1. Imitation and analogy

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Abstract
Exemplary judges are important for legal theory and legal practice. Still the conception of imitation of exempla as analogical reasoning is criticized here. Imitation as character development may well be more important. Thus, there is, at least, it is argued, one kind of exemplary reasoning – namely, imitative reasoning – that is not coextensive with analogical reasoning. Exempla have educational value, help in theorizing about excellence in adjudication, and are pivotal in the evolution of legal culture.

Keywords: exemplars, imitation, virtue, character

1 Introduction
Exemplary reasoning plays a prominent role in both legal theory and legal practice. ‘Exemplary reasoning’ is understood as ‘reasoning by analogy’ or ‘reasoning by example’, but regardless of whether one uses ‘exemplary reasoning’ as logically equivalent to analogical reasoning, or to refer to reasoning ‘case-by-case’, this form of reasoning is mostly viewed as involving reasoning with exemplary cases.1 There is, I would argue, another kind of exemplars that are highly relevant to law, namely, exemplary judges, that is to say, paradigmatically good judges. In this essay, my aim is to provide an account of what those exempla are and which roles they might play within a theory of legal reasoning. This analysis may also clarify the issue of how exemplary reasoning and analogical reasoning relate to each other.

The structure of this chapter is as follows.2 Section 2 distinguishes between two kinds of exemplarism, case-based exemplarism and

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1 On the use of these terms, see Brewer, 1996, nn. 6, 50, and 51 and accompanying text.
2 Some parts of this chapter build on previous work on exemplarity that appeared in Amaya, 2013.
subject-based exemplarism, which is the focus of the rest of the chapter. Section 3 provides a virtue account of (subject-) exempla, according to which exemplary judges are, first and foremost, exemplars of virtue. Section 4 discusses several models of judicial exemplarity and shows the variety and broadness of the repertoire of models that may potentially contribute to legal argument. Such contribution is always made via ‘imitation’, that is to say, exemplary judges provide models that we may emulate. The nature of imitation is discussed in section 5: the view according to which imitation is a matter of analogy is criticized and an alternative model of imitation as character development is put forward. Section 6 explores the different ways in which imitation of exempla is relevant to law; more specifically, it argues that exempla play a critical role in legal education, legal reasoning, and the evolution of legal culture. The conclusion suggests a few avenues for further research (section 7).

2 Two versions of exemplarism

An important distinction needs to be drawn between two kinds of legal exempla, namely, exemplary decisions or cases and exemplary judges. It has been the former, rather than the latter, that have been the focus of most work on exemplary reasoning. However, exemplary judges, alongside exemplary cases, are highly relevant to both legal theory and legal practice. Thus, we may distinguish between two types of exemplarism: case-based exemplarism, which examines the role of leading cases in legal reasoning, and agent-based exemplarism, which focuses on the study of exemplary judges. These two versions of exemplarism are not in opposition to each other, but they are rather complementary. Each of them contributes in its own distinctive way to improving legal practice and theorizing about that practice.

Agent-based exemplarism can be either foundational or non-foundational. According to the foundational version, the identification of paradigmatically

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3 Some discussion may be found in Pound, 1938; Currie, 1964; Schwartz, 1979; and Hambleton, 1983. Some biographical sketches of the careers and contributions of renowned judges include: Andenas and Fairgrieve, 2009; Ball and Cooper, 1992; Ball, 1996; Gunther, 2010; White, 2007; Vile, 2003; and Yarbrough, 2008. See also the series ‘Exemplary Judges’ published by the Mexican Supreme Court of Justice (in Spanish).

4 See Zagzebski’s related distinction between exemplarist ethical theories that make persons the primary exemplars, exemplarist act-based theories, and exemplarist outcome-based theories: Zagzebski, 2004, p. 48.
good judges provides the foundation of a theory of adjudication. In this view, judgments about how judges should decide are derivative from particular judgments about the identity of exemplary judges. That is to say, the latter enjoys a conceptual priority over theoretical judgments so that the evalulative properties of decisions are defined in terms of paradigmatically good judges. We do not have, on 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 investigation into how exemplary judges actually decide cases.5

This ambitious form of agent-based exemplarism is rather 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 (1999, p. 18) put it, 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.6

A non-foundational version of agent-based exemplarism looks more promising. On this view, exempla have an important place in a theory of legal reasoning, even if they cannot be said to provide the foundation for

6 Ultimately, the problem is not that of giving exemplars a foundational role but that of assuming 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 Amaya, 2015.
such a theory. There are three main roles for exempla in a theory of adjudication: the notion of a paradigmatic good judge is critical to inculcating the traits of character that are necessary for good legal decision-making, developing a theory about excellence in judging, and giving an account of the evolution of legal culture.

3 Exemplarity and virtue

How can we go about identifying exempla? What is it that makes a particular judge an exemplary one? According to an influential approach, developed by Linda Zagzebski, exemplars may be identified through the emotion of admiration. On 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, 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 over-optimistic: only the humane person can like or dislike persons properly, as Confucius says. 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 pre-theoretical and straightforward way to identify exemplarity: there are no raw emotions – just as there are no raw data – but judgments about who to admire are also informed by some pre-existent 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.

Instead of using the emotion of admiration as the basis for a theory of exemplarity, my suggestion is that we use the resources of virtue theory to describe exempla. On this virtue approach to exemplarism, exemplary judges are those who possess the judicial virtues, i.e. the traits of character that are necessary to excel at the functions institutionally assigned to judges. 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, or 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 come into conflict, to determine the right mean in which virtue consists, and to specify what virtue requires in the particular case (Zagzebski 1996, pp. 211–231).

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 (see B. Williams, 2006, pp. 205–217). Despite these difficulties, the good judge can hardly be described without appeal to the virtue of justice: this virtue is, as Hart says, the more juridical of the virtues and a virtue especially appropriate to law (see Hart, 1994). 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, i.e. the traits of character that are necessary to ensure the proper functioning of institutional bodies.8

Judges who have all – or some – of these virtues compel admiration. That is to say, exemplary judges are also admirable judges. Zagzebski (2017, p. 113) defines the concept of virtue in terms of admiration. In her view, a virtue is ‘a deep and enduring acquired trait that we admire upon reflection’. But this is the relationship between virtue and admiration wrongly reversed. We admire a person because of her virtue, it is not that a person is virtuous because we admire her. A virtue account of exemplarity recognizes the importance of admiration in an exemplarist theory, without defining, in a problematic way, exemplarity (and virtue) in terms of admiration.

An objection may, however, be raised against a virtue approach to exemplarity. 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

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8 For instance, one might list the virtues of the communicator and the virtues involved in reaching consensus among those necessary to ensure the proper functioning of institutional bodies. The issue of which virtues are conducive to effective institutional bodies is different from the question of whether institutions, as opposed to individuals, may possess virtues. On the latter question, see Lahroodi, 2007, and Fricker, 2010.
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 may be relativistic in that different cultures embody different virtues. Then there is no tension between virtue theory and exemplarism, as what counts as virtuous shifts with the context as much as what counts as exemplary. While there are certainly important relativist versions of virtue theory, a non-relative account of the virtues is a more promising way to develop a virtue-based account of normativity (see Nussbaum, 1988). A response to the objection that says 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 – which put in place normative standards that importantly vary with context – a virtue approach to exemplarity has the advantage of providing exemplarism with the resources needed to put worries about relativism to rest.

Another important advantage of the virtue model of exemplarity is that it allows us to capture some of the qualities we typically associate with the good judge. Some of the traits of character mentioned above are among those that laypeople, as much as jurists, would identify with exemplarity. It would be most surprising if someone were to say that justice is not a virtue we expect good judges to possess. This is, nonetheless, compatible with having different conceptions of exemplarity in judging, as 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. 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. Thus describing exemplary judges by appeal to the judicial virtues provides a way of identifying exemplars that allows for variation, but without depriving exemplars of their normative content, for, to be sure, it is not as if any trait

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9 Thanks to Maksymilian Del Mar for raising this objection.
10 See most prominently MacIntyre, 2007.
11 Although it is, I think, an advantage of exemplarism that it helps to bring about agreement, as agreement is more likely on who are good judges than on what good judging requires. I touch on this issue in the last section of Amaya, 2013.
could count as a judicial virtue or any specification could count – on the non-relativist approach I am advocating – as a specification of the virtue of justice. The next section discusses different types of exempla all of which have the potential to contribute in various ways to improving both legal theory and legal practice.

4 Models of exemplarity

So exempla are virtuous persons who provide models that are worthy of admiration and imitation. There are, however, several classes of exemplars and different ways in which one may be exemplary. Each of these categories contributes in distinctive ways to performing the roles which exemplars may be claimed to play in the legal context.

4.1 Real and fictional exempla

There are both real and fictional exempla. Sometimes, we learn about exempla and the way in which they virtuously face the situations confronting them by first-hand experience. The teachers we study with, our parents or grandparents, friends, and co-workers sometimes provide us with models we want to imitate – or hope to avoid. But, fortunately, the circle of persons we can learn from is much larger than the group of persons we have a direct relationship with. We also learn about virtue from historical characters, from persons who are very distant from our acquaintance, and from exemplary individuals who have existed only in fiction. We learn from all these exemplary persons 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: while we can certainly learn about judicial virtue from our law professors and peers, a great deal is learnt through the stories told about great judges or legal thinkers we have never personally interacted with. 12

Two kinds of narrative 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

12 On the relation between virtues and narrative, the locus classicus is MacIntyre, 2007. MacIntyre’s account connects a virtue approach to normativity with a relativist position that is markedly different from the kind of objectivity that a virtue approach to exemplarity may bring about.
we have never met, from historical writings of exemplary characters as well as from depictions of admirable persons in literary texts. While there are obvious differences between historical and literary narratives, they might also be closer than it might appear. Until the end of the eighteenth century, history was a branch of literature in the West, and historical texts of Imperial China extensively relied on literary sources (Tan 2005, p. 416). Stories circulating about real persons from the past – of those who make it into historical texts and those who are known only to a smaller circle of persons – and even stories about contemporary persons might be in important respects like literary narratives. Regardless of their connections, both kinds of 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. The relevant repertoire of exempla thus includes not only real exempla that we have first-hand experience of, but also those that we get to know through historical narratives – as well as fictional exempla, as described in literary texts and film.

4.2 Negative and positive exempla

Exempla may also be positive or negative. ‘Anti-exemplars’ raise a host of interesting issues. Do they work equally well as models through which one may regulate one’s behaviour? Against the relevance of negative exemplars, it has been argued that good and bad models are not equally strong (anti-) mimetic objects (see Fossheim, as reported in Zagzebski, 2017, p. 135). Zagzebski also claims that ‘it is easier to model ourselves on what we want to be than on what we want to avoid’ and has raised doubts about the educational value of negative exemplars (Zagzebski, 2017, p. 31). However, there is some empirical evidence to support the view that negative exemplars have motivational force, and that teaching methods that provide exposure to both positive and negative exemplars are more effective – at least in the domains under study – than exclusive exposure to positive exempla (see P. Haack, 1972; and Lockwood et al., 2005). Thus, exemplars of judicial vice, alongside with exempla of judicial virtue, should also be given a role within a theory of judicial exemplarity (see G. Williams, 2013).

The potential value of negative examples reinforces the view that literature importantly contributes to enlarging the repository of exempla, since fictional judges are often models of judicial vice, rather than models of 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 Victor Hugo’s The Last Days of a
Condemned Man, Rabelais’s Gargantua and Pantagruel, and Tolstoy’s Resurrection), overly formalistic (as in Shakespeare’s The Merchant of Venice), or simply as fools (as in Grisham’s The Appeal or García Márquez’s One Hundred Years of Solitude). But, given the benefits of using both positive and negative examples, this does not detract from the value of literature as an important source for exemplarity. Models of vice can help judges develop the judicial virtues insofar as reflection upon them allows judges to appreciate the serious consequences of judicial vice and, thus, may lead them to see the importance of cultivating the judicial virtues as well as understand (by contrast) what judicial virtue requires.

4.3 Heroes, saints, sages, and the ordinary exempla

Three main categories are usually discussed under the notion of exemplar: the saint, the hero, and the sage. These figures represent different, irreducible forms of exemplarity, identified with the caring, the brave, and the just. They are also associated with predominant virtues, namely, charity, courage, and wisdom (Zagzebski, 2017, p. 96). These categories are undoubtedly important as exempla that one may aspire to emulate. However, it is critical to note that the kind of exempla that provide us with good models do not only include the great heroes, sages, and saints, but also ordinary persons. Ordinary heroes – that is to say, persons who have not done extraordinary things in an extraordinary way but that, 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 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 in South Africa – which 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.

For discussion see Zagzebski, 2017, ch. 3; see also Markovits, 2012.

For a defence of the claim that there are irreducibly different kinds of moral exemplarity, see Blum, 1988. For a discussion of studies indicating that moral excellence may be exemplified in different ways, see Walker and Hennig, 2004.

The relevance of ‘ordinary’ exempla for the cultivation of judicial virtue is highlighted by Wigmore (1936). After describing the career of Ervoan Heloury Kermartin of Tréguier, in Brittany, later to be hailed as Saint Yves, patron saint of the judicial profession, he writes: ‘he [Saint Yves] had pursued this career as an ordinary man, amidst the very same conditions that
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, our 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 pose, nevertheless, great moral challenges. Narratives and first-hand experience 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 (Olberding, 2012, p. 10).

4.4 Partial and complete exempla

Exemplarity does not require the possession of all the virtues. Similarly, on an admiration account of exemplarity, exemplars need not be admirable to the highest degree in every trait (Zagzebski 2017, p. 65). Most exempla provide partial, rather than complete, models. Some exempla, nonetheless, possess an unusually large share of virtues; others are, however, exemplars of a certain virtue, but not exemplary all things considered. There is yet a further, related distinction, between ‘moral paragons’, who exemplify how to be a good person, and ‘role models’, who are domain-specific. But even if most legal exemplars (or exemplars, for that matter) fall short of completeness, they are still useful as models that are worthy of imitation, aids to legal theorizing, and vehicles for the development of the law. Furthermore, there seems to be evidence indicating that in order to be truly inspirational, a model should reflect behaviour that the apprentice considers attainable (see

surround any lawyer and any judge at any time in any country. Well may he be enshrined in our aspirations as an example of the ideal of Justice attainable in real life by a member of our profession!’ 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 Burnett, 1805, pp. iii–v.
Moberg, 2000). This makes partial exempla (and ordinary folk, in contrast to the categories of the sage, the hero, and the saint) extremely valuable for modelling one’s conduct.

4.5 Exempla and other normative ideals

As argued, exemplary judges possess the traits of character conducive to good legal decision-making to a higher degree than most judges; but they do not need to possess all the virtues, nor need they perfectly embody them. This sets exempla apart from other kinds of normative ideals that are farther removed from what is humanly attainable. Judge Hercules is a case in point. According to the version of exemplarism proposed here, Dworkin’s Hercules would not be an exemplary judge. Unlike Hercules, exempla do not have any superhuman skill, ability, or trait of character. Hercules idealizes away from human conditions and capacities and this sheds serious doubts on whether it posits a normative standard that is relevant for us, i.e. a standard that is capable of guiding and improving judicial practice. In contrast, exemplars provide judges with a normative ideal that they may approximate. Exemplars are also to be distinguished from other normative ideals that, while attainable by flesh-and-blood judges, are nonetheless disembodied. The ideals of ‘the virtuous person’, the spoudaios (‘the great’), or the phronimos (‘the wise’) are examples of normative ideals that arguably do not abstract away from human capabilities but lack the embodiment and concreteness of exemplars. Exemplars, as I will argue below, are not merely instances of some abstract conception of virtue, but their power as tools for professional and personal development, theory development, and the evolution of culture is inextricably linked to their particularity. In all their richness, imperfection, and specificity, exempla provide us with models that are worthy of imitation. The next section examines what is involved in imitation and subjects the kind of exemplary reasoning that is at work in imitative reasoning to close scrutiny.

5 Imitation as character development

Imitation is a topic that has recently been the object of intense study in various disciplines, including neuroscience, psychology, animal behaviour,
computer science, education, anthropology, media studies, and philosophy.\textsuperscript{17} We are thus witnessing a renewed interest in what was once a fundamental pillar of the study of rhetoric, music, and the arts, fading away as the modern urge for innovativeness took hold.\textsuperscript{18} However, recent research has shown that imitation, far from being an undemanding cognitive task or an outmoded form of engaging in literary or artistic activities, is a rare ability, linked to characteristically human capacities like mindreading and understanding of language, and plays a critical role in cultural accumulation and evolution (Hurley and Chater, 2005 p. 14; see also Gerrans, 2013). It is also of fundamental importance in moral development and an essential aspect of mature empathy (Decety, 2011). What does imitation consist in? Two pathways to imitation may be distinguished: a ‘low road’ to the imitation of specific observed behaviour, which is wired into our cognitive equipment and has a neurological basis, and a ‘high road’, mediated by the activation of personality traits and social stereotypes and leading observers to assimilate their behaviour to general patterns of observed behaviour (Dijksterhuis, 2005, pp. 207–221). This imitative influence may be automatic as well as deliberate, in that it results from the conscious selection of models of behaviour. I will be concerned here with deliberate imitation only, as a kind of imitation that is most directly relevant to legal theory and legal practice.

Now, how does such imitation proceed? Imitation can hardly be viewed as an automatic process whereby one mimics the exemplar’s behaviour; rather, it is a reason-guided activity. A common approach to imitation views ‘analogy’ as the method of imitation and, thus, imitative reasoning as a form of analogical reasoning. In this view, paradigmatic characters provide the basis for the following kind of argument:

\begin{quote}
One should emulate $P$.

$P$ did $x$ in situation $y$.

A situation similar to $y$ obtains.

Therefore, one should do $x$.\textsuperscript{19}
\end{quote}

Understanding imitation as a form of analogical reasoning brings to light the extent to which the process of emulation involves the exercise of reason.

\textsuperscript{17} For a useful introduction see Hurley and Chater, 2005.
\textsuperscript{18} See Frow, 2009, discussing the transition from a ‘classical regime’, valuing imitation, to a ‘modern regime’, built on the model of proprietary authorship.
\textsuperscript{19} See Tan, 2005, p. 414; see also Keith McGregor, ‘Imitation as Analogy’ (unpublished manuscript).
However, there are several problems with this account of what is involved in imitation. First, according to this account, 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 possess already 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, this account establishes that imitation results in a 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 persons. Imitation does not amount to a mindless repetition of the exemplar's behaviour.\textsuperscript{20} The point of emulation is not to get the young or the student to do as the master does, but rather to develop in them the features of character, such as the capacity to form one's own views and act accordingly, we find admirable. 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 also the historical circumstances might 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 current circumstances. This, however, rather than detracting from the value of exempla, shows their normative power. We might disagree about what exemplary persons did in the past, or the decisions they took, but we still admire the way they faced the situations they faced and we learn about how to act and decide in our current circumstances by looking at the way they behaved and decided in the past.

\textsuperscript{20} Just as habituation – the other major way of inculcating virtue – is not a mindless process either: see Sorabji, 1980 and Sherman, 1989, pp. 157–201.
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 need to 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 behaviour, it is necessary to emulate the emotional reaction of others as well.\textsuperscript{21} 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 already said, is a matter of both action and feeling. 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.\textsuperscript{22} 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 in order 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 behaviour is one able to grasp what virtue requires in new circumstances. Thus, imagination is central to fully comprehending paradigmatic characters and extending that understanding into practice.

Third, imitation, when successful, results in a transformation of oneself (Tan, 2005, p. 419). One imitates with a view to becoming a 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 (Blum, 1988, pp. 215–216). To start with, virtue is dependent on various sorts of circumstances, as debates over ‘moral luck’ have shown. In addition, it just does not seem to be within our power to bring about in ourselves the psychological structure constituting moral

\textsuperscript{21} For a discussion of the emotional aspects of emulating paradigmatic characters see Tan, 2005, pp. 420–423.

\textsuperscript{22} For an argument to the effect that imagination is central for successful imitation see Tan, 2005, pp. 417–419.
excellence (Zagzebski, 2006, p. 136, and Blum, 1988, p. 216). I will not take a stand on these issues, although I do find Mencius’ claim that ‘the sage and ordinary mortals are of a similar kind’ (Tan, 2005, p. 414) much more persuasive than views that make excellence the province of a few, thereby making morality inaccessible and thus cutting it off from the will of ordinary persons. But the important point is that – debates over whether excellence can be accomplished by all human beings notwithstanding – we can all surely be better than we 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 which – unlike other normative ideals – they can, at least, approximate.²³

6 The role of exemplary judges in law

Imitation of exemplars, as a venue for character formation, may play an important role in legal theory and has also important practical consequences. Exemplars of judicial virtue perform three main roles in legal education, legal reasoning, and the development of the law.

6.1 Education and imitation

The imitation of exempla is widely regarded as a means to education in the history of Western education indeed (Warnick, 2008, p. 2). Interestingly, it also has a prominent place in non-Western thought. In the Confucian tradition, emulation is not merely one way of moral education, but is considered to be by far the most efficient way (Olberding, 2012, p. 10). The imitation of exempla has been, and still is, regarded as a main educational tool in a variety of domains. Similarly, in law, exempla are critical to the professional development of judges. Exemplary judges are instrumental to instilling virtues in the judiciary by serving as models that they may imitate. As argued, the array of models that can be put at the service of education is quite broad and includes not only positive exempla but also negative, real

²³ An interesting objection to this line of thought – which I cannot consider here – sheds doubts over whether it would be a good thing that ordinary judges emulate exemplary ones. In this view, while exemplary persons might well be able to do extraordinary things, non-exemplary persons may better stick to the rules, as the consequences of attempts at exemplary conduct by non-exemplary persons may be disastrous.
and fictional exempla, supererogatory categories such as saints, heroes and sages, but also more down-to-earth, less than perfectly virtuous persons, who are nonetheless role models or exemplars in some specific aspects or that excel in some domain.

The educational potential of exempla imitation has some important implications for legal education and judicial training. If imitation of exempla is an important vehicle for legal education, then it seems necessary to structure legal education and, more specifically, the judicial career, in a way that provides ample opportunities to know about, learn from, and become acquainted with those who in the past and present, in real life or in fiction, have a large share of the virtues that we take to be critical to good legal practice.

6.2 Theorizing about excellence in adjudication

Exemplars play important roles in the development of legal theory, more specifically, they are important tools for theorizing about virtuous adjudication. Exemplary judges thus do not merely illustrate the judicial virtues, but they are also at the root of our conception of judicial virtue. Exempla do not simply ‘represent traits of character in our imagination’ but are rather ‘the vessels through which we construct those traits’ (Clark, 2012, p. 88). In other words, exemplars do not just embody a prior, abstract conception of virtue, but also contribute to fleshing out what judicial virtue consists in in the first place and what virtuous judicial practice looks like.

Exemplars aid the task of theorizing about excellence in adjudication in several ways. 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 the best judicial practice consists of. Judgments about exemplary judges also provide us with a test against which one may evaluate theories of adjudication (Zagzebski, 2004, p. 41). 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 it has the consequence that exemplary judges are not paradigmatically good judges when assessed by the theory’s standards.

In addition, reflection upon exemplary judges raises a number of questions that importantly broaden the aims of inquiry (Olberding, 2012, p. 188). For example, what distinguishes the exemplars’ responses 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. Another way in which the study of exemplars may advance a theory of judicial virtue or excellence in judging is by revealing connections between the virtues, especially between the moral and epistemic virtues, as well as by providing a test for the ‘unity of the virtues’ thesis (Zagzebski, 2017, p. 119).

Finally, exemplars help us enrich our conception of the virtues (Clark, 2012; see also Olberding, 2008, pp. 631 and 635). Virtues are often illustrated by a limited set of traditional exemplars and this leads to a more impoverished and less sophisticated picture of what excellence in judging amounts to. 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 imaginativeness 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. 24 In sum, while we can certainly engage in an abstract description of the virtues of judging, reflection upon exemplars contributes in a number of ways to developing a more subtle and complex account of excellence in adjudication.

6.3 The evolution of legal culture

Imitation, through the so-called ‘ratchet effect’, has been claimed to be the mechanism that drives cultural and technological transmission, accumulation, and evolution (Tomasello, 1999, and Tennie et al., 2009). Imitation helps transmit with a very high degree of fidelity through generations insights about how to achieve goals that could hardly be rediscovered through trial-and-error learning. Imitation not only helps preserve cultural artefacts that would otherwise be lost but also spreads these discoveries, which form a platform for future developments. The unique evolution of human culture is thus characterized by a ‘ratchet effect’ in which ‘modifications and improvements stay in the population fairly readily (with little loss or backward slippage) until further changes ratchet things up’ (Tennie et al., 2009, p. 245). This process relies both on inventiveness and faithful transmission, but while inventiveness is quite widespread among primates,
humans transmit cultural items with a much higher degree of fidelity. Thus, it is the faithful transmission (the ratchet) that explains why human culture is cumulative in a way in which (other) animal cultures are not. This difference is explained by the fact that imitation in humans, unlike imitation in other, non-human animals is process-oriented, rather than outcome-oriented. Such imitation is, in this view, the key to a unique form of social learning and accounts – alongside distinctive forms of cooperation that lead to active teaching, social motivations for conformity and normative sanctions against non-conformity – for humanity's unique form of cumulative cultural evolution.

These theses about the importance of imitation, as a distinctively human form of social learning, for the evolution of human culture hint at the relevance of imitation for the development of legal culture as well. Imitation of experts has been claimed to be ‘a reliable way to learn how to use tools, make fishing nets, hunt, play music, pronounce words, or reproduce stories’ (Gerrans, 2013, p. 21). Similarly, the imitation of exemplary judges, of experts at judging, seems a safe way to go about learning how to behave, think, reason, and act in an adjudicative setting. Legal culture, as much as human culture in general, may rightly depend to a large extent on the degree to which patterns of reasoning, thought, and action are transmitted across generations through processes of imitation. Imitation in law, as much as in art, music, or culture, is coupled with creation and inventiveness. It is the medium through which legal culture is inherited and by which the law cumulatively evolves and is improved.

7 Conclusions

In this chapter, I have defended the value of (agent-)exemplars for legal theory and legal practice. Exemplars provide us with models that are worthy of imitation. Such emulation, however, cannot be adequately explained as involving a kind of analogical argument. Imitative reasoning is a subclass of exemplary reasoning that cannot be reduced to analogical reasoning. Successful emulation involves a transformation of the self and, is, at bottom, a critical avenue for character development. Exemplary judges are virtuous judges, i.e. judges who possess and display the judicial virtues. This virtue account of exemplarity is, as argued, comprehensive enough to encompass diverse models of exemplarity and is responsive to the different kinds of exemplars that inspire us to thrive and help us to improve.
Exemplars of judicial virtue play three main roles: they contribute to legal education by helping to instil the virtues in the judiciary, they are important tools for theorizing about excellence in adjudication, and they are critical to the evolution of legal culture. These roles, however, do not exhaust the potential contributions of exemplarity to legal theory. The study of exemplarity might arguably shed light on some core debates in current legal theory, such as the problem of disagreement, the nature of authority, and discussions over generalism vs. particularism in law. Thus it is necessary to recognize the imitation of exempla as a major topic in legal theory and legal practice, important as it is in other disciplines as well.

About the author

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25 Thanks to Damiano Canale for pointing out that there is an important connection between exemplarity and authority.