

Exemplarism and Judicial Virtue

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Abstract: This paper argues that exemplary judges, that is, paradigmatically good judges, are vitally important both to inculcating the judicial virtues and to developing a theory of judicial virtue. Critically, such exemplars are not only real but also fictional. Thus, literature is central to both improving the judicial practice and theorizing about excellence in judging.

Keywords: exemplars / judicial virtue / imitation / legal reasoning

Judges, that is, judges with a name and a biography—either flesh-and-blood judges or judges who come to life as the product of literary imagination—are notably absent in legal scholarship. There is a vast amount of discussion about excellence in adjudication, which patterns of reasoning result in the best legal decision making, which factors ought (or ought not) to be taken into account in the adjudicative arena, and more recently, which traits of character are conducive to good legal decisions. However, there is very little discussion about those who—in life or in fiction—excel at judging, best use the resources of legal reasoning, take decisions that miss nothing of relevance, and display the dispositions required for good legal decision making.¹

This state of affairs is not merely fortuitous; it is not simply the case that legal theorists and legal philosophers have happened to be interested in topics other than judicial virtue when investigating legal reasoning. The absence of the discussion of exemplary judges is the result of what has been the dominating view of adjudication since the Enlightenment, that is, a conception of adjudication that identifies correct legal decision making with impersonality and objectivity. According to this view, the effective

Law & Literature, Vol. 25, Issue 3, pp. 428–445. ISSN 1535-685X, electronic ISSN 1541-2601. © 2013 by The Cardozo School of Law of Yeshiva University. All rights reserved. Please direct all requests for permission to photocopy or reproduce article content through the University of California Press's Rights and Permissions website, at <http://www.ucpressjournals.com/reprintinfo.asp>. DOI: 10.1525/lal.2013.25.3.428.

implementation of the rule of law requires an administration of justice that effaces the subject as much as possible.² In short, according to this model of adjudication, the best judge is the judge that cannot be seen.

This is not the place to argue for a more subjectivized conception of adjudication.³ Indeed, it would take more than a short essay to persuade anyone of the significance of the subject in the administration of justice. More modestly, my aim in this paper is to bring to light the relevance of exemplars, paradigmatically good judges, for a theory of adjudication. More specifically, I will argue that exemplars are critical for instilling the judicial virtues that are necessary for correct legal decision making as well as constructing a theory of legal reasoning. Thus, exemplary judges, I shall contend, play an important role in both personal development and theory development. Since such exempla are not only real judges but also fictional ones, literature is useful for improving judicial practice as well as theorizing about excellence in judging. There are, however, different notions of exemplarity that might be relevant to legal reasoning and diverse ways in which a theory of adjudication that gives an important place to exempla might be developed. I begin by discussing some theoretical alternatives and specifying the version of exemplarism I find most promising.

EXEMPLARISM

A theory of legal reasoning that gives a place to exemplars might take different forms. To start with, there are exemplary decisions or cases as well as exemplary judges. Thus, one could distinguish between case-based exemplarism and agent-based exemplarism.⁴ Whereas the former focuses on the role of leading cases in legal reasoning, the latter examines the place of exemplary judges in a theory of adjudication. I emphasize the role of exemplary judges, rather than exemplary cases, in a theory of legal reasoning. My claim is that issues concerning the agents who are responsible for the best legal decisions or which characteristics they should have to yield exemplary decisions are relevant for developing a theory of legal reasoning. To be sure, an agent-oriented approach to legal exemplarism is not meant to replace a conception of legal reasoning that gives leading cases or decisions a central role in the development of the law. Quite the contrary, both approaches, I would argue, are best understood as

complementary. The study of paradigmatically good judges, alongside the study of paradigmatically good decisions, is critical for developing a theory of adjudication that gives subjects their due in the administration of justice.

Agent-based exemplarism can be either foundational or nonfoundational. According to the foundational version, the identification of paradigmatically good judges provides the foundation of a theory of adjudication. In this view, judgments about how judges should decide are derived from particular judgments about the identity of exemplary judges. The identity of judges enjoys a conceptual priority over theoretical judgments so that the evaluative properties of decisions are defined in terms of paradigmatically good judges. We do not have, in this approach, any criteria for good legal decision making in advance of identifying exemplary judges. Rather, judgments about the identity of paradigmatically good judges provide the basis for constructing a theory of adjudication. Such a theory would be the result of an empirical investigation into how exemplary judges actually decide cases.⁵

This ambitious form of agent-based exemplarism seems to me to be quite problematic. Most importantly, it rests on a highly untenable view of theory construction. It is not as if one could merely collect data on exemplars and then build up a theory about exemplary legal decision making. The idea that there is some raw data against which theories may be tested has long ago fallen into disrepute, and its credentials when it comes to data concerning exempla are no better. A more plausible view about how theory and data relate to each other appeals to coherence-oriented methods, such as reflective equilibrium. When developing a theory, we work from “both ends,” as Rawls put it,⁶ so that we revise theoretical judgments about how cases should be decided in light of particular judgments about the identity of exemplars, which are also revisable in light of our more theoretical judgments about good legal decision making. There is no conceptual priority of particular judgments about the identity of exemplars over theoretical judgments about how cases ought to be decided, but rather, there is a relation of interdependence between both sets of judgments. Assigning exempla a foundational role within a theory of adjudication assumes a deeply unsatisfactory view about how data and theory relate to each other.⁷

A nonfoundational version of agent-based exemplarism looks more promising. In this view, exempla have an important place in a theory of

legal reasoning, even if they cannot be said to provide the foundation for such a theory. There are two main roles, I would argue, that exempla may play in a theory of adjudication: the notion of a paradigmatic good judge is critical to both inculcating the traits of character that are necessary for good legal decision making and developing a theory about excellence in judging. I shall take up the discussion of each of these roles in turn, but before I do that let me further clarify the kind of exemplarism I am advocating by explaining in some detail the notion of exempla that I take to be relevant to legal reasoning and, more specifically, to judicial reasoning.

EXEMPLARY JUDGES

The version of exemplarism I favor uses the resources of virtue theory to describe exempla. By this virtue approach to exemplarism, exemplary judges are those who possess the judicial virtues, that is, the traits of character that are necessary to excel at the functions institutionally assigned to judges.⁸ The judicial virtues include moral virtues as well as epistemic or intellectual virtues. Honesty, magnanimity, courage, and prudence are among the moral virtues we expect good judges to possess. The good judge also has a number of intellectual virtues, such as open-mindedness, perseverance, intellectual autonomy, and intellectual humility. Among the intellectual virtues, the virtue of practical wisdom, or *phronesis*, stands out as a particularly important virtue for successful judicial decision making. This virtue is necessary to arbitrate between the demands imposed by the specific virtues in cases in which these demands overlap or conflict, to determine the right mean in which virtue consists, and to specify what virtue requires in the particular case.⁹

To be sure, the virtue of justice is paramount in judicial legal decision making as well. This virtue cannot find an easy place within a theory of virtue: the virtue of justice, unlike other virtues, cannot be understood as a mean between two vices, neither can it be associated with a characteristic motive.¹⁰ Despite these difficulties, the good judge can hardly be described without appealing to the virtue of justice: this virtue is, as Hart says, the more juridical of the virtues and a virtue especially appropriate to law.¹¹

In addition to the general moral and intellectual virtues, the judicial virtues also include the virtue of fidelity to law or judicial integrity, which

is a virtue specific to the role of the judge. Finally, it is a mark of exemplarity in the context of judicial decision making to exhibit a set of institutional virtues, that is, the traits of character that are necessary to ensure the proper functioning of institutional bodies.¹²

Judges who have all or some of these virtues attract admiration.¹³ That is to say, exemplary judges are also admirable judges. Although there is an important connection between exemplarity and admiration, I would not go as far as identifying exempla exclusively on the basis of the emotion of admiration, as some exemplarists, most importantly Zagzebski,¹⁴ propose. According to Zagzebski's account, exemplars are persons who are most admirable, and we identify the admirable by the emotion of admiration. This reliance on the emotion of admiration to identify exemplarity seems to me, however, to be problematic. To start with, the proposal to identify exemplars by the emotion of admiration assumes that most observers will find the exemplar naturally admirable, but this assumption seems to be overly optimistic: only the humane person can like or dislike people properly, as Confucius says.¹⁵ In addition, it does not seem to be the case that most people converge in their feelings of admiration, partly because judgments about who is admirable are not theory-free judgments, but depend on some previous, even if inarticulate, conception of virtue. The appeal to the emotion of admiration does not provide us with a pretheoretical and straight way of identifying exemplarity: there are no raw emotions—just as there are no raw data—but judgments about who to admire are also informed by some preexistent theoretical ideas about the good. What an admirable judge is, is not something we find out merely by empirical investigation, but we do have some previous conception of correct judging *before* identifying who the good judges are.

The description of exemplars in terms of virtue allows us to capture some of the qualities we typically associate with the good judge. Some of the character traits that I have mentioned above are among those that lay people, as much as jurists, would identify with exemplarity. It would be most surprising if someone were to say that justice is not a feature good judges are expected to possess. This is, nonetheless, compatible with having different conceptions of exemplarity in judging, since the virtues might be further specified in different ways. Surely, not everyone has the same idea of justice or agrees on what a just judge is. Consequently, people might differ in their identification of good judges as well.¹⁶ Furthermore,

there might also be different ways in which a judge may be an exemplary one. That is to say, there may be different models of exemplarity.¹⁷ Thus, the description of exemplary judges by appealing to the judicial virtues provides a way of identifying exemplars that allows for variation, but without depriving exemplars of their normative content, since not every trait could count as a judicial virtue, and not every specification could count as a specification of the virtue of justice.

Exemplars, so conceived, have an important place in a theory of legal reasoning. As opposed to the “objective,” “subject-less” conception of legal reasoning that is mostly assumed in legal scholarship, agent exemplarism gives subjects their due in the administration of justice. However, the theory, with its reliance on models of virtue, is far from being a mere vindication of subjective legal decision making, and it remains, in an important sense, normative.¹⁸ The normative bite of a theory of legal reasoning that recognizes the relevance of paradigmatically good judges is best viewed, I would argue, by reflecting on the role that such exemplary people play in both the professional development of the judiciary and the development of a theory of adjudication, which I turn now to examine.

EXEMPLA AND THE CULTIVATION OF VIRTUE

Exempla are instrumental to instilling virtues in the judiciary by serving as models to imitate.¹⁹ If virtue, as Aristotle argued, is acquired by imitation, then we need models who are worthy of imitation.²⁰ Paradigmatic good judges, both real people and fictional ones, provide judges with models that can be emulated. How does such imitation proceed? How do exempla contribute to the cultivation of judicial virtue? Imitation can hardly be viewed as an automatic process whereby one mimics the exemplar’s behavior; rather, it is a reason-guided activity. More specifically, imitation could be understood as a form of analogical reasoning. Arguably, paradigmatic characters could provide the basis for the following kind of argument:

One should emulate P.
 P did x in situation y.
 A situation similar to y obtains.
 Therefore, one should do x.²¹

To understand imitation as a form of analogical reasoning brings to light the extent to which the process of emulation involves the exercise of reason. However, there are several problems with this account of what is involved in imitation. First, according to this argument, the identification of one's situation as similar to the situation faced by the exemplar functions as a premise from which to derive the conclusion that one ought to do as the exemplar did. However, the identification of relevant similarities between situations already presupposes a kind of moral sensitivity that is distinctive of those who are worthy of imitation. Thus, it is not as if one draws an analogy and then imitates, but one needs to already possess some degree of virtue in order to be able to draw the relevant analogies between the situation faced by the exemplar and one's own situation.

Second, the foregoing argument establishes that imitation results in the person doing just as the model did. But this is a poor conception of what is involved in the process of emulation. Imitation, when successful, leads to developing the kind of moral and intellectual autonomy that is characteristic of exemplary people. Imitation does not amount to a mindless repetition of the exemplar's behavior.²² The point of emulation is not to get the young or the student to do as the master does, but rather to develop the features of character we find admirable in them, such as the capacity to form one's views and act accordingly. It is not petty fidelity to the master's ways that one seeks in emulation, but rather the acquisition of those traits of character that make the master worthy of imitation.

Finally, there is an additional reason why it may not be the case that one should do as P did: the space of possibility available to the exemplar might be very different from the possibilities we have. Maybe P did x because that was, back then, the best possibility available, but had he faced such situation now, he would have acted differently. Not only may the possibilities differ, but the historical circumstances might also differ dramatically. Exempla are particular individuals living in concrete situations, and like any other human being, they cannot escape having specific shortcomings and limitations. Thus, imitation cannot merely be a matter of doing now what the exemplar did before, for virtue might require that we act otherwise under the current circumstances. This, however, rather than detracting from the value of exempla, shows their normative power. We might disagree about what exemplary people did in the past or the decisions they made, but we still admire the way they faced their situations, and we learn

how to act and decide in our current circumstances by looking at the way they behaved and decided in the past.

Hence, a more complicated picture of the process of imitation than the description provided by the foregoing argument is required. Several dimensions to successful emulation must be taken into account. First, the emulation of paradigmatic characters has an important emotional aspect. For such emulation to be more than a superficial imitation of external behavior, it is necessary to emulate the emotional reaction of others as well.²³ One needs to be able to learn not only about what others did, but also about the way they felt about the situations. Virtue, as Aristotle always said, is a matter of both action and feeling.²⁴ Thus, successful imitation requires that one understands how the exemplar acted and felt in a situation in order to be able to virtuously respond to a different set of circumstances.

Second, imitation critically involves the exercise of imagination.²⁵ The imaginative participation in the exemplar's ethical experience is necessary for successful emulation. One needs to be able to put oneself in the situation of the paradigmatic character to understand how the exemplar acted the way she did, what purposes she had in mind, what her attitudes and feelings were, and what she was responding to. Only after has one gained an adequate understanding of the exemplar's behavior, is one able to grasp what virtue requires in new circumstances. Thus, imagination is central to fully comprehending paradigmatic characters and extending that understanding to practice.

Third, imitation, when successful, results in a transformation of oneself.²⁶ One imitates with a view to becoming the sort of person like the model. Through the process of emulation one learns to see things the way the virtuous person sees them. That is to say, one acquires the kind of sensibility that is characteristic of the exemplars. When one succeeds at emulating the exemplar, one makes the exemplar's way of seeing things one's own.

In short, successful imitation results in developing a kind of character that is worthy of admiration. This transformation of the self, it might be argued, is not open to all. Most people cannot become anything like the exemplars they admire.²⁷ To start with, virtue is dependent on various sorts of circumstances, as discussions over "moral luck" have shown.²⁸ In addition, it just does not seem to be within our power to bring about the psychological structure constituting moral excellence in ourselves.²⁹ I will

not take a stance on these issues—although I find Mencius’ claim that “the sage and ordinary mortals are of a similar kind”³⁰ much more persuasive than views that make excellence the province of a few, thereby cutting off morality from the will and universal accessibility. But the important point I would like to highlight is that—discussions over whether excellence can be accomplished by all human beings notwithstanding—we can all surely become better than we currently are. Even if it turns out that not every judge can become an exemplary one, they can all come to possess some virtues in a greater degree than they now do, regardless of the circumstances they are in. Exemplars help judges improve by providing ideals that, unlike other normative ideals, they can, at least, approximate.³¹

CONSTRUCTING A THEORY OF ADJUDICATION

Exemplars play an important role in the development of a theory of legal reasoning as well. Not only do exemplary judges illustrate the judicial virtues, but they are also at the origin of our conception of judicial virtue. Clark writes:

It is possible, of course, to engage in a theoretical discussion of the virtues—to analyse and argue about what forms of what virtues are desirable and why, given various views of what it means to thrive. But that is like trying to choose or design clothes by imagining them on hangers. We need someone to put them on and model them for us if we want to know what they really look like. So, rather than merely defining the virtues in the abstract, we construct them in part through moulds and models. A person says to himself or herself, “I want to be brave like my father, wise like my teacher, tough like my coach.” Or, alternatively, “I do not want to be weak or foolish or irresponsible like X, and Y, and Z.” We also use famous people, or what we think we know of them, to embody traits to which we aspire or we hope to eschew. The point here is not just that these people *represent* traits of character in our imagination. More than that, they are also the vessels through which we construct those traits. We do not have some agreed-upon and clear idea of courage or wisdom, which a father or teacher then comes to stand for in our minds, or an unambiguous picture of greed or materialism, for which a particular villain, real or fictional, becomes a shorthand. Those people are the ways in which we come to conceive of those ways of being.³²

Thus, exemplars do not merely embody a previous conception of virtue and vice, but they also root these notions. Not only do exemplary judges contribute to inculcating the judicial virtues in the judiciary and thereby improving the judicial practice, but they also contribute to fleshing out what judicial virtue consists of in the first place and what virtuous judicial practice looks like. In addition to being efficacious for personal development, they importantly contribute to theory development.

Exemplars aid the task of theorizing about excellence in adjudication in several ways. To start with, they help us refine and revise our conception of judicial virtue. We may, in light of what we learn about exemplary judges, come to improve upon our views of what constitutes the best judicial practice. Judgments about exemplary judges also provide us with a test against which one may evaluate theories of adjudication.³³ Theories about how judges should decide should fit judgments about the identity of paradigmatically good judges. Of course, such judgments are, like any other particular judgment, revisable in light of theoretical reasons. But it does tell against a theory about how judges should decide that, when assessed by the theory's own standards, exemplary judges are found to be not paradigmatically good judges. In addition, reflection upon exemplary judges invites a number of questions that importantly further the aims of inquiry.³⁴ For example, what distinguishes the exemplars' response from the responses of others? What conditions are necessary for being a good judge? Which are sufficient? What is it that we admire in great judges? A careful examination of exemplars may yield insight into larger theoretical questions about how judges should decide.

Finally, exemplars help us enrich our conception of virtues.³⁵ Virtues are often illustrated by a limited set of traditional exemplars, and this leads to a more impoverished and less sophisticated picture of what constitutes excellence in judging. For instance, the virtue of practical wisdom is traditionally associated with Solomon. As a result, we come to see this virtue as endowing its possessor with the kind of imaginative-ness and resolution we expect in good judges, but also as tied up with a view of adjudication that is in severe tension with the demands of the rule of law. The analysis of an enlarged canon of relevant models may lead to constructing more refined versions of the virtues.³⁶ In sum, although we can certainly engage in an abstract description of the virtues of judging, reflecting upon exemplars contributes to developing a more

subtle and complex account of excellence in adjudication in a number of ways.

EXEMPLA, LAW, AND NARRATIVE

A theory of legal reasoning that recognizes the relevance of exemplars in the development in both personal development and theory development gives narrative a relevant place within the theory. Sometimes, we learn about exempla and the way in which they virtuously faced the situations confronting them by first-hand experience. The group of people we have a direct relationship with – teachers we study with, our parents or grandparents, friends, and coworkers – can sometimes provide us with models we either want to imitate or hope to avoid. But fortunately, the circle of people we can learn from is much larger than this group. We also learn about virtue from characters from the past, from people who are very distant from our acquaintance, and from exemplary individuals who have existed only in fiction. We learn from all of these exemplary people only through narrative. Thus, narratives are critical to broadening the horizon of exempla we admire and hope to emulate. This function of narratives is as important in law as in any other context: although we can certainly learn about judicial virtue from our law professors and peers, a great deal is learned through the stories told about great judges or legal thinkers with whom we have never interacted.³⁷

Two kinds of narratives make an extended set of models available to us: historical narratives and literary narratives. We learn about virtue, judicial or otherwise, through the stories circulating about outstanding individuals we have never met, such as historical writings of exemplary characters and depictions of admirable people in literary texts. Despite the obvious differences between historical and literary narratives, they might also be closer than they appear to be. Until the end of the eighteenth century, history was a branch of literature in the West, and the historical texts of Imperial China extensively relied on literary sources.³⁸ Stories circulating about real people from the past, both those who made it into historical texts and those who are known only to a smaller circle of people, and stories even about contemporary people might be, in important respects, like literary narratives. Regardless of their connections, both kinds of historical and literary narratives are

central to exemplarism insofar as they provide us with models to emulate beyond those that we encounter on the basis of first-hand experience.

It is critical to note that the kind of exempla made available through narratives include not only great heroes but also ordinary ones. Ordinary heroes—that is to say, people who have not done extraordinary things in an extraordinary way but who, nevertheless, have excelled at facing our most common problems and troubles, and have an admirable understanding of the meaning of life and what matters to us—are critical to our learning about basic features of ordinary moral experience. Similarly, in the context of law, we may learn not only from those judges who have faced important cases involving moral dilemmas, or who have worked in regimes—such as the Nazi regime or the apartheid regime in South Africa—that required them to face danger and fight great evils, but also from those judges that have to address far more routine cases and work under less exceptional circumstances.³⁹ Ordinary exempla are also of the utmost importance to theory development. Moral theory oftentimes focuses on the raw tensions involved in moral dilemmas, just as legal theory is mostly preoccupied with the problems posed by hard cases that involve deep conflicts of values. However, regular moral life (as much as the life of the law) is often conducted in the absence of severe conflicts, which is not to say that it does not nevertheless pose great moral challenges. Narratives of ordinary heroes help us develop a theory of virtue and, more specifically, of judicial virtue, that instead of focusing on extremely difficult cases, has the resources to account for the whole of our experience and provides guidance in the ordinary circumstances that characterize most of our daily life.⁴⁰

Finally, a theory of legal reasoning that makes room for exemplars brings to light yet another way in which literature is relevant to law: to wit, literature significantly enlarges the set of models of judicial virtue. As has been argued by many, literature importantly contributes to the development of the moral virtues as well as the epistemic or intellectual virtues.⁴¹ One of the ways in which it does so, I would argue, is by providing rich descriptions of characters that are worthy of our admiration as well as characters that we do well to avoid. Indeed, more often than not, fictional judges are models of judicial vice, rather than models of judicial virtue. Judges are frequently portrayed in literary texts as corrupt (as in Shakespeare's *Measure for Measure*, Euripides' *Hecuba*, and Quevedo's *The Dream*

of the Skulls), indifferent (as in Hugo's *The Last Days of a Condemned Man*, Rabelais' *Gargantua and Pantagruel*, and Tolstoi's *Resurrection*), overly formalistic (as in Shakespeare's *The Merchant of Venice*), or simply as fools (as in Grisham's *The Appeal* or García Marquez's *One Hundred Years of Solitude*). But this does not detract from the value of literature as a source of exempla of judicial virtue. Reflection upon models of vice allows judges to appreciate serious consequences of judicial vice, and this may lead them to see the importance of cultivating the judicial virtues as well as understanding (by contrast) what judicial virtue requires.⁴² Not only does literature aid personal development, but literature, insofar as it extends the relevant repository of both positive and negative exemplars, is also an important aid to the development of theory. Literary depictions of both excellence and vice help us refine and enrich the conception of the character traits that are characteristic of the good judge. In sum, literature not only presents us with an array of models for judges to imitate (or avoid), but it is also a vehicle through which we may construct richer versions of the judicial virtues.

EXEMPLARITY AND DISAGREEMENT

In this paper, I have defended the value of exemplars for a theory of legal reasoning. I have argued that exemplars play two main roles in such a theory: they help instill the virtues in the judiciary by providing models that judges may emulate, and they aid the task of theorizing about judicial virtue in a number of ways. In addition, I would argue, exemplars help to bring about agreement as it is more likely that people's particular judgments about the identity of paradigmatically good judges converge than that they reach agreement at the level of theory.⁴³ For example, although there seem to be insuperable differences among competing theoretical approaches to constitutional interpretation and the adjudication of constitutional controversies, most participants in the debate would agree in identifying Marshall or Holmes as exemplary judges.⁴⁴

This is not to minimize the extent to which a theory of legal reasoning that makes room for exemplars has to face the recalcitrant problem of disagreement. To the contrary, an exemplarist theory of legal reasoning gives rise to two distinct forms in which the problem of disagreement may

present itself. First, there might be disagreement among exemplary judges about how a given case should be decided.⁴⁵ This, however, does not speak against the theory, but rather, makes it applicable in the conditions of value pluralism that characterize modern societies.⁴⁶ Secondly, there might be different conceptions of exemplarity, some of which may even have incompatible properties. In other words, there may be disagreement about the qualities that make an individual exemplary. As a result, judgments about who the exemplary people are may also differ. Similarly, because there is a plurality of competing views on adjudication and political morality, there does not seem to be a shared ideal of judicial virtue or consensus about whether particular judges are exemplary ones.

Hence, a theory of adjudication that makes room for exemplars does not solve the perennial problem of disagreement. If anything, it provides us with a different angle from which to address this problem. More specifically, it suggests that debates over theory might be profitably addressed by reflecting on the way in which judges who are worthy of admiration and emulation actually behave, thereby making the problem of disagreement somewhat more tractable.

Despite its limitations, the incorporation of exempla in a theory of legal reasoning is, I believe, an important step toward articulating a normative theory of adjudication that gives, nevertheless, due recognition to the role that subjects play in the administration of justice. Most importantly, assigning exempla a prominent place within a theory of legal reasoning allows us to construct, or so I have argued, a more inspirational and aspirational conception of the judicial function than the technical one embedded in current legal culture.

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1. Some discussion may be found in Roscoe Pound, *The Formative Era of American Law* (Boston: Little, Brown and Co., 1938); George Currie, "A Judicial All-Star Nine," 1 *Wisconsin Law Review* 3 (1964); Bernard Schwartz, "The Judicial Ten: America's Greatest Judges," 3 *South Illinois University Law Review* 405 (1979); and James E. Hambleton, "The All Time, All-Star, All-Era Supreme Court," 69 *American Bar Association Journal* 463 (1983). Some biographical sketches of the careers and contributions of renowned judges include: Mads Andenas & Duncan Fairgrieve, *Tom Bingham and the Transformation of the Law* (Oxford: Oxford University Press, 2009); Howard Ball & Phillip Cooper, *Of Power and Right: Hugo Black, William O. Douglas and the America's Constitutional Revolution* (New York: Oxford University Press, 1992); Howard Ball, *Hugo Black: Cold Steel Warrior* (Oxford: Oxford University Press, 1996); Gerald Gunther, *Learned Hand: The*

Man and the Judge (Oxford: Oxford University Press, 2010); Edward White, *The American Judicial Tradition: Profiles of Leading American Judges*, 3rd rev. ed. (New York: Oxford University Press, 2007); John R. Vile, *Great American Judges: An Encyclopedia* (Santa Barbara CA: ABC-CLIO, 2003); Tinsley Yarbrough, *Harry A. Blackmun: The Outsider Justice* (Oxford: Oxford University Press, 2008). See also the series “Exemplary Judges” published by the Mexican Supreme Court of Justice (in Spanish), available at <http://www.scjn.gob.mx/libreria/Paginas/catalogo.aspx>.

2. Admittedly, there are non-negligible differences between the Continental legal culture and the Anglo-Saxon one. Formalism has had an impact in civil law systems unheard of in common law countries. As a result, judges have enjoyed somewhat more visibility in common law countries than in civil law countries. Of course, the very structure of civil law systems and the role they give to judges, as opposed to the case-based common law systems, also explains the relative importance of judges—of particular judges—in the Anglo-Saxon legal culture and the culture at large when compared with their place in Continental Europe. The difference, however, is only one of degree. The discussion of what makes for good legal decision making is largely conducted both in Continental scholarship and Anglo-Saxon scholarship in a way that sidesteps any serious consideration of those who excel at the practice of adjudication.
3. But see Claudio Michelon, “Practical Wisdom in Legal Decision-Making,” in *Law, Virtue and Justice*, eds. Amalia Amaya & Hock Lai Ho (Oxford: Hart Publishing, 2012).
4. See Zagzebski’s distinction between exemplarist ethical theories that make persons the primary exemplars, exemplarist act-based theories, and exemplarist outcome-based theories. See Linda Zagzebski, *Divine Motivation Theory* (Cambridge: Cambridge University Press, 2004), 48.
5. A foundational agent-based version of exemplarism is defended by Linda Zagzebski for both ethics and epistemology. See Zagzebski, *id.*; “Exemplarist Virtue Theory,” 41.1–2 *Metaphilosophy* 41 (2010); “Ideal Agents and Ideal Observers in Epistemology,” in *Epistemology Futures*, ed. S. Hetherington (Oxford: Oxford University Press, 2006), 131–47.
6. John Rawls, *A Theory of Justice*, rev. ed. (Cambridge MA: Harvard University Press, 1999), 18.
7. Ultimately, the problem is not to give exemplars a foundational role but to assume that a theory needs to have a foundational structure (whether the foundations be exempla or any other foundation) for it to be able to explain and justify the practice. Surely we want theories that have the resources to do that, but the structure of such theories need not be foundational. Coherentist structures are, for a number of reasons, preferable to the traditional foundationalist ones. For a discussion of the coherentist-foundationalist debate as it applies to law, see Amalia Amaya, *The Tapestry of Reason: An Inquiry into the Nature of Coherence and its Role in Legal Argument* (Oxford: Hart Publishing, forthcoming).
8. Exemplary judges possess the traits of character that are conducive to good legal decision making to a higher degree than most judges, but they do not need to possess all the virtues nor perfectly embody them. Most certainly, they do not have any super-human skill, ability, or character. Thus, Dworkin’s Hercules would not be an exemplary judge in that sense. There are two main features that set Hercules apart from exempla of virtue. First, principles play a role in Hercules’s reasoning that is not compatible with the role they play in the reasoning of a virtuous judge, insofar as the virtuous judge would always test the application of both rules and principles against the particular features of the case. Second, a model of virtue provides judges with a normative ideal that they may approximate. In contrast, Hercules idealizes away from human conditions and capacities, and this sheds serious doubt over whether Hercules’ approach posits a normative standard that is relevant for us, i.e., a standard that is capable of guiding and improving the judicial practice. I thank Randy Gordon for prompting me to contrast Hercules with the ideal embedded in the virtuous judge.
9. See Linda Zagzebski, *Virtues of the Mind* (Princeton NJ: Princeton University Press, 1996), 211–31.

10. See Bernard Williams, *The Sense of the Past* (Princeton NJ: Princeton University Press, 2006), 205–17.
11. See H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1997), 7.
12. For instance, one might list the virtues of the communicator and the virtues involved in reaching consensus among the virtues that are necessary to ensure the proper functioning of institutional bodies. The issue of which virtues are conducive to well-working institutional bodies is different from the question of whether institutions, as opposed to individuals, may possess virtues. On the latter question, see Reza Lahroodi, “Collective Epistemic Virtues,” 21.3 *Social Epistemology* 281 (2007), and Miranda Fricker, “Can There Be Institutional Virtues?,” *Oxford Studies in Epistemology*, vol. 3, eds. T. S. Gendler and J. Hawthorne (Oxford: Oxford University Press, 2010), 235–52.
13. I am assuming here, contrary to the thesis of the unity of the virtues, that judicial exemplarity does not require the possession of every virtue. If this is so, then, there will be different types of judicial exemplarity. For a defense of the claim that there are irreducibly different kinds of moral exemplarity, see Lawrence A. Blum, “Moral Exemplars: Reflections on Schindler, the Trocmes, and Others,” 13 *Midwest Studies in Philosophy* 196 (1988). For a discussion of some studies indicating that moral excellence may be exemplified in different ways, see Lawrence J. Walker & Karl H. Hennig, “Differing Conceptions of Moral Exemplarity: Just, Brave, and Caring,” 86 *Journal of Personality and Social Psychology* 629 (2004).
14. For references, see *supra* note 5.
15. Confucius, *The Analects* (New York: Oxford University Press, 2008), 4.3.
16. Although it is, I think, an advantage of exemplarism that it helps to bring about agreement, as people are more likely to agree on who the good judges are than on what good judging requires. I will touch on this issue in the last section of this paper.
17. Blum distinguishes four main kinds of moral exemplarity: moral heroes, Murdochian moral exemplars, the idealists, and the responders. See Blum, *supra* note 13. Walker and Hennig studied three types of moral exemplars: the just, the brave, and the caring. See Walker & Hennig, *supra* note 13. Similarly, there might be different ways in which judicial exemplarity is exemplified. I leave the discussion of a possible taxonomy of judicial exemplarity for another occasion.
18. It might be argued that there is an inherent tension in combining exemplarism with virtue theory: exemplarity is more context-dependent than virtue, and thus, an exemplarist theory of legal decision making advocates a looser, more flexible, normative standard than a virtue-based one, which aims to be valid across contexts. One could respond to this objection by denying that a virtue approach to normativity aims to provide any transcultural standards. A normative approach based on the virtues is relativistic in that different cultures embody different virtues. Thus, there is no tension between virtue theory and exemplarism, as what counts as virtuous shifts with context as much as what counts as exemplary does. I do not find this line of response appealing though: whereas there are certainly important relativist versions of virtue theory (see, most prominently, Alasdair MacIntyre, *After Virtue*, 3rd ed. (Notre Dame: University of Notre Dame Press, 2007)) a nonrelative account of the virtues (see Martha Nussbaum, “Non-Relative Virtues: An Aristotelian Approach,” 13 *Midwest Studies in Philosophy* 32 (1988)) seems to me to be a more promising way to develop a virtue-based account of normativity. A response to the objection claiming that virtue theory and exemplarism are in tension because the former defends a less context-dependent conception of normativity than the latter, does not consist in claiming that virtue is a relative concept, but rather in denying that exemplarity should be understood along relativist lines. Unlike other approaches to exemplarity—for example, those that ground exemplars on the emotion of admiration—that put in place normative standards that importantly vary with context, a virtue approach to exemplarity, I would argue, has the advantage of providing exemplarism with the resources needed to put worries about relativism to rest. I thank Maksymilian Del Mar for raising this objection.

19. In the Meeting of the Latin American Commission of Judicial Ethics that took place in 2008 in Panama City, it was agreed that it was convenient to publish, in each country, a series on “Exemplary Judges,” which would present the biography of outstanding judges, with a view to “being an incentive for the young who aim to be judges.” In the preface of the first issue of the Mexican series, Justice Ortiz Mayagoitia writes: “I hope that this biography succeeds in motivating many judges to improve their professional activity” (Leopoldo López, *Antonio Florentino Mercado*, Jueces Ejemplares Series, vol. 1, SCJN, México, 2010) (my translation).
20. Aristotle, NE 1103a33–b22. Furthermore, on the Confucian tradition, emulation is not merely one way of inculcating virtuous behavior, but it was considered to be by far the most efficient way. See Amy Olberding, *Moral Exemplars in the Analects: The Good Person is That* (New York: Routledge, 2012), 10.
21. See Sor-Hoon Tan, “Imagining Confucius: Paradigmatic Characters and Virtue Ethics,” 32 *Journal of Chinese Philosophy* 414 (2005).
22. Just as habituation—the other major way of inculcating virtue—is not a mindless process either. See Richard Sorabji, “Aristotle on the Role of Intellect in Virtue,” in *Essays on Aristotle’s Ethics*, ed. A. Rorty (Berkeley: University of California Press, 1980), 201–20; and Nancy Sherman, *The Fabric of Character: Aristotle’s Theory of Virtue* (Oxford: Clarendon Press, 1989), 157–201.
23. For a discussion of the emotional aspects of emulating paradigmatic characters, see Tan, *supra* note 21, at 420–23.
24. On the relationship between virtue and emotion in Aristotle, see Rosalind Hursthouse, *On Virtue Theory* (Oxford: Oxford University Press, 1999), chapter 5; Sherman, *supra* note 22, ch. 2; and Susan Stark, “Virtue and Emotion,” 35 *Noûs* (2001).
25. For an argument to the effect that imagination is central for successful imitation, see Tan, *supra* note 21, at 417–19.
26. See *id.* at 419.
27. Blum, *supra* note 13, at 215–16.
28. *Id.*
29. Zagzebski, “Ideal Agents,” *supra* note 5, at 136; and Blum, *supra* note 13, at 216.
30. Tan, *supra* note 21, at 414.
31. An interesting objection to this line of thought—which I cannot consider here—sheds doubt over whether it would be a good thing that ordinary judges emulate exemplary ones. In this view, whereas exemplary people might well be able to do extraordinary things, we rather get nonexemplary people to play by the rules, for the consequences of nonexemplary people trying to emulate exemplars are likely to be disastrous.
32. Sherman Clark, “Neoclassical Public Virtues: Towards an Aretaic Theory of Law-making and Law teaching,” in Amaya & Ho, *supra* note 3, at 88.
33. See Zagzebski, *supra* note 4, at 41.
34. Olberding, *supra* note 20, at 188.
35. See Clark, *supra* note 32. See also A. Olberding, “Dreaming of the Duke of Zhou: Exemplarism and the *Analects*,” 35.4 *Journal of Chinese Philosophy* 625, 631 and, 635 (2008).
36. Another function—only available to foundational exemplarism—is to avoid circularity in theory by providing a foundation of the theory. See Zagzebski, *supra* note 4, at 45–46.
37. On the relation between virtues and narrative, the *locus classicus* is MacIntyre, *supra* note 18. MacIntyre’s account connects a virtue approach to normativity with a relativist position that is markedly different from the kind of objectivity that, I would claim, a virtue approach to exemplarity may bring about.
38. Tan, *supra* note 21, at 416.
39. The relevance of “ordinary” exempla for the cultivation of judicial virtue is highlighted by Wigmore. After describing the career of Ervoan Heloury Kermartin of Tréguier, in Brittany,

afterward to be hailed as Saint Yves, patron saint of the judicial profession, he writes: “he [St. Yves] had pursued this career as an ordinary man, amidst the very same conditions that surround any lawyer and any judge at any time in any country. Well may he be enshrined in our aspirations as an ensample of the ideal of Justice attainable in real life by a member of our profession!” John H. Wigmore, “St. Ives, Patron Saint of Lawyers,” 5 *Fordham Law Review* 407 (1936). Similarly, Burnett writes: “No part of history is more instructive and delighting than the lives of great and worthy men. . . . But the lives of heroes and princes are commonly filled with the account of the great things done by them, which do rather belong to a general rather than a particular history and do rather amuse the readers’ fancy with a splendid shew of greatness, than offer him what is really useful to himself. . . . But the lives of private men, though they seldom entertain the reader with such a variety of passages as the others do; yet certainly they offer him things that are more imitable, and do present wisdom and virtue to him not only in a fair idea, which is often looked on as a piece of the invention or fancy of the writer, but in such plain and familiar instances, as do both direct him better, and persuade him more.” See Gilbert Burnett, *The Life and Death of Sir Matthew Hale, Kt. Lord Chief of Justice of England* (1805), iii–v.

40. See Olberding, *supra* note 20, at 8.
41. See Martha Nussbaum, *Poetic Justice* (Boston, Beacon Press, 1995); Martha Nussbaum, *Love’s Knowledge* (Oxford: Oxford University Press, 1990); Michael DePaul, *Balance and Refinement* (New York: Routledge, 1993); Michael DePaul, “Argument and Perception: The Role of Literature in Moral Inquiry,” 85: 10 *Journal of Philosophy* 522 (1988); Alan H. Goldman, *Practical Rules* (Cambridge: Cambridge University Press, 2002); Zagzebski, *supra* note 9, at 22.
42. An interesting question, which I hope to consider in a future work, is whether there are significant differences in function between positive and negative exemplars, that is, between models of judicial virtue and models of judicial vice. More specifically, there is the question of whether the account of imitation (of positive exempla) provided above may be used to explain what is involved in the process of avoiding the kind of motives and behavior characteristic of negative exemplars. I thank Maksymilian Del Mar for raising these questions.
43. See Paul deVries, “The Discovery of Excellence: The Assets of Exemplars in Business Ethics,” 5 *Journal of Business Ethics* 193 (1986).
44. These two judges are present in the main lists of best American judges. See Hambleton, *supra* note 1, at 464. The criteria used in the various lists vary (for a comparison, see *id.* at 463) and sometimes are not even made explicit. On the account provided here, judges, such as Marshall and Holmes, would be exemplary insofar as they exhibit to a high degree some of the judicial virtues described above.
45. Similarly, Solum argues that different virtuous judges could reach different decisions in the same case. See Lawrence Solum, “Virtue Jurisprudence: A Virtue-Centred Theory of Judging,” in *Moral and Epistemic Virtues*, eds. M. Brady & D. Pritchard (Malden: Blackwell, 2003), 163–98.
46. On this problem, see Amalia Amaya, “The Role of Virtue in Legal Justification,” in Amaya & Ho, *supra* note 3.