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Book Reviews

Exemplarity and Singularity: Thinking Through Particulars in Philosophy, Literature and Law, edited by MICHÈLE LOWRIE and SUSANNE LÜDEMANN.
Abingdon: Routledge, 2015, x + 212 pp (£80 hardback). ISBN: 978-1-138-02049-8.

This is, if you'll forgive the expression, an exemplary and singular volume. It is so in that sense of exemplarity that elevates something as worthy of admiration, as a guide for others to emulate. Part of what makes it exemplary is that it is singular (unique, original, innovative), and this for three reasons: first, it explicitly and consistently confronts a problem that has received too little attention (theorising the notion of 'example' and related notions, such as 'case', 'metaphor', 'instance'); second, it is intensively interdisciplinary, covering (as signalled in the title) philosophy, literature and law, including Roman law and common law; and third, it travels across both continental and Anglo-American traditions, including bringing to an English-speaking audience fresh translations of classic and new work in German (including, helpfully, bringing to light differences in terminology as between English, German and Latin).[1]

Exemplarity, as the editors and its authors are all too aware, has another meaning: when one holds something up as an example, one says of it that it is typical of some phenomenon; for example, as when a tailor presents a piece of fabric as a sample – an example of what you can expect if you purchase the fabric. Here, there is arguably no relation with singularity: the tailor picks a sample that is neither unusually bad nor unusually good, but one that is instead middling, average, normal, typical, common – again, representative. This kind of example is not held up as one to admire or emulate – as a guide that others are prescribed to follow – but, simply, because it is average, normal and so on: it may very well become somewhat of a benchmark – that is, it may produce a convention rather than a norm.

We have already entered into the complex world of exemplarity, which carries several possible meanings, with different connections to the normative. To give this some analytical rigour, let us refer to two kinds of exemplarity, based on two degrees of normativity – one strong and one weak. On the strong sense of normativity we are dealing with either an ideal (including something singular, unique and rare – and thus not necessarily expecting any level of regularity – and simultaneously worthy of admiration and emulation) or a norm; that is, a course of conduct (that can be more or less regular, though some minimal level of regularity is required, and) that one expects oneself and others to follow, such that one is disposed to criticise oneself and others when they do not comply. This strong sense of normativity is connected, then, to either a 'singular and/or a prescriptive sense of exemplarity' (as when we speak of role models or exemplars). On the weak sense of normativity, we are dealing with behaviour that is typical, common or average, but may for that reason establish a convention to which people develop a kind of normative attitude; in other words, as with norms, though to a lesser degree, persons are disposed to follow the behaviour themselves and expect others to do so, and they are disposed to criticise themselves

1. For a French take, see P Lacour and J Revel (eds) *Penser pas cas* (Paris: Enquête, 2005).

and others for lack of compliance.[2] This weak sense of the normative, then, is connected to what we might call 'typical exemplarity' (as above, with the tailor's sample, but we can also speak of standard measures, and other kinds of standardisation). To complicate things further, one has to see the two degrees of normativity, and the two kinds of exemplarity, as related to each other: first, a judgement of what is singular is to some extent dependent on a judgement of what is typical (and vice versa); second, the line between the singular and/or a prescriptive kind of exemplarity (and the ideal or norm) and the typical kind of exemplarity is often blurred (think of the language of standardisation, which can hover over both); and, third, when looked at over time, at least some of the dynamics of normative change can be linked to changing judgements as to what behaviour is but a (typical) convention and what is a (singular) norm or ideal (sometimes the classification changes from convention to norm, and sometimes from norm to convention).

All the chapters in this collection wrestle with these ambiguities and tensions within the concept and discourse of exemplarity – and, as noted above, they do so in the various contexts of philosophy, literature law. The collection is divided into three parts, each containing four or five chapters (as well as an introduction by the editors, Lowrie and Lüdemann). The first part offers a smorgasbord of philosophical resources on exemplarity, ranging from a new translation of a paper by Lipps (which the editors bill as a 'classic analysis of the instance, example and case from a phenomenological and legal perspective'),[3] through to discussion of related themes in Husserl (by Waldenfels), Aristotle (by Haverkamp) and Adorno (by Geulen). The second part zooms in on 'The Roman practice of exemplarity'. This might seem anomalous – why single out the Roman practice? – but it is not: as the chapters here illustrate, *exempla* in the Roman tradition receive extensive attention, both in theories of rhetoric and oratory (as explored by Langlands and Möller, particularly by reference to Quintilian) and in their practice (in Seneca – tackled by Roller; in Roman law – discussed by Ando; and in the Roman-inspired work of Machiavelli – by McCormick). Finally, the third and most wide-ranging part (which follows on nicely from the Roman part, setting up a comparison between Ancient and Modern discourses on exemplarity), contains work on the early modern common law (by Goodrich), and on exemplarity in Freud (by Fleming), Bacon (by Frey), Goethe (by Martyn) and Stendhal (by Morrissey). As is readily visible from this account of the structure, the book is both thematically coherent and contains a veritable embarrassment of diverse riches.

If there is one theme in this collection that is most likely to be of direct interest to legal scholars, it is this: the capacity of examples to inhabit both the particular and the general, or, as the editors prefer to see it, 'the grey area between' them.[4] The idea here

2. For some philosophers of normativity, conventions are not normative at all, but this seems rash to me: persons can develop normative commitments to conventions, even if they are often not as strongly held as commitments to norms (the other difference is that conventions often develop to solve coordination problems and are typically in the self-interest of persons, whereas norms are often constraints on self-interest).

3. Lowrie and Lüdemann 'Introduction' in M Lowrie and S Lüdemann (eds) *Exemplarity and Singularity: Thinking Through Particulars in Philosophy, Literature and Law* (Abingdon: Routledge, 2015) p 2.

4. Ibid, p 5. The full quote is worth including: 'The grey area between generals and particulars where imagination and judgement proceed by comparing and contrasting, grouping and regrouping "cases", separating out what does not fit some overarching system, calls for further examination.'

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would be that examples are narratologically structured images (of action, or attitude) that are linked to varying degrees of normativity (strong or weak, as above). To make this relevant to the legal context, one has put aside a certain bias against particularity, and one that is quite commonly encountered both in philosophy and in legal scholarship; namely, the idea that examples are but illustrations of what is already known, rather than themselves being a form of knowledge or, at the very least, being generative of knowledge. Literary theory is not typically burdened by the same bias: indeed, one could argue that *the* problem for literary criticism is how to show that we attain knowledge through the particulars of fiction.[5] The analogous problem in philosophy and legal theory would be: how is philosophical and legal knowledge composed of (if not constituted by) and at the very least generated by the examples in those domains; such as the examples in philosophy (thought experiments, scenarios) and descriptions (and framing) of facts of cases in law?

Let me pause here to make a point about some relevant sources in contemporary legal theory, regrettably not referred to in this volume. Even if we restrict ourselves to the past few decades, there has been a good amount of work on the above problem: for example, by Geoffrey Samuel, who has emphasised the role of images of facts in legal reasoning;[6] by Bernard Jackson and his account of the social stock of narratives and how they are integral to legal knowledge and legal reasoning;[7] and by Zenon Bankowski, in his work on parables and the various related debates this has produced.[8] To this ought to be added classic works, such as Edward Levi's *An Introduction to Legal Reasoning*.[9] If there is one criticism, then, to make of this collection it is that this literature is not discussed – this makes it harder for legal scholars in the Anglo-American tradition to relate to this material. All the same, in my judgement, these scholars should persevere. Here is why.

Legal knowledge, we might say, is exemplary: it comes in the form of examples that are narratologically structured images that are connected to normative attitudes of varying strength. The torts of negligence or nuisance; the crimes of burglary or battery; and all manner of laws, from constitutional to contract law – all can be understood as domains of such examples. This character of legal knowledge is kept alive (constantly somewhat destabilised, challenged, stretched) in two ways; namely, in the entry and exit points to the system. Legal knowledge is prodded by examples coming in (in the form of disputes), and is then translated into everyday life (in the form of living examples, as it were – persons interpreting what it is that the law requires of them). Within the system, this is all mediated by officials (judges and lawyers, and others) who are a kind of filter, managing legal knowledge as sandwiched in between those two domains of social action: disputes and everyday guidance.

What makes this collection so excellent, and so useful to the legal scholar, is that it provides resources for exploring this process of 'mediation', this slow commerce of examples – precisely that grey area between the particular and the general that demands the exercise of judgement and the imagination. Although all the chapters speak to this

5. A wonderful example is M Wood *Literature and the Taste of Knowledge* (Cambridge: Cambridge University Press, 2005).
6. See G Samuel *Epistemology and Method in Law* (Aldershot: Ashgate, 2003).
7. See B Jackson *Law, Fact and Narrative Coherence* (Liverpool: Deborah Charles, 1988).
8. See, in particular, two collections: Z Bankowski and J McLean (eds) *The Universal and the Particular in Legal Reasoning* (Aldershot: Ashgate, 2006); M Del Mar and C Michelon (eds) *The Anxiety of the Jurist* (Aldershot: Ashgate, 2013).
9. E Levi *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press, 1949).

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theme in one way or another, there are four from which we can learn something directly about legal knowledge so conceived: Lipps, Möller, Ando and Goodrich.

Lipps sets the scene by carving out a necessary space for judgement: to judge '*according to the law*', as a judge must, 'does not mean that this or that particular cases is already contained within the law … in the way that a customs tariff, for example, can only be checked *against* the relevant provisions'.[10] It is useful to set out the remainder of the passage in full:

> To 'subsume' a case under the law does not mean to define it according to already existing law, but rather to *assimilate* the way in which that cases relates to those laws. Subsumption under the law may thus be a tool of legal determinacy, but it is not the primary goal of a judicial decision. A judge's verdict contributes to the development of the system of laws; but the reasons he gives for his verdict are also part of this process. For in every presentation of a case, the laws – i.e., the existing legal framework – must be dealt with. And yet the point of the reasons given for a particular verdict is not merely to provide a 'lesson' – as would indeed be the case if verdicts could be deduced simply from a knowledge of the laws according to which a judge judges, in the same way that one learns how to do something by reading its instructions. The contrary is rather true: it is precisely in order to *find* a verdict that a judge is appointed as *judge* in the first place.[11]

The language here is tantalising – especially the concept of 'assimilation', by which I would have thought is meant not only that the 'case is *altered* by the decision made about it',[12] but that so is the 'existing legal framework', composed as it is of verdicts and reasons. The point here also is that the case is already presented to the judge as a decidable one – as sufficiently typical when characterised and framed in a particular way – though this is always with a remainder of atypicality, in part squeezed out by the case being presented by two opposing parties.

Can we say more about this process of 'exemplary judgement'? One place to look is Möller's chapter, which seeks to confront 'this uncertain terrain' – that 'moment of uncertainty … whenever an example or an exception, alone or in concert, is applied in a concrete legal case'.[13] The key here is 'the force of examples' and how they enable the generation of 'exceptions'. This force can be illustrated in the use of examples by a defendant's advocate as to the possible effects of the interpretation of a law supported by the plaintiff's or prosecutor's advocate (the example comes from Cicero).[14] In this way, 'it is the dynamism of *exempla*', Möller says, 'which leads to the making of exceptions'.[15] This is in many ways a perfectly familiar process to students of common-law reasoning, though often under the label of 'hypothetical reasoning'.[16] Möller's chapter both offers new resources (especially from the tradition of rhetoric)

10. H Lipps 'Instance, example, case, and the relationship of the legal case to the law' in Lowrie and Lüdemann, above n 3, pp 28–29; original emphasis.
11. Ibid, p 29; original emphasis.
12. Idem; original emphasis.
13. M Möller '*Exemplum* and *exceptio*: building blocks for a rhetorical theory of the exceptional case', in Lowrie and Lüdemann, above n 3, p 99.
14. Ibid, p 102.
15. Ibid, p 103.
16. See eg SL Hurley 'Coherence, hypothetical cases, and precedent' (1990) 10(2) Oxford J Legal Stud 221. There are some fascinating connections here to the use of concrete, imaginary hypotheticals in the process of moral reasoning – a process recognised to have been important by Kant, Hare and Dewey.

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and calls for new work on the particular exercise of the imagination involved in reasoning with hypothetical cases.

Further resources for another, related process of the legal imagination – namely, analogy – are provided courtesy of Ando's treatment of that topic in Roman law.[17] Excavating Ulpian's defence of *exempla* against the dismissal of them ('as mere particulars; instances of judgement')[18] by Justinian and Republican pleaders, Ando urges an examination of Roman records that reveal the practice of 'legal reasoning as occurring through generic narratives or conceptual models'.[19] Properly understood, in this process:

> The application of case was thus never a matter of simply citing an earlier case that maps some present reality. The fit between the case at hand and one of a number of possible precedents was established adversarially, by urging the salience of facts that align the one with the other and bracketing those of disinterest to the model of causation and responsibility that one's chosen precedent (or meta-narrative) is prepared to recognise.[20]

What we have here are the adversarially staged dialectics of similarity and dissimilarity: a battle of images and counter-images, and of relative skills in re-description (eg at a lower or higher level of generality) that allow for either similarities or dissimilarities to surface or dissipate.[21]

Finally, but also of most direct relevance, reference must be made to the chapter by Goodrich, which argues that 'the example is the defining feature of the jurisdiction' of the early modern common law.[22] Goodrich also brings into view important and often neglected resources for studying common-law reasoning: first, the Christian and humanist practices of the 'excavating and unravelling of classical *exempla*'; and, second, the tradition of the emblematic *exempla*, which is connected both to mnemonics (the art and pedagogy of memory) as well as moral instruction.[23] The lawyer 'needs a sound memory for storing the endless particulars, the unlimited *exempla* of legal casuistry over time', but this 'storehouse of prior practices, the examples conceived as images of classical or antique events, are not simply the method of recalling the substance of dogma and doctrine but are also the cites of *inventio*, of the beginning of any justificatory judgement'.[24] So while there is an undeniable dimension of persuasiveness to the use of examples, especially when they echo classical times, they are also

17. C Ando 'Exemplum, analogy and precedent in Roman law', in Lowrie and Lüdemann, above n 3.
18. Ibid, p 113.
19. Ibid, p 114; and see C Ando *Roman Social Imaginaries* (Toronto: Toronto University Press, 2015).
20. Ando, above n 17, p 118.
21. On this process in more detail, see J Stone *Precedent and Law: Dynamics of Common Law Growth* (Sydney: Butterworths, 1985).
22. P Goodrich 'The exampleless example: of the infinite particulars of early modern common law', in Lowrie and Lüdemann, above n 3.
23. Ibid, p 141. For more on the connection between image, memory and moral instruction, see M Carruthers *The Craft of Thought: Meditation, Rhetoric and the Making of Images, 400–1200* (Cambridge: Cambridge University Press, 1998). And for more on emblematic *exampla*, see P Goodrich *Legal Emblems and the Art of Law:* Obiter depicta *as the Vision of Governance* (Cambridge: Cambridge University Press, 2014).
24. Goodrich, above n 22, pp 142–143.

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ways of ushering in change, precisely under the canopy of the grand old past. But to make an example do that sort of work is an art: there is the question of timing (as with comedy), the knowledge of one's audience and mastery of a range of sources from which one can draw. In the case of the early Anglican jurists, these sources included 'the fabulous histories and plural mythologies that trace Anglican law to the Samothes, to Ceres, to Pythagoras and the Druids, to Lycargus of Sparta, to Romulus and Remus, to Brutus, to nature and God'.[25] What makes them so powerful? As classical narratives, they are both singular and normative, maxims in the form of images – and at the same time more stretchable than propositions, capable of housing 'a multitude of similar particulars'.[26] One might ask in similar vein: what are the 'classical' images for contemporary legal thought? What is storehouse of emblems that populates the memories of present judges and advocates? What are the contemporary sensibilities of performance that make a piece of advocacy more or less persuasive? These questions of image, narrative, performance and knowledge are all, surely, closely connected.

I have but scratched the surface of this collection. There are many riches to be mined here. The authors and editors are to be lauded for bringing to the table so many new possible avenues, and forgotten resources, for exploring the practices of the legal imagination.

MAKSYMILIAN DEL MAR*

Soul, Self & Society: The New Morality & the Modern State, by EDWARD L RUBIN. Oxford: Oxford University Press, 2015, 464 pp (£20.49 hardback). ISBN: 9780199348657.

1. THE NEW JOHAN CRUIJFF?

Reading *Soul, Self & Society* reminded me of a quote from the recently deceased legendary soccer player Johan Cruijff: 'You only start to see it, once you get it.'[27] There are two reasons for this. The first one is that the line of argument in the book, which basically revolves around a transition of three types of morality (the morality of honour, the morality of higher purpose and the morality of self-fulfilment) and the consequences this transition will have for modern government, appear as so well-substantiated, logical and self-evident that one is inclined to think: why did I not see it like this myself before? The obvious answer is that it needs a great scholar with a broad overview of history, philosophy, political science, sociology and law to put together all the different pieces of the puzzle regarding how the changes in morality may have affected the position of the modern state in order to show the bigger picture.

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25. Ibid, p 147.

26. Ibid, p 144.

27. Which is the title of a book, with famous Cruijff quotes, written by a Dutch member of the scientific council of government. See P Winsemius *Je gaat het pas zien als je het door hebt* (Amsterdam: Balans, 2005).

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