions might be rather risky, even irresponsible, becomes, when voiced by the Officious Bystander (however legally and morally compelling is the point itself), implicitly an unwelcome intrusion into the farmer's business. There is thus at least a temptation to read this variation of the scenario, not from the perspective of the officious outsider, but from that of the farmer, to feel the force of the intrusive question, and its officiousness, as if we were him, and to be annoyed by the officiousness on his behalf. Thus, the chances of finding for the plaintiff may be marginally reduced. The Officious Bystander and the Reasonable Person are thus horses for particular legal courses for a reason, and that reason is at least in part generic, a product of their association, or lack of association, with suggestions of social comedy, and the implications for viewpoint they carry.

Another area of Del Mar's model of inquiry that resonates with literary study is the importance of individuality in legal inquiry and judgement, and the complex relationship between individual judges and the judicial function itself. A judge has a *persona*, an amalgam of their institutional role as judge (either sitting alone or with others), their reputation as an advocate and scholar, and their individual personality and style.<sup>21</sup> So, when they speak in the first person, their voice is in some sense both that of the role and that of the individual as they interpret the law at issue. This too suggests clear analogies with the situation in drama, in which an individual actor is always only partially submerged in their role as they interpret the scripts before them. Thus, David Tennant playing Hamlet, for example, is never simply Hamlet, but always 'David Tennant's Hamlet', and so at the same time not

19 Del Mar, *Artefacts of Legal Inquiry*, 353.

20 Del Mar, *Artefacts of Legal Inquiry*, 353-354.

21 Del Mar, *Artefacts of Legal Inquiry*, 54-55ff.



Richard Burton's Hamlet, or Laurence Olivier's. But the almost-but-never-quite-total absence of those other memorable embodiments of the role from the performance we are currently watching nonetheless adds a shadow to the present performance, haunting its margins, as do those other memorable roles that the present actor has played in his career, his own version of case law. Thus, David Tennant playing Hamlet is also, even if only subliminally, Dr Who playing Hamlet, and the 'David Tennant' of *Staged* playing Hamlet, who is sure to talk ironically about this performance with Michael Sheen at some point on a future show. We compare the current performance with the precedents provided by those other roles and performances, finding similarities and differences between them, even if we are not consciously looking for them.

The relationship between the two (or more) bodies we see speaking when we see a judge giving a judgement or an actor acting thus echoes the relationship between the king's two bodies famously described by Ernst Kantorowicz in his account of medieval theories of royal sovereignty.<sup>22</sup> One body, that attached to the role, is institutional, potentially immortal, quasi-mystical, not tied to the accidents of its individual incumbents, a body around which a weighty corpus of theory, precedent, case-law, or theatre anecdote accretes over time; while the other, the visible, physical, body of *this* judge, *this* actor, here before us *now* in all their imperfect, unprecedented specificity and frailty, is neither neutral nor immortal, but rather gendered, racially marked, their voice and deportment inflected by age, class, sexuality, region, familial, personal, and professional history, a body which is always only imperfectly bound by precedent, institutional pressures, and the legal or dramatic text they are interpreting. They are free to interpret their roles, but as they do so they are always mindful of the audiences before them, of their peers and future scholars, and of the precedents set by their predecessors. Each is individually recognisable as inhabiting the same role, but each is doing so in their own distinct way, qualifying, adding to, or developing the body of case law with each performance.

Judges, advocates, and actors alike find themselves repeatedly interpreting ambivalent, contested, texts which do not readily declare their relevance to the performance or the case currently in hand, and, having inquired into their particulars, they are called on to judge. From a theatrical perspective, there are well-known cases where an actor and/or director must decide from an ambivalent surviving text what that text requires of them: whether, for example, it is his 'too, too *solid*' or his 'too, too *sullied*' flesh that Hamlet wishes would melt and resolve him of his contradictions.<sup>23</sup> Is *this* Hamlet (*my* Hamlet), a metaphysician, a moralist, or a theologian, or a mixture of all three? But there are other cases where the words, like those of a contract, are clear, but their precise implications in a given case uncertain. Does Hamlet tell Horatio, for example, that 'there are more things in heaven and earth than are dreamt of in *your* (i.e. *his*) philosophy', or that there are

22 Ernst Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton: Princeton University Press, 2016 ed., original, 1957).

23 *Hamlet*, Act I, Scene II, lines 129-30, in Stanley Wells and Gary Taylor, ed., *The Oxford Shakespeare: The Complete Works* (Oxford: The Clarendon Press, 1988).

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more things than are dreamt of in ‘your *Philosophy*’ (as opposed, say, to your Theology, your Science, or your Medicine)?<sup>24</sup> The implications of this choice are equally momentous, indeed arguably more so, for one forces Hamlet and his only remaining friend apart, marking the culmination of the prince’s self-imposed social alienation (‘I’ve seen things that you cannot dream of; you, with your limited capacity to imagine, cannot help me here...’), the other draws the two men closer together, twin souls united by shared experience (‘*we* have seen things that would confound the philosophers, it’s just you and me against the world from here on’).

Thus, deep within every production of *Hamlet*, and indeed of any play, are a host of particular judgements regarding a set of fundamental questions: what is meant by this text, these words? How can we, how can I, make it mean in *this* situation *now*? In this sense, *Hamlet*, again, like all drama, falls under the category of what Del Mar calls ‘artefactual language’, ‘linguistic forms [that] capture our attention and call on us to participate, i.e., to do things with them’.<sup>25</sup> In particular, they call on us to do things with them interactively and particularly, as directors, actors, spectators, readers, scholars, and reviewers. They are one of those places that we, or some of us at least, go back to as resources for cultural and social thinking and imagining, spaces where we are cued to respond, emotionally, intellectually, perceptually, to those things that are at the core of our individual and collective moral being, and of our social relations: duty, belief, trust, responsibility, doubt, family, hurt, anger, the desire for revenge. In this sense, *Hamlet* is a safe space, a tool, for social reflection and potential social change, an imaginative cue to think and act, both a familiar precedent and a test case for inquiry. It is, at the same time also, literally and metaphorically, an extended commonplace, a matter ‘eminently re-usable, and [which] because [it is] so familiar, so well-worn...can be re-used in any number of unprecedented ways’.<sup>26</sup> And it is also a set of test cases, Hamlet v. Claudius, Hamlet v. Gertrude, Ophelia v. Hamlet, Leontes v. Hamlet, or Hamlet v. The Form and Pressure of the Time, for crimes ranging from homicide and usurpation to abandonment, loss of title, and breach of promise. It is, again to quote, Del Mar, a text to be ‘contested and argued over, and [which]...remains unresolved, while still serving as a resource for joint attention and joint construction’.<sup>27</sup>

There is another powerful echo between Del Mar’s generative analysis and the study of theatre that I would like to at least touch upon, and that takes us to a fundamental point of convergence between the two: the idea of imagination itself. At the heart of the model presented in *Artefacts* of the spaces opened up by metaphors, figures, and scenarios is the imagination and its operation in creating a distinct and separate epistemic realm. But what, exactly, does it mean to enter that realm? What do we have to give away to get there, and what do we gain on arrival? Del Mar is rightly sceptical of any suggestion that entering an imaginative universe involves being deceived into believing that it is in any obvious sense ‘real’.

24 *Hamlet*, Act I, Scene V, lines 168-69-30, in Wells and Taylor, *The Oxford Shakespeare*.

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

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

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

However much they might invest cognitively, emotionally, kinesically, in a book or a play, the reader and the spectator know that they are reading or watching a fiction. But this in no way spoils either their emotional investment or the pleasures that they gain from it.<sup>28</sup> Conventional ideas based upon the notion of the willing suspension of disbelief are thus unhelpful here. Quoting and summarising the claims of Jean-Marie Schaeffer, Del Mar observes,

‘The situation of fictional immersion could in fact be compared to the one in which we are victims of a perceptual illusion all the while knowing that it is a matter of illusion’. There is, further, a certain pleasure – a complex one, with its mixed character of self-reflexivity and immersion – associated both with voluntarily experiencing the illusion and voluntarily enjoying fiction.<sup>29</sup>

But, if watching a play or reading a book does not exactly involve the suspension of disbelief, what does it involve? The idea of illusion raises another set of potentially misleading possibilities. The medieval drama scholar Philip Butterworth talks of the ‘agreed pretence’ at the heart of early performance: the actor agrees to pretend to be someone else in another situation and we agree to pretend that they are these things too.<sup>30</sup> This is the fundamental contract at the core of the kinds of play-acting governing children’s games, for example. But, given that most plays written before the existence of professional playhouses were designed for performance in halls, streets, or yards, and their actors never sought to disguise that fact, addressing their audiences consistently as spectators when and where they are, the idea of *pretence*, like that of *illusion*, seems rather wide of the mark. With Del Mar, I would prefer to talk about the invitation to *imagine* rather than to pretend, as pretence is always at least implicitly allied with deception, and so with a lack or an absence, however many caveats we introduce to qualify that association. To pretend is to take as so something that we know is not so, while simultaneously taking as not so something we know to be so. In that sense, pretence involves a demarcation and a closing down of generative possibilities, a conscious step away from what we know to be real and important. I would rather think in terms, not of the ‘as if...’ of pretence, but, with Del Mar, of the ‘what if...?’ of imagination,<sup>31</sup> replacing thinking of something *instead of* the real situation with thinking of something *as well as or alongside* that reality.

This takes us back to the classic formulation ‘Put case that...’ so beloved of, and so useful to those trained in the early-modern common law. ‘Come with me for a moment in imagining the following’ it says. This is not the same as the rhetorical manoeuvre, so familiar from TV courtroom dramas, that begins, ‘I put it to you’ with its coercive, unidirectional closing down of possibilities (‘I put it to you, Mr

28 Del Mar, *Artefacts of Legal Inquiry*, 106.

29 Del Mar, *Artefacts of Legal Inquiry*, 107, quoting J.-M. Schaeffer, *Why Fiction?* (Lincoln: University of Nebraska Press, 1999), 166.

30 Philip Butterworth, *Staging Conventions in Medieval English Theatre* (Cambridge: Cambridge University Press, 2014), 2, 20-22ff.

31 Del Mar, *Artefacts of Legal Inquiry*, 26.

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Halifax, that you entered the building with no other intention than to murder your brother’). Rather, ‘Put case that...’ is an invitation to join in a joint imaginative, speculative inquiry that opens up possibilities by imagining similarity and dissimilarity between the present case and other situations. ‘Put case that a man built his house on the common highway...’, ‘Put case that another king in another place took a wife...’ formulations that, even if only subliminally, cue in us the possibility, not just of imagining, but of *pleasurably* imagining possible solutions to difficult questions, through their similarity to other pleasure-inducing genres such as the joke (‘Put case that an Englishman, an Irishman, and Scotsman went into a pub...’) or the Fairy Tale (‘Put case that, once upon a time, in a land far, far away...’).

I would thus identify the central invitation to participate in theatrical spectatorship, and that at the heart of the appeal to fictionality at the core of the courtroom scenarios cited by Del Mar, as, like the cue for the law student to engage in a moot, or a grammar school boy to join in a disputational exercise, an invitation to share in the putting of cases. As Del Mar suggests, there is no need to be side-tracked by notions of pretence, deception (willing or otherwise), or illusion. ‘We do not need [to] believe or fake-believe, to participate in fictional worlds.’<sup>32</sup> In such a situation, no one is being deceived, and no one coerced. The process is open-ended, collaborative, and exploratory, undertaken with the eyes wide open, confident in the human subject’s capacity to engage with multiple, over-lapping levels of cognitive complexity simultaneously, and to enjoy that complexity in part in and for itself.

More debatably, Del Mar claims that such acts of imagining are always will-dependent and consciously chosen, ‘an active process; something we do rather than something we undergo’. ‘This sense...of actively doing something, as well as doing it largely consciously and deliberately’, he observes, ‘is an important threshold characteristic of imagination as I model it in this book’.<sup>33</sup> There is a lot of insight in this claim too, and the idea of the imagination as a fundamentally active faculty is an important corrective to those ideas of the fictive based on models of illusion and deception discussed earlier. But we miss something important if we do not also acknowledge, as Del Mar does, the ways in which the imagination can operate independently of, or even despite the human will. For, we imagine as embodied creatures. Our capacity to think about, think with, or think through an idea is conditioned, indeed generated, by the embodied nature of our experience. Thus, as the work of Guillemette Bolens demonstrates, we imagine, as we think, and as we respond to real-world stimuli, *kinesically*, via perceptual simulation.<sup>34</sup> As a key aspect of the capacity to imagine is, as Bolens, Terence Cave and others have

32 Del Mar, *Artefacts of Legal Inquiry*, 108.

33 Del Mar, *Artefacts of Legal Inquiry*, 145 and 147ff.

34 See, for example, Guillemette Bolens, *The Style of Gestures: Embodiment and Cognition in Literary Narrative* (Baltimore: Johns Hopkins University Press, 2012); and Guillemette Bolens, *Kinesic Humor: Literature, Embodied Cognition, and the Dynamics of Gesture* (New York and Oxford: Oxford University Press, 2021).

demonstrated,<sup>35</sup> facilitated by haptic and kinesic intelligence, it is perhaps better to think of that capacity as a fundamental human faculty, certainly, and a powerfully affective cognitive tool, but one of which we are never absolutely, unconditionally, in control. It can be, and indeed often is (to use a term that has taken on such significance in the contemporary world) *triggered* in us by others as well as being willed into action by ourselves. We do not have to want it to, for it to do its work within and upon us. Consider the following scenario, which I warn you seriously not to try to imagine: I am sitting in the dark and reach out to take a grape from a bowl, only to grasp instead a slug...<sup>36</sup>

My assumption is that some readers at least may have been 'triggered' in some way, even if only a little, by the scenario and the associated haptic simulations it cued, unwilled and unwanted – although you always perceived them for what they were. You were not deceived into thinking the slug was real. For part of the pleasure in our responses to such cues to haptic or kinesic stimulation comes precisely from our acknowledgement of the way we have been, *are being*, triggered. This is why drama – theatre – is so powerful a medium for moral or intellectual inquiry. Happening around us in real space and time, it can trigger us, through the medium of perceptual simulation, whether we want it to or not. Having made the choice to witness a play, we open ourselves to the affective experience, and the affective risks, of spectatorship, whether to traumatic or to comedic effect. Thus, a play such as Shakespeare's *Richard III* can make us laugh at, and laugh *with* a murderer, despite our otherwise impeccable conviction that murder and murderers are repugnant. *King Lear* can fill us for a time, perhaps a long time, with despair at the condition of humankind and drain us of our sense of human possibility, even if we know that our own experience and situation are entirely different. Such plays, fully alive to that involuntary aspect of the imaginative faculty, build cues for the imagination, kinesic and otherwise, into their narrative and performative structures. In the same way, the earliest English moral plays made the personified vices so initially seductive, giving the devil all the best tunes, so as to provide affective real-time demonstrations of the attractiveness of sin rather than simply having an authority figure warn spectators that this was so. In this sense, as Del Mar suggests, the imagination can share features with cognitive processes such as understanding and perception, but it is fundamentally different to them in that capacity to operate independently of the will, and even in contradiction to it. We understand, we *know*, that there was no bowl of grapes, no slug: they were not there, were not *anywhere*, but nonetheless, eugh!, there they are again... This is the

35 See, Bolens, *Kinesic Humor* and Terence Cave, *Thinking With Literature: Towards a Cognitive Criticism* (Oxford: Oxford University Press: 2016).

36 The scenario builds upon, and twists, a point made by Guillemette Bolens in her chapter, 'L'haptique en art et en littérature: Ovide, Proust et Antonello de Messine', in *Le Toucher. Prospections médicales, artistiques et littéraires* (Paris: Le Manuscrit, 2019), ed. M. de J. Cabral, J.D. de Almeida, and G. Danou, 28-29 (<https://archive-ouverte.unige.ch/unige:120744>). There Bolens suggests that even in the dark one can immediately identify variously, an apple, an orange, and a peach, on the strength of such factors as their respective textures, weight, density, resistance to pressure, etc. The power of the point is such, that even reading about the experiment, one finds oneself simulating, and responding to, the haptic sensations that each fruit would trigger if touched.

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perverse capacity of the imagination captured so neatly by the nonsense rhyme that fascinated me as a child:

The other day upon the stair  
I saw a man who wasn't there.  
He wasn't there again today;  
I wish that man would go away!

A rhyme that is not nonsensical at all if one acknowledges the power of the imagination to create unwelcome, unwilled effects: strange men on unspecified stairways, the sensation of slugs grasped slimily in the hand. So, the invitation to imagine, to perceptually simulate, a haptic sensation, a movement, a gesture, need not always be one that we can readily resist. Not always a courteous calling-card to attend a companionable soirée, it can on occasion arrive with all the compulsive force of a press-gang. And that too needs to be taken into consideration in our modelling, whether we are looking at sixteenth century theatre texts or the determinations of modern judges.

In concluding this brief discussion of *Artefacts* and its dialogue with literary studies, let us now turn to one final matter. One of the pleasures of *Artefacts* is, as I have suggested, its capacity to uncover the kinesically powerful metaphoric imagery hiding in plain sight in even the most apparently spare and uninflected legal documents. A case in point is the affective resonance implicit in a phrase like 'let us now turn to'. On the surface it is simply a marker of transition. I have been considering one thing, now I will consider another. But it is, as Del Mar notes, drawing on the work of Ullrich Langer,<sup>37</sup> nonetheless rich in implicit affective and associative energy. The inclusive, plural 'us' assumes a collective act, an unstated communal agreement that a subject has been satisfactorily attended to and that now is the right moment to move on together to another subject, and not just any other subject, but, again by implication, to the correct subject to follow on from the previous one in some logical sequence, *now*. And the notion of collectively turning itself, not merely moving or passing, but actively turning (whether with the head or the whole body) toward the new topic, brings with it resonances of all of those senses and cases in which turning our bodies towards someone or something implies or denotes affection, mercy, forgiveness or desire. One turns in response to a call or an appeal from another, and in doing so one acknowledges and begins to address that appeal. The phrase is thus charged with implicit persuasive force. It offers us a gambit to which we need to respond either acceptingly or (less easily) resistantly. But it presents that gambit not explicitly as an instruction or a challenge but tacitly, almost subliminally, its coercive potential so readily (and quietly) assumed that it would take the Officious Bystander at his most obtrusively inquisitive to draw it into the open. In this it is like so much that Del Mar illuminates

37 Del Mar, *Artefacts of Legal Inquiry*, 192, citing Ullrich Langer, 'Turning to the Beloved (Virgil, Petrarch, Scève)', in *Movement in Renaissance Literature: Exploring Kinesic Intelligence* ed. Kathryn Banks and Timothy Chesters (London: Palgrave Macmillan, 2018), 31-54.



and celebrates in *Artefacts*. It invites rather than compels, it does its work subtly through nuance and implication, and the invitation it offers is open-ended, drawing us in by its very incompleteness. Such, as Del Mar suggests, is the affordance of the kinds of artefactual language that drive both literature and legal inquiry alike. Thus, studying the two together as mutually implicated fields has indeed much to tell us about both, as *Artefacts* more than amply demonstrates.