



**HAL**  
open science

## Commentary on Del Mar's "Artefacts of Legal Inquiry: The Value of Imagination in Adjudication"

Margherita Arcangeli

► **To cite this version:**

Margherita Arcangeli. Commentary on Del Mar's "Artefacts of Legal Inquiry: The Value of Imagination in Adjudication". 2021. hal-03939866

**HAL Id: hal-03939866**

**<https://hal.science/hal-03939866>**

Submitted on 15 Jan 2023

**HAL** is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

## COMMENTARY ON DEL MAR'S *Artefacts of Legal Inquiry*

*The Junkyard*, 4<sup>th</sup> May 2021

<https://junkyardofthemind.com/blog/2021/4/29/book-symposium-arcangeli-commentary-and-response>

Engaging with *Artefacts of Legal Inquiry* has been a formative training for my imaginative abilities. With remarkable care and rigour, Maks Del Mar brings readers into the realm of adjudication and invites them (especially in the second part of the book) to play with him by exploiting their imaginations. Instead of abstractly theorizing about the imagination, Del Mar aims at showing how it works in the specific case of adjudication. In so doing Del Mar outlines a theory of the imagination, but a *dynamic* one – as he might say (according to him, theorising is an activity with an undeniable contingent and variable character – see §C of the Introduction).

Del Mar complains that extant theories of the imagination focus too much on framing a static *concept*, rather than an adaptable *model*. I will start by outlining his alternative model of the imagination, after which I will examine its relations to other views on imagination – keeping of course an eye out for my preferred one, recreativism!

On Del Mar's picture, imagining is the combination of two processes. First, we construct “a distinctive epistemic frame”, that is to say, we play with the epistemic constraints that anchor us to reality by loosening some and tightening others. Second, we undergo a variety of participative modalities (Del Mar examines three varieties of participation: affective, sensory and kinesic).

With respect to the first “limb” of imagining, Del Mar stresses five “threshold criteria”, which enable the epistemic frame shift. Entering a distinctive epistemic frame calls for a process that is:

- (i) primarily deliberate and conscious;
- (ii) active and often social – i.e., implying the contribution of others;
- (iii) appropriately (un)tuned with what is (taken to be) true;
- (iv) epistemically engaged;
- (v) “accompanied by a sense of the purpose-built and time-bound” (p. 147) – i.e., displaying its

pragmatic and contingent nature.

These characteristics make the boundaries of the imagination very flexible, which can thus include not only paradigmatic sensory forms hinging on mental imagery, but also cognitive forms, like

supposition, conceiving, hypothesising and even (at least some cases of) acceptance. As Del Mar puts it: “I have sought to incorporate what has been excluded by some philosophers as not part of imagination” (p. 149). Indeed, Del Mar’s model contrasts with other accounts of the imagination, which set stricter requirements on what counts as imagining, such as the involvement of mental imagery (as in Kind’s view), or taking a stance “from the inside” (as in Peacocke’s view). This should hold also for recreativism – the view according to which imagining is recreating a non-imaginative mental state. Although Del Mar grants this approach a high level of flexibility, he nonetheless presents his model as an alternative to it.

I am a recreativist who is very sympathetic to Del Mar’s view, so I see more convergence than divergence between his model and recreativism – at least in the version I defend. Let me spell out these convergences (and divergences) more in detail.

Recreativism is well suited to account for the wide range of experiential perspectives we may take up when we are imaginatively engaged. According to this view, imagining is “X-like imagining”, where X is a type of non-imaginative mental state (e.g., sensory experience). The scope of X is a matter of debate in the literature. For instance, some philosophers think that emotions can be re-created in imagination (e.g., Goldman), while others deny it (e.g., Currie & Ravenscroft). Anyway, recreativism is a framework apt to Del Mar’s theoretical needs in building his second limb of imagining.

Recreativism can also accommodate quite well the aforementioned “threshold criteria”. First, on this account, imagination is a will-dependent mental action. Arguably, this does not mean that imaginings cannot be spontaneous or passive: we can fail to recognise our own agency, or fail to control some of our imaginings, yet they are still products of our will (see, e.g., [Arcangeli 2018](#)). Will-dependence satisfactorily squares with criterion (i) and, at least partially, with criterion (ii) – I will come back to the social aspect of imagination below.

Second, Del Mar himself stresses that criterion (iii) roughly coincides with what other philosophers have called “truth-independence”. He complains about this terminology, though, insofar as it might convey a misleading picture of the imagination as an escape from, rather than a form of engagement with, the world – thus overlooking criterion (iv). Saying that imagination is truth-independent is a way of stressing the kind of force imagination (*qua* psychological attitude) gives to its content: imagination does not commit us to take what is imagined to be true. The label choice might be infelicitous, but it certainly does not aim to make imagination disconnected from the world. It is also a way to distinguish imagination from other attitudes, such as perception and belief, but this does not mean that it is severed from and cannot work together with them. This idea is clearly taken on board by recreativists: just think about the many epistemically loaded contexts in which recreativism has been

applied (e.g., mindreading, thought experimentation, self-deception, mental time travel). So, although recreative imagination is often associated with the idea of being off-line, I totally agree with Del Mar that imagining is more like being on-line in a particular way.

What about criterion (v)? I take it to hint at phenomenological aspects of imagining: imagining comes as imbued with a feeling of artificiality. Imagining mostly feels like that: when we imagine we are aware that we are momentarily looking at the world from an *as-if* perspective (of course something may go wrong and we might fail to feel that change in perspective). Recreativism has paid little attention to the phenomenology proper to imagination, having stressed mostly the phenomenological similarities between imaginings and their counterparts. It has, however, the resources to deal with this issue. I have suggested that there might be a specific way it feels to be in some conscious recreated state ([Arcangeli 2018](#)). I have not developed this idea fully, but it seems to me that recreation brings with it the pragmatic flavour captured by Del Mar's criterion (v).

Sociality is where I see the main divergence between Del Mar's model and recreativism. To my knowledge, the latter has focused on imagination as an individual capacity, rather than as an activity that can be collectively carried out. But there does not seem to be anything to prevent recreativism from being applied to social contexts. In fact, Del Mar's book can be seen as pursuing exactly such an application!

To my eyes recreativism, more than being an alternative to Del Mar's model, provides the building blocks needed to articulate it. So why not endorse recreativism? Del Mar worries (p. 132) that recreativism does not do justice to the two processes he has identified as vital for explaining how imagination works (i.e., constructing an epistemic frame and participating within it). But it is likely that these intimately connected processes – as Del Mar himself recognises – only become visible when imagination gets applied in a particular domain, such as adjudication. This is one of the many merits of *Artefacts of Legal Inquiry*, a fascinating read that provides food for thought. I cannot dwell on the case studies analysed by Del Mar here, but they enrich the theory of imagination making it more fine-grained.