

Educating the Legal Imagination

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1. Introduction

In 1874, the Spanish painter Pere Borrell del Caso (1835–1910), known for his *trompe l'oeil* paintings, painted what is often said to be his most famous work, 'Escaping Criticism'. The painting depicts a young boy poised on the edge of a frame, creating the illusion of a painted figure coming alive – one about to leave the world of art and enter that of life (hence, I suppose, 'Escaping Criticism'). I call upon this painting here as an icon of active learning and as an allegory of the role of imagination. On the one hand, the boy's body is vigorous and full of energy, and his eyes are open and full of wonder and surprise – as if he can't wait to jump out of the frame and explore. On the other hand, he has not quite left the frame – indeed, he holds onto it with both hands, indicating tentativeness, uncertainty, perhaps some anxiety, or at least some doubt. Conceived of as an active learner, the boy depicts an energetic but careful curiosity, something purposefully tentative, cautiously exploratory – a vigorous doubt, a poised inquisitiveness. Understood as an allegory of imagination, the boy is both inside and outside, both on-line and off-line, in a liminal state, and engaged in a dual mental process that involves both being aware of artifice (being off-line) and still participating (being on-line) – a kind of immersive reflexivity, an enchanted rationality, which I shall suggest is key to the imagination.

In what follows, I take my cue from this painting in order to 1) propose a model of the role and value of the imagination in legal reasoning and 2) discuss the associated abilities to imagine and provide some ideas and resources for how we might educate those abilities in the legal context. The focus of this article is on education, so I will only sketch the model in section 2 and then go on in three further sections (3–5) to discuss the following three abilities: a) the ability to

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take epistemic distance and participate, b) the ability to generate alternatives and possibilities, and c) the ability to construct mental imagery. In so doing, I will be drawing upon some more or less recent teaching experiences, some from my own classes (mainly in 'Jurisprudence and Legal Theory', a final year compulsory course in the undergraduate law degree at Queen Mary University of London) and some which I have developed with a visual artist and Shakespeare actress in a past project (see Del Mar 2016).

2. Artefacts and the Imagination in Legal Reasoning

We imagine in many different ways and in many different contexts. No one model of the imagination can hope to capture all these differences, and nor should it. To imagine, on the model I here can merely sketch, is to combine two processes (this duality being crucial): First, having been made aware of an artefact, we enter into a distinct epistemic frame, where we take epistemic distance and suspend certain epistemic commitments and norms, and second, we simultaneously actively participate – we do things with and thanks to these artefacts. This model requires quite some unpacking, which, once again, I can only do cursorily.

The first term here that requires unpacking is 'artefact'. By an artefact I mean a fabricated form that, first, captures our attention by signalling its own artifice, and second, calls on us to do something with it. The 'fabricated form' I focus on here is written language, but forms can also include visual marks, gestures, and sounds.¹ These artefacts can vary in two principal ways: First, they capture our attention, signalling their own artifice, in different ways, and second, they call on us to do different things with them, appealing to a range of affective, sensory, and kinetic abilities.

This is all very abstract, so let me give some examples. Forms can signal their own artifice quite explicitly, as when we say 'Let us suppose X' or 'Let us treat X as if it is Y' or when we introduce a subjunctive mood with, for example, 'perhaps' or 'maybe'. But forms can also implicitly signal their own artifice, for example, by appearing overtly stylised or patterned (as in alliteration) or through authorial self-undermining (e.g., contextual evidence of the unreliability of a narrator). The general point is that in signalling their own artifice in these different ways, forms (in this case, forms of language) put us on epistemic notice or alert. As they do so, artefacts appeal to our emotions of wonder, surprise, and perhaps also the pleasure of reflexivity.

1 This implies that language is not the only resource available to legal reasoning – for example, legal practice is also guided by, and could find resources within, visual forms. Thus, legal education ought to include the development of critical visual literacy in lawyers. The teaching of visual rhetoric in law schools has been strongly advocated by Richard Sherwin (e.g., 2011) in recent years, and it would be great to see more discussion of visual legal epistemology and visual legal education in the future.

These artefacts differ not only in how they signal their own artifice, but also in how they invite us to do different things with them. For example, an artefact might set up a semantic clash (as in metaphor) and invite us to resolve that clash (by relating the two images in a metaphor with each other). Or an artefact might be underspecified in some way – for instance, through the use of blanks or ellipsis (...) – and thus invite us to complete something (to fill in the blanks). Or an artefact may present itself as having double or excess meaning (as in allegory or irony) and thus invite us to go elsewhere or peak behind the veil of the words. In general, by presenting themselves as incomplete, underspecified, excessively meaningful, incongruous, or dislocated, artefacts – in this case, forms of language – call upon us to do something with them. In doing something with them, it would be inaccurate to say that we are using them, as we might use a tool or instrument. The kind of invitation issued to us by artefacts calls for something else – a mode of mindful participation, a travelling alongside, a process in which we are neither entirely passive nor entirely active (and thus neither entirely in control nor entirely groundless).

This process that artefacts invite us into is the process of imagination. Just as there is variability in kinds of artefacts and what they invite us to do, so there is variability in how we exercise the imagination. As related to the above model, we can, first, take epistemic distance in different ways, suspending different kinds of epistemic commitments and norms, and second, we can participate in different ways, doing so along a spectrum of affective, sensory, and kinetic involvement. Let me, again, give some examples.

There is a rich variety of epistemic acts and attitudes via which we can take epistemic distance. They have subtle differences, and a fuller study of these would demonstrate the distinct epistemic atmosphere of each. They include, for instance, supposing something is so, considering or conceiving something to be in a certain way, entertaining some thought, and pretending. Each of these can itself be exercised variably – we can pretend to be someone or something else, we can pretend to treat someone or something as someone or something else, and so on. These epistemic acts and attitudes come in different degrees of epistemic distance – and involve different ways of bracketing or quarantining what we believe or know. Note that this way of modelling imagination does not reduce it to ‘suspension of disbelief’ – such an epistemic act is but one of many possible ways of taking epistemic distance, and indeed is a particularly strong one. It is common to take more subtle, more tentative, more cautious epistemic distance, retaining some epistemic standards (e.g., coherence amongst elements) while suspending others (e.g., correspondence between words and things).

In addition to taking epistemic distance in different ways we simultaneously participate – and we do so in different ways. It is crucial to see that to imagine is not just to go off-line (precisely to take epistemic distance), but instead to be off-line and on-line at the same time. Recall again the boy in the painting: He is both in and out of the frame, in a liminal state. That is also the state of the imagination – a dynamic process which combines yielding to something, and yet doing something active, participating. We can participate in different ways – for example, we can merely suppose, exercising little mental imagery, kinetic simulation, or affec-

tive involvement (as when we suppose that there exist only prime numbers). Or we can participate in ways that involve much more mental imagery, kinetic simulation, and affective involvement – as when I, say, see a volume of Hans Christian Andersen tales in a bookshop and imagine the face of my mother reading them to me or when I enact something (I pretend to be a monster and chase my five-year-old around the house).

Modelled in this way, the imagination is not some extraordinary ability, exercised only by artists and geniuses, or something that involves a purely or predominantly mental and unconstrained flight from reality (as in a daydream or fantasy). Quite the contrary, understood in this way, imagination is something we exercise often, in the company of others and indeed interactively with them (as in games of pretence) and which is connected (in varying degrees) with our emotions and our bodies. The imagination understood this way should also not to be confused with creativity – some exercises of the imagination may be creative (i.e., may involve the generation of something novel or some unusual mixture of previously recognised elements), but they need not necessarily be.²

If we understand imagination in this way, we can see that it plays a vital and important role in legal reasoning. When a judge is inquiring into what may be normatively relevant in this case and in potential cases of this kind in the future, and thus searching for what may be the relevant values or interests at stake, such a judge will often exercise the imagination. Indeed, the chances are that such a judge will already have been invited to do so – either by counsel in the case or in reading material proposed as relevant (e.g., past cases). For instance, a judge may entertain a hypothetical scenario – an artefact which signals its own artifice (e.g., by being a caricature or hyperbole, in its exaggerated facts) and in being under-specified (short, pithy) invites the judge to construct mental imagery and react emotionally to the facts in the hypothetical. In so participating (experiencing the hypothetical scenario visually and emotionally), the judge may explore what values and interests may be at stake in the case before her.³ Similarly so with a metaphor (of which the law is full): In entertaining the relation between two images proposed in a metaphor (e.g., that the constitution is a living tree), and thus in attempting to resolve a semantic conflict between these images, a judge enters into a distinct epistemic frame where she suspends referentiality and searches for ways in which such a relation may make sense. In that process – in this case, of metaphorical cognition – a judge may consider what aspects of a tree might help in exploring what methodological approach to take to constitutional interpretation (e.g., to emphasise the leaves and their changing colours in the seasons, which may lead to more progressive interpretation, or the more sturdy and robust roots, which may lead to a more conservative interpretation).⁴ Or, to give one more example, in inquiring into the reasonableness of an accused or defendant's

2 For some more takes on this ordinary and constrained conception of the imagination, see Kind and Klug (2016).

3 For more on experiencing and reasoning with hypothetical scenarios, see Del Mar (2018).

4 The literature on metaphor in legal reasoning is vast. A recent collection, with relevant references, is Hanne and Weisberg (2018). See also Del Mar (2017a).

actions, a judge may simulate a mental film of a Reasonable Person – this being a figure similar but not identical to the accused or defendant, acting in similar but not identical circumstances of the case. In engaging in this practice of figuration, a judge can explore what features of the actual defendant, and the actual facts, are important in deciding what is reasonable.

These processes of the imagination are valuable at three different levels: the individual, the interaction between individuals, and the resourcefulness of legal language over time. At the level of the individual (e.g., a lawyer or judge), these processes are crucial, for they both stimulate and make possible normative judgment by connecting it to our affective and kinetic abilities. Further, these processes, enabled by such artefacts as metaphors, hypothetical scenarios, figuration – and there are more, create time and space for thought; they help deliberating agents hesitate; and they provide them with shelters for inquiry and thus allow for non-committal experimentation and the generation of alternatives and possibilities. They are also – and this is important – fun and pleasurable to engage in.⁵ Imagination is also valuable at the level of interaction between persons in real time, typically in a courtroom, and over time as when artefacts appear in the texts of judgments or other legally relevant materials. At the level of interaction, these artefacts – whether they be metaphors, scenarios, figurations, or others – feature in live interaction between judges and advocates and sometimes between the judges. The persons in such scenes of interaction entertain a metaphor together, share possible variations of facts in hypothetical scenarios, and examine the possible actions of a Reasonable Person interactively. Artefacts, then, and related processes of imagination, can often spark non-confrontational, indirect conversation, enable joint attention, involve humour (which has important cognitive and political advantages), and allow participants to share or compare emotional and kinetic experiences. Further, at the level of legal language existing over time, artefacts enable inquiry across time, allowing agents at a later time to pick up where the last conversation left off, doing so by re-examining a metaphor, or introducing a new variation into a hypothetical scenario. Such artefacts keep legal language alive, not allowing it to become too automatic, too ready-to-hand (precisely because it invites us to be active, to do things with it). Such language also

- 5 The model of the imagination that I have in mind here (which one might, if pressed, call ‘deliberative’) ought to be distinguished from what one may call ‘the perspectival imagination’, as when judges attempt to imagine what some experience was like or might be like for a certain person. Such perspectival exercises of the imagination are in fact often painful (for the experiences in question themselves are often painful), and they are also difficult. Despite the difficulties involved, I have elsewhere argued (see Del Mar (2017b)) that it is often important that judges try to overcome imaginative resistance – here, the role of emotion is important. If this is correct, then this also has implications for legal education – students need to develop the ability to exercise the perspectival imagination. The ‘perspectival imagination’ has also sometimes been characterised as the ‘moral imagination’, and reference here is often made to related abilities such as empathy and sympathy. Martha Nussbaum has been a leading voice in this respect, also in terms of educating the moral imagination (see e.g. Nussbaum (1995)). For educating the moral imagination in law schools, see also Sarat, Frank and Anderson (2011); and Bankowski and Del Mar (2013).

affords collective memory, and perhaps also collective modesty, for it reminds us of the further work (of the imagination) that the law requires.

Necessarily, the above is a sketch of a model – of the imagination and its role and value in legal reasoning.⁶ What I turn to now are three related abilities (to imagine) and how we might be able to encourage our students to exercise them in the legal context.

3. Ability I: Taking Epistemic Distance and Participating

Although I have stressed that the imagination is something we exercise relatively often, both in our daily life and in specialised contexts (like the law), it is also important to see that we need to learn to imagine and that we can be better or worse at it. In what follows, I present three such abilities: 1) taking epistemic distance and participating, 2) generating alternatives and possibilities, and 3) constructing mental imagery.

The first ability is the most emblematic of the model of the imagination, as I have sketched it. One might think of it as the general ability to imagine. The first point to make about it is that it is an ability that we need to acquire – we are not born with it, and indeed some persons have trouble acquiring it. Stanley Cavell offered some entertaining examples of this in his *The Claim of Reason* (1979):

A soldier being instructed in guard duty is asked: ‘Suppose that while you’re on duty in the middle of a desert you see a battleship approaching your post. What would you do?’ The soldier replies: ‘I’d take my torpedo and sink it.’ The instructor is, we are to imagine, perplexed: ‘Where would you get the torpedo?’ And he is answered: ‘The same place you got the battleship.’ (Cavell 1979, p. 151)

The point – in this ‘old gag about supposition’ (ibid.) – is that not all of us come to acquire the ability to take epistemic distance and participate, including developing responsiveness to cues of artifice. The soldier plays, but not quite in the manner desired by the instructor – the soldier, we might say, does not play along; he is not responsive to taking epistemic distance (in this case, to suspend the norm of likelihood or probability – given how improbable it is a battleship will appear in the middle of a desert) and to participating (to going along with it and considering his response in the imaginary scenario). Of course, one could also read the ‘gag’ as showing that the soldier understands perfectly well and plays with the instructor

6 For reasons of space, I have ignored here previous efforts by legal scholars who have drawn on the concept of the imagination and advocated for its education in law schools – perhaps most obviously, through the work and legacy of James Boyd White (see his classic (1973), now reissued in 2018, and see Etxabe and Watt (2014)). I have sought to add, however, modestly to these important efforts by offering a more explicit model of the imagination and by identifying particular abilities to imagine that we can develop in law schools.

(i.e., knowing that the instructor wants him to play along, the soldier pokes fun at the instructor's methods). There is less ambiguity (though also less hilarity) in another of Cavell's examples:

I am teaching chess to someone, and after a game I say, 'Supposing my king had been there, and your last pawn there, and the rest of the board was empty: what would you have done?' If he says 'I would not have moved the pawn' that may show that he has or has not mastered a mode of endgame. But if he says 'I would have fainted' he is making a weak joke. And if he asks seriously: 'How do you know there are no other pieces on the board?' then that suggests he hasn't mastered a mode of speech, a form of life, viz. imagining or supposing. (Cavell, 1979, p. 151)

Put aside here the fudging of a distinction between imagining and supposing (I consider the latter to be a subset of the former) and put aside also the reference to 'mastery' (for I do not think we ever 'master' anything) – the principal point is that there is here a relevant ability one needs to acquire, and one which one might not, that is, the ability to go along with an invitation to take epistemic distance and participate (in this case, to suggest a move in the game with the restrictions proposed by one's teacher).

In his important and pioneering book *The Work of the Imagination* (2000), Paul Harris provides a detailed account of when children develop the ability to 'go along with a pretend stipulation (e.g., a red brick is cake, a yellow brick is a banana), and extend it over time' (Harris 2000, p. 12-13). The answer is that some children as young as two can do this, and that, furthermore, they acquire and develop this ability in interactive contexts – indeed, pretence for children is a crucial form of interaction (or play), and one that 'calls for considerable flexibility and sensitivity' (Harris 2000, p. 29). Such pretend play – especially when it involves role-pretence and not just object-pretence – 'is much more flexible than a script-enactment theory would allow', for example, the child 'enacts the way that the characters might respond to novel and unexpected events' (Harris 2000, p. 35), where such enactment presumably must be responsive to cues (of pleasure or displeasure) from one's interacting partners. As Harris points out, engagement in these kinds of activities – pretence being one way in which one might exercise the imagination – is crucial to the development not only of social skills, but also reasoning abilities as well as arguably moral abilities (e.g., adopting the perspective of another, seeing something from another's perspective).

In developing his account, Harris is objecting to certain earlier accounts of the imagination, which worried that imagination was deleterious to the cognitive development of children, for example, because children who engaged in it were at risk of losing themselves in flights of fancy or fantasy, sealing themselves off from reality. However, as Harris discussed, and as I have emphasised, it is a mistake to think of imagination as necessarily a flight from reality – instead, the imagination involves a dual mental state, and one that is better conceptualised as a tentative exploration of reality, rather than a flight from it.

Law students are, of course, not children. However, some may not have had much opportunity to acquire the ability to take epistemic distance and participate, and many will have lost much of the opportunities to continue to exercise this ability (given how little opportunities we have to play as we get older, at least in the educational setting). Even where students have acquired such an ability, and have had opportunity to keep exercising it, one can always improve it. The next question, then, is how: How might we give our students opportunities to exercise and develop this ability? In answering this question, let me first mention some general resources and then propose some specific activities for the legal context. One obvious resource for developing this ability is literature. In his marvellous book *How To Do Things with Fictions* (2012), Joshua Landy resists the usual ways of arguing for the value of literature (e.g., that it assists in the development of empathy) and argues instead that we think of (some) fictions as ‘formative’, that is, as forms of language and narrative that allow us to ‘fine tune our mental capacities’ (Landy 2012, p. 10). Here are four examples he provides:

- The parables of St. Mark: Reading the parables, and engaging in parabolic reasoning, helps – says Landy – train a mental capacity for reading one thing and thinking of another (see Landy 2012, ch. 2). It might be added here that parables (or at least some of them) are a particular subset of allegorical literature. They often surprise the reader by positioning the reader in the place of one of the characters in the parable. Parables are, then, a highly self-reflexive form of allegory.
- Plato’s *Dialogues*: These texts, often via the device of authorial irony (i.e., the way that the authority of Socrates is often undermined), help train us to distance ourselves from our beliefs and adopt a critical stance towards them (see Landy 2012, ch. 4). As Landy points out elsewhere, ‘Plato’s desire to leave critical space between himself and his purported mouthpiece [Socrates] is routinely covered up, denied, or simply not imagined as a possibility’ (Landy 2007, p. 93). This is so, for instance, in *The Symposium* or in *Gorgias* – in both, therefore, it is ‘not sufficient to understand what is being said’ (ibid., p. 96); one must participate more actively, precisely in a form of double-reading – for what is said and for how what is said is undermined by the narrative and other linguistic features.⁷
- Proust’s *In Search of Lost Time*: Proust’s ‘convoluted sentences’, says Landy, ‘stretch the mind’s capacity for keeping multiple hypotheses in play, while imposing provisional order on a rich set of material’ (Landy 2012, p. 18). The linguistic and grammatical features of Proust’s sentences are clearly crucial here, but it may be that other genres of fiction (without such ‘convoluted sentences’) can also assist in similar (though not identical) training, for example, detective fiction.

7 See also Schur (2014), who points out that when we really engage with Plato’s texts, we are never quite sure what to believe or what opinion is really held by Socrates. Plato, then, plays with the fragility of belief, or better, gives us an opportunity to experience that fragility.

- Austen's *Pride and Prejudice*: According to Landy, Austen invites us, thanks to that novel's 'liberal use of free indirect discourse, to practice stepping back from our sometimes overhasty judgments', and this is because 'free indirect discourse always situates us half inside a belief and half outside it' (Landy 2012, p. 18).

In all these cases, whether it be reading figuratively or appreciating irony or exercising provisionality and holding multiple hypotheses in mind or relating sub-junctively to our beliefs, we are learning to take epistemic distance, and at the same time, actively participating (being affectively involved or simulating kinetically or constructing mental imagery).

To the above list, we can surely also add (some) poetry. One of the sub-abilities involved in the ability to take epistemic distance and participate is that of hesitating (which itself is a crucial dimension of the process of normative judgment). Experiencing poetry can improve our ability to hesitate. According to John Gibson, 'Poetic meaning is experienced as latent, that is, there is frequently and importantly a felt gap between understanding the language of a poem and understanding the poem itself' (2011, p. 4). If we take Gibson at his word, we can see how experience in reading poetry can help develop the ability to tolerate a gap between language and the construction of meaning, thereby exercising also the ability to hesitate (e.g., before attributing meaning to a word or phrase).

These are some of the general resources we can bring to bear,⁸ and there is (and I would argue should be) room for such literatures in a law school curriculum (or at least via extracurricular reading clubs). Nevertheless, the real challenge in educating the imagination in a legal context is crafting activities that develop abilities to imagine that are not experienced from the beginning by law students as beyond or far removed from the legal world (as the above examples are likely to be experienced, rightly or wrongly). Here are three possible activities that seek to avoid foregrounding unfamiliar terrain, and instead invite students to perform unfamiliar activities on very – indeed, all too – familiar texts:

- *Translating Assertions into Tentative Statements*: Working in pairs or small groups, students are given 1) a text (excerpt from a judgment or a statute) and 2) a pack of cards, each card containing some subjunctive term, for example, 'perhaps' or 'maybe'. They are asked to attach these subjunctive terms to assertive statements they find in the text – whether at the beginning of a phrase or in the middle or at the end or in substitution of a more assertive expression – in a way that they think may helpfully generate questions about the meaning of the assertive phrase. For example, Section 5(1) of the Unfair

8 Another set of resources might be taken from the exercises articulated in Descartes' *Meditations* – as Hatfield points out, these exercises are 'means for suspending judgment' (e.g., about corporeal things) (Hatfield 1986, p. 47). Descartes is often a bit of a villain in anti-foundational philosophies of knowledge and education, but if we think of his *Meditations* as exercises in being able to doubt actively (ever-extending our ability to doubt), then we might be able to draw on his work in constructing a pedagogy of imagination.

Terms in Consumer Contracts Regulations (1999) says, 'A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'. Students here might substitute 'may perhaps' for 'shall' or insert 'maybe' before 'contrary to the requirement of good faith' or add 'perhaps' between 'it' and 'causes'. The pairs or groups then swap the amended texts and consider how the alterations of the other pair or group affect the meaning of the text. Part of the point here is to encourage students to be more reflective about the language choices made by (in this case) the statutory draftspersons, but another is to assist students in reading a text subjunctively, that is, considering actively where the language of a provision might be ambiguous (even if it doesn't appear to be so at first or without the assistance of any facts that make application of the language difficult).

- *Detaching Consequences from Operative Conditions*: In a similarly structured exercise, students are given a text (e.g., a statutory provision), as well as scissors and writing material, and are asked to cut off consequential statements (the 'then' statements, in rules that take the form 'If X, then Y', and to either leave them hanging for another group to fill in or paste in a different consequential term from another provision. In Section 5(2) of the above Regulations, the consequence appears before the operative conditions (Y, if X): 'A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term'. Students could here cut out the beginning of the sentence until and including 'negotiated', and ask another group to fill in the blank. Alternatively, the students could delete the operative conditions ('drafted in advance...' etc.) and ask students in another pair or group to supply their own. Again, the point here is to invite students to think actively about the choices being made and also the difficulty in both choosing and drafting them. It is also to defamiliarise what may otherwise be all-too familiar texts that are read much too quickly or memorised without any attempt at active engagement with their potential meaning.
- *Improvising Statutory Interpretation*: In groups of about 6 students, take a statutory provision, set up an initial factual tableau (a set of facts that ostensibly corresponds to that statutory provision– this may be taken from a case in which the statute was applied), and invite 4 students to act out the scenario. Students develop the scenario in some (typically unexpected and often humorous) direction. The other 2 students (as well as potentially the teacher) have 'Pause' and 'Go' cards and can thus stop the improvisation at a certain point and invite discussion as to whether the provision still applies or now wouldn't apply to the scenario as improvised. There are all kinds of variations of this activity, including allowing one of the observing students to step in (at their choice of moment) and take over the role of one of the students in the scenario or allowing students to rewind the scenario and change it. I have done this in a workshop with students across all three years in our undergraduate degree on a provision of the Unfair Contract Terms Act 1977. The tableau

that was set up (inspired in part by the facts in *R&B Customs Brokers* (1987)) was designed to explore the distinction between ‘dealing as a consumer’ and ‘purchasing in the course of a business’, which are important concepts for that legislation. As the scenario was improvised, we paused at various times to consider which of the two categories applied most.

Conducting such activities with one’s students takes considerable preparation time – the activities have to be well structured and explained clearly to the students, and the teacher has to have had a sense of where they may develop and what points may be important to bring out (e.g., what issues may arise in the interpretation of the above provisions). However, there is also clearly an element of unpredictability in such exercises, and there has to be a joint commitment of both teachers and students to an atmosphere of exploration and play. These are, if you like, suggestions for what might be done in a Laboratory–Playground of Statutory Language, where both teachers and students take on a hybrid role of children in a playground and scientists in a laboratory. The physical elements of these activities are important: Cutting up texts with scissors and improvising scenarios add strong kinetic and embodied dimensions to these exercises of imagination – this makes the exercises not only memorable, but also helps students to be more playful (more willing to take risks, and thus distance themselves from what they know and find familiar).

4. Ability II: Generating Alternatives and Possibilities

The above general ability to imagine is, as noted, emblematic of the model of imagination I have proposed. I have, therefore, spent more time on it than I shall with the next two. However, the next two abilities are also crucial, and of great value to anyone learning to think legally.

Once we are within the distinct epistemic frame of imagination (precisely by taking epistemic distance and participating in a variety of ways), we can then also exercise an ability to generate and multiply possibilities and alternatives within it. If one thinks of the general ability to imagine as one of holding or suspending, or bracketing or quarantining, then one can think of this ability as one of thinking sideways, horizontally, taking tangents and detours. One can generate possibilities and alternatives in a wide variety of ways, for example:

- By maximising the past: constructing counterfactuals as to what would have happened if X had not happened, or if Y had happened⁹
- By maximising the future: constructing possible (or indeed impossible, improbable) future scenarios (or consequences of potential decisions)

9 See on this topic now the new book by Catherine Gallagher (2017). A lot remains to be done on how counterfactual reasoning should be and might be developed in law schools.

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- By multiplying and shifting perspectives: constructing variations of points of view or character
- By reading subjunctively: reading for what was not said or not described and for what might have been said instead or differently; this will sometimes involve rescuing irrelevancies, zooming in and out of facts (as described), or changing and adding characters

All these ways of generating possibilities and alternatives have important analogues in legal reasoning, for instance:

- In attributing causality and responsibility, we often rely on conventions of what is likely and normal, but these can often be mistaken or conceal biases
 - multiplying counterfactual scenarios can help make those attributions more careful.
- Decisions about what may be normatively relevant (what interests and values may be at stake in cases of this kind) often depend on hypothetical scenarios (in which we imagine, say, the consequences of a prospective norm being enacted) – becoming better at imagining variations of such hypothetical scenarios can help improve those judgments of relevance.
- An important aspect of legal reasoning involves imagining the attributes, actions, and attitudes of imaginary figures (e.g., reasonable persons, officious bystanders, right-thinking members of society). Being able to imagine variations of a perspective can help in the search for relevant normative differences.
- When casting about for possibly relevant precedents, and thus also analogies, one needs to read those past cases actively, that is, to simultaneously reconstruct the facts of the past case and the present case (thereby connecting or indeed disconnecting, rather than simply applying, the past with the present). Reading actively, as noted earlier, involves reading for what is not said or what could have been said differently – for example, for what facts might be or might have been thought to be relevant. This kind of reading (which generates possibilities and alternatives) can help with the ability to re-characterise the facts of a past case (for instance, at a higher level of generality), thereby making it either more or less similar to the facts of the present case.

Here are three activities one might engage in a legal context to develop this ability to generate alternatives and possibilities:

- *Variations of Utopia*: Students form small groups, and each group is tasked with constructing a utopia – either a utopia with law (so an ideal legal utopia) or a utopia without law (so a utopia where law is not needed). They are required to give a name to their utopia and to imagine it as concretely as they can (including its geography, and any other features of what life is like there). They are then asked to choose one member of their team as an ambassador, who travels away from their utopia to a meeting of all such ambassadors and describes what life is like in their utopia. Each ambassador, from each group, does so, and we then compare and contrast the utopias constructed. I have tried this in my ‘Jurisprudence and Legal Theory’ classes, and this was a fun

and successful activity. It brought to light many (different and contestable) assumptions the students operated under as to what were the functions and benefits of law.

- *Variations of Figuration*: Students are given a case involving the Reasonable Person to read prior to the class. When I have tried this in the past, I have done so with the famous case of *Vaughan v Menlove* (1837). Working in small groups initially, and then comparing the results across groups in a large group discussion, students imagine variations of the Reasonable Person, that is, they are asked to describe what would have been done by 1) the Extremely Reasonable Person, 2) the Very Reasonable Person, 3) the Extremely Unreasonable Person, and 4) the Very Unreasonable Person. Again, this has always been a fun activity to engage in – especially when thinking about the extremes (of the extremely reasonable or unreasonable). This exercise is designed to assist with the ability to imagine both counterfactual scenarios and variations on them, and to shift between perspectives.
- *Reading Cases Actively*: Nietzsche once said that to read well is to ‘read slowly, deeply, looking cautiously before and aft, with reservations, with doors left open, with delicate eyes and fingers’ (quoted in Boulous-Walker, 2017, p. 24). In that spirit, students may be given a variety of activities that invite them to read actively, generating possibilities and alternatives as they go. Students are given a case to read before a workshop, and in the workshop they are given various activities that give them opportunities to imagine the facts of the case in greater detail than is described or to introduce new facts. These activities can involve giving the students props (including photographs related to things mentioned but not described in detail in the case) or asking them to re-characterise a character named in the case (by imagining their back-story or giving them a name where have none, etc.) or inviting them to introduce a character. I do not describe these activities here in more detail, as I have done so elsewhere (see Del Mar 2016).

5. Ability III: Constructing Mental Imagery

Let me turn now to the final ability: constructing mental imagery. For some philosophers, constructing mental imagery is synonymous with exercising the imagination – as noted earlier, some philosophers do not regard supposing as an exercise of the imagination, and this is because supposing does not (or is said not to) involve constructing mental imagery (see Balcerak-Jackson 2016). In the model I have proposed, constructing mental imagery is one of the ways in which we exercise the imagination (another way is, indeed, supposing without constructing mental imagery). It helps to think of the imagination in this more gregarious way, for it helps us see the spectrum of cognitive, affective, kinetic, and sensory abilities that exercises of the imagination can involve.

In his ever-inspirational lectures (*Six Memos for the Millennium*, 1988), which he never got a chance to deliver (as he died before completing them), Italo Calvino

wrote with his characteristic mix of clarity and lyricism about the value of ‘visibility’:

If I have included visibility in my list of values to be saved, it is to give warning of the danger we run in losing a basic human faculty: the power of bringing visions into focus with our eyes shut, of bringing forth forms and colours from the lines of black letters on a white page, and in fact of thinking in terms of images. I have in mind some possible pedagogy of the imagination that would accustom us to control our own inner vision without suffocating it or letting it fall, on the other hand, into confused, ephemeral daydreams, but would enable the images to crystallise into a well-defined, memorable, and self-sufficient form, the icastic form. (Calvino 1988, p. 92)

One could argue that some of Calvino’s own works offer the best kind of pedagogy of the imagination (e.g., *Invisible Cities*: See Modena 2011), at least when understood as training in ‘bringing forth forms and colours’ from text.¹⁰ Calvino himself said we could do worse than look to St. Ignatius of Loyola and his *Spiritual Exercises* (1522–1524). In these exercises, as Calvino put it, ‘the believer is called upon personally to paint frescoes crowded with figures on the walls of his mind’ (Calvino 1988, p. 86). Famously, the exercises required the student to visualise a place, for example, ‘a temple, a mountain, a valley of teats, the Virgin’s chamber, a warrior camp, a garden’, and in ‘painstaking’ detail: ‘Consider the length of the road, its width, if it passes through a plain or across valleys and hills’ (Barthes 1976, p. 55). ‘The visual composition of place’ was, however, only one element. Others were that the exercises were multisensory and involved the embodied and situated self. In other words, the student was asked to construct mental imagery of the details of a place and simulate how it might have been experienced by the people who found themselves in it, as well as how he himself would have felt if (say) walking through it. Thus, for instance, ‘imagining of Hell consists in perceiving it five consecutive times in the mode of each of the five senses: seeing the incandescent bodies, hearing the screams of the damned, smelling the stink of the abyss, tasting the bitterness of tears, touching the fire’ (Barthes 1976, p. 59). Constructing mental imagery, then, does not stand apart from, but instead works intimately in tandem with, kinetic and affective involvement.

The pedagogical role of constructing mental imagery, and its link with kinesis and affectivity, was recognised by Kieran Egan, in his *Imagination in Teaching and Learning* (1992). Egan spoke of the power of learning through ‘affective images’ – of acquiring knowledge by constructing mental imagery, this being imagery in which we simulate emotion:

If we study earthworms, we will do well to feel ourselves slither and push, tentatively exploring a direction looking for softer passages through the soil, contracting and expanding our rippling muscles in the direction of scents,

moisture, grubs. That is, as we learn about the anatomy of an earthworm we have to feel our way into that anatomy, to feel how the world would feel and taste and smell with that anatomy. If we study trees, we similarly evoke images and sensations, waking and opening to the spring sun, the throbbing sap, the ecstasy of flower and fruit, the slowing cold and curling back into our sleeping barky shell for winter. (Egan 1992, p. 118)

One might object that this may work for the natural world, but is unlikely to work when studying the social world or the conceptual structure of some abstract concept. Egan very much disagrees and offers a striking ‘affective image’ of the concept of democratic government as a ‘well-meaning but unstable giant’:

...so that seething mass of conflicting hopes and ambitions, which seems in constant danger of falling into chaos, manages somehow to stagger forward, helping people to live the lives they want... the image of a well-meaning but unstable giant, carrying a population on a huge tray, contoured and shaped like the country, constantly stumbling and zig-zagging, trying to follow the directions given by the people being carried. The giant has to struggle over treacherous terrain – buffeted, abused, despised – yet persisting. The people on the tray ignore him, getting on with their lives, but occasionally shout for him to turn right, or left, or go back, or leap forward. Much of his stumbling is due to trying to follow all these directions at once. And yet the giant keeps going, more or less forward, and manages to stay upright, and keep the country more or less on an even keel... (Egan 1992, p. 137)

Constructing imagery in this way can of course be deployed by the teacher in explaining some complex phenomenon – in the above case, describing the dynamics over time of government processes and their constant relative instability. They can also be a process of learning, that is, the very experience of constructing them in a way that makes emotional and kinetic sense (we can simulate the movements of the giant, and thus understand the dynamics of government in a certain way) can be a wonderful way of exploring the complexity of a concept.

Bearing the above in mind, here are three possible exercises for law students, designed to develop the ability to construct mental imagery:

- *Collective Listening to the Oral Reading of a Case*: Students in small groups lie on the floor with their eyes closed, while the teacher or (better) another student reads a portion of a case (in particular, its facts). Part of this exercise may involve the students on the floor echoing words they seem significant, but it would mainly involve the students trying to visualise the facts. Having done so, the students are put into pairs to share experiences of what they visualised, followed by a general discussion of the similarities and differences in the processing of fact descriptions.
- *Storyboarding a Case*: Before the class, students are given a case or a portion of a case to read. Then, in small groups or pairs, students are asked to storyboard those facts into text-less images – into a comic strip. Students need

not actually draw the images, but instead describe what would be in them – of course, if the students were keen, one could attempt some actual storyboarding (or one could try this by pairing a law student with a visual artist). The class then discusses the difficulties of storyboarding in this way – for instance, what facts had to be imagined in some specific detail that need not be so described in language. This exercise offers an opportunity not only to train the construction of mental imagery, but also to explore the ambiguities of language (and specifically fact description in cases).¹¹

- *Emblematic Law*: In small groups or in pairs, students are asked to construct an imaginary emblem of law (as in the nature of law) or some area of the law or some concept of the law. Constructing an emblem involves coming up with a figure (e.g., as in the figure of justice), in a certain setting and with certain props (on the tradition of legal emblems: See Goodrich 2013). In this version, students do not draw an actual emblem (though this too may be done, if the students are keen), but instead imagine one. After the initial exercise, the class has a general discussion as to how different groups or pairs imagined the emblem. This could be done not only in legal theory classes, but also in classes on particular concepts of law (e.g., consideration or promissory estoppel in contract law).

As noted, lawyers and judges need to construct mental imagery often in the exercise of the imagination in legal reasoning. They do so when they deploy metaphor, propose and offer variations or counterexamples to hypothetical scenarios, and when simulating imaginary figures (like the Reasonable Person). Exercises for constructing mental imagery in law students, then, are much called for – especially in environments that are fun rather than stressful (Socratic-like debates over hypotheticals in a lecture or seminar are often stressful rather than playful – or playful only for the professor in charge).

6. Conclusion

The emphasis of the above argument for the role of the imagination has been an epistemological one: Imagination plays an important and underestimated role in legal reasoning by enabling and sustaining an inquiry into normative relevance, that is, into what values and interests may be at stake in a particular case and in cases of that kind. Artefacts like metaphors, hypothetical scenarios, and figuration are valuable for individual lawyers and judges, for scenes of interaction in courtrooms, and for the resourcefulness of legal language over time. Given the imagination's epistemological importance, we should – or so I have argued – look for ways that we can encourage its development in law students. I have, in

11 For further discussion and some related exercises (especially in the context of reading past cases), which also draw on differences between visual and linguistic expression, see Del Mar (2016).

that spirit, described a number of more or less closely law-related resources and activities.

In addition, however, to the epistemological arguments are also the moral and political ones. In his series of lectures, *The Educated Imagination*, Northrop Frye argued that ‘what produces...tolerance is the power of detachment in the imagination, where things are removed just out of reach of belief and action’ (Frye 1964, p. 56). Conceiving of the imagination in this way – as ‘the power of detachment’ from belief and action – Frye writes passionately about the relationship between tolerance and listening to and being able to follow stories (making affective sense of them), and more generally about the moral and political importance of being ‘flexible’ in ‘our manipulation of possibilities’. Others, too, have defended the moral and political importance of the imagination on the basis of seeing it as a mode of the suspension of disbelief. My approach here is different (though not altogether so): Rather than foregrounding detachment, I have spoken of a more liminal state, both attached and detached at the same time. If this is detachment, it is a very immersive or participatory one – but it is probably better conceived as a kind of reflexive enchantment, a fictional rather than fantastical mode. Imagination understood this way certainly has moral and political importance – notably in how it can help us develop respect for difference and the otherness of others, but not from a safe vantage point or as an observer, but as a participant who experiences their own limitations. In that sense, exercising the imagination can help us find wonder and responsibility in our epistemic finitude. That, however, is the topic for another occasion.

References

- Balcerak-Jackson M. (2016). On the epistemic value of imagining, supposing, and conceiving. In A. Kind & P. Kung (Eds.). *Knowledge through imagination* (pp 41-60). Oxford: Oxford University Press.
- Bankowski Z. & Del Mar M. (Eds.) (2013). *The moral imagination and the legal life*. Ashgate.
- Barthes R. (1979). *Sade, Fourier, Loyola*. Berkeley: University of California Press.
- Boulous-Walker M. (2017). *Slow philosophy*. London: Bloomsbury.
- Boyd White J. (1973). *The legal imagination: studies in the nature of legal thought and expression*. Boston: Little, Brown.
- Calvino I. (1988). *Six memos for the new millennium*. Cambridge, Mass.: Harvard University Press.
- Cavell S. (1979). *The claim of reason*. New York/Oxford: Oxford University Press.
- Del Mar M. (2016). Learning how to read a case: resources from the visual and dramatic arts. In B. van Klink & U. de Vries (Eds.). *Academic learning in law* (pp 244-266). Cheltenham: Edward Elgar.
- Del Mar M. (2017a). Metaphor in international law: language, imagination and normative inquiry. *Nordic Journal of International Law*, 170-195.
- Del Mar M. (2017b). Imagining by feeling: a case for compassion in legal reasoning. *International Journal of Law in Context*, 143-157.
- Del Mar M. (2018). Emotion experiments in legal thought. *Critical Analysis of Law*.
- Egan K. (1992) *Imagination in teaching and learning: ages 8 to 15*. London: Routledge.

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- Etxabe J. & Watt G. (Eds.) (2014). *Living in a law transformed: encounters with the works of James Boyd White*. Ann Arbor: Michigan Publishing.
- Frye N. (1964). *The educated imagination*. Bloomington: Indiana University Press.
- Gallagher C. (2017). *Telling it like it wasn't*. Chicago: Chicago University Press.
- Gibson J. (2011). The question of poetic meaning. *Nonsite*. <http://nonsite.org/article/the-question-of-poetic-meaning> (last accessed 29 October 2018).
- Goodrich P. (2013). *Legal emblems and the art of law*. Cambridge: Cambridge University Press.
- Hanne M. & Weisberg M. (2018). *Narrative and metaphor in the law*. Cambridge: Cambridge University Press.
- Harris P. (2000). *The work of the imagination*. London: Wiley-Blackwell.
- Hatfield G. (1986). The senses and the fleshless eye: the meditations as cognitive exercises. In A. Rorty (Ed.). *Essays on Descartes' meditations* (pp. 45-76). Berkeley: University of California Press.
- Kind A. & Kung P. (Eds.). *Knowledge through imagination*. Oxford: Oxford University Press.
- Landy J. (2007). *Philosophical training grounds: Socratic sophistry and platonic perfection in symposium and Gorgias* (p. 63). Arion.
- Landy J. (2012). *How to do things with fictions*. Oxford: Oxford University Press.
- Modena L. (2011). *Italo Calvino's architecture of lightness: the Utopian imagination in an age of urban crisis*. New York and London: Routledge.
- Sarat A., Frank C. & Anderson M. (Eds.) (2011). *Teaching law and literature*. New York: The Modern Language Association of America.
- Schur D. (2014). *Plato's wayward path: literary form and the republic*. Cambridge, Mass.: Harvard University Press.
- Sherwin R. (2011). *Visualising law in the age of the digital baroque: arabesques and entanglements*. New York: Routledge.